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LAW APPLICABLE TO SUBSTANTIVE ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION: AN AFRICAN PERSPECTIVE

by

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DECLARATION

I, Lawrencia Oppong Peprah, hereby declare that this thesis is my original work, and that it has not been previously submitted for the award of a degree at any other university or institution.

Signed: _____

Date: 30th October, 2023

Place: Hatfield, Pretoria

DEDICATION

This thesis is lovingly dedicated to my parents and my siblings.

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ABSTRACT

This thesis examines the law applicable to substantive issues in international commercial arbitration from an African perspective. More specifically, the thesis examines the methods used by arbitrators to assign the applicable substantive law in the absence of the parties' choice in Egypt, Ghana, South Africa and Côte d'Ivoire. Considering the vital role of the law applicable in determining the rights and obligations of the parties to international commercial arbitration, the thesis seeks to identify the most efficient method for assigning the applicable law in the absence of the parties' choice.

To this end, the thesis explores existing literature including scholarly works on the topic, the national and selected institutional arbitration laws in Egypt, Ghana, South Africa, Côte d'Ivoire and elsewhere, to identify the common methods and strategies used by arbitrators in the selection of the law applicable to the merits of the dispute. The thesis scrutinises these methods to provide a comprehensive evaluation of the efficiency, predictability and legitimacy of each identified method from an African perspective.

Ultimately, the thesis proposes a method that can enhance predictability and legal certainty for when arbitrators must assign the applicable substantive law in African international commercial arbitration, thereby promoting the development of a conducive business environment in the region. Moreover, by establishing a consistent regulatory framework for determining the substantive law in the absence of the parties' choice, Africa may reinforce its position in the global legal landscape by developing its own distinctive jurisprudence in international commercial arbitration.

Keywords: African perspective, law applicable to substantive issues, international commercial arbitration, law applicable to the substance of a dispute, arbitrators discretion, conflict of laws.

LIST OF ABBREVIATIONS

1923 Geneva Protocol	Geneva Protocol on Arbitration Clauses of 1923
1927 Geneva Convention	Geneva Convention for the Execution of Foreign Arbitral Awards of 1927
AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
AALCO	Asian African Legal Consultative Organization
AALR	Anglo-American Law Review
ABAJ	American Bar Association Journal
ACSS	Africa Centre for Strategic Studies
ADR	Alternative Dispute Resolution
ADR Hub	Ghana ADR Hub
AfAA	African Arbitration Association
Afr JIntl & CompL	African Journal of International and Comparative Law
Afr Res Rev	African Research Review
AFSA	Arbitration Foundation of Southern Africa
AIAJ	Asian International Arbitration Journal
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ALCC	Asian Legal Consultative Committee
ALR	Alberta Law Review

Am Anthropol	American Anthropologist
Am Bus LJ	American Business Law Journal
Am J Comp L	American Journal of Comparative Law
Am U L Rev	American University International Law Review
AmJCompL	American Journal of Comparative Law
ArbIntl	Arbitration International
Arch Philos	Archives de Philosophie du Droit
ARIA	American Review of International Arbitration
ASIL Proceedings	Proceedings of the ASIL Annual Meeting
AUILR	American University International Law Review
Brook J Int'l L	Brooklyn Journal of International Law
Brussel I Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council (2012)
CACI	Court of Arbitration of Côte d'Iviore
CCJA	Common Court of Justice And Arbitration
Chic J Int Law	Chicago Journal of International Law
CILSA	Comparative and International Law Journal of Southern Africa
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJCR	Cardozo Journal of Conflict Resolution
Clev SLR	Cleveland State Law Review

CLJ	Cambridge Law Journal
CLWR	Common Law World Review
Colum L Rev	Columbia Law Review
Contemp Asia Arb J	Contemporary Asia Arbitration Journal
CPR	International Institute for Conflict Prevention & Resolution
CUP	Cambridge University Press
DEFA	Development Finance Agenda
DIAC	Dubai International Arbitration Centre
DIS	*Deutsche Institution für Schiedsgerichtsbarkeit*
DJ	De Jure
DRI	Dispute Resolution International
Duke Law J	Duke Law Journal
ECAFE	United Nations Economic Commission for Asia and the Far East
ECE	United Nations Economic Commission for Europe
E-commerce	Electronic Commerce
ECOSOC	United Nations Economic and Social Council
EDI	Electronic Data Interchange
Erasmus Law Rev	Erasmus Law Review
ERPL	European Review of Private Law
ESIGN	Electronic Signatures in Global and National Commerce Act

FAA	Federal Arbitration Act
FLRev	Federal Law Review
FordhamLR	Fordham Law Review
Franch Law J	Franchise Law Journal
GAC	Ghana Arbitration Centre
Ghana ADR Act	Ghana Alternative Dispute Resolution Act, Act 798
Glob Jurist	Global Jurist
GroJIL	Groningen Journal of International Law
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HCCH	Hague Conference on Private International Law
HKIAC	Hong Kong International Arbitration Centre
HLRA	Harvard Law Review Association
Hofstra L Rev	Hofstra Law Review
ICC	International Chamber of Commerce, Paris (Established 1919)
ICDR	International Centre for Dispute Resolution
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
IJLMH	International Journal of Law Management & Humanities

ILQ	International Law Quarterly
ILSA JICL	ILSA Journal of International & Comparative Law
Int Lawyer	International Lawyer
Int'l Bus Law	International Business Lawyer
Intl J Arb Med & Disp Man	International Journal of Arbitration, Mediation and Dispute Management
Intl Tax & Bus Law	International Tax & Business Lawyer
Int'l Trade & Bus L	International Trade and Business Law Review
Ir Jur	Irish Jurist
ISLRev	IALS Student Law Review
J Bus Law	Journal of Business Law
J Contemp Asia	Contemporary Asia Arbitration Journal
J L & Com	Journal of Law and Commerce
J Organiz Behav	Journal of Organizational Behaviour
J Priv Int Law	Journal of Private International Law
JBL	Juta's Business Law
JCLA	Journal of Comparative Law in Africa
JIDS	Journal of International Dispute Settlement
JILI	Journal of the Indian Law Institute
JIntlArb	Journal of International Arbitration
JLSD	Journal of Law, Society and Development

JSDLP	Journal of Sustainable Development Law and Policy
KAA	Kenyan Arbitration Act
KIAC	Kigali International Arbitration Centre
Law & Pol'y Int'l Bus	Law and Policy in International Business
Law Contemp Probl	Law and Contemporary Problems
Law Soc Rev	Law and Society Review
LCIA	London Court of International Arbitration, London (Established 1892)
LMCLQ	Lloyds Maritime and Commercial Law Quarterly
Me L Rev	Maine Law Review
MENA	Middle East North African
MIAA	Mauritian International Arbitration Act
MichL Rev	Michigan Law Review
Minn Law Rev	Minnesota Law Review
MJECL	Maastricht Journal of European and Comparative Law
MJIL	Melbourne Journal of International Law
Mod Law Rev	Modern Law Review
Mon LR	Monash University Law Review
N Ill U L Rev	Northern Illinois University Law Review
NCIA	Nairobi Centre for International Arbitration
Neth Int Law Rev	Netherlands International Law Review

New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NILR	Netherlands International Law Review
NW U L Rev	Northwestern Journal of International Law & Business
NYUL Rev	New York University Law Review
OECD	Organisation for Economic Co-operation and Development
OHADA	*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*
OJEC	Official Journal of the European Communities
Oxf J Leg Stud	Oxford Journal of Legal Studies
Panama Convention	Inter-American Convention of International Commercial Arbitration
PDRCI	Philippine Dispute Resolution Centre Inc
Pécs	Pécs University
PECL	Principles of European Contract Law and the Principles
PELJ	Potchefstroom Electronic Law Journal
Philos Rev	Philosophical Review
PRIME Finance	Panel of Recognised International Market Experts in Finance
PTE	Pécs: University
PYIL	Polish Yearbook of International Law

RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law
Rev Rom Asig	Romanian Review of Arbitration
RJT	Revue Juridique Thémis
Roger Williams Univ Law Rev	Roger Williams University Law Review
Rome Convention	Convention 80/934/EEC on the Law Applicable to Contractual Obligations (1980)
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations Regulation (EC) No 593/2008 of the European Parliament and of the Council (2008)
Rome II Regulation	Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations
SAcLJ	Singapore Academy of Law Journal
SADC	Southern African Development Community
SAMLJ	South African Mercantile Law Journal
SIAC	Singapore International Arbitration Centre
South Calif Law Rev	Southern California Law Review
SSRN	SSRN Electronic Journal
StudZR	StudZR-WissOn
Tex L Rev	Texas Law Review

TransL	Transnational Lawyer
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
U Chi L Rev	University of Chicago Law Review
U Miami Int'l & Comp L Rev	University of Miami International and Comparative Law Review
U Pa L Rev	University of Pennsylvania Law Review
UETA	Uniform Electronic Transactions Act
UNBLJ	University of New Brunswick Law Journal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
Uniform Act	Uniform Act on Arbitration
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
Univ Ill Law Rev	University of Illinois Law Review
Univ Tor Law J	University of Toronto Law Journal
USAA	United States Arbitration Act
UQLJ	University of Queensland Law Journal
Va L Rev	Virginia Law Review
VaJIntLaw	Virginia Journal of International Law
VandJTransnatlL	Vanderbilt Journal of Transnational Law
VJICLA	Vindobona Journal of International Commercial Law and Arbitration

WAMR	World Arbitration & Mediation Review
Wash U L Rev	Washington University Law Review
Washington Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
William Mary Q	William and Mary Quarterly
William Mitchell Law Rev	William Michell Law Review
WIPO	World Intellectual Property Organization
Yale J Intl L	Yale Law Journal
YAR	Young Arbitration Review
YLJ	Yale Law Journal

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CHAPTER 1

GENERAL INTRODUCTION

1. Introduction

The term Alternative Dispute Resolution (ADR) connotes a process or procedure, other than adjudication by a presiding judge in court litigation, in which a neutral third party assists with the resolution of issues in controversy.[1] The concept encompasses procedures such as mediation, negotiations and arbitration. In relation to the term ADR, an argument can successfully be made that these procedures are not an alternative to litigation but rather complementary to the formal justice system.[2] Both arbitration and mediation, for instance, are not alternatives to formal litigation per se as they do not replace it but rather complement the scope of formal litigation by providing options from which parties can choose.[3] These are processes that are selected when they present a more appropriate way of resolving a dispute at hand.

Among all the dispute resolution techniques, arbitration is ideal for resolving commercial disputes.[4] Particularly, international arbitration is preferred for resolving international commercial disputes, compared to judicial adjudication.[5] Parties choose international arbitration because it provides them with a neutral forum to resolve their disputes, and there is the likelihood of obtaining enforcement (by virtue of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958 (New York Convention)).[6] Additionally, international commercial arbitration generally

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1 Rozdeiczer and Alvarez de la Campa *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* 1.

2 Rozdeiczer and Alvarez de la Campa *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* 1.

3 Rozdeiczer and Alvarez de la Campa *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* 1.

4 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 1; Blackaby *et al Redfern and Hunter on International Arbitration* 1.

5 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 1; Born *International Commercial Arbitration* 48-50.

6 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). See New York Arbitration Convention 2023 https://www.newyorkconvention.org/.

guarantees confidentiality, procedural flexibility and simplicity for commercial dispute resolution.[7] International commercial arbitration may be designed to meet the specific requirements of a dispute instead of being conducted according to fixed national procedural rules.[8] Parties may select the law applicable to the substance of the dispute and the procedure for arbitration. They can also appoint the arbitrators, choose the language and the location of the arbitration, allowing for greater convenience and efficiency.

While international commercial arbitration offers several advantages over court litigation in resolving transnational commercial disputes, indeed, it is not without its challenges, particularly concerning the choice of law.[9] Choice of law issues can arise in international commercial arbitration in regard to the substantive law applicable to the merits of the dispute, the substantive law applicable to the arbitration agreement, the procedural law applicable to arbitration proceedings and the conflict of laws rules applicable to determine each of these applicable laws.[10] Each of these choice of law issues can have a significant influence on the international commercial arbitration process. Understanding which potential law will be applicable in each case, therefore, can be critical.

The law applicable to the substance of the dispute, for instance, plays a very vital role in international commercial arbitration proceedings.[11] The arbitration award is based on this applicable substantive law, and the provisions of this law settle the contrasting interests of the disputing parties.[12] Party autonomy is a fundamental principle within the international commercial arbitration process. Parties are free to choose the laws or rules of law that will determine their substantive rights and obligations in relation to their contract. Parties, however, do not always expressly indicate such laws or rules in their contracts. Modern national and institutional laws or

7 Blackaby *et al Redfern and Hunter on International Arbitration* 27, 29.
8 Blackaby *et al Redfern and Hunter on International Arbitration* 29.
9 Ma 2015 *Contemp Asia Arb J* 187.
10 Born *International Commercial Arbitration* 4081.
11 Croff 1982 *Int Lawyer* 613.
12 Croff 1982 *Int Lawyer* 613.

rules on international commercial arbitration generally indicate that in the absence of the parties' choice, the arbitral tribunal has broad discretion. Such freedom, however, may bring with it, as a corollary, unpredictability, unnecessary costs, and needless delays in resolving the parties' dispute.

The United Nations Commission on International Trade Law's (UNCITRAL)[13] rules of arbitration,[14] for instance, provide that, in the absence of the parties' choice, arbitrators are to apply the law designated by whatever conflict of laws rules the arbitrators deem appropriate (*voie indirecte*).[15] In accordance with such a provision, should the arbitrator consider the conflict of laws of the place of contract or the place of contract performance in order to assign the law which will govern? Or should the arbitrators look to the conflict rules of the forum where the arbitration is seated or the forum where the contract was breached or some other conflict of laws rules? Even where the arbitral tribunal is directed to apply the law that it determines to be appropriate (without conducting a conflict of law analysis — *voie directe*), similar questions become relevant.[16] Are the arbitrators to apply the substantive law of the seat of arbitration or that of the place of performance of the contract? Or are the arbitrators to apply the substantive law of the place where the contract was formed, that of the forum where the contract was negotiated or some other appropriate substantive law? Arguably, the level of uncertainty and unpredictability that exists in such processes is not favourable for international trade, especially considering its reliance on international commercial arbitration for dispute

13 Established in 1966, the United Nations Convention on International Trade Laws (UNCITRAL) is an organisation that aims to modernise and harmonise the laws of international trade. See UNCITRAL 2020 https://uncitral.un.org/.

14 That is the UNCITRAL Arbitration Rules with art 1, paragraph 4, as adopted in 2013 and art 1, paragraph 5, as adopted in 2021 (1976) and the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (1985). See UNCITRAL 2023 https://uncitral.un.org/.

15 Art 33 of the UNCITRAL Arbitration Rules (1976); Art 28 of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (1985).

16 Art 35 of the UNCITRAL Arbitration Rules (with new art 1, paragraph 4, as adopted in 2013); art 21 of the International Chamber of Commerce (ICC) Arbitration Rules (2021).

resolution.

Consequently, this thesis attempts to clarify the complexities involved in the choice of law issues that arise in international commercial arbitration. Specifically, the complexities associated with the law applicable to the substance of the dispute shall be critically evaluated. It is submitted that understanding the various methods that arbitral tribunals use to determine the law applicable to the substance of the dispute in the absence of the parties' choice, is necessary to facilitate the development of arbitration into an effective and predictable tool for the resolution of international commercial disputes in contemporary Africa. Therefore, at the conclusion of the thesis, an efficient method for determining the substantive law applicable to the merits of the dispute shall be proposed.

1.1. Research Problem

Even though international arbitration remains the preferred mechanism for resolving international disputes, it has not always operated optimally.[17] In recent times, debates and reforms usually deal with the growth in cost and time of arbitration.[18] Some of the debates also focus on the challenges that arbitrators face when dealing with specific problems such as multiple parties, multiple claims and dilatory tactics.[19] Others also focus on the role of arbitrators, the various laws and their application to international arbitration.[20] For instance, what amount of discretion should arbitrators have to choose the applicable law in the absence of the parties' choice and what methodology should they employ in such situations?

To remain the preferred dispute resolution mechanism for international disputes, it is vital that arbitration constantly seeks to improve both the fairness and efficiency of its processes.[21] In the context of adjudication, efficient arbitration proceedings should as much as possible aim to minimise transaction costs, reduce delays, and preserve the commercial

17 Waincymer *Procedure and Evidence in International Arbitration* 5.
18 Waincymer *Procedure and Evidence in International Arbitration* 5.
19 Waincymer *Procedure and Evidence in International Arbitration* 5.
20 Moses *The Principles and Practice of International Commercial Arbitration* 55.
21 Waincymer *Procedure and Evidence in International Arbitration* 12-13.

relationships that parties wish to continue.[22] The fairness of outcomes and the processes followed to arrive at them should also be assured in the arbitration process.

The trend has been that the parties with a connection to Africa (that is African-based parties or companies registered in Africa) usually nominate world-acclaimed arbitration institutions to conduct their international arbitration, with the expectation of benefiting from their advanced legal frameworks and expertise.[23] Here, there is the ever-present query of how efficient this practice is for the development of arbitration in Africa. More so, there is the issue of how well-suited the rules of such arbitration institutions are for the resolution of disputes with African origins — that is, to resolve disputes related to African contracts, projects or investments, as well as disputes involving African parties and those seated in Africa. The cost of using these renowned arbitration institutions can also often be a major impediment to access to justice and the expansion of arbitration throughout the continent, creating a barrier for many African parties.

It is an undeniable fact that the more vibrant a country's legal structures and systems are, the more likely it is to attract foreign investments and trade.[24] International commercial arbitration as a dispute settlement regime has proved to be particularly advantageous in this regard. It provides the confidentiality, neutrality and flexibility that investors need for the fast resolution of their commercial disputes independent of national courts.[25] Countries that have successfully established themselves as world-acclaimed arbitration centres[26] have not only used arbitration to improve transnational commercial dispute resolution but have also established an arbitration industry that is capable of driving an economy.[27]

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22 Waincymer *Procedure and Evidence in International Arbitration* 20-22.
23 Ostrove, Sanderson and Veronelli *Developments in African Arbitration* 22-23.
24 Naish, Ambrose and Young *Inside Arbitration: Perspectives on Cross-Border Disputes* 4.
25 Blackaby *et al Redfern and Hunter on International Arbitration* 28-30.
26 Arbitration centres such as the London Court of International Arbitration (LCIA), London (Established 1892) and the International Chamber of Commerce (ICC), Paris (Established 1919).
27 Gastorn "Examination of Arbitration Related UNCITRAL Texts and their Adoption by African States" 2.

According to a 2019 United Nations Conference on Trade and Development (UNCTAD) report, economic growth in Africa can be associated with an increase in intra-African commerce and foreign investment.[28] With its young population and vast natural resources, Africa is an attractive investment destination with the potential for enormous growth and innovation. Foreign direct investment (FDI) to Africa, for instance, hit a record of $83 billion in 2021.[29] Intra-African FDI likewise has increased as African leaders strive to build deeper trade relations outside of the Western hemisphere.[30] With the signing of the African Continental Free Trade Area Agreement (AfCFTA) in 2018, it is expected that African countries will increase trade amongst themselves by exchanging more manufactured and processed goods.[31]

The expansion of transnational trade inevitably gives rise to disputes as they are an inherent part of the commercial landscape.[32] As such, the use of various ADR methods, which will assist in effectively resolving international commercial disputes in a business-friendly manner, has become necessary in recent times.[33] Therefore, African countries are putting efforts into developing and growing arbitration industries that address disputes involving African parties, contracts and projects.[34] By actively encouraging the use of arbitration through the establishment of arbitration institutions and centres some African countries aim to become the preferred destinations for the resolution of disputes in the region.[35] Through the establishment of

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28 UNCTAD *Made in Africa – Rules of Origin for Enhanced Intra-African* Trade 27.
29 UNCITRAL *World Investment Report 2022: International Tax Reforms and Sustainable Investment* 12.
30 UNCITRAL *World Investment Report 2022: International Tax Reforms and Sustainable Investment* 11.
31 UNCTAD *Made in Africa – Rules of Origin for Enhanced Intra-African Trade* 197-202.
32 African Development Bank *Developing Africa's Workforce for the Future* 1.
33 International Trade Centre *Settling Business Disputes: Arbitration and Alternative Dispute Resolution* 32.
34 Naish, Ambrose and Young *Inside Arbitration: Perspectives on Cross-Border Disputes* 4.
35 Naish, Ambrose and Young *Inside Arbitration: Perspectives on Cross-Border Disputes 4.*

various arbitration centres and institutions across the region, international commercial arbitration is thriving.[36]

Nevertheless, whereas some arbitration-friendly African countries have actively developed their arbitration institutions over the years, others still lack the requisite legal structures and local expertise for conducting arbitration.[37] This has led to a situation where arbitration, as a dispute resolution mechanism, has become unattractive to international parties and even domestic ones. This trend, however, is gradually changing, as old and new arbitration institutions, as well as jurisdictions on the continent, are increasingly adopting modern arbitration rules, such as the *UNCITRAL Arbitration Rules* of 1976[38] and the *UNCITRAL Model Law on International Commercial Arbitration* of1985 (UNCITRAL Model Law).[39] The full impact of such instruments on the development of arbitration in Africa is still being assessed by writers. The rules they provide for determining the law applicable to substantive issues is an aspect of arbitration that needs exploring from an African point of view.

While party autonomy is the essence of arbitration, under most arbitration laws and rules, arbitrators also enjoy broad power and wide discretion in determining how cases will be conducted, subject of course to the parties' agreement and any mandatory provisions of the applicable law.[40] Undoubtedly, there are numerous national, institutional, and international arbitration rules that can be selected to regulate international commercial contracts globally. Usually, these arbitration laws indicate the nature and

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36 Among these thriving centres include, Cario Regional Centre for International Arbitration (CRCICA), Arbitration Foundation of Southern Africa (AFSA) and the Lagos Court of International Commercial Arbitration (LCRICA). Global Arbitration Review *The Middle Eastern and African Arbitration Review 2018* 22.

37 Naish, Ambrose and Young *Inside Arbitration: Perspectives on Cross-Border Disputes* 5.

38 UNCITRAL Arbitration Rules (1976) with art 1, paragraph 4, as adopted in 2013 and art 1, paragraph 5, as adopted in 2021. See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

39 UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006; Gastorn "Examination of Arbitration Related UNCITRAL Texts and their Adoption by African States" 1.

40 Blackaby et al *Redfern and Hunter on International Arbitration: Student Version* 189.

scope of the arbitrator's discretionary powers.[41] The UNCITRAL Model Law, for instance, grants arbitrators the discretion to make determinations regarding interim measures,[42] rules of procedure[43] and the competence to rule on its jurisdiction.[44] During an arbitration proceeding, at the very least, two different laws are applicable — laws that govern substantive issues and laws that regulate procedural issues.[45] Whereas the law applicable to procedural issues and the law governing substantive issues may be one and the same, it is also not uncommon that they would vary.[46] The apparent challenges that this may present make the determination of the choice of law issues particularly vital in the context of international commercial arbitration.

The main issue is that each national and institutional arbitration law may provide its own unique approach to determining the applicable substantive law in the absence of the parties' choice. A mixed bag of approaches for determining the applicable law, thus, exists to be used by arbitrators. The question is what methods are used to determine the applicable substantive law for international commercial arbitration in Africa specifically and are they efficient? There is no straightforward answer to this question. This is because, choice of law issues for international commercial arbitration can be quite complex – as is the case for any contract with an international character.[47] The simplest way to prevent complexities when determining the applicable law in an international commercial arbitration would have been for parties to clearly stipulate which laws will govern their rights and obligations, the arbitration agreement and procedural matters.[48] However, one can only hope for such straightforward clarifications.

This study, therefore, critically examines the methods that have been

41 See Art 19(2) of the UNCITRAL Model Law (1985).
42 Art17 A(1)(b) of the UNCITRAL Model Law (1985).
43 Art 19 of the UNCITRAL Model Law (1985).
44 Art 16 of the UNCITRAL Model Law (1985).
45 Doug 2014 *SAcLJ* 912.
46 Doug 2014 *SAcLJ* 912.
47 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 97.
48 Croff 1982 *Intl Law* 613.

designated for determining the applicable substantive law in the absence of the parties' choice under national and institutional arbitration laws in selected African countries. Understanding the intricacies of these methods is paramount for the development of international arbitration in Africa. Where arbitrators must make a choice between rules to govern the merit of the dispute, could a non-national law like *lex mercatoria* be chosen? What conflict of laws system should be used? What are the arbitrator's options of choice? Is the arbitrator's choice limited or unlimited? All these questions are crucially relevant for the case of international commercial arbitration in Africa.

1.2. Importance and Justification for the Study

The importance and justification for this study can be seen from two perspectives. First, the potential for international commercial arbitration, to be used as a tool for economic development in Africa, makes it increasingly necessary to understand its administration. For this study, understanding the processes for determining the law governing the merits of a dispute in contemporary Egypt, Ghana, South Africa and Côte d'Ivoire is paramount. An analysis of these jurisdictions is crucial due to their growing prominence as arbitration hubs in Africa and their shown dedication to modernising their arbitration laws to align them with international standards.[49] An analysis of pertinent issues, like the role of arbitrators or the arbitral tribunal and the role of conflict of laws rules, like party autonomy, in the selection of the applicable substantive law, is necessary due to the potential impact on arbitration outcomes and the trust of international investors.

Second, the purpose of this study is to explore international commercial arbitration bearing in mind the different legal systems and varying levels of legal infrastructure across countries in contemporary Africa. This calls for a sound understanding of the numerous legal frameworks for governing the determination of the law applicable to the merits of a dispute in jurisdictions such as Egypt, Ghana, South Africa and Côte d'Ivoire. It can be asked whether these frameworks are similar or radically different from those in

[49] Wheal *et al* 2020 https://www.whitecase.com/publications/insight/africa-focus-autumn-2020/institutional-arbitration-opportunities-challenges.

established arbitration centres and jurisdictions in other parts of the world. Evaluating the effectiveness of national and institutional arbitration laws is essential to the growth and development of international commercial arbitration in the long run.

1.3. Research Questions

The main question posed by this thesis is: *what is the most efficient method used by arbitrators to assign the law applicable to substantive issues arising in international commercial arbitration in Egypt, Ghana, South Africa and Côte d'Ivoire?*

To answer this, the sub-questions considered are:

1. What are the positive laws used for international commercial arbitration in Africa, specifically in Egypt, Ghana, South Africa and Côte d'Ivoire?
2. What are the nuances of the applicable substantive law in international commercial arbitration?
3. What are the possible methods used by arbitrators to assign the applicable substantive law drawing from sources originating outside Africa and encompassing both national and international sources?
4. What methods are used by arbitrators to assign the applicable substantive law specifically in Egypt, Ghana, South Africa and Côte d'Ivoire?
5. Are the methods used by arbitrators to determine the applicable substantive law efficient for international commercial arbitration in Egypt, Ghana, South Africa, and Côte d'Ivoire, considering commercial imperatives such as predictability and legal certainty?

1.4. Research Objectives

Specifically, the objectives of this research are:

1. To identify and analyse positive laws used for international commercial arbitration in Egypt, Ghana, South Africa and Côte d'Ivoire.

2. To identify and evaluate the possible methods used by arbitrators for assigning the applicable substantive law in international commercial arbitration, drawing from sources originating outside Africa and encompassing both domestic and international origins.
3. To analyse the methods used by arbitrators for assigning substantive law applicable to the merits of the dispute for international commercial arbitration in Egypt, Ghana, South Africa and Côte d'Ivoire.
4. To identify the most efficient method for assigning the applicable substantive law in Egypt, Ghana, South Africa and Côte d'Ivoire.
5. To provide suggestions to improve the method for determining the substantive law applicable to the merits of the dispute, to benefit other African jurisdictions with similar models as Egypt, Ghana, South Africa and Côte d'Ivoire.

1.5. Research Methodology and Scope

Due to time, resources and data availability, it is prudent to know the method to be followed to achieve the objectives of this research and the scope of the research. These methodological considerations will assist in properly apportioning time and resources. The following method and scope are thus proposed.

1.5.1. Method

This is a desktop study that is heavily dependent on primary and secondary sources. Primary sources for the thesis include, but are not limited to, case law, conventions, agreements, bilateral treaties, acts and regulations. In terms of secondary sources, the thesis relies on books, working papers, journal articles, policy documents (electronic and hard copies alike) and discussion papers, amongst others.

The study generally uses two research methodologies. First, the study uses an analytical approach to assess and critique the legal framework for determining the applicable law to the merits of a dispute for arbitration in selected jurisdictions in Africa. Second, the study uses a comparative analysis to determine the most efficient method used by arbitrators to assign

the substantive law applicable to the merits of a dispute, in the absence of the parties' choice. This is done by analysing the various methods provided in international arbitration instruments found in select African countries, as well as other jurisdictions and international sources, for assigning the applicable law in the absence of the parties' choice. While the study primarily centres on scrutinising international arbitration instruments in select African countries, final proposals may also draw upon broader international practices and principles to provide recommendations with wider applicability.

Four countries have been selected as comparators in this regard: Egypt, Ghana, South Africa and Côte d'Ivoire. In relevant instances, however, brief reference is made to the arbitration laws of other African countries like Mauritius, Kenya and Nigeria. The four countries, however, were specifically chosen for the following reasons:

1) Egypt was selected for this research mainly because international arbitration (institutional or ad hoc arbitration) in the country is based on a rich array of rules.[50] It is *inter alia* home to the Cairo Regional Centre for International Commercial Arbitration (CRCICA),[51] the oldest arbitration centre in Africa.[52] This centre originates from an international agreement signed between the Egyptian Government and the Asian African Legal Consultative Organisation (AALCO).[53] Recording 1585 filed cases as of 31 August 2022,[54] CRCICA has established itself as a very strong arbitration centre whose rules deserve examination. The *Egyptian Law Concerning Arbitration in*

50 See generally Shehata *Arbitration in Egypt: A Practitioner's Guide*.

51 Cairo Regional Centre for International Commercial Arbitration (CRCICA), established 1979. See CRCICA 2022 https://crcica.org/.

52 Formally set up in 1979 the CRCICA has, over the years, developed arbitration and ADR mechanism in the region with specific focus on Africa. See CRCICA 2022 https://crcica.org/.

53 The agreement was signed in 1978 between the Egyptian Government and the Asian Legal Consultative Committee (now known as since 2001 AALCO). The aim of this agreement was to enhance international commercial arbitration in Asia and Africa by establishing several arbitration centres within the Afro-Asian area. See AALCO 2022 https://aalco.int.

54 African Arbitration Association 2022 http://afaa.ngo/page-18626.

Civil and Commercial Matters No. 27 of 1994 (Egyptian Arbitration Law)[55] that governs arbitration seated in Egypt shall be considered in this research. Egypt has the potential to be the leading player in commercial arbitration in Africa and the Middle East, capable of competing with leading traditional arbitration centres like the International Chamber of Commerce (ICC) International Court of Arbitration[56] and the London Court of International Arbitration (LCIA)[57] due to its years of experience in arbitration.[58]

2) Ghana was selected because the country has the potential to be a competent and viable destination for international commercial arbitration in the Western region of Africa. The country's *Alternative Dispute Resolution Act, Act* 798 of 2010 (Ghana ADR Act)[59] is a comprehensive legislative framework for arbitration.[60] It applies to both national and international arbitration.[61] This Act empowers parties to employ arbitration as a means to settle their business conflicts, granting them the freedom to utilise ad hoc proceedings,[62] the arbitration rules of any institution[63] and the ADR Centre alongside its rules.[64] The same act also contains rules on other ADR methods such as customary arbitration, negotiation and mediation. The country is also home to arbitration institutions like the Ghana

55 Egyptian Law Concerning Arbitration in Civil and Commercial Matters No. 27 of 1994. See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.

56 Established in 1923. See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration.

57 Established in 1892. See LCIA 2023 https://www.lcia.org/.

58 Ostrove, Sanderson and Veronelli *Developments in African Arbitration* 25.

59 See Dennis Law 2017 https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324.

60 The Ghana's ADR Act is unique in the sense that it governs not only arbitration, mediation but also customary arbitration.

61 Ntrakwah and Asiama *Arbitration Guide IBA Arbitration Committee: Ghana* 2.

62 Alternative Dispute Resolution Act 798 of 2010.

63 An example of such an institution is the Ghana Arbitration Centre. It is a prominent, non-profit centre incorporated in October 1996, which is mostly used in domestic arbitration.

64 An ADR Centre is yet to be established in accordance with Part IV of the Ghana ADR Act to facilitate arbitration in the throughout the country.

Arbitration Centre (GAC)[65] and Ghana ADR Hub (ADR Hub),[66] which resolve both domestic and international disputes.[67] While these institutions may not match the level of experienced arbitration centres like CRCICA in resolving international commercial disputes, they still have the capacity to handle an increased number of such cases. Over time, these institutions have adopted arbitration rules and innovative practices in line with current international standards.[68] The ADR Hub, for instance, aims to expand its presence in Africa through *inter alia* training students in ADR practices and working closely with international organisations to promote the practice of ADR.[69]

3) South Africa was selected for similar reasons as Ghana. South Africa also has the potential to be an effective and viable hub for settling arbitration disputes in the Southern African Development Community (SADC) region. By modernising the country's arbitration rules through the adoption of the UNCITRAL Model Law (with some variations), the *South African International Arbitration Act 15* of 2017 (International Arbitration Act),[70] is specifically tailored to address international commercial arbitration. This Act shall be explored in the research. The institutional rules of the Arbitration Foundation of Southern Africa (AFSA) shall also be explored. The centre has achieved a high degree of success in the field of arbitration during its 20 years of existence.[71]

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65 See GAC 2022 https://arbitrationcentregh.com/.

66 This centre was established in 2017. See Ghana ADR Hub 2022 https://www.ghanaadrhub.org/.

67 They, however, are mostly used to resolve domestic disputes. Mostly international arbitration is conducted at the ICC Court of Arbitration and LCIA. Ntrakwah and Asiama *Arbitration Guide IBA Arbitration Committee: Ghana* 1.

68 The rules of the ADR Hub for instance are modelled after the ICC Arbitration Rules

69 Ghana ADR Hub 2022 https://www.ghanaadrhub.org/.

70 South African International Arbitration Act 15 of 2017. See South African Government 2017 www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitrationact15of2017.pdf.

71 In 2015 for instance, the AFSA's efforts extended into the development the China Africa Joint Arbitration Centre (CAJAC) to facilitate dispute resolution between Chinese and African parties.

4) Selecting Côte d'Ivoire[72] for this research presents the opportunity to explore the arbitration laws of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA), as used throughout the Member States. The legal regime of how the law applies to the merits of a dispute is determined under the *Common Court of Justice And Arbitration (CCJA) Rules* of 2017[73] and the *Uniform Act on Arbitration* of 2017 (Uniform Act)[74] shall be assessed. Here, the research shall concentrate on the legal regime for institutional arbitration as presented under the CCJA Rules. This shall provide a fair idea of its application and effect in other OHADA Member States. Indeed, Côte d'Ivoire has another important arbitration institution, the Court of Arbitration of Côte d'Ivoire (CACI). However, this shall not be focused on in the research.[75] On the other hand, the legal regime of OHADA's Uniform Act for ad hoc arbitration or institutional arbitration that is not conducted by the CCJA Centre as established in Côte d'Ivoire shall also be analysed in this research. As home to the CCJA, Côte d'Ivoire plays a pivotal role in arbitration within OHADA. Côte d'Ivoire is a viable selection for the research because it shall also provide a civil law perspective to the issue of determining the law applicable to substantive issues in arbitration.

1.5.2. Scope

There are currently 54 countries in Africa with diverse laws on international arbitration.[76] The thesis does not, however, aim to examine every arbitration law or rule in Africa to determine the method used by arbitrators to assign the substantive law applicable to the merits of a dispute in the absence of

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72 Côte d'Ivoire is one of the 17 Member States of the OHADA. See OHADA 2023 https://www.ohada.org/en/history-of-ohada/.

73 See OHADA 2023 https://www.ohada.org/en/ccja-arbitration-rules/.

74 See OHADA 2023 https://www.droit-afrique.com/uploads/OHADA-Uniform-Act-1999-arbitration.pdf.

75 This shall not be a focus of the work because, although, in fact, the centre is designed to be used for both international and domestic disputes, it is mostly used for domestic disputes.

76 United Nations Conference on Trade and Development *Economic Development in Report 2018: Migration for Structural Transformation* 32.

the parties' choice. To ensure clarity and preciseness, the scope of the thesis is, hence, placed within the confines of the following four points.

First, this research focuses on the various choice of law approaches used by arbitrators to determine the law applicable to substantive issues in international commercial arbitration. More specifically, the research focuses on analysing the rules provided in the national and institutional arbitration laws of Egypt, Ghana, South Africa and Côte d'Ivoire, to address situations where parties have made no choice of an applicable substantive law and the arbitrators or arbitral tribunals must assign one. To obtain a clarification of the situation in Egypt, Ghana, South Africa and Côte d'Ivoire, the research focuses on both past and current choice of law provisions found in national and selected institutional arbitration laws. Therefore, the arbitration laws to be considered include (but are not limited to) — the Egyptian Law Concerning Arbitration in Civil and Commercial Matters No. 27 of 1994 and the Cairo Regional Centre for International Commercial Arbitration Rules of 2011 form Egypt; the Alternative Dispute Resolution Act, Act 796 of 2010 and the Ghana Arbitration Centre Rules as at 2023 from Ghana; the International Arbitration Act 15 of 2017 and the Arbitration Foundation of Southern Africa (International Arbitration) Rules of 2017 from South Africa; and the OHADA Uniform Act on Arbitration of 2017 and the Common Court of Justice and Arbitration Rules of 2017 from Côte d'Ivoire.

Second, international contractual commercial disputes shall be the focus of this research.[77] This is mainly due to the fact that contractual disputes are common in international trade. With more trade and foreign investment happening within Africa, it is anticipated that the potential for disagreements and conflicts arising from contractual obligations and agreements will increase.

Third, the present study focuses on the UNCITRAL arbitration instruments (the UNCITRAL Model Law and the UNCITRAL Arbitration Rules). Understanding the UNCITRAL's contributions to the development of the rules relating to the applicable substantive law is vital considering its work

[77] As opposed to other types of commercial disputes like delictual commercial disputes.

in promoting and harmonising international commercial arbitration. The rules of world-acclaimed arbitration institutions such as the ICC International Court of Arbitration,[78] the Singapore International Arbitration Centre (SIAC),[79] the Hong Kong International Arbitration Centre (HKIAC),[80] and the London Court of International Arbitration[81] will be analysed in this research. Specifically, the provisions relating to the applicable substantive law found in both current and past versions of these arbitration rules will be identified and evaluated.

Fourth and final, this research focuses on arbitration between non-state actors, that is private individuals or entities rather than those between nation-states or between countries and foreign investors. Analyses and deductions made under the research are geared towards the benefit of both ad hoc and institutional international commercial arbitration in Africa and globally.

1.6. Structure and summary of the chapters

This thesis consists of seven chapters:

Chapter 1: General Introduction

This chapter provides a general overview of the law applicable to substantive issues in international commercial arbitration, with a specific focus on an African perspective. The chapter specifies the research problem, outlines objectives, provides justification for the research, sets the scope and limitations, and briefly reviews relevant literature. Further, the chapter introduces the methodology and the structure of the thesis, to serve as a roadmap.

Chapter 2: Positive laws for international commercial arbitration in

78 ICC International Court of Arbitration established 1923. See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/.
79 Established in 1991. See SIAC 2020 https://siac.org.sg.
80 Established in 1985. See HKIAC 2023 https://www.hkiac.org/.
81 See LCIA 2023 https://www.lcia.org/.

African countries

This chapter recounts the origins and development of arbitration in Africa. It further analyses the laws and principles used by the arbitrator in the determination of the law applicable to the merits of the dispute. Also, the positive laws for international commercial arbitration in Egypt, Ghana, South Africa, Côte d'Ivoire and other relevant African countries are assessed in this chapter. The purpose of this chapter is to establish the *status quo* of international commercial arbitration in the selected jurisdictions in Africa.

Chapter 3: Nuances of the substantive law applicable to the merits of a dispute in international commercial arbitration

This chapter explores the intricacies and specific aspects of the applicable substantive law relevant to international commercial arbitration. The chapter compares the applicable substantive law to other allied concepts, drawing on its role in the international commercial arbitration process. The chapter also seeks to reveal the considerations, rules and limitations that come into play when parties and arbitrators choose the applicable substantive law. The purpose of this chapter is to offer a deeper understanding of how the applicable substantive law interacts with the international arbitration process, what principles apply and how they differ in other legal contexts.

Chapter 4: Possible methods used by arbitrators to assign the applicable substantive law in international commercial arbitration

The purpose of this chapter is to determine the possible methods or approaches used by arbitrators to assign the applicable substantive law in the absence of the parties' choice drawing from sources originating outside Africa. This will highlight global trends in relation to provisions on the applicable substantive law in international commercial arbitration. To do this, the chapter provides an overview of such methods as they are presented in international conventions, national arbitration statutes and institutional arbitration rules. The chapter analyses and discusses how these methods operate in terms of their strengths and weaknesses.

Chapter 5: Methods used by arbitrators to assign the applicable

substantive law in Egypt, Ghana, South Africa and Côte d'Ivoire

This chapter reviews and analyses the methods available to arbitrators for determining the applicable substantive law according to specific arbitration laws enacted in Egypt, Ghana, South Africa and Côte d'Ivoire. The chapter emphasises the common features of the provisions relating to the applicable substantive law from an African perspective, while also exploring the potential influence of the UNCITRAL arbitration instruments on these regulations. It also evaluates the potential constraints when arbitrators have to assign the applicable substantive law from an African perspective.

Chapter 6: Efficient methodology for assigning the applicable substantive law

The purpose of this chapter is three-fold. First, the chapter identifies and evaluates the nature of various policy considerations that underlie the arbitrators' discretion in international commercial arbitration. Second, the chapter demonstrates how these policies influence the arbitrators' discretion when assigning the law applicable to the merits of the dispute. Finally, the chapter highlights the most efficient method for selecting the applicable substantive law in Egypt, Ghana, South Africa and Côte d'Ivoire, in light of the identified policies.

Chapter 7: Conclusions and Proposals

This chapter provides the conclusions of the study and puts forward proposals and recommendations.

1.7. Contribution of the Study to the Field of Knowledge

The main contribution of this thesis is to identify and outline the most efficient method for determining the applicable substantive law considering the different legal systems and varying levels of legal infrastructure across selected countries in contemporary Africa. The aim is to assist parties and arbitrators in correctly identifying the law which will apply to the substantive issues in arbitration proceedings.

The findings of the study will also assist to reform arbitration processes to enhance the predictability and certainty regarding the determination of the substantive law applicable to the merits of a dispute. For Africa, in particular, this could lead to a more conducive environment for cross-border trade and investment, where disputes are resolved efficiently and according to clear legal principles. The fact is, within Africa and throughout the world, a reliable and effective legal framework can foster trust and confidence in the arbitration process.

1.8. Limitations of the Study

One of the limitations of this study is the fact that arbitration case law is not abundant, at least with respect to published awards.[82] As a private affair, international commercial arbitration awards are not always published. This makes it particularly difficult to identify and analyse the approaches used to assign the applicable substantive law based on the existing corpus of arbitration awards.

To compensate for this limitation, the study identifies and evaluates the methods used to assign the applicable substantive law based on the provisions of national and institutional arbitration laws that address the issue. National and institutional arbitration laws (as well as the parties' agreement) play a crucial role in defining the scope of authority and discretion of the arbitrator. As such, they can serve as a valuable source of information to understand how arbitrators are expected to assign the law applicable to the merits of a dispute where parties fail to select one.

1.9. Some Observations on Terminology

For the purpose of this thesis and unless otherwise specified, the following terms may be used interchangeably: (a) private international law and conflict of laws are used interchangeably in this thesis to denote the set of rules that applies to cases involving a foreign element; (b) choice of law process and conflicts analysis connote the process followed to determine the applicable law; (c) applicable law and governing law connote the law applicable to the

82 Mayer 1986 *Arbitr Int* 276.

underlying contract as opposed to the arbitration agreement; (d) substantive laws and substantive rules; (e) contemporary Africa is represented by Egypt, Ghana, South Africa and Côte d'Ivoire.

CHAPTER 2

POSITIVE LAWS FOR INTERNATIONAL COMMERCIAL ARBITRATION IN AFRICAN COUNTRIES

2. General Introduction

It is commonplace when studying an issue in any field to have a clear idea about its origin or history, evolution and the features that distinguish it from similar legal issues within the particular area of study. The main issue in question in this research is identifying the most efficient method for determining the law applicable to substantive issues in international commercial arbitration in selected countries in Africa. To meet this objective, we need to have a clear understanding of the origins and development of arbitration instruments — most importantly from an African point of view.

This chapter is divided into three sections. Section I shall recount the origins and development of arbitration in general and the development of international commercial arbitration laws in Africa specifically. Recent initiatives to promote arbitration in Africa shall be highlighted and some perceptions about arbitration based in Africa shall also be considered. Section II further analyses laws, theories and principles used in international commercial arbitration and how they manifest in Africa. Section III of the chapter assesses the current position of positive laws of arbitration in contemporary Africa. In particular, the legal frameworks of Egypt, Ghana, South Africa, and Côte d'Ivoire as well as other relevant countries in the region shall be assessed. Both national and institutional regimes will be considered here to establish the *status quo.* The chapter aims to provide an exposition of the development of arbitration in general and particularly in Africa.

Section I: Origins and Development of Arbitration

2.1. Origins of Arbitration

The exact time and place of the origin of arbitration are unknown.[1] According to Wolaver, its origin is lost in obscurity.[2] The use of arbitration to resolve disputes, however, predates other contemporary means of dispute

1 Wolaver 1934 *U Pa L Rev* 132.
2 Wolaver 1934 *U Pa L Rev* 133.

resolution such as judicial adjudication. The practice has existed throughout various stages of history and civilisation. All through history, monarchs and prominent people in society were known to have settled the disputes of subjects or persons who voluntarily submitted themselves before them through some form of arbitration.[3] The practice of arbitration is mentioned in the history of Romans and Greeks.[4] For instance, some ancient Greek city states preferred arbitration to war as a means of resolving interstate disputes.[5] As far back as 337 B.C., King Philip II of Macedon (the father of Alexander the Great) is known to have secured the peace treaties he had negotiated in territorial disputes, using arbitration.[6] The Roman Empire used arbitration in civil matters to some degree and contributed to its spread throughout Europe during their conquests.[7] Wolver averred that, compared to the history of law, the history of arbitration is not a narrative about the growth and development of principles and doctrines but a matter of free decision.[8] Each case is viewed in the light of practical expediency and decided in accordance with the ethical or economic norms of some particular group.[9] Generally, arbitration started as a private affair based on the needs of the society that practised it. Domestic arbitration can be considered one of the earliest forms of arbitration with other forms or variations of the practice such as international commercial arbitration and investment arbitration surfacing due to the accelerated growth of globalisation and international trade.

The fundamental principles of arbitration have not changed over the centuries as it remains a voluntary agreement between parties to bind themselves to the decisions of presiding arbitrators.[10] It is worth noting, however, that ideologies such as the concept of state and its accompanying notions of territoriality, sovereignty, independence, self-reliance, equality,

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3 Rantsane 2020 *PELJ* 3.
4 Johnston *The Historical Foundations of World Order: The Tower and the Arena* 195.
5 Generally, ancient Greeks were war oriented. Hence, some city states in the empire were adamant to practice arbitration. Countries such as Persia, Sparta and Argos on the other hand willingly used arbitration to resolve serious in-state disagreements. Johnston *The Historical Foundations of World Order: The Tower and the Arena* 195-198.
6 Johnston *The Historical Foundations of World Order: The Tower and the Arena* 196.
7 In relation to inter-state arbitration, ancient Romans were unwilling to submit their dispute to a neutral power to act as arbitrator. Nevertheless, they were willing to act as arbitrators to other nations. Matthaei 1908 *Class Q* 246.
8 Wolaver 1934 *U Pa L Rev* 132.
9 Wolaver 1934 *U Pa L Rev* 132.
10 S Emerson 1970 *Clev SLR* 157.

and integrity — all of which are characteristic of a democratic state – did influence the pace at which arbitration developed.[11] As governments became more organised, they created national courts which became the most frequently used mode of resolving disputes.[12] Notwithstanding, disputing parties resorted to flexible non-judicial methods to settle their disagreements. These methods were by nature mediation or conciliation processes but indiscriminately referred to as arbitration.[13] This affected the relevance of arbitration over time and slowed its development. Nevertheless, arbitration is now the preferred standard method for international dispute resolution relating to countries, individuals and corporations.[14] Arbitration has become more organised and relevant with notable developments in commercial arbitration.

2.1.1. Origins and development of commercial arbitration

Historically, commercial arbitration is speculated to have become more popularly associated with the trade practices of the gilds of merchants in England.[15] Here, the main aim of arbitration was to enhance trade relations through the smooth resolution of disputes. As merchants travelled for trade, they conducted their commercial business under their own law — the merchants' law.[16] This was more or less an unwritten code of trade customs and practices uniformly used by merchants at trading cities or trading fairs. When merchants travelled from city to city, it was the merchants' law rather than the national laws of their own countries that were used to resolve commercial disputes.[17] The merchants of English gilds (which were like trading associations) submitted their disputes to the gild before seeking out the courts.[18] Although this practice was effective, it could not compete with the formidable English courts that had developed in medieval times. In truth and practice, however, the merchants' laws and customs struggled to find their place within the common law.[19] Riddled with technicalities, delays and

11 Emerson 1970 *Clev SLR* 157.
12 Emerson 1970 *Clev SLR* 157.
13 Emerson 1970 *Clev SLR* 157.
14 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 1; Born and Miles *Global Trends in International Arbitration* 4.
15 Macassey 1938 24 *ABAJ* 518- 524.
16 For in-depth discussion on the origins and development of the merchants' law see Kerr 1929 *Va L Rev 350; Macassey 1938 ABAJ* 518.
17 Macassey 1938 *ABAJ* 519.
18 Jones 1928 *Minn Law Rev 243.*
19 Jones 1928 *Minn Law* Rev 244.

exorbitant expenses, the courts' structure seemed inefficient for the timeous resolution of commercial disputes. Private arbitration soon became the popular option of merchants for the expeditious resolution of commercial disputes.[20] Initially, the development of commercial arbitration was neither assisted by the efforts of the courts nor parliament through statute.[21] It developed of its own accord, creating a sound quasi-judicial system that could no longer be ignored by the authorities.[22] The *English Arbitration Act* of 1689 drafted by John Locke, was the first of such English statutes which expressly recognised the practice of arbitration for dispute resolution.[23] This assimilation of law and practice was attributed to the eventual growth and development of arbitration not only in England but all through Europe.

2.1.2. Origins and development of international commercial arbitration

International commercial arbitration is a far more current nomenclature given to commercial arbitration that involves foreign elements such as foreign parties and contracts.[24] However, reaching a consensus on what this term should stand for or address has not been straightforward. Particularly, an important issue historically has been determining an acceptable meaning for the terms ‘international’ and ‘commercial’ when drafting arbitration laws.

Concerning the determination of the commercial character of arbitration, many jurisdictions or instruments have their way of delimiting what is considered a commercial transaction or commercial dispute. An account of this situation is seen when the *Geneva Protocol on Arbitration Clauses* of 1923 (1923 Geneva Protocol)[25] granted countries the opportunity to limit the application of the Protocol to specific types of commercial contracts under their national laws.[26] This practice was carried forward to the *Geneva Convention for the Execution of Foreign Arbitral Awards* of 1927 (1927

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20 Trakman 2003 *Univ Tor Law* J 274; Mustill 1989 *JIntlArb* 43-44.
21 Macassey 1938 24 *ABAJ* 520.
22 Sturges 1960 *NYUL Rev* 1045 -1046.
23 Ellenbogen 1952 *Law Contemp Probl* 657.
24 Croff 1982 *Intl Lawyer* 613.
25 Geneva Protocol on Arbitration Clauses of 1923. It was adopted by the then League of Nations. See United Nations 2022 https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf.
26 Art 1 Geneva Protocol of 1923.

Geneva Convention)[27] and essentially repeated under the New York Convention.[28] Worth noting is that it is prudent in international arbitration to have a fairly broad interpretation of what is to be considered commercial so as not to exclude certain transactions or certain types of disputes. It is no surprise that the UNCITRAL Model Law[29] squarely addressed the term 'commercial' by not only giving it a broad definition but also providing one in line with best international practices.[30] Although this definition is found in a footnote of the UNCITRAL Model Law, it is very insightful and it provides that:

> The term 'commercial' should be given a wide interpretation to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.[31]

This provision focuses on the parties' underlying transaction considering the nature of their relationship rather than the nature and form of the parties' claims. It definitively interprets the term instead of leaving the issue to individual countries with no guidance for a uniform interpretation.

Defining the term 'international' for arbitration has also not been straightforward. It is a term mainly used to distinguish between purely national or domestic and transnational arbitration.[32] The distinction between

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27 See United Nations 2022 https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf.

28 Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 10.

29 UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006. See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

30 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 10.

31 Found in second footnote in the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985). See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

32 It would, however, be limiting to assume that arbitration is domestic only when it is seated at a given place and is subject to the national laws of that place. Broadly speaking, any arbitration seated in a country, can be considered domestic in relation

national and international arbitration is essential for both legal and practical reasons.[33] For instance, in international arbitration (unlike national or domestic arbitration) parties do not necessarily need to have a connection with the seat of arbitration. Hence, parties or arbitral tribunals are provided with the opportunity to select a neutral seat for their international arbitration. Also, some jurisdictions have separate laws regulating international and domestic arbitration.[34] These statutes may provide special provisions for parties using either type of arbitration. For instance, countries, large corporations and businesses usually engage in international arbitration while domestic arbitration is reserved for resolving local disputes.[35]

Indeed, there is no generally accepted distinction between domestic and international arbitration as it is a matter of national law.[36] Throughout the history of the development of arbitration laws, at least three different meanings have been given to international arbitration.[37] The first meaning is objective, focusing on the nature of the dispute.[38] Here, the international character of commercial arbitration can be established by identifying a cross-border element in the underlying business agreement.[39] Also, reference by parties to an international arbitration institution can be an indication of the international character of the arbitration. A more specific example of the use of this approach can be seen in the first published *International Chamber of Commerce (ICC) Conciliation and Arbitration Rules* of 1922,[40] where business disputes were only characterised as international when they involved parties from different countries.[41] Here, the nature of the business dispute determined whether arbitration was

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to that country — irrespective of it being international by nature. Whether arbitration is domestic or international depends on a country's arbitration laws. Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 7.

33 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 7.

34 For instance, South Africa and Mauritius have separate laws for International Arbitration.

35 In Ghana for instance, the Ghana ADR Act provides for customary arbitration for the resolution of some domestic disputes.

36 National laws determine which type disputes may be submitted under domestic or international arbitration. Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 12.

37 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 9.

38 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 9.

39 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 9.

40 See Jus Mundi 2023 https://jusmundi.com/en/document/rule/en-rules-of-conciliation-and-arbitration-1922-icc-rules-1922-sunday-1st-january-1922.

41 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 10.

international. Due to how narrow this position was (considering how complex international transactions could be) the ICC in its 1927 Rules expanded the scope of the law to include instances where the parties were nationals of the same country.[42] A similar situation is found in the *French Code of Civil Procedure*.[43] Its article 1504 stipulates that *"*arbitration is international when international trade interests are at stake*."* This regime focuses on the resolution of disputes emanating from transactions that are not economically limited within the boundaries of a particular country.[44]

The second meaning given to international arbitration is subjective. It focuses on the nationality of parties as opposed to the dispute or their relationship.[45] Issues such as the domicile or place of performance and place of business of the parties to the arbitration agreement are also considered to determine whether an international element is present. The *European Convention on International Commercial Arbitration* of 1961 (1961 European Arbitration Convention),[46] for instance, provides a clear example of this approach. It provides in article I (1) (a) of the Convention among other things that:

> Arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having when concluding the agreement, their habitual place of residence or their seat in the different Contracting States…

The 1961 European Arbitration Convention, accordingly, only focuses on the domicile and residence of the parties making the nationality of the parties irrelevant.

The third possible meaning given to international involves a blend of both approaches stated earlier – that is the subjective and objective approaches. A representative example of this approach can be found in the UNCITRAL

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42 Art 5 ICC Arbitration Rules of 1927.

43 The French Civil Procedure Code, Decree No. 2011-48 of 2011 was issued on 13th January 2011. Provisions on arbitration can be found in arts 1442-1527 of the Code of Civil Procedure. It regulates both domestic and international arbitrations. Carducci *ArbIntl* 125.

44 Carducci *ArbIntl* 125.

45 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 9.

46 European Convention on International Commercial Arbitration (1961) was signed at Geneva on 21 April 1961 and entered into force on 7th January 1964. See United Nations 2023 https://treaties.un.org/doc/Publication/UNTS/Volume%20484/volume-484-I-7041-English.pdf.

Model Law which was created mainly to regulate international commercial arbitration.[47] It specifically provides in article 1(3), various situations which make arbitration international. The UNCITRAL Model Law posits that arbitration is international if parties after the agreement have their businesses in different jurisdictions or if the seat of arbitration or place of substantial performance is situated outside the country in which the parties have their places of business and if the parties expressly agree that the subject matter of the arbitration agreement relates to more than one country.[48] In all, determining whether arbitration is 'international' and delimiting what constitutes a 'commercial transaction' depends upon the provisions of the relevant national law.[49] In trying to draft an appropriate arbitration law, one that addresses best industry practices and developments, the history of international commercial arbitration concurrently evolved.

2.1.3. Contributions of transnational treaties, governmental and non-governmental organisations or institutions to the historical development of international commercial arbitration

Over the years, several governmental and non-governmental organisations or institutions have pursued many activities that greatly impacted the development of laws for international commercial arbitration.[50] These contributions are manifold and go far back in history. Different initiatives have been taken all over the world to develop and improve international commercial arbitration. An attempt to highlight them all would be unattainable. Therefore, more recent and notable contributions shall be analysed, starting and going no further than when the *Geneva Protocol on Arbitration Clauses* was established in 1923.[51]

1. *Geneva Treaties*

Although there are various accounts of the origin of arbitration across continents, efforts of the United Nations General Assembly seem to have

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47 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 10.
48 Art 1(3) of the UNCITRAL Model Law (1976).
49 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 7.
50 Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 19.
51 United Nations 2023 https://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958.

made the greatest impact on the acceptance of commercial arbitration at an international level.[52] To address demands for the unification and the international enforcement of arbitration agreements and arbitral awards, one of the earliest enactments of the League of Nations (the predecessor of the United Nations) was the 1923 Geneva Protocol.[53] This Protocol ensured the enforcement of arbitral awards in countries where they were rendered. It enabled parties to enter into internationally enforceable arbitration clauses or agreements. The Protocol only applied between parties who were both subject to jurisdictions that had ratified the treaty.[54] Although a pioneer in its time, the 1923 Geneva Protocol had a few shortcomings. A case in point, article 1 of the Protocol provided that:

> Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such a contract relating to commercial matters or any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.
> Each Contracting State reserves the right to limit the obligation mentioned above to contracts that are considered commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.[55]

It can be gleaned from the above that the Contracting States could limit the scope of application of the Protocol. They could have in their national laws, varied opinions as to what disputes were 'capable of settlement by arbitration' or what could be interpreted as a 'commercial matter'. This liberal approach adopted under the 1923 Geneva Protocol meant countries could disagree on these issues. This did very little for the uniform application

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52 Domke 1959 *AJIL* 414.

53 Geneva Protocol on Arbitration Clauses of 1923. See United Nations 2022 https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf. A year prior the adoption of the 1923 Protocol (in 1922), the ICC adopted its first rules of arbitration and in 1923 established the Court of Arbitration. These laws contributed enormously to the development international commercial arbitration by providing an institution for the resolution of business disputes to support trade and investment.

54 Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 20.

55 Art 1 of the Geneva Protocol on Arbitration Clauses (1923).

of the law. Another major issue with the 1923 Geneva Protocol was that when an arbitration proceeding was conducted in a Contracting State, there was no guarantee of enforcement if the place of the award was not the place of enforcement.[56] The Protocol ensured that the Contracting States enforced awards per their national laws if the arbitral award was made in its territory.[57] It was difficult for courts to reach a consensus on what requirement was to be used to determine jurisdiction. Some used the residence, domicile or usual place of business requirement and others used the nationality requirement. In all, the 1923 Geneva Protocol did not contribute much to recognition and enforcement.[58] This led to the adoption of the 1927 Geneva Convention.[59] The 1927 Geneva Convention, similar to the 1923 Geneva Protocol, was widely accepted and ratified by countries.[60] It provided for the enforcement of arbitration awards outside the country in which the award was made on the condition that the jurisdiction in which the enforcement was sought was a Contracting State.[61] The Convention attempted to improve upon the shortcomings of the 1923 Geneva Protocol but due to structural deficiencies, it failed to allow for the recognition and enforcement of both arbitration clauses and awards.[62] A case in point can be deduced from article 1(d) of the 1923 Geneva Protocol. Among other things, it provided that, "the award ... becomes final in the country in which it has been made." Here, the interpretation of the word 'final' was left to the discretion of the courts of the country in which the arbitration took place.[63] This led to varied interpretations of when an award was considered final. Some countries only considered the award final after a party seeking enforcement gained approval from the court of the country that rendered the award. Therefore, in an instance where a party is seeking enforcement, she would not only need leave from local courts to enforce the award but would also require approval from the courts in the country from which the award was to be executed. Indeed, the 1927 Geneva Convention ameliorated the

56 Volz and Haydock 1996 *William Mitchell Law Rev* 874.
57 Art 3 of the Geneva Protocol on Arbitration Clauses (1923).
58 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 60.
59 Geneva Convention for the Execution of Foreign Arbitral Awards (1927). See United Nations 2022 https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf.
60 Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 21.
61 Art 1 of the Geneva Convention for the Execution of Foreign Arbitral Awards (1927).
62 Volz and Haydock 1996 *William Mitchell Law Rev* 876.
63 Volz and Haydock 1996 *William Mitchell Law Rev* 877.

situation created by the 1923 Geneva Protocol, but more could be done to improve the recognition and enforcement of foreign arbitral awards.

2. The New York Convention

Another vital international instrument in the history of the development of international commercial arbitration is the New York Convention.[64] It was established to improve on the shortfalls in the 1923 Geneva Protocol and the 1927 Geneva Convention when it came to recognition and enforcement of foreign arbitral awards. This Convention emerged from an initiative of the ICC to improve on shortcomings of the 1927 Convention – mainly to eliminate its double exequatur requirement.[65] The organisation produced a preliminary draft Convention in 1953 attempting to address this issue. This initial draft was further amended by the United Nations Economic and Social Council (ECOSOC) to provide a sound arbitration process that protected the integrity of arbitral awards.[66] Both the ICC's preliminary draft and the ECOSOC draft served as the agenda for a conference held in 1958 in New York. This conference ultimately led to the promulgation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention.[67] The scope of application of this new convention was wide and extraordinary. Take for instance, unlike the Geneva Treaties that focused essentially on commercial claims, the New York Convention addresses issues involving both commercial and non-commercial claims.[68] It legitimises and enforces awards granted in any country (whether a Contracting State or not).[69] The Contracting States can opt for a commercial reservation or reciprocity reservation under this convention.[70] Generally, the New York Convention has been a success. It is the cornerstone of modern international commercial arbitration, currently

64 See New York Arbitration Convention 2023 https://www.newyorkconvention.org/.
65 The double exequatur is the requirement that arbitral awards be final and recognised in its country of origin before being confirmed abroad. Born 2018 *Mich J Int Law* 117, 126.
66 Born 2018 *Mich J Int Law* 118.
67 Born 2018 *Mich J Int Law* 118.
68 Volz and Haydock 1996 *William Mitchell Law Rev* 878.
69 Art I of the New York Convention (1958).
70 This provision is found under Art I (3) of the New York Convention (1958). A commercial reservation implies that Contracting States have elected for the Convention to exclusively apply to commercial claims. The reciprocity reservation also implies that the Contracting State can opt for the Convention to apply only to awards made in the territory of another Contracting State.

having 172 Contracting States.[71] The New York Convention can be considered not only as an effective means of enforcing international arbitration agreements and awards but also as a durable instrument that is used and has been used by both national courts and arbitral tribunals for over 50 years.[72]

3. The 1961 European Convention on International Commercial Arbitration

The next noteworthy international instrument in the historical development of international commercial arbitration is the 1961 European Arbitration Convention.[73] For the first time in any international arbitration instrument, the applicability of the Convention to international commercial arbitration specifically was clearly announced in its preamble.[74] Generally, the purpose of the convention was to improve and promote European trade by ensuring the effective and efficient operation of international commercial arbitration. Most of the signatories of the 1961 European Arbitration Convention were also Contracting States of the New York Convention. However, unlike the New York Convention, the 1961 European Arbitration Convention's application was originally exclusively restricted to countries in Eastern and Western Europe.[75] Although the convention did not envisage its scope to be universal, its establishment meant the international recognition of the need for uniform and special rules to govern international commercial arbitration.[76]

4. The ECE Arbitration Rules and the ECAFE Arbitration Rules.

The development of accepted rules for ad hoc arbitration also contributed to the international acceptance of arbitration. In 1966, three noteworthy sets of rules were adopted; the *Arbitration Rules of the United Nations Economic*

71 United Nations 2023 https://www.newyorkconvention.org/countries.
72 Born 2018 *Mich J Int Law* 118.
73 The 1961 European Arbitration Convention was signed on 21 April 1961 and entered into force on 7 January 1964. See United Nations 2023 https://treaties.un.org/doc/Publication/UNTS/Volume%20484/volume-484-I-7041-English.pdf.
74 Hascher "European Convention on International Commercial Arbitration of 1961: Commentary" 507.
75 Volz and Haydock 1996 *William Mitchell Law Rev* 878.
76 From the Preamble of the Convention, it can be deduced that law was designed to regulate the organisation and operation of international commercial arbitration in relations between physical or legal persons of different European countries.

Commission for Europe (ECE Arbitration Rules),[77] the *United Nations Economic Commission for Asia and the Far East*, *Rules for International Commercial Arbitration* (ECAFE Arbitration Rules)[78] and the *European Convention Providing a Uniform Law on Arbitration*.[79] Among these rules, the most successful was the ECE Arbitration Rules.[80] It was used widely for ad hoc arbitration across Europe. Parties had to expressly opt to settle their disputes under it. Although the Uniform Law never came into force and the ECAFE Arbitration Rules were barely used, their existence signified a conscious effort to develop arbitration in the 1960s.[81]

5. *The UNCITRAL Arbitration Rules*

The UNCITRAL Arbitration Rules were adopted in April 1976.[82] It came into being as a result of the efforts of the UNCITRAL[83] to improve transnational trade. The rules are used to resolve a wide range of disputes either ad hoc or those administered by an arbitration institution as long as it is selected by the parties.[84] From the year of adoption, the UNCITRAL Arbitration Rules found rapid and overwhelming acceptance.[85] In the same year of its

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77 Arbitration Rules of the United Nations Economic Commission for Europe (1966). This set of rules is one of the creations of the Economic Commission for Europe. This commission was set up by the United Nations Economic and Social Council (ECOSOC) in 1947 to assist in the development of international trade and practices in Europe. It focused mainly on developing law relating to international contracts and international commercial arbitration. The ECE Rules on Arbitration was created by the commission to supplement the European Convention on International Commercial Arbitration of 1961. Krüger 1968 *AmJCompL* 139.

78 United Nations Economic Commission for Asia and the Far East (ECAFE) Rules for International Commercial Arbitration (1966). The ECAFE was a post war commission formed to assist with economic reconstruction and the development of Asia and the Far East. The ECAFE Arbitration Rules was created by the Commission to provide standard rules for arbitration for the region. See generally United Nations Secretary General *Progressive Development of the Law of International Trade: Report of the Secretary-General.*

79 The draft of the European Convention Providing a Uniform Law on Arbitration (1966) was prepared by the Rome Institute. The draft after several revision finally laid down the rules regarding procedure in both domestic and institutional arbitration. Krüger 1968 *AmJCompL* 139.

80 Cohn 1967 *ICLQ* 950.

81 Cohn 1967 *ICLQ* 951.

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

83 Established in 1966. See UNCITRAL 2020 https://uncitral.un.org/.

84 Art 1(1) of the UNCITRAL Arbitration Rules (1976).

85 Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 24.

inception, for instance, the UNCITRAL Arbitration Rules were adopted by the Asian-African Legal Consultative Organisation (AALCO).[86] The original members of this organisation comprised seven Asian countries, namely Burma (now Myanmar), Ceylon (now Sri Lanka), India, Indonesia, Iraq, Japan, and the United Arab Republic (now the Arab Republic of Egypt and the Syrian Arab Republic).[87] The acceptance of the UNCITRAL Arbitration Rules by this significant number of countries was positive for the advancement of international commercial arbitration. The standing of the Rules was further enhanced when the United States and the then Soviet Union also endorsed the UNCITRAL Arbitration Rules a few months after its inception.[88] These countries in total formed part of a significant portion of the world's growing economy and population. This implied a wide recognition and acceptance of international arbitration. The UNCITRAL Arbitration Rules have been very successful. There are four versions of the rules presently, with the most current version incorporating expedited arbitration rules.[89]

6. The UNCITRAL Model Law

After the adoption of the UNCITRAL Arbitration Rules, the UNCITRAL Model Law was adopted by the UNCITRAL on 21 June 1985, at the end of its eighteenth session.[90] The UNCITRAL Model Law was created to harmonise and improve national law on international commercial arbitration. It

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86 This organisation was originally known as the Asian Legal Consultative Committee (ALCC) which was duly constituted in 1956. This name was changed to Asian-African Legal Consultative Committee (AALCC) in April 1958 and finally in 2001 Asian African Legal Consultative Organisation (AALCO) at a conference in New Delhi. This constant change of name was to ensure that all members felt included in the organisation. Considered as the outcome of the historic Bandung Conference, held in Indonesia, in April 1955 the organisation, was formed to serve as an advisory board to Member States on issues relating to international law. The UNCITRAL Arbitration Rules (1976) were endorsed by the AALCC in July of 1976.See AALCO 2021 http://www.aalco.int/about; Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 24.

87 AALCO 2021 http://www.aalco.int/about.

88 Bergsten *Dispute Settlement. International Commercial Arbitration. 5.1 International Commercial Arbitration* 24.

89 These versions of the UNCITRAL Arbitration Rules include the 1976 version, the 2010 revised version, the 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration (2014) and the 2021 version which incorporates the UNCITRAL Expedited Arbitration Rules (2021). See UNCITRAL 2023 https://uncitral.un.org/en/content/expedited-arbitration-rules.

90 UNCITRAL Secretariat "Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006" 23.

addresses all the various stages of an arbitration process — from the arbitration agreement to the recognition and enforcement of arbitral awards. The UNCITRAL Model Law, since its inception, has created an acceptable standard for modern arbitration laws. This law is designed to fit into all kinds of legal and economic systems worldwide. It is an effective tool to improve arbitration laws in developing countries. Countries could enact separate laws to regulate their domestic arbitration while using the UNCITRAL Model Law for international commercial arbitration to reflect prevailing practices. The total number of jurisdictions that have adopted this UNCITRAL Model Law indicates its immense contribution to the history and development of international commercial arbitration.[91]

2.2. Development of International Commercial Arbitration in Africa

2.2.1. The past

As discussed above, the exact origin of arbitration is shrouded in obscurity, but this is even more true from an African perspective. The specific origin of the practice is unknown but its existence before colonialism is not in doubt.[92] Every community of people has a way of resolving disputes among its citizens and African societies were and are no different. In pre-colonial times, the situation was that African communities applied customary law or native law to resolve their disputes.[93] This unwritten law varied from tribe to tribe and was organised based on the structure of the society. For instance, in acephalous tribes[94] disputes were resolved by a council of elders, heads of families or traditional social groups.[95] On the other hand, in cephalous tribes,[96] the chief or political leader formed a native tribunal or court (of which he was head) charged to resolve disputes.[97] Extra-judicial methods such as negotiation, mediation and arbitration were frequently used to settle

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91 Currently 87 jurisdictions have arbitration statutes based on the UNCITRAL Model Law. See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

92 Kirgis 2014 *CJCR* 102.

93 Kirgis 2014 *CJCR* 102.

94 Acephalous tribes are communities without a political leader. Examples of such communities include the Igbo tribe, Yako tribe and Ibibo tribe, all found in Nigeria. Eisenstadt 1959 *Am Anthropol* 209.

95 Amankwah 1970 *Cornell Int Law J* 41.

96 Cephalous tribes are communities with a political leader. Examples of such communities include the Ashanti and Bono tribes in Ghana, Yorubas of Nigeria and the Zulus of South Africa. Amankwah 1970 *Cornell Int Law J* 41.

97 Amankwah 1970 *Cornell Int Law J* 41.

disputes in African societies during pre-colonial times. Although these practices did not hold these specific technical names in the African setting, they existed in some form before the arrival of the Europeans in Africa.[98] An attempt to sum up the histories or origins of various pre-colonial African laws or practices would be impossible with the continents' numerous tribes and ethnic groups.[99]

Nevertheless, the genesis of the enactment of arbitration regimes in Africa can be traced to colonial rule. Asuozo has posited that "the enactment of arbitration laws in Africa was a legacy of colonialism".[100] Similarly, Brand also suggests that the traditional form of dispute resolution was disrupted by colonialism, paving the way for a more structured and formalised approach to resolving conflicts.[101] Additionally, Onyema points out that the shift from indigenous mechanisms of dispute resolution to contemporary litigation and modern alternative dispute resolution mechanisms in Africa can be attributed to colonialism.[102] The truth of these assertions is seen in the fact that the arrival of the Europeans on the shores of Africa marked not only the beginning of a transnational trade but also the promulgation of laws to facilitate it. Seven main European countries colonised Africa — Britain, France, Germany, Belgium, Spain, Portugal, and Italy.[103] Initially, these colonial powers did not recognise or understand the nature and structure of the customary laws or practices of the indigenes.[104] They were unwilling to submit their personal or commercial matters to customary laws as they considered them inadequate for their purposes.[105] This created a situation where customary laws and practices for dispute resolution were relegated to the background. This did not last long as colonial authorities soon realised they could better control the indigenous people through their institutions.[106]

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98 See generally Ajayi and Buhari 2014 *Afr Res Rev* 138-157.

99 Okeke 2011 *Roger Williams Univ Law Rev* 7.

100 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 119.

101 Brand "Amicable Dispute Resolution in South Africa" 591-592; Sempasa 1992 *CUP* 390,408.

102 Onyema "Chapter 36: Shifts in Dispute Resolution Processes of West African States" 519.

103 From 1885 to the start of the First World War, the British had control over 30% Africa's population, France had 15%, Portugal 11%, Germany 9%, Belgium 7% and Italy 1%.

104 In Ghana (then Gold Coast) for instance, the British enacted the Native Jurisdiction Ordinance of 1878 which did not permit the administration of justice to the native through indigenous tribunals. Amankwah 1970 *Cornell Int Law J* 45.

105 Aiyedun and Ordor 2016 *Law, Democracy and Development* 158.

106 Kirgis 2014 *CJCR* 102.

In British colonies, for instance, chiefs and community leaders or elders were allowed controlled authority through indigenous tribunals or courts to resolve disputes between indigenes.[107] As a result, they created a dual system where pre-existing customary laws or indigenous tribunals and colonial laws or courts operated.[108] This dual system eventually assimilated into a unique legal system that reflected both customary practices and Western laws. Although Western laws overshadowed the new legal systems they introduced in Africa, customary laws and practices were still recognised, subject to statutory limitations.[109] Today, customary laws and practices are still recognised and usually underlie laws such as those addressing land, inheritance and family matters.[110]

Post-colonisation, most African countries who had inherited their legal systems from imperial powers, adapted them to suit the needs of their new societies.[111] Accordingly, the history and development of arbitration instruments in Africa are rooted in these inherited legal systems.[112] For instance, French and British laws greatly impacted the development of arbitration on the continent.[113] This was mainly due to the vast portion of land and populations of Africans they colonised. During colonialism, colonial powers applied similar laws in Africa as those that prevailed in their countries.[114] After independence, most of these colonised countries adopted the prevailing colonial rules which included arbitration regimes. For this reason, Asuoza has grouped the development of arbitration laws in Africa

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107 Amankwah 1970 *Cornell Int Law J* 45.

108 The British, for instance, figured by allowing the customary law or courts to operate, they could gain more control over the natives through their own institutions. They legitimised native courts establishing them by statue. Amankwah 1970 *Cornell Int Law J* 45.

109 Amankwah 1970 *Cornell Int Law J* 45-48.

110 Ghana, for instance, in its present Ghana Alternative Dispute Resolution Act 798 of 2010, includes the rules to regulate customary arbitration in the country. Also, the conveyancing of land in Western region of Nigeria is regulated by the Property and Conveyancing Law (PCL) of 1959 and customary law.

111 Kirgis 2014 *CJCR* 103.

112 Kirgis 2014 *CJCR* 102.

113 The 1889 UK Arbitration Act (as amended) for instance was mainly used in British colonies to regulate arbitration. The French also used the Napoleonic Code of Civil Procedure of 1806 which was first extended by the Decree of 15 May 1889 in its colonies. However, the Decree of 31 December 1925 specifically extended its application to arbitration clauses. Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 120.

114 Kirgis 2014 *CJCR* 102.

into three generations.[115]

The first generation of arbitration laws in Africa, according to him, stems from the colonial era.[116] As discussed above, this generation of arbitration laws in Africa saw the enactment of the first formal arbitration regulatory frameworks based on prevailing laws in the countries of the colonial powers. Arbitration law was a creation of colonial arbitrators and applied solely to domestic arbitration.[117] The arbitration laws of this era did not specifically address commercial arbitration or international arbitration. Although the shortcomings of these laws for international dispute resolution were obvious, they set the stage for the development of arbitration in Africa.

The second generation of arbitration laws from Asuoza's point of view emanated from British and French laws.[118] The common law (mostly linked to the United Kingdom) and the civil law (mostly linked to France or Belgium) were more or less the basis of legal systems in Africa. Apart from the existence of several tribes and customary laws or practices, colonial links created some sort of divide between practices and procedures used for arbitration on the continent. In this era, arbitration laws were usually revised colonial laws. The colonised countries retained some aspects of these outdated colonial statutes. This generation of arbitration laws was not entirely outmoded, especially for resolving domestic disputes. Nevertheless, these regimes were wholly or mostly inadequate for international commercial arbitration prompting further revisions of laws.

Finally, the third generation of arbitration laws came about as a result of the efforts of the United Nations General Assembly, to develop standard arbitration rules.[119] These efforts lead to the development of instruments

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115 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 120.

116 The first generation of arbitration laws in Africa refers to those enacted between 1896 and 1960. According to Asouzu these were law enacted by colonial administrators. Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 120.

117 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 121.

118 The generation consisted of Acts or revised colonial arbitration laws enacted in the late 1950s and 1960s. Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 123.

119 According to Asuozo, these were laws enacted in Africa from 1984. Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 140.

such as the New York Convention, the UNCITRAL Model Law and the UNCITRAL Arbitration Rules which greatly impacted arbitration laws in Africa. The International Arbitration Code of Djibouti[120] which was enacted in 1984, for instance, had provisions for international commercial arbitration. Although it was enacted before the UNCITRAL Model Law came into force, the work done by UNCITRAL greatly influenced the creation of the new Code.[121] Also, Nigeria enacted the *Nigerian Arbitration and Conciliation Decree No. 11*[122] in 1988 to address international commercial arbitration.[123] This Act had provisions for international arbitration and conciliation. The provisions on arbitration were based on both the UNCITRAL Model Law of 1985 and the UNCITRAL Arbitration Rules of 1976 and provisions on the conciliation aspect were based on the *UNCITRAL Conciliation Rules* of 1980.[124] The Nigerian Arbitration and Conciliation Act was the first of its kind in Africa.[125] A series of countries such as Togo,[126] Algeria,[127] Tunisia[128] and Côte d'Ivoire[129] all followed suit by enacting arbitration-specific laws.

Generally, the development of the legislative framework for arbitration in Africa has not been uniform. Each country has adopted laws that serve the best interests of its jurisdiction. Asuozo has averred that based on differences in legislative approaches, two groups of countries can be

120 International Arbitration Code of Djibouti of 1984.

121 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 125.

122 See Law Global Hub 2022 https://www.lawglobalhub.com/arbitration-and-conciliation-act-1988/.

123 Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-nigeria/.

124 See UNCITRAL 2023 https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation.

125 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 125.

126 Togo created the Court of Arbitration of Togo by enacting Law No. 89-39 of 28 November 1989. Akakpo, Zotchi and Bitho, *Togo: Delos Guide to Arbitration Places (GAP)* 4.

127 In Algeria, rules governing international arbitration were first enacted through the Legislative Decree No. 93-09 of 1993. This law modified the former 1988 code of civil procedure by introducing a modern arbitration law. See generally Ghellal "Algeria".

128 Tunisia enacted the Tunisian Arbitration Code Law No. 93–42 of 1993 which modified and repealed portions of the Code of Civil and Commercial Procedure of 1959 to make provisions for arbitration. Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 125.

129 In Côte d'Ivoire, the Law No. 93–671 of 1993 Concerning Arbitration specifically addressed domestic arbitration. Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 9.

identified in Africa.[130] The first group of countries are those that base arbitration laws on the UNCITRAL Model Law, wholly or partly. The second group of countries do not base their laws on the UNCITRAL Model Law wholly or partly but have arbitration laws that are influenced by their former imperial countries or by association with the *Treaty on the Harmonisation of Business Law in Africa* of 1993 (OHADA Treaty).[131] For instance, in Ghana, the Ghana ADR Act[132] is inspired by the UNCITRAL Model Law.[133] It, however, addresses issues such as arbitration management conferences and other ADR methods such as mediation.[134] On the other hand, countries such as South Africa have adopted the UNCITRAL Model Law to regulate international commercial arbitration[135] whilst having another law governing domestic arbitration.[136] Furthermore, treaties such as the OHADA Treaty, established in 1993,[137] have also contributed to the development of international commercial arbitration in Africa. The OHADA Treaty creates a Common Court of Justice and Arbitration (CCJA)[138] to assist with the uniform application of the treaty among Member States and to administer arbitration. Also, the treaty provides the Uniform Act on Arbitration of 2017 (Uniform Act)[139] which applies when the seat of arbitration is in a Member State and

130 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 124.

131 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 124; See OHADA 2023 https://www.ohada.org/en/treaty-on-the-harmonization-of-the-business-law-in-africa/.

132 Alternative Dispute Resolution Act 798 (2010). See Dennis Law 2017 https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324.

133 Amarteifio, Lartey, and Okudzeto & Associates 2023 https://www.uk.practicallaw.thomsonreuters.com.

134 The Ghana ADR Act regulates both domestic and international arbitration in Ghana.

135 The International Arbitration Act 15 of 2017 is the current legal regime that governs international commercial arbitration in South Africa. To keep up with current commercial practices, this law replaced these outdated laws; the Arbitration Act 42 of 1965, Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, and Protection of Businesses Act 99 of 1978. Rudolph and Bernstein *International comparative legal guide to international arbitration: South Africa* 454.

136 South Africa is governed by the Arbitration Act 42 of 1965. See South African Government 2023 https://www.gov.za/documents/arbitration-act-14-apr-1965-0000.

137 The purpose of this treaty is to create a uniform legal framework for conducting business in Africa. Currently there are 17 Member States to this treaty, have its laws automatically applicable in Member States. See OHADA 2023 https://www.ohada.org/en/treaty-on-the-harmonization-of-the-business-law-in-africa/.

138 The OHADA Treaty in 1993 created this court. It is located in Abidjan. Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius 9*.

139 See OHADA 2023 https://www.ohada.org/en/arbitration-law/.

when arbitral awards are issued after the Act came into force. The Uniform Act, which is also designed along similar lines as the UNCITRAL Model Law, is usually used in former French colonies.[140]

It will suffice to say that the sources of third generation arbitration instruments in Africa are modern. They provide users of arbitration with high levels of efficiency and fairness for their dispute resolution. The concern now is for more African countries to adopt these instruments and their best practices. The COVID-19 global pandemic has set in motion the need for very flexible arbitration laws that take the need for technology in the arbitration process into account. This could be the beginning of a new generation of arbitration laws in Africa and the world as a whole.

2.2.2. Current initiatives for international commercial arbitration in Africa

In recent years, international commercial arbitration has experienced tremendous growth in both commercial and investor-state arbitration globally.[141] Central to this growth has been the increase in trade from one part of the world to another.[142] This has been driven by a cultural mix of different arbitrators, parties, lawyers and legal systems. A remarkable system for alternative dispute resolution has emerged with the ability to propel economic growth and development.

Regardless of the numerous advantages of arbitration, initial disparities existed between the degree of acceptance and practice of arbitration. In the early 1980s, only a few jurisdictions were arbitration-friendly (more so in Africa) or had arbitration laws that were in line with modern practices.[143] This situation greatly improved with the enactment of international instruments such as the UNCITRAL Model Law. With the UNCITRAL Model Law serving as soft law more parties in recent years submitted to arbitration.[144] The New York Convention has also contributed to this regard by aiding with the recognition and enforcement of arbitration awards.

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140 Gastorn "Examination of Arbitration Related UNCITRAL Texts and their Adoption by African States" 3.

141 Born and Miles *Global Trends in International Arbitration* 1.

142 Born and Miles *Global Trends in International Arbitration* 1.

143 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 1.

144 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 1-2.

The emergence of numerous arbitration institutions with relatively similar rules has also contributed to the growth and development of arbitration. By providing efficiency and procedural predictability, arbitration institutions have gained prominence in dispute resolution. The American Arbitration Association (AAA)[145] and the International Institute for Conflict Prevention & Resolution (CPR),[146] both based in New York City, the International Centre for the Settlement of Investment Disputes (ICSID)[147] and the London Court of International Commercial Arbitration (LCIA) are reputable arbitration institutions that have in recent years supported the development of arbitration. In emerging markets, institutions such as the Dubai International Arbitration Centre (DIAC),[148] the Hong Kong International Arbitration Centre (HKIAC)[149] and the Singapore International Arbitration Centre (SIAC)[150] have

145 The American Arbitration Association (AAA) is a non-profit organisation that provides alternative dispute resolution. It was created in 1926. The AAA provides administrative services such as the appointment of mediators and arbitrators, setting hearings and conflict-management services in the US as well as abroad. Its global component is administered by the International Centre for Dispute Resolution (ICDR) which was created in 1996. See American Arbitration Association 2023 https://www.icdr.org/about.

146 International Institute for Conflict Prevention & Resolution (CPR) is an independent non-profit organisation that strives for the prevention and resolution of conflict with the leadership thought of its member companies, mediators, arbitrators, law firms and academics. It was established in 1977 and it has since then provided dispute management services as well as training and education. See CPR International Institute for Conflict Prevention & Resolution 2022 http://www.cpradr.org.

147 The International Centre for the Settlement of Investment Disputes (ICSID) which is based in Washington DC was created under the auspices of the World Bank on 14 October 1966. It is charged to address cases where a party is government, or its agency and the other party is a foreign investor. In addition, both the host state and the investor state must have ratified the Convention on the Settlement of Investment Disputes between States. Currently, the ICSID has 162 Signatory and Contracting State. In 2019, 49 of the 54 African countries are signatories to this Convention. See ICSID 2023 https://icsid.worldbank.org/about/member-states/database-of-member-states.

148 Previously known as the Centre for Commercial Conciliation and Arbitration, the Dubai International Arbitration Centre (DIAC) is an independent, non-profit institution that was created in 1994 to provide arbitration services. It is one of the biggest arbitration centres in located in the Middle East. See International Bar Association 2023 https://www.ibanet.org/.

149 The Hong Kong International Arbitration Centre (HKIAC) is an institution that provides alternative dispute resolution services. It was established in 1985 and assists with dispute resolution within Hong Kong and abroad. See HKIAC 2023 www.hkiac.org/about-us.

150 The Singapore International Arbitration Centre (SIAC) is a non-profit organisation that started operations in 1991. It provides independent and neutral arbitration services to the global business community. Due to the confidentiality, procedural

also contributed their fair quota to the development of international commercial arbitration.

In Africa specifically, some recent efforts include the formation of organisations such as the African Arbitration Association,[151] the ICC's African Commission[152] and the AfricArb (a Paris-based association)[153] aiming to facilitate the expansion of arbitration in Africa by promoting expertise and capacity-building. There are also notable developments regarding commercial arbitration in the various sub-regions of Africa. Found in the East of Africa are the Mauritius International Arbitration Centre (MIAC),[154] the Kigali International Arbitration Centre (KIAC)[155] and the Nairobi Centre for International Arbitration (NCIA),[156] in the north the Cairo Regional Centre for International Commercial Arbitration (CRCICA),[157] in the south the Arbitration Foundation of Southern Africa (AFSA)[158] and the OHADA's Common Court of Justice and Arbitration (CCJA)[159] based in Abidjan is used by francophone countries in Western and Central Africa.

2.2.3. Perceptions about arbitration seated in Africa

Although the popularity of arbitration seated in Africa is growing, the reputation of African arbitration centres is still not at par with other long-established arbitration institutions. The ICC International Court of Arbitration and the LCIA, for instance, have substantial experience and a proven track

flexibility, swift and cost-effective service the centre provides, as of 2018, it was recognised as the most popular seat of arbitration in Asia. See Henderson, Furlong and Leong 2023 http://uk.practicallaw.thomsonreuters.com.

151 The African Arbitration Association (AfAA) promotes, encourages, facilitates and advances the use of international arbitration in Africa. It is a non-profit association that was formed in 2018. See African Arbitration Association 2018 https://afaa.ngo/.

152 This African Commission is to be launched by the International Court of Arbitration of the International Chamber of Commerce to expand the courts range of activities and growth in Africa. Although this commission is not yet in force, it represents a good attempt to promote arbitration in Africa. See ICC 2018 https://iccwbo.org/media-wall/news-speeches/icc-court-launch-africa-commission/.

153 This is a non-profit organisation that was launch in 2018. It is made up young practitioners who aim to develop arbitration into an accessible and efficient method for dispute resolution in Africa. See Herbert Smith Freehills 2018 https://hsfnotes.com.

154 See MIAC 2022 https://miac.mu/.

155 See KIAC 2022 https://kiac.org.rw.

156 See NCIA 2023 https://ncia.or.ke/.

157 See CRCICA 2022 https://crcica.org/.

158 See AFSA 2022 https://arbitration.co.za/.

159 See OHADA 2023 https://www.ohada.org/en/arbitration-law/.

record that makes them the primary institutions used to resolve international disputes involving African parties.[160] Insufficient expert arbitrators, outdated arbitration laws and court interference in arbitration processes have been highlighted as some of the reasons why parties are less likely to have an African-seated arbitration.[161] These perceptions are mainly based on the assumption that arbitration as a practice is underdeveloped in Africa. From the belief that most African countries are not pro-arbitration, to the belief that arbitral awards from Africa are not easily enforced, it would seem inexpedient to opt for international arbitration seated in Africa.[162] The reality is that not only is there a proliferation of African arbitration centres across the continent but there are also many experienced and qualified arbitration experts and arbitrators.[163] Although the reliability of these perceptions is questionable, there is indeed well-established evidence that fails to assuage such beliefs.

Take for example Ghana's ADR Act, where the jurisdiction of the High Court can be invoked at various stages in an arbitration proceeding.[164] This Act grants the High Court the power to direct a case before it to arbitration, even when there is no arbitration agreement.[165] Although the court requires the consent of the parties in writing to do so, practically speaking, they influence this decision.[166] Parties might be reluctant to go against the directions of the court. With parties selecting arbitration for its neutrality and confidentiality features, such an indirect interference could be a great disincentive.

Indeed, when parties select a seat of arbitration through their arbitration agreement, they are implicitly choosing to have the country's court supervise and potentially consider any challenged award.[167] Thus, laws governing the recognition and enforcement of arbitral awards have to be in

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160 According to the ICC, 130 parties from sub-Saharan Africa (representing 5% of all parties) accounted for its 2019 caseload. The LCIA also in recorded a 10% increase of cases involving African parties in 2019. Wheal *et al* 2020 https://www.whitecase.com/publications/insight/africa-focus-autumn-2020/institutional-arbitration-opportunities-challenges.

161 Hodges *et al Commercial Arbitration in Africa: Present and Future* 3.

162 Hodges *et al Commercial Arbitration in Africa: Present and Future* 6-10.

163 Hodges *et al Commercial Arbitration in Africa: Present and Future* 10.

164 For instance, under sec 39 of the Ghana ADR Act, the court is empowered to give support during arbitration proceedings. Also, under sec 40, the High Court has the power to make ruling on preliminary points of law.

165 Sec 7 of the Ghana ADR Act 798 of 2010.

166 Onyema 2012 *ArbIntl* 133.

167 Hodges *et al Commercial Arbitration in Africa: Present and Future* 10.

line with best international practice to attract parties to select that seat. Most African countries have acceded (fully or partially) to modern arbitration instruments but have yet to ratify them or have only recently done so. A case in point is South Africa's *Recognition and Enforcement of Foreign Arbitral Awards Act 40* of 1977,[168] which was promulgated to give effect to the New York Convention.[169] This law, however, did not adopt the provisions of the Convention in its entirety when it was promulgated. It for instance only talked about the recognition and enforcement of foreign arbitral awards and did not mention the enforcement of arbitration agreements.[170] Enforcement of arbitration agreements is essential because it signifies acceptance of the choice seat and scope of the agreement.[171] A law that does not clarify the effects of an arbitration agreement is not a very efficient one.

Again, corruption in Africa has done great disfavour to the development of arbitration in Africa. In September 2015 for instance, over 30 judges were exposed by a journalist for their corrupt practices in Ghana.[172] According to the 2019 Corruption Perception Index, Sub-Sahara Africa was the lowest-scoring region on the index.[173] Here, a perception is created that the legal systems in Africa have failed and cannot be trusted. This might not be so in reality. Nevertheless, more needs to be done to dispel such false perceptions and encourage arbitration seated in Africa. Traditional arbitration centres such as the LCIA and the ICC International Court of Arbitration have over the years acquired the legal and human expertise that parties trust for the resolution of their disputes. However, addressing some of the underlying challenges related to arbitration seated in Africa will ensure its development into a vibrant industry. In all, no matter how well established or how well-administered arbitration is in Africa, its quality would only gain reputation through long-term utilisation.

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168 See South African Government 2023 https://www.gov.za/documents/recognition-and-enforcement-foreign-arbitral-awards-act-25-mar-2015-1205.

169 Ripley-Evans "South Africa" 475.

170 Thankfully this omission has been corrected under the International Arbitration Act of 2017. Same is yet to be done for the Arbitration Act 42 of 1965 that continues to govern domestic arbitrations only. Wethmar-Lemmer and Schoeman 2019 *TSAR* 127-128; Ripley-Evans "South Africa" 477.

171 Caivano "International Commercial Arbitration: 5.2 The Arbitration Agreement" 3.

172 Ostrove, Sanderson and Veronelli *Developments in African Arbitration* 26.

173 Transparency International *Corruption Perceptions Index 2019* 20.

2.3. Comments

From the above, it can be concluded that, generally the true origin of arbitration is not clear. However, there is evidence that it has been practised for a long time in various cultures. Varying accounts about its origin may exist globally but the central theme of the practice being preferred for dispute resolution is shared. From an African point of view, the history of arbitration is a story of colonisation and assimilation of laws. A discussion about the development of laws on international commercial arbitration from an African perspective would be incomplete without acknowledging the influence of colonial rule. Current trends reveal that the legal framework for arbitration in Africa is steadily developing to meet international standards. For the purpose of this thesis, it is worth admitting that a unique arbitration system peculiar to Africa is emerging. This is a system marked by Africa's cultural diversity and history.

Section II: Applicable Laws, Foundational Principles and Theories in Arbitration

2.4. Introduction

Arbitration has come a long way from its obscured beginnings, developing into a practice based on a myriad of laws and principles that regulate it. This section presents a short discussion on the meaning and scope of the various applicable laws[174] in any arbitration. Having clarified what these laws entail, a further discussion and analysis of how they manifest themselves in African arbitration laws shall be done. Finally, a brief analysis of the principle of party autonomy, which is more or less the foundation for the application of these laws, shall be done.

2.4.1. Which laws apply in international commercial arbitration?

Several sets of rules are applicable in international arbitration and include the procedural law applicable to the arbitration proceedings, the law applicable to the merits of the dispute, the law applicable to the arbitration agreement and the law(s) of the place(s) of the enforcement of an arbitral award (issues involving this law usually becomes relevant after an award is

[174] The phrase "applicable law" as used here and subsequently refers to all laws applicable to international commercial arbitration, not merely the substantive law.

issued).[175] It is possible in international arbitration for each of these laws to be from different countries. Understandably, this is not always an easy or straightforward issue. For instance, difficulties may arise where parties have failed to select the applicable law and the arbitral tribunal has to select one. The process for determining the applicable law in such an instance might require time, expense and skills which may perhaps not be present. Thus, where different systems govern the different aspects of the arbitration, clearly determining which law governs which issue is imperative. Generally, choice of law issues in international arbitration can be complex making it critical to know and understand the laws that can potentially be applied in the various aspects of arbitration.

a. The procedural law applicable to the arbitration proceedings

The terms *lex arbitri*, arbitration procedural law and arbitration rules all refer to provisions that regulate, among other matters, the procedure of international arbitration.[176] There are intrinsic differences between these terms although incorrectly used interchangeably. Distinguishing between them although not easy is necessary.

The *lex arbitri* is a Latin phrase that means the law of arbitration.[177] This law is not directly selected by the parties in arbitration. That is to say when parties choose country X as the seat of arbitration, they inadvertently (without need for express intention) select the aspects of country X's laws to become the *lex arbitri*. The *lex arbitri* constitutes the legal framework for international arbitration. Greenberg, Kee, and Weeramantry rightly described the legal framework of a chosen *lex arbitri* as:

> The relevant law itself might be found in an independent statute on international arbitration or it might be a chapter in another law, such as a civil procedure code or a law also governing domestic arbitration. However, the lex arbitri of a given jurisdiction can also include other statutes and codes (even those not specifically dealing with arbitration), and case law which relates to the basic legal framework of international arbitrations seated there.[178]

175 Born *International Arbitration: Law and Practice* 68.
176 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 58.
177 Henderson 2014 *SAcLJ* 887.
178 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 58.

From the above, it can be deduced that the totality of a country's national law on arbitration is considered the *lex arbitri.*[179] The content of laws governing arbitration varies from country to country.[180] The *lex arbitri* serves a default function by providing a set of procedures for the conduct of arbitration within a territory. The law of arbitration also regulates external relationships such as those between arbitration, courts and public policy. Thus, the *lex abitri* creates a legal framework that not only directs arbitration, but also supervises, and supports its conduct.

Further, the procedural law or the law applicable to arbitration proceedings regulates procedure in arbitration matters (excluding substantive matters). Juxtaposed to the *lex arbitri*, the procedural law has a slight difference. According to Redfern and Hunter, the *lex arbitri* is the general provision governing the arbitration and the procedural law details what will be adopted or adapted for the fair conduct of the proceeding.[181] For instance, the *lex arbitri* for country X may dictate that parties to the arbitration are to be treated fairly. It would be the procedural law that indicates specific conduct such as when to submit prehearing briefs or exchange witness statements.

Finally, procedural rules or arbitration rules are rules selected by parties to regulate the mechanism and process of arbitration.[182] Typically, these comprise rules from an arbitration institution, ad hoc arbitration rules such as the UNCITRAL Arbitration Rules, and rules agreed upon by parties. The express choice of an arbitration rule (institutional or otherwise) by parties demonstrates an intention for the selection to override default provisions made by the law governing arbitration procedure (unless it is mandatory). Where parties have not agreed on an arbitration rule, procedural rules (or the *lex arbitri)* provide the default rules that support the arbitration process.

b. The law applicable to the merits of the dispute

To use the words of Redfern and Hunter:

> The substantive law, the applicable law or the governing law all refer to the

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179 This possibly includes applicable arbitration laws of arbitration institutions (which is of course subject to the concerned country's law on arbitration).

180 It is worth noting that the *lex arbitri* is to arbitration as the *lex fori* is to court litigation. The *lex fori* is simply the law of the country in which an action is brought.

181 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 171.

182 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 59.

> particular system of law that governs the interpretation and validity of the contract, the rights and obligations of the parties, the mode of performance, and the consequences of breaches of the contract.[183]

Ordinarily, the underlying dispute in any arbitration is resolved by the substantive law of a particular legal system.[184] The applicable law of the contract out of which a dispute arises usually applies to substantive issues of the arbitration.[185] Based on the principle of party autonomy parties are free to agree upon the law that will assist to determine a dispute and the arbitrators typically give effect to the parties' agreement subject to mandatory national laws or public policy.

For international commercial arbitration, the arbitral tribunal's work becomes complicated when parties fail to choose the applicable law. Institutional or national rules usually specify the principles for selecting the applicable law. For example, in determining the applicable law to substantive issues, the rule may indicate that a tribunal directly applies a set of rules (*voie directe*)[186] or determine the conflict of laws rules to apply first, then determine the applicable law with this chosen rule (*voie indirecte*).[187] In some instances, a specific choice of law rule is designated by the seat of arbitration to determine the applicable law.[188]

Numerous laws are considered for the determination of the applicable law — national laws, institutional rules, conventions, treaties, trade usages and transnational laws. Whichever law is used will determine the method for selecting the applicable law. Case in point, where institutional rules call for the use of the direct method (*voie directe*) the tribunal may exercise its discretion directly to determine the applicable law for substantive issues. On the other hand, the indirect method limits the arbitral tribunal to choose the

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183 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 185.

184 Born *International Arbitration: Law and Practice* 69.

185 Doug 2014 *SAcLJ* 912.

186 Art 35(1) of the UNCITRAL Arbitration Rules and art 21 of the ICC Arbitration Rules adopt the direct method for determining the applicable law.

187 Essentially, art 28(2) of the UNCITRAL Model Law makes use of the indirect method for determining the law applicable. Also, art VII (1) of the European Convention of 1961 also adopts this same approach.

188 This is the position under art 187 of the Swiss Private International Law Act of 1987 and art 39 of Egyptian Law No. 27 of 1994, where in the absence of choice, the arbitral tribunal shall decide the case according to rules of law with which the case has the closest connection.

appropriate conflict of laws rules, which will assist to determine the applicable law to substantive issues.[189]

Various conflict of laws rules can be applied to determine the law applicable to substantive issues. For instance, the conflict of laws rule may require the applicable law to be the law closely connected either to the arbitrator or the parties or the dispute, the law of the seat of arbitration or the law of the place of characteristic performance. Several questions can be asked here; what conflict of laws rules are applied in African jurisdictions and arbitration centres? Is the distinction between approaches such as the *voie directe* and *voie indirecte* necessary in Africa's situation? What other *sui generis* conflict of laws approaches exist in Africa? Seeking out the answers to these questions and more is necessary for understanding the choice of law approaches that exist in Africa. It is acknowledged that there are divergent legal systems in Africa that influence the applicable law to international commercial law issues. This thesis is ultimately a comparative study to gain insight into the current processes used to determine the law applicable to substantive issues in international commercial arbitration in Africa.

c. The law applicable to the arbitration agreement

The agreement to arbitrate is the underlying basis of voluntary international arbitration.[190] This agreement to arbitrate takes the form of a clause drafted within the confines of a contract.[191] The agreement to arbitrate is a contract in its own right, separate from the substantive contract it is based on. The parties' presumed intention to arbitrate persists even though the substantive contract might have ended in one way or the other. This is based on the doctrine of separability.[192] In international arbitration, parties may generally

189 Doug 2014 *SAcLJ* 918.

190 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 71.

191 Two basic types of arbitration agreement exist – the arbitration clause and the submission agreement. The arbitration clause addresses issues that may arise in the future, whereas a submission agreement address issues from existing disputes (it looks to the past). Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 147.

192 According to the separability doctrine, an arbitration clause in a contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of that contract. Graves and Davydan "Competence-Competence and Separability-American Style" 157. The doctrine is depicted in, art 23(1) of the UNCITRAL Arbitration Rules (1976), which provides that an arbitration clause that forms part of an underlying contract shall be treated as independent of

choose the law applicable to their agreement to arbitrate. Where they fail to expressly or tacitly choose the law to govern their arbitration agreement, the law of the seat of the arbitration and the law that governs the contract as a whole is usually used.[193] It is reasonable to assume that an express choice of law to govern a whole contract can also govern the arbitration clause. Lew has posited that:

> There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause.[194]

The arbitration agreement forms part of the whole contract and as such can be governed by the same law. Also, based on the principle of party autonomy and separability, the arbitration agreement can be governed by a different law from that which governs the whole contract.

The law of the seat of arbitration is used to govern the arbitration agreement in some jurisdictions and under some arbitration rules when parties fail to select one. Article 16.4 of the LCIA Arbitration Rules of 2020 for instance provides *inter alia* that, the law applicable to the arbitration agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitration seat.[195] This is subject to article 16.5 which also provides that, "Notwithstanding article 16.4, the LCIA Arbitration Rules shall be interpreted in accordance with the laws of England."[196] These provisions depict the LCIA's adoption of the seat of arbitration approach. English courts also use the seat of arbitration approach.[197] This position was established in the case of *Sulamérica Cia Nacional de Seguros SA and ors v Enesa*

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the other terms of the contract. The UNCITRAL Model Law also reflects the principle of separability in Art 16(1). Art 23(2) of the LCIA Arbitration Rules, sec 7 of the English Arbitration Act of 1996 and art 178(3) of the Swiss Federal Statute on Private International Law all embody the principle of separability.

193 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 158.

194 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 158.

195 See LCIA 2023 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

196 See LCIA 2023 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

197 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 159.

Engenharia SA and ors.[198] At the Court of Appeal level of this case, a three-stage inquiry was established as the common law position. The inquiry in sum is to first consider the express choice of the parties, failing which there will be an attempt to deduce the implied choice of the parties.

Finally, in the absence of an implied choice, the court is to consider the law with the 'closest and most real connection' with the arbitration agreement. In this case, the law with the closest and most real connection to the arbitration agreement was the law of the place of arbitration — which in this instance was English law. Just like other applicable instruments in any international commercial arbitration, it would be prudent for parties to always expressly stipulate their preferred laws to avoid the waste of time and resources to determine one.

2.4.2. Foundational theories and the applicable laws of arbitration

As established above, the procedural law, the law applicable to the merits of the dispute and the law applicable to the arbitration agreement have to be established in any arbitration. Arbitration creates a legal framework within which these laws operate and it varies from jurisdiction to jurisdiction. This legal framework is respected and obeyed by the courts of sovereign countries and international entities. Various theories have been proposed to justify or explain the reasons why key players adhere to the legal framework created in arbitration. These theories and their justifications manifest themselves differently in every jurisdiction. Scholars do not have a single viewpoint regarding the different interpretations given by national courts on various aspects of arbitration — more so for its choice of law aspects.[199] Generally speaking, various scholarly writings about the juridical nature of arbitration have been categorised into four different theories: the jurisdictional theory, the contractual theory, the hybrid theory (or the mixed theory) and the autonomous theory.[200] Subsequently, this section briefly illustrates the content of these theories to see how they can enhance arguments in this thesis. Alongside this, how these theories manifest in the choice of law issues from an African point of view shall be demonstrated.

198 Sulamérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors (2012) EWCA Civ 638.
199 Kidane *The Culture of International Arbitration* 63.
200 Yu 2008 *J Contemp Asia* 257.

i. The jurisdictional theory

Proponents of this theory believe that countries (especially those of the place of arbitration) play a vital supervisory role in the arbitration process.[201] Even though they accept that arbitration stems from the parties' agreement to arbitrate, the validity of the agreement and arbitration procedures must all conform to the laws of the seat of arbitration. Theorists also provide the same reason why arbitral awards are to be recognised and enforced by the laws of the country where it is sought. The proponents of the jurisdictional theory believe that similar to judges, the authority of the arbitrator stems from the country and as such they have to apply the laws of the specific country when settling disputes.[202] The theory promotes the concept of national court supervision of the arbitration proceedings. Proponents of this theory believe that arbitration is subject to the law of where it takes place and arbitrators cannot apply rules that contradict the mandatory rules and public policy of the place of arbitration.[203]

Emmanuel Gaillard espoused a theory called *International Arbitration Relegated to a Component of a Single National Legal Order* under which he makes some suggestions in line with the jurisdictional theory.[204] He suggests that the authority of arbitrators stems from national laws of the seat of arbitration. This connects an arbitral award exclusively to the law of the country in which arbitration takes place. In this theory, he argues that a country may develop idiosyncratic theories to favour its nationals, to the detriment of foreign parties. According to Gaillard, foreign parties are likely to tolerate such unfair rules to avoid scandal or chaos in the arbitration process.[205] He suggests that order is put before justice. This is with the sense that, order guarantees the success of arbitration through the support

201 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 67.

202 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 68.

203 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 68.

204 Emmanuel Gaillard, in his work *Legal Theory of International Arbitration*, suggests three legal theories of arbitration before he endorses the last one. The three theories he espoused are International Arbitration Relegated to a Component of a Single National Legal Order, International Arbitration Anchored in a Plurality of National Legal Orders and International Arbitration as an Autonomous Legal Order: The Arbitral Legal Order. See generally Gaillard *Legal Theory of International Arbitration*.

205 Gaillard *Legal Theory of International Arbitration* 24.

of national laws and territorial interests precede justice to any foreign party. Similarly, Jan Paulson also theorises that any arbitration is necessarily national as it lives or dies based on the law of the place of arbitration.[206] He avers that arbitration is a great paradox because it seeks the cooperation of the very public authorities from which it wants to free itself.[207] This theory is based on a territorial principle that leads to a close link between the place of arbitration and the applicable procedural law.

Scholars usually have either a liberal or strict attitude to the adherence to the jurisdictional theory. For liberal scholars, although arbitration should be connected to the law place of arbitration, parties could give arbitrators the power to choose non-national laws or a law *ex aequo et bono* as long as the *lex loci arbitri* allows it.[208] For strict scholars such as Francis Mann, arbitration should be governed by the municipal laws of the place where it is held.[209] He further dismissed the notion that international commercial arbitration could be severed from the *lex fori*.[210] He believed that arbitration could not be conducted in a legal vacuum. It must always inexorably be connected to a country.

Although parties may agree to have their arbitration conducted by any law or at any place, their authority to do so must necessarily be connected to a particular country. As evident from a former position adopted by Belgium to exclude its court's authority to entertain an application for the annulment of an award with at least one Belgian party, it proved to be problematic when parties required judicial assistance.[211] Here, the attempt to remove judicial review proved to be futile as international businesses preferred to conduct arbitration in countries where court supervision of the process was possible.

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206 Jan Paulson referred to this as the territorial thesis in his work, *The Idea of Arbitration*. In this book he considers legal foundations of arbitration. Initially, he rejects the territorial thesis as being outdated. He subsequently proposed three legal theories before endorsing a combination of two of these theories. He suggested considering legal process conducted by non-state actors as a matter that reflects social reality whether or not touched by a state. Hence arbitration can operate under arrangements that do not depend on national law or judge at all. See generally Paulsson *The Idea of Arbitration*.

207 Paulsson *The Idea of Arbitration* 30.

208 Yu 2008 *J Contemp Asia* 258.

209 Goode 2001 *ArbIntl* 29. Mann's 1967 seminal piece *'Lex Facit Arbitrum',* which was publish in 'International Arbitration *Liber Amicorum for Martin Domke*' discusses the connection of arbitration and the state in detail.

210 Goode 2001 *ArbIntl* 29.

211 Goode 2001 *ArbIntl* 30.

On the subject of the choice of the applicable law, unless parties expressly choose the national laws of other countries, judges should not go beyond the confines of their national laws when deciding on the merits of a dispute. Based on this theory, in the absence of an express choice by the parties, the judges may only apply the choice of law rules of their own country.

The theory provides a strong justification for national courts exercising supervisory powers over arbitration. In African arbitration laws, the supervisory role of the court is acknowledged at various stages of the arbitration process. For instance, article 9 of the Egyptian Arbitration Law[212] provides that:

> (1) Competence to review the arbitral matters referred to by this Law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate court in Egypt.
> (2) The court having competence in accordance with the preceding paragraph shall continue to exercise exclusive jurisdiction until completion of all arbitration procedures.

Under this law, the court has original jurisdiction to review matters such as the appointment of arbitrators,[213] removal of arbitrators,[214] and to order interim or conservatory measures, whether before the commencement or during arbitration proceedings.[215] Where the arbitral tribunal alone cannot produce the best outcome in arbitration proceedings, the court complements its efforts.

Concerning recognition and enforcement, most modern African arbitration laws are based on the New York Convention. This law provides for the supervisory power of national courts in recognition or enforcement matters. For example, article 39 (1) (2) (b) of the *Mauritian International Arbitration Act*[216] similar to article V (2) of the New York Convention provides that:

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212 Egyptian Law Concerning Arbitration in Civil and Commercial Matters No. 27 of 1994. See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.
213 Art 17 (a) Egyptian Arbitration Law of 1994.
214 Art 20 Egyptian Arbitration Law of 1994.
215 Art 14 Egyptian Arbitration Law of 1994.
216 Mauritian International Arbitration Act of 2008.

> (1) Any recourse against an arbitral award under this Act may be made only by an application to the Supreme Court for setting aside in accordance with this section.
> (2) (b) the Court finds that – (i) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius law; (ii) the award is in conflict with the public policy of Mauritius.

From the above, national courts at the recognition or enforcement stage have the opportunity to ensure legitimate interest in the arbitration process. Countries that are signatories of the Convention have the power to refuse recognition or enforcement in favour of their public policies or mandatory laws. In all, this theory emphasises the need for African countries to have a robust judicial system that can support international arbitration proceedings.

ii. The contractual theory

Contrary to the jurisdictional theory the contractual theory rejects the significance of the *lex fori.*[217] The arbitration agreement takes centre stage in this theory.[218] This agreement gives arbitration its substance and contractual character. It determines the validity of an arbitration process independent of the *lex loci arbitri*.[219] The contractual theorists believe that parties to arbitration should be free to choose the law that will govern the procedural and substantive matters of the proceedings without national interference. They believe that the relationship of parties in arbitration is based on the concept of *pacta sunt servanda* and that they should perform their obligations without national pressure.[220] Indeed the arbitration proceedings and the arbitration agreement can be influenced by relevant laws in the place of arbitration, but proponents of the contractual theory suggest that arbitration is primarily based on the parties' agreement to arbitrate. Under this theory, the country's influence is not discarded. If a party reneges on its obligation under the arbitration, the country could be called upon to intervene.

The contractual theory focuses on party autonomy and the choices parties make when contracting. When selecting the applicable law in arbitration

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217 Yu 2008 *J Contemp Asia* 265.
218 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 62.
219 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 62.
220 Yu 2008 *J Contemp Asia* 266.

under the contractual theory, parties have the unlimited right to choose both the main contract's procedural law and the applicable law governing the main contract.[221] Arbitrators are obliged to follow the choices made by parties under their agreement to arbitrate. They are the representatives of the parties and as such must ensure that the arbitration award conforms to the main contract. Things become unclear when parties have not expressly chosen the application of certain rules. As far as the issue of the choice of the procedural law is concerned the *lex fori* relating to arbitration proceedings usually is applied in the absence of an express choice of law by the parties. With a choice of the applicable law in arbitration, the arbitrator looks to the contract or the arbitration agreement to find the applicable substantive law in line with the parties' expressed or implied wishes. In the absence of an express choice by the parties, choice of law rules of the *lex fori* may be used to determine the applicable law.[222]

As it is well known, several modern arbitration laws in Africa have adopted or used the UNCITRAL Model Law and/or the UNCITRAL Arbitration Rules. The principle of party autonomy underlies both of these instruments. Parties are given autonomy to choose both the procedural law of the arbitration and the applicable law governing the arbitration.

As to the choice of applicable law, the UNCITRAL Model Law of 1985 provides in article 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.[223]

The UNCITRAL Arbitration Rules of 2010 also provides in article 35 (1) that:

> (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

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221 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 62.

222 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 62.

223 See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

appropriate.[224]

Parties have similar autonomy to determine the procedural law and the applicable law under the arbitration laws in African countries such as Mauritius,[225] Ghana[226] and Nigeria.[227] For instance, parties are permitted to choose the procedural law under article 20(1) of the Kenyan Arbitration Act No. 4 of 1995. It provides *inter alia* that:

> (1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.[228]

Article 5 of the Egypt Arbitration Law No. 27 of 1994 also provides that:

> In the cases where this Law permits the two parties to the arbitration to select the procedures which must be followed in a given matter, this also includes their right to allow third parties to make such selection. In this respect, any arbitration organisation or centre in the Arab Republic of Egypt or abroad shall be deemed a third party.[229]

This provision establishes a regime where not only the agreed choices of the parties are recognised, but also those done on their behalf by third parties. Based on the contractual nature of arbitration parties can choose any law to apply to their arbitration. However, the selected law can never be truly independent of the *lex loci arbitri*. It is relied upon to resolve problems that arise when parties fail to express the necessary choices when contracting.

iii. The hybrid theory (or the mixed theory)

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224 See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

225 Art 32(1) of the Mauritian International Arbitration Act of 2008 for instance grants parties the autonomy to choose the applicable law of the arbitration. See Permanent Court of Arbitration 2023 https://pca-cpa.org/en/services/appointing-authority/mauritian-international-arbitration-act/.

226 Art 48(1) of the Alternative Dispute Resolution Act of 2010 also grants parties the independence to choose the applicable law of the arbitration.

227 Art 47 of the Nigerian Arbitration and Conciliation Act of 2004 also grants parties the freedom to choose the applicable law of the arbitration.

228 Kenyan Arbitration Act No. 4 of 1995. See National Council for Law Reporting 2023 http://kenyalaw.org.

229 See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.

Proponents of this theory suggest that arbitration has a dual character in that arbitration is a balance between the jurisdictional and contractual theories.[230] They believe that both theories fail to provide a satisfactory explanation for the modern framework of arbitration when they stand alone. Proponents of this theory are convinced that international arbitration relies on the elements of the two theories functioning in harmony. Commentators such as Sauser-Hall maintain that arbitration derives its contractual origins from the private agreement between parties which also provides the rules to govern the arbitration.[231] The link between the arbitration agreement and the jurisdiction creates a strong connection between the arbitration and the place where it is seated. On the one hand, the parties' freedom to contract empowers them to choose governing laws and arbitrators. On the other hand, based on the jurisdictional theory issues such as the validity of arbitration agreements and issues regarding arbitration proceedings are to adhere to the dictates of mandatory rules and public policy of the *lex fori*. In instances where no express choice of law has been made, arbitrators derive their authority to determine the applicable law from national laws or from the rules of the arbitration institution involved.[232] Furthermore, the scrutiny of arbitral awards for recognition and enforcement is done within the confines of the mandatory rules and public policy of the country in which it is sought. As seen above, modern African laws (especially those based on either the UNCITRAL Arbitration Rules or the UNCITRAL Model Law) have provisions that reflect both the contractual and the jurisdictional theories. The main difference in their application may be attributed to the varying public policy and mandatory rules of each country.

iv. The autonomous theory

This theory depicts arbitration as an autonomous system belonging to an emancipated regime. This school of thought advocates for a holistic view of

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230 Jurists such as Fernand Surville and Sauer-Hall advocate for a hybrid theory to explain the framework of international commercial arbitration. Surville and Arthuys *Cours Elémentaire de Droit International Privé* 634-635; Samuel and Currat *Jurisdictional Problems in International Commercial Arbitration: a Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* 60, Yu 2008 *J Contemp Asia* 274.

231 Sauser-Hall 1952 *AnnIDI* 469; Sauser-Hall 1957 *AnnIDI* 394; Yu 2008 *J Contemp Asia* 274.

232 Doug 2014 *SAcLJ* 911.

arbitration instead of isolating its character to jurisdiction, contract or both.[233] Here, arbitration is to be examined based on its use and purpose with no attachments to jurisdiction or the arbitration contract. Proponents of this theory advocate for delocalised arbitration.[234] From the issues regarding the validity of arbitration agreements, and choice of the applicable law to issues regarding recognition or enforcement, proponents of the autonomous theory argue that the national laws of the place of arbitration should not have a supervisory role.[235] As long as the parties agreed to arbitrate, arbitral awards and arbitration agreements are to be enforceable in any country.

Proponents of this theory such as Rubellin-Devichi suggest placing arbitration at a supra-national level where it is autonomous.[236] She believes this will afford international commercial arbitration the needed space for expansion and growth. Complete party autonomy for parties to select the law governing procedural matters, time and place of arbitration as well as the law to govern the substantive matters ensures this growth.

Gaillard also under his theory of *International Arbitration as an Autonomous Legal Order: the Arbitral Legal Order* opines that arbitration operates in a transnational legal order which is largely viewed from the arbitrators' perspective.[237] He argues that where arbitrators are confronted with a plurality of conflicting views from several legal orders, they are to resort to identifying and applying rules that are generally accepted at a given time in the international community passing over a country's isolated position.[238] He suggests an international arbitral legal order that is independent of a jurisdiction but regulated by arbitrators. Arguments made under this school of thought ultimately favour a modern international view of the application of different non-national rules and principles to arbitration (usually those with no connection to the seat of arbitration and its laws). As far as the choice of

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233 Sauser-Hall coined and discussed the hybrid theory in 1952. For further information read Sauser-Hall 1952 *AnnIDI 469*; Sauser-Hall 1957 *AnnIDI* 394; Yu 2008 *J Contemp Asia* 274.

234 Moses *The Principles and Practice of International Commercial Arbitration* 56.

235 Moses *The Principles and Practice of International Commercial Arbitration* 56.

236 Rubellin-Devichi *L'arbitrage; Nature Juridique, Droit Interne et Droit International Privé* 365; Yu 2008 *J Contemp Asia* 274.

237 Jan Paulson also follows similar arguments as Gaillard when he described arbitration as the product of *an autonomous legal order accepted as such by arbitrators and judges.* Gaillard *Legal Theory of International Arbitration* 35; Paulsson *The Idea of Arbitration* 30.

238 Gaillard *Legal Theory of International Arbitration* 36.

law applicable to substantive issues of the arbitration is concerned, parties may by agreement submit to any law – be it the *lex mercatoria,* a national law, or amiable compositeur. By choosing these laws parties can opt out of the technicalities presented by national legal systems. Where parties fail to make such a selection, by the dictates of this theory, arbitrators may apply or choose any law which appears appropriate by considering several legal systems and not only the law of the place of arbitration. Commentators have acknowledged that the downside to having an autonomous legal system is that there may be substantial uncertainty regarding what these laws constitute.[239] To avoid such uncertainties, the theory advocates for the use of uniform law instruments such as the *Hague Principles on Choice of Law in International Commercial Contracts* of 2015 (Hague Principles)[240] and the *UNIDROIT Principles of International Commercial Contracts* of 2016 (UNIDROIT Principles).[241]

Generally, African countries do not fully embrace this extremely liberal, delocalised, or autonomous legal order.[242] However, by their adoption of modern arbitration regimes such as the UNCITRAL Model Law, there appears to be some hope for the recognition of non-national laws and ultimately stateless awards.[243] The International Arbitration Act of South Africa for instance incorporates the UNCITRAL Model Law (with minor modifications), thereby aligning itself with the Model Law's stance on various matters. Article 2A of the UNCITRAL Model Law[244] which addresses the international origin and general principles provides that:

> (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
> (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles

239 König 2015 *PYIL* 281.
240 Hague Principles on Choice of Law in International Commercial Contracts (2015). See HCCH 2023 https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.
241 UNIDROIT Principles of International Commercial Contracts (2016) See UNIDROIT 2021 https://www.unidroit.org/instruments/commercial-contracts/.
242 Sempasa 1992 *CUP* 407.
243 Sempasa 1992 *CUP* 403-407.
244 This was an amendment adopted by the United Nations Commission on International Trade Law. at its thirty-ninth session, in 2006. United Nations *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session.*

on which this Law is based.

From the above, when interpreting the provisions of the UNCITRAL Model Law, it should be noted that its principles align with its aim to liberalise international arbitration. This is done by ensuring party autonomy and limiting national interference in the arbitration process. One way of liberalizing international arbitration is by allowing the application of non-national law, customs and usages and the *lex mercatoria* to the arbitration contract. Hence, in South Africa, it is anticipated that practitioners will interpret contracts and disputes according to international trade practices in line with the design of the UNCITRAL Model Law. Due to the possibility of variations when adopting the UNCITRAL Model Law, this position cannot be generalised for other countries in Africa. More so, national courts in African countries that have incorporated the New York Convention can, based on articles V(1)(e) and (2)(b), elect to reject an arbitrator's choice of the applicable substantive law on public policy grounds.[245] Therefore, a paradox exists within the autonomists' views. Altogether, autonomists are convinced international commercial arbitration should be independent of the *lex fori*; however, such ideas can only truly be actualised when those same countries permit such liberal views.

2.4.3. Basic principles in arbitration

There are several principles or doctrines involved in the legal framework of arbitration. For instance, the UNCITRAL Model Law recognises the principle of party autonomy, the competence-competence doctrine,[246] the territoriality principle, the principle of separability and the principle of enforceability.[247] At least one of these principles is always present in arbitration laws. Although they make arbitration laws user-friendly and more flexible, each has its strengths and limits within the arbitration process. For the purposes of this thesis, the focus shall only be on the principle of party autonomy. This is

245 Born *International Arbitration: Law and Practice* 320.

246 The competence-competence principle or *kompetenz-kompetenz* principle is a procedural doctrine which grants arbitrators the power to make decisions on challenges to their jurisdiction made by any party to the arbitration. This could be a challenge of the tribunal jurisdiction to make pronouncements on issues such as the validity of arbitration agreement or the interpretation of the arbitration clause. Examples on this doctrine can be found in Art 16(1) of the UNCITRAL Model Law and art 23(1) of the UNCITRAL Arbitration Rules. See generally Graves and Davydan "Competence-Competence and Separability-American Style" 157-178.

247 Jain 2015 *SSRN* 3.

because its permitted scope within a jurisdiction dictates the limits placed on the freedom to select the applicable law. It is essential to understand what the principle is as well as the possible limits to it in respect of the freedom to choose the applicable law.

a. Party autonomy

Contracting parties are generally free to enter into agreements that give rise to rights and obligations in domestic or international transactions. As long as parties can contract, they can agree on any form or terms within limits such as good faith, fair dealing, and mandatory rules.[248] According to the principle of party autonomy private parties who are legally capable, of their own free will can enter into private relationships/agreements without interference from government or private entities.[249] Based on this principle, parties are free to create rights and obligations as well as to determine the process for dispute resolution. By extension, they are free to choose the applicable laws that will govern their arbitration. Except for supervision and enforcement of the arbitral award, parties have full autonomy over the arbitration process. It is worth noting that, party autonomy when used in international commercial arbitration usually refers to the parties' freedom to choose the applicable substantive law for arbitration.[250] Generally, the parties may select from a plethora of laws including national laws on arbitration, institutional arbitration laws, non-national rules or the *lex mercatoria*. Almost all national legal systems and transnational international commercial law regimes accept the principle of party autonomy. For instance, article 47(1) and article 47(5) of Nigeria's Arbitration and Conciliation Act of 2004 [251] demonstrate the principle of party autonomy and they provide that:

> (1) The arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to

248 For instance, 2059 of the French Civil Code stipulates that *"all persons may submit to arbitration those rights which they are free to dispose of."* Also, art 11 of the Egyptian Law No. 27 of 1994 stipulates that, '*Arbitral agreements may only be concluded by natural or juridical persons having capacity to dispose of their rights. Arbitration is not permitted in matters where compromise is not allowed.'* Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 249.

249 Fagbemi 2016 *JSDLP* 228.

250 Doug 2014 *SAcLJ* 911.

251 See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-nigeria/.

> the substance of the dispute.
> (5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction.'[252]

Similarly, some provisions found under the UNCITRAL Model Law also support the party autonomy principle. For instance, article 19(1) of the UNCITRAL Model Law provides that:

> Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[253]

Article 21 (1) of the ICC Arbitration Rules of 2021 also *inter alia* provides that:

> 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.[254]

The freedom to choose the applicable law is very essential as it ultimately binds the parties to their chosen law. Arbitrators are obliged to respect the choices that parties make. Where parties fail to select the applicable substantive law, their freedom to choose is extended to arbitrators who must endeavour to act in a fair and just manner.

b. Limits to party autonomy

Although party autonomy is accepted and recognised universally, its scope differs from jurisdiction to jurisdiction.[255] Many systems narrow/ limit their scope either by excluding certain contracts wholly or partly, excluding contractual issues such as capacity and consent, confining party autonomy to contractual matters rather than non-contractual matters, or limiting what laws parties may choose.[256] According to Redfern and Hunter, such

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252 See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-nigeria/.
253 UNCITRAL Model Law International Commercial Law (1958). See UNCITRAL 2020 https://uncitral.un.org/.
254 See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.
255 Symeonides 2019 *SSRN* 3.
256 Symeonides 2019 *SSRN* 3.

restriction on the parties' freedom to choose the applicable law ensures that the choice is *bona fide*, legal, and not contrary to public policy.[257]

Mandatory laws and public policy of countries usually dictate the extent of these limitations. Typically, no derogations are allowed from such laws or policies. According to Born, public policy and mandatory laws in most developing countries are similar but also different from jurisdiction to jurisdiction.[258] Countries may for instance have policies that particularly protect consumers within their jurisdiction. Where it is found that an award does not conform to public policy or a mandatory rule, an enforcing court could refuse enforcement.[259]

Provisions in international arbitration instruments such as the UNCITRAL Model Law and the New York Convention also place limits on party autonomy. The UNCITRAL Model Law in an actual sense does not grant total autonomy to parties. Some of its provisions appear mandatory to essentially protect the arbitration regime.[260] Although it does not refer to any of its provisions as 'mandatory', they are designed to safeguard any arbitration process by restraining the parties' freedom of choice. For instance, the provisions of the UNCITRAL Model Law that govern the essential validity of the arbitration agreement curtail the parties' freedom.[261] Without strict compliance with these provisions, an award could be denied recognition and enforcement.[262] Similarly, the grounds for recognition and enforcement of arbitral awards stipulated in article V of the New York Convention also restrict party autonomy. Strict adherence to such conditions is necessary to ensure the orderly conduct of arbitration and the recognition and enforcement of awards.

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257 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 189.

258 Born *International Arbitration: Law and Practice* 308.

259 More information on the implication of mandatory laws and public policy on choice of law in arbitration shall be given in Chapter 3.

260 For instance, according to the UNCITRAL Model Law (1985) an arbitration agreement must be in writing (art 7(2)), parties must be treated equally during arbitration proceedings (art 18) and parties shall be given notice of any hearing and be sent any materials supplied to the arbitral tribunal by the other party (art 24(2) (3)).

261 According to art 7(2) of the UNCITRAL Model Law (1985), arbitration agreement must necessarily be in writing.

262 For instance, according to the UNCITRAL Model Law (1985) parties must be treated equally during arbitration proceedings (art 18) and parties shall be given notice of any hearing and be sent any materials supplied to the arbitral tribunal by the other party (art 24(2) (3)).

Party autonomy is one of the major reasons why arbitration is preferred to litigation. Parties have freedom at every stage of the arbitration process. Nevertheless, it is worth acknowledging that this freedom is not without limits. The restrictions and limitations in place are necessary to assist the arbitration process by preventing arbitrariness. It would seem that such limitations on the freedom to choose the applicable law appear at the beginning and the end of arbitration. That is, when parties select the applicable law within mandatory laws or public policy and when the courts have to recognise and/or enforce an award with the parties' agreement in mind. Questions remain about the limits to the arbitrators' freedom when selecting the applicable law on behalf of parties when none is selected. Do they have to consider the underlying contract? Do they necessarily have to consider the law of the seat of arbitration? These and more will be explored in detail further in this work.

2.5. Comments

As demonstrated above, there are various principles, theories and applicable laws in any arbitration. Arguments made about these theories or principles are mainly academic; however, they assist in understanding the legal framework of arbitration. It would be difficult to ascribe only one particular theory or principle to arbitration instruments. Similar to other arbitration instruments, arbitration laws in Africa embody a number of these principles or theories. This section shatters any illusion that arbitration instruments in Africa are based on different theories/principles than arbitration laws found in the global community. The provisions of arbitration laws usually find their basis in these principles or theories regardless of the jurisdiction in which it is found. Different legal cultures may affect how they manifest but their very essence remains the same.

Section III: Arbitration Laws in Contemporary Africa

2.6. Introduction

Having considered the origins and development of arbitration, the applicable laws in arbitration as well as the underlying theories and principles of arbitration, it is only prudent at this juncture to highlight existing positive laws of arbitration in contemporary Africa. This will reveal the prevailing state and status of arbitration in Africa. For purposes of this thesis, the position in contemporary Africa shall be represented by Egypt, Ghana, South Africa

and Cote D'Ivoire. The laws of other relevant jurisdictions such as Nigeria and Mauritius shall be included in the discussion to further demonstrate the current state of arbitration in Africa.

Usually, in every jurisdiction, there is a general law that is part of the *lex fori* which addresses arbitration matters. This law is generally used for domestic or ad hoc arbitration that takes place in the said country. Arbitration institutions and centres which are present in a country also have their own sets of rules and procedures separate from national laws on arbitration to regulate their operations. These institutional rules are operating within the confines of mandatory rules and public policies of the *lex fori.* Subsequently, this section seeks to examine the positive laws of arbitration found in contemporary Africa as represented by the chosen jurisdictions for comparison, by highlighting notable provisions while making positive contributions in other respects.

2.6.1. Egypt: History and current laws on arbitration

Egypt is a country whose legal system is built on a combination of Islamic Shari'a Law and the Napoleonic Code.[263] Based on its use of established systems of codified laws, it is considered a civil law system that operates on French legal concepts. The Shari'a Law has over time been relegated to matters dealing with personal issues such as inheritance and marriage leaving the Civil Code as a principal source of civil law in Egypt.[264] The *Egyptian Civil Code No. 131* of 1948 is a comprehensive law that covers various issues including personal rights issues, tort and contract.[265] For issues of a commercial nature, the Code is supplemented by laws such as the *Commercial Code No. 17*[266] and the *Code of Civil and Commercial Procedures No. 13*.[267]

Arbitration specifically is regulated by Law No. 27 of 1994 promulgating the Law Concerning Arbitration in Civil and Commercial Matters (Egyptian Arbitration Law) which is modelled after the UNCITRAL Model Law though

263 Shehata *Arbitration in Egypt: A Practitioner's* Guide 1-2.

264 Although Egypt was colonised by the British, its common law had very little impact on its legal system. Shehata *Arbitration in Egypt: A Practitioner's Guide* 1-2.

265 This law greatly influences the civil and commercial law in MENA countries. Currently Saudi Arabia and Lebanon remain the only Middle East/North African (MENA) countries whose laws not significantly influenced by Egyptian law.

266 Egyptian Commercial Code No. 17 of 1999.

267 Egyptian Code of Civil and Commercial Procedures No. 13 of 1968.

with modifications.[268] This Egyptian Arbitration Law repealed articles 501-513 of Law No. 13 of 1968 which were provisions relating to arbitration.[269] This law has been in force in Egypt as its primary law on arbitration since it came into force on 22 May 1994 to the present.

2.6.1.1. Relevant provisions of the Egyptian Arbitration Law

The Egyptian Arbitration Law contains 58 articles grouped into 7 parts.[270] These parts have been categorised as follows: Part I (articles 1-9) covers the general provisions, Part II (articles 10-14) deals with the arbitration agreement, Part III (articles 15- 24) covers matters about the arbitration panel, Part IV (articles 25- 38) relates to the conduct of the arbitration proceedings, Part V (articles 38-51) addresses the arbitral award and the closing of the procedures, Part VI (articles 52- 54) covers nullity of the arbitral award and Part VII (articles 55- 58) addresses the recognition and enforcement of arbitral awards. The operation of this law is better appreciated when the instrument is read as a whole. An attempt to give an overview of the entire law would not do it justice. Hence, in the subsequent discussion, only provisions that might enhance the discussion in this thesis shall be considered.

2.6.1.2. Scope

The Egyptian Arbitration Law applies to both domestic and international arbitration including ad hoc arbitration.[271] According to article 1:

> Without prejudice to the provisions of international conventions in force in the Arab Republic of Egypt, the provisions of the present Law shall apply to all arbitration between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such arbitrations are conducted in Egypt or when the parties to an international commercial arbitration conducted abroad agree to subject it to the provisions of this Law.
> With regard to administrative contract disputes, the arbitration agreement shall have the approval of the concerned minister or the official assuming his

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268 The Egyptian Arbitration Law No. 27 of 1994 (Arbitration in Civil and Commercial Matters) incorporates 1997 amendments. Originally written in Arabic, the unofficial English translation of this law shall be used in this thesis.

269 Art 3 of the Preamble to the Egyptian Arbitration Law provides this amendment.

270 See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.

271 Asouzu 1996 *Afr JIntl & CompL* 140.

> powers with respect to public juridical persons. No delegation of powers shall be authorised, therefore.[272]

A few implications inexorably flow from the above article. First, the scope of application for Egypt's arbitration law includes instances where arbitration is conducted in Egypt or where parties in an international commercial arbitration agree to apply Egyptian Law to resolve their disputes.[273] This illustrates that the Egyptian Arbitration Law not only allows parties to agree to have their arbitration seat in Egypt but also permits them to apply the law extra-territorially.[274] The extraterritorial application of the Egyptian Arbitration Law is a modification made to the UNCITRAL Model Law on which it is based. The UNCITRAL Model Law only envisages a territorial use of enacted arbitration laws.[275] Except for issues such as those relating to the recognition and enforcement of arbitral awards[276] and those relating to interim measures and their compatibility with an agreement to arbitrate[277], the model law provides only for instances where the place of arbitration is in an enacting country. Second, although the Egyptian arbitration law is the general law on arbitration, its existence does not extinguish other international law obligations the country may have under the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (Washington Convention)[278] and the New York Convention.[279]

2.6.1.3. Definition for 'International' 'commercial' 'arbitration' under the arbitration law

Under Egyptian Arbitration Law, a dispute is considered commercial if the dispute arose over a legal relationship of an economic nature, whether contractual or non-contractual. Such economic relationships include

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272 See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.

273 The second part of art 1 (which is an amendment to the Act done in 1997) dictates that an agreement to arbitrate governmental contract disputes between government agencies and private persons will only be effective upon the approval of the concerned minister. This sought of contract does not fall in the purview of this thesis.

274 Asouzu 1996 *Afr JIntl & CompL* 141.

275 Art 1(2) of UNCITRAL Model Law (1985).

276 Art 9 of UNCITRAL Model Law (1985).

277 Arts 35 and 36 of UNCITRAL Model Law (1985).

278 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

279 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

commercial agencies, banking and insurance.[280] Comparing the text in the Egyptian Arbitration Law and the UNCITRAL Model Law reveals that whereas the definition of 'commercial' is a substantial provision in the former it is merely found in the footnote in the latter. Although the very essence of the two definitions is the same, the lists of what constitute an economic relationship or contractual relationship are not alike. Ultimately, these lists are merely illustrative and not exhaustive. They provide an idea of what could be considered 'commercial'.

'Flexible' is an appropriate word to describe the definition of what is considered international under Egyptian arbitration law. According to this law, international disputes include, *inter alia*, those disputes with subject matter relating to an arbitration agreement that is linked to more than one jurisdiction and the parties to the arbitration agree to resort to a permanent arbitration organisation or centre headquartered in Egypt or abroad.[281] The Egyptian Arbitration Law provides a flexible system where institutional arbitration, be it in a permanent arbitration organisation or an arbitration centre, is considered international whether arbitration is in or outside Egypt.[282] The wide and flexible nature of the definition of 'international' also extends to arbitration between two Egyptians (whether private or public persons) as long as the arbitration agreement is linked to more than one jurisdiction.[283]

Finally, the Egyptian Arbitration Law also provides a definition for 'arbitration'. The first thing to note is that the definition of arbitration in this law relies on the free will of the parties to agree in a contract to resolve their dispute through arbitration.[284] The law does not envisage statutory or compulsory arbitration. As long as parties have voluntarily agreed to arbitrate, the law allows them to resolve their dispute either by ad hoc or institutional arbitration.

2.6.1.4. Party autonomy under the arbitration law

A constant feature that runs through the Egyptian Arbitration Law is the freedom given to parties to agree to arbitrate and organise the entire

280 Art 2 of the Egyptian Arbitration Law of 1994.
281 Art 3 of the Egyptian Arbitration Law of 1994.
282 Art 3(2) of the Egyptian Arbitration Law of 1994.
283 Art 3(3) of the Egyptian Arbitration Law of 1994.
284 Art 4(1) of the Egyptian Arbitration Law of 1994.

arbitration process as they deem fit within the provisions of the arbitration law. The parties' agreement to arbitrate dictates all the essential laws and procedures needed to conduct the arbitration. In the absence of an agreement on such issues, the court/arbitral tribunal or another third party would have to fill those gaps.

The Egyptian Arbitration Law gives parties the freedom to decide on issues such as the procedures and applicable procedural laws to be used by the arbitral tribunal,[285] legal rules to be applied to the subject matter of the dispute (the applicable substantive law)[286], the language(s) of the arbitration,[287] and the place of arbitration.[288] The Egyptian Arbitration Law also gives parties the freedom to agree to allow third parties to select the procedures applicable in arbitration.[289] Such third parties may be any arbitration organisation or centre whether in Egypt or not.

2.6.1.5. The role of courts under the arbitration law

The court plays an essential role at the beginning, during and after arbitration proceedings. Its intervention in the arbitration process is not only necessary but strategic for parties, third parties and governments who need the process to be conducted smoothly. In some instances, certain court interventions cannot be avoided. Certain roles may be exclusively reserved for the courts. For instance, to protect the basic procedural rights of parties and the arbitration process itself, the courts' role cannot be usurped. Also, with the recognition and enforcement of arbitral awards, the court is indispensable.

The Egyptian Arbitration Law acknowledges the vital role of the court in the conduct of arbitration in or outside Egypt. The fundamental role of the court is illustrated under article 9 of this Law. It provides *inter alia* that the court has original jurisdiction in judicial review matters.[290] For international commercial arbitration (whether in Egypt or abroad), Egyptian arbitration law designates jurisdiction to the Cairo Court of Appeal unless the parties

285 Art 25 of the Egyptian Arbitration Law of 1994.
286 Art 39 of the Egyptian Arbitration Law of 1994.
287 Art 29(1) of the Egyptian Arbitration Law of 1994.
288 Art 28 of the Egyptian Arbitration Law of 1994.
289 Art 5 of the Egyptian Arbitration Law of 1994.
290 Art 9(1) of the Egyptian Arbitration Law of 1994.

agree on the competence of another court of appeal in Egypt.[291] Also, the law provides that the court with competence in a case would have exclusive jurisdiction till the conclusion of all arbitration processes.[292] This move ensures that foreign parties and arbitrators are certain as to which court would have jurisdiction even where none is selected. Other functions the law permits the court to have include inter alia, enforcing or refusing to enforce an arbitration agreement,[293] making an order terminating the mandate of an indolent arbitrator[294] and taking jurisdiction in an action for nullity of awards.[295]

2.6.1.6. Institutions or arbitration centres found in Egypt: The Cairo Regional Centre for International Commercial Arbitration (CRCICA)

Egypt is home to the oldest arbitration centre in Africa – the Cairo Regional Centre for International Commercial Arbitration (CRCICA or Cairo Centre). It was established in 1979 by the African Legal Consultative Organisation (AALCO) and the Egyptian government.[296] It initially ran for an experimental period of three years before it was finally given permanent status. In 1987, a Headquarters Agreement between AALCO and the Egyptian Government made the CRCICA a recognised international organisation endowed with branches, privileges and immunities.

The CRCICA is an independent non-profit organisation that provides specialised services for resolving investment and trade disputes.[297] The centre uses ADR methods such as mediation, conciliation and arbitration to resolve commercial disputes. It also provides advice and consultation services to parties for their investment and trade contracts. Through seminars and conferences, the centre offers training programs for arbitrators and other dispute resolution experts. In efforts to promote the resolution of disputes through peaceful non-binding or binding means, the Cairo Centre established several organisations and centres. Among these are included a Mediation and Alternative Dispute Resolution Centre as a

291 Art 9(2) of the Egyptian Arbitration Law of 1994.
292 Art 9(3) of the Egyptian Arbitration Law of 1994.
293 Art 10(2) and art 13 of the Egyptian Arbitration Law of 1994.
294 Art 20 of the Egyptian Arbitration Law of 1994.
295 Art 54(2) of the Egyptian Arbitration Law of 1994.
296 Talaat, Shahine and Essam "Egypt" 155.
297 Talaat, Shahine and Essam "Egypt" 156.

branch of the Cairo Centre to administer commercial arbitration, the Alexandria Centre for International Arbitration, the Centre's Maritime Arbitration Branch in Alexandria and the Institute of Arab and African Arbitrators in Egypt.[298] The CRCICA has its own set of arbitration rules separate from the Egyptian Arbitration Law. The CRCICA Rules have been amended and revised in 1998, 2000, 2002, 2007 and 2011.[299] The most current version of the rules is the CRCICA Rules of 2011, a modification of the 2010 revised version of the UNCITRAL Arbitration Rules. The CRCICA Rules is made up of 48 articles grouped into 5 sections.

2.6.2. Ghana: History and current laws on arbitration

Ghana was the first country in Sub-Saharan Africa to gain independence from the British.[300] After this, the country adopted the British common law legal system. As established earlier in this chapter, African countries had their methods for dispute resolution before colonialism and Ghana was no different. Chiefs and community leaders with their elders resolved all manner of disputes between their subjects. During colonial rule in Ghana (then Gold Coast) however, the British assimilated (where possible) the existing traditional legal system to their common law system.[301] Although a comprehensive formal system based on common law currently exists in Ghana, its links with tradition are undeniable. It is submitted that till today, formal laws involving issues such as marriage, inheritance and chieftaincy are greatly affected by traditional practices and norms. Concerning dispute resolution, Ghana in recent times has enacted an arbitration law that links the traditional and formal legal systems. The Alternative Dispute Resolution Act, Act 798 of 2010 (Ghana ADR Act)[302] instituted an alternative dispute resolution regime that merges the formal court structure with the traditional legal system. As a first of its kind in Africa, this Act has created a unique system that preserves the cultural practices of the people.[303] This can serve as a model for other countries in Africa. The Ghana ADR Act lays down rules

298 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 25.
299 See El Shalakany and Shalakany Law 2023 https://uk.practicallaw.thomsonreuters.com/.
300 Berry *Ghana: A Country Study* 29.
301 Kirgis 2014 *CJCR* 6.
302 This Act replaced the Arbitration Act of Ghana of 1961 which was enacted after Ghana became a republic. See Dennis Law 2017 https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324.
303 Onyema 2012 *ArbIntl* 101.

for mediation and arbitration as alternatives to both the courts and traditional dispute resolution practices.[304] The Ghana ADR Act is the primary source of law for arbitration seated in Ghana. Its design was heavily influenced by the UNCITRAL Model Law with modifications. Other arbitration institutions or centres that provide alternative dispute resolution mechanisms in Ghana also have their own rules.

2.6.2.1. Relevant provisions of the Ghana ADR Act

The Ghana ADR Act has 138 Sections divided into 5 Parts of unequal lengths.[305] Part I covers arbitration, Part II is on mediation, Part III covers customary arbitration, Part IV is on the Alternative Dispute Resolution Centre and Part V makes provision for financial, administrative and miscellaneous matters. Also, the Act contains five schedules with the first addressing Ghana's implementation of the New York Convention. An attempt to review the 138 sections of the Act in this thesis would not do it justice. Hence, particular attention shall be devoted to Part I and Part III of the Act which address arbitration and customary arbitration respectively.

2.6.2.2. Scope the Ghana ADR Act

Part I of the Act regulates all arbitration matters except those that relate to the national or public interest, the environment, enforcement and interpretation of the Constitution, or any other matter that by law cannot be settled by an alternative dispute resolution method.[306] All arbitration, domestic or international can be regulated under this Part of the Act as long as it does not fall within the exceptions provided. It however appears that most international commercial disputes are settled at traditional international arbitration centres such as the ICC International Court of Arbitration and LCIA.[307] The newness of the Act might be the reason for the low frequency of usage in resolving international matters. It has not gained the recognition and experience needed to compete with these traditional centres. Nevertheless, there could also be other reasons that will be discovered in the course of this thesis.

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304 Onyema 2012 *ArbIntl* 101.
305 See Dennis Law 2017 https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324.
306 Sec 1 of the Ghana ADR Act of 2010.
307 Ntrakwah and Asiama *Arbitration Guide IBA Arbitration Committee: Ghana* 1.

Further, Part III of the Act introduces a novel way of adding customary law into mainstream laws. It mainly applies to domestic arbitration and as such, just a highlight of some interesting provisions will be made.[308] First, Part III only applies when parties voluntarily submit to customary arbitration. Awards are binding whether or not the dispute is connected to a written agreement. The Act places little or no significance on writing as a requirement for arbitration under Part III.[309] Also, parties are not obliged to apply formal legal rules of procedure. They can opt for an informal dispute resolution process peculiar to the community of Ghana.[310] Parties are however obliged to adhere to the rules of natural justice and fairness.

2.6.2.3. Definition for 'international' 'commercial' 'arbitration' under the arbitration law

Unlike most modern arbitration laws, the Ghana ADR Act does not define what international commercial arbitration is. As discussed earlier, Part I applies to all kinds of arbitration except those exempted by law. The Act provides a very general scope of applicability. This approach can have both advantages and disadvantages. On the positive side, it allows parties to bring a wide range of types of disputes to be resolved by arbitration. Investors who are not conversant with the laws of Ghana need not worry that their type of agreement or dispute cannot be arbitrated in Ghana. At the other end of the spectrum, parties, arbitrators, and courts may often be confronted with disputes where a clear definition of what constitutes international commercial arbitration would be necessary. This is more so with statutes designed for not only domestic and international arbitration but also customary arbitration.

2.6.2.4. Party autonomy under the arbitration law

The parties' free will and autonomy are recognised under the Ghana ADR Act. Parties are allowed several choices including expressly agreeing on the appointment procedure for arbitrators,[311] the language,[312] place of

308 This is because domestic arbitration falls beyond the scope of this thesis.
309 Sec 90 of the Ghana ADR Act of 2010.
310 Sec 93 of the Ghana ADR Act of 2010.
311 Sec 14 and sec 92 of the Ghana ADR Act of 2010.
312 Sec 32 of the Ghana ADR Act of 2010.

arbitration[313] and the substantive law of the arbitration.[314] The Act allows parties to proceed ad hoc or under the rules of any arbitration institution of their choice or the ADR Centre and its rules.[315] The Act provides detailed guidelines for the arbitral tribunal and parties for the conduct of the arbitration.[316] Parties however have the freedom to opt-out of using the guidelines provided for the conduct of arbitration. They may choose the services of an appointing authority or agree not to use one.[317] Generally, the Ghana ADR Act endeavours to provide support to its users, but it always holds the parties' autonomy supreme.

2.6.2.5. The role of courts under the arbitration law

The Ghana ADR Act unlike the Egyptian Arbitration Law envisages statutory or compulsory arbitration.[318] The Act empowers the court to play an active role in arbitration. For instance, when a court with a matter pending before it is of the view that the action or a part of the action can be resolved through arbitration, that court may with the consent of the parties in writing, despite that there is no arbitration agreement in respect of the matter in dispute, refer the action or any part of the action to arbitration.[319] Although the court requires the written consent of the parties before suggesting arbitration, it may be argued that parties may indirectly be forced to opt for arbitration. They may find it difficult to refuse arbitration suggested by the court.

Concerning Part I, the High Court's jurisdiction can be invoked at various stages of the arbitration. At the beginning of the arbitration, the court plays a supporting role by taking and preserving evidence where there is urgency.[320] They also assist to take the evidence where the arbitrator or

313 Sec 11 of the Ghana ADR Act of 2010.
314 Sec 48 of the Ghana ADR Act of 2010.
315 The ADR Centre is an independent body corporate whose objective is to facilitate the practice of alternative dispute resolution. The centre has its own set of rules found in the second schedule of the Act.
316 Onyema 2012 *ArbIntl* 109.
317 Under sec 14(3) and sec 16 (3)(a) the services of the appointing authority can be used in the appointment of arbitrators. The traditional role of the appointing authority under this Act is similar to that which is found in arts 6 and 11(3) of the UNCITRAL Model Law and arts 6 and 8(2) of the UNCITRAL Arbitration Rules. The overall role of the appointing authorities in this Act is, however, wider, mimicking the function of a public entity. For further discussion see Onyema 2012 *ArbIntl* 109.
318 Onyema 2012 *ArbIntl* 113-114.
319 Sec 7(1) of the Ghana ADR Act of 2010.
320 Sec 39 (3) of the Ghana ADR Act of 2010.Where there is no urgency, a party can still apply to the court for assistance on the written agreement of all parties.

other institution or person vested by the parties with power in that regard, is unable for the time being to act effectively.[321] The Act empowers the court to also among other things, remove an arbitrator,[322] make a final determination on the jurisdiction of the arbitrator[323] and adjudicate on the fees payable to the arbitrator.[324] At the end of the arbitration, the High Court also assists with the recognition and enforcement of awards. For instance, the Act provides for the enforcement of two kinds of foreign awards — New York Convention awards and non-Convention awards.[325] For New York Convention awards, the court follows the guidance provided in the Convention as found in the first schedule of the Act. The High Court enforces non-Convention awards when it is satisfied the award was made by a competent authority under the laws of the country where the foreign award was made and there is a reciprocity arrangement between Ghana and such country. The Ghana ADR Act gives the court a lot of authority in the arbitration processes. This approach is very different from the limit on court intrusiveness as provided under the UNCITRAL Model Law. The biggest question here is whether such court or national interference can adversely affect the parties' autonomy especially when determining the choice of law in arbitration.

2.6.2.6. Institutions or arbitration centres found in Ghana

The Ghana Arbitration Centre (GAC)[326] and the Ghana ADR Hub (the Hub)[327] are renowned for assisting with domestic and institutional arbitrations seated in Ghana. For this thesis focus shall be on the GAC and its rules. The GAC was established through the efforts of a group of senior members in the Ghanaian legal profession in October 1996.[328] The GAC is an alternative dispute resolution organisation that provides both services and practical training in arbitration, mediation and a dispute resolution system designed for individuals, businesses and law firms. When the centre was established in 1996, it developed its own bespoke arbitration rules and procedures for administering arbitration.

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321 Sec 39 (4) of the Ghana ADR Act of 2010.
322 Sec 18 of the Ghana ADR Act of 2010.
323 Sec 26 of the Ghana ADR Act of 2010.
324 Sec 22 of the Ghana ADR Act of 2010.
325 Onyema 2012 *ArbIntl* 115.
326 GAC 2022 https://arbitrationcentregh.com/.
327 Ghana ADR Hub 2022 https://www.ghanaadrhub.org/.
328 Onyema *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* 141.

The arbitration rules of the GAC are streamlined in terms of 59 sections. These rules contain simplified procedures that promote the resolution of disputes by arbitration and other ADR methods. The GAC Rules reflect acceptable international principles of arbitration such as party autonomy,[329] and the authority of an arbitral tribunal to determine its own competence.[330] The GAC is not only skilled at administering arbitration under its own rules but also has hosted arbitration proceedings conducted under the rules of prominent arbitration institutions such as the International Chamber of Commerce (ICC); and ad hoc references under the UNCITRAL Arbitration Rules.[331] With Ghana as the headquarters of the African Continental Free Trade Area (AfCFTA),[332] the GAC is strategically positioned to be a logical choice for many intra-African disputes.

2.6.3. South Africa: History and current laws on arbitration

Similar to most countries in Africa, the South African legal system is greatly influenced by colonialism.[333] Specifically, the country's arbitration regime is built on civil and common law concepts. Its civil law aspect can be traced to the arrival of Jan van Riebeeck at the Cape of Good Hope in 1652.[334] Dutch settlers applied Roman-Dutch law among themselves and gradually extended their dispute resolution practices to the indigenous people.[335] Their practices encouraged peaceful and non-violent dispute resolution devoid of unnecessary litigation. Although these practices formed the very tenets of arbitration practice in South Africa, they never developed into arbitration law.[336] It is the English common law regime that almost exclusively influenced arbitration law in South Africa. More specifically, the *English Arbitration Act* of 1889 influenced the development of arbitration in South Africa.[337] The *Natal Arbitration Act 24* of 1898, *Cape Arbitration Act 29* of

329 For example, according to sec 14 of the GAC Rules, parties are free by agreement to name arbitrators or specify the method for appointing them.
330 Sec 54 of the of the GAC Rules.
331 Onyema *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* 159.
332 The AfCFTA agreement was adopted and opened for signature on 21 March 2018. See AfCFTA 2022 https://au-afcfta.org/.
333 The system is a mixture of English Common Law, a hybrid of Roman-Dutch civil law and customary law.
334 Rantsane 2020 *PELJ* 10.
335 Ramsden *The Law of Arbitration: South African and International Arbitration Ramsden* 13.
336 Rantsane 2020 *PELJ* 11.
337 Rantsane 2020 *PELJ* 13.

1898 and the *Transvaal Arbitration Ordinance 24* of 1904 all adopted this Act with modifications for their peculiar purposes. The English legal system's influence is further seen in the adoption of the *South African Arbitration Act* of 1965[338] which is based on the *English Arbitration Act* of 1950. The South African Arbitration Act was initially considered avant-garde but, over the years, it has been criticised for allowing court interference in the arbitration process.[339] The current advancement in arbitration practices and laws also revealed its inadequacy for international arbitration. To improve and/or reform the arbitration regime in South Africa, two systems have emerged – one dealing with domestic arbitration and the other with international arbitration. The *South African Arbitration Act* of 1965 currently only applies to domestic arbitration and the South African International Arbitration Act 15 of 2017[340] applies to international arbitration seated in South Africa. For this thesis, only the International Arbitration Act shall subsequently be analysed.

2.6.3.1. Relevant provisions in the International Arbitration Act

The International Arbitration Act regulates international arbitration proceedings in South Africa as well as the enforcement of foreign arbitral awards. The Act has 22 sections grouped into 4 chapters.[341] Chapter 1 covers general provisions; Chapter 2 addresses international commercial arbitration; Chapter 3 covers recognition and enforcement of arbitration agreements and foreign arbitral awards; and Chapter 4 addresses transitional and other provisions. In addition to this, it also contains four schedules.

2.6.3.2. Scope of the International Arbitration Act

The first thing to note from the International Arbitration Act is that it incorporates the 2006 version of the UNCITRAL Model Law.[342] This Act is not merely designed based on the UNCITRAL Model Law. It integrates the

338 Arbitration Act 42 of 1965.
339 Butler 1994 *CILSA* 134.
340 See South African Government 2017 www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitrationact15of2017.pdf.
341 See South African Government 2017 www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitrationact15of2017.pdf.
342 Sec 6 of the International Arbitration Act and Schedule 1 of 2017.

law in its entirety subject to the modifications provided by the Act.[343] Expressions or words used in the Act are deemed to bear the same meaning as they have under the UNCITRAL Model Law unless it is inconsistent with the South African Constitution.[344] Also, when interpreting the UNCITRAL Model Law, the courts or tribunals may refer to the reports of UNCITRAL and its secretariat.[345] Matters are subject to international commercial arbitration under the Act when parties have agreed to submit to arbitration. Disputes to be resolved by arbitration must be capable of determination by arbitration under any law of the Republic and not contrary to public policy.[346] The arbitration may not be excluded only because an enactment confers jurisdiction on a court or another tribunal to determine a matter falling within the terms of an arbitration agreement.[347]

2.6.3.3. Party autonomy under the arbitration law

Similar to the UNCITRAL Model Law, the International Arbitration Act equally supports the party autonomy concept.[348] Since the UNCITRAL Model Law is incorporated into the International Arbitration Act, explicit provisions such as those that require respect for the parties' choice of procedural law,[349] language[350] and applicable law[351] are mutually shared by the instruments. Where parties have failed to make such a choice, power rests with the arbitral tribunal to ensure that arbitration is conducted according to laws they deem applicable.[352] Violating any provision under these laws that grant party autonomy could result in the unenforceability of an award.[353]

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343 Sec 6 of the International Arbitration Act of 2017.
344 Sec 2 of the International Arbitration Act of 2017.
345 Sec 8 of the International Arbitration Act of 2017.
346 Sec 7 (1) (a) and sec 7 (1) (b) of the International Arbitration Act of 2017.
347 Sec 7(2) of the International Arbitration Act of 2017.
348 By the dictates of art 7 of the UNCITRAL Model Law (1985) and sec 7 of the International Arbitration Act of 2017, parties have the choice to submit to an international commercial arbitration by arbitration agreement.
349 Art 19 of the UNCITRAL Model Law (1985).
350 Art 22 of the UNCITRAL Model Law (1985).
351 Art 28 of the UNCITRAL Model Law (1985).
352 Art 28(2) of the UNCITRAL Model Law (1985) applies to the international arbitration regime found in South Africa.
353 For instance, art 35(1)(a)(iii) of the UNCITRAL Model Law (1985) and sec 18(1)(b)(iv) both similarly provide that, when an award deals with a dispute not contemplated by or not falling within the terms of submission agreed upon by parties, a competent court can be petitioned to refuse recognition or enforcement.

2.6.3.4. The role of courts under the arbitration law

The South African legal regime for international arbitration drives the role of courts in the arbitration process from the UNCITRAL Model Law. According to article 5 of the UNCITRAL Model Law, as incorporated, no court shall intervene in international arbitration proceedings except where permitted in terms of the International Arbitration Act and the UNCITRAL Model Law. Although the court's authority is limited by this provision, it is still needed to prevent and remedy injustice to parties or the arbitral tribunal. The judicial intervention also ensures that awards made by arbitral tribunals are made effective. Certainly, the International Arbitration Act and the UNCITRAL Model Law greatly limit court interference in the arbitration process. However, no judicial interference is impossible in the arbitration process. For instance, the default position in the absence of an agreement or where parties have failed to reach an agreement is for the courts to take the necessary steps to secure one.[354] The court may also be requested to make an unappealable decision about the jurisdiction of an arbitral tribunal. Parties may apply for the courts to set aside an award where that award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.[355] The courts also may appoint arbitrators where parties fail to agree on one altogether or under an agreed appointment procedure.[356] Generally, South African courts respect arbitration and its processes. This can account for why arbitration in the country has a promising future.

2.6.3.5. Institutions or arbitration centres found in South Africa

The Arbitration Foundation of Southern Africa (AFSA) is a non-profit institution that provides private dispute resolution. It was created in 1996 as a result of the partnership between members of the legal and accounting professions.[357] The institution has three main divisions namely, International

354 Art 11 (4) (b) of the UNCITRAL Model Law (1985).
355 Art 34(1) and (2)(iii) of the UNCITRAL Model Law. In this instance, the court can set aside only that part of the award which contains decisions on matters not submitted to arbitration.
356 Art 11(3) and 11(4) of the UNCITRAL Model Law (1985).
357 See AFSA 2022 https://arbitration.co.za/a-brief-history/.

Arbitration,[358] Domestic Arbitration[359] and Construction Arbitration.[360] These divisions each have their own rules that regulate the arbitration process. AFSA also has a subsidiary, the China-Africa Joint Arbitration Centre (CAJAC Johannesburg).[361] CAJAC offers disputing parties international rules specially made for China-Africa dispute resolution in convenient and well-equipped venues.[362] AFSA also provides services such as mediation, training and dispute resolution for municipalities in South Africa.[363] For purposes of this thesis, the focus shall be on the international division of the AFSA. Since the enactment of the International Arbitration Act, efforts have been made to revise AFSA's international rules on arbitration. In line with this, AFSA's new rules on international arbitration was launched on 1 July 2020.[364] The *AFSA International Arbitration Rules* of 2020 contains 38 articles. It is designed to meet the needs of users and the best modern practices in the arbitration industry. The rules address issues that are part of recent global developments such as electronic arbitration filing[365] and remote hearings,[366] administrative secretaries[367] and multi-party contracts.[368] Similar to other arbitration laws, the rules are based on the principles of party autonomy. Parties under these rules may decide on procedural matters such as language, the seat of arbitration and the number of

358 International arbitration implies in instances where disputes arise between companies or individuals in different countries (cross- border disputes). The AFSA has international rules based on the UNCITRAL Arbitral Rules (2013). The present AFSA International Arbitration Rules came into force on 1 June 2021. See AFSA 2022 https://arbitration.co.za/international-arbitration/international-rules/.

359 AFSA Domestic arbitration envisages the resolution disputes between companies or individuals from the same country. The parties must agree to submit their cases before the AFSA. The institution also has its AFSA Domestic Arbitration Commercial Rules to regulate domestic arbitrations submitted to it. See AFSA 2022 https://arbitration.co.za/domestic-arbitration/commercial-rules/.

360 Construction Arbitration means under art 11.5 of the AFSA Construction Arbitration Unadministered Standard and Expedited Rules means any arbitration proceedings directly or indirectly relating to or arising from the construction industry including, without limitation, the preparation of land and the construction, alteration and repair of buildings, structures and other immovable property. See AFSA 2022 https://arbitration.co.za/construction-arbitration/construction-rules/.

361 This centre operates on a uniform set of rules adopted by all CAJAC members. See AFSA 2022 https://cajacjhb.com/.

362 See AFSA 2022 https://arbitration.co.za/cajac-afsa/.

363 See AFSA 2022 https://arbitration.co.za/.

364 Lim and Travaini 2020 http://arbitrationblog.kluwerarbitration.com.

365 Art 3(2) of the AFSA International Arbitration Rules of 2020.

366 Art 21(6) of the AFSA International Arbitration Rules of 2020.

367 Art 16 of the AFSA International Arbitration Rules of 2020.

368 Art 28 of the AFSA International Arbitration Rules of 2020.

arbitrators. They may also determine the governing law for the arbitration. All the new initiatives presented by the AFSA International Arbitration Rules make it a great addition to the South African legal regime for arbitration.

2.6.4. Current laws on arbitration in Côte d'Ivoire

Côte d'Ivoire's legal system is based on civil law. This reflects the country's history as a French colony. The country's legal framework on arbitration, however, is derived from its membership of OHADA.[369] The organisation has been instrumental in developing a strong legal framework for its Contracting States covering various areas of commercial law. The main objective of the organisation is to develop simple, modern and common rules to be adopted by the Contracting States.[370] OHADA adopts unified laws or common rules known as Uniform Acts applicable in the Contracting States.[371] These Uniform Acts supersede previous existing national law in every Contracting State. The organisation's activities are also regulated by a common court known as the Common Court of Justice and Arbitration (CCJA) located in Abidjan, Côte d'Ivoire. Specifically for arbitration, OHADA operates a dual legal system in which a set of rules addresses institutional arbitration and another, ad hoc arbitration or institutional arbitration not regulated by the organisation. The former is regulated by the Arbitration Rules of the CCJA (CCJA Arbitration Rules)[372] and the latter by the Uniform Act on Arbitration.[373] These rules do not distinguish between domestic and international arbitration. By replacing the arbitration law in all OHADA Contracting States, these rules apply to arbitration in Côte d'Ivoire.[374]

2.6.4.1. CCJA and its rules

According to the CCJA Rules, the institution plays the role of a Supreme Court (CCJA Court) and also administers arbitration as an arbitration centre

369 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 9.

370 Art 1 of the OHADA Amended Treaty on the harmonisation of business law in Africa 1993. Hence, although this discussion is focused on arbitration in Côte d'Ivoire, it can be generalised as the prevailing condition in all the OHADA Contracting States such as Mali, Niger, Senegal and Togo.

371 Art 5 of the OHADA Treaty.

372 Arbitration Rules of the Common Court of Justice and Arbitration of 2017.

373 Uniform Act on Arbitration of 2017.

374 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 9.

(CCJA Centre).[375] The CCJA Court has jurisdiction over the interpretation and application of the OHADA Treaty. It also assists with the administration of arbitration under the CCJA Arbitration Rules. Thus, the CCJA functions as a court and arbitration centre. The CCJA Arbitration Rules which were greatly inspired by the ICC Rules do not distinguish between domestic and international arbitration.[376] Parties may commence an institutional arbitration to be administered under the CCJA Arbitration Rules where they have agreed to use the rules. The parties may be nationals of OHADA Contracting States or from elsewhere.[377] It does not matter if they are private individuals or state entities. The institution's jurisdiction is, however, limited to instances where at least one party is domiciled in an OHADA Contracting State or if the contract is wholly or partially enforced in the territory of one or several of the Contracting States.[378] This, however, does not mean that arbitration must specifically be seated within the OHADA territory. There must necessarily be a link to OHADA for the CCJA Centre to have jurisdiction. Hence, where both or one party to an arbitration agreement is a national of Côte d'Ivoire or domiciled in Côte d'Ivoire the CCJA Arbitration Rules may be applied. Also, where an arbitration agreement or contract is wholly or partly enforceable in Côte d'Ivoire, the CCJA Centre could have jurisdiction. However, parties merely agreeing to the seat of arbitration in Côte d'Ivoire will not give the Centre jurisdiction or make the CCJA Arbitration Rules applicable.

Articles in the CCJA Arbitration Rules are categorised into three chapters.[379] Chapter I covers the role of the Common Court of Justice And Arbitration, Chapter II presents the procedure applicable before the Common Court of Justice And Arbitration and Chapter III addresses issues of recognition and enforcement of arbitration awards. Similar to modern arbitration laws the Rules support the doctrine of party autonomy. Parties are free to choose the

375 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 6.
376 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 9.
377 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 11.
378 Art 2 of the CCJA Arbitration Rules of 2017.
379 See OHADA 2023 https://www.ohada.org/en/ccja-arbitration-rules.

law applicable to the merits of the dispute[380] and the rules governing the proceedings.[381]

The CCJA and its rules provide a very solid legal framework for institutional arbitration. However, a potential conflict of interest lies at the very core of its operations. The dual function of the CCJA as a judicial court with the capacity to validate and enforce arbitral awards and the court's role as supervisor and/or administrator of arbitration has the potential of raising a structural conflict. Investors or parties may be confused as to where the loyalty of the Court lies. How this court is constituted can also be criticised for the potential conflict it poses. Judges of the CCJA are appointed from among the OHADA Contracting States.[382] Who is to say such judges might not favour parties from their countries when a matter is before them? A nation can interfere in the arbitration process through this angle. The neutrality of proceedings is one of the major reasons why parties in recent years opt for arbitration over litigation. The structure of the CCJA and its rules may greatly compromise this.

2.6.4.2. Uniform Act on Arbitration

Contracting States of OHADA also adopted the Uniform Act on Arbitration, which sets out the basic principles of arbitration. The Act which is originally written in French has 36 articles grouped under 7 different chapters.[383] The initial text of the Uniform Act which was adopted in 1999 has been replaced by a 2017 version. The Act applies to an ad hoc arbitration seat in an OHADA Contracting State or to institutional arbitration other than that referred to as CCJA arbitration seated in an OHADA Contracting State.[384] The territorial element in this scope of application unfortunately limits the reach of the Act. Where arbitration is, for instance, between the OHADA Contracting States but seated in a non-OHADA country, this Act would not apply. Also, this scope of application raises the question: can arbitral awards rendered in non-OHADA countries be recognised and enforced under this Act? Considering how relatively new this Act is, the scope should have been made a lot clearer.

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380 Art 17 of the CCJA Arbitration Rules of 2017.
381 Art 17 of the CCJA Arbitration Rules of 2017.
382 Art 31 of the Treaty on the Harmonisation of Business Law in Africa (OHADA) (1993).
383 See OHADA 2023 https://www.droit-afrique.com/uploads/OHADA-Uniform-Act-1999-arbitration.pdf.
384 Art 1 of the Uniform Act of 2017.

Further, the Uniform Act also applies to both domestic and international arbitration. Private or public parties may by agreement submit their disputes seated in an OHADA Contracting State to this Act.[385] Similar to previously discussed arbitration instruments, the Uniform Act also respects party autonomy. For example, under its provisions, a state court must declare its incompetence and refer a matter to arbitration where an arbitration agreement exists.[386]

Unlike the regime under the CCJA Rules, the Uniform Act is highly dependent on national courts to supervise the conduct of arbitration. They handle requests to set aside an award on grounds such as lack of due process by the arbitral tribunal and violation of public policy.[387] The enforcement of awards under this Act may be done in national courts and appeal lies to the CCJA Court.[388] Côte d'Ivoire is a signatory to the New York Convention and as such recognition and enforcement of foreign arbitration awards shall be done under this law. Not all OHADA countries have ratified[389] the Convention and as such may have different processes and standards for the recognition and enforcement of foreign awards in their national courts.

2.6.5. Arbitration in other noteworthy countries

i. Nigeria

Arbitration in Nigeria is governed by the Arbitration and Conciliation Act Cap A18 Laws of the Federation (ACA).[390] Since its enactment in 1988, the ACA has not had any modifications or amendments to its provisions. Nevertheless, the 35-year-old arbitration act has been finally repealed and

385 Art 2 of the Uniform Act of 2017.
386 Art 13 of the Uniform Act of 2017.
387 Art 26 (d)(e) of the Uniform Act of 2017.
388 Art 28 of the Uniform Act of 2017.
389 As of 2021 the following OHADA Member States have ratified the New York Convention of 1958: Benin, Burkina Faso, Cameroon, Central African Republic, Gabon, Guinea, Côte d'Ivoire, Mali, Niger, and Senegal. Comoros, Democratic Republic of the Congo. Chad, Congo, the Equatorial Guinea, Guinea Bissau and Togo are yet to do so. United Nations 2023 https://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=1729.
390 Arbitration and Conciliation Act 1988 Cap A18, Laws of the Federation of Nigeria of 2004. See Law Global Hub 2022 https://www.lawglobalhub.com/arbitration-and-conciliation-act-1988/.

replaced by the *Nigerian Arbitration and Mediation Act* of 2023.[391] This new Act was modelled after the revised UNCITRAL Model Law adopted in 2006. The new arbitration act significantly revamps and enhances the legislative framework for domestic and international arbitration in Nigeria. The new act applies to arbitration throughout the Federal Republic.[392] However, some individual states have their own arbitration laws. Lagos, for instance, has the *Lagos State Arbitration Law* of 2009 (LSAL).[393] Unless parties have indicated the contrary, this law applies to all arbitrations that arise in the State. This law is modelled after the UNCITRAL Model Law and incorporates its 2006 amendments. Nigeria has been a signatory to the New York Convention since 1970.[394]

ii. Mauritius

Mauritius has a hybrid legal system based on both French civil law and English common law. Consequently, procedural law issues fall under the purview of common law and substantive law issues largely fall under civil law.[395] Domestic arbitration is regulated under articles 1003 to 1028 of the *Mauritian Civil Procedure Code* (CPC)[396] and international arbitration is governed by the *Mauritian International Arbitration Act* of 2008 (MIAA).[397] The MIAA is modelled after the UNCITRAL Model Law with modifications.[398]

In 2011, the LCIA and the Government of Mauritius mutually agreed to create the LCIA-MIAC Arbitration Centre in Mauritius.[399] This centre was an innovative way of creating a prominent, recognised and credible arbitration centre in Africa. Although domestic arbitration could be administered at the centre, its main aim was to attract foreign investors and large

391 See Oger-Gross, Obamuroh and Singla 2023 https://www.whitecase.com/insight-alert/new-arbitration-regime-comes-force-nigeria.
392 Sec 1 of the Arbitration and Mediation Act of 2023. See Oger-Gross, Obamuroh and Singla 2023 https://www.whitecase.com/insight-alert/new-arbitration-regime-comes-force-nigeria.
393 See Laws Nigeria 2019 https://laws.lawnigeria.com/2019/04/03/lagos-state-arbitration-law/.
394 United Nations 2023 https://www.newyorkconvention.org/list+of+contracting+states
395 Kim 2010 *South Calif Law Rev* 705.
396 In effect 8 April 1981.
397 Namdarkhan, Meetarbhan and Rajahbalee *Why Mauritius? A National Court in Support of International Arbitration*13.
398 Namdarkhan, Meetarbhan and Rajahbalee *Why Mauritius? A National Court in Support of International Arbitration* 13.
399 See Nursimulu and Hornan 2019 http://arbitrationblog.kluwerarbitration.com.

corporations.[400] The LCIA-MIAC Arbitration Centre ceased operations in 2018 even though its creation is considered ground-breaking. In the same year, the Mauritius International Arbitration Centre (MIAC) was established to replace the defunct LCIA-MIAC Arbitration Centre. The MIAC is regulated by the MIAC Arbitration Rules which became effective on 27 July 2018.[401] This law is based on the UNCITRAL Arbitration Rules and contains 43 articles grouped into IV sections.[402]

iii. Kenya

Kenya's arbitration is governed by the *Kenyan Arbitration Act No. 4* of 1995 (KAA).[403] This law applies to both domestic and international arbitration.[404] It also governs arbitration proceedings and the recognition and enforcement of foreign arbitral awards. The Arbitration Act which largely is based on the UNCITRAL Model Law was amended in 2010.[405] This amendment to the KAA was based on the 2010 version of the UNCITRAL Model Law to reflect developments in the practice of domestic and international arbitration.[406] The Arbitration Act does not regulate the recognition and enforcement of awards. That falls under the scope of the New York Convention, which Kenya ratified and incorporated in 1989.[407] Also, the Nairobi Centre for International Arbitration (NCIA) was established in 2013 with the backing of AALCO.[408] Its rules, the *Nairobi Centre for International Arbitration, Arbitration Rules* (NCIA Rules) came into force in 2015.[409] These rules are all modelled after the ICC Arbitration Rules.

2.7. Comments

It can be concluded based on evidence from the selected countries that

400 See Nursimulu and Hornan 2019 http://arbitrationblog.kluwerarbitration.com.
401 See MIAC 2022 https://miac.mu/.
402 See MIAC 2022 https://miac.mu/.
403 See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-kenya/.
404 Art 2 Kenyan Arbitration Act No. 4 of 1995.
405 See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-kenya/; Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 81.
406 See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-kenya/.
407 See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-kenya/.
408 Cliffe Dekker Hofmeyer *International Arbitration in Africa a Comparison of Arbitration Rules* 17.
409 Cliffe Dekker Hofmeyer *International Arbitration in Africa a Comparison of Arbitration Rules* 17.

current arbitration laws in Africa are largely influenced either by the various UNCITRAL international arbitration instruments, the ICC Arbitration Rules or the LCIA Arbitration Rules. Countries in contemporary Africa have adopted these laws in full or modified them to suit their countries' peculiar needs and purposes. On various issues that affect the arbitration process, different stands are taken in each jurisdiction. For example, in varying degrees, they permit or do not permit national judicial interference in the arbitration process. The principle of party autonomy manifests itself in all of the above-mentioned jurisdictions' arbitration laws. Though such manifestations are similar, they can be quite different in effect. Each approach adopted by a country has its strengths and weaknesses. For the purposes of this thesis, acknowledging the presence of such differences and similarities could assist in selecting the best approach for determining the law applicable to the substance of the dispute in the arbitration process.

2.8. General Concluding Remarks

To conclude, arbitration has come a long way from its very obscure beginnings into an era where it has taken centre stage in international commercial dispute resolution. Its development and growth have been a global effort, with governments and non-governmental institutions playing different major roles. In Africa, the recognition of arbitration for the resolution of international disputes can be traced back to colonial rule. However, post-colonialism, arbitration in Africa has taken on a life of its own. Various interventions have, over the years, been taken to develop and improve arbitration practice in Africa. Nevertheless, arbitration seated in Africa is not on par with arbitration seated in traditional centres such as the LCIA and the ICC International Court of Arbitration. African countries are gradually but surely developing the arbitration industry through the adoption of modern arbitration laws. Adopted arbitration laws in Africa are quite similar to those found in Europe although they are yet to garner the trust and notoriety of providing effective alternative dispute resolution of their Western counterparts. Basically, all theories and principles that underline the traditional arbitration laws (UNCITRAL international arbitration instruments, the ICC Arbitration Rules, the New York Convention or the LCIA Arbitration Rules) are reflected in African arbitration laws. Even though they may manifest based on the idiosyncrasies of each African country they are essentially the same. For the purposes of this thesis, acknowledging the existence of such similarities and differences will assist to make accurate

evaluations about how the applicable substantive law is determined in African arbitration laws.

CHAPTER 3

NUANCES OF THE SUBSTANTIVE LAW APPLICABLE TO THE MERITS OF A DISPUTE IN INTERNATIONAL COMMERCIAL ARBITRATION

3. General Introduction

> Despite their differences, common law, civil law and socialist countries have all equally been affected by the movement towards the rule allowing the parties to choose the law to govern their contractual relations. This development has come about independently in every country and without any concerted effort by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws.[1]

Party autonomy is a recognised principle when dealing with choice of law in international commercial agreements. It follows *a fortiori* that the principle is recognised when dealing with the choice of applicable law in international commercial arbitration. The principle is established under most national and international arbitration instruments.[2] Parties or arbitrators are given different degrees of freedom to choose the law applicable[3] to any arbitration. The question is, given this freedom, which laws do parties or arbitrators usually select as the applicable law of the merits of the dispute and how do they ascertain them? Be it a national law, an institutional law or general principles of equity and good conscience, there are various approaches used by parties or arbitrators to determine the applicable substantive law in arbitration. This also raises another important question; how do we define the applicable substantive law in the context of international commercial arbitration distinct from other related concepts?

This chapter attempts to discuss the matter in two sections. Section I demonstrates and clarifies the meaning and scope of the substantive law applicable to the merits or substance of a dispute in the arbitration process. Generally, this section demonstrates what the law applicable to the merits or substance of a dispute in arbitration is by clearly differentiating it from other

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1 Lew *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* 75; Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 187.

2 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 187.

3 For the purposes of this chapter, applicable law refers to the law applicable to the substance or merits of a dispute in arbitration. Also, the terms governing law and substantive law of an arbitration will all be used interchangeably to refer to the law applicable to the substance of a dispute.

allied concepts and exploring its role in the arbitration process. Section II, on the other hand, analyses the right of parties to select the applicable law and the limits on that freedom as well as the duty of arbitrators to assign the applicable law in the absence of such a choice. The section overall aims to explore the complex issue of selecting the applicable substantive law in arbitration proceedings.

Section I: The Substantive Law Applicable to the Merits of a Dispute

3.1. Introduction

The concept of substantive law appears in various shades through the arbitration process. There can be mention of the substantive law applicable to the merits of a dispute, the substantive laws of any specific jurisdiction (for instance, those of the arbitration seat) and substantive laws of an arbitration institution. For this thesis and to understand the concept of the substantive law applicable to the merits of a dispute, it shall be split into two separate terms — namely 'the substantive law (applicable law)' and 'the merits of a dispute'. In the discussion that follows, the meaning and scope of these two terms shall be assessed, followed by an analysis of the relevance of the applicable law in the arbitration process. Subsequently, the parties' and arbitrators' choice of the applicable law, as well as the limits on their choices shall be analysed. To be sure, this section answers the crucial question, what is the substantive law applicable to the merits of a dispute and its relevance in the arbitration process?

3.1.1. The applicable substantive law in international commercial arbitration: the substance-procedure dichotomy

In private international law, the classification of an issue as substantive or procedural is relevant as it assists in the determination of what law would apply.[4] This distinction is a vital component of the choice of law process. Once issues are classified as substantive or procedural, a forum is a step closer to identifying the governing law.[5] In international commercial arbitration, the distinction also has significant ramifications in the arbitration process. A discussion on the substantive law, therefore, necessarily entails an appraisal of the inter-relationship between the concepts, substance and procedure in the context of arbitration. To clearly understand what the term 'substantive law' is generally about and its specific application in arbitration,

4 Malcai and Levine-Schnur 2014 *Oxf J Leg Stud* 1.
5 Carruthers 2004 *Int Comp Law Q* 691.

it is prudent to begin by discussing the nature of the substance-procedure dichotomy.

Bentham is believed to have coined the expressions 'substantive' and 'adjective' in his book, *The Works of Jeremy Bentham*.[6] He alleged that the branch of law that prescribed the course of procedure could be categorised as adjective laws and the other laws which concern execution could be described as substantive laws.[7] According to Bentham, every act for which a course of procedure is commenced has the objective to execute some substantive law.[8] Salmond also posits that:

> Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which these ends are to be attained.[9]

He argues that the law of procedure is the branch of law which governs the process of litigation (that is issues inside the courts) and substantive law is the law that deals with affairs in the outside world.[10] For instance, in a dispute before a forum, the procedural law would regulate the conduct of proceedings in the court while the substantive law would define the rights of parties. Holland further asserts that:

> The law defines the rights which it will aid and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law', or Procedure.[11]

The underlying argument espoused by these, and other commentators is that substantive law establishes the rights and obligations that regulate people or organisations whilst procedural law establishes legal rules for aiding and protecting the substantive laws. In other words, substantive laws are those laws that determine rights and procedural law determines the remedies for the rights.[12] In jurisprudence, although substantive and procedural laws are distinct concepts, one cannot function without the

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6 Bentham *The Works of Jeremy Bentham* 5-6; Kocourek 1941 *FordhamLR* 157.
7 Bentham *The Works of Jeremy Bentham* 15; Kocourek 1941 *FordhamLR* 157.
8 Bentham *The Works of Jeremy Bentham* 6.
9 Salmond *Jurisprudence on the Theory of the Law* 577.
10 Salmond *Jurisprudence on the Theory of the Law* 577.
11 Holland *The Elements of Jurisprudence* 90; Kocourek 1941 *FordhamLR* 158.
12 The rights and remedies argument used to distinguish between substance and procedure although plausible, is a narrow view of the nature of the distinction. This is because many rights may belong to the sphere of procedure and rules defining the remedy may be part of the substantive law. Salmond *Jurisprudence on the Theory of the Law* 576.

other.[13] This assertion is in line with the classic/orthodox view that the two categories of law can be separated by a sharp boundary.[14] Nevertheless, writers have also argued that the distinction is merely illusionary and that the terms substantive law or procedural law could mean different things depending on the context within which it is used.[15] Llewellyn for instance avers that:

> The differentiation between substantive law and adjective law is an illusion, although the prevalence of this illusion (as of any other) has results in human behaviour and must be taken account of.[16]

Walter Wheeler Cook also added his voice to the discussion when he noted that words such as 'substance' and 'procedure' do not have fixed connotations but that, their precise meaning varies according to the context within which they are used.[17] He asserted that the distinction between substance and procedure should, to borrow his words, be "for the purpose in hand".[18] It would be erroneous to assume that legal words/terms have the same meaning when used in various areas of law. Depending on the context within which a word is used, it could have different ramifications or implications. Take for instance the word 'award' in a general sense it means a prize. However, in the legal sense, an award is a grant made by a court in litigation.[19] A court among other things may grant an award of costs, an award of compensation or an award of damages to a successful party in the litigation. The meaning of the word award however connotes something different in the context of arbitration. In arbitration, the final decision of the arbitrator or arbitral tribunal is known as an award. Certainly, some legal concepts which are used in various legal fields often have a common core

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13 Bentham *The Works of Jeremy Bentham* 6; Salmond *Jurisprudence on the Theory of the Law* 577.

14 The classical view is that in a cause of action, procedure and substance can be sharply separated. Here, there is a belief that even if this distinction is not necessarily true, there is a legitimate need for the division of elements in a cause of action. The distinction serves as a useful tool for the administration of justice. Jeremy Bentham holds this view. Salmond, on the other hand, is of the view that, there is a sharp line that can be drawn between the two concepts in theory but that in practice many procedural laws are wholly and substantially equivalent to substantive laws. See generally Salmond *Jurisprudence or the Theory of the Law*; Bentham *The Works of Jeremy Bentham*; Kocourek 1941 *FordhamLR* 160.

15 Ailes 1941 *MichL Rev* 395; Cook 1933 *Yale J Intl L* 333.

16 Llewellyn *The Bramble Bush on Our Law and Its Study* 84; Llewellyn *The Bramble Bush* 82-83.

17 Chamberlayne *A Treatise on the Modern Law of Evidence: Procedure* 171; Cook 1933 *Yale J Int l L* 336.

18 Cook 1933 *Yale J Intl L* 337.

19 Garner and Campbell Black (eds) *Black's Law Dictionary* 157.

meaning which aids users to immediately associate the term with a particular issue regardless of its purpose. For instance, when the word stay is used in a legal sense, it generally means the postponement or halting of proceedings, judgment or the like.[20] Be it a stay of execution, the stay of a mandate or the stay of a trial, the central idea behind the word 'stay' (which implies some suspension of action) remains the same. Although a term is used in various contexts, producing varied ramifications, a legal academic or legal professional would find it hard to argue a contrary meaning where there is a general meaning associated with it.

In the same light, when determining the meaning of substance or procedure, instead of solely relying on the general idea behind the terms,[21] the better approach is to consider the purpose and context within which they are used.[22] This consideration exposes the true meaning and scope to be assigned to the terms when used in a particular field of law. Take for instance, when determining criminal liability, the facts which constitute a wrong are determined by the substantive law and the facts which determine proof of wrong is a question of procedure.[23] In private international law, the *lex causae* (as designated by a country's conflict of laws rules) governs substantive issues and the *lex fori* (that is the law administered by the court hearing the case) regulates procedural issues.[24] In the context of international commercial arbitration, the terms substantive and procedural are generally used respectively to distinguish between laws that govern how arbitration is conducted and the laws that govern the rights and obligations of the parties to the arbitration. The procedural law of arbitration (which is a

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20 Garner and Campbell Black (eds) *Black's Law Dictionary* 1548.

21 A commentary on substance-procedure dichotomy describes the application of ordinary language to the concepts as conducting a philosophical or conceptual analysis. Here the concepts are viewed in the sense of ordinary language which prevails outside law. In other words, the substance-procedure concepts are given a context-free or context-independent meaning. Malcai and Levine-Schnur 2014 *Oxf J Leg Stud* 1-3.

22 This is mainly due to the fact that specific legal contexts dictate the normative considerations needed to classify a norm as substantive or procedural. Normative (legal or moral) considerations are sensitive to circumstances and as such what is substantive, or procedure may vary in different context. Malcai and Levine-Schnur 2014 *Oxf J Leg Stud* 1-3.

23 Salmond *Jurisprudence on the Theory of the Law* 578.

24 Classification, which is also called characterisation or qualification, can be understood the allocation of a question raised by the factual situation before the court to its correct legal category. Generally, it is the duty of the forum court to characterise an issue as substantive or procedural. Nevertheless, the classification of issues as procedural or substantive is not so clear cut, making the subject a matter for several debates. Fawcett, Carruthers and North *Cheshire, North and Fawcett Private International Law* 42.

subset of the *lex arbitri*), directs and facilitates the internal procedure of the arbitration. The term 'substantive' may be attached to non-procedural laws such as the substantive law that governs the arbitration agreement, the substantive laws of the arbitration seat and the substantive law applicable to the merits of the dispute. In any international commercial arbitration proceeding, at least the procedural law (*lex arbitri*) and the law applicable to the merits of the dispute are present.

The distinction between substance and procedure also has significant implications when it is done in the context of determining the nature of a legal rule.[25] Whether an issue is to be classified or categorised as one of substance or procedure depends on the context within which it is used. In the examination of a domestic legal relationship (one which lacks an international dimension), the rules of a particular legal system are used to classify substantive and procedural issues. This process is generally straightforward as the distinction is done based on a single legal system. Conversely, where the legal relationship has an international dimension, several laws may contradict when it comes to categorising or classifying issues as substantive or procedural. Judges (or even arbitrators) may face some problems when categorising issues as substantive or procedural in such an instance. This is mainly because what is considered a substantive matter in one jurisdiction may be a procedural matter in another. Also, there are instances where substantive issues may have procedural effects and procedural issues may have substantive implications.[26] Borderline issues (that is issues that are not clearly substantive or procedural) such as statutes of limitations and interests including the rate, period, and availability of simple or compound interest,[27] privilege and burden of proof may be categorised differently in each jurisdiction or legal culture.[28] It should, however, be noted that the determination of the nature of a legal rule cannot

25 Fawcett, Carruthers and North C*heshire, North and Fawcett Private International Law* 77.

26 For example, evidentiary presumptions help with both the conduct of proceedings and also directly impacts on the arbitrator's decision on the merits of a dispute. Pauker 2020 *ArbIntl* 3;5.

27 See art 10 of the Rome Convention (1980) and art 49 of the English Arbitration Act of 1996; Pauker 2020 *ArbIntl* 27-31.

28 For instance, typically common law jurisdictions perceive limitation of claims as a procedural matter whereas civil law jurisdictions perceive limitations as a substantive matter. See Symeonides *American Private International Law* 272; Bělohlávek "Extent of Procedural and Substantive Law in Arbitration and Litigation" 48; Pauker 2020 *ArbIntl* 31-34.

be done in the abstract.[29] The classification of an issue as substantive or procedural must be done by having a broad view of the meaning of the two terms and the exact purpose for making the distinction. In arbitration where an issue is more related to the essence of the dispute, it is likely to be classified as a substantive issue[30] and where it relates to the conduct of the proceedings it might be classified as a procedural issue.[31]

Although the method for distinguishing between procedure and substance in arbitration and litigation can be similar, they manifest differently.[32] For instance, contrary to court litigation, where proceedings are necessarily connected to a particular forum, in international commercial arbitration, there is no such definite connection to a forum country. The selection of a seat of arbitration could be for reasons of convenience, neutrality or even fortuitous.[33] Therefore, procedural law for international arbitration is not necessarily the domestic laws of the forum country. It may comprise rules of procedure referred to by the parties in their arbitration agreement (including institutional and non-institutional rules) as well as the arbitration rules of the seat of arbitration. These arbitration rules commonly provide only a broad framework focusing on the conduct of arbitration *stricto senso* and rarely make pronouncements on the classification of borderline issues (such as prescription or limitation of actions) as substantive or procedural. Such classifications are left to the discretion of the arbitral tribunal where the parties have not reached agreement on the issue. This discretion of the arbitral tribunal is not unlimited but subject to the mandatory laws of the seat of arbitration. The mandatory laws of the forum country[34] may also provide rules that classify borderline issues as substantive or procedural where the parties have no agreement.[35]

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29 Fawcett, Carruthers and North *Cheshire, North and Fawcett: Private International Law* 7.

30 For instance, determining whether a contractual term is an innominate term, warranty or condition is a clearly a substantive question. Pauker 2020 *ArbIntl* 3.

31 For example, determining whether parties are required to submit one or more written pre-hearing submissions is clearly procedural matter. Pauker 2020 *ArbIntl* 3.

32 Belohlavek "Extent of Procedural and Substantive Law in Arbitration and Litigation" 31-57.

33 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 82.

34 In private international law literature, a rule is most often considered to be mandatory when a court must apply it although by virtue of its conflict of laws rules it would have ordinarily applied some other body of law. See generally Bermann 2007 *ARIA* 1-20.

35 Belohlavek "Extent of Procedural and Substantive Law in Arbitration and Litigation" 31-57.

In a typical international commercial arbitration, after issues of procedure have been settled, arbitrators endeavour to clarify and establish the material facts of the dispute.[36] This is done by among other things examining the parties' agreement, contractual documents, and other relevant evidence. The facts gathered, inform, and guide the tribunal to its final award. Where the substantive law applicable to the merits of a dispute is unknown, the facts and/or evidence from a detailed contract could assist in the determination of the proper outcome of the arbitration. Waincymer makes the point that the approaches used to identify, interpret, and apply the law dealing with the merits (substantive law) follow procedural and evidentiary approaches.[37] Be it how an arbitral tribunal uses its discretion to identify the applicable law or how it interprets principles to determine the applicable law, there is a procedure that is followed to attain each goal. The application of the governing law in arbitration is a matter that is attributed to the substance of the dispute, though its identification is in the first place a procedural matter.[38] The bottom line is that procedural matters and substantive matters in international commercial arbitration can, by and large, be intertwined.[39]

3.1.2. The law applicable to the substance of a dispute distinct from other allied concepts

Although both the substantive law applicable to the merits of a dispute and the substantive law applicable in litigation (or national substantive law) refer to the non-technical or non-procedural aspects of the applicable law, the scope of their application is quite different due to the context within which they are used. Whereas the former involves parties or arbitrators selecting from a wide variety of laws to govern the underlying contract (subject to the *lex arbitri),*[40] the latter is determined by the law of the forum country involved and used by its courts.[41] In an instance where a contract is domestic, the applicable law by default in any litigation would be that of the country concerned unless parties designate otherwise. Where a contract is international, the conflict of laws rules of the country concerned would be used to determine the appropriate applicable law to the dispute. Thus, in national courts, the substance of any dispute is governed by the rules

36 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 185.
37 Waincymer *Procedure and Evidence in International Arbitration* 981.
38 Hayward 2017 *SSRN Electronic Journal* 4,9; Waincymer 2011 *JIntlArb* 201, 207.
39 International Law Association *Final Report: Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* 209; Waincymer *Procedure and Evidence in International Arbitration* 977.
40 Chukwumerije 1994 *AALR* 265-310.
41 Rogerson *Collier's Conflict of Laws* 5.

designated by the choice of law rules of the country (*lex causae*).[42] Contrary to litigation, parties or arbitrators have larger discretion when it comes to determining the applicable substantive law than judges.[43] They may choose or apply not only national laws but also non-national rules and principles to the substance of the dispute. Usually, the selection of a legal system of a given country to be applied to the merits of a dispute is construed as referring to the substantive law of that country and not to its conflict of laws and rules.[44]

Additionally, mention can be made of the substantive law applicable to the parties' arbitration agreement as distinct from the substantive law applicable to the merits of a dispute. Based on the concept of separability it would be erroneous to assume that the scope of law that governs the arbitration agreement is the same as that which governs the substance of the dispute. The substantive law applicable to the arbitration agreement regulates its formation, validity, enforcement and termination whereas the substantive law applicable to the merits of the dispute aims to determine the rights and the obligations of parties as they emanate from the underlying contract, validity and interpretation of the parties' contract as well as mode of performance and consequences of breach.[45] Specifically, the law applicable to the arbitration agreement among other things regulates the agreement's formal requirements, the arbitrability of its subject matter and the extent of admissibility of judicial review.[46] Party autonomy makes it possible for parties to expressly select the same applicable law to govern the arbitration agreement and the substance of the dispute. Where the parties have not done this, entirely different laws may apply to each. Nonetheless, as already

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42 For instance, contractual issues relating to interpretation are governed by the *lex contractus* and property issues involving transfer of title are governed by the *lex situs*.

43 Belohlavek "Extent of Procedural and Substantive Law in Arbitration and Litigation" 36.

44 Absent any contrary language in a choice of law provision, decision makers interpret a reference to a legal system in a choice of law clause as referring to the substantive law of the chosen system and not its conflict of laws rules. This is to prevent the situation where further conflicts analysis is needed to arrive at the applicable law. This because, where this *renvoi* occurs, it usually leads to laws that are not within the expectation of parties. This the approach adopted under art 28 (1) of the UNCITRAL Model Law and art 8 of the Hague Principles. Born *International Commercial Arbitration* 4181-4182.

45 Born *International Commercial Arbitration* 621-622, 4181.

46 Jacquet *Dispute Settlement: International Commercial Arbitration, 5.5 Law Governing the Merits of the Dispute* 11.

discussed, where there is no express or implied or tacit choice of law[47] to govern the arbitration agreement it is reasonable to assume that the law of the seat of arbitration or the law that regulates the contract as a whole can be applicable.[48] On the other hand, where no express law is chosen by the parties, arbitrators may select from a wide array of laws to apply to the substance of the dispute.[49] This may include trade usages, the *lex mercatoria* and other transnational laws such as the CISG and the UNIDROIT Principles, the likes of which when selected to apply to the arbitration agreement would not make sense.

3.1.3. The merits or substance of a dispute in international commercial arbitration

The terms merits of a dispute and substance of a dispute are often used interchangeably in international commercial instruments. Take for instance article 28(1) of the UNCITRAL Model Law *inter alia* provides that:

> 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.* (Emphasis added). [50]

Similarly, article 35(1) of the UNCITRAL Arbitration Rules of 2013 *inter alia* also provides that:

> The arbitral tribunal shall apply the law designated by the parties as applicable

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47 A true or real choice of law which is not made expressly is referred to as an implied choice of law in some jurisdiction (such as Ghana, England and other common law jurisdictions) and in other jurisdictions (such as South Africa) as tacit choice of law. Neels and Fredericks 2011 *DJ* 101-110. Although the expressions implied and tacit choice of law are often used interchangeably, they can be distinguished from each other. Parties are said to have made a tacit choice of law where there is evidence to indicate such an actual choice was made, though this is not express in their contract. This tacit choice of law may have been evidenced through other means such as the statements and conduct of the parties. Conversely, the concept of implied choice of law, as employed in common law courts, encompasses the notion of tacit choice. An implied choice of law is said to exist when there is evidence indicating that the parties did not expressly choose an applicable of law nevertheless one is presumed to have been made by operation of law. Thus whereas an implied choice is the based on the inferred intentions of the parties, the tacit choice is based on their true intentions. See generally Marshall 2012 *MJIL* 505-539; Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 325.

48 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 158.

49 For the distinction between the *voie directe* and *voie indirecte* methods see para 3.3.2 below.

50 See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

> to *the substance of the dispute*. (Emphasis added)[51]

A variation of the use of the terms can also be found in article 21(1) of the International Chamber of Commerce (ICC) Arbitration Rules of 2021, which *inter alia* provides that:

> 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*. (Emphasis added)[52]

Also, article 22.3 of the LCIA Arbitration Rules of 2020 *inter alia* provides that:

> (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*. (Emphasis added)[53]

In each of these instruments, the terms merits of a dispute or substance of a dispute could be substituted one for the other without actually affecting their essential meaning.[54] A question that can however be raised concerning these terms is, which issues fall within the ambit of the expressions, substance of a dispute or merits of a dispute? From a standard legal dictionary, the term 'merits' generally may be defined as the elements or grounds of a claim or defence.[55] In this sense, it can be broadly understood as the grounds upon which claimants assert their rights and respondents raise their defence.[56] It may also be considered as the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points.[57] In international commercial arbitration, such substantive considerations may emanate from the terms of a detailed

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51 UNCITRAL Arbitration Rules (with new art 1, paragraph 4, as adopted in 2013).

52 International Chamber of Commerce (ICC) Arbitration Rules (2021). See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration; ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

53 See LCIA 2023 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

54 It would appear that the distinction between the terms is merely technical and has no real effect on the implication or outcome of the provisions. However, according to Heikanen, when one speaks of merits in a dispute it may refer to the merits of a claim or subject matter of the claim. He argues that although the meanings of the terms may overlap, they do not always collide and as such they should be distinguished. This discussion, however, is not a matter of interest for this section. For more information refer to Heiskanen 2006 *ArbIntl* 597-612.

55 Garner and Campbell Black (eds) *Black's Law Dictionary* 1107.

56 Heiskanen 2006 *ArbIntl* 599.

57 Garner and Campbell Black (eds) *Black's Law Dictionary*1107.

contract and/or relevant facts.[58] Typically, a commercial contract will contain a multitude of detailed terms that govern the performance of each party. Express contractual terms which are central to a transaction may be grounds for a claim in a dispute. Even the unexpressed intention of the parties may be implied in a contract and could be grounds for a claim in a dispute.[59] The substance of the dispute in arbitration may be based not only on the express terms of a contract but also on long-term commercial relations between parties, ancillary contracts and payment guarantees.[60]

Due to contractual autonomy, parties may draft the terms of their arbitration agreement however they wish. They may have long-detailed arbitration agreements or clauses (or very short ones) that skilfully elaborate on the categories of disputes that will be subject to arbitration. The terms of an arbitration agreement may dictate and limit the type of matters which can be referred to arbitration.[61] By its reference to a particular contract or a specific legal relation, the arbitration agreement or clause is a good indicator of the subject matter of the arbitration. The agreement may set out the types of disputes parties have agreed to settle by arbitration. Where an arbitral tribunal does not follow such agreements, it may be grounds for the non-recognition or non-enforcement of arbitral awards.[62] The finality of an arbitration award contributes to its appeal for commercial dispute resolution. It would be counterproductive for every single possible issue that can arise out of the arbitration to be subject to judicial review. It is for this reason that arbitration instruments such as the New York Convention[63] provide an exhaustive list of issues that can be brought before a court.[64] Concerning issues of scope of an award, article V1(c) of the New York Convention provides as grounds for setting aside an award that:

> The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not

58 Waincymer *Procedure and Evidence in International Arbitration* 978.

59 According to Lord Wright in the case Luxor (Eastbourne) Ltd v. Cooper (1941) AC 108, 137–8, HL, there terms may be implied into a contract in three ways; by law, on the basis of custom or trade usage and based on fact. Andrews *Arbitration and Contract Law* 207; McKendrick *Contract Law: Text, Cases, and Materials* 337-367.

60 Tang *Jurisdiction and Arbitration Agreements in International Commercial Law* 36.

61 This is subject to the forum' mandatory provisions with respect to arbitrability. Born *International Commercial Arbitration* 2079.

62 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 92.

63 See New York Arbitration Convention 2023 https://www.newyorkconvention.org/.

64 There are five exhaustive grounds to justify a country's refusal to recognise and enforce an award under art V of the New York Convention (1958).

> so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.[65]

Parties may have the opportunity to seek for an award to be set aside where it is shown that the award did not in whole or in part concern a dispute within the contemplation of the parties. Where the arbitral tribunal exceeds its authority, by awarding more than, or something different from, what the parties had claimed, it can be grounds for refusing recognition or setting aside an award.[66] The party against whom enforcement is sought must prove that the arbitrators have transgressed the boundaries of their authority. To determine whether arbitrators have exceeded the scope of their jurisdiction, the parties' arbitration agreement and in some cases the terms of reference signed by them, must be scrutinised.[67] It is however to be noted that, blatant mistakes of law or fact made by the arbitral tribunal are not grounds for the refusal of an award based on article V(1)(c) of the New York Convention.[68] In principle, a request for enforcement does not include the review of the substance of an award.[69]

All in all, the parties' respective claims, defences and relief sought, among other things may be based on express terms of the arbitration agreement, express or implied contractual terms, ancillary agreements that exclude certain claims or defences and the facts surrounding the case. These can constitute the substance of a dispute in arbitration. Non-contractual claims (such as claims in tort) with a nexus to the underlying contract may also be the subject matter of a dispute.[70] To enhance the efficiency of the arbitration

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65 Art 34(iii) and 36 (iii) of the UNCITRAL Model Law (1985) provides a similar provision.

66 Moss 2008 *Glob Jurist* 39.

67 The terms of reference (which may include a list of issues to be determined) have been used in ICC arbitration to extend the scope of the arbitrators' jurisdiction by amending and extending the existing arbitration agreement. Azeredo da Silveira and Lévy "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention" 649, 677.

68 Azeredo da Silveira and Lévy "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention" 661.

69 Arbitrators are chosen by parties to provide a final and unappealable decision on matters submitted to them. Where the award reflects the honest decision of the arbitrators and arbitration proceedings were conducted in a fair hearing of parties, courts are unlikely to set aside the award based on the erroneous application of law of fact. See generally Fertilizer Corp. of India v. IDI Management, Inc. 517 F. Supp. 948 (S.D. Ohio 1981) cited in Azeredo da Silveira and Lévy "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention" 666.

70 Different laws, however, may apply to non-contractual and contractual claims. However, to ensure harmony non-contractual issues may be governed by the same law as the contract. Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 114.

process and to prevent confusion about the issues to be determined, procedural rules such as the ICC Arbitration Rules of 2021 require the arbitral tribunal to draft the terms of reference or a similar document.[71] Among other things, in terms of reference, arbitrators must summarise the parties' respective claims, and relief sought and unless considered inappropriate, draw up a list of issues to be determined.[72] Absent such a document arbitrators generally may deduce the subject matter of a dispute from the facts surrounding a case and the contractual terms.

3.1.4. The role of the substantive law applicable to the merits of a dispute in international commercial arbitration

International commercial contracts can be very detailed documents containing numerous terms, obligations, and duties of parties. An analysis of such detailed contracts can reveal to the arbitrator which party is liable to perform which obligation or duty. The solution to any dispute can be found *prima facie* in the parties' contract.[73] The arbitrator could decide the merits of an entire dispute based on the provisions of the parties' contract or based on factual issues (such as whether goods were defective or whether performance conformed to specifications) without referring to any applicable substantive law.[74] In fact, it has been suggested that an award cannot be set aside just because there was an error in the application or interpretation of the applicable law of a contract.[75] The question therefore is, what is the role of the applicable substantive law in the arbitration process or what is the role of a choice of law clause or agreement, if the arbitrator can resolve a

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71 Art 23 of the ICC Rules on Arbitration (2021). See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

72 Other procedural rules such as the Singapore International Arbitration Centre Rules of Arbitration (SIAC Rules of Arbitration) and the UNCITRAL Arbitration Rules on the other hand do not require the preparation of terms of reference. It is opened to parties to agree for such a document to be prepared or for arbitrators to be drawn up.

73 Lew *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* 581.

74 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 185.

75 For instance, the United States Federal Arbitration Act enacted in 1925, does not envisage judicial review for error of law. However, based on the US doctrine of manifest disregard of the law, an error in law may be used as a defence against the enforcement of a US award, in highly exceptional cases. However, an error in law may not be used as a defence against the enforcement of a foreign award. This is very different from the English position where the English Arbitration Act allows parties to appeal for error of law. Here, parties however may contract out the right to appeal for the errors of law. They may nonetheless not opt out of provisions that challenge arbitral awards on the basis of want for jurisdiction and serious procedural irregularities. See generally Tompkins 2018 *DRI*; Celik 2013 *ISLRev* 13-24.

dispute without it or if it cannot be grounds for non-recognition or non-enforcement of an award? The following subsection explores some answers to this question.

a. A choice of the substantive law to govern the merits of the parties' dispute eliminates inconsistency

Where parties have selected the applicable law to the merits of a dispute, all concerned (arbitrators and parties alike) can definitively predict their positions in the event of a dispute. Arbitrators have a precise understanding of which laws or rules of law to apply to determine an award and parties can predict with a high degree of certainty, the likely outcome of their claims in the arbitration process. By having prior knowledge of the applicable law, parties are guided on which legal arguments to expect or to present in an arbitration.[76] When parties agree on the governing law of their contract, it can be presumed that each party considered their likely positions when selecting a particular law and that one party would not be disadvantaged by the choice of applicable law. The choice of an applicable law enhances the predictability, certainty and orderliness with which arbitration is conducted. These are essential attributes that establish arbitration as an effective alternative to litigation for international commercial dispute resolution.

b. A choice of the substantive law to govern the merits of parties' dispute protects their interests

The governing law determines the outcome of a dispute. During contractual negotiations, before a dispute arises, it is prudent for parties to bargain and/ or make concessions in relation to the applicable law, to favour individual party interests. Every country has different statutes or laws which significantly impact how an arbitration turns out. The substantive remedies available to parties, and the types of damages recoverable or limitation defences available to parties differ from one legal system to another. Even questions involving the currency of an award are a matter determined not only by the terms of the parties' contract but also by the applicable substantive law.[77] A choice of the governing law by parties enables them to select the methods and remedies by which arbitrators must resolve their disputes in line with their interests. Working within the confines of a familiar law boosts parties' confidence in the outcome of the arbitration. A choice of the governing law of the contract obviates the danger of a dispute being

76 Gertz 1991 *NW U L Rev* 173.
77 Born *International Commercial Arbitration* 4894.

presented before a forum that is not conversant with the problem area involved. Some national arbitration laws and institutional rules may be better equipped to deal with certain specialised issues than others. For instance, parties involved in the construction sector or financial sector may prefer arbitration rules that are modified to settle disputes in that sector.[78] A choice of law clause allows parties to select customised arbitration laws appropriate for their purposes.

c. A choice of law governing the merits of parties' dispute saves time and cost

To explain this next point, a hypothetical illustration shall be used. Assume that a business owner in country A entered into a series of commercial contracts with a company in country B covering sales, supply, modifications and the maintenance and operations of equipment. The parties did not agree on a governing law or forum for any dispute in their arbitration agreement. Unfortunately, all the contracts were terminated following a series of unpredictable events in country A and disputes arose in connection with amounts claimed by each party and performance. Imagine further that the parties are both uncompromising to make neither the laws of country A nor B the governing law of their contract. The country A business owner does not support the application of country B's substantive rules because it does not allow for interest claims on payments made. The country B company is also against the application of country A's law as governing law of the contract because it is notorious for allowing for an award of punitive damages. Consequently, regarding the governing law of their contract, the parties are at an impasse. Arbitrators have the daunting task of resolving the dispute to meet the reasonable expectations of each party. This may require extra time and money to sift through legal issues, facts, and evidence to satisfy each party. Large corporations and businesses opt for arbitration to avoid the delays associated with litigation. Where arbitrators

78 For example, parties in the financial sector may select non-profit organisations such as PRIME Finance (which stands for the Panel of Recognised International Market Experts in Finance) and its arbitration rules which based on the modified version of the 2010 UNCITRAL Arbitration Rules, to resolve their disputes. Similarly, in the construction sector, parties may elect to apply rules such as the Construction Industry Arbitration Rules and Mediation Procedures of 2015 (of the American Arbitration Association) and Construction Industry Model Arbitration Rules (CIMAR) published in 2005, which is to be read consistently with the English Arbitration Act of 1996, to their disputes. See Society of Construction Arbitrators 2022 https://www.constructionarbitrators.org.

must determine the applicable law, it defeats this reason for opting for arbitration over litigation.

Notwithstanding the above discussion, compared to litigation, it would be difficult to place the role of the applicable substantive law in arbitration on a pedestal. While judges are duty-bound to adhere to the law when rendering a judgment, arbitrators do not have such a defined scope for the application of the governing law when determining an award, more so when there is no express choice of applicable law. The arbitrators' relationship with the governing law in arbitration varies from case to case.[79] They do not have a fixed framework for conducting a choice of law analysis. This is mainly because the role of substantive law in any arbitration is defined by the parties in their agreement.[80] They design arbitration based on their wishes. This does not necessarily mean disputants direct arbitrators to base their decisions on substantive law principles. On the contrary, the arbitral tribunal's decision is typically based on the terms of an agreement between parties, the customs of the trade in which they conduct business, the applicable law, or some combination of these.[81] Arbitrators tend to resolve disputes primarily by drawing upon their expertise, competencies, and experience, rather than solely based on their application of substantive laws.[82] Typically, awards are not subject to appellate review or not easily vacated just because they are not supported by law. Where the arbitral tribunal's award is supported by sound reasoning based on facts, the substantive law holds little or no attention.[83] As noted by one commentator, judicial/legal scrutiny is needed to vet the voluntariness of arbitration and not the correctness of an award.[84] The choice of arbitration itself is an indication that parties want to resolve their disputes with a mechanism that is flexible, quick, private, simple and informal. Applying law may not be the chief concern of parties who submit their disputes to arbitration. As Redfern and Hunter put it, arbitrators as more concerned with what was and was not said; what was and was not promised; what was and was not done.[85] Typically, parties expect arbitrators to consider the terms of the agreement

79 Levin 1997 *Am Bus LJ* 178.
80 This is done either by their express agreement or by arbitrators who consider the agreement of the parties.
81 Goldberg *et al Dispute Resolution Negotiation, Mediation and Other Processes* 500.
82 Levin 1997 *Am Bus LJ* 179.
83 Levin 1997 *Am Bus LJ* 179.
84 Levin 1997 *Am Bus LJ* 179.
85 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 155.

to resolve their dispute and not to select national laws that override their contractual terms.[86]

Nevertheless, it is submitted that the substantive law applicable to the merits of a dispute is relevant to the arbitration process. Contracts may contain the needed information to resolve a dispute, but they cannot exist in a legal vacuum.[87] A chosen applicable law offers a sound basis for decisions and promotes predictable awards. This enhances international commercial arbitration as a meaningful alternative dispute resolution mechanism. International arbitration may not be law-centred like litigation, but the presence of law to govern the legal relationship of disputants can have a great impact on the arbitration process. According to the 2020 ICC survey, only 5% of cases submitted did not have an express choice of law clause.[88] This is an indication that parties understand and accept the value of selecting an applicable law in arbitration.

3.2. Comments

As is evident from the discussion so far, answering the question of what law is applicable to the substance of the dispute in international arbitration is not straightforward. The law applicable to the substance of the dispute can be distinguished from the procedural law, the substantive law of the place of arbitration and the substantive law that governs the agreement to arbitrate. Its scope, purpose and role uniquely set it apart from these other types of law applied in the arbitration process.

It should be noted that acknowledging the nuances of the applicable substantive law helps to understand the subtleties, exceptions, and variations that exist within the concept. When it comes to resolving a dispute through arbitration, the applicable substantive law is the body of law that governs the contract out of which a dispute arises. It has a significant impact on the outcome of a dispute. It is therefore important to not only know what the applicable substantive law is but to also understand the complexities of that law. By having a comprehensive understanding of what the applicable substantive law is in international commercial arbitration, parties and arbitrators can better navigate the dispute resolution process and make informed decisions.

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86 Buys 2005 *St John's Law Review* 93-94.
87 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 156.
88 International Chamber of Commerce *ICC Dispute Resolution 2020 Statistics* 17.

Section II: Choices in the Selection of the Applicable Substantive Law

3.3. Introduction

As previously noted, in arbitration either parties declare their intentions concerning the law applicable to their contract or the arbitral tribunal determines the law applicable to it. These two scenarios each present critical questions in relation to the choice of the applicable substantive law in arbitration. For instance, what elections of laws are available to the parties or the arbitrator; how is the determination of the law governing the substance of a dispute made by parties or the arbitrator and what are the limits on the choices that can be made. The following subsection explores the various choices that parties and arbitrators have and make when determining the law which shall govern the substance of a dispute.

3.3.1. The parties' choice of the substantive law

In arbitration, it is commonplace for parties to indicate the substantive law that governs their contractual relationship.[89] This choice of the applicable law is usually made in the contract between the parties or in their arbitration agreement. The governing law can be selected at any stage of the arbitration — before or even after a dispute arises.[90] This choice can be express or tacit.[91] Where parties in international commercial arbitration choose the law to govern their contract, they have a certain number of options. They usually choose the national law of one of the contracting parties to govern their agreement. They may select the national law of the place of arbitration, *lex loci contractus* or even the law of a country that does not even have a remote connection with their contract. If the parties have expressly selected a particular law, the arbitral tribunal is duty-bound to apply said law. Absent an express choice of the applicable law, usually, the will or intention of the parties is considered to determine the applicable law.[92] Before proceeding to objectively determine the applicable law by the *voie directe* or *voie indirecte* methods, arbitrators usually first endeavour to determine if parties made a tacit choice of law.[93] Arbitration rules typically

89 In some instances, parties instruct arbitrators on the method to follow to determine the law applicable to the merits of their dispute.

90 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 790; Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 188.

91 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 787.

92 Blessing 1997 *JIntlArb* 43,44.

93 Blessing 1997 *JIntlArb* 43,44.

do not specify how to determine the intentions of parties in relation to the applicable law, absent an express choice.[94] Therefore, arbitrators may deduce the tacit choice of law from the provisions of the contract, the circumstances of a case or even infer it from the conduct of parties. For example, where parties have argued their case based on a particular law, although it has not been selected to be applied to the merits of the dispute, it can be inferred as a tacit choice. Whether applying an express or tacit choice of law, arbitrators must endeavour to remain within the framework of the parties' contractual intentions.[95]

Aside from parties typically choosing national laws to govern their international contracts, they are also known to select non-national laws.[96] This type of choice allows parties to free themselves from the technicalities of national laws and to reflect the international nature of their transactions.[97] Parties (or arbitrators) who wish to apply non-national rules may look towards various sources of international rules. They may select neutral or amorphous bodies of law such as the *lex mercatoria* and general principles of law such as good faith and fair dealing.[98] There is increasing support for the use of uniform customs and practices of international trade such as the Hague Principles,[99] the UNIDROIT Principles,[100] and the Incoterms of the International Chamber of Commerce[101] to govern contractual relationships in arbitration. These laws may be used to govern the contract, to supplement or correct the application of national law.[102]

Generally speaking, there are no restrictions on the kinds of substantive law parties may select to regulate their arbitration. In fact, parties may even authorise arbitrators to apply non-national standards to their contractual relationship.[103] For instance, they may expressly authorise arbitrators to act

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94 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 788.
95 Blessing 1997 *JIntlArb* 44.
96 Waincymer *Procedure and Evidence in International Arbitration* 1001.
97 Anglade 2003 *Ir Jur* 102
98 Waincymer *Procedure and Evidence in International Arbitration* 1007.
99 Although art 1(b) of the Hague Principles excludes the application of the principles to the arbitration agreements and agreements on choice of court, the law can be selected by parties to regulate their underlying contractual relationship.
100 See UNIDROIT 2022 https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/.
101 See ICC 2023 https://iccwbo.org/business-solutions/incoterms-rules/incoterms-rules-history/.
102 Anglade 2003 *Ir Jur* 102.
103 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 215.

as *amiable compositeur* or resolve their disputes *ex aequo et bono*. Article 28(3) of the UNCITRAL Model Law for example provides that:

> The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.[104]

As an *amiable compositeur*, the arbitral tribunal is authorised to resolve the dispute by referring to principles of general justice and fairness.[105] In cases where equitable principles must be applied, general moral principles based on the subjective sense of the arbitrator are considered.[106] Arbitrators have the autonomy to decide a particular case based on its equities or particularities when parties expressly authorise them to do so.[107] For recurrent and long-term relationships, this approach to dispute resolution is suitable due to its flexibility. In instances where a selected applicable law does not cover a particular issue in the arbitration, these principles or standards are also useful.

Furthermore, based on the doctrine of *dépeçage,*[108] parties may also select more than one substantive law to govern different aspects of their contractual relationship.[109] Article 2(1) (b) of the Hague Principles for instance enables the parties to opt for several laws to be applied selectively to different aspects of an international contract.[110] Parties may have a blend of national laws, transnational laws or even non-legal standards. To give an example, parties may select the CISG[111] to govern the performance of their contract, the arbitration laws of London to govern the validity and interpretation of their contract and require the arbitral tribunal to resolve their

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104 A similar provision can be found in art 35(2) of the UNCITRAL Arbitration Rules of (2013).

105 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 217, 218.

106 Bělohlávek "Application of Law in Arbitration, Ex Aequo et Bono and Amiable Compositeur" 38.

107 Where such standards are not skilfully applied by arbitrators, they can modify the original agreement of the parties. It is advisable for parties to expressly authorise the application of such standards. Bělohlávek "Application of Law in Arbitration, Ex Aequo et Bono and Amiable Compositeur" 37.

108 Dépeçage is a term used to describe the situation where parties choose different laws to govern different aspects of the same contractual relationship or dispute. Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 794; Born *International Commercial Arbitration* 4258.

109 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 794.

110 See HCCH 2023 https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

111 United Nations Convention on Contracts for the International Sale of Goods (1980) See UNCITRAL 2023 https://uncitral.un.org/en/texts/salegoods/conventions/.

dispute *ex aequo et bono*. *Dépeçage* in arbitration is widely accepted in most modern arbitration laws.[112] However, the functionality of making such a choice to regulate international commerce comes into question. It is to be noted that, having a multiplicity of applicable laws for one contract can create inconsistencies and imbalances when the scope of each law is in question.[113] This makes it quite inappropriate for international commercial dispute resolution.

In international commercial arbitration, apart from national mandatory laws or public policy rules, there appears to be no limit on what law the parties can agree to apply to their contractual relationship. The parties' agreement on the applicable law can take any shape or form. For example, they can have a floating choice of law clause which assists parties to plan for any contingent scenario that may arise concerning the applicable law.[114] Parties may for instance agree that in any arbitration seated in country A, the laws of the country shall apply to the underlying contract. However, where the same dispute is moved to country B, it is the laws of that country B that now become applicable to the contractual relationship.

3.3.2. The arbitrator's choice of the substantive law

As already alluded to in previous sections, where parties have not indicated the substantive law applicable to the merits of their dispute, even implicitly, arbitrators are charged with the responsibility of establishing what law applies to the contract. This is a general position usually found in most modern arbitration statutes and institutional arbitration rules. For instance, article 35(1) of the *Swiss Rules for International Arbitration* of 2021 (Swiss Rules) provides that:

> The arbitral tribunal shall decide the case by applying 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.[115]

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112 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 794.

113 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 795.

114 The floating choice of law clause is a clause provides for two or more governing laws and leaves the exercise of the choice until the occurrence of an event unrelated to the actions of the parties.

115 See Swiss Arbitration Association 2023 https://www.swissarbitration.org/resources/swiss-rules-2021.

Similarly, article 33 of the UNCITRAL Arbitration Rules of 1976 provides that:

> 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 law determined by the conflict of laws rules which it considers applicable.[116]

Also, article 22.3 of the LCIA Arbitration Rules of 2020 *inter alia* provides that:

> If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.[117]

The provisions in these modern arbitration regimes are contrary to the outdated position of requiring arbitrators to necessarily apply the private international law rules of the seat of arbitration to determine the law applicable to the merits of a dispute.[118] In the past, unless parties have specifically indicated a different method for determining the law applicable to the substance of a dispute, the law of the forum applied.[119] The choice of a seat of arbitration could be interpreted as the parties' choice of applicable law. The rationale behind this approach was that, when judges were faced with an international dispute, they applied their forum's private international law and as such the same was to be done by arbitrators. Modern arbitration statutes and institutional rules have moved away from this position since the seat of arbitration is often linked to the dispute for tenuous and practical reasons such as convenience, geographical location and legal neutrality. The widely accepted idea presently is that international arbitration is not bound by the *lex fori* in the same way as litigation.[120] International arbitration is viewed as operating under a transnational legal order that provides a certain degree of autonomy from national legal systems. Most modern arbitration laws grant arbitrators a greater degree of freedom to choose the law applicable to the substance of a dispute severed from the *lex fori*. Given

116 UNCITRAL Arbitration Rules (1976).
117 LCIA Arbitration Rules (2020).
118 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 867.
119 This was the position adopted in the 1957 Amsterdam Resolution of the Institute of International Law's Resolution on Arbitration in Private International Law. This position is now obsolete. Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 867, 868.
120 Born *International Commercial Arbitration* 4102- 4104.

this latitude, arbitrators select both national and non-national laws to regulate the merits of a dispute.

It would be erroneous to assume that the conflict of laws rules of the seat of arbitration is not relevant in the arbitration process.[121] In the search for the applicable law, arbitrators may consider the choice of law rules of the seat of arbitration. Also, when disputants choose an arbitration institution's rules, it can mean the application of the law of the forum, if the rules so specify.

The international commercial arbitrator's power, specifically to determine the applicable law governing the merits, in recent times, is generally broad under arbitration statutory instruments.[122] However, these laws grant varying degrees of freedom to the arbitrator to determine the applicable law. Some of the arbitration laws constrain the arbitrators' discretion to select the applicable law while others do not. The following arbitration provisions showcase some of the variations in the authority given to arbitrators to determine the law applicable to the substance of a dispute. Section 24(2) and (3) *Sri Lankan Arbitration Act* of 1995 provides that:

> (2) Failing any designation by the parties to any arbitration agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
>
> (3) The provision of subsections (1) and (2) shall apply only to the extent agreed to by the parties.[123]

Section 30(4) of the *Malaysian Arbitration Act 646* of 2005 also provides that:

> (4) Failing any agreement under subsection (2), the arbitral tribunal shall apply the law determined by the conflict of laws rules.[124]

And article 1051(2) of the *German Arbitration Law* of 1998 provides that:

> (1) 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

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121 Born *International Commercial Arbitration* 4108-4109.

122 Born *International Commercial Arbitration* 4104.

123 See Parliament of the Democratic Socialist Republic of Sri Lanka 1995 https://www.slnarbcentre.com/pdf/.

124 See The Commissioner of Law Revision 2006 https://www.iaa-network.com/wp-content/uploads/2013/07/.

closely connected.[125]

Comparing section 24(2) Sri Lankan Arbitration Act, section 30(4) of the Malaysian Arbitration Act and article 1051(2) German Arbitration Law reveals that the arbitrator's discretion to determine the applicable law of the dispute can be highly constrained, very open, or very specific. The Sri Lankan position for instance is to assert that, the tribunal can only determine the applicable law when the parties specifically authorise them to do so. Here the arbitrator's discretion to determine the applicable law is constrained as compared to the Malaysian position. The Malaysian Arbitration Act does not require an arbitrator to have permission from parties before choosing the law applicable to the merits of a dispute when none has been selected. The authority of the arbitrator to select the applicable law by applying conflict of laws rules is the default position. By not indicating the specific conflict of laws rules to be applied, the arbitrators' discretion is very open. They can choose between a plethora of conflict of laws rules, to determine the most appropriate applicable law. On the other hand, some of the arbitration statutes are very specific as to which conflict of laws rules are applicable, as is the situation under the German Arbitration Law. The wording or phrases used in a particular arbitration instrument, to designate the authority of arbitrators to determine the law applicable to the merits of a dispute can be diverse and have various implications. The methods or approaches they provide for determining the applicable law are also diverse. There can be mention of provisions that stipulate that the arbitral tribunal shall apply the law which it considers appropriate,[126] that the arbitral tribunal shall apply the conflict of laws rules which it determines to be appropriate[127] and that the arbitral tribunal shall apply the law or rules of law which it considers to be the most appropriate.[128] The implications of provisions such as these shall be analysed in the next part of this chapter.

3.3.3. Determining the scope of the arbitrator's discretion

The arbitrator's discretion to select the applicable substantive law when parties fail to select one can be broad and unfettered. The uncertainty

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125 See Deutsche Institution für Schiedsgerichtsbarkeit 2015 https://sccinstitute.com/media/29988/german-arbitration-act.pdf.

126 For example, art 35(1) UNCITRAL Arbitration Rules (2013) and art 36(2) Commercial Arbitration Law of Cambodia of 2006 have this provision.

127 An example of this provision can be found at art VII (1) of European Convention of 1961.

128 A typical example of this provision is found in art 1054 of Netherlands Arbitration Act, Code of Civil Procedure of 1986.

resulting from this discretion may potentially affect the parties' rights, obligations and the outcome of their case.[129] The arbitrator's discretion to select the applicable substantive law finds its textual foothold in different arbitration statutes and rules. The wording of such provisions also indicates the scope of the arbitrator's discretion when determining the applicable law. Since arbitration statutes or rules defer, there may be several permutations of phrases that determine the scope of the arbitrator's discretion when selecting the applicable substantive law.[130] These provisions may or may not provide some guidance to arbitrators regarding the selection of the applicable substantive law. Analysing arbitration provisions critically will reveal answers to the following question about the scope of the arbitrator's discretion when determining the applicable substantive law.

i. Is the arbitrator's discretion restricted or unfettered?

When the arbitrator's discretion to determine the applicable substantive law under article 34 of the *Spanish Arbitration Act of 2003*,[131] is compared to article 145 of the *General Principles of the Civil Law of the People's Republic of China*,[132]it is revealed that the latter is more restrictive than the former.[133] The former provides that the arbitrator shall apply the law that they consider appropriate whereas the latter provides that the law of the country to which the contract is most closely connected shall be applied where none is chosen.[134] The inference that can be made when the two provisions are compared is that whereas under Spanish law, an arbitral tribunal may select any law they deem appropriate to apply to the dispute without it necessarily having a connection with the contract, such a connection must necessarily be established under the Chinese law.

Article 35(1) of the UNCITRAL Arbitration Rules contains similar language

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129 Hayward *Conflict of laws and Arbitral Discretion - the Closest Connection Test* 2.

130 Waincymer *Procedure and Evidence in International Arbitration* 993.

131 See Ministerio de Justicia 2013 https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Act_on_arbitration_%28Ley_60_2003__de_arbitraje%29.PDF.

132 The General Principles of the Civil Law of the People's Republic of China Order No. 37 of 1986. In China, the Arbitration Law of the People's Republic of China of 1995 and arbitration-related rules of Civil Procedure Law regulate both domestic and international arbitration. See AsianLII 2021 https://www.asianlii.org/cn/legis/cen/laws/gpotclotproc555/.

133 Here, the arbitration statutes of Spain and the People's Republic of China are compared because their rules have foundations based on the UNCITRAL Model Law (1985).

134 A similar position is found under art 126 of the Contract Law of the People's Republic of China of 1999.

as article 34 of the Spanish Arbitration Act. The majority of drafters of the UNCITRAL Arbitration Rules supported this approach because of its flexibility in determining the applicable law.[135] They, however, added that such a choice should not be made arbitrarily but be backed with reasons. Although arbitrators enjoy wide freedom to select whatever law or laws they deem most appropriate, they must proceed in a reasoned and adjudicative manner.[136] The Chinese approach, although restricting the scope of the arbitrator's discretion, provides also a flexible but specific choice of law rule. This provides the arbitral tribunal with some guidance when investigating the applicable substantive law. Indeed, there are arbitration rules that restrict the scope of the arbitral tribunal's discretion more than others. However, the arbitrator's discretion is likely not to be unfettered because, in their search for the appropriate law, they still must consider factors such as the parties' arbitration agreement, mandatory rules, public policies and the procedural law of the arbitration.[137] Factors such as these establish a basic parameter within which the arbitrator's discretion must necessarily fall.

ii. Can the arbitrator select more than one law or even a non-national rule or law?

Another variation of language under choice of law provisions that delimits the scope of the arbitrator's discretion can be found in the use of the expressions 'the law' and 'rules of law'. For instance, article 21(1) of the ICC Arbitration Rules of 2021 *inter alia* provides that:

> In the absence of any such agreement, the arbitral tribunal shall apply the *rules of law* which it determines to be appropriate. (Emphasis added)[138]

An example of the second variation can be found in article 23 (2) of the *DIS Rules* of 1998. It provides that:

> 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

135 UNCITRAL *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-First Session: A/CN.9/684* 21.
136 Born *International Commercial Arbitration* 4107.
137 Born *International Commercial Arbitration* 4107.
138 See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

connected. (Emphasis added)[139]

The use of the expression 'the law' generally connotes that the arbitral tribunal may select one particular national law. Using the word 'law' in the singular creates the impression that arbitrators cannot select non-national legal rules, transnational laws or principles. It also creates the impression that the merits of a dispute may not be governed by more than one law. Interpreting arbitration provisions that have been designed using the term 'law' in its singular sense, greatly restricts the arbitrator's discretionary power.[140] This may have impractical connotations for contemporary international commercial arbitration as it is not usually governed by one law. This approach of interpreting the term 'the law' in its singular sense has however been broadened under some arbitration laws.[141] For instance, the drafters of article 35(1) of the 2010 UNCITRAL Arbitration Rules have suggested that the expression 'the law' should be interpreted in sufficiently broad terms to include the arbitral tribunal's authority to apply different laws, depending on the circumstances of the case.[142]

Furthermore, the use of the expression 'rules of law' creates the impression that, the arbitral tribunal may select not just one particular national law, but that they may even choose transnational rules and principles such as the *lex mercatoria*. To make clear the scope of the arbitrator's discretionary power, in relation to the range of options of law they may apply, some arbitration instruments have abandoned the use of the restrictive expression 'the law' for a more direct and liberal option, 'the rules of law'.[143] Some have also used both expressions at the same time, to prevent confusion about the scope of the arbitrator's discretion.[144]

iii. Can the arbitrator select the applicable law directly or indirectly using conflict of laws rules?

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139 The DIS (German Arbitration Institution) Arbitration Rules of 1998. This arbitration rules designed by the Deutsche Institution für Schiedsgerichtsbarkeite.V. German Institution of Arbitration to regulate both domestic and international arbitration. See DIS 2015 https://sccinstitute.com/media/29988/german-arbitration-act.pdf.

140 Waincymer *Procedure and Evidence in International Arbitration* 993.

141 Waincymer *Procedure and Evidence in International Arbitration* 993.

142 Caron and Caplan *The UNCITRAL Arbitration Rules a Commentary (With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*128.

143 For example, art 24(2) of the DIS Arbitration Rules (2018) changes the restrictive approached provided under sec 23(2) of its 1998 Rules.

144 An example of this approach is found in art 29(2) of the Arbitration Rules of the Arbitration Institute of the Finland Chamber of Commerce Arbitration Rules of 2020.

The various methods that have been discussed in previous sections can be categorised as directing the arbitrator to directly or indirectly determine the applicable substantive law. The direct method is considered more flexible and liberal as it does not mandate a conflict of laws analysis.[145] There may be several permutations of the direct method. Arbitration statutes and rules may for instance instruct arbitrators to directly apply the law or rules of law they consider to be appropriate and the law which is most closely connected to the dispute. The indirect method which requires some conflict of laws analysis to be done in order to determine the applicable law can be a restrictive and complex process. Usually, arbitration statutes and rules that follow this approach may instruct that arbitrators apply the law determined by the conflict of laws rules which they consider applicable, the arbitration seat's conflict of laws rules or a specific choice of law rule such as the closest connection rule.[146] Various commentators have suggested that to avoid the possible complexities associated with determining the applicable substantive law, in the absence of choice, parties must consciously decide on the law to govern their underlying contract.[147]

3.3.4. Limits on the choice of the applicable law in arbitration: Mandatory law and public policy

Arbitration as an alternative dispute resolution mechanism is all about choice.[148] It involves among other things the choice to arbitrate, the choice of law, the choice of arbitrators, the choice of the place of arbitration and the choice of procedures to be applied. This makes party autonomy the bedrock of arbitration. As alluded to in various stages of this discussion, mandatory laws and public policy limit party autonomy in international arbitration. They serve as mechanisms that countries use to regulate and supervise international arbitration. Party autonomy operates only to the extent permitted by the *lex fori*.[149] Although mandatory laws and public policy limit the freedom of parties or arbitrators to choose the applicable law, they are technically not the same concepts. They have different implications in the arbitration process although their functions may overlap. The question is

145 Caron and Caplan *The UNCITRAL Arbitration Rules a Commentary (With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)* 128.
146 Moses *The Principles and Practice of International Commercial Arbitration* 75-78.
147 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 224; Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration*.
148 Buys 2005 *StJohn'sLRev* 59.
149 Symeonides 2013 *Am J Comp L* 882.

how do they influence the choice of law selection process in international commercial arbitration?

i. Mandatory rules

Mandatory rules also referred to in French as *lois de police, lois d'application immediate, règles d'ordre public*, are provisions that prevail irrespective of the law chosen by the parties to govern their dispute or irrespective of the law applicable to their contract.[150] They are rules that are directly applicable without any choice of law analysis to determine their applicability in a case involving a foreign element.[151] The purpose of mandatory provisions is to safeguard perceived public interests. They reflect national policies, that protect parties within or outside their contract.[152] Generally, mandatory rules are used to protect the economic, social and political interests of a country. The *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations* (Rome I Regulation)[153] aptly defines mandatory laws as:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.[154]

Mandatory rules may be procedural or substantive in nature.[155] Procedural mandatory rules establish obligatory guidelines for attaining certain substantive contractual outcomes.[156] For instance, it may require that arbitration be conducted following due process. On the other hand, substantive mandatory laws restrict the variety of possible contractual arrangements that parties may agree on.[157] Examples of typical issues include securities laws, antitrust, intellectual property and taxation.[158] When parties are selecting the governing law of their contractual relationship, it is

150 Zhilsov 1995 *NILR* 88-94.
151 Chen 2016 *Int'l Trade & Bus L* 250.
152 Mandatory rules that protect parties outside their contract are driven by factors that a negative external effect on the public whereas mandatory rules that that protect parties within their contracts have negative internal effects on the parties to a contract. Zamir 2020 *Tex Law Rev* 289.
153 See Thomson Reuters 2023 http://uk.practicallaw.thomsonreuters.com/.
154 Art 9 (1) of the Rome I Regulation (2008).
155 Mandatory rules by nature may comprise both a spatial criterion and a substantive content. Zhilsov 1995 *NILR* 89.
156 Zamir 2020 *Tex Law Rev* 289.
157 Zamir 2020 *Tex Law Rev* 289.
158 Waincymer *Procedure and Evidence in International Arbitration* 1013.

prudent for them to consider the implications of their selections in relation to mandatory rules. The restrictions of a particular forum's mandatory rules can impact a party's choice of one law over another. Agreements on the law applicable to a contractual relationship indirectly encompass the mandatory rules.

Where arbitrators must select the law applicable to a party's contract, they must consider possible mandatory laws connected to the dispute. Several conflicts may arise concerning mandatory laws in arbitration. There may be conflicts between national and party interests in the outcome of the arbitration; conflicts between two or more national mandatory laws or national interests.[159] Arbitrators must resolve such conflicts by taking into consideration and balancing the competing interests of all players involved. Doing this, however, may not be so straightforward. For instance, when mandatory rules put national and party interests in direct conflict, where the arbitrators' allegiance lies speaks greatly to their approach to mandatory rules. That is, do the arbitrators accept that arbitration is a private process initiated by parties or do they consider it a process that emanates from a country? The answer to this question is not easy because it involves arbitrators choosing between the parties that appoint them and the country supporting them.[160] Notwithstanding this, acknowledging that arbitration is a hybrid system that is contractual in nature and subject to some national law, for instance, may assist in establishing the balance between national and party interests. In this sense, the will and intention of parties must be considered when the arbitrators make a selection of the governing law, as well as national interests.

The conflict may also be between the mandatory laws of the different countries involved at various stages of the arbitration process. In this instance, arbitrators establish a balance between conflicting mandatory rules by using objective and fair means to decide between the legitimate legislative goals of the various countries whose citizens are involved in international transactions.[161] A country may be connected to a dispute because it is the place where the contract was concluded, because it is a potential place where enforcement can be sought and because assets are held there. The application of the mandatory rules of some of the countries connected to a transaction may render an arbitration agreement invalid or in some instances render some issues incapable of being arbitrated. That is to

159 Barraclough and Waincymer 2005 *MJIL* 207.
160 Barraclough and Waincymer 2005 *MJIL* 207.
161 Barraclough and Waincymer 2005 *MJIL* 207.

say, mandatory rules could influence the selection of the proper law. Decision-makers must skilfully weigh the different interests of the various countries connected to the transaction to determine the applicable mandatory rule in relation to the circumstances of the case. It is to be noted however that, in cases of true conflict with competing policies of equal force, each forum is likely to apply its own law.[162] In all, there is no set method for resolving the tension between party and national interests when it comes to the application of mandatory rules in arbitration.[163] Notwithstanding this, a party's or arbitrator's choice of the governing law generally will immediately be given effect where it reflects the policy regarding its application and meets the scope of requirements of the forum country.[164]

ii. Public policy

Public policy rules also known in French as *lois d'ordre public*, enable courts of a particular country to refuse recognition and enforcement of an arbitral award where its enforcement is sought.[165] The UNCITRAL Model Law on which most modern arbitration law is based has no definition of public policy. Similarly, the New York Convention which is the leading document on recognition and enforcement does not define what public policy is. Accordingly, governments have developed their individual formulations and interpretations for the concept of public policy.[166] No one jurisdiction has the same public policy as the other. Various countries have different standards that underpin their national public policy and different interpretations of it. Indeed, the public policy exception is codified in numerous instruments, including the UNCITRAL Model Law[167] and the Hague Principles.[168] Article

162 Naón *Choice-of-Law Problems in International Commercial Arbitration* 171.
163 Barraclough and Waincymer 2005 *MJIL* 243.
164 Symeonides 2013 *Am J Comp L* 883.
165 Although the common law term public policy and the civil law term *ordre public* are analogous they are not synonymous in meaning and scope. Whereas both the notion public policy and ordre public imply that foreign laws or acts should be not be recognised where it would be inconsistent with a country's fundamental conceptions what is legal, just and moral. On the other hand, the civil law notion of *ordre public* further extends to domestic rules and statutory requirements which are peremptory by nature. However, conception of the notion of public policy under New York Convention corresponds to the French notion of *ordre public*. The gradual development of the notions into one idea has reduced the relevance for the difference between the two concepts. Garcia de Enterria 1990 *Law & Pol'y Int'l Bus* 395,396; Zhilsov 1995 *NILR* 94.
166 See generally Garcia de Enterria 1990 *Law & Pol'y Int'l Bus* 390-440.
167 Art 36(1)(b)(ii) of the UNCITRAL Model Law (1985) directs that an award be set aside when it contradicts public policy.
168 Art 11 of the Hague Principles (2015) addresses overriding mandatory rules and public policy (*ordre public*).

V(2)(b) of the New York Convention provides that, a competent court may refuse recognition and enforcement of an arbitral award when it discovers that it would be contrary to its public policy.[169]

The public policy concept can be considered as a device that is used to counterbalance the principle of party autonomy and the judge's effort to interpret essential social and economic principles of a legal system, to determine which aspects of the party's contract or chosen law infringe upon it.[170] Public policy rules may also be considered as a set of normative principles which represent the social and legal values of a particular country.[171] In this sense, not only judges are obliged to apply them but also other legislative bodies. Usually, a legal system's economic, social, religious and political values inform their formulation of a public policy exception.

Public policy may have a negative or sometimes a positive connotation. In its negative form, public policy is commonly used as a tool to preserve and safeguard the foundations and standards of a forum country.[172] In this sense, public policy is used as a defence against the application of foreign rules or arbitral awards where their enforcement will be inconsistent with the fundamental principles of the forum country. In cases where the enforcement of a foreign award would manifestly infringe the integrity of a forum country's legal order, it may be refused based on public policy. With regards to public policy, it is the consequences of the application of a rule within a forum country which is in question and not the foreign rule itself.[173] When a judge is presented with a case involving a foreign element, he first considers the local conflict of laws rules to determine the applicable law. Where the conflict of laws rules points to a foreign law other than the *lex fori*, the judge considers its suitability for the present case by determining if its application will violate any fundamental principle of the forum country. Where it is established that the foreign applicable law is unsuitable, it inadvertently displaces the operation of conflict of laws, making way for the application of the norm established by the legal system of the forum country for such situations. In cases like this, the *lex fori* is usually directly applied when the indicated *lex causae* regarding a particular issue is displaced by public

169 A similar provision is found in art 36(2)(b) of the UNCITRAL Model Law (1985).
170 Zhilsov 1995 *NILR* 95.
171 Zhilsov 1995 *NILR* 95.
172 Zhilsov 1995 *NILR* 95.
173 Zhilsov 1995 *NILR* 96.

policy.[174]

On the other hand, public policy in the positive sense connotes instances where the function of the law is to ensure that certain rules apply in a particular instance irrespective of the applicable law.[175] In this regard, the application of public policy is compulsory in a particular situation. Writers suggest that *lois d'ordre public* reflects the fundamental principles of the *lex fori*, and therefore should be enforced regardless of the presence the foreign elements in the case.[176] The operation of these rules demonstrates the positive function of public policies by identifying and imposing the application of certain rules when specific issues arise before the forum country without rejecting the otherwise applicable foreign law.
Here, public policy adopts a peremptory character which cannot be derogated from by the parties

iii. The interrelatedness of mandatory rules and public policy

As can be deduced from the discussion so far, mandatory rules and public policy are very different but also overlap. They are both tools used by countries to protect the fundamental principles of their society. In some ways, mandatory laws are expressions of public policy.[177] The fundamental values they seek to protect are often by nature public policies.[178] The main difference between mandatory rules and public policy lies in the moment they intervene.[179] Mandatory laws restrict conflict of laws analysis whereas public policy interferes after a conflict of laws analysis was conducted and foreign law is deemed applicable.[180] Mandatory provisions are usually considered at the start or during the conflict of laws analysis and public policy operates during the enforcement of the particular proper law. Once a mandatory provision is deemed applicable, it immediately curtails any further investigation into foreign law. On the other hand, public policy may be used to avoid the application of a foreign law rule indicated by a choice of law

174 However, some countries are known to apply methods other than directly applying the *lex fori* where this situation arises. For instance, in Germany, to filling the gaps left by the exclusion of foreign law, the court is directed to consider the law closest to the law which has been rejected before resorting to the *lex fori*. Zhilsov 1995 *NILR* 89.
175 Zhilsov 1995 *NILR* 95.
176 Chong 2006 *J Priv Int Law* 28-30,32-35; Lee 1998 *UQLJ* 1, 4–6; Zhilsov 1995 *NILR* 100-105.
177 Nygh *Autonomy in International Contracts* 203.
178 Zhilsov 1995 *NILR* 88.
179 Kessedjian 2007 *Erasmus Law Rev* 26.
180 Kessedjian 2007 *Erasmus Law Rev* 26.

rule.[181] The choice of law rule may be applicable within the forum, however, based on a public policy exception a forum court may avoid the result of its application.[182] Forum courts may use this approach for several reasons, including the fact that they want to apply their forum laws and the fact that the forum may have a very important connection with the circumstances of the case.

Also, it is necessary to note that both public policy and mandatory laws can be viewed from two perspectives — national and international.[183] National public policy or national mandatory laws are rules or principles of the *lex fori* that parties cannot derogate from when they enter into domestic agreements. The national public policy or mandatory laws regulate only internal domestic relationships. On the other hand, international public policy or mandatory rules are used where the relationship involves a foreign element.[184] International contracts and foreign awards are regulated by public policy principles and mandatory rules that go beyond rules used for purely internal cases. It should be noted that both national and international public policy or mandatory rules form part of the *lex fori.*[185] Public policy rules and mandatory laws that are obligatory in the international context may also be obligatory in the domestic context. Distinguishing between international and national mandatory rules or public policy helps to sort out which principles and concepts apply in cases that are international or purely domestic. Notwithstanding this, there may be situations where mandatory rules and public policies of a country are foreign to those of the forum country.[186] Arbitral awards have demonstrated that in such situations, generally, for the arbitral tribunal to apply a foreign mandatory law or public policy, there should be a relatively close connection between the relevant contract and the foreign country whose mandatory law is at issue.[187] It is

181 Paulsen and Sovern 1956 *Columbia Law Rev* 981.
182 Paulsen and Sovern 1956 *Columbia Law Rev* 981.
183 Zhilsov 1995 *NILR* 98-100.
184 Here, 'truly international public policies' should not be confused with transnational public policies, which are not found in any national law. Transnational public policies are standards that have been accepted and used in the international community. These may include principles general principles of morality, due process, fair hearing and principles that condemn terrorism, drug trafficking and corruption in public international law. Zhilsov 1995 *NILR* 98; Barraclough and Waincymer 2005 *MJIL* 218; Mayer "Chapter 2: Effect of International Public Policy in International Arbitration" 61-69.
185 Symeonides 2013 *Am J Comp L* 884.
186 Born *International Commercial Arbitration* 4157.
187 Some legislative provisions permit the application of foreign mandatory rules or public policies in limited circumstances. For instance, arts 9(2) and 9(3) of the Rome

certainly prudent for arbitral tribunals to determine the applicability of foreign mandatory laws and public policies against the broader backdrop of all the interests, parties and countries, concerned in international commercial transactions and the unique circumstances of each case.

3.4. Comments

Whether applicable substantive law is selected by the parties or arbitrators, it essentially serves as a system of law that governs the rights and obligations of parties to the agreement. Although this legal system may be curtailed by mandatory rules and public policy, it is suggested that knowledge of the possible limits on a choice of applicable law has definite advantages. Arbitrators and parties can select the appropriate law considering the possible outcomes of their choices. This could save the time and expense associated with lengthy arbitration or litigation.

The applicability or otherwise of mandatory laws and public policy in the absence of the parties' express choice of the applicable substantive law in international commercial arbitration can be a controversial issue. The admitted contractual nature of international commercial arbitration and its lack of allegiance to any particular legal order means that the party and national interest may be in conflict. Multiple parties and countries may have conflicting mandatory laws or conflicting interests in the outcome of an arbitration. It is suggested that, how the arbitrator strikes a balance between such competing interests, requires a consistent and principled approach. Otherwise, the arbitrator's decision on such issues may undermine the integrity of arbitration as a dispute resolution mechanism.

3.5. General Concluding Remarks

The discussion so far reveals that the substantive law applicable to the merits of a dispute is vital in international commercial arbitration. In arbitration, it can simply be understood as the law that applies to a dispute. This is different from the law that regulates the conduct of the arbitration or the law applicable to the arbitration agreement. The merits of a dispute is the substance of a claim or defence. In arbitration, substantive law governs

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I Regulation (2008) and arts 7(1) and 7(2) of the Rome Convention (1980) require that a close connection is established between the relevant foreign country and the contract and conduct (performance). Born *International Commercial Arbitration* 4163. For arbitral awards on the application of foreign mandatory law or public policy see ICC Final Award No. 14792 Yearbook XXXVII (2012) and ICC Final Award No 8528 of 1996 Yearbook XXV (2000).

the basis of a claim or defence. As established in the chapter, substantive law may be found in both national and non-national sources. A choice of substantive law can however be limited by mandatory rules or public policy.

As stated in the introductory paragraph to this chapter, despite the differences in legal cultures, party autonomy has become a generally accepted rule. Similarly, in arbitration, despite the differences in the legal cultures of countries, it is widely accepted that parties may determine the law that will govern the merits of a dispute. It is also widely accepted that where parties have not selected the law that will regulate the substance of their dispute, the arbitrator may choose one. This freedom afforded parties and arbitrators however is not without its limitations. The different related concepts of mandatory laws and public policy curtail the arbitrators and the parties' choices when it comes to the governing law. It is essential for parties and arbitrators to understand these limitations to ensure that their choice of a governing law is made within those boundaries, to preserve the integrity of the international commercial arbitration process.

CHAPTER 4

POSSIBLE METHODS USED BY ARBITRATORS TO ASSIGN THE APPLICABLE SUBSTANTIVE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

4. General Introduction

Parties often fail to select the law that will govern their rights and obligations because they could not agree on the law to be applied or because they simply disregarded the issue.[1] In such situations, the parties' failure to select a law to govern their disputes presents arbitrators with the task of determining the applicable substantive law. The default authority of the arbitrator to assign the applicable substantive law is recognised in almost all arbitration rules and laws.[2] This two-sectioned chapter aims to analyse the diverse approaches observed within arbitration rules and laws.

Section I highlights the methods present under national and non-national regimes used by arbitrators to determine the substantive law applicable to the merits of a dispute, where parties have not indicated any. Here, various sources of the approaches used by arbitrators shall be outlined and their provisions analysed. Variations in the approaches presented under these provisions shall be noted and discussed. Section II delves into common methods used by arbitrators to assign the governing law, highlighting how they operate, the various strategies they offer arbitrators to assign the applicable substantive law, and their similarities as well as their differences.

The chapter fundamentally aims to demonstrate how the law applicable to the merits of a dispute in arbitration is determined in the absence of the parties' choice under various national and non-national regimes found outside Africa (mostly those of Western regimes). In this regard, the focus shall be on answering two questions: what are the methods or approaches among arbitration laws or rules used by arbitrators when they must assign the substantive law applicable merits of a dispute and how do these laws or

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1 Carlquist *Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration* 21.

2 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 102.

rules operate?[3]

Section I: Sources of the Methods Used by Arbitrators to Assign the Applicable Substantive Law

4.1. Introduction

The application of conflict of laws rules of a forum in an international case before a domestic court is different from its application in a dispute submitted to international arbitration.[4] In the case of the former, a judge applies a fixed set of conflict of laws rules of the forum to determine the applicable law. These conflict rules assist in identifying what law is applicable in a situation involving a foreign element. The judge is bound to apply the particular set of conflict rules that are connected to the particular international contract. In the case of the latter, arbitrators are not bound to apply the conflict rules of the forum and they have expansive discretion to determine the applicable law. As established earlier, the default position for situations where parties fail to select the governing law of their dispute under most arbitration instruments is that arbitrators determine it. These instruments offer different methods to arbitrators to determine the law governing the dispute. Usually, these methods (which are varied) may or may not point to the application of conflict of laws rules to determine the governing law of the dispute. This section of the chapter reviews various methods or approaches that arbitral tribunals use to determine the governing law of the dispute. The appraisal will be done to determine the common approaches used by arbitrators to determine the applicable substantive law in the absence of the parties' choice. Sub-sections that follow provide an exposition of the various approaches found in national and non-national sources.

4.1.1. Common methods to determine the substantive law in national arbitration laws

Generally, in a particular national territory, there may be specific laws for domestic arbitration and those precisely for international arbitration.[5] These

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3 Matters regarding ascertaining the contents of the various possible applicable laws does not fall under the purview of this thesis. For more information on ascertaining the content of applicable laws, see generally International Law Association *Final Report: Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*.

4 Belohlavek "Extent of Procedural and Substantive Law in Arbitration and Litigation" 35,36.

5 Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 202.

may be found in one statutory instrument on arbitration or in separate ones. In relation to determining the applicable law, usually, national arbitration laws grant arbitrators substantial discretion to either choose the appropriate or applicable set of conflict of laws rules or follow a specific choice of law rule.[6] The approach provided for determining the applicable law in international arbitration seated in a particular territory differs from jurisdiction to jurisdiction. Examples of common methods used by arbitrators to identify the applicable law as found in national laws on arbitration (specifically those applicable to international arbitration) include the following.

1. Section 1051(2) of the *German Arbitration Law* of 1998 provides that:

> (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.*[7] (Emphasis added)

2. Section 64 (2) of the *Arbitration Ordinance of Hong Kong* of 2011 which is based on article 28 (2) of the UNCITRAL Model Law[8] provides that:

> (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*.[9] (Emphasis added)

3. A variation of this approach is also found in section 41(2) of the *Act LX* of 2017 on arbitration for Hungary. It provides that:

> (2) In the absence of a choice of law by the parties, the arbitral tribunal shall determine the applicable substantive law *in accordance with the private international law rules which it considers applicable.*[10] (Emphasis added)

4. Article 1054(2) of the *Dutch Code of Civil Procedure* of 1986 applicable to arbitration in the Netherlands *inter alia* provides that:

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6 Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 202.
7 German Arbitration Act of 1998.
8 UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006.
9 Hong Kong Arbitration Ordinance (Cap 609) of 2011. See HK e-Legislation 2022 https://www.elegislation.gov.hk/hk/cap609?pmc=1&m=1&pm=0.
10 Hungarian Arbitration Act, Act LX of 2017. See ILO 2018 https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/106843/131257/F-266585574/J2017T0060P_20180102_FIN.pdf.

> (2) Failing such choice of law, the arbitral tribunal shall make its award in accordance with *the rules of law which it considers appropriate*.[11] (Emphasis added)

Most contemporary national laws on arbitration provide that arbitrators have the authority to identify the applicable law by at least one of the abovementioned approaches.[12] An international arbitration law may empower arbitral tribunals to use a specific conflict of laws rule, the conflict of laws rules which it considers applicable and the rules of law which it considers appropriate. Archaic approaches such as the mandatory application of the local conflict of laws rules of the seat of arbitration and the application of substantive laws of the seat of arbitration have become obsolete and unpopular under modern international arbitration laws.[13] Modern international arbitration laws gravitate towards creating a system that grants arbitrators wide discretion to determine the law pertaining to the substantive issues between parties, especially, one that is not heavily reliant on the laws of the seat of arbitration.

The first approach in the list above is a depiction of the approach where a specific conflict of laws rule is to be applied to arbitrations seated within a national territory.[14] The arbitration laws of Germany,[15] Switzerland,[16] Japan,[17] Korea[18] and China[19] adopt this approach by specifically directing arbitrators to apply the law most closely connected to the subject matter of the arbitration. Here, the conflict rule specifically designated serves as a formula to be applied in international arbitration matters seated within the national territory. This approach is different from the archaic approach of mandatorily requiring arbitrators to apply the local conflict rules of the seat of arbitration. In this approach, usually the rule designated in the arbitration statutory instrument is to be applied by arbitrators to determine the law governing the dispute, without referring to the conflict of laws rules of the forum.[20] This

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11 Dutch Code of Civil Procedure of 1986. See SiSU 2010 http://www.jus.uio.no/sisu.
12 Born *International Commercial Arbitration* 4092.
13 Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 191-196.
14 See point 1 para 4.1.1 above.
15 Sec 1051(2) of the German Arbitration Law of 1998.
16 Art 187(1) of the Switzerland Federal Act of 1987.
17 Art 36(2) of the Japanese Arbitration Law No.138 of 2003.
18 Art 29(2) of the Korean Arbitration Act, Act No. 14176 of 2016.
19 Art 145 of the General Principles of the Civil Law of the People's Republic of China, Order No. 37 of 1986.
20 This, however, does not mean the arbitral seats conflict of laws rules is no longer significant in international arbitration. On the contrary. Where its application is implied or a country's arbitration rules designate it application, it is still used. Gaillard

approach is lauded for being flexible and predictable as it permits arbitrators to select any law which has some connection to the dispute. Specific conflict rules on how arbitrators should determine the applicable law allow the countries to regulate the arbitration process without relying on archaic provisions such as the mandatory application of local conflict laws or substantive laws of the seat of arbitration.[21]

The second approach highlighted above permits arbitrators to identify and apply a choice of law rule they consider applicable or appropriate.[22] Here, to determine the applicable law, the arbitrators must necessarily apply the law determined by a conflict of laws rule. In other words, the arbitrators must conduct a conflict of laws analysis to determine the applicable law. To do this, they use methods such as the cumulative test or the method of applying general principles of private international law to sift through the choice of law rules of legal systems to determine the applicable law.[23] This approach is considered the oldest approach found in modern arbitration laws for determining the applicable law.[24] When arbitrators are empowered to use this approach, they have broad autonomy not only to determine the applicable conflict of laws rule but also the applicable substantive law. They are neither restricted to applying the conflict rules of a particular country nor restricted to applying any specific conflict of laws rules.

The third approach highlighted above depicts the method by which arbitrators can directly select the laws they deem appropriate without recourse to any conflict of laws analysis.[25] They may choose whichever substantive law they consider appropriate to be the applicable law. Arbitrators mandated to apply this method are free to choose the rules of statutes, transnational rules or even invent the selection of a combination of laws.[26] In effect, the third approach allows arbitrators to select whichever substantive law they deem appropriate or applicable. Comparing this

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and Savage *Fouchard, Gaillard, Goldman on international commercial arbitration* 868,869.

21 Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 204.

22 See point 2 para 4.1.1 above.

23 Subsequently these approaches shall be discussed.

24 It first appeared in art VII, paragraph 1 of the 1961 European Convention on International Commercial Arbitration. This approach was also used in art 33 of the UNCITRAL Arbitration Rules (1976) and sec 46(3) of the English Arbitration Act of 1996. The approach is used in art 28(2) of the UNCITRAL Model Law (1985). Countries who have adopted the model law also use this approach. Jacquet *5.5 Law Governing the Merits of the Dispute* 17.

25 See point 3 para 4.1.1 above.

26 Gaillard and Savage *Fouchard, Gaillard, Goldman on international commercial arbitration* 875.

approach to the second approach listed above, some commentators have argued that they are very similar in practice.[27] Actually, both methods do not only provide arbitrators broad discretion when selecting the appropriate or applicable substantive law but also allow them to consider similar factors (such as the *locus solutionis* or *locus contractus*) when searching for the applicable law.[28]

Finally, when countries mandate the application of particular laws in specific instances a fourth approach to determine the applicable law emerges. This comes in the form of mandatory statutory instruments enacted with the aim of protecting parties in specific circumstances.[29] Such national laws may target specific issues such as consumer protection, antitrust or securities. Countries require the mandatory application of such laws when a particular type of situation arises. This is not a choice of law method *per se,* but it offers arbitrators a specific option of law in special instances. The mandatory law becomes the substantive law applicable when specific claims or defences are raised in the arbitration.[30]

4.1.2. Common methods to determine the substantive law in institutional arbitration rules

Generally, institutional arbitration rules allow both parties and arbitrators to freely select the law applicable to the substance of their dispute.[31] Similar to the situation under national laws, the arbitrator is granted varying degrees of authority to select the applicable law where it is absent. Usually, the position of institutional arbitration rules regarding the arbitral tribunal's authority to determine the applicable law varies from one instrument to another. However, due to the legal harmonisation efforts of intergovernmental organisations such as the Hague Conference on Private International Law (HCCH), the Institute for the Unification of Private Law (UNIDROIT) and most importantly the UNCITRAL, current institutional arbitration instruments have very similar features.[32] This trend is particularly evident when it comes to the approach for assigning the law applicable to

27 Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 204.
28 Doug 2014 *SAcLJ* 931.
29 Born *International Arbitration: Law and Practice* 269.
30 Born *International Arbitration: Law and Practice* 269.
31 Born *International Commercial Arbitration* 4085.
32 Similar features found in major institutional rules include emergency arbitrator provisions and rules on the power to order consolidation and rejoinder. There, however, still remains some significant features that vary from one institutional rule to the other. This may include the arbitration institution's approach to confidentiality obligations and its approach to the appointment of arbitrators.

the merits of a dispute in the absence of the parties' choice. Take, for instance, the following provisions on the arbitrator's authority to select the applicable law as presented in the rules of five renowned arbitration institutions.[33]

1. Article 21(1) of the International Chamber of Commerce (ICC) Arbitration Rules of 2021 provides *inter alia* that:

   (1) In the absence of any such agreement, the arbitral tribunal shall apply the *rules of law which it determines to be appropriate.*[34] (Emphasis added)

2. Article 31(1) of the Singapore International Arbitration Centre (SIAC) Rules of 2016 provides that:

   31(1) The Tribunal shall apply the law or 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 or rules of law which it determines to be appropriate.*[35] (Emphasis added)

3. Article 36(1) of the Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules of 2018 *inter alia* provides that:

   36 (1) Failing such designation by the parties, the arbitral tribunal shall *apply the rules of law which it determines to be appropriate.*[36] (Emphasis added)

5. Article 22(3) of the LCIA Arbitration Rules of 2020 *inter alia* provides that:

   22(3) If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall *apply the law(s) or rules of law which it considers appropriate.*[37] (Emphasis added)

6. Article 49(2) of the *China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules* of 2015 *inter alia* provides that:

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33 According to a 2021 international arbitration survey conducted, these international arbitration centres are the current top five preferred centres for international commercial dispute resolution. White & Case LLP *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*.

34 See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

35 See Singapore International Arbitration Centre 2020 https://siac.org.sg.

36 See HKIAC 2023 https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018.

37 See LCIA 2023 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

> (2) In the absence of such an agreement or where such agreement is in conflict with a mandatory provision of the law, the arbitral tribunal shall *determine the law applicable to the merits of the dispute.*[38] (Emphasis added).

The above-cited institutional arbitration rules tend to follow a broadly similar pattern when it comes to determining the applicable substantive law. They mostly reflect the choice of law approach adopted under the UNCITRAL Arbitration Rules of 1976.[39] Specifically, the above-mentioned institutional rules reflect the approach set out in article 35(1) of the 2010 or 2013 versions of UNCITRAL Arbitration Rules. This approach, which is known as the direct method (*voie directe*), grants the arbitrator freedom to select any law without conducting a conflict of laws analysis.[40] To compete with other arbitration institutions, centres are constantly changing their rules to improve the services they provide to their clients. A look at the provisions listed above reveals that top arbitration institutions in recent times prefer not to direct arbitrators to mandatorily conduct a conflict of laws analysis when they have to determine the applicable law. Arbitrators are given broad discretion when selecting the applicable law in the absence of a choice by the parties.

The question here is, is the conflict of laws analysis removed when parties submit their disputes to institutional arbitration in contemporary times? In response to this well-justified question, one may put forward the argument that as long as an international contract could be associated with more than one law, the conflict of laws analysis may never be fully eliminated from the arbitration process. Before arriving at the law or rules of law they deem appropriate arbitrators would have to compare a plethora of conflict of laws rules and connecting factors before arriving at the appropriate governing law of the contract considering the particular circumstance at hand. Notwithstanding current trends, typically, institutional arbitration rules may either mandate the arbitral tribunal to select the conflict of laws rule it considers appropriate to determine the applicable law or select the substantive law it deems appropriate.[41] In a few instances also, institutional rules have prescribed the application of specific conflict of laws rules similar to what is done in some national arbitration laws.[42] They refer to the

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38 See CIETAC-EU 2019 https://www.cietac-eu.org/rules/.

39 Since the adoption of the UNCITRAL Arbitration Rules in 1976, it has become widely used and accepted standard from which arbitration bodies draw inspiration when preparing or modernizing their own institutional arbitration rules. See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

40 This approach shall be considered into detail later in this section.

41 Born *International Commercial Arbitration* 4098.

42 For example, art 35 of the Swiss Rules of International Arbitration of 2021 (Swiss Rules) establishes the closest connection rule.

application of the law with the closest connection to the parties' relationship. All in all, regardless of the method adopted under an institutional arbitration rule, its aim usually is to provide arbitrators broad freedom and flexibility to determine the applicable law.

4.1.3. The relationship between national arbitration rules and institutional arbitration rules

It is trite that arbitration institutional rules set out the framework for the arbitration. These rules provide administrative rules that assist the arbitration process. Where parties agree on and refer to a particular arbitration institution and its rules, it implies that they consent to the application of its basic procedural framework to their arbitration. Although it is common for parties to choose an arbitration institution located in their chosen seat, it is neither a necessary nor compulsory practice.[43] Parties may, for instance, choose to have a Switzerland-seated arbitration under ICC Arbitration Rules. A valid question at this juncture is, what happens when the rules of the arbitration institution conflict with the national arbitration rules of the seat? More specifically, what happens when the choice of law methods for determining the governing law of the dispute prescribed in the rules of the arbitration institution conflict with those of national arbitration rules? For instance, where the parties' arbitration seat has rules that specify the application of a particular conflict of laws rule to determine the applicable law when specific issues arise[44] and they also submit to arbitration institution rules which allow arbitrators to apply the law it deems appropriate or applicable, the applicable method comes into question.

According to Born, the solution to this issue lies in national law.[45] He argues that based on party autonomy, which is guaranteed under most national laws on arbitration, the parties' choice of an arbitration institution should technically supersede any statutory formulae for determining the governing law of a dispute. Whether a party makes an express or tacit choice of law, it should technically supersede any national choice of law formulae prescribed for determining the applicable law. This position is, however, not inexorable. Countries always reserve the right to enact arbitration laws that contain a formula that must mandatorily be followed when determining the

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43 K&L Gates *Guide to Leading Arbitral Seats and Institutions* 1.

44 Examples of such provisions can be found in art 187(1) of the Switzerland Federal Act of 1987 and art 29(2) of the Korean Arbitration Act, Act No. 14176 of 2016. They specify that the laws with closest connection with the subject of dispute must apply.

45 Born *International Arbitration: Law and Practice* 269.

law governing a dispute seated within its territory. Therefore, when an arbitration seat prescribes a special choice of law rule which parties cannot contract out of, it supersedes any expressly chosen proper law of the underlying contract, as well as choice of law guidelines found in any arbitration institution's rules.[46]

4.2. Methods for Assigning the Applicable Law Found in International Arbitration Conventions, other Regional and National Statutory Instruments

International arbitration conventions or treaties rarely make express pronouncements on the choice of substantive law.[47] Sometimes, however, some provisions in such conventions may have limited bearing on such choice of law issues. The New York Convention, for instance, a typical international arbitration convention, does not address the issue of the law applicable to the substance of a dispute in the absence of the parties' choice.[48] Nevertheless, the Convention's silence on the matter can be interpreted as granting the arbitral tribunal broad authority to select the applicable substantive law.[49] Courts in the Contracting States are obligated not to review the merits of a dispute.[50] Article V of the New York Convention provides an exhaustive list of grounds for refusing recognition and enforcement of awards.[51] Awards are only refused if one of these exceptions applies. The review of the merits of a dispute does not fall within this scope.[52] The New York Convention does not consider the arbitral tribunal's

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46 Born *International Arbitration: Law and Practice* 269.

47 The 1923 Geneva Protocol and the 1927 Geneva Convention both for instance do not have provision having any bearing on the law governing the substance of a dispute. United Nations Commission on International Trade Law *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 124.

48 Inter-American Juridical Committee *Guide on the Law Applicable to International Commercial Contracts in the Americas* 169.

49 Born *International Commercial Arbitration* 4215.

50 This principle has been established in case law such as Kotraco, Inc. v. V/O Rosvneshtorg, Moscow District Court, Russia, 31 October 1995, XXIII Y.B. COM. ARB. 735 (1998) and Xiamen Xinjindi Group Ltd. v. Eton Properties Ltd., High Court, Hong Kong, 14 June 2012, HCLL (13/2011) and in the commentary of books such as Gaillard and Savage *Fouchard, Gaillard, Goldman on international commercial arbitration* 983 and Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 622.

51 United Nations Commission on International Trade Law *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 124.

52 However, due to the permissive nature (as opposed to mandatory) of art V, it is possible that a court may overrule an exception although it is established. United

erroneous decision on fact or law, grounds for non-recognition or non-enforcement of an award.[53] By doing this, the Convention endorses the arbitral tribunal's authority to determine the law applicable to the substance of a dispute. In the same light, article 5(2)(b) of the *Inter-American Convention on International Commercial Arbitration* of 1975 (Panama Convention)[54] makes public policy violations grounds for non-recognition or non-enforcement of an arbitral award.[55] Where the arbitral tribunal's determination of the applicable law is contrary to the public policy of a country, it may be grounds to refuse recognition and enforcement of an award. Notwithstanding this position, due to the pro-enforcement idea that backs conventions such as the Panama Convention and the New York Convention, only serious violations of public policy are sufficient to warrant refusal of recognition or enforcement.[56] Although arbitration conventions such as the Panama Convention and the New York Convention do not expressly address issues regarding the law applicable to the substance of a dispute in the absence of the parties' choice, they implicitly recognise any law applied by arbitrators to determine the merits of a dispute — as long as it does not violate public policy.

Even though it is not common, some international arbitration conventions do have actual provisions on the choice of substantive law. For instance, the 1961 European Arbitration Convention is not passive about the subject of choice of law. Its article VII is titled 'Applicable Law'.[57] This article enshrines the authority of both parties and arbitrators to determine the law applicable to the substance of a dispute.[58] Similarly, article 42 of the

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Nations Commission on International Trade Law *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 124.

53 United Nations Commission on International Trade Law *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 126.

54 The Inter-American Convention on International Commercial Arbitration also known as the Panama Convention is a multilateral agreement which regulates the conduct of international commercial arbitration and the enforcement of arbitral awards. The Convention has been incorporated into US law under secs 301 to 307 of the Federal Arbitration Act (FAA) of 1925. Its art 5 is similar to art V of the New York Convention.

55 See OAS 2023 https://www.oas.org/.

56 United Nations Commission on International Trade Law *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 240-243.

57 See United Nations 2023 https://treaties.un.org/.

58 Specifically, art VII(1) European Convention on International Commercial Arbitration (1961) establishes both the parties' and arbitral tribunal's authority to select the applicable to the substance of the dispute. Hascher "European Convention on International Commercial Arbitration of 1961: Commentary" 532.

Washington Convention[59] also provides that parties are free to agree on the applicable law and arbitrators have the authority to select one where it is absent.[60] In relation to the authority of the arbitrator to determine the law governing the dispute, the Washington Convention directs *inter alia* that:

> 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.[61]

The 1961 European Arbitration Convention also *inter alia* provides 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.[62]

Both conventions envisage that the arbitral tribunal shall conduct some conflicts analysis to determine the law applicable to the substance of the dispute. However, when the two provisions are compared, it is revealed that under the Washington Convention arbitrators are directed to which conflict of laws rules to apply (that is the law of the Contracting State party to the dispute)[63] while the provision under the 1961 European Arbitration Convention is silent on how arbitrators are to conduct the conflict of laws analysis. Most arbitration conventions are either silent on the approach or provide insufficient tests to be used by arbitrators to determine the governing law of the dispute. Consequent to this, the process for analysing and identifying the applicable law in the absence of a choice by the parties becomes heavily reliant on the arbitral tribunal's broad and often unfettered discretion. The procedural course which arbitrators take to determine the

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59 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) aims to promote cross-border investment by providing effective facilities of conciliation and arbitration of investment dispute between Contracting States and nationals of other Contracting States. It is with this agenda in mind that the Convention established the International Centre for Settlement of Investment Dispute (ICSID) in 1966. World Bank Group – ICSID 2023 https://icsid.worldbank.org/. Although the Washington Convention is a great example for some issues, its operations do not fall within the scope of this thesis.

60 See World Bank Group – ICSID 2023 https://icsid.worldbank.org/.

61 Art 42(1) of the Washington Convention (1965).

62 Art VII (1) of the European Arbitration Convention (1961). See United Nations 2023 https://treaties.un.org/doc/Publication/UNTS/Volume%20484/volume-484-I-7041-English.pdf.

63 The choice of law process adopted under the Washington Convention for investment arbitration points to conducting the closest connection test. The conflict of laws rules of the Contracting State that is most closely connected to the dispute is considered alongside international law. This clearly defined process limits the extent of the arbitrators' discretion in the arbitration process.

applicable law must ultimately thrive to meet the reasonable expectations of the parties and commercial realities. Still, due to their wide discretion, arbitrators are free to ground their decisions on any reason, even those based on subjective views. The arbitral tribunal's analysis and eventual selection of the law may affect the outcome of a case. The question here is what limits should be placed on the arbitral tribunal's discretion or should there even be limits on it? The answer to this question may reveal the true purpose of a conflict of laws analysis in the arbitration process. In the meantime, where international arbitration conventions do not address choice of law issues, by virtue of the widely accepted concept of party autonomy, rules and principles of other international instruments may be used to fill in the gaps.

4.2.1. Regional and national private international law regimes for assigning the applicable substantive law

Apart from international conventions which are specifically designed for arbitration purposes, there are also other treaties and soft law instruments that provide guidelines on choice of law to regulate contractual relationships.[64] Based on the principle of party autonomy, these instruments may be applicable in the arbitration process and may directly affect the choice of the substantive law. Usually, these instruments may be designed to directly address the choice of law issues generally, regulate the choice of law issues within specific contractual relationships or regulate the choice of law issues within specific regions.[65] Arbitral tribunals are led to apply these instruments either directly through the parties' choice of applicable law or through some other choice of law rules. The arbitral tribunal's duty to apply international conventions or uniform substantive law treaties is derived from the parties' or arbitrators' selected applicable law and not the relevant conventions themselves.[66] Consequent to the fact that these international instruments may not be designed specifically for international arbitration, arbitral tribunals can have varied opinions about their application in the arbitration process. The ways in which some of these international instruments affect the determination of the substantive law in the absence of the parties' choice are discussed below.

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64 Born *International Commercial Arbitration* 4089.

65 Born *International Commercial Arbitration* 4089.

66 Conventions are generally not designed to create obligations for arbitrators. Arbitrators are not legally bound like organs of any state party to a convention. Schroeter "Mandatory Private Treaty Application? On the Alleged Duty of Arbitrators to Apply International Conventions" 304.

i. The application of the Rome I Regulation in arbitration

The European Union Parliament and the Council of the European Union promulgated the Rome I Regulation[67] to resolve conflict of laws that may arise out of contractual obligations in civil and commercial matters.[68] The Rome I Regulation replaced the predecessor instrument the *Convention 80/934/EEC on the Law Applicable to Contractual Obligations* of 1980 (Rome Convention) in Member States – except for those that fall within the territorial scope of the Rome Convention and those in which the Regulation does not apply by virtue of article 299 of European Community Treaty (EC Treaty).[69] The Rome I Regulation is a European Union (EU) instrument which is directly applicable in proceedings before the courts and other authorities of Member States. The role of the Rome I Regulation, however, in the context of international arbitration is not so clear. The Rome I Regulation neither expressly mandate nor exclude its direct application to international arbitration.[70] Nevertheless, express mention of arbitration in the Rome I Regulation can be found in article 1(2).[71] This provision excludes the application of the Regulation to arbitration agreements.[72] Interpreting the nature of the silence of the EU instrument on the matter of its application to arbitration has become a subject hotly debated by commentators.[73]

Some commentators opine that due to the universal application feature of the Rome I Regulation, it may be applied to all kinds of legal proceedings that arise within the EU territory — including arbitration.[74] This interpretation suggests the direct application of the Rome I Regulation to all arbitrations seated in an EU Member State. The reasoning behind this view is that to

67 See Thomson Reuters 2023 http://uk.practicallaw.thomsonreuters.com/.

68 Bonomi "The Rome I Regulation on the Law Applicable to Contractual Obligations: Some General Remarks" 165,166.

69 The Rome I Regulation (2008) applies to contract concluded after 17 December 2009.

70 Babić 2017 *J Priv Int Law* 79.

71 Babić 2017 *J Priv Int Law* 79.

72 Based on the concept of severality the arbitration agreement may be viewed separately from the underlying contract. This provision puts the underlying contract within the scope of application of the Rome I Regulation. This provision cannot be compared to the outright exclusion of arbitration as seen in Art 1(2)(b) of the Brussel I Regulation. It is generally accepted that the Regulation only excludes arbitration agreements and not the dispute itself. Yüksel 2011 *J Priv Int Law* 151-157.

73 Bělohlávek "Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration" 39-43.

74 Art 2 of the Rome I Regulation (2008) provides for the universal application of the Regulation. Babić 2017 *J Priv Int Law* 72.

not directly apply the Rome I Regulation in arbitration cases would be tantamount to breaching EU law and jeopardising EU public policy.[75] To counter this view, it has been argued that such mandatory application of the Regulation can neither be deduced from its text nor its purpose.[76] The purpose of the Rome I Regulation is to provide regular conflict of laws rules that courts of Member States have to apply. The Regulation is not intended to have a direct application in arbitration matters or replace the arbitration laws of Member States.[77] Any such direct application would only curtail the autonomy of parties or arbitrators to determine the law governing the dispute. Unlike courts in the EU that must necessarily apply EU conflict of laws rules, arbitral tribunals are not bound to apply the conflict of laws rules of any one particular legal order. The freedom afforded parties or arbitrators in the selection of the applicable law is the essence of submitting to arbitration.

Though the Rome I Regulation does not directly or mandatorily apply in arbitration, it does play a significant role in the determination of the law applicable to the substance of a dispute. At the very least, it establishes the parties' freedom to choose their applicable law.[78] Where there is no choice of the governing law by the parties and there is a conflict of laws, the Regulation offers a solution to the problem. For instance, Recital 21 of the Rome I Regulation explains that:

> In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.[79]

In the same light, article 4 of the Rome I Regulation[80] in its entirety provides

75 Babić 2017 *J Priv Int Law* 72.
76 Babić 2017 *J Priv Int Law* 77.
77 Fawcett Carruthers and North *Cheshire, North & Fawcett: Private International Law* 700, 701; Yüksel 2011 *J Priv Int Law* 160,161.
78 Art 3 of both the Rome I Regulation (2008) and the Rome Convention (1980) provide for the parties' freedom to choose the applicable law.
79 Rome I Regulation (2008).
80 Rome I Regulation (2008).

the principle of proximity for determining the applicable substantive law.[81] The import of this principle is that a contract shall be regulated by the law of the country which has the closest connection.[82] Article 4(1) of the Regulation initially establishes fixed rules in relation to some specifically named contracts.[83] Then according to article 4(2), where a contract is not covered by article 4(1) or where the elements of a contract would be covered by more than one of the fixed rules in article 4(1), the contract is to be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.[84] Further article 4(3) of the Regulation also contains an escape clause that allows a departure from specific rules where proximity is not achieved in practice. Hence, where the contract is manifestly more closely connected with another country, its law will apply. Overall, article 4 of the Rome I Regulation provides not only one single conflict of laws rule for all kinds of contracts but establishes several conflict rules for different contractual obligations. Such a diverse yet predictable approach to determining the law applicable to a substantive contract can be a very useful tool in international commercial arbitration.

In sum, the prevailing opinion on the extent to which the EU instrument regulates international arbitration is that arbitral tribunals are likely to consider applying the Rome I Regulation to disputes when there is a substantial connection to an EU Member State.[85] For disputes that have no connection to the EU, arbitral tribunals often consider applying article 4 of the Rome I Regulation in the sense that it is an established general principle of private international law.[86] The widely accepted rules contained in the Rome I Regulation may potentially influence the arbitral tribunal's decision on the law to govern the dispute. Arbitral tribunals must however consider overriding public policies and mandatory rules when applying the Rome I Regulation in international arbitration.

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81 Fawcett Carruthers and North *Cheshire, North & Fawcett: Private International Law* 725,726; Bonomi "The Rome I Regulation on the Law Applicable to Contractual Obligations: Some General Remarks" 173-176; Güneysu-Güngör "Article 4 of Rome I Regulation on the Applicable Law in the Absence of Choice – Methodological Analysis, Considerations'' 171-172.

82 Güneysu-Güngör "Article 4 of Rome I Regulation on the Applicable Law in the Absence of Choice – Methodological Analysis, Considerations''171-172.

83 Art 4(1) of the Rome I Regulation contains eight fixed rules governing frequently encountered contracts such as sale of goods contracts and service provision contracts. Fawcett Carruthers and North *Cheshire, North & Fawcett: Private International Law* 727.

84 See Thomson Reuters 2023 http://uk.practicallaw.thomsonreuters.com/.

85 Born *International Commercial Arbitration* 4090; Babić 2017 *J Priv Int Law* 89.

86 Born *International Commercial Arbitration* 4090; Babić 2017 *J Priv Int Law* 89.

ii. The application of the Restatement (Second) of Conflict of Laws in arbitration

In the United States (USA), the principal law that governs arbitration (domestic and international) is the *Federal Arbitration Act* (FAA).[87] It is a federal statute that applies all over the USA. The primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced in accordance with its terms. It provides rules that regulate *inter alia* the validity, irrevocability and enforcement of agreements to arbitrate[88] and it implements the New York Convention and the Panama Convention.[89] Similar to other international instruments on arbitration, the FAA supports the notion that arbitrators are bound by the arbitration rules and procedures agreed on by parties. However, the FAA generally does not address the issue of choice of the substantive law. Consequently, to resolve choice of law issues in international commercial arbitration, arbitral tribunals resort to common standards outlined in instruments such as the Restatement (Second) of Conflict of Laws, the CISG and article 2 of the Uniform Commercial Code.[90]

The *Restatement (Second) of Conflict of Laws* of 1971[91] is a legal treatise that provides judges and lawyers with recommended approaches, particularly for tort and contract conflict of laws cases.[92] The Restatement plays a significant role when designating choice of law methodologies.[93] The Restatement provides a two-stage approach for conducting a choice of law analysis. First, it provides a rule that is to be followed when a particular issue arises and then it subsequently sets out the rules that courts usually apply

87 The Federal Arbitration Act (FAA) (1925) or United States Arbitration Act (USAA), was adopted as early as 1925. The decisions of the United States Supreme also affect arbitration in general. It assists interpreting and filling in gaps on issues that the FAA does not address. Gaillard and Savage *Fouchard, Gaillard, Goldman on international commercial arbitration* 83, 84.

88 Sec 2 the Federal Arbitration Act of 1925.

89 Chapter 2 and Chapter 3 of the Federal Arbitration Act of 1925 implement the New York Convention and the Inter-American Convention of International Commercial Arbitration of 1975 (Panama Convention) respectively.

90 Rutledge *Arbitration and the Constitution* 103-106.

91 An ongoing project is underway to create the Restatement of the Law Third, Conflict of Laws. This effort aims to reevaluate the critical area of conflict of laws, taking into account the substantial legal advancements that have occurred in the field since the influential publication of the Restatement Second in 1971. As of 2023, material including those for Torts, Property, and Contracts, Domicile, Choice of Law and Foreign Law have been approved along with amendments. See American Law Institute 2023 https://www.ali.org/projects/show/conflict-laws/#_status.

92 Fredericks 2020 *Obiter* 25.

93 Fredericks 2020 *Obiter* 25.

in that given situation.[94] The Restatement's basic methodology is to first characterise an issue into a category, in order to ascertain its connecting factor, and then apply the law indicated by the connecting factor. For instance, section 188(1)[95] of the Restatement (Second) contains the general rule for establishing the applicable law in the absence of choice. It provides that:

> The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in s6.[96]

This provision establishes the concept of 'the most significant relationship' between the transaction and the parties. This provision establishes that a law selected in the absence of a choice of the governing law of the contract must have a connection to the transaction and the parties. The principle that there must necessarily be a connection between a law chosen and a dispute has however generally been abandoned in contemporary international arbitration law.[97] There is a move toward giving arbitrators or parties the latitude to select laws that are neutral or not connected to a dispute. No matter the reasons given for a choice, most jurisdictions respect a choice of a governing law that is not connected to either the parties or their transaction.[98] The concept of 'most significant relationship' on the other hand is comparable to the 'most closely connected' approach under article 4(4) of the Rome I Regulation but quite different from the 'manifestly more closely connected' method under article 4(3) of the same Regulation.[99] Similar to the 'most closely connected' approach, the phrase 'most significant relationship' emphasises the importance as well as the depth of the relationship between the law of the country, the parties and their transactions.[100] On the other hand, the phrase 'manifestly more closely connected' emphasises the obviousness of the connection between the

94 Fredericks 2020 *Obiter* 25 -27.
95 Sec 188 of the Restatement (Second) regulates contracts of sale for both goods and services. Apart from this sec 191 of the Restatement (Second) also specifically governs the sale of goods.
96 American Law Institute 2023 http://www.kentlaw.edu/perritt/conflicts/rest188.html.
97 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 793.
98 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 793.
99 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 129.
100 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 129.

country, the parties and their transactions.[101] To establish the most significant relationship, one must consider various connecting factors, the second stage of the Restatement's approach for conducting a choice of law analysis. Section 188(2) provides the connecting factors that establish the most significant relationship between the transactions and the parties.[102] The factors listed include the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties. These factors will not be taken into consideration where it is purely fortuitous and holds no relation to the parties or their contract. For instance, although the place of negotiating may be a significant connecting factor on its own, it is likely not to be considered where parties do not meet to negotiate in person but do so from different jurisdictions via email or telephone.[103] The choice of law approach provided in Restatement (Second) represents the main approach in private international law relating to contract across the states. Due to the flexibility and predictability of this approach it may be well-suited for addressing choice of law issues in arbitration, from the recognition of the parties' selected applicable law, express or tacit,[104] to identifying the country with which a contract has the most significant relationship.[105]

iii. The application of the United Nations Convention on Contracts for the International Sale of Goods in arbitration

After more than 40 years, the United Nations Convention on Contracts for the International Sale of Goods (CISG)[106] is still a relevant and influential legal instrument used in international trade.[107] The CISG was developed to

101 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 129.

102 Sec 188(3) of the Second Restatement elucidates that, if the place of negotiating the contract and the place of performance is in the same state, the local law of this country will usually be applied.

103 Fredericks 2020 *Obiter* 27.

104 Sec 187(1) of the Restatement (Second) provides that the law chosen by the parties shall govern the contract.

105 Sections such as sec 188 and sec 191 of the Restatement (Second) reference the most significant relationship method.

106 United Nations Convention on Contracts for the International Sale of Goods (1980). See UNCITRAL 2023 https://uncitral.un.org/en/texts/salegoods/conventions/.

107 Compared to the 1955 Convention on the Law Applicable to International Sales of Goods, which entered into force September 1, 1964 and the Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 (Hague Sales Conventions) which is yet to come into force, the CISG is a very successful instrument. Organisation of American States *Inter-American Juridical Committee.*

provide a modern, fair and uniform legal regime to regulate contracts for the international sale of goods. It contains a body of substantive rules that regulate international contracts for the sale of goods. Leaving aside the issues that may arise as a result of reservations made by some Contracting States, the application of the CISG by courts can be fairly straightforward.[108] The scope of application of the CISG is established in articles 1 to 6 and article 10. Particularly, article 1(1) contains its basic scope. It provides that:

> Article 1
> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of private international law lead to the application of the law of a Contracting State.[109]

Pursuant to the above provision, after an international contract is categorised as a sales contract, involving parties with their places of business in different countries, the CISG becomes applicable in two main ways.[110] First, the CISG becomes applicable directly where parties have their places of business in different Contracting States. In this instance, by virtue of article 1(1)(a), no antecedent conflict of laws analysis is required. The second way by which the CISG becomes applicable is where only one or neither parties have their places of business in the different Contracting States. Pursuant to article 1(1)(b), in this instance, the CISG becomes applicable where the relevant court's national conflict rules lead to the application of the law of a Contracting State. Article 1(1)(b) becomes relevant only when the CISG is not applicable by virtue of article 1(1)(a). article 1(1)(b) functions in a supporting capacity in this sense. Notwithstanding this mode of operation, based on article 95, countries may make reservations concerning the alternative application of article 1(1)(b) in relation to article 1(1)(a).[111]

Apart from the two mentioned instances, parties may choose the law applicable to their contract, and thereby exclude the application of the CISG

Guide on the Law Applicable to International Commercial Contracts in the Americas 47.

108 Kröll *Arbitration and the CISG* 62.

109 See UNCITRAL 2023 https://uncitral.un.org/en/texts/salegoods/conventions/.

110 Wethmar-Lemmer 2016 *DJ* 59; Ziegel 2005 *J L & Com* 59.

111 See generally Wethmar-Lemmer 2016 *DJ* 58-73; Ziegel 2005 *J L & Com* 59-73.

where it would otherwise have been applicable by virtue of article 1.[112] The validity of such a choice is determined in accordance with the forum's private international law. According to article 6 of the CISG however, parties may exclude the application of the CISG or, subject to article 12, derogate from or vary the effect of any of its provisions.[113] This provision makes it necessary for a forum court to investigate whether the Convention was not excluded, modified or derogated from by the parties, when deciding on the possible application of the CIGS. The scope of application of the CISG can also be affected by the fact whether the forum court is a Contracting State or not.[114] Courts in Contracting States are bound to apply the CISG when the applicability criteria in article 1(1)(a) or 1(1)(b) are satisfied, unless they made an article 95 reservation,[115] which would then remove their obligation to apply the CISG via article 1(1)(b).[116] Conversely, courts in non-Contracting States are not under any international law obligation to begin their enquiry with article 1(1) of the CISG.[117] A non-Contracting State however would apply the CISG if its rules of private international law lead to the application of the law of a Contracting State.[118]

The possibility of applying the CISG in arbitration is not a matter of confusion. Although mentioned merely in passing, articles 45(3) and 61(3) of the CISG expressly contemplate the use of the Convention in arbitration by referencing the arbitral tribunals in the text. Evidence from various CISG databases[119] reveals that arbitral tribunals usually use the CISG to resolve the sale of goods disputes.[120] The CISG has been applied in arbitration in various ways. It has been applied in arbitration because it was chosen by the parties or the arbitral tribunal, because of the effect of conflict of laws,

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112 Although this option is not directly indicated in the text of the CISG, it is based on the principle of party autonomy which is generally recognised in international contract law. Art 6 of the CISG however gives recognition to the principle of party autonomy. Kröll "Arbitration and the CISG" 63.

113 Art 6 and art 12 of the CISG.

114 Kröll "Arbitration and the CISG" 62.

115 Wethmar-Lemmer 2016 *DJ* 60.

116 Wethmar-Lemmer 2016 *DJ* 66-69; Schwenzer *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 18-20.

117 Wethmar-Lemmer 2016 *DJ* 70-71; Schwenzer *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 18-20

118 Wethmar-Lemmer 2016 *DJ* 70-71.

119 Examples of such databases include the UNILEX 2002 http://www.unilex.info/ and the UNCITRAL 2023 https://www.uncitral.org/clout/.

120 Although mentioned merely in passing, arts 45(3) and 61(3) of the CISG expressly contemplates the use of the Convention use in arbitration by referencing the arbitral tribunals in text.

and because it was considered to constitute a set of general principles.[121] Therefore, when it comes to using the CISG in arbitration, an issue of concern is not the possibility of its application but rather the justifications that arbitral tribunals provide for applying it.

First of all, the application of the CISG by courts cannot be likened to its application by arbitral tribunals. Arbitral tribunals are neither bound by the Convention nor have any international law obligation to apply the CISG when resolving a dispute. They are private and independent from the legal system of any particular country. In this sense, the arbitral tribunal like the courts in non-Contracting States is not obliged to consider the CISG via article 1(1), even when its requirements are met.[122] Rather, the arbitral tribunal when determining the substantive law of a dispute will consider the provisions of the relevant applicable arbitration laws. Therefore, the justification for the use of the CISG in arbitration depends on the precise facts and circumstances of a case. When parties expressly select the law of a Contracting State as the applicable law, the CISG generally will be applied as part of this law, provided the requirements of article 1(1) are met.[123] A party's reference to the CISG only in a choice of law clause also makes the Convention applicable. It is widely accepted that parties need not reference a CISG Contracting State before the arbitral tribunal can apply the Convention.[124] Parties may also expressly exclude the application of the CISG to their contractual relationship. Where parties have not expressly selected the CISG, arbitral tribunals have varied views on its application by virtue of article 1(1).[125] Some commentators argue that the CISG may be applied by virtue of article 1(1)(a) when parties have their places of business in the Contracting States.[126] Here, the arbitral tribunal follows the same approach which would have been used by the national courts they replace.[127] The arbitral tribunal, however, does not acquire its mandate to

121 Kröll "Arbitration and the CISG" 61.
122 Kröll "Arbitration and the CISG" 65.
123 Schwenzer *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 22.
124 Schwenzer *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 22, 23.
125 Born *International Commercial Arbitration* 4223; André and Spilker 2013 *RabelsZ* 137.
126 See Kröll "Arbitration and the CISG" 64, 65; Schwenzer *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 22, 23.
127 André and Spilker 2013 RabelsZ 137, 138; Kröll Arbitration and the CISG 64, 65; Schwenzer *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (CISG) 23,24.

apply the CISG from being a seat in a Contracting State. Rather, by virtue of the national arbitration laws or the rules that replace arbitration law, the arbitral tribunal may apply the CISG under article 1(1)(a).[128] On this same point, some commentators are also of the opinion that the CISG does not become applicable in arbitration by virtue of article 1(1)(a) but rather through a conflict of laws analysis which leads to the application of the law of a Contracting State.[129] Here, the argument is that the CISG only becomes applicable pursuant to article 1(1)(b), even if the arbitral tribunal is seated in a Contracting State. The reason why the arbitral tribunal applies the CISG is not because of its connection with a particular state's *lex fori.*[130] Even when the place of arbitration is in a Contracting State, like courts in a non-Contracting State, the arbitral tribunal's application of the CISG is considered a consequence of article 1(1)(b).

Although there appears to be no definite regime justifying the applicability of the CISG in arbitration via article 1(1)(a), what is not in doubt is that the arbitral tribunal is under no obligation to apply it.[131] Unless it is expressly selected (or excluded) by parties, the arbitral tribunal need not consider the CISG in the arbitration process. A justified question at this point is, is it always necessary to rely on article 1(1) of the CISG for justification for the application of the CISG in arbitration? The answer to this question will depend on the perspective from which it is viewed. First, where parties have expressly or tacitly selected the CISG to govern their contractual relationship, arbitrators must comply with their will. The arbitral tribunal must generally apply the law chosen by parties otherwise risk that an award would not be recognised or enforced. In this regard, the arbitral tribunal's justification for applying the CISG is based on the widely accepted principle of party autonomy and not article 1(1) of the CISG. Again, where the arbitral tribunal applies the CISG *ex officio*, they need not provide reasons for their choice of law.[132] As long as the chosen law is applied correctly, it is unlikely that an award would not be enforced or recognised. In this regard, the justification for the application of the CISG may be for reasons other than article 1(1). For instance, the arbitral tribunal may have applied the CISG because it constitutes generally accepted principles of international trade.[133]

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128 André and Spilker 2013 *RabelsZ* 137.
129 Kröll "Arbitration and the CISG" 64, 65.
130 Kröll "Arbitration and the CISG" 65.
131 André and Spilker 2013 *RabelsZ* 135.
132 André and Spilker 2013 *RabelsZ* 133.
133 It is noteworthy that the CISG cannot be considered either a trade usage or a part of the *lex mercatoria*. André and Spilker 2013 *RabelsZ* 157.

The arbitral tribunal and the parties' choice justify the application of the CISG and not the convention itself.[134] As a body of principles that offer a series of default rules that can be used to fill in the gaps in a contract, as well as assist in interpreting it, is prudent for arbitral tribunals to apply the CISG in international commercial dispute resolution regardless of the reasons for its application.

iv. The application of the Hague Principles on Choice of Law in International Commercial Contracts in arbitration

Approved on 19 March 2015, the Hague Principles are an innovative addition to the body of work created under the auspices of a Specialist Working Group of the HCCH.[135] The Hague Principles constitute a set of guidelines that may be applicable in cross-border commercial matters. Specifically, the Hague Principles provide general rules on the choice of law for international commercial contracts. The preamble to the Hague Principles best indicates and describes its purpose and aims.[136] It provides that:

> (1) This instrument sets forth general principles concerning the choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.
> (2) They may be used as a model for national, regional, supranational or international instruments.
> (3) They may be used to interpret, supplement and develop rules of private international law.
> (4) They may be applied by courts and by arbitral tribunals.[137]

From the provision above, the Hague Principles apply to international commercial contracts by virtue of the widely accepted concept of party autonomy, with limited exceptions.[138] Parties may expressly or tacitly choose the Hague Principles to apply to their substantive contract. Such a choice

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134 Based on art 26 of the Vienna Convention on the Law of Treaties of 1969, international treaties/conventions are only binding on the Contracting States who are parties to it. Therefore, with convention such as the CISG, only Contracting States are bound to apply them. Schroeter "Mandatory Private Treaty Application? On the Alleged Duty of Arbitrators to Apply International Conventions" 306; André and Spilker 2013 *RabelsZ* 138.

135 Symeonides 2013 *Am J Comp Law* 874.

136 Hague Principles on Choice of Law in International Commercial Contracts (2015). See HCCH 2023 https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

137 See HCCH 2023 https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

138 Art 11 of the Hague Principles (2015) expressly limits the parties' choice of the applicable law by overriding mandatory rules and public policy.

must be made expressly or appear clearly from the provisions of their contract or the circumstances of their case.[139] A mere agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of governing law.[140] Parties may select the Hague Principles to be used either in resolving their disputes involving international commercial contracts before courts or in arbitration.[141] A selected applicable law need not be connected to the parties or their transaction.[142] The Hague Principles may govern the whole or part of the parties' substantive contract. In fact, the Hague Principles may be used to interpret or supplement international uniform instruments and domestic law.[143] They provide a liberal approach to establishing the governing law by enabling parties to choose different laws for different parts of their contract.[144] The Hague Principles also provide useful guidance on the interaction of public policy, mandatory rules and the choice of the applicable law.[145]

The Hague Principles serve as a guide for developing or modernising commercial legal instruments. It assists in the development of private international law rules by the courts or arbitral tribunals.[146] This is with the aim of promoting legal certainty in international commercial contracts and enhancing the predictability of cross-border commercial matters. The Hague Principles are, however, not a convention or a model law.[147] Considered as a soft law instrument, the Hague Principles are not binding in any country.[148] They do not impose an obligation for application in international contracts. They are not a model law that provides Contracting States with a set of rules that is intended to be adopted substantially to achieve substantive and linguistic harmony. The Hague Principles are rather a representation of preferred basic rules relating to the law that will govern the parties' international commercial contracts. They embody a set of major principles that the HCCH considers appropriate for dealing with issues involving the

139 Art 4 of the Hague Principle (2015); See generally Neels and Fredericks 2011 *DJ* 101-110.
140 Art 4 of the Hague Principles (2015).
141 Art 4 of the Hague Principles (2015).
142 Art 2(4) of the Hague Principles (2015).
143 Neels and Fredericks 2011 *DJ* 102.
144 Art 2(2) of the Hague Principles (2015); See Comment 2.6 Hague Principles on Choice of Law in International Commercial Contracts (2015).
145 The commentary on the Hague Principles (2015) provides useful guidelines for these issues.
146 Neels and Fredericks 2011 *DJ* 102.
147 Girsberger and Cohen 2017 *Unif Law Rev* 317.
148 Girsberger and Cohen 2017 *Unif Law Rev* 317.

law governing the parties' international contract. From this, it can be deduced that the rules provided in the Hague Principles only have a limited reach.[149] It only addresses the effects of the parties' agreement on the law that will govern their contractual relationship.

Although the Hague Principles do not provide a method for determining the applicable substantive law where parties have failed to select one, it is suggested that it may be used to resolve choice of law issues that may arise in the arbitration process. For instance, where arbitration statutes or rules permit parties to select rules of law to govern their contract, the Hague Principles may be used as a guide to determine which rules of law can be chosen. Usually, when the phrase 'rules of law' is used, parties may select non-national laws.[150] For greater certainty, article 3 of the Hague Principles set the criteria to be used by the decision-makers (such as the arbitral tribunal) to determine the rules of law applicable to a dispute. According to article 3, rules of law must be generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise. Where parties may select non-national rules, this criterion deters them from choosing uncertain and vague rules of law.[151] Based on the standard provided, generally accepted rules that parties may select include the CISG (not linked to a Contracting State) and the UNIDROIT Principles.[152] In line with article 3 of the Hague Principles, these rules of law may apply to the parties' contract regardless of the method of dispute resolution, arbitration or litigation.

Similarly, assuming the arbitral tribunal has to establish whether parties have made a tacit choice of law, the Hague Principles may be used as a guide. For instance, the use of the phrase 'appear clearly from the provisions of the contract or the circumstances' under article 4 (first sentence) of the Hague Principles is a standard for establishing a tacit choice of law.[153] In other words, tacit agreements on the governing law must appear clearly from the contract or the circumstances of the case. Based on the Hague Principles, an arbitral tribunal may infer the choice of applicable

149 Girsberger and Cohen 2017 *Unif Law Rev* 318.
150 See Comment 3.1 Hague Principles on Choice of Law in International Commercial Contracts (2015).
151 Pertegas and Marshall 2014 *Brook J Int'l L* 998.
152 Non-national rules of law may not cover all matters relating to a particular contract. Therefore, where parties select them, it may be necessary to supplement their provisions with some other substantive law. Pertegas and Marshall 2014 *Brook J Int'l L* 998.
153 Neels and Fredericks 2011 *DJ* 107.

law not only from the parties' contract but also from their conduct.[154] In the same light, based on the second sentence of article 4, where parties have conferred jurisdiction on a country, an arbitral tribunal (or court) should not construe such a designation as a choice of the law of that country as the governing law of the contract. The bottom line is that the Hague Principles provide a set of predictable, modern and flexible rules that may be used in international commercial arbitration. It provides, among other things, rules on the formal validity of a choice of law,[155] rules for the battle of forms,[156] rules on *renvoi* [157] and rules on severability.[158] An arbitral tribunal may rely on the provisions of the Hague Principles for clarification on choice of law issues.

v. UNIDROIT Principles of International Commercial Contracts in international commercial arbitration

First published in 1994 and now in its fourth edition (2016),[159] the UNIDROIT Principles are uniform substantive law rules used to regulate international commercial contracts.[160] It is a non-binding instrument that reflects consensus on principles of contract law commonly used in the international commercial community.[161] It is a restatement of commercial contract law used globally. The UNIDROIT Principles are closely modelled after the CISG.[162] However, unlike the CISG which is limited to international contracts for the sale of goods, the UNIDROIT Principles deal with a broad range of commercial contracts.[163] Similar to the Hague Principles, the UNIDROIT Principles are a versatile instrument capable of being applied in

154 The same rules apply where an existing choice of law is to be modified. See Comment 4.16 Hague Principles on Choice of Law in International Commercial Contracts (2015).
155 Art 5 of the Hague Principles (2015).
156 Art 6 of the Hague Principles (2015).
157 Art 8 of the Hague Principles (2015).
158 Art 7 of the Hague Principles (2015).
159 In May 2017, in accordance with the Governing Council of the International Institute for the Unification of Private Law's (UNIDROIT) mandate, the Secretariat prepared and published the 2016 edition of the UNIDROIT Principles. This fourth edition of the UNIDROIT Principles is not a revision of the previous editions but rather amends the 2010 edition to take better account of long-term contracts.
160 See UNIDROIT 2022 https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/.
161 Piers and Erauw 2012 *J Priv Int Law* 441.
162 Perillo 1994 *FordhamLR* 282.
163 Perillo 1994 *FordhamLR* 282, 283.

litigation or arbitration when parties expressly or tacitly choose it.[164] They may be incorporated into a choice of law clause or may be designated as the applicable substantive law.[165] The chosen applicable law must not exclude its application. Parties may elect for the UNIDROIT Principles to supplement a chosen national law where necessary. In some cases, also, parties may agree that their substantive contract is governed by the *lex mercatoria* or the general principles of law. In this instance, the arbitral tribunal may consider the UNIDROIT Principles as general principles of international law.[166]

Generally, where a choice is absent, courts apply their conflict of laws rules, which inevitably result in the application of national law and not a soft law such as the UNIDROIT Principles.[167] In arbitration, the application of soft laws such as the UNIDROIT Principles choice is foreseeable. This is due to the fact that arbitral tribunals have a greater discretion to determine the applicable law and are not burdened by the *lex fori* like judges. In the absence of a choice of the proper law, the arbitral tribunal may directly or through a choice of law analysis select the UNIDROIT Principles as the applicable law.[168] As long as the arbitral tribunal's choice of the UNIDROIT Principles reasonably reflects the parties' expectations it may be used to resolve arbitration disputes. The UNIDROIT Principles may be used as a supplement where the relevant applicable law does not provide an answer to resolve a matter.[169] Assuming the parties selected a law that is undeveloped and does not sufficiently address an issue, the arbitral tribunal may use the UNIDROIT Principles to supplement it. The UNIDROIT Principles may also be used to interpret and supplement international uniform instruments such as the CISG.[170] The bottom line is that the

164 This can be deduced from its purpose as stipulated under the Preamble of the UNIDROIT Principles. See International Institute for the UNIDROIT Principles of International Commercial Contracts (2016).

165 Piers and Erauw 2012 *J Priv Int Law* 444.

166 This can be deduced from its purpose as stipulated under the Preamble of the UNIDROIT Principles. See International Institute for the UNIDROIT Principles of International Commercial Contracts (2016).

167 Piers and Erauw 2012 *J Priv Int Law* 444.

168 Piers and Erauw 2012 *J Priv Int Law* 445.

169 Perillo 1994 *FordhamLR* 283.

170 On this issue of the UNIDROIT Principles being used to interpret or supplement the applicable law based on art 7 of the CISG, there are several opinions. It has been argued that the CISG cannot be interpreted by the UNIDROIT Principles because it was adopted subsequent to the CISG. Also, it has been argued that the UNIDROIT Principles can be used to interpret the CISG based on their character as general principles of international commercial law. According to Michael Joachim Bonell, (a

UNIDROIT Principles can be a very useful tool in arbitration practice, especially where the international contract is silent on the applicable law. The arbitral tribunal may avoid particular requirements of an unknown foreign legal system or supplement undeveloped rules by referring to the UNIDROIT Principles.[171] The UNIDROIT Principles provide both parties and arbitrators with a choice of a neutral, flexible and predictable governing law that can be applied to contractual relationships.

4.2.2. Choice of law rules for electronic contracts

Electronic commerce (e-commerce) can be understood to include any transaction conducted via digital technology.[172] This may include transactions made over open networks such as the internet, closed networks such as electronic data interchange (EDI) and debit and credit cards.[173] People in recent times are interacting more and more electronically rather than through physical exchanges. This can be attributed to the increased need for paperless and fast transactions. According to a 2020 report by the Organisation for Economic Co-operation and Development (OECD), the COVID-19 pandemic further accelerated the expansion of e-commerce toward new firms, products and customers.[174] Characterised by speed and the absence of territorial boundaries, e-commerce has become a vital tool for international trade. Although the use of technology in trade presents new opportunities for economies and society, its development also challenges the essence of traditional private international law rules.[175] Where contracts are concluded and performed by electronic means, answering private international law questions involving jurisdiction and choice of law can be very vague. Determining connecting factors such as place of business, place of domicile and place of performance may not be so clear.[176]

Assuming a party's contract of sale of goods is formed by electronic means, and requires that goods be delivered online, without physical delivery (such

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producer of the UNIDROIT Principles), the UNIDROIT Principles can be used to fill gaps in the CISG only where they are expressions of general principles underlying the CISG. See generally Bonell 2002 *RJT* 335-354.

171 Perillo 1994 *FordhamLR* 283.

172 Sookman 1999 *UNBLJ* 120.

173 Sookman 1999 *UNBLJ* 120.

174 See OECD 2020 https://oecd.org/coronavirus.

175 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 6.

176 Gillies *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* 30.

as a download), ascertaining the place of delivery may be more difficult. Delocalising transactions made over the internet may be problematic.[177] The laws of several different countries may all be connected to the contract or dispute. Traditional private international law rules which are national and territorial may not be efficient to regulate jurisdiction and choice of law issues that may arise from e-commerce.[178] In response to this, countries and intergovernmental organisations have introduced new laws or adapted existing substantive laws and policies to regulate e-commerce.[179] For instance, the EU introduced *Directive 2000/31/EC* (Electronic Commerce Directive) to regulate cross-border online services in the EU internal market.[180] The United States has similarly introduced *the Uniform Electronic Transactions Act* (UETA)[181] and the *Uniform Computer Information Transactions Act* (UCITA)[182] to regulate e-commerce activities. In addition, international organisations such as the Hague Conference on Private International Law (HCCH) and UNCITRAL have also undertaken projects, written reports and guidelines to direct and develop legal regulations to accommodate the use of technology in international commerce.[183] All these efforts are geared towards providing legal certainty for parties who choose e-commerce.

As with normal contracts, parties to an electronic contract (e-contract) may

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177 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 93.

178 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 180.

179 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 7; Gillies *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* 6.

180 See EUR-Lex 2000 http://data.europa.eu/eli/dir/2000/31/oj/eng.

181 The Uniform Electronic Transactions Act (UETA) (1999) works in tandem with the Electronic Signatures in Global and National Commerce Act (ESIGN Act) (2000) to guarantee that electronic contracts are valid and that electronic signatures are defensible. See generally Wittie and Winn 2000 *The Business Lawyer* 293- 340.

182 This uniform national contract law was proposed in 1999 and developed by to govern software licensing and other computer information transactions. The UCITA was, however, met with strong opposition. Some stakeholders contended that its scope was too large to extent of endangering consumer rights. Till date only two countries have adopted it — Maryland and Virginia. Andersen, Raymakers and Reichenthal 2001https://cs.stanford.edu/people/eroberts/cs201/projects/2000-01/ucita/index.html.

183 To facilitate the use of e-commerce, the UNCITRAL has developed text such as the UNCITRAL Model Law on Electronic Commerce of 1996, UNCITRAL Model Law on Electronic Signatures of 2001 and the UNCITRAL Model Law on Electronic Transferable Records of 2017. The Hague Conference on Private International Law, for instance, jointly held round table discussions with University of Geneva on the 2, 3 and fourth of September 1999 on questions of private law that may be raised Electronic Commerce and the Internet. See HCCH 2022 https://www.hcch.net.

have a choice of law clause or agreement.[184] In the absence of a choice of applicable law, it may be more difficult to establish the law applicable to e-contracts than to normal contracts. The unique features of electronic communications may make it difficult to establish conventional connecting factors. The timing and location of contractual communication and negotiations play a more vital role in determining the applicable law for e-contracts than they would for normal contracts.[185] When conducting a choice of law analysis for e-contracts, one would come to the realisation that rarely do either national or special e-commerce laws include conflict of laws rules.[186] Assuming conflict of laws issues arise, the wording and concepts in some existing conventional choice of law provisions or instruments may guide the determination of the law applicable to an electronic commercial contract.[187] Concepts such as characteristic performance, substantial connection/relationship and closest connection which are found in such instruments may be used to determine the law applicable to an electronic commercial contract. Although the application of these concepts to normal contracts may differ from their application to e-contracts, they may still assist in resolving the e-commerce choice of law dilemma.

Take, for example, interpreting concepts such as characteristic performance for e-contracts concluded online and offline. For goods that are physically delivered after a transaction online, the place of performance can easily be deduced to be the place of delivery. On the other hand, when determining the place of performance for an online sale and delivery of digitised goods, the most realistic connecting factor to be considered could be the place of business.[188] When determining the applicable law for digitised goods, a place of business is preferred as the place of performance as opposed to abstract connecting factors such as the place of uploading and the place of downloading. A reasonable question at this point would be: whose place of business is most closely connected to the performance? Here, conventional

184 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 101.

185 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 97.

186 For example, the EC Directive on Electronic Commerce in the EU does not have choice of law provisions. Similarly the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Transferable Records (2017) do not address include conflict of laws rules. Wang *Internet jurisdiction and choice of law: legal practices in the EU, US and China* 98.

187 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 99.

188 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 112.

choice of law provisions suggest that the seller's place of business is to be regarded as having the closest connection to a contract.[189] This position is given credence by the fact that the seller's place of business has a permanent connection to his past, present and future dealings.[190] The seller's performance in a sale of goods contract constitutes the essence of the contract. Assuming parties have not selected the law applicable to their contract for a sale of goods, the Rome I Regulation, for instance, provides the rule that the law of the country where the seller has his habitual residence is applicable.[191] The seller's principal place of business can be deduced even where delivery is made over the internet.[192] Similarly, assuming the seller, a party to an e-contract, has more than one place of business, the CISG may also provide guidance for establishing one. According to the Convention, where a party has more than one place of business, the place of business is where it has the closest relationship to the relevant contract at any time before or at the conclusion of the contract.[193] When determining the applicable law for e-contracts, conventional choice of law provisions or instruments may assist to define the connecting factors in the absence of a choice of law clause.

4.2.3. Methods to determine the substantive law adopted by the UNCITRAL

UNCITRAL instruments on international commercial arbitration have provided two significant approaches to be used by an arbitral tribunal to determine the law applicable to the substance of a dispute. The first approach can be found in the UNCITRAL Arbitration Rules of 1976.[194] By the dictates of these Rules, the arbitral tribunal is empowered to apply the law determined by the conflict of laws rules which it considers applicable.[195] In this indirect method (*voie indirecte*), arbitrators must necessarily conduct

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189 From the analysis of the choice of law provisions of EU, US and China, it is revealed that the seller's place of business has is an enduring factor with a connection to the contract. See generally Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China*.

190 Wang *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 113.

191 Art 4(1)(a) of the Rome I Regulation (2008).

192 Art 6(4) of the UN Convention on Electronic Contracts (2005) clarifies that a location is not a place of business merely because that is where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located or where the information system may be accessed by other parties.

193 Art 10(a) of the CISG.

194 The UNCITRAL Arbitration Rules (1976).

195 Art 33 of the UNCITRAL Arbitration Rules (1976).

a conflict of laws analysis to determine the law applicable to the substance of a dispute. Here, to avoid *renvoi*, the internal substantive laws of a country as determined by the conflict of laws rules of that country are applied. This same approach was adopted in the next major arbitration instrument developed by UNCITRAL, the UNCITRAL Model Law.[196] Its article 28 (2) provides that:

> Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the *conflict of laws rules* which it considers applicable.[197](Emphasis added)

In the drafting of this provision, supporters of this approach were of the opinion that the Model Law should provide arbitral tribunals guidance on determining the applicable law.[198] They argued that by requiring an arbitral tribunal to conduct some conflict of laws analysis, parties were guaranteed certainty and predictability on the matter. They, however, suggested that, since courts are unlikely to review the arbitral tribunals' chosen conflict of laws rule and its resultant applicable substantive law, such selections should be accompanied by reasons.[199] The indirect method can be restrictive. Although arbitrators have absolute freedom over the conflict of laws rules to apply, they must necessarily resort to such a rule, rather than directly selecting the applicable law.

The second approach to determining the applicable law was adopted in the 2010 revised 1976 version of the UNCITRAL Arbitration Rules.[200] Article 35 (1) of the 2010 UNCITRAL Arbitration Rules provides that:

> (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*

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196 This approach was also maintained in the 2006 amendment of the UNCITRAL Model Law. Caron and Caplan *The UNCITRAL Arbitration Rules a Commentary (With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)* 127.

197 See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

198 Caron and Caplan *The UNCITRAL Arbitration Rules a Commentary (With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)* 127; UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/40/17* 46.

199 UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/40/17* 46.

200 This position was maintained in its 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration.

be appropriate. (Emphasis added)[201]

In contrast to the 1976 Rules, this approach (found in the second sentence) provides that arbitral tribunals need not select the applicable law in accordance with the conflict of laws rules they consider applicable.[202] Rather, the arbitral tribunal is mandated to apply the law which it determines to be appropriate. Here, the arbitral tribunal is not required to conduct any conflict of laws analysis. They may directly (*voie directe*) choose the law applicable to the substance of the dispute. In the drafting of this provision, supporters of this approach were of the view that requiring arbitral tribunals to conduct a conflict of laws analysis first to determine the law applicable to the substance of the dispute limited their power.[203] Since the tribunal usually considered similar connecting factors when directly selecting the applicable law, as it would in a conflict of laws analysis, some drafters preferred the direct means of determining the applicable law. They argued that the direct method provided a flexible and modern solution for determining the appropriate law.[204]

Another issue that is discussed by drafters is the arbitrator's power to select more than one applicable law. At first glance, the use of the words 'shall apply the law' in the second sentence of article 35(1) creates the illusion that arbitrators are limited to applying only one law. However, drafters clarified that the fact that it is not unusual for several laws to be applied in international commercial arbitration, such an interpretation is not likely.[205] The Arbitration Rules were designed with the intention of being understood in sufficiently broad terms, so that the arbitrator may select different laws depending on the issues at stake. Similar to the indirect method, where an arbitral tribunal uses the direct method there is an obligation to give reasons for its decision. The arbitral tribunal is under an obligation to determine the applicable law reasonably and objectively.[206] Decisions are to be backed up

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201 See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

202 Caron and Caplan *The UNCITRAL Arbitration Rules a Commentary (With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)* 127.

203 UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/40/17* 47.

204 UNCITRAL *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-First Session: A/CN.9/684* 21.

205 Caron and Caplan *The UNCITRAL Arbitration Rules a Commentary (With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules*) 128.

206 Ma 2015 *Contemp Asia Arb J* 194.

by reasons to avoid arbitrariness. When the choice of law methods used in the UNCITRAL Model Law and the UNCITRAL Arbitration Rules are compared, it is revealed that the Arbitration Rules' approach is direct, modern and liberal whereas the Model Laws' approach is indirect and restrictive. As noted in previous sections, the UNCITRAL Model Law and the UNCITRAL Arbitration Rules have inspired the drafting of many national and institutional rules on arbitration. Their choice of law rules for determining the law applicable to the substance of a dispute in the absence of a choice has been either adopted verbatim in such instruments or have been developed along similar lines.

4.3. Comments

From this section, it can be deduced that arbitrators have different methods of exercising their discretion when determining the applicable law. These methods are found in both national and non-national sources. The sources provide two overarching methods to be used by arbitrators to assign the applicable substantive law. Though a third method can be identified, that is where a specific conflict of laws rule is provided to be used by arbitrators (usually the closest connection rule), it is suggested that it is a mere variation of the indirect method. The reason for this is although there is a specified rule for assigning the applicable substantive law, the application of a conflict of laws rule in the selection process is compulsory.

The use of international conventions and other regional or national private international law regimes in international commercial arbitration is common and beneficial. They can provide clear guidance and a solid legal framework for addressing complex choice of law issues that may arise in international commercial arbitration. Whether the parties expressly or tacitly select them to resolve their dispute or arbitrators decide to apply them, these instruments can contribute to the effective resolution of international commercial disputes. Understanding the circumstance in which these instruments apply is, therefore, crucial.

Section II: Revisiting the Common Methods Used to Determine the Law Applicable to the Substance of a Dispute

4.4. Introduction

From the discussion so far, the arbitral tribunal generally enjoys broad discretion when it comes to determining the applicable law. International conventions, national arbitration statutory instruments and institutional

arbitration rules may provide relatively clear guidance as to the method to be used by the arbitrator to determine the applicable law. As established, the arbitral tribunal may determine the law applicable to the substance of a dispute directly or by some conflict of laws rules — that is, the direct (*voie directe*) and indirect (*voie indirecte*) methods. The following sub-sections critique the two overarching approaches. It explores how they operate and showcases their differences and their similarities. The advantages and disadvantages of these two methods shall also be noted where necessary.

4.4.1. Application of the relevant methods for assigning the applicable substantive law

In practice, in the absence of an express choice of law clause, the arbitral tribunal usually considers the implied choice made by the parties first.[207] Here, arbitrators begin the choice of law process by considering laws that reflect the presumed intentions of the parties. Where such an implied choice of law cannot be identified, the arbitral tribunal subsequently resorts to either using a conflict of laws analysis or directly selecting the applicable substantive law, depending on the circumstances of the case. At this point, the arbitral tribunal exercises its broad discretion to select the applicable law based on the will or intention of the parties.[208] As evident from the discussion so far, neither the direct nor indirect methods provide clear guidelines or steps arbitrators must follow, to determine the applicable law. The arbitrators' freedom to select the most appropriate law for the issues at hand leads them to apply various strategies when using either the direct or indirect method, to arrive at the applicable substantive law. Subsequently, how the direct and indirect methods operate and the various strategies arbitrators use to reach the final law applicable to the substance of a dispute are discussed.

4.4.2. The indirect method

Generally speaking, the indirect method for resolving the question of what law applies to the substance of an arbitration dispute represents the notion that arbitrators must apply conflict of laws rules in their search for the applicable law. This notion may, however, manifest differently through the various ways in which arbitral tribunals justify their application of substantive

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207 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 219.

208 This has been described has a subjective approach because the arbitral tribunal considers the hypothetical will of the parties considering their contract and other surrounding circumstances. Blessing 1997 *JIntlArb* 43.

law by the method. The choice of law rules may direct the arbitral tribunal to apply a specific conflict of laws rule or be free to decide on the matter.[209] Where the arbitral tribunal is obliged to apply a specific conflict of laws rule, the matter is quite straightforward. They become relieved of the duty to identify a conflict of laws rule. On the other hand, assuming the arbitral tribunal is free to decide on the conflict of laws rule to apply, the indirect method may come in various forms. Taking into consideration that the arbitral tribunal cannot altogether abandon a conflict of laws analysis, they must follow different approaches to determine the appropriate conflict of laws rules. Subsequently, some of the conflict of laws rules that arbitral tribunals resort to via the indirect method and the approaches they employ to arrive at a suitable applicable substantive law shall be discussed.

4.4.2.1. Out-dated methods

a. Conflict of laws rules of the place of arbitration

A traditional approach to determining the applicable law was for arbitrators to apply the conflict rules of the place of arbitration – that is, the conflict of laws rules of the *lex fori.*[210] Historically, the view was that arbitrators were mandatorily required to apply the arbitration seat's choice of law rules to resolve disputes. Like judges resolving an international commercial dispute, arbitrators are bound to mandatorily apply not only the procedural rules of the arbitration seat but also its choice of law rules. An example of such a provision is found in article 11(1) of the 1957 Resolution on Arbitration in Private International Law.[211] It stipulates *inter alia* that:

> The rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference.

This approach ties the applicable substantive law inexorably to the arbitration seat. Some commentators who have advanced arguments in line with this jurisdictional theory (as opposed to the autonomous theory)

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209 Some writers considered the instance where there is a specified choice of law rule of the seat of arbitration, which was specifically designed for international arbitration matters, to be a separate method distinct from the indirect method. Other writers also categorise both the situations where a choice of law rule (usually, the closest connection rule) is specified and where it is not methods to be the indirect method, considering the fact that, both situations call for the application of a conflict of laws rule. Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 204; See generally Meier 2018 *StudZR* 1-26.

210 Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 191.

211 Institut de Droit International 2023 https://www.idi-iil.org/app/uploads/2017/06/1957_amst_03_en.pdf.

suggest that the arbitrators' choice of law should be governed by the conflict of laws system of the seat of arbitration.[212] They argue that arbitration finds legal grounding within the laws of the seat of arbitration although it is an agreement between private parties. They also suggest that since the authority of the arbitrator to decide which law applies emanates from the procedural law which forms part of the *lex arbitri*, ultimately the local conflict of laws rules must be applied. The strictness of this approach in their opinion ensures predictability and certainty of dispute results.

In modern times, however, the strictness of this approach has proven to be a disadvantage leading many jurisdictions to abandon it.[213] For instance, the likelihood that the arbitration seat's connection with the dispute may be fortuitous could lead arbitrators to apply a substantive law unintended by the parties. Only when parties have expressly designated the seat of arbitration is the issue regarding it certain. Otherwise, the arbitral tribunal may not find it easy to identify the applicable substantive law. In fact, it is suggested that arbitration in the digital age completely renders the traditional approach of mandatorily applying the law of the arbitral seat obsolete. Arbitration hearings can be fixed in more than one country making it difficult to identify the seat of arbitration — more so for online arbitration.[214] A forum selected for arbitration may be a matter of convenience and not a matter of connection.[215] Today, an indirect method that leads to the application of the arbitration seat's conflict of laws rules is more flexible than the traditional approach. Assuming arbitrators decide to apply the arbitration seat's conflict of laws rules, it would likely be because it is the preferred applicable law considering the circumstance of the dispute or that it reflects the parties' tacit choice of law.[216]

b. Conflict of laws system of the country that would otherwise have had jurisdiction but for the arbitration.

The norm is that the conflict of laws rules of a *lex fori* are used to resolve international disputes brought before a local court. This authority is displaced when parties by agreement decide to resolve their dispute by arbitration. This approach surmises that the conflict of laws rules of the jurisdiction which would have had the authority to resolve the dispute, but

212 Maniruzzaman 1993 *Neth Int Law Rev 206.*
213 Gaillard "The Role of the Arbitrator in Determining the Applicable Law" 192.
214 See generally Wahab "ODR and E-Arbitration: Trends and Challenges"399-441.
215 Maniruzzaman 1993 *Neth Int Law Rev* 207.
216 Born *International Commercial Arbitration* 4104.

for the agreement to arbitrate, regulates the arbitration.[217] According to the theoretical basis for this approach, the jurisdiction displaced by the agreement to arbitrate re-establishes its control over the arbitration through the application of its conflict of laws rules.[218] This approach, which was established by Dionisio Anzilotti,[219] has nevertheless been criticised. Primarily, it has been argued that the approach makes the already difficult process of determining the applicable law even more challenging.[220] An arbitrator, using this approach, would have to first determine the jurisdiction which would have had jurisdiction had parties not submitted to arbitration, and then refer to that country's conflict of laws rules. In an international commercial dispute, there may be more than one jurisdiction that fits this criterion. This makes the approach of using the conflict of laws rules of a country which would have had jurisdiction but for the agreement to arbitrate very uncertain and inconvenient. A second criticism levelled against the method is that its process appears cyclical.[221] A case in point is, assuming the arbitral tribunal wants to know the appropriate conflict of laws rules, they must first identify the country which would have had jurisdiction. However, for them to know the appropriate jurisdiction in order to identify the applicable law, they must first select a conflict of laws rule. This renders the approach redundant in practice. For these reasons, over the years this approach has been abandoned.[222]

4.4.2.2. Rarely used methods

a. Conflict of laws rules of the potential enforcement jurisdictions

Arbitrators, using the indirect method, may apply the conflict of laws rules of the country where enforcement of the award is likely.[223] This involves arbitrators determining the jurisdiction which parties are likely to seek for the enforcement of their rights connected to an award. This conflict of laws rule may be applied to reflect the parties' mutual expectations. Since there may be multiple possible countries where enforcement can be made, where arbitrators resort to this approach their final choice must be supported by cogent reasons that explain their decision. Notwithstanding this, one major

217 Born *International Commercial Arbitration* 4115.
218 Croff 1982 *Int Lawyer* 624.
219 Anzilotti, Trattari Generali di Diritto Internazionale Pubblico , 1 Riv. Dir. Internazionale 467 (1906); Croff 1982 *Int Lawyer* 614.
220 Croff 1982 *Int Lawyer* 624.
221 Croff 1982 *Int Lawyer* 624.
222 Croff 1982 *Int Lawyer* 614
223 Born *International Commercial Arbitration* 4115.

problem that stifles the use of this conflict of laws method has to do with *forum non conveniens*.[224] Where arbitrators hinge an award on the conflict of laws rules of a particular potential jurisdiction to the exception of others, based on the parties' presumed/inferred intentions, a problem arises when the potential court acknowledges that another forum might be more appropriate.[225] To avoid such complications this approach is rarely used to establish the applicable substantive law. [226]

b. Conflict of laws rules connected to the arbitrator

The conflict of laws rules of the arbitrator have been considered when determining the applicable law. This approach is rarely used because it raises some plausible questions. For instance, where there is more than one arbitrator, which arbitrator's law should be applied and which of his laws should be applied? What test would be used to determine the conflict of laws rules connected to the arbitrator? Answering questions such as these can be very nuanced. However, to be specific as to which of the arbitrators' laws should be considered, it has been suggested that his domicile, nationality or place of residence may be helpful.[227] The rationale behind this approach is that arbitrators are likely to be more knowledgeable and conversant with their personal law. This approach has, however, been heavily criticised.[228] First, it has been argued that it is the arbitrator's knowledge of the conflict of laws that should matter and not his substantive personal law. Apart from the arbitrator's personal connection to the substantive law, it may not have a real connection to the parties or their contract. To presume that arbitrators only understand their personal law is to woefully underestimate their capability to understand and apply foreign law.[229]

c. Conflict of laws rules connected to a party to the dispute.

In other instances, conflict of laws connected to parties to a dispute can be considered when determining the applicable law. Similar to what is done when the arbitrator's law is being considered, a party's domicile, place of residence or nationality may be used to determine the specific applicable conflict of laws rule.[230] The main argument against the application of the

224 Waincymer *Procedure and Evidence in International Arbitration* 995.
225 Waincymer *Procedure and Evidence in International Arbitration* 995.
226 Waincymer *Procedure and Evidence in International Arbitration* 995.
227 Croff 1982 *Int Lawyer* 628.
228 Croff 1982 *Int Lawyer* 629.
229 Croff 1982 *Int Lawyer* 628.
230 Croff 1982 *Int Lawyer* 628.

conflict of laws of a party has been that it can be very one-sided.[231] Considering the fact that parties may come from different jurisdictions the choice of the conflict of laws rule of one party may leave the other party unsatisfied. In fact, in disputes where there are more than two parties the situation can be quite tense as the choice of one party's law over another may appear biased. Parties generally would not wish for their disputes to be resolved according to the other's national law. The situation, however, is very different where parties agree in advance on which laws will apply to their dispute. This can provide clarity and reduce the perception of bias. Nevertheless, getting all parties to agree on a neutral choice of law can itself be a challenge.

4.4.2.3. Contemporary methods

a. Conflict of laws rules of countries with the closest connection to the dispute

Arbitrators are known to apply the conflict of laws rules of the country most closely connected to a dispute, in their search for the most appropriate or applicable law.[232] To arrive at the most closely connected country, they first analyse all the countries linked to the dispute to identify the one which is most closely connected to the merits of the parties' dispute considering the circumstances of the case. Countries may be considered as most closely connected to a dispute because of factors such as, they could be the place of characteristic performance, the place where the contract was concluded and whether they are the home of the seller. After a country is considered to be the closest connected to a dispute, the arbitrator will consider its conflict of laws rules to determine the appropriate applicable substantive law. Thus, in this method, the arbitral tribunal goes through three stages before arriving at the most appropriate law. First, they identify the most closely connected country, then, determine the country's applicable conflict of laws rules, before finally using it to identify the applicable substantive law. This three-stage analysis the arbitral tribunal conducts before arriving at the appropriate law has been criticised for being needlessly complex and furthering a form of *renvoi*.[233] There is an inherent risk that the selected conflict of laws rules of the jurisdiction with the closest connection to a

231 Croff 1982 *Int Lawyer* 628.
232 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 110.
233 Born *International Commercial Arbitration* 4113-4114.

dispute may lead to results that are beyond the reasonable expectations of the parties.[234]

The preferred method is to apply the substantive law of the country with the closest connection to the dispute and not its conflict of laws rules.[235] In this variation of the direct method, once the country which is most closely connected to a dispute is identified, arbitrators can apply its substantive law without any further investigation of its conflict of laws rules. This approach is flexible, practical and eliminates the complexities and uncertainties associated with a conflict of laws analysis. The approach is also favoured because it operates in a way akin to the choice law analysis conducted for contracts under instruments such as the Rome I Regulation and the Restatement (Second).[236]

b. Choice of law rule that arbitrators consider appropriate or applicable.

Article 46(3) of the English Arbitration Act and article 28(2) of the UNCITRAL Model Law are typical examples of the indirect method.[237] According to these provisions, and others similar to them, the arbitral tribunal must first choose the appropriate conflict of laws rules and then, apply them to determine the applicable substantive law. According to this method, arbitrators have the freedom to apply any conflict of laws rules, be it the closest connection rule or the *lex loci contractus* to determine the applicable law.[238] They can choose a particular private international law rule considering the circumstances of the case to determine the applicable law. In other instances, they are known to cumulatively analyse all the different conflict of law rules that have any contact with the dispute, to determine the appropriate choice of law rule.[239] Regardless of the choice of law rule, arbitrators ultimately end up applying, it must be the most appropriate for the circumstance of the case — what is considered appropriate in one situation may not necessarily be so for another.

c. Application of non-national legal systems

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234 Born *International Commercial Arbitration* 4114.
235 Born *International Commercial Arbitration* 4094.
236 Born *International Commercial Arbitration* 4115.
237 Croff 1982 *Int Lawyer* 629.
238 König 2015 *PYIL* 277.
239 This approach may lead to a two-step analysis which has been called *conflit au deuxième degré* (meaning the second-degree conflict). Here, the arbitral tribunal cumulatively assesses all conflict of laws rules to connected to a dispute. Where they all lead to the same solution, it may be used as the basis for not applying one, referring to the situation as a false conflict. Croff 1982 *Int Lawyer* 629.

Usually, the arbitral tribunal applies the national laws of a particular legal system, instead of non-national laws, whether they determine the applicable law via the direct or indirect method.[240] Although they have applied non-national laws such as the *lex mercatoria*, general principles of law and the UNIDROIT Principles absent a parties' choice, the source of their authority to do so may not always be clear.[241] Consider article 28(2) of UNCITRAL Model Law. It directs that the arbitral tribunal apply *the law* determined by the *conflict of laws rules* which it considers applicable.[242] This provision has been interpreted to mean that the arbitral tribunal may consider several or any conflict of laws rules to determine the applicable law but they must ultimately apply the law of a particular country.[243] In other words, non-national rules may be applied to determine the appropriate conflict of laws rules but after this, their authority to do so ends. Absent a party's express choice of non-national law, article 28(2) of UNCITRAL Model Law can be understood as not authorising arbitrators to ultimately select a non-national legal system. Some jurisdictions with arbitration laws modelled after the UNCITRAL Model Law have modernised article 28(2) by referring to *rules of law* instead of *law* to permit arbitrators to apply non-national rules in the absence of the parties' choice of law[244] to decide the parties' dispute. Nevertheless, several other jurisdictions still refer to the *law* in their choice of law rules,[245] leaving the questions about the authority of the arbitral tribunal to select and/or apply non-national rules unanswered. Arguments have been advanced that applying non-national rules or principles in arbitration is similar to arbitration *ex aequo et bono*.[246] This is because when applied in arbitration they both may yield unpredictable or undesirable results for the parties. Generally, the arbitral tribunal is allowed to conduct arbitration *ex aequo et bono* or as *amiable compositeur* where parties have

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240 König 2015 *PYIL* 282.

241 König 2015 *PYIL* 282.

242 When the wording of art 28(1) and art 28(2) of the UNCITRAL Model Law is compared, it appears that unlike arbitrators, parties may select 'rules of laws' to be applicable to the merits of their dispute irrespective of whether these are classified as a national or non-national law. Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 736-744.

243 König 2015 *PYIL* 282.

244 Arbitration laws in countries such Switzerland and France refer to *rules of law* instead of the *law* to indicate that the arbitrator may apply non-national laws as well. Other arbitration laws such as the LCIA Arbitration Rules 2020 refer to both the expressions law and rules of law to indicate that arbitrators may apply non-national and or national laws.

245 Countries such as England (art 46 of the English Arbitration Act of 1996) and Japan (art 36(1) of the Japanese Arbitration Law, Law No.138 of 2003) still refer *to law* in their provisions on choice of law.

246 Born *International Commercial Arbitration* 4254.

expressly agreed for it to do so.[247] The argument is that, similarly, parties must expressly authorise arbitrators to apply non-national rules or laws to their disputes.[248] Still, non-national rules such as the *lex mercatoria,* general principles of laws or conventions containing conflict of laws provisions generally can be used as a flexible approach to resolving choice of law issues in international arbitration.

4.4.3. The direct method

The direct method used by arbitrators for determining the law applicable to the substance of a dispute first appeared in the 1981 French Code on international arbitration.[249] By the dictates of this approach, arbitrators can immediately apply substantive rules without going through or invoking any conflict of laws provisions. The arbitral tribunal selects the applicable law directly by either examining all substantive laws connected to the dispute or by considering non-national laws like the *lex mercatoria.* They ultimately select the law that establishes a connection between the contract and a significant connecting factor.[250] In modern times, this approach has become very popular. This is because it does not impose a particular method for determining the applicable law. The method simply provides arbitrators with an avenue to freely determine the applicable law or rules of law taking into account the nature of a relationship, the characteristics of the parties and any other relevant circumstance. In line with the autonomous nature of arbitration, this approach provides arbitrators with the needed latitude to make a selection of the appropriate law detached from any particular *lex arbtiri*. Due to this reason, the approach is commonly used in arbitration rules of various institutions.[251]

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247 Art 28(3) of the UNCITRAL Model Law (1985) for instance provides that, the arbitral tribunal shall decide *ex aequo et bono* or as amiable *compositeur only* where the parties have expressly authorised it to do so. This a provision has been adopted in countries such as Switzerland and India who have designed their arbitration laws based on the UNCITRAL Model Law.

248 Born *International Commercial Arbitration* 4254

249 See art 1496 of the French Code of Civil Procedure, Book IV of 1981 which came into force on 14 May 1981. The direct method subsequently also appeared in art 1054 (2) of the Netherlands Code of Civil Procedure of 1986. Gaillard and Savage *Fouchard*, *Gaillard, Goldman on International Commercial Arbitration* 876.

250 Karton 2010 *UNBLJ* 4.

251 The direct method can be found in the arbitration rules of institutions such as World Intellectual Property Organisation (WIPO) – art 61 (a) of its 2021 Rules, the International Court of Arbitration of the International Chamber of Commerce (ICC) — art 21(1) of its 2021 Rules and the Chamber of Arbitration of Milan; art 3 of its 2019 Rules.

Arbitrators adopt various strategies when using the direct method to choose the applicable substantive law. Such strategies are typically pragmatic, result-oriented and frequently reflect the reasonable expectations of the parties.[252] To meet such expectations, for instance, arbitrators are also known to consider the parties' contract and surrounding circumstances of the dispute, such as evidence from past dealings, terms of reference and even the written submissions of the parties.[253] The arbitral tribunal's selected applicable law may also aim to ensure neutrality and enhance compromise in the arbitration process. To achieve neutrality, arbitral tribunals are known to rely on international conventions, general principles of law and the *lex mercatoria.* To accommodate the interests of all parties to the dispute, arbitrators even consider the idiosyncrasies of any potential applicable national law. The choice of any national law may have different implications on issues such as punitive damages, limitations and exemptions. As such, acknowledging the likely impact of the choice of a particular proper law and the fact that no such choice is truly neutral enables the arbitral tribunal to select a law that best addresses each party's rights. Indeed, to do this the arbitral tribunal may need to analyse the impact of a particular law before its final selection. A decision to choose a particular substantive law based on some foreknowledge of its impact might make its selection appear pre-judged. To avoid prejudice in such circumstances, the arbitral tribunal's choice of the applicable law should be backed up by cogent reasons. In situations like this, Waincymer suggests giving reasons based on neutral policies for the choice of a particular governing law. Where the arbitral tribunal is using the direct method, it is advisable that they consider laws that promote the requirements of an international commercial regime. That is, their choice of the applicable law should be best suited for international commerce and the peculiarities of an instant case.

4.4.3.1. The direct method and the application of non-national laws or rules

Based on the direct method of assigning the applicable substantive law, the arbitral tribunal may directly apply not only national law but also a non-national set of laws.[254] Although an arbitral tribunal may either apply national or non-national laws to resolve a dispute, they usually hesitate to opt for the latter over the former. The reason for such hesitation may be due to their non-binding and non-national character. Even though the application of

252 Waincymer *Procedure and Evidence in International Arbitration* 997.
253 Waincymer *Procedure and Evidence in International Arbitration* 997.
254 König 2015 *PYIL* 284.

these instruments is not frequent, some arbitration rules authorise the arbitral tribunal to apply rules of law (as opposed to law) they deem appropriate.[255] The use of the phrase 'rules of law' in such laws signifies that an arbitral tribunal may apply a non-national set of provisions to the substance of the dispute where there is no express choice by the parties. Usually, where arbitrators are permitted to select non-national laws, there may also be an obligation on them to justify their choices with cogent reasons.[256] Although their failure to do so is likely not grounds for annulment or non-enforcement of the award, its presence is a great way to validate a selected applicable law.[257] By virtue of the direct method, the arbitral tribunal may select rules such as the UNIDROIT Principles, the Hague Principles, the CISG and Incoterms as the law applicable to the merits of a dispute directly, without recourse to a conflict of laws analysis. Arbitrators are also known to consider principles of the *lex mercatoria* such as good faith and fair dealing in international trade, freedom and sanctity of contract and trade usages when determining the law applicable to the merits of a dispute.[258] In some instances, these non-national laws or rules are selected to supplement the law governing the dispute. They provide a useful complement to fill the gaps in law and to find proper solutions considering the circumstance at hand.[259]

4.4.4. Strategies for establishing the applicable law or conflict of laws rules

As previously mentioned, the arbitral tribunal has a great degree of flexibility to determine the applicable law. When exercising its discretion, the tribunal is known to apply a variety of strategies or methods to determine the law applicable to the merits of a dispute. These methods by nature increase consistency to structure the arbitrators' discretion and also provide guidance for determining the law applicable to the merits of a dispute. Some of the strategies that arbitrators employ to select the applicable law, whether they are authorised to do so directly or indirectly through a conflict of laws analysis shall subsequently be analysed.

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255 An example of such a provision can be found in art of the ICC Rules (2021).
256 König 2015 *PYIL* 284.
257 In some instances, however, courts and the arbitral tribunal are under the express duty to make every effort to ensure that an award is enforceable in law. Art 35 of the 1998 ICC Arbitration Rules for example charges the court and arbitrators with this duty.
258 Doug 2014 *SAcLJ* 915.
259 König 2015 *PYIL* 285.

a. The closest connection test

Friedrich Carl von Savigny's work on choice of law mainly sought to determine the proper seat or territory to which any legal relation involving a conflict of laws situation belongs.[260] He opined that conflict of laws rules should operate in a neutral manner; that is, they should not prefer particular parties, laws or jurisdictions.[261] In the absence of the choice of an applicable law, for instance, he called for the application of objective rules established by neutral criteria to determine the governing law.[262] In line with this, he suggested that every legal relation must be governed by the law of the country to which it pertains or to which it relates.[263] Here, such laws are to be applicable whether the legal relation belongs to the particular jurisdiction or it is foreign to it. In other words, he suggested that the legal system that has the closest territorial connection with a legal relation/case should be applied. The methodological compromise between certainty and flexibility that characterises the closest connection principle greatly stems from Von Savigny's work.[264]

Today, the closest connection test takes on a more functional meaning.[265] The test is used to establish the worthiness of the application of a law considering the circumstances of an instant case. Variations of the closest connection test have been adopted in the Rome Convention,[266] Rome I Regulation[267] and the Restatement Second[268] to determine the law applicable to contractual obligations in the absence of the parties' choice. As a tool, the test is used to establish a genuine connection, rather than a

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260 Von Savigny *System Des Heutigen Römischen Rechts*; Von Savigny *Private International Law. A Treatise on the conflict of laws*; Obiri-Korang, 2020 *JCLA* 47.

261 Von Savigny *Private International Law — A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time 27, 32;* Reimann 1999 *VaJIntLaw 594*.

262 Von Savigny *Private International Law — A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time* 27, 32; Reimann 1999 *VaJIntLaw* 595.

263 Von Savigny *Private International Law — A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time* 27, 32; Reimann 1999 *VaJIntLaw* 597-600.

264 Reimann 1999 *VaJInt. Law* 595.

265 Reimann 1999 *VaJInt Law* 594

266 See art 4 of the Rome Convention (1980). See EUR-Lex 2018 https://eur-lex.europa.eu/EN/legal-content/summary/convention-on-the-law-applicable-to-contractual-obligations-rome-convention.html.

267 See art 4 of the Rome I Regulation (2008). See Thomson Reuters 2023 http://uk.practicallaw.thomsonreuters.com/.

268 See Sec 188 of the Restatement Second (1971). See American Law Institute 2023 http://www.kentlaw.edu/perritt/conflicts/rest188.html.

vague one, between a contract and a country.[269] In arbitration, assuming an arbitral tribunal has the discretion through an indirect choice of law provision to adopt any conflict rule considered 'appropriate' or 'applicable', the closest connection test may be used to establish the said rule. Here, the arbitral tribunal may apply the test to establish the closest connected conflict of laws rule, which shall be subsequently used to determine the applicable law.

Also, the closest connection test can be used to facilitate the determination of applicable law through the direct method where, for instance, a specific choice of law rule directs the application of the test.[270] To identify the most appropriate rule given the circumstances of an instant case, the arbitral tribunal may have to consider several different relevant factors. The closest connection test qualifies the relationship between a particular contract and a connecting factor. Connecting factors that may be considered by the arbitral tribunal include the governing law of the contract, the law of the seat of arbitration, the law of the place of concluding a contract and the law of the place of performance. The closest connection test is used as an objective standard to determine the applicable law considering the connecting factors of a case. Ultimately, using the closest connection test discourages the arbitral tribunal from venturing beyond the limits of their legitimate jurisdiction or the reasonable expectations of the parties. It provides a useful guide for determining the applicable substantive law.

b. The cumulative test

The cumulative test involves the concurrent application of the choice of rules of all legal systems connected with a particular dispute.[271] Although the rules may differ, they are simultaneously applied because they lead to the same result. In other words, where all different choice of law rules linked to a particular dispute point to the same law, the arbitral tribunal applies it. The cumulative test is a process by which the arbitral tribunal, instead of applying a single connecting factor, looks to all systems that have a connection with the dispute to see if they point to the same solution.[272] The method may be used to demonstrate that upon the analyses of all conflict

269 According to the Giuliano-Lagarde Report, the connection established must exist between the contract as a whole and the law of a country other than that of forum country. Giuliano 1980 *OJEC* 27.

270 For instance, art 187 of the Swiss Private International Law Act of 1987 provides that in the absence of the parties' choice of governing law, the arbitral tribunal shall decide the case according to the rules of law with which the case has the *closest connection*.

271 Croff 1982 *Int Lawyer* 629.

272 Croff 1982 *Int Lawyer* 629.

of laws rules or national substantive laws connected to a dispute, they lead to the same applicable law. The method helps to establish that a false conflict exists between all the choice of law rules linked to the dispute.[273] It should be noted that the false conflict is not among the substantive rules but among the conflict rules. For instance, where an arbitral tribunal seated in Paris was to consider whether to apply the conflict of laws rules of France, Yugoslavia or Egypt, it did not matter that each determined the applicable substantive law differently.[274] French conflict rules referred to the substantive law of the seller's domicile, the Egyptian conflict rules pointed to the substantive law of the place of signature and the Yugoslav conflict rules mentioned the substantive law of the principal office of the seller. In this case, all connected conflict of laws rules pointed to the Yugoslavian substantive law. The arbitrator could base his selection on the applicable law based on the three conflict of laws rules of these countries since they led to the same result.

As a strategy for determining the applicable substantive law, the cumulative test has some strengths and limitations. As a strength, the use of the method instils into parties, trust in the choice of law selection process. Establishing that all potentially applicable rules linked to a particular dispute lead to the same substantive law provides parties insulation against annulment or recognition proceedings based on the arbitral tribunal's failure to apply the appropriate law or rules. Actually, hardly would parties protest on grounds that their expectations have not been met with the application of such a law. On the other hand, an obvious limitation of the cumulative test appears whereupon the analysis of potentially applicable laws, points to two or more different substantive laws. In such a scenario, the best that the cumulative test offers is identifying these rules without actually resolving the conflict between them. An alternative choice of law method must be applied in this situation to ultimately resolve the conflict and determine the applicable law. Notwithstanding this, the cumulative test can be used either in the direct or the indirect methods.

c. Apply the *lex mercatoria*

The term *lex mercatoria* which literally means 'law merchant' purportedly flourished in medieval and early modern Europe.[275] It emerged from the customary practices of traders and merchants of that time. As practices and

273 Croff 1982 *Int Lawyer* 630.
274 ICC Case No. 6281 of 1989 Yearbook XV (1990) 96.
275 Hatzimihail 2008 *Law Contemp Probl* 169.

customs for international commerce have evolved over the years, so has the composition of the *lex mercatoria*.[276] The writings of Berthold Goldman[277] and Clive Schmitthoff[278] have been instrumental to the development of this new *lex mercatoria*.[279] They both theorised about the scope and legal quality of modern transnational commercial law. Goldman described the new *lex mercatoria* as an autonomous legal system that exists outside of domestic laws and public policy.[280] This new `body of transnational legal principles and rules developed gradually out of emerging activities such as usages, practices, use of model contracts and contract clauses that exist within the international business community. Schmitthoff suggested that this new set of laws also developed out of the efforts of international agencies to harmonise and unify international trade laws.[281] He suggested that the modern *lex mercatoria* originates from international laws and international commercial customs. Therefore, in modern times, the *lex mercatoria* can be said to include the mercantile customs formulated by international bodies such as the ICC Code of Practices, the Incoterms and rules for documentary credits, uniform laws, standard contracts, the usages of international trade and general principles of law.[282]

The flexibility and adaptability of the *lex mercatoria* to the needs of modern international commercial arbitration make it an effective tool for resolving issues of choice of law. The *lex mercatoria* provides an independent legal order distinct from any national law through which arbitrators can apply rules which are widely accepted. It comprises a set of transnational rules that are more flexible than any national law. Some commentators suggest that, due

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276 Hatzimihail 2008 *Law Contemp Probl* 169.

277 Berthold Goldman advocated for a stateless *lex mercatoria.* His definition of *lex mercatoria* is closely connected with international arbitration. He theorised that, the *lex mercatoria*, was essentially custom and that written laws were merely evidence of customary rules. Between 1964 and 1993 Goldman shared his view on the *lex mercatoria* in arts and chapters. For more information on his work see generally De Ruysscher 2020 *MJ* 465-483; Hatzimihail 2008 *Law Contemp Probl* 169-190.

278 Clive Schmitthof was not concerned about the purity of the sources of the new *lex mercatoria.* He emphasised that present day *lex mercatoria* emanated from international laws and international custom. That is, from both national and non-national sources such as treaties, model laws, commercial usages and practises. His views on *lex mercatoria* were represented in several arts and chapters starting from 1961. For discussion on his views, see generally De Ruysscher 2020 *MJECL* 465-483; Hatzimihail 2008 *Law Contemp Probl* 169 -190.

279 Hatzimihail 2008 *Law Contemp Probl* 169.

280 This was the basis for his view about the *lex mercatoria* espoused in his 1964 essay Frontières du Droit et Lex Mercatoria. See generally Goldman 1964 *Arch Philos* 177; Hatzimihail 2008 *Law Contemp Probl* 169 -190.

281 Schmitthoff 1988 *J Bus Law* 105; De Ruysscher 2020 *MJ* 468.

282 De Ruysscher 2020 *MJECL* 468.

to the autonomous nature of international arbitration, an equally independent and flexible set of rules and principles, such as the *lex mercatoria,* should regulate it.[283] Due to the sophistication of international commercial disputes, national laws may lead to unfair outcomes while the *lex mercatoria* provides a neutral set of rules that may ensure equity and fairness. The *lex mercatoria* may be used as a tool in choice of law analyses. Here, it can be used to clarify the parties' intentions as to the applicable substantive rules, fill in the gaps of a chosen national law and reduce the impact of peculiarities of individual national laws in the arbitration process. The *lex mercatoria* may be applied through the direct and indirect methods.

To consider the application of the *lex mercatoria* through the indirect method, it is to be noted that the method necessarily results in the application of a national law to the substance of the dispute. Therefore, arbitrators are likely to apply the *lex mercatoria* at the conflict of laws stage in order to determine whether there is an established rule of conflict.[284] As already noted, arbitrators may either cumulatively apply the conflict of laws of national legal systems connected with the dispute or apply general principles of conflict of laws by the indirect method. Where they apply general principles of conflict of laws, they ultimately consider a rule of conflict of laws that is widely accepted in national legal systems or international conventions, as the appropriate conflict of laws rule considering the party's legitimate expectations. The arbitral tribunal may consider generally accepted private international law rules that enjoy international consensus. For instance, where an arbitral tribunal had to determine the applicable law to the merits in the absence of the parties' agreement, in an exclusive agency agreement between French agents and an Italian manufacturer, they decided to apply French law as the governing law since the "centre of gravity" of the contract was the place of performance of the characteristic obligation.[285] In this agreement, the French agents undertook the most characteristic obligation under the agency agreement, which was the search for clients. To justify their decision, the arbitral tribunal, noted that the approach of considering the "centre of gravity" of the contract, was adopted by international instruments like the Hague Convention of 14 March 1978 on the law applicable to agency and representation, and the

283 Goldman believed that the aim of the new *lex mercatoria* was to legitimise the direct application of non-national legal sources to avoid national legal systems. Hatzimihail 2008 *Law Contemp Probl 189.*

284 Elcin *Lex Mercatoria in International Arbitration Theory and Practice* 274.

285 ICC Award No. 7329 ICC Bulletin, Vol. 7, No.1, at 93 (1996).

Rome Convention. In this instance, the tribunal referred to these instruments although they did not apply to the case.

When determining the applicable law through the direct method, it may lead to the application of national law and/or the *lex mercatoria* to the substance of the dispute. Unlike the indirect methods, the direct method can be completely free of the constraints of conflict of laws regimes. The selection of an applicable law through the direct method may be based on the arbitral tribunal's abstract interpretation of contractual intentions and the relevant contracting or arbitral practice.[286] In fact, they may via the direct method determine the applicable law by considering the content of a particular contract and the circumstances that surround it. For instance, in a contract between French and Dutch buyers and a Vietnamese exporter, there was no choice of law clause.[287] The arbitral tribunal, upon analysing correspondence exchanged between the parties, concluded that there was no tacit choice of law. However, to regulate issues of price the contract referred to international trade usages, such as the Incoterms 1990 and for issues relating to force *majeure*, they referred to the Uniform Customs and Practice for Documentary Credits (UCP) 500. The arbitral tribunal was of the opinion that, by referring to the Incoterms and the UCP, the parties intended for their contract to be regulated by recognised trade usages and general principles of international trade. This assertion was also furthered by the fact that the application of trade usages was consistent with article 13(5) of the 1988 ICC Rules and with the arbitral practice. Based on this, the arbitral tribunal, in this case, referred to CISG or to the UNIDROIT Principles in support of its decision. Although Vietnam had not ratified the CISG, the arbitral tribunal referred to the CISG with respect to the calculation of the amount of compensation due to buyers caused by the seller's default since the Incoterms 1990 and the UCP 500 contained no provision regarding the effect of failure by one party to fulfil contractual obligations. In contrast to the indirect method, arbitral tribunals via the direct method can apply the *lex mercatoria* even though the relevant choice of law rules have not referenced the 'rules of law' terminology in its provisions.[288] Although this is possible, the arbitral tribunal must do so taking into consideration the reasonable expectations of the parties. Assuming parties reasonably expect the arbitral tribunal to apply the law of a country, via the direct method, arbitrators are likely to comply. It is good practice, therefore,

286 Elcin *Lex Mercatoria in International Arbitration Theory and Practice* 280.
287 ICC Award No. 8502 ICC Bulletin Volume 10 No. 2 (1999) 72.
288 Elcin *Lex Mercatoria in International Arbitration Theory and Practice* 285.

for the arbitral tribunal to provide reasons for their decisions to apply the *lex mercatoria* made through the direct method. The arbitral tribunal must attempt to demonstrate to the parties that they cannot reasonably apply any law other than the one finally determined.

4.4.5. Differences between the direct and the indirect methods

The first obvious difference between the two methods is that one grants arbitrators authority to make a direct choice of the applicable law whereas the other grants them an indirect choice of the law applicable to the substance of the dispute. The arbitral tribunal's use of one method or the other is dependent on the provision of the relevant legal instrument. There may be various variations of the methods in different arbitration instruments. The wording of a choice of law provision provides insight into not only the method to be applied but also the extent of the arbitral tribunal's freedom to choose the applicable substantive law. Take, for instance, the wording of Section 34 of *Thailand's Arbitration Act* of 2002.[289] It provides *inter alia* that:

> Failing any designation by the parties, the arbitral tribunal shall decide the dispute in accordance with Thai laws, save where there is a conflict of laws, the arbitral tribunal shall apply the law determined by the principle of conflict of laws *it considers appropriate*.[290] (Emphasis Added)

Also, section 31 of the *Norwegian Arbitration Act* of 2004[291] provides *inter alia* that:

> Failing any designation by the parties, the arbitral tribunal shall apply *Norwegian conflict of laws rules.*[292] (Emphasis Added)

Comparing these two provisions reveals two variations of the indirect method. The Norwegian position envisages the application of the arbitral seat's conflict of laws rules and the Thai arbitration law requires that the arbitral seat's law be applied except where there is a conflict of laws, in which case arbitrators are to apply the conflict of laws it considers appropriate. These two provisions mandate the application of the conflict of laws rules to determine the applicable law although they vary from atypical provisions that are modelled after the UNCITRAL Model Law. They still require an arbitral tribunal to conduct some conflict of laws analysis.

289 Arbitration Act (BE 2545) of 2002.
290 See ILO 2014 https://www.ilo.org/.
291 Norwegian Arbitration Act No 25 of 2004. See New York Arbitration Convention 2023 https://www.newyorkconvention.org/11165/web/files/document/2/1/21101.pdf.
292 See Kaasen "International Arbitration in Norway" 14.

Similarly, numerous variations of the direct method can be found in arbitration instruments. The following are examples of some variations in the direct method. Article 1445 of the *Mexican Commerce Code* of 1889[293] provides, *inter alia*:

> If the parties do not indicate the law to govern the litigation fund, the arbitral tribunal, taking into account the *characteristics and connections of the case*, will determine the right applicable.[294] (Emphasis added)

Also, article 45(1) of *Chapter 387 of the Laws of Malta*[295] provides, *inter alia*:

> Failing such designation by the parties, the arbitral tribunal shall apply Maltese law including the *rules of Maltese law* relative to the conflict of laws.[296] (Emphasis added)

In the USA, ORS 36.508(3) of the *2023 Edition of the Oregon State's Chapter 36 Mediation and Arbitration Special Actions and Proceedings Dispute Resolution* provides that:

> (3) Failing any designation of the law under subsection (1) of this section by the parties, the arbitral tribunal shall apply the rules of law it *considers to be appropriate given all the circumstances surrounding the dispute.*[297] (Emphasis added)

Based on the examples above, the direct method may manifest in diverse ways. The provision may simply require arbitrators to apply the law or rules of law they consider appropriate, as is the case in article 35(1) of the UNCITRAL Arbitration Rules. On the other hand, provisions depicting the direct method may also provide specific directions by which the arbitral tribunal may determine the law applicable to the substance of the dispute. The arbitral tribunal may be directed to consider the circumstances surrounding the dispute, the substantive law of the arbitral seat and the characteristics and connections of the dispute. Generally speaking, provisions such as these serve as a guide for arbitrators to arrive at the best possible choice of applicable substantive law, bearing in mind the

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293 Mexican Commerce Code of 1889 updated in 2014.
294 See Global-Regulation 2014 https://www.global-regulation.com/translation/.
295 Malta Arbitration Act (Cap. 387) of 1996. See ILO 2007 https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86863/98598/F540182867/MLT86863.pdf.
296 See ILO 2007 https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86863/98598/F540182867/MLT86863.pdf.
297 See Oregon Laws 2023 https://oregon.public.law/statutes/ors_chapter_36.

peculiarities of the dispute. However, it does not mandatorily require a conflict of laws analysis.

Another difference between the direct and indirect methods for selecting the applicable substantive law of a dispute is conceptual.[298] The direct method may be perceived as favouring an interest-or-contextual-based approach to identifying the law applicable to the substance of a dispute whereas the indirect method supports a rules-based approach. An interest-or-contextual-based approach involves the arbitral tribunal weighing competing interests within the context of a particular case to determine the applicable law.[299] Decisions about the applicable law or rule are suspended until there is clarification on the facts of the particular dispute.

The indirect method, on the other hand, involves an investigation of pre-existing rules to link a particular legal category to a particular jurisdiction.[300] In other words, it involves the weighing of a variety of criteria to determine the applicable law. Unlike the interest-based approach (direct method), the rules-based (indirect method) approach involves the tribunal making a conceptual distinction between law and fact-based rules.[301] The interest-based approach ensures that the arbitral tribunal's ultimate selection of the applicable law better reflects the facts of a dispute. It can be argued that this approach reduces the predictability of the arbitral tribunal's decision on the applicable law. It, however, increases fairness and equity in the process of choice of law.[302] Conversely, the rules-based approach increases predictability, certainty and neutrality.[303] However, there is a real possibility that the abstract rule that an arbitral tribunal is directed to apply only captures a fraction of the relevant facts of the case. In a sense, for parties or arbitrators who have to select/use the direct method or indirect method, it becomes a question of the premium they place on accuracy over predictability when it comes to the arbitral tribunal's decision on the law applicable to the merits of their dispute.

4.4.6. Similarities between the direct and indirect methods

One of the areas in which the direct and indirect methods converge is the fact that they both generally give the arbitral tribunal broader freedom to

298 Waincymer *Procedure and Evidence in International Arbitration* 994.
299 Heiskanen 2010 *ArbIntl* 451.
300 Heiskanen 2010 *ArbIntl* 446.
301 Heiskanen 2010 *ArbIntl* 447.
302 Waincymer *Procedure and Evidence in International Arbitration* 995.
303 Waincymer *Procedure and Evidence in International Arbitration* 995.

determine the applicable law as compared to judges. In the search for the applicable law, the arbitral tribunal is not bound by the choice of law rules of the seat of arbitration like judges. They have virtually unfettered freedom to determine the applicable rules of law. The arbitral tribunal may even consider non-national legal rules (such as the *lex mercatoria*) to aid them in their search for the applicable law. Generally speaking, the direct or indirect method may be viewed merely as variations of the arbitrator's freedom to determine the applicable substantive law.[304] Although the modalities, limitations and parameters to determine the applicable substantive law may vary from one legal instrument to another and from one method to another, the underlying principle that the arbitral tribunal can determine the applicable substantive law in the absence of a choice is not in question under most modern arbitration statutes and institutional rules.

Another area of convergence between the two approaches is that the reasoning and relevant connecting factors considered when identifying the applicable law under either the direct or indirect method may be the same. The arbitral tribunal's thought process for identifying the applicable substantive law under either method may inevitably be the same.[305] To conclude that a particular law is more suitable, arbitrators, using either method, will consider the impact and outcome of their options in relation to the circumstances of the dispute. The reasons for choosing one law over another may likely be the same under either method. Although under the direct method, arbitrators are not obligated to consider the conflict of laws rules, unlike under the indirect method, similar connecting factors may be considered bearing in mind the circumstance of the case. Under either method, arbitrators may consider a similar variety of potentially connecting factors such as the place of arbitration law governing the arbitration agreement, the place of performance of the contract, the nationality or domicile of the debtor, the place where the effects of the performance of the contract are felt and the place of negotiation and/or conclusion of the contract. The purpose of either method is to establish a link between a legal relationship (a contractual claim emanating from the arbitration) and a connecting factor that serves as a localising element. Under both approaches, arbitrators are likely to ignore connecting factors that only have a tenuous link to the arbitration.[306] Ultimately a selected law by either approach may lead to the same result as arbitrators are likely to lean

304 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 216.
305 Waincymer *Procedure and Evidence in International Arbitration* 994.
306 Heiskanen 2010 *ArbIntl* 454.

towards a decision that aligns with the reasonable expectations for the parties.

4.5. Comments

From this section, it can be deduced that arbitrators employ various strategies through the direct or indirect methods to determine the applicable law. Whether the applicable substantive law is to be determined by the direct or indirect method, arbitrators can leverage the strengths and weaknesses of either method to determine the appropriate law. For instance, assuming an arbitration law directs the arbitral tribunal to conduct a conflict of law analysis to determine the applicable law, it is likely they would ultimately opt for the substantive laws of the country most closely connected to the dispute instead of the conflict of law rules of the seat of arbitration, especially when it has only a tenacious link to the dispute. It is suggested that regardless of the choice of law approach applied to determine the applicable substantive law, it is the skill and expertise of arbitrators that matter most.

4.6. General Concluding Remarks

This chapter discussed several interesting aspects regarding the possible methods and strategies used by arbitrators to assign the applicable substantive law. A review of the various national arbitration laws, arbitration conventions and arbitration institution rules reveal that there are different methods for arbitrators to determine the applicable substantive law. Choice of law instruments such as the Rome I Regulation and the Rome Convention may assist in the determination of the applicable substantive law in the absence of choice. Substantive laws such as the CISG and the UNIDROIT Principles also provide the rules and principles that may be used to resolve the merits of a dispute. These instruments also assist in determining the law applicable to e-contracts. Here as well, established choice of law rules such as the Rome I Regulation and the CISG provide the choice of law principles to guide the arbitral tribunal's conflict of laws analysis. The UNCITRAL has also over the years adopted variations of the direct and indirect methods to guide conflict of law analysis. The choice of law provisions in instruments such as the UNCITRAL Model Law and the UNCITRAL Arbitration Rules have greatly impacted the development of choice of law rules in national and institutional sources.

The two main methods for determining the applicable law — the direct method and the indirect method — guide arbitral tribunals to select an applicable substantive law from among various possible options. Where the arbitral tribunal uses the indirect method, they must necessarily conduct conflict of laws analysis taking into consideration things such as national legal systems, international conventions and the circumstances surrounding a case. In contrast, where the arbitral tribunal uses the direct method, they need not conduct such an analysis to determine the substantive law. However, it is prudent for them to give reasons for their choice of law. Whether arbitrators use the direct method or the indirect method, it is likely they would consider the same elements or connecting factors when selecting the applicable law. It is suggested that although there are differences between the two methods, the strategies they offer for determining the law applicable to the substance of a dispute may converge. The bottom line is that, in international arbitration, the law that applies to disputes varies from case to case and as such choice of law methods also differ in every case. The arbitrator must determine the applicable substantive law, bearing in mind the implications of their choices within the unique circumstance of each case.

CHAPTER 5

METHODS USED BY ARBITRATORS TO ASSIGN THE APPLICABLE SUBSTANTIVE LAW IN EGYPT, GHANA, SOUTH AFRICA AND CÔTE D'IVOIRE

5. General Introduction

> The most effective method of creating a 'universal' system of law governing international arbitration has been through international conventions (and, more recently, through the Model Law). International conventions have helped to link national systems of law into a network of laws that, while they may differ in their wording, have as their common objective the international enforcement of arbitration agreements and of arbitral awards.[1]

Over the years, the United Nations Commission on International Trade Law (UNCITRAL) has put in place an entire framework of legal instruments to govern the area of international commercial arbitration.[2] This movement began with the New York Convention,[3] continued with the UNCITRAL Arbitration Rules,[4] and, then, the UNCITRAL Model Law.[5] The impact of these UNCITRAL texts on the framework of legal instruments in the area of international arbitration is that they have triggered convergence in terms of procedural similarities, practices of arbitral tribunals and judicial approaches for setting aside and enforcing arbitral awards.[6] Generally, the convergence of practices and norms can be seen in a number of areas in the modern international commercial arbitration process. Mention can be made of convergence on the arbitral tribunal's ability to determine its jurisdiction, the so-called competence-competence doctrine.[7] Further, legal convergence is

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1 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 59.

2 See generally Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 See United Nations 2023 https://www.newyorkconvention.org/.

4 UNCITRAL Arbitration Rules with art 1, paragraph 4, as adopted in 2013 and art 1, paragraph 5, as adopted in 2021 (1976). See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

5 UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (1985). There can also be mention of the UNCITRAL Notes on the Organising Arbitral Proceeding of 1996 (updated in 2016). See UNCITRAL 2023 https://uncitral.un.org.

6 Here, convergence is used to mean arbitration instruments, practices and customs increasingly resembling each other.

7 This is sometimes expressed in French as *competence de la competence* and in German as *kompetenz-kompetenz*. It is a doctrine that represents the idea of a legal

found in the substantial acceptance of provisions for severability of the arbitration clause and general principles of arbitration such as party autonomy and procedural fairness.[8]

Consensus-based legal instruments conceived for international arbitration (such as the UNCITRAL arbitration instruments)[9] have significantly unified the basic international arbitration legal framework, though a certain measure of disunity remains.[10] The UNCITRAL Model Law, for instance, has served as a legislative archetype for the reform and modernisation of many arbitration laws.[11] Nevertheless, the different preferences of countries (or arbitration institutions) have led to variations in its implementation. To assume that governments and arbitration institutions that have enacted a particular consensus-based legal text have identical arbitration laws would be misleading. The provisions of arbitration statutes and institutional rules may reflect diverse degrees of similarity or follow dissimilar approaches from consensus-based legal rules conceived for international arbitration.[12] When it comes to provisions relating to the applicable substantive law, for instance, although there is substantial acceptance of the arbitral tribunal's authority to determine it under modern arbitration laws, the approaches that they use to assign the applicable substantive law may vary from instrument to instrument.

Given the possibility of such variations, this chapter reviews and analyses in three sections, the methods provided for arbitrators to determine the applicable substantive law under selected arbitration laws in Africa. First, section I generally outlines features common to provisions relating to the applicable substantive law, found in national and institutional international commercial arbitration laws. It also specifically considers such features from an African perspective. Section II provides an exposition of the approaches for determining the applicable law in the absence of the parties' choice found in the national and the selected institutional arbitration rules of Egypt,

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body such as a court or arbitral tribunal having jurisdiction to rule or decide the extent of its own competence on an issue before it. Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 340.

8 Kaufmann-Kohler 2003 *VandJTransnatlL* 1321.

9 For the purposes of this chapter, the expression 'UNCITRAL arbitration instruments' refers to the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration.

10 See generally Faria *Legal harmonisation through Model Law*.

11 Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 2-3.

12 Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 15.

Ghana, South Africa and Côte d'Ivoire. Finally, section III, from an African perspective, highlights the potential constraints on the arbitral tribunal's discretion when establishing the applicable substantive law. Generally, this chapter analyses the rules and practices used by arbitral tribunals to assign the applicable substantive law, mostly those of Egypt, Ghana, South Africa and Côte d'Ivoire and the impact, if any, which the UNCITRAL arbitration instruments has on these rules and practices.

Section I: Features of Provisions Relating to the Substantive Law of a Dispute

5.1. Introduction

Generally, the trend towards the harmonisation and unification of arbitration laws has led arbitral tribunals to increasingly apply similar legal principles.[13] Apart from the widespread adoption of principles such as party autonomy, a regulatory framework for arbitration procedure, with similar content and form is in recent times also commonly used.[14] The UNCITRAL Model Law, which was specifically created as a benchmark for international arbitration has greatly influenced the development of such a regime. Take, for instance, its influence on provisions that regulate the determination of the applicable substantive law found in arbitration laws. Although such provisions may emanate from different instruments, they generally have some shared characteristics. Taking as its starting point the very successful UNCITRAL Arbitration Rules,[15] the UNCITRAL Model Law strongly influences the characteristics of provisions on law applicable to the substance of a dispute.[16] The following section highlights these shared features to demonstrate the harmonising role played by the UNCITRAL arbitration instruments. However, before getting into this discussion what can be understood by the concepts of harmonisation and unification of laws in arbitration?

5.1.1. The unification and harmonisation of laws

Unification of laws can be understood as the adoption of an agreed set of rules, guidelines or standards to be applied to international legal

13 See para 5.1.1 below for the distinction between unification and harmonisation of laws.
14 See generally Ma 2015 *Contemp Asia Arb J* 185-228.
15 UNCITRAL Arbitration Rules (1976).
16 Kaufmann-Kohler 2003 *VandJTransnatlL* 1315,1324.

relationships.[17] In other words, international unification involves countries adopting a common legal standard to govern particular aspects of international transactions. In this process, conflicting rules of two or more systems of national laws applicable to the same international legal transaction are replaced by a single rule.[18] It involves the process of providing the same rules for different countries so that the same solution applies everywhere when a conflict arises concerning a given relationship. This process of unification can be achieved by accepting customs, international practice or through an international agreement between countries by convention or within the framework of international organisations.[19] Generally speaking, international unification of laws has, to mention but a few, occurred or is about to be achieved in matters relating to negotiable instruments,[20] contracts of the sale of goods[21] and principles for international commercial contracts.[22] Specifically, there can also be mention of the unification by the European Union (EU) on the law applicable to contractual agreements. In international commercial arbitration, uniformity has been assisted by international conventions such as the European Convention on International Commercial Arbitration of 1961[23] and the New York Convention.

On the other hand, the harmonisation of laws can be understood as a process through which standards of different countries are combined into one practical standard.[24] It describes a process which facilitates the understanding of the structure and concepts of different systems of law. Broadly speaking, harmonisation is an avenue through which the effects of a type of transaction in one legal system are brought as close as possible

17 Zaphiriou 1994 *NwULRev* 407.

18 UNCITRAL Secretariat *Unification of the Law of International Trade: Note by the Secretariat: A/C.6/L.572* 13. See United Nations 2023 https://uncitral.un.org/en/commission.

19 René 1968 *AJCL* 19.

20 Adopted by the General Assembly on 9 December 1988, the United Nations Convention on International Bills of Exchange and International Promissory Notes of 1988 is an example of convention that unifies relating to bills of exchange and promissory notes.

21 The United Nations Convention on Contracts for the International Sale of Goods (1980) is a typical example of unified rules on the contract of sale of goods.

22 The UNIDROIT's work on contract law, UNIDROIT Principles of International Commercial Contracts of 2016 is an example of unified contractual principles.

23 See United Nations 2023 https://treaties.un.org/doc/Publication/UNTS/Volume%20484/volume-484-I-7041-English.pdf.

24 See generally Goldring 1978 *FLRev*; Rosett 1992 *AmJCompL*.

to the effects of similar transactions under the laws of other countries.[25] Conceptually, the harmonisation of laws may be considered as the process through which domestic laws are made more similar. It goes beyond the mere comparison of laws to entail the elimination of their diversity through either statutory reform or the adoption of techniques and solutions.[26] The process of harmonising different laws involves effecting similarities into a detailed regulatory requirement so that persons who are required to comply with the laws of several jurisdictions can do so without undue trouble and expense. Harmonisation aims to give effect to an approximation or co-coordination of different legal provisions by eliminating major differences and creating minimum standards.[27] Through model laws and legislative guides, the harmonisation of laws may be achieved. In arbitration, for instance, the UNCITRAL Model Law successfully provides a means through which diverse elements of different legal systems are combined or adapted to form a coherent whole, while retaining individuality.

Both unification and harmonisation efforts mainly aim to enhance legal certainty and predictability.[28] However, as can be deduced from above, the two concepts as conceived in comparative law have very different implications. At the inception of the movement for the unification of trade law, the general goal of the agenda was to attain the standardisation of laws, utilising uniform model codes or statutes.[29] This movement was geared toward creating ideal uniform laws for particular fields which sovereign jurisdictions would adopt and consistently apply. In recent times, however, uniformity is not the main goal for the unification of law. The concept has become closely associated with the notion of harmonisation of law.[30] This stems from a gradual but general realisation that true uniformity of laws among sovereign jurisdictions is an unrealistic goal, if not impossible. As a result of this realisation, the notion of unification of laws is now generally used and understood in line with the less ambitious objective of harmonisation.

5.1.2. Legal convergence in arbitration laws

It is an undeniable fact that in recent times arbitration has become not only a preferred alternative dispute resolution mechanism but also one that has

25 Goldring 1978 *FLRev* 289.
26 Boodman 1991 *AmJCompL* 707.
27 Boodman 1991 *AmJCompL* 707.
28 See generally Goldring 1978 *FLRev* 284-325; Rosett 1992 *AmJCompL* 683-697.
29 Boodman 1991 *AmJCompL* 707-708.
30 Boodman 1991 *AmJCompL* 708.

led to interactions between participants from different cultures and legal systems. The possibility of such interactions has triggered a general move toward the unification and harmonisation of procedures through treaties and soft law.[31] These international instruments set general frameworks that represent political and collective desires to harmonise and create a model ground for procedural arbitration laws. The Geneva Protocol on Arbitration Clauses of 1923[32] and the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927,[33] for instance, represent the first steps towards creating model rules on the recognition of arbitration clauses and awards — later crystalising as the New York Convention.

Through the efforts of the UNCITRAL Working Group on International Arbitration, a neutral framework that promotes synergy between different legal traditions exists for international arbitration proceedings.[34] The UNCITRAL Model Law, for instance, provides countries with a template for modernising and harmonising their arbitration regulations and statutes. The Model Law, since its adoption by UNCITRAL, has provided a means through which different legal, economic and political regimes of the world may co-exist by promoting the integration of arbitration rules.[35] In a scenario where party A, from a common law country and party B, from a civil law country, engage in international arbitration, the differences in the legal traditions could lead to foreseeable tensions when the applicability of rules has to be deduced. The UNCITRAL Model Law promotes the harmonisation of the arbitration concepts of different legal systems by providing minimum standards to cope with the flaws that disparities can create. Although the UNCITRAL Model Law does not have a mandatory effect on countries, it has been widely adopted due to the fair and efficient legal structure it provides.[36]

Similar to other model laws, the UNCITRAL Model Law can be regarded as a balanced and discrete set of provisions that could be enacted as a single

31 Garnett 2002 *MJIL* 400.
32 Geneva Protocol on Arbitration Clauses (1923). See United Nations 2022 https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf.
33 Geneva Convention for the Execution of Foreign Arbitral Awards (1927). See United Nations 2022 https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf.
34 Selim 2017 *Intl J Arb Med & Disp Man* 402.
35 UNCITRAL *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 1.
36 UNCITRAL *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 1.

statute or as part of the legal regime for dispute resolution.[37] Model laws are appropriate tools for the modernisation and harmonisation of national law when it is expected that countries will need to make adjustments to the text of the model to accommodate local idiosyncrasies. In contrast to an international convention which would typically restrict or prohibit the possibility of changes to a text containing obligations, model laws permit jurisdictions to modify or omit provisions upon incorporation into national law.[38] Certainly, the flexibility inherent in model laws has the potential to stifle harmonisation as compared to conventions. Notwithstanding this, it is precisely the flexibility inherent in model laws that contributes to a model law potentially being more widely accepted than arbitration conventions dealing with the same subject matter.[39] To attain a satisfactory level of harmonisation and certainty through the adoption of a model law, jurisdictions should make as few changes as possible when incorporating it into their legal systems.[40] Adhering to the uniform text of a model law as much as possible makes arbitration laws transparent and familiar to the different participants in the arbitration process.

Arbitration institutions have also played an important role in the convergence of arbitration laws. When seasoned institutions such as the International Chamber of Commerce (ICC) International Court of Arbitration and the London Court of International Arbitration (LCIA) change or modify their arbitration rules, for instance, it is likely to influence other institutions to adopt those changes. Due to this phenomenon, more and more institutional arbitration rules tend to converge. Also, as arbitration institutions compete against each other in terms of reputation and best practice, they tend to adopt arbitration frameworks that enhance legal certainty and predictability. In this regard, the UNCITRAL Arbitration Rules has influenced and contributed to the convergence of institutional arbitration laws.[41] Widely used in ad hoc arbitrations as well as institutional arbitration, the UNCITRAL Arbitration Rules constitute a comprehensive set of rules that is efficient and predictable. Prepared with the assistance of arbitration

37 UNCITRAL *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 1.
38 UNCITRAL *Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* 13-14.
39 UNCITRAL *Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* 14.
40 Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 16.
41 Sanders 1979 *AJCL* 453.

experts from all over the world, the UNCITRAL Arbitration Rules offer its users a well-balanced set of modern arbitration rules.[42]

Generally speaking, the arbitrator's influence and guidance also contribute to the gradual convergence of arbitration procedures. In the absence of a party's choice of applicable arbitration rules for instance, where arbitrators have to select one, they regularly suggest the same or similar procedures across cases for reasons of comfort and ease.[43] Although such a recurrent practice does not in any way create a precedent, it provides strong persuasive effect in shaping not only subsequent decisions but also directing conversations about preferred procedural practices.[44] It can be argued that the regular use and general acceptance of common practices by arbitrators could eventually lead to the creation of a legal custom.[45] Through international fora and discussions, arbitrators share their experiences, opening them up to criticism and enhancement.[46] Gradually, norms are formed through this process. The effect of such norms is that they influence the expectation of users on how particular issues should generally be dealt with. This in turn reinforces not only the use of these norms but their adoption as standard practice in arbitration. In the same light, new norms that become generally accepted over time also serve as the basis for the update and revision of institutional and national arbitration rules or laws.

Certainly, the harmonisation of arbitration rules increases predictability in the arbitration process. However, the flexible nature of arbitration proceedings allows for the possibility that participants may design case-specific processes. This possibility raises the question, can arbitration rules be truly harmonised? The flexible nature of arbitration itself implies that parties and arbitrators may use practical, strategic and creative considerations to design case-specific procedures. Notwithstanding this, when it comes to arbitration law, what is not in doubt is that best practices are enshrined in arbitration instruments such as those of the UNCITRAL.

5.1.3. Development of provisions on law applicable to the substance of a dispute

In general, it can be argued that the harmonisation of international commercial arbitration laws has made the structure, content and text of

42 Sanders 1979 *AJCL* 453.
43 Cheng 2012 *ASIL Proceedings* 292.
44 Ariz 2021 *U Miami Int'l & Comp L Rev* 374.
45 Cheng 2012 *ASIL Proceedings* 292.
46 Cheng 2012 *ASIL Proceedings* 292.

most national and institutional arbitration laws similar. Provisions that highlight and engender widely accepted international trade practices, for instance, are commonly found in international commercial statutes and legal instruments. Provisions that reflect the party autonomy principle for example are found in almost every arbitration instrument. Specifically, when considering provisions relating to the law applicable to the substance of a dispute found in national and institutional arbitration laws, they appear to be increasingly similar. An early model of a typical provision relating to the law applicable to the merits of a dispute is found in the European Convention on Arbitration.[47] Its article VII titled, 'Applicable Law' provides that:

> (1) The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. 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. In both cases, the arbitrators shall take account of the terms of the contract and trade usages.
> (2) The arbitrators shall act as *amiable compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration.[48]

Article VII of the Convention inspired similar provisions in the UNCITRAL Model Law.[49] The legislative history of the UNCITRAL Model Law indicates that drafters wanted to omit provisions on ascertaining the law applicable to the merits of a dispute. This was because drafters were of the opinion that it was not necessary for a law on arbitration to deal with the law relative to the substance of a dispute.[50] Notwithstanding this, they decided to include such a provision in the model law — as was done in the preceding 1976 UNCITRAL Arbitration Rules. Drafters agreed that because the UNCITRAL Model Law was designed to deal with international commercial arbitration, the lack of provisions on the rules applicable to the substance of a dispute would make the model law incomplete.[51] Subsequent to the enactment of

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47 European Convention on International Commercial Arbitration (1961). See United Nations 2023 https://treaties.un.org/doc/Publication/UNTS/Volume%20484/volume-484-I-7041-English.pdf.

48 See United Nations 2023 https://treaties.un.org/.

49 European Convention on International Commercial Arbitration (1961); Hascher "European Convention on International Commercial Arbitration of 1961: Commentary" 533.

50 UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/40/17* 232. See United Nations 2023 https://uncitral.un.org/en/commission.

51 UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/40/17* 232. See United Nations 2023 https://uncitral.un.org/en/commission.

the UNCITRAL Model Law and its provisions relating to the substance of a dispute, numerous countries (as well as arbitration institutions) have adopted the approach of including such provisions in their arbitration rules. Typically, countries that have adopted the UNCITRAL Model Law incorporate the structure and textual content of its provisions relating to the applicable substantive law.[52] Also, some countries that have not adopted or replicated the Model Law entirely have provisions on the applicable substantive law inspired by its textual approach and philosophical underpinnings.[53] In the same light, the rules of arbitration institutions tend to follow a broadly similar pattern when it comes to provisions on the applicable substantive law — most of them are based on the UNCITRAL Arbitration Rules. It can be argued that the current trend is that the structure and textual content of such provisions are largely influenced by the style adopted by the UNCITRAL arbitration instruments.

a. The structure of provisions on the law applicable to the substance of a dispute in the UNCITRAL framework

Inspired by the construction of article 28 of the UNCITRAL Model Law the structure and content of provisions on the law applicable to the substance of a dispute found in numerous modern national arbitration laws have become similar.[54] In the same light, article 33 (now article 35) of the UNCITRAL Arbitration Rules has also influenced the framework of such provisions in numerous institutional arbitration laws.[55] Due to the widespread direct or indirect adoption and influence of these two UNCITRAL arbitration instruments, the framework of provisions relating to the applicable substantive law of a dispute would typically contain:

1. Provisions establishing the parties' freedom to select the law applicable to the substance of their dispute;
2. Provisions establishing the arbitrator's authority to select the applicable substantive law (either directly or indirectly through a conflict of laws analysis) in the absence of the parties' choice;

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52 Examples of countries that have arbitration laws based on art 28 of UNCITRAL Model Law (1985) include Singapore, Chile, Hong Kong, Mauritius, Nigeria, South Africa and Ghana.

53 Although Ghana, for instance, is not considered an UNCITRAL Model Law jurisdictions, it wholly adopts art 28 in the arbitration laws.

54 Cheng 2012 *ASIL Proceedings* 293.

55 Examples of institutional arbitration rules based on art 35 of the UNCITRAL Arbitration rules include the Philippine Dispute Resolution Centre Inc. (PDRCI) Arbitration Rules of 2015 (art 44) and the Singapore International Arbitration Centre (SIAC) Arbitration Rules of 2016 (art 31).

3. Provisions permitting arbitrators to decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised so; and
4. Provisions requiring arbitrators in all situations relating to the choice of the applicable substantive law to decide in accordance with the terms of the contract and trade usages.

Whether or not a provision listed above is added to a particular arbitration law depends on the peculiar needs of each enacting jurisdiction or arbitration institution. Nevertheless, there are some principles established by the UNCITRAL arbitration instruments that are inseparable from provisions of the law applicable to the substance of a dispute — for example, the principle of party autonomy. Virtually all modern arbitration rules and laws (based on the UNCITRAL arbitration instruments or otherwise) recognise the party autonomy principle in similar terms.[56] That is, parties are generally free to choose, expressly or impliedly, the law applicable to the merits of their dispute. Article 28 of the UNCITRAL Model Law (with the limited exceptions of paragraph 4) establishes the importance of party autonomy in the choice of the applicable substantive law of a dispute, similar to article 35(1) of the UNCITRAL Arbitration Rules.[57] Provisions relating to assigning the applicable substantive law may permit parties to select more than one law, national law and non-national laws. Parties are generally not restricted in their choice of the applicable substantive law and their choice is binding on arbitrators. The party autonomy principle is not only a pillar but also the hallmark of international commercial arbitration.[58] It permits parties to choose not only the applicable substantive law but also the law applicable to the conduct of the arbitration process such as choice of place and language of the arbitration. As is almost invariably the case, when a provision relating to the applicable substantive law is present in a particular institutional arbitration rule or arbitration statute, it will direct that parties have the freedom to choose the law that is to govern the merits of their dispute.

Provisions on the choice of the substantive law also usually go further to permit parties to expressly authorise arbitrators to determine their dispute

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56 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 101.

57 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 732.

58 Silberman and Ferrari "Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong" 262.

as *amiable compositeur* or *ex aequo et bono*.[59] This authority granted to arbitrators to decide as *amiable compositeur or ex aequo et bono* can be considered as one of the applications of the party autonomy principle. Ordinarily in commercial disputes, absent the express consent of the parties, decisions are not reached *ex aequo et bono*.[60] Any resort to *ex aequo et bono* only occurs where parties expressly elect it in substitution for or in addition to their chosen substantive law.[61] Certainly, not all provisions relating to the choice of the substantive law make direct reference to *amiable compositeur* or *ex aequo et bono*. Some arbitration laws do not clearly extend this right to parties or recognise equity-based consideration in arbitration.[62] Also, there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiable compositeurs*.[63] In an instance where parties anticipate uncertainty in this respect, they can provide clarification on the matter by having arbitration agreements that specifically direct arbitrators to resolve their dispute as *amiable compositeur* or *ex aequo et bono.* Paragraph 3 of article 28 of the UNCITRAL Model Law, however, has clearly enshrined that the parties' express authorisation suffices for a decision to be made by arbitrators as *amiable compositeur* or *ex aequo et bono*.[64] This provision at least reduces uncertainty regarding the arbitrator's authority in such matters within jurisdictions that have adopted the UNCITRAL Model Law.[65]

Again, a common provision in modern international commercial arbitration laws is that, where parties have not indicated an applicable substantive law or provided instructions regarding it, arbitrators generally enjoy broad discretion to determine it. It can be argued that provisions that establish the arbitrator's authority to select the applicable substantive law have become the default rule for those granting party autonomy in the choice of the law

59 Such provisions are found in the Nigerian Arbitration and Conciliation Act of 1990 (art 47(4)) and the Mauritius International Arbitration Act of 2008 (art 28(4)).

60 Trakman 2008 *Chic J Int Law* 624.

61 Trakman 2008 *Chic J Int Law* 624.

62 The Swedish Arbitration Act of 1999 makes no reference decisions being made as *amiable compositeur* or ex *aequo et bono.* Notwithstanding this it is suggested by commentators that equity-based considerations are implicitly permitted for arbitration. Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 751.

63 UNCITRAL Secretariat *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration* para 39.

64 See UNCITRAL 2023 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

65 Art 49(3) of Hungarian Arbitration Law Act of 1994 is an example of a provision that follows the approach adopted under art 28(3) of UNCITRAL Model Law.

governing the substance of the dispute.[66] According to most authors, arbitrators exercise their discretion through two main methods when assigning the applicable substantive law. That is, they either select the applicable substantive law directly (*voie directe*) or through a conflict of laws analysis (*voie indirecte*). Typically, institutional and countries' international arbitration rules prescribe either the direct or indirect methods to be used by the arbitral tribunal to select the applicable substantive law.[67] The method provided indicates the extent and nature of the arbitrator's discretion when determining the applicable substantive law.

Finally, a significant rule usually added to provisions relating to the applicable substantive law found in arbitration laws is one requiring the arbitral tribunal to decide in all cases according to the terms of the contract and applicable trade usages. Whether parties have expressly or impliedly selected the applicable substantive law or whether they have expressly authorised the arbitrator to decide as *amiable compositeur* or *ex aequo et bono* the underlying contract and trade usages must be considered.[68] In a situation where the arbitrators are for instance expressly authorised to decide the dispute as an *amiable compositeur*, and specifically based on good faith, they must endeavour to reconcile the terms of the contract with it. Also, where arbitrators have to determine the applicable substantive law in the absence of the parties' choice, based on such provisions, they must decide following the terms of the parties' contract and applicable trade usages. A typical example of such a provision, article 28(4) of the UNCITRAL Model Law, requires the arbitral tribunal to in certain circumstances override the express choice of law by the parties in favour of the terms of the contract and to take into account any applicable usages of trade applicable to the transaction.[69] Typically, the terms of a contract suffice to determine the rights and obligations of the parties in dispute.[70] That means, without reference to any extraneous legal interpretation, the terms of a contract may be sufficient to determine the merits of a dispute. Trade

66 Case on point, paragraph 2 of the UNCITRAL Model Law sets out the default rule to its paragraph 1 of art 28. Similar provisions can be found in the arbitration statutes of Zambia, Nigeria and Zimbabwe.

67 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 786.

68 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 755.

69 UNCITRAL Model Law (1985); Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 755.

70 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 755.

usage on the other hand may include a trade practice established solely between particular international contracting parties, best practice and accepted norms of industry or trade.[71] Although the hierarchical relationship between the two principles is unclear from most provisions on the matter, what can readily be understood is that trade usage cannot be relied upon to justify a deviation from clear contractual terms.[72]

b. The text of provisions on the law applicable to the substance of a dispute in the UNCITRAL framework

On the whole, it can be argued that the textual content of international commercial arbitration laws, has been greatly impacted by the UNCITRAL arbitration instruments. Take for instance the UNCITRAL Model Law, its uniform text has been adopted verbatim by numerous countries.[73] Currently, even when a country has not wholly adopted the UNCITRAL Model Law, they are most likely to have enacted its arbitration laws with provisions inspired by its text.[74] The flexibility inherent in model laws makes it particularly desirable in those situations where it is likely that a country would wish to make various modifications to the uniform text before it would be ready to enact it as national law. With the aim of achieving a satisfactory degree of harmonisation, predictability and certainty, the UNCITRAL Model Law is designed using fairly clear and concise language. Similarly, the UNCITRAL Arbitration Rules provide a comprehensive and user-friendly set of arbitration rules. Tailored to provide standard international rules for arbitration, the UNCITRAL Arbitration Rules are ideal for arbitration between parties from different legal systems.

The *travaux préparatoires* tell the drafting story of the UNCITRAL arbitration instruments and are a useful tool for the interpretation of their articles.[75] An analysis of the *travaux préparatoires* of both UNCITRAL arbitration instruments reveals that during their preparation, several deliberations and

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71 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 757.

72 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 755.

73 Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 15.

74 This is mainly because the flexibility inherent in model laws such the UNCITRAL Model Arbitration Law affords countries the opportunity to adopt its provisions subject to their individual needs. UNCITRAL *Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* 13-14.

75 Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 14.

decisions were made regarding the textual content of provisions relating to the applicable substantive law.[76] According to the *travaux préparatoires* of the UNCITRAL Rules for instance, concerning its article 33(1) (now article 35), deliberations were made on whether the arbitral tribunal should apply 'the law with which the case has the closest connection' or 'the law the tribunal determined to be appropriate in the absence of the parties' choice'.[77] Here, a consensus was reached on adopting language that represented the *voie directe* method over having a designated conflict of laws rule. Due to this, the direct method for assigning the substantive law has become associated with the UNCITRAL Arbitration Rules. Another notable deliberation found in the *travaux préparatoires* of the UNCITRAL Model Law concerned whether to adopt the expression 'rules of law' or 'law' to indicate whether parties had the authority to designate the rules of more than one legal system, including rules elaborated on the international level.[78] Drafters described the expression 'rules of law' as having a broader meaning than the expression 'the law'.[79] They agreed that at least in so far as the UNCITRAL Model Law and arbitration laws following it are concerned, the expression 'rules of law' meant that the parties' choice of substantive law is not limited to a national system of law but may include those that are not part of any particular legal system.[80] The final decision made by the Working Group concerning issues like these has generally shaped the text of many subsequent arbitration laws.[81]

Apart from the influence of the UNCITRAL arbitration instruments, the arbitration rules of renowned institutions such as the LCIA and the ICC have also, to a large extent, influenced the textual content of arbitration laws. The worldwide success of such arbitration institutions has made their rules a

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76 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 732-726.

77 Here, drafters settled on latter position. UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/CN.9/ WG. II/WP.151/Add.1* 30; See United Nations 2023 https://uncitral.un.org/en/commission.

78 Art 33(1) of the UNCITRAL Arbitration Rules (1976) referred to 'the law' designated by parties and 'the law' determined by the conflict of law rules.

79 UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/40/17* 45; See United Nations 2023 https://uncitral.un.org/en/commission; Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 733.

80 UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session: A/40/17* 45; Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 733.

81 Art 28 of the UNCITRAL Model Law (1985) follows the approach under the UNCITRAL Arbitration Rules.

source of inspiration and a benchmark for national jurisdictions and other arbitration institutions. Relatively new arbitration institutions prefer to align their rules with institutions such as the LCIA and the ICC in order to also nudge both parties and arbitrators to choose their services. The main aim of institutional arbitration usually is to provide arbitration services that are efficient, flexible, transparent and cost-effective. The rules of arbitration institutions are an avenue through which all these may be achieved. Similar to other provisions found in institutional arbitration rules, provisions on the substantive law, usually lean towards being clear and concise. Article 22(3) of the LCIA Arbitration Rules of 1998 for instance provides that:

> (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.[82]

From this provision, the broad nature of both parties' and arbitrators' authority to determine and apply the substantive laws is made clear. Broad, clear and concise language is used here to convey their authority to select not only national laws but also non-national laws or both. Similar broad, clear and concise language has become common to modern institutional arbitration laws.[83] Competition among jurisdictions and institutions for arbitration business provides the incentive for this sort of innovation in international arbitration law. Governments and arbitration institutions strive to adjust and improve their legal frameworks aiming for simplicity, flexibility and pragmatism.

5.1.4. Features of provisions relating to the applicable substantive law found in third-generation arbitration laws enacted in Africa

In context, modern arbitration laws or rules in Africa are those that came into force after the UNCITRAL Model Law of 1985.[84] On this basis, jurisdictions such as Egypt, Ghana and South Africa whose international commercial arbitration statutes were enacted in 1994, 2010 and 2017

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82 London Court International Arbitration (LCIA) Rules (1998). See LCIA 2022 https://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.

83 Consider art 21(1) of the ICC Arbitration Rules (2021). It provides that 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.

84 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 124.

respectively can be regarded as having modern arbitration statutes.[85] Similarly, the OHADA's *Uniform Act on Arbitration* which was adopted in 1999 (revised in 2017) and applicable in the Member States such as Côte d'Ivoire is modern. Even though these third-generation arbitration laws[86] have some shared features, no two of such laws are identical.[87] Some of these features have been part of arbitration laws in Africa since the nineteenth century.[88] More current features are influenced by the arbitration laws of some Western countries and, to a greater extent, by the UNCITRAL Model Law.[89] Although the influence of the UNCITRAL Model Law on third-generation arbitration laws enacted in Africa is extensive, the divergent legislative approaches countries adopted during legal reform affect their conformity with the model law.[90]

The UNCITRAL Model Law never officially specified the criteria for deeming a jurisdiction as a Model Law country. It merely provides an official list of countries which are considered to have adopted the UNCITRAL Model Law.[91] Nevertheless, an unofficial definition of what could constitute conformity to the Model Law has been stated by Binder. He opined that:

> 1. When reading the national statute, the impression must be given that the legislator took the Model Law as a basis and made certain amendments and additions but did not simply take the Model Law as one amongst various models or follow only its 'principles'.
> 2. The bulk of the Model Law provisions must be included (70 to 80%).
> 3. The law must contain no provision incompatible with modern international commercial arbitration (e.g., foreigners may not be arbitrators, no-excludable appeal on errors of law).[92]

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85 Out of the 54 African countries, 40 have relatively modern arbitration laws that were enacted post the UNCITRAL Model Law (1985).

86 According to Asuozu, arbitration rules enacted in Africa from 1984 to date are to be classified as third generation arbitration laws. Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 124.

87 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 124.

88 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 140.

89 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 140.

90 There can be direct adoption and incorporation by reference of the UNICTRAL provisions. Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 19-20.

91 Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 16.

92 Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 16.

Based on this, an arbitration law can be considered to be an enactment of the UNCITRAL Model Law, where the greater part of its provisions does not conflict with the fundamental philosophy of the Model Law. Typically, countries (African or otherwise) may wholly or partly adopt the UNCITRAL Model Law. They may also decide not to adopt the Model Law at all, although in such instances it usually serves as a source of inspiration and guidance.[93] The possibility to adopt the UNCITRAL Model Law to varying degrees extends to adaptations of the structure and text of its provisions on the applicable substantive law. Countries that have arbitration laws, largely based on the UNCITRAL Model Law, usually follow the structure and textual approach adopted under article 28. Specifically, when it comes to the method for assigning the substantive law in the absence of the parties' choice, the UNCITRAL Model Law prescribes the indirect method (*voie indirecte*).

Nevertheless, because the UNCITRAL Model Law by nature can be subject to several adoptions, countries adopting it may deviate from the indirect method it provides for assigning the applicable substantive law. Typically, changes made by legislators mostly concern paragraph 2 of article 28 of the UNCITRAL Model Law, which refers to the law designated by the conflict of laws rules in the event that parties failed to make any designation.[94] In Africa, for instance, out of the eleven countries that are currently recognised as having their arbitration rules largely based on the UNCITRAL Model Law, six adopt the indirect method for assigning the applicable substantive law.[95] There are also instances where African countries are recognised as having largely adopted the UNCITRAL Model Law but have deviated from the indirect method for assigning the applicable substantive law.[96] The Ugandan Arbitration and Conciliation Act, Cap. 4 of 2000, for instance, which is largely based on the UNCITRAL Model Law (as well as the UNCITRAL Arbitration Rules of 1976), does not adopt the indirect method. Rather, it adopts the

93 This is the case with the OHADA's Uniform Act on Arbitration of 2017. See OHADA 2023 https://www.ohada.org/en/arbitration-law/.

94 Similarly, based on paragraph 35(1) of the UNCITRAL Arbitration Rules (2013), adopting countries and arbitration institutions may vary the arbitrator's authority

95 These six countries that adopt the indirect method include South Africa, Nigeria, Zambia, Zimbabwe, Mauritius and Madagascar.

96 There are countries that partly adopt the UNCITRAL Model Law (1985) but still adopt its indirect method for assigning the applicable substantive law. For instance, Ghana is not recognised as having adopted the UNCITRAL Model Law. However, its provision for international commercial arbitration is heavily inspired by the UNCITRAL Model Law, including its position for establishing the law applicable to the substance of a dispute.

direct method. According to section 28(3) of the *Ugandan Arbitration and Conciliation Act* of 2000:

> If there is no choice of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute.[97]

Similarly, the *Kenyan Arbitration (Amendment) Act No. 11* of 2009[98] which is largely based on the UNCITRAL Model Law, does not follow the indirect method. Its section 29(3) provides that:

> Failing a choice of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute.[99]

Furthermore, the *Rwandan Law on Arbitration and Conciliation in Commercial Matters* of 2008[100] is also largely based on the UNCITRAL Model Law. However, the law provides a specific choice of law rule to be applied by the arbitral tribunal to establish the applicable substantive law when international arbitration is seated in Rwanda. Its article 40(2) provides:

> Failing any designation by the parties, the law applicable to the substance of the dispute shall be the Rwandan Law and the International Conventions ratified by the State of Rwanda.[101]

From the provisions above, it would be erroneous to assume that countries who make use of the UNCITRAL Model Law, when drafting their arbitration laws, automatically adopt the indirect method. The selection approach adopted in a particular statute depends on the preferences of the legislators of a country. Some may prefer arbitrators assigning the substantive law with the restricted approach of the indirect method for its certainty and predictability whereas some would prefer the direct method for its

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97 Uganda Arbitration and Conciliation Act (Chapter 4) of 2000. See ILO 2013 https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94563/110997/F-1874446647/UGA94563.pdf.

98 In 2009, Kenyan Arbitration Act No. 4 of 1995 underwent some amendments. This, however, did not affect the Act's position on the arbitral tribunal's discretion to determine the substantive law applicable to merits of a dispute. See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-kenya/.

99 See ILO 2014 https://www.ilo.org/.

100 See Laws Africa – Gazettes Africa 2008 https://gazettes.africa/akn/rw/officialGazette/government-gazette/2008-03-06/special/mul@2008-03-06.

101 Rwandan Law on Arbitration and Conciliation in Commercial Matters of 2008.

flexibility.[102] Motivation for the selection of one choice over the other, therefore, varies from jurisdiction to jurisdiction. It is suggested that it is only upon the examination of the provision establishing the arbitral tribunal's authority to determine the applicable law that one will identify the approach allowed under an instrument and perhaps the underlying motivation for adopting a particular method for assigning the applicable law. It can also be suggested that despite (or perhaps because of) the range of permutations available when countries adopt the UNCITRAL Model Law, provisions for the determination of the applicable law found in third-generation arbitration laws enacted in Africa have become similar.[103]

5.2. Comments

In brief, there is undeniably a growing trend towards the harmonisation and unification of arbitration laws and practices. Specifically, the provisions on the applicable substantive law have become similar in text and structure. Arguably, this has been fuelled by the broad application of the UNCITRAL Model Law and the UNCITRAL Arbitration Rules. These instruments allow for the governments (and arbitration institutions) who adopt them to make adjustments to the text of the Model Law to accommodate local requirements that vary from system to system. This has allowed African countries (and arbitration institutions) to equally adopt the best practices they present, tailored to fit their needs. It can be argued that the convergence of arbitration laws and institutional rules (manifested generally through the adoption of the UNCITRAL arbitration instruments), and practices of arbitral tribunals in international arbitrations have rendered the differences in provisions relating to applicable substantive law found in different arbitration instruments less significant.

Section II: An Exposition of the Arbitral Tribunal's Choice of Applicable Substantive Law in Contemporary Africa

5.3. Introduction

102 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 865-866.

103 This may also be because they have learned from each other's experiences and adopted best practices. Garnett 2002 *MJIL* 400-413; Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 124-137.

It is an undeniable fact that in arbitration parties retain a higher degree of control over how their dispute is resolved as compared to litigation.[104] During pre-dispute or post-dispute arbitration negotiations and in the drafting of an arbitration clause, the parties have the authority to make choices that affect important aspects of the arbitration process. Examples of such choices are their choice of arbitration seat and arbitration institution. By choosing a particular arbitration seat, parties inevitably choose their arbitration rules and consent to the supervisory jurisdiction of the national court.[105] The parties' choice of a particular arbitration institution also carries with it the choice of its rules. Arbitration statutes and institutional arbitration rules provide the basic framework for arbitration (subject to the parties' agreement on different rules).[106] These arbitration rules also determine the approach that arbitrators would use to assign the law applicable to the merits of a dispute in the absence of the parties' choice. Although such provisions are commonly found in modern international commercial arbitration rules, there are variations in the discretion they afford arbitrators in determining the applicable law. This section provides an overview of national and institutional attitudes towards the determination of the applicable substantive law in Egypt, Ghana, South Africa and Côte d'Ivoire. Specifically, the section analyses the arbitration statutes and institutional rules found in these countries to identify the methods they provide for assigning the applicable substantive law.

5.3.1. National attitudes towards the arbitrator's authority to assign the applicable substantive law in the absence of a choice by the parties

In Africa (and elsewhere), the *lex arbitri* may be incorporated into an independent statute such as the Egyptian Arbitration Law[107] and the Kenyan Arbitration Law[108] or a Code of Procedure as is the case in Algeria which has its arbitration law in articles 1006 to 1061 of its Code of Civil and

104 Belohlavek "Extent of Procedural and Substantive Law in Arbitration and Litigation" 41.

105 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 58.

106 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 58.

107 Egyptian Arbitration Law No. 27 of 1994. See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.

108 Kenyan Arbitration Act No. 4 of 1995. See ILO 2014 https://www.ilo.org/.

Administrative Procedure.[109] The *lex arbitri* provides a set of national rules that establish the general framework for the conduct of arbitration proceedings. Each country's *lex arbitri* regulates important matters (such as the internal matters to the arbitration, the external relationship between arbitration and courts and the relationship between arbitrations and public policies like arbitrability issues)[110] that may arise in the conduct of arbitration proceedings. In addition to the procedural matters that they address, national arbitration statutes also usually contain provisions on the applicable substantive law. Such provisions specify the methods to be used by the arbitral tribunal to establish the substantive law. The following subsection highlights such methods as provided in the international commercial arbitration rules of Egypt, Ghana, South Africa and Côte d'Ivoire. A question to be answered here is that, given the approaches available to the arbitral tribunal for assigning the substantive law in each of these countries, what choices can they and do they make?

a. Egypt

International commercial arbitration in Egypt is regulated by the Egyptian Arbitration Law, Law No. 27 of 1994 (Egyptian Arbitration Law).[111] This law applies to ad hoc arbitrations (international or domestic) conducted in Egypt or to cases where parties agree to subject their international dispute to the Arbitration Act. Put differently, the Egyptian Arbitration Law governs the proceedings of any arbitration that is seated in Egypt or where parties have expressly held it to be applicable.[112] Assuming arbitration is seated in Egypt and parties have not selected the law applicable to the substance of their dispute, the Egyptian Arbitration Law provides the approach to be used by the arbitral tribunal to establish it. Article 39(2) of the Egyptian Arbitration Law provides:

> (2) If the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral tribunal shall apply the substantive rules

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109 Algerian Code of Civil and Administrative Procedure of 2009. See Aceris Law LLC 2020 https://www.acerislaw.com/arbitration-in-algeria/. The *lex arbiri* encompasses case law which relates to the basic of legal framework of international arbitration seated within the particular territory. Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 58.

110 Henderson 2014 *SAcLJ* 888.

111 Egyptian Arbitration Law No. 27 of 1994. See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.

112 Art 1 of the Egyptian Arbitration Law of 1994 envisages its application extraterritorially to international commercial arbitration conducted outside Egypt.

of the law it considers most closely connected to the dispute.[113]

As noted elsewhere in this thesis, the Egyptian Arbitration Law is inspired by the 1985 version of the UNCITRAL Model Law.[114] Notwithstanding this, on some issues, the Egyptian Arbitration Law deviates from established positions under the UNCITRAL Model Law. Notable of these deviations include the Egyptian Arbitration Law's applicability to both domestic and international arbitration,[115] its demand for an odd number of arbitrators[116] and the possibility of its extraterritorial application.[117] Also, when it comes to the approach adopted for determining the applicable law in the absence of the parties' choice, the Egyptian Arbitration Law deviates from the approach adopted under the UNCITRAL Model Law. Whereas the UNCITRAL Model Law provides that the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable, the Egyptian Arbitration Law provides a specific conflict of laws rule directing the arbitral tribunal to apply the law most closely connected to the dispute. Under the Egyptian Arbitration Law, the arbitral tribunal is obliged to determine the applicable law based on a specified conflict of laws rule.

In a sense, the approach adopted under the Egyptian Arbitration Law is similar to that which the UNCITRAL Model Law provides. They both require the arbitral tribunal to apply a conflict of laws rule to establish the applicable substantive law.[118] This is in line with the indirect method which requires the arbitral tribunal to necessarily apply conflict of laws rules to establish the applicable law. However, unlike under the UNCITRAL Model Law, under the Egyptian Arbitration Law, the arbitral tribunal is not free to decide on which conflict of laws rules it considers applicable. It must apply the specified conflict of laws rule to establish the applicable substantive law. Notwithstanding this, the Egyptian Arbitration Law does not provide specific connecting factors that the arbitral tribunal should follow to establish the substantive law having the closest connection to the dispute. On a case-by-case basis, the arbitral tribunal determines which connecting factors are

113 Egyptian Arbitration Law No. 27 of 1994. See International Arbitration Resources 2023 https://www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.
114 Talaat, Shahine and Essam "Egypt" 153.
115 Art 1 of the Egyptian Arbitration Law of 1994.
116 Art 15 of the Egyptian Arbitration Law of 1994.
117 Art 1 of the Egyptian Arbitration Law of 1994.
118 See art 39(2) of the Egyptian Arbitration Law of 1994 and art 28 (2) of the UNCITRAL Model Law (1985).

relevant depending on the nature of the dispute to aid in assigning the applicable law.

The approach adopted under the Egyptian Arbitration Law has its advantages and disadvantages. On one hand, the arbitral tribunal is relieved of the duty of determining an appropriate conflict of laws rule before establishing the applicable substantive law. They can simply determine the applicable substantive law, by considering the law most closely connected to the facts and circumstances of the dispute. This can be relatively straightforward. On the other hand, comparing this form of the indirect method to the position under the UNCITRAL Model Law, this approach can be quite restrictive. Under the UNCITRAL Model Law, although the arbitral tribunal has to first establish the appropriate conflict of laws rule before establishing the applicable substantive law, they can choose any conflict of laws rule. Ultimately, the arbitral tribunal's choice of conflict of laws rule, be it the *lex loci contractus* or maybe the *lex loci solutionis*, would be based on what is most suitable for the circumstance of a particular case. Notwithstanding this, the effectiveness of the closest connection rule for establishing the applicable law is evident in its adoption of rules such as the Rome I Regulation. The most closely connected test has the ability to take into account all connecting factors.[119] It provides a degree of certainty over the broader alternative approach of allowing the arbitral tribunal to determine the conflict of laws rule it deems appropriate in order to determine the applicable law. The arbitration laws of countries such as Germany[120] and Switzerland[121] also call for the application of the closest connection rule when the arbitral tribunal has to establish the applicable substantive law.

b. Ghana

The Alternative Dispute Resolution Act of 2010 (Ghana ADR Act) in its entirety represents a unique attempt to merge rules for alternative dispute resolution into a single national law.[122] Its Part I which is designated to regulate arbitration seated in Ghana is inspired by the UNCITRAL Model

119 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 110-111.

120 Sec 1051(2) of the German Arbitration Act of 1998.

121 Art 187 of the Switzerland Federal Act on Private International Law (PILA) of 1987.

122 The Ghana ADR Act, Act 798 of 2010 contains rules for mediation, customary arbitration, international and national arbitration in a single document. See Dennis Law 2017 https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324.

Law with some notable modifications.[123] Notable of such adaptations under the Ghana ADR Act is the fact that the appointing authority's role is expanded,[124] arbitrators have the power to subpoena witnesses[125] and courts have the power to refer cases to mandatory arbitration.[126] Notwithstanding these deviations, concerning the arbitral tribunal's choice of the applicable substantive law, the Ghana ADR Act and the UNCITRAL Model Law provide the same approach — that is the indirect method. Similar to article 28(2), section 48 (3) of the Ghana ADR Act provides that:

> Where or to the extent that no law has been chosen or agreed on, the arbitrator shall apply the law determined by the conflict of laws rules which the arbitrator considers applicable.[127]

As can be seen from this, the ADR Act requires the arbitral tribunal to determine the applicable substantive law by explaining their choice through the conflict of laws rules which they deem applicable. Consistent with the two-tier system provided by similar provisions, the arbitral tribunal as a first step must determine the conflict of laws rule and as a second step apply the rule to establish the law applicable to the merits of a dispute. Assuming arbitration is seated in Ghana, the arbitral tribunal may logically consider the conflict of laws rules of the seat of arbitration or the conflict of laws rules of the place where an award is likely to be enforced. They may also consider the conflict of law rules of the place of contractual performance and those of a jurisdiction with some elements common to the parties, such as common residence, domicile and nationality.[128] There is no restriction on which conflict of laws rule an arbitral tribunal may use to determine the applicable substantive law.

In Ghana, where the proper law of an international contract is not expressly selected by the parties or cannot be inferred from the parties' agreement,[129]

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123 It can be argued that the UNCITRAL Model Law (1985) heavily influenced the Ghana ADR Act. Even though the Ghana ADR Act adopts principles from the UNCITRAL Model Law, Ghana is not considered an adopting country.

124 Examples of the expand role of the appointing authority is found in Secs 19, 26 and 32 of the Ghana ADR Act. See generally Onyema 2012 *ArbIntl* 101-124.

125 Sec 31(9) of the Ghana ADR Act of 2010.

126 Sec 7 of the Ghana ADR Act of 2010.

127 See Dennis Law 2017 https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324.

128 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 105-113.

129 Ghanaian courts ascertain the implied choice of law for international commercial contracts by applying the standard of a reasonable businessperson to determine the presumed intention of the parties to a contract. Oppong *Private International Law in Ghana* 53.

courts consider the system of law with 'the closest and most real connection' with the agreement.[130] Here, courts consider all the surrounding circumstances of the formation of the contract to determine which ones have a substantial connection to the dispute. This was the approach adopted in the leading Ghanaian Court of Appeal case of *Godka Group of Companies v P S International Ltd*.[131] Brief facts of the case are as follows: the plaintiff was an American company incorporated in Indiana, USA, and the defendant was a company incorporated in Ghana. They entered into a sale of goods contract. The parties however did not choose the law applicable to their contract and the court had to decide on its proper law. Considering that the place of performance and the place with which the transaction had a substantial connection was Ghana, the law of Ghana was held to be the proper law of the contract. The place of performance of the contract was Ghana, the mode of payment was by a Ghanaian agent located in Ghana, the goods were to be utilised in Ghana and the nationalities of the parties were considered to be Ghana and USA. Here, in line with the English common law position, the court determined the objective proper law by weighing all these connecting factors to the contract to determine the law with the closest and most real connection to the contract.[132]

Comparing this position to the indirect method found in the Ghana ADR Act reveals that, whereas a Ghanaian court has some direction on determining the proper law of a contract, an international arbitral tribunal has wider freedom on the matter in arbitration proceedings. An international arbitral tribunal seated in Ghana generally enjoys broad discretion when it comes to the method, they use to establish the applicable conflict of laws rule. They may for instance select the applicable conflict of laws rule by cumulatively applying the conflict of laws rules of all legal systems connected to the dispute or consider the conflict of laws rules of the country most closely

130 This test replaces the old common law position of applying the *lex loci contractus* to the contract in the absence of an agreement to the contrary. Vita Food Products Inc v Unus Shipping Co Ltd (1939) AC 277 (PC) 290.

131 Godka Group of Companies v P S International Ltd (1999-2000) 1 GLR 409 2.

132 According to sec 54(2) of the Ghanaian Courts Act 459 of 1993, (2) Subject to this Act and any other enactment, the rules of law and evidence (including the rules of private international law) that have before the coming into force of this Act been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of the rules which may occur. This provision directs Ghanaian courts to apply English common law rules of private international law to resolve conflict issues. In the *Godka* case, the Ghanaian Court of Appeal relied on the English case Boissevain v Weil (1949) 1 KB 482 490 and Bonython v Commonwealth of Australia (1951) AC 201 219 HL to establish the law of Ghana as the applicable law since it had substantial connection to the contract.

connected to the parties' dispute.[133] Their selection of one conflict of laws rule over another is usually at their entire discretion. This is not the case for Ghanaian courts who must determine the proper law of a contract in the absence of such a choice based on the system of law with which a transaction has its closest and most real connection.

Further provisions in the Ghana ADR Act that may be linked to the law applicable to the merits of a dispute include, pronouncements on the currency of a money award,[134] simple or compound interests to be awarded[135] and damages awarded to compensate for conduct of bad faith or for time wasting.[136] Although the Ghana ADR Act does not prescribe elaborate substantive principles like the UNIDROIT Principles,[137] when parties want to select Ghana as the seat of their arbitration, they will be subject to the Ghana ADR Act, and therefore it is prudent for them to take into consideration rules such as these found in the Act.

c. South Africa

Zimbabwe, Zambia and South Africa are examples of countries in Africa that adopted the UNCITRAL Model Law fully.[138] In other words, these countries incorporate the UNCITRAL Model Law in its entirety within their arbitration laws. Although there may be modifications in such statutes, they are usually relatively minimal or non-existent. The International Arbitration Act 15 of 2017 (International Arbitration Act),[139] which governs international arbitration in South Africa for instance is largely based on the UNCITRAL Model Law as far as the regulation of international arbitration proceedings are concerned.[140] Section 6 of the International Arbitration Act incorporates the UNCITRAL Model Law into South African Law as Schedule 1 to the

133 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 105-113.
134 Sec 48(6) of the Ghana ADR Act of 2010.
135 Sec 48(7) of the Ghana ADR Act of 2010.
136 Sec 48(8) of the Ghana ADR Act 2010.
137 UNIDROIT Principles of International Commercial Contracts (2016). See UNIDROIT 2022 https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/.
138 An example of a non-African country that incorporates the UNCITRAL Model Law wholly into its laws is Ireland, sec 6 of the Irish Arbitration Act of 2010.
139 See South African Government 2017 www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitrationact15of2017.pdf.
140 South African Government 2017 www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitrationact15of2017.pdf.

International Arbitration Act. Apart from certain adaptations,[141] the International Arbitration Act incorporates the UNICTRAL Model Law by reference.[142] When it comes to the provisions relating to assigning the law applicable to the merits of a dispute, since the International Arbitration Act incorporates the UNCITRAL Model Law, it follows the Model Law's approach. Specifically, when an arbitral tribunal has to determine the applicable substantive law, the International Arbitration Act incorporates the approach adopted under article 28(2) of the UNCITRAL Model Law. That is, where an international arbitral tribunal is seated in South Africa, it shall determine the law applicable to the substance of the dispute by applying the conflict of laws rules it considers applicable.[143]

For South Africa, the incorporation of the UNCITRAL Model Law marks an important step towards the improvement of the overall practice of international commercial arbitration.[144] Before the adoption of the International Arbitration Act, assuming an international arbitral tribunal seated in South Africa opted to apply the local private international law rules to establish the substantive law of a dispute, they would face some challenges. This is because South African private international law rules can be considered outdated and ambiguous for establishing the applicable substantive law of an international arbitration dispute where parties have failed to choose one.[145] In South Africa, where parties have not selected the proper law applicable to their international contract, courts have the power to determine the applicable law. The authority suggests that South African courts usually follow two approaches to establish the applicable proper law of a contract in the absence of the parties' choice.[146] The first possibility is for the courts to try to determine the applicable law by establishing the presumed intention of the parties. That is, what law the parties would have indicated had they considered the issue. This approach was followed in the

141 A notable divergence however between the text of the two laws is that the International Arbitration Act omits arts 17B and 17C of the UNCITRAL Model Law. This omission is to the effect that, arbitral tribunals do not have the power to grant interim reliefs on an *ex parte* basis. According to the adaption made under the International Arbitration Act, this power is reserved to courts.

142 This type of adoption best serves UNCITRAL's goals of uniformity and harmonisation in international trade law, as the whole law is adopted verbatim. Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 19.

143 Art 28 of the UNCITRAL Model Law (1985).

144 See generally Wethmar-Lemmer and Schoeman 2019 *TSAR* 127-137.

145 Wethmar-Lemmer and Schoeman 2019 *TSAR* 134.

146 South African courts consider the presumed intention and the closest connection test when such issues arise: Neels and Fredericks 2003 *SAMLJ* 66-67.

case *Standard Bank of SA Ltd v Efroiken and Newman.*[147] In this case, although the contracting parties had no clear intention about the proper law of the contract, the courts imputed that they must have had a legal system in mind. This subjective approach has been criticised as being an absurd artificial attempt to apply a rule of law based on the presumed intention derived from facts or situations in which such a common intention is non-existent or is a matter of mere conjecture.[148] Nevertheless, in situations in which an actual choice by the parties can be deduced through other means aside from it being expressly stipulated, it is considered their tacit choice of law.[149]

Although South African courts have not definitively rejected this subjective approach, they have expressed a preference for an objective standard for establishing the proper law of a contract where the parties had not themselves effected a choice.[150] Therefore, the second approach used by South African courts to establish the proper law of a contract is for them to determine the law with the closest and most real connection to it.[151] Here courts take into account all relevant connecting factors to establish the proper law of the contract. Among the numerous connecting factors that can be considered, the *locus solutionis* is usually considered the most relevant.[152] Notwithstanding this, establishing the law of the place of performance of the contract is not always straightforward. Assuming the place of payment and the place of characteristic performance (such as delivery) are in different countries, choosing between the two places of performance can be difficult. In such a scenario, South African courts are known to apply either the unitary principle[153] or the scission principle[154] to determine the *locus solutionis.*[155]

In terms of the scission principle, each obligation has its own proper law whereas the unitary principle stipulates that the same proper law governs

147 Standard Bank of South Africa Ltd v Efroiken and Newman (1924) AD 171.
148 Carter 1950 *IQL* 255.
149 Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 328-329.
150 Neels and Fredericks 2011 *DJ* 104.
151 Neels and Fredericks 2003 *SAMLJ* 66.
152 Neels and Fredericks 2003 *SAMLJ* 69.
153 The principle was enunciated in the cases Improvair (Cape) (Pty) Ltd v Establissements Neu (1983) (2) SA 138 ©, Kleinhans v Parmalat SA (Pty) Ltd (2002) 9 BLLR 879 (LC) and Parry v Astral Operations Ltd (2005) 10 BLLR 989.
154 The scission principle is enunciated in the Standard Bank of SA Ltd v Efroiken and Newman (1924) AD 171 and the Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd (1986) (3) SA 509 (D) cases.
155 Fredericks 2006 *JBL* 178.

both or all obligations. Matters can be complicated in the case of the former as the principle supports more than one legal system to be applicable to the same contract. The criticism levelled against this principle is that it has the potential of causing legal uncertainty and judicial inconvenience when determining the proper law.[156] It is for this reason that the latter principle is preferred in such a situation. It has been suggested that, where the unitary principle is to be applied, the choice between two legal systems should be done by considering all other factors.[157] Where this does not lead to a single proper law, one of three proposed solutions may be. First, Van Rooyen who supports the unitary principle believes the scission principle is the most appropriate option in such circumstances.[158] The second approach which was enunciated in the *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* case,[159] suggests that in an instance where all relevant connecting factors do not assist to establish a choice between *leges loci solutionis*, an ad hoc rule that the *lex loci solutionis* relating to the place of payment should be applied.[160] The last approach which is based on the decision in the case of *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd*[161] suggests that, in such situations courts apply the *lex loci solutionis* in respect of delivery.[162]

Basically, the South African private international law is not clear on which legal system will govern in the absence of the parties' choice.[163] The corollary of this is that the South African private international law regime is inconsistent with modern internationally accepted choice of law approaches, which can lead to uncertain and unpredictable outcomes. The choice of law regime under the Rome I Regulation, where fixed rules are provided for international sales contracts and commercial contracts, however, is widely accepted and preferred.[164]

The International Arbitration Act's approach of requiring an international arbitral tribunal to determine the applicable substantive law by applying appropriate conflict of laws rules improves the difficult situation they would

156 Fredericks 2006 *JBL* 178.
157 Neels and Fredericks 2003 *SAMLJ* 70.
158 Van Rooyen *Die Kontrak in Die Suid-Afrikaanse Internasionale Privaatreg*.
159 Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd (1986) (3) SA 509 (D)
160 Fredericks 2006 *JBL* 178; Neels and Fredericks 2003 *SAMLJ* 70-71.
161 Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd (2003) 1 All SA 453.
162 Fredericks 2006 *JBL* 178; Neels and Fredericks 2003 *SAMLJ* 70-71.
163 Fredericks 2006 *JBL* 177.
164 Wethmar-Lemmer and Schoeman 2019 *TSAR* 135.

have faced if they had to apply the South African private international law regime. The approach affords the arbitral tribunal the opportunity to apply internationally accepted conflicts principles. Although the arbitral tribunal still needs to determine the appropriate conflict of laws rules considering numerous connecting factors, it is suggested that the International Arbitration Act's approach to determining the law applicable to the merits of a dispute unbinds the arbitration process from South Africa's domestic private international law.

d. Cote d'Ivoire

As already established in Chapter 2, the *Uniform Act on Arbitration* of 1999 (the Uniform Act) is the governing law for arbitration in all OHADA Member States.[165] It follows that its fundamental principles apply to both national and international arbitration in Cote d'Ivoire, an OHADA Member State. The rules of the Uniform Act are however optional in the sense that parties are free to choose whether to apply them or not. The Act may be chosen by parties as the applicable law although the seat of arbitration is not in an OHADA Member State. Regardless of this, when the seat of arbitration is in one of the Member States, the Uniform Act shall apply to any arbitration.[166]

Accordingly, when deciding whether the rules of the Uniform Act govern a particular arbitration, the following three options can be considered;[167] first, the rules of the Uniform Act will be applicable if the arbitral tribunal is seated in an OHADA Member State;[168] second, the rules of the Uniform Act will govern the arbitration proceedings if it is referred to in an arbitration clause. In both instances, there will be no reference to an institutional framework. Third, if the arbitration clause refers to the arbitration rules of an institution, other than the arbitration rules of the Common Court of Justice and Arbitration (CCJA), the Uniform Act becomes applicable.[169]

From this, assuming there is no reference to institutional arbitration and an international arbitral tribunal is seated in Cote d'Ivoire, the Uniform Act becomes applicable. Parties may also select the rules of an arbitration institution (which is not the CCJA) such as the ICC Arbitration Rules while seated in Cote d'Ivoire. In this instance, the Uniform Act may be applicable

165 See para 2.6.4 above.
166 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 16.
167 Pena "Arbitration Centres in French-Speaking African Countries" 175.
168 Art 1 and art 35 of the Uniform Act on Arbitration 2017.
169 Art 10 of the Uniform Act on Arbitration 2017.

to augment the provisions of the expressly selected institutional rules. Although certain provisions are binding insofar as the arbitration is subject to the Uniform Act, where parties have expressly agreed on the application of other rules, the Act will merely be used to fill in gaps left by the chosen law.[170]

The Uniform Act Is based on the UNCITRAL Model Law.[171] It adopts some of the UNCITRAL Model Law's essential characteristics and basic principles. For instance, the Uniform Act reflects key internationally accepted arbitration norms such as party autonomy[172] and the separability principle.[173] The Uniform Act nevertheless also deviates from the UNCITRAL Model Law on certain issues to create an original regime for the OHADA territory. For instance, unlike the UNCITRAL Model Law, the Uniform Act does not define the term arbitration,[174] and it allows the arbitral tribunal to order the provisional enforcement of an award.[175] Additionally, in relation to the choice of the substantive law applicable to the merits of a dispute, the Uniform Act also diverts from the approach adopted under article 28 of the UNCITRAL Model Law. Article 15 of the Uniform Act provides that:

> The arbitrators shall decide the dispute in accordance with the rules of law chosen by the parties or, in the absence of such a choice, according to those chosen by them as the most appropriate taking into account, where necessary, the international trade usages. They may also decide as *amiable compositeur* when the parties have authorised them to do so.[176]

This provision can be interpreted as the direct method for selecting the applicable substantive law. Here, the arbitral tribunal can establish the law applicable to the merits of a dispute without conducting a conflict of laws analysis. Assuming parties A and B, engaged in an ad hoc arbitration seated in Côte d'Ivoire, for some reason failed to indicate the substantive law applicable to the merits of their case, the arbitral tribunal can choose the substantive law or rules they consider as most appropriate to govern the dispute. Similarly, assuming parties A and B submit themselves to

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170 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 16.

171 Viscasillas 2016 *JLSD* 67.

172 For instance, according to art 14 of the Uniform Act on Arbitration 2017. Parties may directly or by reference to arbitration rules, determine the arbitration procedure.

173 Art 4 of the Uniform Act on Arbitration 2017.

174 Art 1(3) of the UNCITRAL Model Law (1985) provides a definition for arbitration.

175 The arbitral tribunal has no such power under the UNCITRAL Model Law. Provided for under art 28 of the Uniform Act on Arbitration 2017.

176 OHADA Uniform Act on Arbitration of 1999. See OHADA 2023 https://www.ohada.org/en/arbitration-law/.

institutional arbitration, other than under the CCJA, seated in Côte d'Ivoire, the arbitral tribunal can determine the law applicable to the merits of a dispute by applying the most appropriate law without conducting a conflict of laws analysis. Here, the arbitral tribunal on its quest to determine the applicable law may consider the closest connection test, cumulative test or simply select a set of substantive rules that may or may not have some connection to the dispute in question.

Prior to the OHADA treaty and the coming into force of the Uniform Act, assuming an international arbitral tribunal was seated in Côte d'Ivoire (or in any other OHADA Member State) and the parties did not select the law applicable to the merits of their dispute, the question is how was it determined? Following the French Revolution of 1789, French Laws became directly applicable within its colonies, including Côte d'Ivoire.[177] This included the application of the French civil procedure and commercial and administrative laws within its colonies.[178] With specific regard to arbitration, although the application of the French Code of Civil Procedure extended to its colonies, interestingly, its provisions on arbitration were not applicable.[179] Consequently, during the post-colonial rule, former French colonies in Africa did not have laws on arbitration. Therefore, several of the francophone countries in Africa, post-independence enacted arbitration laws to augment the French Code of Civil Procedure, which was still applicable in most countries. Côte d'Ivoire for instance adopted a national arbitration law, *Law No 93-671* of 1993, to support the *Code of Civil, Commercial and Administrative Procedure of Ivory Coast* of 1972.[180] This arbitration law was largely influenced by the *French Decree No. 80-354* of 1980 and *Decree No. 81-500* of 1981, relating to domestic and international arbitration respectively. Law No 93-671 of 1993 applied to arbitrations seated in Côte d'Ivoire before it was replaced by the OHADA provisions of 1999.[181] Currently, the 2017 Uniform Act which has replaced the 1999 initial text provides the requisite principles of the law of arbitration to regulate the different phases of arbitration proceedings. From remedies available against

177 See generally Spieler 2009 *William Mary Q* 365-408.

178 Amoussou-Guenou 1998 *Int'l J of Arb Med & Disp Man* 63.

179 One plausible reason suggested to explain the exemption of the arbitration rules from application within colonies is the fact that, arbitration as a judicial means of settlement of disputes, did not fit within the French direct rule colonial policy. See generally Amoussou-Guenou 1998 *Int'l J of Arb Med & Disp Man* 62-63.

180 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 9.

181 Jahnel *Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius* 9.

awards[182] to recognition and enforcement of arbitral awards,[183] the Uniform Act streamlines the rules for efficient arbitration proceedings within the OHADA Member States.

5.3.2. The arbitral tribunal's choice of non-national laws in Egypt, Ghana, South Africa and Côte d'Ivoire

Apart from the ability of parties to select non-national laws, theoretically, if the parties fail to select a governing law, an arbitral tribunal may elect to apply non-national law.[184] When paragraphs 1 and 2 of article 28 of the UNCITRAL Model Law are read together for instance, it seems parties have the right to choose 'the rules of law' (that is both national and/or non-national laws) to apply to their dispute while arbitrators are restricted to only select 'the law' (that is the national law) determined by the conflict of laws rules.[185] Some of the UNCITRAL Model Law jurisdictions have made this position very clear in the language of arbitration provisions relating to the applicable substantive law.[186] In contrast, other UNCITRAL Model Law jurisdictions have opted to give the arbitral tribunal less or the same rights as parties to apply national laws and/or non-national laws.[187]

In the case of Egypt for instance, paragraph 2 of article 39 of its Arbitration Law uses the expression 'substantive rules of law' rather than the word 'law' to indicate the scope of the arbitral tribunal's choice.[188] Assuming an international arbitral tribunal is seated in Egypt, or the Egyptian Arbitration Law is the applicable law, in the absence of governing law, the arbitral tribunal has the freedom to consider a wide variety of sources to establish

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182 Appeal against the arbitration award is provided for under Chapter V of the Uniform Act on Arbitration of 2017.

183 Chapter VI of the Uniform Act on Arbitration of 2017 addresses recognition and enforcement of arbitral awards.

184 Some authors have however suggested that upon the comparison of art 28 (1) and art 28(2) of the UNCITRAL Model Law (1985), arbitrators may not – in the absence of a choice of law agreement select non-national rules of law to govern the merits of the dispute. Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 134; Born *International Commercial Arbitration* 4122-4123.

185 UNCITRAL Secretariat *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration* para 39, 33.

186 For example, Mauritius (art 32 of the Mauritian International Arbitration Act of 2008) follows the approach adopted under the UNCITRAL Model Law (1985).

187 It can be deduced from art 47 of the Nigerian Arbitration and Conciliation Act of 2004 that, both the parties' and the arbitral tribunal's selection of the law applicable to the substance of a dispute is restricted to national laws.

188 Similar approach found in art 187(1) of the Swiss Federal Act on Private International Law (PILA) of 1987.

the applicable law that is most closely connected to the dispute. By using the expression 'rules of law' in the Egyptian Arbitration Law, it can be assumed that the arbitral tribunal's selection of applicable law is not limited to national law but may include non-national law or uniform instruments. In other words, in relation to the freedom to select the applicable substantive rules of law, the arbitral tribunal may simply select a particular national legal system or may select general principles of law or principles common to legal systems closely connected to the dispute. It is foreseeable that non-national substantive laws such as the texts adopted by the International Chamber of Commerce, like the *International Commercial Terms* (Incoterms)[189] and the *Uniform Customs and Practices for Documentary Credit* (UCP600)[190] and the UNIDROIT Principles may be selected as the applicable law where parties remained silent on the matter. It should be noted however that the objective criteria (most closely connected to the dispute) used in the Egyptian Arbitration Law, not only direct but also constrain the scope of the arbitral tribunal's choice of applicable law.

In the arbitration laws of Ghana and South Africa, the arbitral tribunal is permitted to apply 'the law' determined by the 'conflict of laws rules' they deem appropriate to apply to the merits of a dispute.[191] This position can be understood as permitting the arbitral tribunal to consider a wide variety of conflict of laws rules to select a particular national legal system as the applicable law.[192] That is, assuming an international arbitral tribunal seat in Ghana or South Africa has to determine the law applicable to the substance of a dispute in the absence of the parties' choice, its conflict of laws analysis presumably would ultimately lead to the selection of a particular national

189 The Incoterm Rules were first published in 1936 and its current version was published in 2020. See ICC 2023 https://iccwbo.org/business-solutions/incoterms-rules/incoterms-rules-history/.

190 Uniform Customs & Practice for Documentary Credits (UCP 600) (2007). See ICC 2022 https://2go.iccwbo.org/.

191 See sec 48 (3) of the Ghanaian ADR Act of 2010 and art 28(2) of the UNCITRAL Model Law (1985) incorporated in the South African International Arbitration Act of 2017.

192 There are however instances where non-national laws have been applied in the indirect method. The arbitral tribunal for instance may apply the CISG in the indirect method, if they rely on the conflict of laws rules contained in art 1(1)(a) when its requirements are met. Assuming both parties have their places of businesses in Contracting States, the arbitral tribunal can later apply the rest of the CISG to the substance of the dispute. König 2015 *PYIL* 283.

law.[193]

This version of the indirect method which is adopted under article 28(2) of the UNCITRAL Model Law, places the arbitral tribunal in the same situation as national courts having to determine the applicable law in the absence of designation by the parties, although with the added obligation for the tribunal to select the conflict of law rules to be used for that determination. Even though this approach is likely to result in the application of national law,[194] the determination of the appropriate conflict of laws rules is left to the discretion of the arbitral tribunal.[195] The appropriate conflict of laws rules to be applied are subject to the arbitral tribunal's understanding of the specifics of each case. The arbitral tribunal may arrive at the applicable rules of conflict of laws by for instance cumulatively applying different conflict of laws of national laws related to the dispute or considering general principles of conflict of laws.[196] In the case of the former, where the rules of conflict of laws converge to one single national law the arbitral tribunal considers it as the applicable substantive law. In the case of the latter, the arbitral tribunal may refer to the conflict of laws rules that are widely accepted in international conventions or national legal systems to establish the applicable substantive law. Here, in order to give effect to the reasonable expectations of parties, the arbitral tribunal may consider established conflict of laws rules found in national and non-national conflict of laws rules, such as general principles of private international law or international conventions, whether or not they are in force, even though the arbitral tribunal may not be bound by them as such.[197] For instance, the arbitral tribunal may refer to the law of the country where the seller has his place of business at the time of conclusion of the contract as is provided in article 8 of the *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods* of 1986[198] to establish the applicable substantive law. Although an international convention may no longer be in force or may not be connected to the dispute in any way, arbitral tribunals may rely on it to determine the appropriate

193 It is possible that the selected conflicts of law rule may be a non-national law and lead to the application of a non-national appropriate for the circumstances of the particular dispute. König 2015 *PYIL* 283, 287.

194 See ICC Award No 8962 1997 https://www.unilex.info/cisg/case/464; König 2015 *PYIL* 283 .

195 Born *International Commercial Arbitration* 4121-4122.

196 Elcin *Lex Mercatoria in International Arbitration Theory and Practice* 274.

197 Elcin *Lex Mercatoria in International Arbitration Theory and Practice* 274.

198 Convention on the Law Applicable to Contracts for the International Sale of Goods (1986). See HCCH 2023 www.hcch.net/en/instruments/conventions/full-text/?cid=61.

conflict of laws rules to be used to select the substantive law applicable to the dispute.[199] From this, it can be assumed that in African countries such as Ghana, Nigeria, Kenya, South Africa, Mauritius and other countries that have arbitration laws that incorporate or are inspired by article 28 of the UNCITRAL Model Law, the arbitral tribunal's choice of substantive law by the indirect method usually is some national law. Yet, in the search for the appropriate conflict of laws rule, non-national rules may be applied or considered.

Interestingly, article 28(4) of the UNCITRAL Model Law (just like article 35(3) of the UNCITRAL Arbitration Rule) obliges the arbitral tribunal to in all cases favour the contractual terms and trade usages.[200] This can be understood as permitting arbitrators to give precedence to national or non-national laws connected to a dispute by contractual terms and trade usages over laws that they may arrive at through a conflict of laws analysis. In this situation, non-national laws may be applied or considered, so long as they do not violate public policy or affect enforcement when it can be deduced from the terms of a contract or trade usages.[201] Where the contractual terms and trade usages point to the applicability of some non-national law or rules, the arbitral tribunal has the capacity to give precedence to them over any national law established as the applicable substantive law through this indirect method.

It is suggested that countries that wish for the arbitral tribunal to have the authority to select non-national laws via the indirect method, must make it clear in their arbitration laws. A case in point is found under the Egyptian Arbitration Law, where a specific conflict of laws rule is designated (the closest connection rule) to be followed by the arbitral tribunal in order to find the 'rules of law' applicable to the dispute.[202] This will not only make the arbitral tribunal's work easy but also ensure that decisions about the applicable substantive law are not made arbitrarily.

The OHADA's Uniform Act which is applicable in Côte d'Ivoire follows the direct method that eliminates the requirement of a conflict of laws analysis

199 See ICC Award No. 5713 of 1989 https://www.unilex.info/cisg/case/16; Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 874.

200 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 755.

201 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 755.

202 Art 39(2) of the Egyptian Arbitration Law of 1994.

from the search for the applicable substantive law.[203] In contrast to the indirect methods found in the arbitration laws of Egypt, Ghana and South Africa, the direct method may lead to the application of national and/ or non-national legal rules to the substance of a dispute.

Based on article 15 of the Uniform Act, the arbitral tribunal is permitted to choose the rules of law that they consider most appropriate where parties have not made such a choice. Thus, assuming parties A and B are engaged in an arbitration seated in an OHADA Member State such as Côte d'Ivoire, the arbitral tribunal is at liberty to apply either only national laws, national laws and non-national legal rules such as the UNIDROIT Principles or only non-national legal rules as the applicable law of a dispute in the absence of the parties' choice.[204] The arbitral tribunal operating under the Uniform Act, can bypass national conflict of laws rules and directly apply either the national and/or non-national rules it considers appropriate.

As the above discussion clearly shows, the scope of the arbitrator's discretion when it comes to the application of non-national rules varies depending on the relevant jurisdiction and legal regime. A vast majority of the arbitration laws (in Africa and elsewhere) that use the indirect method, it would appear, typically result in the application of the 'law' (rather than 'rules of law'), determined by the applicable conflict of laws rules.[205] Whereas the jurisdictions that follow the direct method may allow the arbitral tribunal to directly apply non-national laws when it deems it appropriate to do so. Irrespective of the approach provided, the intentions of the parties may also indicate either, in a positive manner, the parties' willingness to have their contract governed by non-national laws or, in a negative manner, their desire to exclude the application of any particular non-national law.[206] The parties' intention may for instance prevail over the relevant established rules of conflict of laws in the particular case, thereby, allowing the arbitral tribunal to directly apply a non-national law in accordance with the circumstances of the case.

5.3.3. The attitude of arbitration institutions toward the arbitrators' authority to assign the applicable substantive law

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203 Art 15 of the Uniform Act of 2017.
204 Art 15 of the Uniform Act of 2017.
205 This is however dependent on the provisions of the relevant arbitration law; König 2015 *PYIL* 287.
206 Elcin *Lex Mercatoria in International Arbitration Theory and Practice* 274.

Arbitration institutions are organisations whose core purpose is to administer arbitration disputes referred to them. These arbitration institutions (whether private or public bodies) manage arbitral dispute referrals and do not decide the substantive dispute between the parties. Each arbitration institution has its own set of rules to provide a framework for the arbitration, and its own form of administration to assist in the process.[207] As a legal entity or organisation, an arbitration institution should at the bare minimum, *inter alia*, maintain a legal personality under the law in which it is incorporated; maintain publicly accessible offices; provide adequate and professionally qualified staff including a board of independent experts to oversee the work of management personnel; and have a set of its own publicly accessible rules.[208]

In relation to arbitration rules, institutions either produce their own bespoke set of rules or adopt other rules such as the UNCITRAL Arbitration Rules.[209] These institutional rules which act as the primary law applicable to the institutional arbitration proceedings, form part of the arbitration agreement between disputing parties. In Africa, most institutional arbitration rules are inspired by the UNCITRAL Arbitration Rules.[210] This has brought some degree of predictability and harmonisation to the practices and norms regulating the conduct of institutional arbitration under these laws.

The UNCITRAL recognises the need for periodic revision of its rules to conform to current international trade and arbitral practices — the same is true for all major arbitration institutions.[211] In Africa (and elsewhere) for instance, arbitration institutions update their arbitration rules at different times, to reflect modern developments and arbitral practices. Some have updated their arbitration rules to reflect modern developments in arbitral practice while others are yet to do so.[212] It can be said that there is no uniform development of the African enacted institutional arbitration rules. At any given point in time, there may be some African institutional arbitration rules that conform to current practices and some that do not. This in effect

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207 There are some parties who only require the arbitration institution to only act as the appointing authority and they proceed to conduct ad hoc arbitration with the appointed arbitral tribunal.

208 Onyema "Arbitration Institutions in Africa" 20.

209 Onyema "Arbitration Institutions in Africa" 24.

210 Others are also inspired by the ICC Arbitration Rules and the LCIA Arbitration Rules. Onyema "Arbitration Institutions in Africa" 24-25.

211 The UNCITRAL Arbitration Rules (1956) for instance was revised in 2010 to reflect the changes that had taken place within arbitration practice over the thirty years.

212 Malloy 2002 *TransL* 44-45.

means that disputing parties that select the arbitration rules of such institutions may need to supplement the provisions of such laws to address the issues they do not cover.

Interestingly, it appears that this problem does not extend to the adoption of provisions relating to the determination of the applicable substantive law in modern institutional arbitration rules. Provisions relating to the applicable substantive law found in the UNCITRAL Arbitration Rules and other major arbitration institutions in the world tend to stay the same upon their revision. That is, the textual approach and the spirit behind such provisions tend to remain the same. Consider the UNCITRAL Arbitration Rules of 1976 – the text of provisions relating to the applicable substantive law has been maintained in all its revised versions.[213] It does not matter which revised version influences the arbitration rules of a particular institution. Similarly, the London Court of International Arbitration (LCIA) Arbitration Rules which are frequently revised has its 1998 and 2020 versions containing the same text for provisions relating to the substantive law, under the same article in both versions — article 22.3.[214] Whether an African-based arbitration institution for instance, has its rules based on the new or old version of the LCIA Arbitration Rules, the provisions relating to the substantive law remain the same.

Although the provisions relating to the applicable substantive law remain the same, under the revised versions of the UNCITRAL Arbitration Rules (and those of other major institutional arbitration rules), an institution may for instance wholly or partly adopt those provisions. Usually, it is the provisions governing the arbitrator's authority that are varied by enacting arbitration institutions. Arbitration institutions adopt various approaches for assigning the applicable law. Only upon an examination of institutional rules would one determine the method provided for assigning the applicable substantive law in the absence of the parties' choice. Based on this assertion, the provisions on assigning the applicable substantive law found in the institutional rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Ghana Arbitration Centre (GAC), the Arbitration Foundation

213 Croft, Kee and Waincymer *A Guide to the UNCITRAL Arbitration Rules* 396.

214 See LCIA 2022 https://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx; LCIA 2023 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

of Southern Africa (AFSA) and the Common Court of Justice and Arbitration (CCJA) are subsequently interrogated to identify the methods they provide.

a. The arbitration rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA)

During the Doha session of 1978, the Asian-African Legal Consultative Organisation (AALCO),[215] decided to establish regional international commercial arbitration centres on the African and Asian continents. The AALCO understood the necessity for international commercial arbitration centres on these two major continents to serve as viable alternatives to traditional institutions in the West. The AALCO agreed that the objective of these centres would be to among other things, promote international commercial arbitration between the Asian and African continents, assist and coordinate the activities of existing arbitration institutions in the two regions and coordinate the conduct on *ad hoc* arbitrations particularly those held under the UNCITRAL Arbitration rules. To further this agenda, in April 1978 the AALCO and the government of Malaysia entered into an agreement to establish a Regional Centre for Arbitration in Kuala Lumpur.[216] Similar agreements were subsequently concluded between the AALCO and the governments of Egypt, Nigeria, the Islamic Republic of Iran and Kenya.

Since its establishment in 1979 under the auspices of the Asian-African Legal Consultative Organisation (AALCO), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), has become the most prominent arbitration institution in Egypt.[217] The Cairo Regional Centre provides a system for the resolution of commercial and investment disputes. The centre also provides a plethora of services including administering international and domestic arbitration as well as other ADR mechanisms according to its rules; providing advice for disputing parties; providing technical and administrative assistance for ad hoc arbitration; and providing assistance to other arbitration institutions that exist within the region.[218]

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215 Originally known as the Asian Legal Consultative Committee (ALCC), constituted on 15 November 1956. See Asian African Legal Consultative Organisation 2022 https://aalco.int/.

216 Raouf and Hussein "The Cairo Regional Arbitration Centre" 70.

217 The Egyptian Settlement and Arbitration Centre for Sports established in 2017 and the Egyptian Olympic Committee and the Egyptian Centre for Voluntary Arbitration and Settlement of Non-Banking Financial Disputes established by virtue of the Presidential Decree No. 335 of 2019 are example of specialised arbitration bodies found in Egypt.

218 Raouf and Hussein "The Cairo Regional Arbitration Centre" 72.

The arbitration rules of the CRCICA are undoubtedly one of the reasons why users elect to arbitrate under its auspices. At the establishment of the CRCICA, it adopted the 1976 UNCITRAL Arbitration Rules with minor modifications to suit institutional arbitration. Since then, the centre's arbitration rules have gone through four amendments leading up to its current version which came into effect on 1 March 2011. This current 2011 version of the CRCICA Rules is based on the 2010 version of the UNCITRAL Arbitration Rules, with minor modifications stemming from CRCICA's position as an arbitration institution and an appointing authority.[219] Some of the critical changes brought on by the adoption of this new set of arbitration rules include *inter alia,* the use of electronic means such as e-mail for notice in the arbitration process;[220] appointment of the arbitral tribunal by multiple parties jointly as claimant or respondent;[221] and permitting the incorporation of an express clause regarding the decision by the CRCICA not to proceed with the arbitration proceeding in the event it manifestly lacks jurisdiction over the dispute.[222]

The 2011 CRCICA Rules also made some notable changes with regard to its provisions relating to the applicable substantive law. In the preceding versions of CRCICA Rules, provisions relating to the applicable substantive law closely followed the text of the 1976 UNCITRAL Arbitration Rules. Apart from permitting parties to select the law to apply to the substance of their dispute, the arbitral tribunal was empowered to establish the applicable substantive law by applying the conflict of laws rules, which it considers applicable.[223]

This was however not done under the 2011 CRCICA Rules. Specifically, article 35 (1) of the 2011 CRCICA Rules provides that where parties fail to designate the law applicable to the substance of the dispute, the arbitral tribunal is empowered to apply the law which has the closest connection to the dispute. Unlike the former rules that provide for the law to be determined by the conflict of laws rules, the 2011 Rules provide a specific choice of law rule for establishing the applicable substantive law. As noted elsewhere in this section, though the arbitral tribunal is bound to apply the specified

219 On 1 March 2011, the CRCICA adopted a new set of arbitration rules reflecting the 2010 revised UNCITRAL Arbitration Rules. Raouf and Hussein "The Cairo Regional Arbitration Centre" 73.
220 Art 2 of the CRCICA Rules of 2011.
221 Art 10 of the 2011 CRCICA Rules of 2011.
222 Art 6 of the 2011 CRCICA Rules of 2011.
223 This provision was always found in art 33 of the 1998, 2000, 2002 and 2007 versions of the CRCICA Rules of 2011.

choice of law rule (in this case the closest connection rule), they need not conduct a conflict of laws analysis to establish the applicable substantive law. Having a specific choice of law rule to assign the applicable substantive law brings some certainty and predictability to the matter. Keeping in mind that arbitration institutions in Africa are competing with those in the West for business, it can be argued that eliminating the need for a conflict of laws analysis and being certain about the choice of law rule could be an incentive for disputing parties to submit to the CRCICA and its arbitration rules.

b. The arbitration rules of the Ghana Arbitration Centre

The Ghana Arbitration Centre (GAC) is an autonomous, non-profit institution incorporated as a company limited by guarantee in 1996 under the then Ghanaian Companies Code of 1963 (Act 179). Undoubtedly, the GAC is the oldest and most well-known institution for resolving disputes through arbitration in Ghana.[224] The centre is a popular choice for resolving international commercial disputes seated in Ghana. The GAC, among other things, provides procedural rules, managerial and administration services for the conduct of arbitration.

The GAC Rules are a set of simplified procedural rules for the conduct of arbitration proceedings. They are made up of rules *inter alia* relating to, the appointment of the centre as administrator of arbitration,[225] the process for the change of a claim,[226] the process for the release of documents for judicial proceedings[227] and rules on administrative fees.[228] What is obvious from analysing the GAC Rules is that the document does not contain provisions relating to the law applicable to the merits of a dispute. The rules neither contain provisions that indicate the parties' freedom to select the applicable substantive law nor indicate the arbitral tribunal's default authority to assign one. In a situation where an arbitration institution's rules are silent on a particular matter, the norm is that national arbitration rules may complement them. Therefore, the absence of a provision relating to the applicable substantive law in the GAC Rules is resolved through its complementary relationship with the national arbitration law of Ghana.

For arbitration seated in Ghana, the national arbitration law, Ghana ADR Act sets the parameters within which arbitral tribunals exercise their mandate in

224 Amofa "The Ghana Arbitration Centre" 141.
225 Sec 3 of the GAC Rules. See GAC 2023 https://arbitrationcentregh.com/rules/.
226 Sec 8 of the GAC Rules.
227 Sec 46 of the GAC Rules.
228 Sec 48 of the GAC Rules.

the country. This national arbitration law governs arbitration procedures within Ghana. Whereas institutional arbitration rules may set out the mode for commencing arbitration, the fees and remuneration to be paid by parties who engage their services and other procedural matters, a country's arbitration laws provide support to arbitration proceedings where a vacuum is created by particular institutional arbitration laws.

Therefore, the Ghana ADR Act can be used to fill the vacuum left by the silence of the GAC Rules on issues relating to the assignment of the applicable substantive law.[229] The Ghana ADR Act, which is currently the primary statute on arbitration in Ghana, is influenced by the UNCITRAL Model Law, with some modification. When it comes to the applicable substantive law, as noted earlier in this section, the Ghana ADR Act provides that arbitrators shall decide the dispute in accordance with the law chosen by the parties and as a default rule, the arbitrators can apply the law determined by the conflict of laws rule they deem applicable. Assuming disputing parties seated in Ghana choose the GAC and its rules to regulate their arbitration, in the absence of a choice of applicable substantive law, the arbitral tribunal can apply the law determined by the conflict of laws rules which it considers applicable. The Ghana ADR Act provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute.

Nevertheless, the situation is very different when arbitration is conducted by the Ghana ADR Hub (ADR Hub) and its Rules. The ADR Hub is also a popular alternative dispute resolution organisation in Ghana that administers both domestic and international arbitration in Ghana.[230] The ADR Hub, in line with keeping up with modern and international trends, launched the *Ghana ADR Hub Arbitration & Mediation Rules* in 2020. [231] The hundred-page document addresses both arbitration and mediation.[232] When it comes to issues relating to the law applicable to the merits of a dispute, ADR Hub's rules contain specific provisions regulating the matter. Its section 24.3 provides that the arbitral tribunal shall decide the merits of the dispute

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229 Apart from the GAC Rules' silence on the process for determining the applicable substantive law, it also does not incorporate the New York Convention as part of its rules. The Ghana ADR Act of 2010, therefore, fills in the gap left when regulating such situations.

230 Kidisil, Asare and Adomako *The Legal 500 Country Comparative Guides: Ghana International Arbitration* 3.

231 Ghana ADR Hub-Arbitration and Mediation Rules of 2020. See Ghana ADR Hub 2022 https://www.ghanaadrhub.org/.

232 It may also be adopted by parties for the conduct of their ad hoc proceedings.

in accordance with the law or rules of law chosen by the parties and that in the absence of such a choice, the tribunal shall apply the law or rules of law it considers appropriate.

The question at this point is, is it prudent for arbitration institutions (more so, African arbitration institutions), to leave the issue of the applicable substantive law unanswered in their rules, in anticipation of it being addressed by the national arbitration laws of the seat of arbitration? It is suggested that the answer to this question can be nuanced. It is an undeniable fact that there is a possibility for the national arbitration law to also be silent on the matter. In such an instance, it might become the responsibility of the arbitral tribunal to determine the applicable law. Establishing the right balance between the conflicting needs of disputing parties by taking into account all the relevant circumstances might not be so straightforward. Even deciding on whether to apply national laws or non-national laws can be an issue of contention. In international commercial matters, where the need for predictability and certainty is particularly acute this might not be ideal. African arbitration institutions cannot afford to operate under such uncertainty when they are in competition with not only each other but also with well-established centres such as the LCIA and ICC for business. It is suggested that it is prudent for the rules of African arbitration institutions to clearly provide guidance in the selection of the applicable substantive law. This can be a factor that influences a party to choose one arbitration institution over another.

c. The international arbitration rules of the Arbitration Foundation of Southern Africa (AFSA)

The Arbitration Foundation of Southern Africa (AFSA)[233] is responsible for administering disputes in accordance with its International Arbitration Rules (and other procedures or rules) where parties have agreed upon them. Unless the parties have specifically chosen the AFSA Commercial Rules or AFSA determines that the dispute is a domestic one, all international arbitrations commenced at the AFSA are regulated by its International Arbitration Rules in effect on the date upon which the arbitration begins.[234]

The current AFSA International Arbitration Rules came into effect on 1 June 2021.[235] During its development, the aim of the AFSA Drafting Committee

233 AFSA 2022 https://arbitration.co.za/.
234 See the preamble of the AFSA International Rules of 2021.
235 Lane "The AFSA Court: A New Dimension in Arbitrations Administered by AFSA" 1.

was to align the AFSA International Arbitration Rules with best practice from an international perspective.[236] In that sense, some of the provisions of the new rules were designed to closely resemble or mirror provisions in successful institutional arbitration rules, including those of the International Court of Arbitration of the International Chambers of Commerce (ICC) and the London Court of International Arbitration (LCIA). Therefore, the new set of AFSA International Arbitration Rules ushers in innovative international arbitration protocols in line with the best international trends and practices.

A few noteworthy features of the rules include the introduction of the AFSA International Court to supervise the administration of dispute resolution by the arbitral tribunal[237] and the AFSA International Secretariat to assist the Court in performing these administrative functions;[238] the possibility for the appointment of an emergency arbitrator by the Secretariat when urgent relief is required prior to the constitution of the arbitral tribunal[239] and a catch-all provision that permits hearings to take place in person or by any other means (including video or telephone conference) that the arbitral tribunal considers appropriate, taking all relevant circumstances into account.[240]

With regard to provisions relating to the determination of the applicable substantive law, the AFSA International Arbitration Rules similarly align its provisions with those found in successful institutional arbitration rules such as the LCIA and ICC Rules. Apart from its recognition of the parties' freedom to choose the rules of law applicable to the merits of their dispute for instance, the AFSA International Arbitration Rules also adopt the default position of the arbitral tribunal applying the rules of law which it determines appropriate — that is, the direct method which does not involve a conflict of laws analysis.[241] This reflects the liberal and flexible regime adopted under most modern institutional arbitration rules for the selections of the applicable substantive law.

Deliberately creating similarities between the AFSA International Arbitration Rules and the rules applicable to other foreign arbitration institutions is a way of creating synergy between them. Also, the alignment of specific provisions with international standards creates familiarity for the parties and

236 Lane "The AFSA Court: A New Dimension in Arbitrations Administered by AFSA" 1.
237 Art 2 of the AFSA International Rules of 2021.
238 Art 1 of the AFSA International Rules of 2021.
239 Art 11 of the AFSA International Rules of 2021.
240 Art 21 of the AFSA International Rules of 2021.
241 Art 19 of the AFSA International Rules of 2021.

arbitrators who use it. This will facilitate greater participation in arbitration administered under the AFSA International Arbitration Rules for foreign parties. The AFSA and its international arbitration rules provide a very solid legal framework for institutional arbitration, underscoring South Africa as a suitable seat for international arbitration.

d. The arbitration rules of the Common Court of Justice and Arbitration (CCJA)

Headquartered in Abidjan, Côte d'Ivoire, the Common Court of Justice and Arbitration (CCJA) is one of the routes provided by the OHADA for the resolution of disputes by arbitration.[242] When a contract is to be performed or is being performed partially or wholly within an OHADA Member State, or at least one of the parties to the contract is domiciled within the OHADA territory and there is a valid arbitration agreement empowering the CCJA Arbitration Centre to administer arbitration proceedings, its regulatory framework becomes applicable.[243] The CCJA Arbitration Centre does not resolve disputes itself but performs administrative functions such as appointing arbitrators and overseeing the general conduct of arbitration proceedings. The CCJA Arbitration Centre administers and supervises arbitration proceedings in accordance with both the OHADA Treaty and the CCJA Arbitration Rules.[244]

The CCJA Arbitration Rules, which were enacted in 1999, are largely inspired by the 1998 ICC Arbitration Rules.[245] Subsequent to this, the CCJA Arbitration Rules were revised, in November 2017 and entered into force in March 2018.[246] This revision, among other things, established certain safeguards against conflicts that may potentially arise as a result of the dual role of the CCJA as the Supreme Court of the OHADA territory and as an arbitration centre. These include the fact that members of the Court who share the same nationality as parties directly involved in an arbitration must recuse themselves from the Court panel and be replaced.[247] Also, there is the possibility for parties directly involved in the arbitration to request the

242 As earlier pointed out, the arbitration system under OHADA is in two-fold; those governed by the Uniform Act on Arbitration and institutional arbitration held under the auspices of the CCJA. The CCJA also serves as a court of last resort arbitral awards and judgements rendered within Member States. See para 2.6.4 above.
243 Art 2 of the CCJA Rules of 2017.
244 Penda "Arbitration Centres in French-Speaking African Countries" 178.
245 Jahnel Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius 9.
246 Penda "Arbitration Centres in French-Speaking African Countries" 175.
247 Art 1 of the CCJA Rules of 2017.

Court to disclose the reasons behind its administrative decisions to all parties.[248] These revisions were made to promote arbitrations within the OHADA territory by providing easily enforceable awards, effective and expedient arbitration proceedings.

Apart from the changes noted above, variations can also be noted in relation to provisions relating to the law applicable to the merits of the dispute, specifically the arbitrator's default authority to determine the substantive law in the absence of the parties' choice. The 1999 version of the CCJA Arbitration Rules did not follow the approach which was established under article 17 of the then 1998 ICC Arbitration Rules for selecting the applicable substantive law.[249] Whereas under the 1998 ICC Arbitration Rules, the arbitral tribunal had the authority to apply *the rules of law* which it determines to be appropriate (*voie directe)*, under 1999 CCJA Arbitration Rules, if parties failed to select the applicable law, the arbitral tribunal was empowered to apply *the law* determined by the conflict of law rules which it considered appropriate in the circumstance (*voie indirecte)*.[250]

Currently, under section 17 of the CCJA Arbitration Rules (2017), the arbitral tribunal is empowered to apply the law determined by the conflict of laws rules which it deems appropriate in the circumstances.[251] The provision places the arbitral tribunal in the same situation as a national court determining the applicable law in the absence of the parties' choice, using conflict of laws rules. Interestingly, this approach adopted under the 2017 CCJA Arbitration Rules is contrary to the liberal trend of granting the arbitral tribunal broad discretion to directly choose the applicable law or rules of law to govern the dispute, where parties did not designate one, found in most modern institutional arbitration rules.[252]

5.3.4. The interrelationship between national and institutional arbitration laws in Africa

Generally, there is a strong deference to the parties' binding agreement as to the law that governs their legal relationship.[253] More likely than not,

248 Art 1 of the CCJA Rules of 2017.
249 International Chamber of Commerce (ICC) Arbitration Rules (1998). See ICC 2023 https://library.iccwbo.org/.
250 Art 17 of the 1999 CCJA Rules; art 17 of the ICC Arbitration Rules of 1998.
251 Common Court of Justice and Arbitration (CCJA) Rules of 2017.
252 See the art 22.3 of the LCIA Arbitration Rules of 2020 and art 21 of the ICC Arbitration Rules of 2021.
253 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 787.

jurisdictions recognise that the parties' freedom in such issues extends to the arbitral tribunal's default authority to select the law applicable to the merits of a dispute. Assuming parties (without an express choice of law clause) agreed to the application of the CRCICA Rules and by extension its formula for establishing the applicable substantive law, most jurisdictions would give credence to such a choice over a specific conflict of laws formula provided in its national arbitration laws. In an international arbitration where an institution and its rules are specifically selected by the parties, it is likely for such a choice to supersede national arbitration rules.

Nevertheless, it can be argued that there is a link between national and institutional arbitration laws which cannot be severed by party autonomy.[254] In line with the jurisdictional theory which suggests that arbitration is inextricably linked to the place where it takes place, national arbitration laws have a critical link to arbitration institutions and their laws.[255] National arbitration laws provide the backbone to arbitration proceedings (institutional or *ad hoc*) conducted within its territory. The interplay between national and institutional arbitration laws can take place almost at any phase within the arbitration process. From filling a legal vacuum left within institutional arbitration rules to ensuring the recognition and enforcement of the awards rendered by tribunals, the role of national laws on arbitration in institutional arbitration cannot be downplayed.

In Africa specifically, national laws on arbitration play a vital role in institutional arbitration proceedings. When it comes to provisions that regulate the determination of the substantive law, for instance, national arbitration laws may either augment institutional rules on the subject or fill in the gaps in law where such rules are missing. A typical example, as discussed early on in this chapter, is the link between the Ghana ADR Act and the GAC Rules.[256] The Ghana ADR Act provides direction as to how the applicable substantive law may be determined since the GAC Rules are silent on the matter. Without such an intervention, it is likely that arbitral tribunals constituted by the GAC may have to rely on their own expertise to determine the method for assigning the law applicable to the merits of a dispute. The Ghana ADR Act complements the private arbitration institutions seated in Ghana such as the GAC, that may have gaps within their rules. National laws on arbitration may also support arbitration

254 Amofa "The Ghana Arbitration Centre" 139.
255 Bělohlávek "Arbitration and Basic Rights: Movement from Contractual Theory to Jurisdiction Theory" 66-67.
256 See para 5.3.3 (b) above.

institutions by providing detailed procedures for the recognition and enforcement of foreign awards. The CRCICA Rules, for instance, is silent on the procedure for recognition and enforcement of foreign awards. Awards rendered by arbitral tribunals seated in Egypt are enforced under Part VII of the Egyptian Arbitration Law.[257] Here, the EAL provides the requisite legal infrastructure to complement the conduct of arbitration under the CRCICA Rules.

There are indeed some national laws on arbitration in Africa that do not provide adequate support to the private arbitration institutions seated within its territory. The national arbitration laws may be outdated or may also omit the same vital provisions as the arbitration institution. The situation that exists within the OHADA territory provides a typical example. The CCJA Court has the competence to rule on the enforcement of awards rendered within the OHADA territory.[258] However, when the execution of a non-CCJA award is sought within an OHADA Member State, it does not fall under the purview of the CCJA Court. The New York Convention or other relevant legal provisions must be applied by the relevant national court in which the execution is sought. The issue is, not all the OHADA Member States have acceded to the New York Convention.[259] In an instance, when such national courts must rule on the enforcement of a non-CCJA award, that is institutional awards rendered outside the OHADA territory, parties may be subjected to onerous national enforcement regimes. In spite of challenges like this, the regulatory and supervisory role of national arbitration laws in the institutional arbitration process cannot be denied. In the case of Africa, more so than elsewhere, the relationship between national and institutional arbitration laws must be exploited for the benefit of the seat.

5.4. Comment

An analysis of the national and institutional arbitration regimes of Egypt, Ghana, South Africa and Côte d'Ivoire reveals a few notable things. First, the UNCITRAL Model Law and the UNCITRAL Arbitration Rules influence the provisions on default procedure for assigning the applicable substantive law in the absence of the parties' choice found in their national and

257 Egypt is a Contracting Party to the New York Convention of 1958. The country acceded to the convention in 1959 with no reservation. See United Nations 2023 https://www.newyorkconvention.org/countries.

258 The CCJA however has some provisions on recognition and enforcement of awards in its Chapter III.

259 The following OHADA Member States have not ratified the New York Convention of 1958: Congo, Guinea Bissau, Chad, Togo and Republic Democratic of Congo.

institutional arbitration laws. Second, the wording of such a provision creates the impression that the arbitrators may or may not designate non-national laws or rules as the applicable substantive law. To make clear the scope of the arbitrator's discretionary power, in relation to the range of options of law they may apply, the OHADA Uniform Act on Arbitration and the Egyptian Arbitration Law, for instance, clearly indicate that the arbitrators have the authority to choose national and/or non-national laws as the applicable substantive law in the absence of the parties' choice. Under the Ghana ADR Act and the South African International Arbitration Act, although such clarity does not exist from the wording of their provisions, presumably arbitrators can consider non-national laws or principles when determining the conflict of laws rules, they consider applicable. Finally, national arbitration laws, in some instances, may complement institutional arbitration laws. This interplay between the two laws may be particularly vital for the development of institutional arbitration in Africa.

As demonstrated in Chapter 4,[260] the current arbitration rules of top arbitration institutions worldwide, such as the International Court of Arbitration, the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC), all tend to favour the direct method of assigning the applicable substantive law. The selected African arbitration institutions discussed in this section, however, have rules that incorporate either the direct or indirect methods. This allows for parties to choose between the direct and indirect methods by their decision to submit to one arbitration institution over the other. Parties must, however, comprehend the consequences of their decision, as it directly impacts the extent of arbitrators' discretion in those matters.

Section III: Potential Constraints on the Exercise of Arbitral Discretion

5.5. Introduction

Discretion, as Dworkin puts it, "is like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."[261] This graphic metaphor provides an apt description of arbitral discretion, which involves arbitrators conducting proceedings in a manner they deem best, within normative forces which constrain them towards objectivity and

260 See para 4.1.2 above.
261 Dworkin 1967 *U Chi L Rev* 32.

accepted notions of justice and fairness.[262] It is unlikely for an arbitral award to be set aside on the ground that the discretionary power vested in arbitrators was exercised inefficiently. However, an arbitral award can be challenged if the arbitral tribunal has acted in a way that exceeds its powers or if the award is against the mandatory laws or public policies of a jurisdiction. Regardless of arbitral discretion, arbitrators have the general responsibility to conduct arbitration proceedings efficiently, leading to enforceable awards.

In the absence of the choice of the substantive law applicable to a dispute, arbitrators usually have the power to choose between alternative laws or rules and the methods for establishing the applicable law. Depending on the circumstances of each case, arbitrators may opt for one course of action over another. The scope of arbitral discretion in international commercial arbitration depends on several factors contingent on where the arbitration is being conducted and under which rules. Nevertheless, an arbitral tribunal has discretion whenever the effective limits on its power leave it free to choose among possible courses of action or inaction. With this in mind, the section argues that in the exercise of arbitral discretion, arbitrators face some controversial situations that may influence the way in which they assign the applicable substantive law. Notable among these are the following:

a. Identifying mandatory rules

When considering the concept of mandatory rules, the major problem that is encountered is determining when a rule should be so classified.[263] In relation to arbitration, a number of scholars have provided competing definitions and systems of classification for the notion of mandatory laws (or public policy).[264] Although such definitions usually aptly describe the role of mandatory laws in the arbitration process, they do not provide a very good idea of the criteria for identifying precisely which rules fall under the concept.[265] Due to the expansive array of laws present within a particular legal system, pinpointing an exact substantive mandatory rule may be daunting.[266] Arbitrators may need to acquaint themselves with the relevant

262 Alexander "Discretion in Arbitration" 85.
263 See generally Fawcett 1990 *CLJ* 44-62.
264 See para 3.3.4 above.
265 Bermann 2007 *ARIA 5.*
266 The identification and applicability of substantive mandatory laws is considered in this section of the thesis as opposed to mandatory procedural rules, an issue which can be less controversial.

applicable substantive laws to identify potential applicable mandatory laws. For instance, although the OHADA territory shares international arbitration laws,[267] each country may have specific substantive mandatory laws applicable to international commercial issues in an arbitration seated in its jurisdiction.

Granted that commonly cited substantive mandatory laws such as competition laws, securities regulations, currency controls, environmental protection laws and antitrust laws may give arbitrators an inclination of where to look for potentially applicable mandatory laws, they do not reflect any unifying factor.[268] The question is, which aspect of these laws or which specific provisions are to be applied despite the parties' agreement? Making this determination can be a challenge, especially when the arbitrators are not conversant with the laws of the particular jurisdiction. The reality is that when it comes to identifying mandatory rules, it is only some statutes that unambiguously establish which rules precisely are mandatory in nature.[269] When an arbitral tribunal seeks to determine if a rule is mandatory or otherwise, it may do so by gauging the depth of a legal system's attachment to values embodied in the relevant mandatory rules— this determination might not be so straightforward.

For instance, the arbitral tribunal in the search for the mandatory nature or otherwise of law may be pushed into pre-existing local scholarly debates about the nature and limits of such rules. A case in point is the debate in Egyptian literature and courts, over whether or not an Egyptian seat can be mandated for transfer of technology agreements.[270] The issue starts from the fact that the Egyptian Arbitration Law does not contain any mandatory provisions specifying that certain disputes should be seated within Egypt. Nevertheless, the *Egyptian Trade Law No.17 of 1999* contains specific provisions for technology transfer agreements. Its article 87 provides that:

> (1) The Egyptian courts shall have the jurisdiction of deciding disputes arising from the technology transfer contract referred to in article 72 of this law. Agreement may be reached on settling the dispute amicably or via arbitration to be held in Egypt according to the provisions of the Egyptian law.
> (2) In all cases, deciding the subject of dispute shall be according to the

267 The Uniform Arbitration Rules of 2017 is applied to international and domestic arbitration seated within the OHADA territory.
268 Mayer 1986 *Arbitr Int* 275; Landolt *Modernised EC Competition Law in International Arbitration* 112-117.
269 Bermann 2007 *ARIA 5.*
270 See generally Ternieden, Badawy and ABD El-Shahid 2017 *JIntlArb* 55- 78.

> provisions of the Egyptian law, and all agreement to the contract otherwise shall be null and invalid.[271]

According to this provision, Egyptian law applies to the substance of technology transfer contracts and arbitration is allowed only if it is held in Egypt. Some Egyptian arbitration practitioners interpret this provision as mandatory and thus restricting the parties' contractual autonomy whereas others ascribe a permissive interpretation to it.[272] The nature of this provision is also highly debated in Egyptian courts. The Egyptian Supreme Constitutional Court considers the provision as public policy,[273] while the Egyptian Court of Cassation considers it a mandatory norm which does not exhibit the attributes of an Egyptian public policy.[274] In a situation like this, assuming an arbitral tribunal has to determine the mandatory nature of the provision, where even national courts do not share a common opinion on the matter, the difficulty becomes apparent.

A question that can be posed at this point is, can arbitrators decide to simply disregard mandatory laws when deciding a case? The answer to this question lies in the fact that arbitration is a private process which bestows on arbitrators the autonomy to act within the arbitration process unless otherwise agreed upon between the parties. Once an arbitral tribunal is entrusted with a case, it has the discretion to decide on a plethora of issues including whether to apply or ignore a mandatory law. Some scholars are of the opinion that there is a strong incentive to ignore mandatory rules and that there is no reason to expect arbitrators to do otherwise.[275] This assertion is based on the premise that parties prefer that their contracts be enforced rather than the mandatory rules that their contract may violate.[276] Parties generally would prefer for the arbitrators they have paid for to uphold their contractual terms instead of deferring to violated mandatory rules of countries. Notwithstanding this, when it is clear to the arbitral tribunal that an award is unlikely to be enforced if the mandatory rules are not applied,

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271 See UAIPT 2003 http://www.uaipit.com/uploads/legislacion/files/1418296310_13.Law_No._17_of_1999_on_Commerce_EN_UAIPIT.pdf.

272 Ternieden, Badawy and ABD El-Shahid 2017 *J Int Arbitr* 56.

273 This was the position in the Supreme Constitutional Court, Case No. 253 dated 15 April 2007 cited in Ternieden, Badawy and ABD El-Shahid 2017 *JIntlArb* 60-61.

274 This was the position in the Court of Cassation, Case No.1042 dated 28 March 2011 cited in Ternieden, Badawy and ABD El-Shahid 2017 *JIntlArb* 60-61.

275 Guzman 2000 *Duke Law* J 1279.

276 Guzman 2000 *Duke Law* J 1279.

they may be inclined to apply these rules to fulfil their duty of rendering enforceable awards.[277]

b. Determining the applicable mandatory laws

Another major problem with the concept of mandatory rules is identifying which country's mandatory rules are to be considered in a particular situation.[278] Based on the classical position mandatory rules must stem from the substantive law of a contract whereas the contemporary position favours a determination detached from the applicable substantive law.[279] Assuming parties select a substantive law, which contains the applicable mandatory rules, there is no controversy about its applicability. However, where the relevant mandatory rule is independent of the substantive law applicable to the contract, its applicability may need to be established.[280] In such a situation, Barraclough and Waincymer have detailed three approaches to determine the applicable mandatory rule.[281] They suggested that arbitrators apply either all mandatory rules, regardless of their nature, origin or connection with the dispute or that they apply no mandatory rules.[282] The third approach mentioned is for arbitrators to apply mandatory rules at their discretion or under an objective formula.[283] In the exercise of arbitral discretion, arbitrators must delicately balance competing considerations to establish the applicability of a mandatory rule. The arbitral tribunal has to weigh the interests of the country sponsoring the mandatory norm against all other legitimate interests at stake to determine the best cause of action. Competing mandatory laws must be weighed up and the consequences of their application or non-application must be gauged. In the ICC Case No. 5294, for instance, the parties' arbitration agreement took precedence over the mandatory norms of a forum.[284]

A brief account of the facts of the case is that a Danish firm commenced arbitration proceedings based on an arbitration clause under its investment contract with an Egyptian firm. The Egyptian firm also initiated an action in

277 Eken 2011 *YAR* 59.
278 See generally Fawcett 1990 *CLJ* 44-62.
279 Baniassadi 1992 *Intl Tax & Bus Law* 68.
280 Baniassadi 1992 *Intl Tax & Bus Law* 72.
281 Barraclough and Waincymer 2005 *MJIL* 225-227.
282 Although the two position seem extreme, Barraclough and Waincymer argued that the approaches eliminate the difficult of determining when to apply mandatory rules or disregard them, by adopting an all or nothing approach. Barraclough and Waincymer 2005 *MelbJlIntLaw* 225-226.
283 Barraclough and Waincymer 2005 *MJIL* 225-227.
284 ICC Award No. 5294 of 1988 Yearbook XIV (1989) 137; Cheng 2005 *AUILR* 478.

the Egyptian courts for a declaration that the arbitration clause violated Egyptian Law. The arbitral tribunal seated in Switzerland in response to this found that since the validity of the arbitration clause was determined by the *lex fori* (which was Swiss Law), its validity or otherwise under Egyptian Law was immaterial. In this case, the law applicable to both the arbitration agreement and the main contract was the same: Swiss Law. Although Egypt has a sovereign interest in cases involving its nationals, in this scenario such authority was transferred to the arbitral tribunal because of the parties' arbitration agreement. If the arbitral tribunal had upheld any ruling of the Egyptian court, it would have been tantamount to it invalidating the parties' arbitration agreement, which would have not been commercially prudent. Instead, the arbitral tribunal gave precedence to the policy of promoting and protecting investments over national interests. To preserve long-term business relationships for instance or perhaps to honour the dictates of costs in money and time, it may even be justifiable for arbitrators to consider the mandatory rules of a legal system that lacks a real connection to the dispute.

To arbitrators, the mandatory laws of all forums are foreign to the arbitration proceedings and as such appropriate analysis is required to determine their applicability. To ensure that an award will be enforced, for instance, the arbitral tribunal may consider applying the mandatory rules of the prospective place where the enforcement of an award may be sought.[285] Arbitrators may also lend credence to the legitimate role of the seat of arbitration in the regulation of the contract, by applying its mandatory rules.[286] Basic economic and trade laws of the place where the contract is to be performed may also be considered by arbitrators, even where the application of such mandatory rules could render the performance of the arbitration difficult or impossible.[287] Arbitrators may even take notice of the mandatory rules of law without actually applying them, to establish an incidence of *force majeure*.[288] Different considerations prevail in each situation to establish the applicability of mandatory laws in international arbitration. The problem with determining the applicability of mandatory laws is that there are no assigned weights for each of these considerations. Arbitrators have to decide which factors deserve more weight when determining the applicability of a mandatory law. It is, of course, reasonable to assume that such discretionary decisions may be affected by the

285 Baniassadi 1992 *Intl Tax & Bus Law* 68.
286 Barraclough and Waincymer 2005 *MJIL* 223.
287 Baniassadi 1992 *Intl Tax & Bus Law* 68.
288 Baniassadi 1992 *Intl Tax & Bus Law* 72.

personal values or self-serving interests of arbitrators. Nevertheless, since there is no single generally accepted approach for dealing with the applicability of mandatory laws in international arbitration, it remains a persistent source of debate.[289]

c. Determining the applicability of non-national laws

Another controversial issue that may arise when assigning the applicable law deals with determining the applicability or otherwise of non-national laws or standards. Based on the transnational character of arbitration and perhaps due to its contractual foundations, arbitral tribunals frequently accept the designation of non-national laws as the applicable law.[290] When parties submit their international contracts to specific national and/or non-national laws arbitrators are inherently obliged to apply them. In the absence of the parties' choice of the applicable law, however, arbitrators do not have such an inherent right to apply non-national or non-binding laws.[291] Usually, the use of the expression the 'rules of law' in arbitration laws gives some inclination to the presence of such an authority. In the absence of such language, it is generally unclear whether arbitrators have the inherent authority to apply non-national rules.

According to Born, in commercial disputes, arbitrators should only apply non-national legal systems or principles in limited instances.[292] This is because non-national laws generally fail to produce predictable results in complex commercial matters.[293] The issue is that, even when non-national rules are expressly chosen by parties, they do so with great reluctance to avoid the debates over the content and basic character of such systems.[294] Assuming the arbitral tribunal decides to apply the *lex mercatoria*, they must do so with considerable caution. There are several definitions for the term *lex mercatoria.* Some scholars consider it a body of substantive law that relates to international trade, incorporated by national legal systems in a manner comparable to trade usages, and not asserting to establish a free-standing and autonomous body of international law.[295] Others equate the *lex mercatoria* to *ex aequo et bono* or *amiable compositeur,* a non-legal regime which arbitrators may use to decide cases based on what is just and fair

289 Greenawalt 2008 *ARIA* 103.
290 König 2015 *PYIL* 271.
291 König 2015 *PYIL* 276-277.
292 Born *International Commercial Arbitration* 4123.
293 Born *International Commercial Arbitration* 4123.
294 Born *International Commercial Arbitration* 4123.
295 Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* 633-634.

according to the circumstance of each case.[296] Due to the existence of numerous and varied definitions for the *lex mercatoria*, it has been argued that the concept is too abstract,[297] difficult to determine,[298] uncertain and full of major gaps.[299]

Nevertheless, when it comes to the application of non-national standards such as the UNIDROIT Principles[300] and *the Principles of European Contract Law and the Principles* (PECL),[301] their content is easily attainable. Although the content of such international restatements of contract principles is more easily attainable in contrast to the *lex mercatoria*, arbitrators still need to consider whether their application will go against the legitimate expectation of parties or commercial prudence. The arbitral tribunal can make such a determination by considering the parties' contract to discern their tacit choice of law. Where that is absent, the arbitrator's decision should be guided by the parties' expectations and needs. Such a determination must be done with skill, as arbitrators would not want to apply rules or principles that the parties have generally rejected.

On the other side of the coin is the question, will awards based on the application of non-national rules or standards be recognised and enforced by courts? Generally, the New York Convention (and most modern arbitration laws) do not allow courts to review awards on substantive grounds. Yet, parties may challenge an award on public policy grounds — that is not only the public policy grounds of the country where it was issued but also universal public policy or international public policy.[302] The PECL and the UNIDROIT Principles, for instance, both contain some guidance on how to deal with the issue of application of the public policy rules.[303] Assuming the UNIDROIT Principles are applied as the law governing the contract, its article 1.4 provides that effect should be given to those mandatory rules of national, supranational and international law which,

296 Born *International Commercial Arbitration* 4204, 4214-4219.
297 Chukwumerije 1994 *AALR* 274; Born *International Commercial Arbitration* 4204.
298 Born *International Commercial Arbitration* 4204.
299 Born *International Commercial Arbitration* 4204.
300 UNIDROIT Principles of International Commercial Contracts (2016).
301 As one the crowning works of Ole Lando, the Principles of European Contract Law and the Principles (PECL) pioneered work in the unification of European private law. Its first part was published in 1995, with second and third parts being published in 2002 and 2003 respectively. See generally Zimmermann 2020 *ERPL* 487-496.
302 Scherer "The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters" 116.
303 Art 1.4 of the UNIDROIT Principles (2016) and art 1:103 of the PECL provide guidance on the effect of mandatory laws.

according to the relevant rules of private international law, are applicable irrespective of the law governing the contract.[304] Although mandatory laws and public policy are considered to be two separate notions, from the Official Comments to article 1.4 of the UNIDROIT Principles, it can be gathered that the Principles contemplate a broad notion of mandatory rules, one which includes both specific statutory provisions and general principles of public policy.[305] The Official Comments to article 1.4 further explicitly refer to article 41 of the 2012 ICC Arbitration Rules, to elucidate the fact that arbitrators are obligated to render enforceable awards in light of the international mandatory rules or public policies of those countries where enforcement of the award is likely to be sought.[306] Therefore, arbitrators must determine whether or not to apply the UNIDROIT Principles, where its application will overlap with the international mandatory laws or public policy of a potential place of enforcement. Generally, awards based on international restatements of contract principles, such as the UNIDROIT Principles are widely recognised and enforced around the world.[307] Arbitration is considered an autonomous system that more willingly accepts the application of non-national rules and principles. It is, nevertheless, prudent that the nuances that accompany their application are considered by the arbitrators who decide to apply them.

Considering the controversies discussed above, a question that can be asked is, are arbitrators of African origin equipped to resolve them? First of all, it is suggested that arbitrators ideally must have the experience and expertise to resolve the above-listed issues when they arise during the assignment of the applicable substantive law. It can be argued that such skill is acquired through the effective utilisation of the arbitrator's skills. Through the frequent encounter of similar issues when they arise in the arbitration proceedings, the arbitrator acquires skills that only practice and experience can provide.[308] The problem with the case of arbitrators of African origin is that they are under-utilised within the regional and

304 The Official Comment 1 to art 1.4 of UNIDROIT Principles (2016) explains that given the nature of the Principles as a non-legislative instrument, neither the Principles nor individual contracts concluded in accordance with the Principles, can be expected to prevail over mandatory rules of domestic law, whether of national, international or supranational origin.

305 Official Comment 2 to art 1.4 of UNIDROIT Principles (2016).

306 Official Comment 4 to art 1.4 of UNIDROIT Principles (2016).

307 Mills *Party Autonomy in Private International Law* 517.

308 Onyema "Effective Utilisation of Arbitrators and Arbitration Institutions in Africa by Appointors" 9.

international arbitration circuit.[309] Arbitrators of African origin are rarely appointed to sit on arbitration panels deciding multi-million/billion-dollar disputes, not even those involving African parties.[310] It is in such international disputes the controversies discussed above are likely to be encountered. The under-utilisation of arbitrators of African origin creates the likelihood that they may lack the required knowledge and expertise to resolve some of these issues. This is not to say that arbitrators of African origin are incompetent, far from it. There are several world-class arbitration training centres, arbitration workshops and seminars conducted at various locations within and outside the continent that sufficiently train arbitrators.[311] Arbitrators of African origin may indeed be equipped with knowledge of how to resolve the numerous questions that may arise when assigning the substantive law, but they may not have the expertise to resolve them. It is a catch-22 situation, parties to an international dispute prefer arbitrators with expertise primarily in the subject matter of the dispute and arbitrators become experts in those subject matters if they are frequently appointed.

5.6. Comments

In international arbitration, arbitrators have the latitude to deal with the numerous controversial questions that may arise when assigning the applicable law. The discretion they have in relation to such matters has created a compilation of diverse opinions on how to resolve the issues that may arise in the arbitration proceedings. In some respects, this is a positive thing. Arbitration as a dispute resolution mechanism thrives on its flexible processes. Having defined ways of dealing with every single issue that may arise within the arbitration process could defeat this purpose. On a case-by-case basis, what is required to effectively resolve a dispute might look different. On the negative side, having too many diverse opinions on how to resolve an issue stifles predictability in the arbitration process. Parties who wish to avoid the far-reaching nature of arbitral discretion must make their intentions clear in their contracts. It is, however, incumbent on arbitrators to

309 Onyema "Effective Utilisation of Arbitrators and Arbitration Institutions in Africa by Appointors" 6.

310 Onyema "Effective Utilisation of Arbitrators and Arbitration Institutions in Africa by Appointors" 6.

311 For example, the Chartered Institute of Arbitrators founded in 1915 and located in London offers training and membership courses through its branches in several Africa countries, including Kenya, Nigeria and Cairo. Onyema "Effective Utilisation of Arbitrators and Arbitration Institutions in Africa by Appointors" 8.

deduce the best approach for resolving the issues that may arise when they have to assign the applicable substantive law.

5.7. General Concluding Remarks

From the discussion so far, five general conclusions can be reached. First, the UNCITRAL legal framework for arbitration greatly impacts the approaches and methods used by arbitrators for assigning the applicable substantive law. The result of this is that such provisions found in national and institutional arbitration laws now generally have similar features. Second, national arbitration laws and institutional arbitration laws found in Egypt, Ghana, South Africa and Côte d'Ivoire each provides the method to be used by the arbitrators to assign the applicable law in the absence of the parties' choice. These provisions found in the national or institutional arbitration laws of these four countries may have been influenced by either the UNCITRAL Model Law, the UNCITRAL Arbitration Rules or, in the instance of the OHADA, by the ICC Arbitration Rules. Third, depending on the relevant national or institutional arbitration law, arbitrators may select either national laws, non-national laws or both. Fourth, national arbitration laws, in some instances, complement institutional arbitration laws. In Africa, this can be very vital for the promotion of institutional arbitration on the continent. Fifth, there are some controversial issues that may arise when the arbitrator has to assign substantive law. Unlike their Western counterparts, arbitrators of African origin are likely to have had less experience resolving some of the controversial issues that arise when the arbitrator is assigning the applicable substantive law.

CHAPTER 6

EFFICIENT METHODOLOGY FOR ASSIGNING THE APPLICABLE SUBSTANTIVE LAW

6. General Introduction

Generally, the goal of every judicial process is to reach a decision which is just, fair and reasonable.[1] In the practice of arbitration, for instance, arbitrators usually strive for justice, fairness, efficiency and reasonableness when making decisions.[2] This extends to how arbitrators exercise their discretion when assigning the applicable substantive law. Whether arbitrators follow the two-tier system under the indirect method or directly select a particular substantive law, their decision to apply one law over another usually aims to be fair to all the parties involved. The broad nature of the procedural discretion of arbitrators allows for them to conduct proceedings in almost any manner they deem best, as long as they respect the arbitration mission and pay heed to fundamental fairness — usually referred to as due process or natural justice.[3]

Flexibility is one of the numerous reasons why disputing parties prefer arbitration as a dispute resolution mechanism.[4] The flexibility of the arbitration process is, however, what is desired by parties and certainly not the flexibility or arbitrariness of substantive outcomes.[5] It is imperative for parties who choose international commercial arbitration as a tool for managing their business risks, that the process produces fair, just, certain and predictable outcomes. Even though legal flexibility surely has a position among the fundamental principles of international arbitration, the importance of legal certainty and predictability has increased recently.[6] This shift that may be felt across the entire arbitration framework is primarily driven by an increased awareness that excessive flexibility may ultimately compromise the arbitration's legitimacy.[7] In the commercial setting, the trend towards legal certainty and predictability is in response to concerns emanating from the participants of international arbitration, parties and

1 See generally Radin 1951 *Wash U L Rev*; Eken 2011 *YAR* 52.
2 Eken 2011 *YAR* 52.
3 The term due process is commonly used in the United States and the term nature justice is used in Britain. Park 2003 *ArbIntl* 281.
4 Greenberg 2004 *VJICLA* 315, 335.
5 Hayward 2017 *SSRN Electronic Journal* 9; Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 353.
6 Waincymer *Procedure and Evidence in International Arbitration* 23-24.
7 Waincymer *Procedure and Evidence in International Arbitration* 23-24.

arbitrators.[8] When it comes to arbitrators assigning the substantive law, for instance, the ever-present question is to what extent should the method be flexible to the detriment of legal certainty, predictability, fairness, cost and time?

Recent developments at the national, regional and international levels tend to lead to the realisation that many governments and arbitration institutions in Africa have adopted modern approaches to arbitration.[9] Due to the far-reaching influence of the UNCITRAL arbitration instruments,[10] issues that arise from the current regulatory regime for assigning the substantive law may potentially affect the numerous national and institutional international arbitration laws that have adopted them.[11] For the most part, the approaches used by arbitrators to assign the applicable substantive law are but various formulations of one basic modern idea — that is, the arbitrator is free to determine the governing law in the absence of the parties' choice. The ever-changing variety in the contours of international disputes and involvement of African-based parties in arbitration, however, calls into question the nature of the arbitrator's discretion. Specifically, an understanding of the policy considerations[12] that influence the choice of arbitrators is necessary. Where international arbitration has African links (either the arbitration laws, parties or arbitrators), do the considerations used to assess the merits of the different possible methods for assigning the applicable law, take on a new perspective?

This chapter elaborates on this matter in three distinct sections. Section I identifies and evaluates the nature of relevant underlying policy considerations that may influence the arbitrator's discretion when assigning a substantive law in international commercial arbitration. Section II demonstrates how these policies influence the discretion of arbitrators when

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8 Waincymer *Procedure and Evidence in International Arbitration* 23-24.

9 Officially 10 African countries have adopted the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 and 36 are Contracting States of the New York Convention. UNCITRAL 2023 https://uncitral.un.org; United Nations 2023 https://www.newyorkconvention.org/countries.

10 That is the The UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 and the UNCITRAL Arbitration Rules (1976).

11 The UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, for instance, has been adopted in 86 countries. See UNCITRAL 2023 https://uncitral.un.org.

12 For the purposes of this chapter, policy considerations are those based on the pragmatic reasons upon which arbitrators rely when making a decision about the applicable substantive law.

assigning the applicable substantive law based on the procedural arbitration rules (institutional or national) in Egypt, Ghana, South Africa and Côte d'Ivoire. Section III highlights the most efficient method for selecting the applicable substantive law in contemporary Egypt, Ghana, South Africa and Côte d'Ivoire in light of relevant policies.

Section I: Underlying Policy Considerations for Assigning the Applicable Substantive Law

6.1. Introduction

The distinction between the direct and indirect methods used to assign the law applicable to the merits of a dispute enjoys doctrinal prominence only in international arbitration.[13] It can be successfully argued that the distinction between the two methods is predominantly artificial.[14] Assuming the arbitral tribunal is to apply the indirect method, one may wonder if in practice they do follow the two-tier system when assigning the applicable law or directly identify the applicable law without following the required steps. Conversely, assuming the direct method is to be followed in a particular scenario, it is very improbable that arbitrators will choose the applicable law without any choice of law analysis. Though it would appear that the direct choice of the substantive law exists in an analytical vacuum, in practice arbitrators may have referred to an unacknowledged choice of law rule.[15]

The reality is that, despite the method used to assign the applicable law, some policy considerations are pertinent to the discussion. The flexibility inherent in arbitrator discretion rests on deeply entrenched, practical considerations.[16] Set forth below in this section are some of the major policies underlying the arbitrator's choice of the applicable substantive law in international commercial arbitration. The section identifies and evaluates the nature of such policies. The important question here is, what are the possible extremes and/or irreconcilable elements of these policy considerations and how are they likely to shape the arbitrator's standard for assigning the applicable substantive law?

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13 Bermann *International Arbitration and Private International Law* 341.
14 Bermann *International Arbitration and Private International Law* 342.
15 Although the arbitrator is required to give reasons for their choice do, may might not have indicated the specific choice of law rule the relied on, but merely describe the process which the followed.
16 Park 2003 *ArbIntl* 285.

a. Three perspectives on policy considerations

Where an arbitrator has to determine the applicable substantive law in international commercial arbitration, policy considerations can be viewed from three perspectives.[17] First is the transnational perspective. The international nature of international arbitration implies that the dispute necessarily involves elements which are foreign vis-à-vis a particular country.[18] There are numerous factors that may connect an arbitration to a particular jurisdiction – the parties, arbitrators or the underlying contract itself.[19] For the purpose of this chapter, transnational policy considerations are concerned with the extent to which one ought to take into account the fact that an international arbitration dispute involves a range of legal systems and their collective and individual impact on the arbitration process. Although arbitration is not automatically linked to any particular national legal system,[20] it is prudent for arbitrators to, for instance, take greater account of the involvement of the various jurisdictions that may have a connection to a dispute.[21] Here, questions such as which jurisdiction is substantially connected to the dispute and in which jurisdiction is enforcement potentially to be sought by parties may be relevant to arbitrators. It is also essential to acknowledge that the collective adherence to norms and practices by countries underpins the validity and legitimacy of the international arbitration process.[22]

Second, there is the party perspective. International commercial arbitration involves the resolution of disputes between parties, and a decision to apply one law over another must take this into account. Typically, no two sets of facts, circumstances, arbitrators, or parties are ever the same in arbitration.[23] Party policy considerations, for the purpose of this chapter, are concerned with the individuality of the facts of the arbitration and how they affect the ultimate result. The diverse requirements and interests of the

17 See generally Gaillard “International Arbitration as a Transnational System of Justice" 66-73; Cheatham "Problems and Methods in Conflict of laws" 291-307.
18 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 45.
19 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 45-51.
20 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 868.
21 This is because the disputes that come before international arbitrators involve parties from different countries or regions, each of which may have their own laws and legal systems that could impact the outcome of the case.
22 Gaillard "International Arbitration as a Transnational System of Justice" 67.
23 Born *International Commercial Arbitration* 4080-4081.

parties must be taken into consideration when determining the applicable substantive law. A party's intention to apply a non-national standard to their arbitration, for instance, can be deduced from the terms of their contract and/or their particular circumstances.[24] Also, what is just and fair in one case may be unjust and unfair in another. It is desirable for arbitrators to select a just rule that takes into account all case-specific factual connections.

Third, there is the jurisprudential perspective. Like any other rule, a choice of law rule used in international commercial arbitration can be evaluated based on its jurisprudential merits — it can be, for instance, praised for producing consistent and predictable results.[25] Conversely, it also can be criticised for the complexity it could introduce into the arbitration process.[26] For the purpose of this chapter, jurisprudential policy considerations are concerned with deciding what qualities are most desirable for a choice of law rule used in international commercial arbitration, and will be influenced by current perceptions of the law's jurisprudential requirements.

6.1.1. Transnational policy considerations

a. Dependence on sovereign support

The legality and effectiveness of international arbitration depend upon the support of different national systems of law, particularly, the arbitration laws of the country which is the seat of the arbitration and the law of the country or potential countries in which recognition and enforcement of arbitral awards are to be sought.[27] Even a staunch contractual theorist will attest that international arbitration, to an extent, operates and/or exists due to sovereign benevolence.[28] An interplay between the private arbitration process and the different national legal systems exists, and may manifest at almost any phase of the arbitration proceedings.

Most often than not, national arbitration laws stipulate a category of disputes which are deemed incapable of resolution by arbitration, even if the parties have otherwise agreed to arbitrate such matters.[29] A country may legislate to make a subject matter non-arbitrable for various reasons — from the

24 König 2015 *PYIL* 269-275.
25 Fawcett 1984 *Mod Law Rev* 650.
26 Although arbitrating international disputes presents advantages over litigation in national courts, it can also give rise to choice of law issues that can be equally as complex as those encountered in litigation.
27 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 58.
28 Barraclough and Waincymer 2005 *MJIL* 214.
29 Born *International Arbitration: Law and Practice* 1412, 1427-1429.

desire to protect the exclusive interests of parties, to protecting the parties deemed to be weak.[30] Whatever be the reason for setting the boundaries of arbitrability, what is not in doubt is that sovereign interests have some relevance in arbitration reality.

Furthermore, once a dispute is arbitrable in a jurisdiction, national courts are generally ready to lend assistance to the arbitration process.[31] A party in the initial stages of arbitration may have to ask the relevant national court to enforce an agreement to arbitrate or, in some instances, ask the court to appoint the arbitral tribunal by instituting legal proceedings. In the course of the arbitration also, a court retains certain general statutory powers and functions, which it may exercise in support of arbitration proceedings at any time, on the application of any party.[32] Such powers and functions are facilitative and supervisory and are essential to the collaboration between the courts and arbitral tribunals in resolving disputes between parties. By supporting arbitration conducted within its territory, countries reasonably can claim some degree of control over it, if only by ensuring that certain minimum standards of justice are met, especially in procedural matters.[33] Once a final award has been made, the arbitral tribunal usually has nothing more to do with the dispute.[34] It is generally accepted that national courts may be called upon to recognise and enforce an international arbitral award. In this regard, national courts may have to make a determination of whether certain minimum standards of due process have been followed, whether or not the subject matter of the award was arbitrable in terms of its laws and whether the award does not violate any public policies.[35]

When the arbitral tribunal has to determine the applicable substantive law, they have to take cognisance of the role played by national legal systems in the survival and development of international arbitration as an institution. Although arbitrators have no obligation to uphold the public policy interests or mandatory rules of any particular national legal system, they must take them into account when assigning the applicable substantive law.[36] An

30 Determining whether or not a specific type of dispute is arbitrable under a particular law is fundamentally a question of public policy that the respective legal system must address. Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 112.
31 Barraclough and Waincymer 2005 *MJIL* 214.
32 Barraclough and Waincymer 2005 *MJIL* 214.
33 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 58-59.
34 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 606.
35 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 606.
36 Elcin *Lex Mercatoria in International Arbitration Theory and Practice 388*.

arbitrator's refusal to take cognisance of such interests imperils the arbitrability of disputes or enforceability of awards linked to those national interests.[37] Ideally, arbitrators should aim to find a correspondence between the actions taken by national legal systems, for the purpose of safeguarding their national or international commercial interests, and the parties' interests and reasonable expectations.

In a word, the dependence on sovereign support for effective international arbitration should be recognised, but not exaggerated.[38] It should be acknowledged that the transnational nature of international commercial arbitration takes away its mechanical connection to any particular national legal system. Presently, the effectiveness of international arbitration does not require that its binding effect be derived from the national legal system of the country where an award happens to be rendered.[39] The harmonisation of the national laws that regulate the conduct of international arbitration and the recognition and enforcement of an award[40] has created the potential for the recognition of arbitral awards in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered.[41]

b. Reliance on the collective actions of legal systems

The legitimacy of arbitration can also be found rooted in the collective actions of legal systems.[42] Views developed collectively through instruments like the UNCITRAL Model Law,[43] the New York Convention[44] and a variety of guidelines express common viewpoints held by national legal systems, on how arbitration should be conducted to be recognised as a legitimate adjudication method. International arbitration does not promote a system of justice entirely divorced from national legal systems.[45] Rather, national legal

37 Elcin *Lex Mercatoria in International Arbitration Theory and Practice 388*.
38 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 58.
39 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 59.
40 That is under the impetus of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. See United Nations 2023 https://www.newyorkconvention.org/.
41 Paulsson 1981 *ICLQ* 359.
42 Gaillard "International Arbitration as a Transnational System of Justice"; Gaillard 2010 *JIDS* 271.
43 UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006. See UNCITRAL 2023 https://uncitral.un.org.
44 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) See United Nations 2023 https://www.newyorkconvention.org/.
45 Gaillard "International Arbitration as a Transnational System of Justice" 69.

orders through collective effort provide a relevant source of legitimacy for the arbitration agreement, the arbitration process and the ensuing award.[46] Although an individual legal system may ultimately recognise an award on a territorial basis, it usually operates within a body of rules on which consensus has been reached collectively by numerous national legal orders.[47]

Acknowledging that the validity and legitimacy of arbitration can be derived from the collective actions of national legal systems allows room for arbitrators to make evaluations that embrace international trends and standards.[48] Assuming the arbitral tribunal has to determine the applicable law, they may consider international trends that reflect the consensus of nations to resolve the particular substantive issue. In such situations, the arbitral tribunal may promote certainty in the arbitration process by endorsing majoritarian principles and rejecting outdated rules of law.[49] When the arbitral tribunal exercises its discretion based on a consensus existing among countries on a matter for instance, it is unlikely that the legitimacy of the arbitrators' performance of this function would be disputed.[50]

6.1.2. Party policy considerations

a. Party expectation

Arguably, one of the most crucial aspects of any arbitration process is deliberation.[51] The term 'deliberation' connotes the process of carefully considering or discussing something.[52] The broad nature of the term suggests that it is not confined to any specific stage within the arbitration process. It would be, therefore, erroneous to assume that only the final award is subject to arbitral deliberations.[53] More likely than not, the arbitral tribunal would make several decisions before a case is finally decided. Whether a decision qualifies as an award or is merely an act of procedural administration, it is also subject to arbitral deliberations.[54]

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46 Gaillard "International Arbitration as a Transnational System of Justice" 69.
47 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 58.
48 See generally Gaillard 2010 *JIDS*; Gaillard "International Arbitration as a Transnational System of Justice" 68.
49 Gaillard "International Arbitration as a Transnational System of Justice" 70.
50 Gaillard "International Arbitration as a Transnational System of Justice" 70.
51 Derains 2012 *AUILR* 911; Mosk "Deliberations of Arbitration" 486.
52 Garner and Black *Black's Law Dictionary* 492.
53 Mosk "Deliberations of Arbitration" 486; Derains 2012 *AUILR* 911-912.
54 Derains 2012 *AUILR* 912.

In general, parties usually do not know how the arbitral tribunal ultimately arrives at and agrees on the various decisions they make within the arbitration process.[55] Apart from the totality of all arguments and motions put forward in the arbitration proceedings, the dispositive parts of the arbitral award and the reasons given for arbitration decisions, the deliberations of the arbitral tribunal are generally obscured from the parties.[56] This, nevertheless, does not take away the obligation of arbitrators to take decisions that reflect party expectations and promote the integrity and legitimacy of international arbitration. Speaking of expectations may seem tenuous where parties have failed to indicate the applicable law. Nevertheless, it is not surprising that these expectations and intentions guide arbitration proceedings as a whole.[57]

The question arises, therefore, what are party expectations of arbitration? First, arbitration itself has evolved from being viewed as a way of resolving relatively simple commercial disputes (or technical ones) by neutral third parties, to a system that involves complex legal and factual issues, multiple jurisdictions and participants from diverse legal systems with varying levels of experience.[58] International commercial arbitration today is a big legal business,[59] and it would be ignorant to assume that perceptions about it remain the same. Previously, parties chose arbitration primarily because it was viewed as a quick and efficient alternative to litigation.[60] Now, it is simplistic to assume that parties choose international commercial arbitration merely to save costs and time.

International arbitration in the twenty-first century has become as formal, costly, time-consuming and subject to tough advocacy as litigation.[61] Parties that engage in international commercial arbitration today opt out of litigation for a myriad of other reasons that go beyond merely saving time and costs. Parties may choose arbitration because it provides for confidentiality, neutrality, the privacy of process, finality of awards, the use of the expertise of decision-makers and the ability to shape the arbitration proceedings.[62] The parties' choice of arbitration in itself indicates their expectation that their

55 Prince, Hooker and Turner 2019 *JIntlArb* 259.
56 Prince, Hooker and Turner 2019 *JIntlArb* 259.
57 Hayward *Conflict of laws and Arbitral Discretion - the Closest Connection Test* 44.
58 Gluck 2012 *ARIA* 236; Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 2-5.
59 See generally Dezalay and Garth 1995 *Law Soc Rev* 27-64.
60 Gluck 2012 *ARIA* 236.
61 Stipanowich 2010 *Univ Ill Law Rev* 8-9.
62 Stipanowich 2010 *Univ Ill Law Rev* 53.

dispute would be resolved by a neutral, impartial and independent decision-maker. In addition to these, commercial parties today are also increasingly attracted by the guarantee of fairness and justice in the arbitration process.[63] These virtues do not only attract parties to arbitration but also indicate what they expect from it as a dispute resolution mechanism.

Undoubtedly, parties can have a contract indicating what they want and expect from a dispute resolution mechanism. Yet, parties articulate minimal expectations about the proper role of arbitrators by merely selecting arbitration as their preferred dispute resolution mechanism.[64] Typically, it is their clear selection of particular institutional arbitration rules under which the arbitral tribunal must exercise its discretion, or subjecting their agreement to a particular national arbitration law, that indicates and manages, to an extent, party expectations about the appropriate role of arbitrators or arbitration.[65] Assuming a dispute is submitted to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules of 2022[66] instead of the International Chamber of Commerce (ICC) Arbitration Rules of 2021,[67] it gives some indication of the expectation of the parties about the appropriate role of arbitrators. In the case of the former, for instance, one can reasonably expect the arbitral tribunal to consider international law tenets and wishes of the Contracting States parties when making their decisions. Whereas in the case of the latter, the arbitral tribunal can be expected to consider the autonomy of the disputing parties and the significance of commercial expectations when making decisions.

It is trite that when adjudicating a case, the arbitral tribunal has a duty to treat parties equally, fairly and impartially to reach a just solution.[68] To achieve this, the arbitral tribunal usually leans towards decisions that they are convinced to be fair and balanced in the particular circumstances. In arriving at such decisions, the arbitral tribunal would typically invoke arguments based on the analysis of what objectively conforms to the reasonable expectations of the parties at the relevant time — be it either when a contractual agreement is concluded or at its termination, even if

63 Japaridze 2008 *Hofstra L Rev* 1415.
64 Franck 2006 *ILSA JICL* 502.
65 Franck 2006 *ILSA JICL* 502-503.
66 International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules (2022). See ICSID 2022 https://icsid.worldbank.org/.
67 International Chamber of Commerce (ICC) Arbitration Rules (2021). See ICC 2023 https://iccwbo.org/.
68 See generally Fortese and Hemmi 2015 *GroJIL* 112.

there were external factors such as third-party interventions or force *majeure*.[69] In other words, the arbitral tribunal considers what the parties would have reasonably anticipated in the given circumstances.

When the arbitral tribunal has to determine the applicable substantive law, for instance, the parties' expectations also guide its decisions. In the initial stages where the arbitrator has to determine the applicable substantive law because the parties have failed to select one, they may consider the hypothetical will or intention of the parties.[70] Here, to satisfy the parties' expectations, arbitrators, when determining the governing law of the arbitration, are likely to remain as closely as possible within the parties' contractual intentions, whether tacitly or positively expressed. Instead of imposing extraneous concepts on the parties, it is preferred that the arbitral tribunal as far as possible honours the genuine common intention of the parties in such situations.[71]

Also, in an instance where the arbitral tribunal merely takes notice of the absence of an express choice of law without considering the hypothetical will of the parties, and, then, proceeds to determine the applicable law, party expectations may influence their ultimate choice of governing law.[72] In their search for the governing law by considering appropriate conflict of laws rules or directly selecting the substantive law, the arbitral tribunal in its deliberations holds in high regard the parties' reasonable expectations. Assuming an established conflict of laws rule designates a particular national law as the governing law and the parties reasonably expected its application, the arbitral tribunal will presume the individual provisions of this national law are in line with the reasonable expectations of the parties in the context of their transaction. This presumption may, however, be rebutted when it can be shown that the individual provisions of the national law are in conflict with the express or implied intentions of the parties and thus no longer reflect the reasonable expectations of the parties to the dispute.[73]

The following two ICC cases illustrate the arbitrators' inclination to search for the mutual expectation of the parties either through the careful analysis

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69 See generally Naimark and Keer 2002 *Int'l Bus Law* 203-209.

70 It is likely that this position would not be popular among common law jurisdictions arbitrators. An English arbitrator is unlikely to search for the applicable law using the hypothetical will of the parties. A tacit choice of law of law can only be found when it is reasonably clear that is the parties genuine choice. Blessing 1997 *JIntlArb* 43.

71 Blessing 1997 *JIntlArb* 44.

72 Blessing 1997 *JIntlArb* 43.

73 Doug 2014 *SAcLJ* 926-927.

of the correspondence exchange or by observing the parties' actions, reflecting what they hope to achieve or avoid. In these cases, the parties' commands in the absence of their choice of the governing law, were given as much respect and regard as any express choice of law would have commanded.

In the first case in point, ICC Case No 7375,[74] the dispute concerned a contract for the supply of goods (one of the nine contracts) concluded between an Iranian buyer (claimant) and an American seller (defendant). None of these contracts contained a choice of law clause. In this case, the defendant argued for the application of the law of Maryland, according to which the period specified by the statute of limitations had expired in their favour. They argued that the law of Maryland was also applicable because Maryland was the place where significant contractual obligations where performed, that is the manufacture of the goods. The claimants, on the other hand, contended that Iranian law was applicable, and that no relevant limitation period existed under it. They argued that, since the contract was negotiated and concluded, and its performance was closely connected to Iran, its law applied.

Based on these arguments, the arbitral tribunal deduced that there was an implied negative choice[75] between the parties, and as such, the contract could not be subjected to either party's laws. The arbitral tribunal considered applying either a neutral national law, the *tronc commun* doctrine[76] or transnational rules of law and general principles of law in this case. They, however, ultimately decided to apply general principles of law and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned wide acceptance in the international community. In this instance, the UNIDROIT Principles[77] was deemed appropriate. In this case, the parties, although they had not made a choice of the governing law for their contracts, by their conduct or 'silence' made it reasonably clear what laws they expected the arbitral tribunal to avoid when

74 ICC Award No 7375 1996 https://www.unilex.info/principles/case/625.

75 In the sense, the parties elected that none of their national laws should be imposed on any of them.

76 The *tronc commun* doctrine is based on the proposition that if parties to an international commercial transaction are free to choose, they would choose their own national laws in order to establish a common consensus over international commercial arbitration. Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 201.

77 UNIDROIT Principles of International Commercial Contracts (2016). See UNIDROIT 2022 https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/overview/.

resolving their case. The arbitral tribunal, thus, was empowered to choose a governing law that was uncontroversial and acceptable to all concerned. The arbitral tribunal's ultimate decision to apply general principles of law and rules of law applicable to international contractual obligations, in this case, revolved around meeting the needs and expectations of the parties whilst respecting perceptions of sovereignty.[78]

The second case in point is ICC Case No 7110.[79] This was a case involving an Iranian government agency (claimant) and an English company (respondent). The parties entered into several contracts relating to the sale, supply, modification, maintenance and operation of certain equipment, and support services relating to it. None of these contracts contained an express choice of law in favour of a national law. However, some of the contracts contained provisions directing that the settlement of the dispute be done according to 'laws or rules of natural justice'. The claimant argued for the application of Iranian law based on the fact that the contracts were signed and performed there. They also later on in the proceedings argued that, in the alternative, the reference to 'natural justice' should be understood as an expression of the parties' intent for their dispute to be resolved by general principles of law. The respondent, on the other hand, contended that the arbitral tribunal should apply English law or, alternatively, the general principles of law. As the party responsible for the characteristic performance, the respondents argued that English law was most closely connected with the contracts or that it was the place of habitual residence of the characteristic performer. In this case, the alternative claims of the parties both pointed to the applicability of the *lex mercatoria* to the substance of the case.

The majority of the arbitral tribunal held that the parties intended to exclude the application of any specific domestic law to their dispute.[80] In their view, the parties intended to have their contracts governed by the general principles and rules which are not enshrined in any specific national legal system. In this instance, the arbitral tribunal decided the UNIDROIT Principles reflected such general rules and principles that enjoy wide international consensus. To establish the applicable substantive law in this

78 An analysis of the facts reveals that the Iranian claimant would quite probably have not entered into the contracts if it had meant subjecting itself to the USA laws. The arbitral tribunal's final decision to apply general principles of laws in this case, therefore, preserved the claimant's perception of sovereignty. Blessing 1997 *JIntlArb* 45-47.

79 ICC Award No 7110 1995 https://www.unilex.info/principles/case/713.

80 ICC Award No 7110 1995 https://www.unilex.info/principles/case/713.

case, the arbitral tribunal did not consider the parties' contract in isolation. They viewed the contracts in light of the long-term relationship of the parties to deduce the reasonable intention and expectations of the parties regarding the governing law. The arbitral tribunal's mandate when establishing the applicable law, in this case, took into account the parties' concerns and expectations for the application of a neutral applicable law, one that does not impose the law of one of the parties or of any third-party country.[81] The authority of the arbitral tribunal emanates from agreements between parties and as such great consideration must be given to party intentions and expectations.

As will subsequently be demonstrated in this section, irrespective of the policies that might influence the arbitral tribunal's decisions, they typically will take party expectations into account when assigning the applicable substantive law.[82] To render just and fair decisions about the applicable law for instance, arbitral tribunals will often consider party expectations. Caution, however, is necessary when the arbitral tribunal considers party expectations. Specifically, arbitrators have to take cognisance that many legal rules are designed to defeat the expectation of parties, who, due to their dominant position, seek to take unfair advantage of others or, conversely, who require special protection.[83] The range of application of such protective laws cannot be readily determined by considering the expectations of the parties.[84] In fact, in such situations, the question of what law is applicable must be determined by other considerations. Although the expectations of the parties are a useful guide for determining the applicable substantive law, the arbitral tribunal may not always be able to accurately determine what these expectations are or what they may have been at the conclusion of the contractual relationship.[85] In a complex multiparty international arbitration, for instance, establishing the common intention of parties may be impossible.[86]

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81 ICC Award No 7110 1995 https://www.unilex.info/principles/case/713.
82 Doug 2014 *SAcLJ* 931.
83 Cheatham and Resse 1952 *Colum L Rev* 971-972.
84 Party expectations have for instance been relied on to decide on the application of mandatory rules in international arbitration matters. Party expectations have for instance been relied on to decide on the application of mandatory rules in international arbitration matters. However, it is important to note that these expectations might conflict with the provisions of such rules. Doug 2014 *SAcLJ* 928.
85 Doug 2014 *SAcLJ* 928.
86 Doug 2014 *SAcLJ* 930.

b. Justice and fairness

At an initial glance, one might have the impression that justice and fairness are the same concepts, and that there is no need to distinguish between them.[87] The reality, however, is that these two concepts may be perceived and interpreted differently depending on the context within which they are used. An all-encompassing definition of fairness or justice can thus not easily be given.[88] Nevertheless, by considering the variety of meanings and characteristics attached to fairness and justice, one would appreciate and comprehend the distinction between the concepts.

Fairness, in a broad sense, can be understood as a way of evaluating people or situations free from bias.[89] It seeks to provide each person within a group/situation with an equal opportunity to benefit without imposing one's views to influence the situation. Regardless of this, what may be fair to one person, in one situation, may not be fair to another. Fairness seeks to establish an equitable approach to dealing with decisions that affect others. In the context of a common law judicial system, fairness, in its broadest sense, includes the rules and procedures developed over the years which regulate how cases are to be conducted and the substantive results that the courts seek to attain.[90] In this sense, fairness, *inter alia*, includes the right to be heard by an unbiased, independent court.[91] In other words, fairness deals with the impartiality of outcomes and the process by which the outcomes are reached.[92] It may also include the fact that a decision of the court was rendered based only on the evidence and arguments before it. In legal settings, fairness refers to how people react to the law.[93] In a civilised society, fairness gives the justice system its moral force and acceptability.

Over the years, philosophers have *inter alia* considered the nature of justice as a desirable quality of society,[94] a moral virtue of behaviour[95] as well as how it applies to ethical and social decision-making.[96] It has been described as the virtue by which all people are given what is their due.[97] Others have

87 Rawls 1958 *Philos Rev* 164.
88 Rawls 1958 *Philos Rev* 164.
89 See generally Goldman and Cropanzano 2015 *J Organiz Behav* 313-318.
90 Tavender 1996 *ALR* 509-510.
91 Tavender 1996 *ALR* 509-510.
92 Waincymer *Procedure and Evidence in International Arbitration* 13-14.
93 Goldman and Cropanzano 2015 *J Organiz Behav* 315.
94 See generally Kent *Metaphysical Elements of Justice*.
95 See generally Mill *Utilitarianism, Liberty & Representative Government*.
96 See generally Rawls 1958 *Philos Rev* 164-194; Rawls *A Theory of Justice*.
97 Plato *The Republic of Plato* 5-11, 331b-335e.

suggested that justice is what the broader social structure has determined to be legally or ethically right or fitting.[98] This should, however, not be confused with an all-inclusive vision of what society considers good; it is only a part of it.[99] Justice is a standard to which society is held, whether willingly or unwillingly. The laws of civil society are like artificial chains binding people to obey the sovereign authority of the state in the name of justice.[100] The different ideas of the nature of justice do not make the term easily generalised. It shifts and changes depending on how the situations to which it is being applied change.[101]

Despite the differences between the terms, justice has been described as fairness.[102] Justice is a broad and encompassing term that provides a standard to which social institutions apply the concept of fairness to different situations.[103] It is a standard by which political and legal systems seek to achieve fair and equitable results.[104] Perceivers of fairness judge it according to its consistency with their understanding of justice. Adherence to the rules and principles of justice should ideally promote perceptions of fairness.[105]

Justice and fairness are of significant importance to the participants in international commercial arbitration.[106] The aim of international arbitration as a dispute resolution mechanism is to create efficient solutions while ensuring that parties are treated with fairness and equality, at the same time providing them with a sense of justice. Typically, a decision to use arbitration as a method of dispute resolution is influenced by the fact that, in contrast to judges, arbitrators are not restricted by law in their ability to draw on external factors when making decisions.[107] While courts are obliged to make just decisions, there are no imperative legal instruments prescribing that disputes settled through arbitration be resolved fairly. Courts have to strictly

98 Rawls 1958 *Philos Rev* 165.
99 Rawls 1958 *Philos Rev* 165.
100 Hobbes *Leviathan: Revised Student Edition* 147.
101 Then, there is also the matter for the various types of justice that may be encompassed in the term. It further complicates the matter. To mention a few, there can be social justice, descriptive justice, restorative justice, procedural justice, compensatory justice and retributive justice. See generally Parnami 2019 *IJLMH* 1-7.
102 See generally Rawls 1958 *Philos Rev* 164-194.
103 Goldman and Cropanzano 2015 *J Organiz Behav* 313.
104 Goldman and Cropanzano 2015 *J Organiz Behav* 313.
105 Goldman and Cropanzano 2015 *J Organiz Behav* 316.
106 Japaridze 2008 *Hofstra L Rev* 1416.
107 Franck 2006 *ILSA JICL* 507- 513.

adhere to the law, precedents and logic when making their decisions.[108] A litigating party who is interested in the outcome of a case expects the judge to be objective and to apply the law properly, free from any subjective factors.

Meanwhile, in arbitration proceedings, there is the possibility for arbitration decisions to be influenced by personal values and principles of business.[109] To arrive at an arbitration decision, the arbitral tribunal does not need to derive its decisions from a consistent line of logical and legal arguments.[110] This is not to say that arbitrators do not take legal norms and their interpretation into account — to the contrary. To avoid their decisions being challenged by the parties, it is very important for arbitrators to correctly apply the law and adopt decisions which do not violate public order.

In the arbitration process, arbitrators may have to find the correct balance between doing what is just and fair either in the view of the parties who appointed them or the wider community.[111] When establishing the applicable law, for instance, the arbitral tribunal may aim for a substantive law that guarantees private justice between the parties, unfettered by national interests. In this situation, it may be challenging to strike a balance between the public nature of justice and the necessarily private nature of international commercial arbitration. The guarantee of justice and fairness in the arbitration process may influence parties to select arbitration as their dispute resolution mechanism.[112] Participants in arbitration place a premium on justice and fairness of the process, above factors such as receipt of a monetary award, speed, cost, arbitrator expertise and finality.[113] When the arbitral tribunal has to establish the applicable law, it is therefore only prudent that they analyse the extent to which the competing rules are consistent with a balance of fairness and justice between the parties to the dispute.

6.1.3. Jurisprudential policy considerations

a. Consistency and predictability

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108 Franck 2006 *ILSA JICL* 507- 513.
109 Maniruzzaman 1999 *Am U L Rev* 717- 719.
110 Maniruzzaman 1999 *Am U L Rev* 717-718.
111 Franck 2006 *ILSA JICL* 506-507.
112 Naimark and Keer 2002 *Int'l Bus Law* 203.
113 See generally Naimark and Keer 2002 *Int'l Bus Law* 203-210.

Consistency as used here describes the extent to which arbitrators align in their assessment of a specific case.[114] On the other hand, predictability as used here describes the level of convergence between the arbitrator's actual award for a particular case and the award others would expect the arbitrator to make in the given instance. On the whole, consistency in arbitral decision-making engenders predictability, thereby contributing to the legitimacy and credibility of arbitration as a dispute resolution system.[115] The decision of parties to submit to an arbitration often depends on their ability to accurately forecast the legal risk to their relative positions. Disputing parties can make such predictions when arbitration produces consistent outcomes upon which they can rely. The discretionary power of the arbitral tribunal exercised at various stages in the arbitration process, however, does not make such predictions easy, more so when they have to assign the applicable substantive law.

The arbitrators' preferences, advocated views or mental attitudes, for instance, may reflect in their legal reasoning when determining the governing law.[116] Unlike in court proceedings, in arbitration, the arbitrator often seriously considers subjective aspects when assigning the applicable substantive law, to facilitate its connection to the underlying contract.[117] Irrespective of the method ultimately used by the arbitral tribunal to determine the applicable law, they endeavour to identify with maximum precision, the expectation of the parties regarding the substantive law result. To do this, the arbitral tribunal strives to select an applicable law that reflects what the parties could have legitimately and reasonably expected as the result of a transaction at the time of the conclusion of the contract.[118] Such a selection of the applicable law is based on the projections of the outcome of applying various possible applicable legal systems and their mutual comparison. As agents of the disputing parties, arbitrators are likely to pay attention to what the intended purpose of the parties' contract was or would have been when determining the applicable law. Arbitrators are often motivated by the desire to select a law which provides relief that will work the least hardship on the parties as opposed to the stringent application of particular rules of law.[119]

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114 See generally Kaufmann-Kohler "Is Consistency a Myth?" 137-147.
115 Barraclough and Waincymer 2005 *MJIL* 212.
116 This has been referred to as the arbitrators' psycho-legal approach to the choice of law process. Maniruzzaman 1999 *Am U L Rev* 717.
117 Belohlavek 2014 *Rev rom asig* 7.
118 Belohlavek 2014 *Rev rom asig* 5.
119 Calkins and Fisher 1948 *HLRA* 1026.

Arbitral tribunals may also disregard legal rules where ethical notions underlying rules of law have little or no appeal, particularly in the context of business.[120] In some cases, business ethics and trade usages influence the arbitrator's determination of the appropriate applicable law. The issue is that what is ethical in one case may not be so in another. Even within the same trade, certain practices may be peculiar to the particular disputing parties. The flexible nature of arbitration decision-making allows for tailor-made solutions to disputes.[121] Although arbitrators may refer to past arbitral awards in support of their arguments, it is commonly accepted that international arbitration has no system of legally binding precedents.[122] An inconsistent and incoherent set of arbitration decisions persists as there is no binding value for having an award based on precedent. Assuming controversy over the price of goods arises between a South African buyer and an Egyptian seller, and the arbitral tribunal is simply required to act as an appraiser, to establish a fair price for the parties, there would be no legal reference points to aid such a determination. In this situation, any decision made by the arbitral tribunal would be peculiar to the particular dispute.

As Goode has opined, "the man of affairs wishes to have his cake and eat it; to be given predictability on the one hand and flexibility to accommodate new practices and developments on the other".[123] The reality is that flexibility is needed in the arbitration process, to enable arbitrators to reach a fair outcome which takes into account the facts and peculiarities of each case. It must also, however, be noted that predictable rules and outcomes contribute to a fair legal system because consistency in arbitration decision-making is an important factor in the fairness of a law.[124] In situations where the application of a legal rule is uncertain, a valid justification for such uncertainty must exist.[125] It is essential to question the necessity of this uncertainty and determine whether there are any compelling reasons to justify its existence within the legal framework.

Nevertheless, considering that predictability is a direct product of consistency, disputing parties require arbitration to produce consistent outcomes. If arbitration fails in this task, it is likely to increase the cost of dispute resolution generally and potentially even risk its own extinction.[126]

120 Calkins and Fisher 1948 *HLRA* 1024.
121 Calkins and Fisher 1948 *HLRA* 1024.
122 Dhawan 2021 *Int'l J of Arb Med & Disp Man* 550.
123 Goode 1988 *Mon LR* 150.
124 Yap 2017 *CLWR* 270.
125 Yap 2017 *CLWR* 270.
126 Barraclough and Waincymer 2005 *MJIL* 212.

Although it will be an oversimplification to link the extinction of arbitration to the inconsistencies present in arbitration decision-making, consistency and predictability are still pertinent considerations that influence how arbitrators deal with the selection of the applicable substantive law.

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

Arbitration is essentially a very simple method of dispute resolution.[127] It provides a system of resolving disputes which is far less complex than litigation. The arbitration procedure is relatively easy for parties of different nationalities to understand and apply. Over the years, the desire for simple and effective methods or procedures has driven many developments in arbitration law. Consider, for instance, the New York Convention, by contrast to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (1927 Convention),[128] which provides a much more simple and effective method for obtaining the recognition and enforcement of awards.[129] The text of the UNCITRAL Model Law also goes through the arbitration process from beginning to end, in a simple and readily comprehensible way.[130]

When discussing how the substantive law is assigned by the arbitral tribunal, the simplicity and ease of the arbitration task are relevant to the conversation.[131] Irrespective of the method used to assign the applicable substantive law for instance, it can be argued that arbitrators are likely to follow a simple approach that makes sense in the particular circumstance. They may resolve to do this because it makes the determination of the applicable law relatively easy in that instance. Assuming all the relevant conflict of laws rules in a particular case lead to the same solution of the dispute, the arbitral tribunal is likely to apply that law directly.[132] Arbitral tribunals have also resorted to applying non-national rules to some of the complex issues that arise from transnational commercial relations because

127 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 2.
128 Geneva Convention for the Execution of Foreign Arbitral Awards (1927). See United Nations 2022 https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf.
129 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 14.
130 Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 3.
131 Simplicity and flexibility are notable attributes of arbitration rules, they allow the parties to adjust dispute resolution to suit their particular relationship. Tractenberg 2019 *Franch Law J* 456.
132 In this situation, there is a false conflict among the relevant conflict of laws rules. Croff 1982 *Int Lawyer* 629.

it was easier than applying national law.[133]

Simplicity and ease of application are not ends in themselves but are nevertheless desirable in a choice of law system.[134] The simplification of the arbitration task is for the convenience of the participants of arbitration and not the arbitrators *per se*. The need for expedited and cost-effective arbitration, for instance, may be justification for an arbitral tribunal considering simple mechanical rules, such as the law of the place of the conclusion of the contract, the law of the place of performance or the law of the seat of arbitration, which may be easy to apply in a particular case. Although the arbitral tribunal's ultimate decision to apply one rule or the other may be influenced by other considerations such as justice, fairness and the parties' expectations, the simplicity and ease of the arbitration task are still relevant to the discussion.[135]

6.2. Attaching Significance to the Relevant Policy Considerations

As can be deduced from the discussion above, it is impossible to mention all the policies that may be relevant to the solution of the various choice of law issues that may arise in international commercial arbitration. Nevertheless, in international commercial arbitration, undoubtedly, the above-identified transnational, party and jurisprudential policy considerations may, in one way or another, influence the choice of an appropriate substantive law. They are likely to be evaluated before a decision can intelligently be reached as to which law should be applied in the instance where the arbitrator has to select one.

Usually, the views one may have on practical options and solutions will invariably be influenced by one's theoretical views on what arbitration is.[136] The essential nature of arbitration is vital to determining how different arbitrators approach the contentious questions and exercise their discretionary powers. Assuming arbitration is fundamentally seen as jurisdictional by nature, then, procedural solutions consistent with the values of those very same national systems or consistent with transnational norms may be appealing. Conversely, if arbitration is considered a consent-based agreement, then, the parties' expectations and intentions would be seen as

133 Arbitrators have relied on non-national rules such as the UNIDROIT Principles (2016) to supplement the governing law, because it allowed them to find proper solutions. König 2015 *PYIL* 286.
134 Leflar 1966 *NYUL Rev* 288.
135 Leflar 1966 *NYUL Rev 28*8.
136 Waincymer *Procedure and Evidence in International Arbitration* 7.

the dominant means to resolve procedural questions.[137] It is important to acknowledge that the theoretical views may affect the significance and order in which various procedural options are ranked.[138]

It should also be noted that very little can be said as to which policy consideration, in case of conflict, should take precedence over the other, since this necessarily depends upon the facts and the circumstance of the particular case.[139] As the applicable substantive law and the choice of law methodologies vary from case to case, so do the considerations that affect the arbitrators' decisions about the law applicable to the merits of the case. Neither of the policies discussed is more dominant or preferred when a decision about the applicable law is to be made. Regardless of this, the decision about the applicable substantive law in a particular case may involve a consideration of more than one of these policies.[140] Assuming parties expect a non-national law to be applied to the merits of their dispute, they would hope that such rules are applied justly and fairly, consistent with international standards and that their ultimate award can be enforced.

To arrive at a reasonable solution when identifying the substantive law, there will inevitably be some trade-offs between the above-identified policy considerations.[141] General rules and procedures are in themselves compromises, and as such, their application may appear to be biased for or against one or both parties in a particular case.[142] In arbitration, when the policies underlying procedural issues are evaluated, it will be revealed that preferences have been made in the rules.[143] Therefore, such rules may carry both advantages and drawbacks when they are applied. In order to manage the advantages and drawbacks of using these rules, arbitrators must be both proactive and reactive in their application. To do this, arbitrators can, for instance, adopt a case-by-case solution informed by general principles or consider identifying different institutional rules and their different approaches to key elements and select according to the parties'

137 Waincymer *Procedure and Evidence in International Arbitration* 7.
138 Waincymer *Procedure and Evidence in International Arbitration* 7; 26-30.
139 See generally Leflar 1966 *NYUL Rev* 267-327.
140 See generally Leflar 1966 *NYUL Rev* 267-327; Fawcett 1984 *Mod Law Rev* 650-670.
141 Waincymer *Procedure and Evidence in International Arbitration* 21-22.
142 Waincymer *Procedure and Evidence in International Arbitration* 21-22.
143 For instance, in Art 35(1) UNCITRAL Arbitration Rules as revised in 2010, parties have a wider freedom to select any law, including non-national laws to govern their contracts. Such privilege is not extended to the arbitrators when they are obliged to select one. Ma 2015 *Contemp Asia Arb J* 193-194.

preferences.[144] International arbitration faces difficulties in reconciling a range of potentially conflicting goals. These may include respect for party autonomy, fairness to disputing parties, predictability, neutrality in light of the distinct values and norms of different legal cultures, and respect for the legitimate concerns of governments regarding the provision of the legal infrastructure for international arbitration. These challenges are all vital to the development of an efficient procedural model, without which arbitration cannot meet the objectives set by its users.

6.3. Comments

The aim of this section has certainly not been to suggest that there is some rigid formula that can lead to optimal decisions relating to the applicable substantive law in all cases. Much has to be left to the insight and integrity of the arbitral tribunal involved. This section highlights the major considerations that could influence the arbitrator's choice of the law applicable to the merits of a dispute. In complex matters with multiple options, as is the case when arbitrators have to assign the applicable substantive law in international commercial arbitration, policy considerations will not always point to one solution.[145] As alluded to in this section, there may be the need to have some trade-offs between relevant considerations. It is important for arbitrators to carefully consider the relevant policy considerations on a case-by-case basis to decipher the appropriate trade-offs for the particular circumstance. This will ensure that the resulting award appears fair, just, and consistent with the expectations and needs of the parties.

Section II: Examining the Impact of Policy Considerations on Arbitrator Discretion

6.4. Introduction

It has been said that arbitration is not a science; it is an art.[146] This statement is epitomised by the manner in which arbitrators exercise their discretion when they have to assign the applicable substantive law. The extent to which they must contemplate the policy considerations identified above, for instance, is not exactly a science. It involves deliberation, which is inextricably linked to the arbitral tribunal's impartiality,[147] their willingness to

144 Waincymer *Procedure and Evidence in International Arbitration* 25.
145 Waincymer *Procedure and Evidence in International Arbitration* 12-13.
146 Aksen 2007 *ArbIntl* 255.
147 See generally Franck 2006 *ILSA JICL* 499-521.

compromise in order to accommodate the interests of the various participants in international arbitration,[148] and their capacity to employ creative solutions to arrive at a fair and reasonable outcome.[149] In international commercial arbitration, it is not enough to simply identify essential policies by which the art of arbitration should be employed.[150] It is equally important to determine the most effective ways to apply these policies and norms in practice.

One of the key challenges in this regard is the need to balance the interests of the various participants in the arbitration process. Arbitrators must be impartial and independent, but they must also take into account the needs and expectations of the parties to the dispute.[151] This can require a delicate balancing act, as the arbitrators seek to find appropriate solutions. By efficiently applying the policies identified in practice, arbitrators can help to ensure that the arbitration process is seen as fair, just, and effective by all involved. This section, therefore, critically assesses how arbitrators account for the underlying policy considerations discussed in section I.[152] Specifically, the section demonstrates how the various policies influence the arbitrator's determination of the law applicable to the merits of a dispute.

6.4.1. Three distinct methods for assigning the applicable law in contemporary Africa

In Africa, virtually all contemporary legal instruments in the area of international commercial arbitration grant the arbitrator broad discretion in determining the applicable substantive law in case parties failed to make any designation.[153] It is suggested that the arbitration rules (national and institutional) in Egypt, Ghana, South Africa and Côte d'Ivoire prescribe three distinct methods to be used by arbitrators to assign the applicable substantive law in the absence of the parties' choice.[154] These methods include the direct application of a specified choice of law rule of the seat

148 See generally Dennis 1911 *Colum L Rev* 493- 513.

149 On a case-by-by case basis, arbitrators decide on what is fair, just and reasonable. Alexander "Discretion in Arbitration" 93.

150 Waincymer *Procedure and Evidence in International Arbitration* 7.

151 Barraclough and Waincymer 2005 *MJIL* 234; Elcin *Lex Mercatoria in International Arbitration Theory and Practice* 62.

152 See para 6.1 above.

153 This can be attributed mainly to the influences of the UNCITRAL arbitration instruments — that is the UNCITRAL Model Law (1985) and the UNCITRAL Arbitration Rules (2013).

154 These groupings were done by comparing the language or text of the provisions relating to the applicable substantive law found in statutory and institutional arbitration laws found in Egypt, Ghana, South Africa and Côte d'Ivoire.

(Group A), the UNCITRAL Method: the application of a conflict of laws rule identified by the arbitrators (Group B), and the direct application of the law or rules of law arbitrators consider appropriate (Group C).[155]

i. The direct application of a specified choice of law rule of the seat (Group A)

This first method is for arbitrators to apply an international arbitration-specific choice of law rule of the seat of arbitration. The arbitrator is required to apply the choice of law rules specifically designed for international arbitration, even though they are not bound by the ordinary choice of law rules of the seat of the arbitration. A prime example of this can be found in article 39 of the Egyptian Arbitration Law No. 27 of 1994 (Egyptian Arbitration Law), which provides the closest connection rule to be used specifically for international arbitration.[156] The same choice of law rule is found in article 35 of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration of 2011 (CRCICA Rules).[157]

ii. The UNCITRAL Method: the application of a conflict of laws rule identified by the arbitrators (Group B)

The second method, that of the UNCITRAL Model Law, involves the identification of the applicable law under a conflict of laws rule that the arbitrators deem appropriate. Section 48(3) of the Ghana Alternative Dispute Resolution Act of 2010 (Ghana ADR Act)[158] and article 28(2) of the South African International Arbitration Act 15 of 2017 (International Arbitration Act)[159] both require arbitrators to apply a conflict of laws rule in order to designate the law applicable to the merits of the dispute. The arbitration rules of the Ghana Centre for Arbitration (GAC)[160] and the

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155 The purpose of grouping national and institutional arbitration laws together in this section is to provide a clear and organized framework for the discussion at hand. Bringing together these two categories of laws will assist to analyse and compare the various regulatory frameworks provided to be used by arbitrators for assigning the applicable substantive law more effectively.

156 See International Arbitration Resources 2023 https:// www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Egypt-Arbitration-Law-1.pdf.

157 See CRCICA 2022 https://crcica.org/.

158 See Dennis Law 2017 https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324.

159 See South African Government 2017 www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitration act15of2017.pdf.

160 The sec 48(3) of Ghana ADR Act can be used to fill the vacuum left by the silence of the GAC Rules on the matter.

Common Court of Justice and Arbitration (CCJA)[161] also follow the same process of requiring arbitrators to identify the conflict of laws rule to assign the applicable substantive law.

iii. The direct application of the law or rules of law arbitrators consider appropriate (Group C)

This third and last method is to allow arbitrators to choose directly the law or rules of law they consider to be appropriate without reference to conflict of laws rules. Although the arbitrator may resort to a conflict of laws rule to assign the applicable law, they are not bound to do so. The Uniform Act on Arbitration of 2017 (the Uniform Act) adopts this approach for assigning the applicable substantive law, where parties have failed to choose one.[162] Similar to most arbitration institutions, the Arbitration Foundation of Southern Africa (AFSA) also adopts this approach in its rules.[163]

6.4.2. The connection between the policy considerations and the three distinct methods

The effectiveness of a method that gives arbitrators discretion will depend not only on how that discretion is structured but also on how it is applied in practice.[164] To demonstrate the connection between the policy considerations discussed in Section I[165] and the three distinct methods prescribed in the arbitration laws (national and institutional) of Egypt, Ghana, South Africa and Côte d'Ivoire,[166] three scenarios will be subsequently examined.[167] For each scenario, it is arbitrarily assumed that the territorial, party and jurisprudential policy considerations discussed previously capture,[168] with varying weights each, the primary reasons for preferring one method over another when it comes to selecting the applicable law. The question to be answered here is, how will a case stand

161 Sec 17 Common Court of Justice and Arbitration (CCJA) Rules of 2017.
162 Art 15 of the Uniform Act on Arbitration of 2017.
163 Art 19 AFSA International Rules of 2021.
164 Barraclough and Waincymer 2005 *MJIL* 208.
165 See para 6.1 above.
166 See para 6.4.1 above.
167 The facts and parties are imaginative to help describe how the policies and the methods used by arbitrators to assign the applicable law in Africa work in practice. This will help to effectively illustrate the complexities and nuances of the issue being discussed.
168 See para 6.1 above.

if analysed in terms of the relevant policy considerations discussed in Section I?

a. Scenario 1

The facts of the first scenario are that a Nigerian trading organisation (claimant) and a Ghanaian Kente textiles operator (defendant) entered into a sales contract on the 25th of April 2022. The contract of sale was for the purchase of 15 bales of Kente textiles from the defendant. Among other things, the contract contained the purchase price, a performance guarantee and a *force majeure* clause. The contract further contained an arbitration clause directing that arbitration be administered under the AFSA Rules. The contract, however, did not indicate the governing law of the contract.

The performance guarantee required that the goods be delivered on the 5th of May 2022 in Nigeria to satisfy performance. This requirement was, however, not met by the defendant who had not delivered the goods as of the 2nd of June 2022. The defendant attributed the delay to heavy rains, fuel shortages and other disturbances. Without being able to arrive at a compromise, the parties submitted their dispute to a sole arbitrator sitting in South Africa. When the issue of the governing law arose, each party strenuously argued for the application of their individual national laws. Considering these facts, the question is what would likely be the thought process of the arbitrator, when he has to assign the law applicable to the merits of the dispute? How will the arbitrator analyse these facts in terms of the relevant policy considerations discussed in Section I?

First, the arbitrator may consider the AFSA Rules for directions on how to assign the applicable substantive law in the absence of the parties' choice.[169] Article 19 of the AFSA International Arbitration Rules of 2021 provides that in the absence of a choice by the parties, the arbitrator is allowed to decide the dispute according to the rules of law he deems appropriate. Here, in accordance with the transnational policies,[170] the arbitrator may choose to apply both national and non-national laws. In the present scenario, the arbitrator may consider applying either Ghanaian or

169 The method used by arbitrators to assign the substantive law, depends on the approach adopted in the applicable arbitration laws. Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 865-866.

170 That is, those policies concerned with extent to which legal systems collectively and individually impact on the arbitration process. See para 6.1.1 above.

Nigerian law in order to render an enforceable award.[171] The arbitrator may also choose to apply the *lex mercatoria*[172]

Second, the arbitrator is likely to consider the parties' expectations. Bearing in mind that each party strenuously argued on the basis of national law, that is Nigerian, and Ghanaian law, the arbitrator may deduce an implied intention of the parties for their dispute to be decided by national law. The arbitrator can make such a choice, claiming that the parties expect that non-national laws will not be used to resolve their dispute. Here, the individuality of the facts and circumstances dictates what the appropriate applicable law should be. Based on the facts of *Scenario 1* above, it is likely that the arbitrator would choose a national law, in line with the implied intention of the parties. In this case, virtually all the obligations of both parties fell to be performed in Nigeria. Consequently, the arbitrator may reasonably settle on Nigerian law, as the principal place of performance was Nigeria.

The direct application of the substantive law or rules that the arbitrators consider appropriate describes Group C identified above.[173] This approach provides arbitrators with a significant degree of flexibility — they are not limited in their choice of applicable law. Arbitrators are liberated from conducting complex conflict of laws analyses to determine the applicable substantive law.[174] The simplicity and ease of the direct selection of the appropriate law may lead to swift arbitration proceedings, in accordance with party wishes. It should however be noted that the application of the direct method does not always lead to an expedited proceeding. In practice, arbitrators often examine the value of applying either a national law or a non-national law in a particular circumstance.[175] Although arbitrators may end up applying the law or rules of law most convenient or familiar to them,

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171 A number of institutional rules specifically require that arbitrators render enforceable awards. Art 42 of the ICC Arbitration Rules of 2021 for instance among other things stipulates that, the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law. See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

172 In a similar situation that arose in the ICC Case No 4237, the sole arbitrator siting in Paris pointed out that, "it is argued in literature that international arbitrators should, to the extent possible, apply the *lex mercatoria*." See Award No 4237 of 1984 Yearbook X (1985) 52.

173 See para 6.4.1 (iii) above.

174 Arbitrators, however, have a duty to give reasons for their choice of a particular law or risk their choice being perceived as arbitrary. Meier 2018 *StudZR* 11-12; Doug 2014 *SAcLJ* 914-915.

175 ICC Award No 3540 of 1980 Yearbook VII (1982) 124.

they will still analyse the effect of applying each relevant law — this can be time-consuming.[176]

There also is the tendency that the choice by the arbitral tribunal may be perceived as an arbitrary one.[177] By arbitrators directly assigning the applicable substantive law, there is the risk of such a choice being based on their subjective instincts. In fact, arbitrators may end up selecting a law that totally disregards the parties' expectations.[178] As such, this may cause the parties to doubt the arbitrators' fairness or impartiality in the matter. Parties may also find it challenging to undo the impact of arbitral awards that disregard their expectations because of the limited judicial review of the merits of the dispute.[179] Such situations reveal the drawback of the flexibility inherent in the direct method.

b. Scenario 2

A South African supplier (claimant) and an Egyptian buyer (defendant) entered into a supply agreement. The claimant had agreed to supply the defendant with chemicals for refining sugar. The contract, which was signed in South Africa, contained an arbitration clause, which among other things directed that arbitration should be seated in South Africa. The parties, however, did not indicate the law that would govern their contractual relationship. A dispute arose between the claimant and the defendant over the buyer's non-payment of the full purchase price and shipping fees. The defendant alleged that the claimant had agreed to pay the shipping expenses. The defendant further alleged that the chemicals that arrived were damaged and as such was not liable to pay the full purchase price. The parties submitted their dispute to an appointed arbitral tribunal in South Africa. To help assign the applicable substantive law, the arbitral tribunal can make use of its discretion in the following ways.

First of all, since the parties agreed for the arbitration to be seated in South Africa, the arbitral tribunal may consult the South African International

176 Institutional arbitration rules usually, however, provide time limits within which certain tasks must be completed within the arbitration process. For instance, according to art 23(3) of the ICC Rules of 2021, within 30 days from the date on which a file has been transmitted to it, the arbitral tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. '2021 ICC Arbitration Rules' (n 165).

177 Meier 2018 *StudZR* 19.

178 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 876.

179 Meier 2018 *StudZR* 16.

Arbitration Act 15 of 2017[180] for guidance. The International Arbitration Act, which incorporates the UNCITRAL Model Law, directs that the arbitral tribunal apply the law determined by the conflict of laws rules that it considers applicable. Since the South African International Arbitration Act does not impose a specific conflict of laws rule, the arbitral tribunal first must determine which conflict of laws rule it deems applicable.[181] Typically, an arbitral tribunal may choose to cumulatively apply all conflict of laws rules involved in the dispute, consider the general principles of private international law, have recourse to the conflict of laws rules national legal systems most closely connected to the dispute or consider the conflict of laws rules of the arbitration seat.[182]

In the instance of this present scenario, assuming the arbitral tribunal decides to consider the cumulative test, they would apply the domestic conflict of laws rules of all legal systems connected to the underlying dispute.[183] Typically, the arbitral tribunal deduces the conflict of laws rules involved in a dispute by looking at the parties' respective legal systems and, frequently, those of the seat.[184] The main idea behind this approach is not to defeat the parties' expectations, assuming they exist.[185] Therefore in this scenario, the arbitral tribunal may consider the conflict of laws rules of South Africa and Egypt, as these legal systems have a direct connection to the parties and their dispute. Here, the applicability of this method only works if the conflict of laws rules of these two legal systems are identical or at least point to the same substantive law. The cumulative test helps to detect false conflicts in potentially applicable conflict of laws rules.[186] In this scenario, if the South African conflict of laws rule[187] is considered the closest and most significant connection,[188] it suggests that the law of the place of payment,

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180 International Arbitration Act no. 15 of 2017. South African Government 2017 www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitration act15of2017.pdf.

181 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 747-750.

182 Meier 2018 *StudZR* 20-24.

183 Petsche "Choice of Law in International Commercial Arbitration" 24.

184 Petsche "Choice of Law in International Commercial Arbitration" 24.

185 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 872.

186 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 872.

187 It should be noted that the content of this rule may be debatable.

188 Here based on the scission principle since the delivery has taken place the proper law of the contract will probably be the *lex loci solutionis* in respect of payment. See the Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd (1986) (3) SA 509 (D); Neels and Fredericks 2003 *SAMLJ* 69.

which is South Africa, prevails. Additionally, the Egyptian conflict of laws rule (*lex loci contractus*) also directs attention to South Africa.[189] Applying the cumulative test, the outcome would likely favour the selection of South African law in this particular scenario.

Assuming the arbitral tribunal resorts to the general principles of private international law, they would have to find common or widely accepted principles in the main systems of private international law.[190] These are likely to be common because they are collectively accepted by legal systems. International conventions, for instance, may provide a viable source of such principles.[191] These instruments reflect a certain consensus on a matter, which is reinforced by widespread ratification of the convention concerned. The arbitral tribunal may also refer to the UNIDROIT Principles as a source of general principles of private international law. Transnational conflict of laws rules, such as the Rome I Regulation[192] may also be consulted. With this approach, the transnational policy considerations, that is the collective impact of legal systems in the arbitration process, influence how the arbitral tribunal selects the applicable law. If, indeed, there is greater acceptance of a convention or any internationally agreed-upon principles, it provides arbitrators with the opportunity to detach themselves from their own diverse experiences to enable them to make objective decisions when resolving conflicts issues.

Finally, the arbitral tribunal may choose to consider the conflict of laws rules of the country most closely connected to the parties' dispute.[193] This method however may pose some difficulties. First, the arbitral tribunal needs to initially select the conflict of laws rules of the country which has the closest connection to the dispute. Since the dispute involves a multiparty contract, this may not be so straightforward. Then, the arbitral tribunal has to analyse the relevant conflict of laws rule in order to select a particular national legal system. This complex and often subjective process may ultimately lead to an applicable law which none of the parties ever expected to apply to their dispute. In the present scenario, for instance, the countries associated with the dispute are South Africa and Egypt. To answer the question of which

189 See art 19 of the Egyptian Civil Code No. 131 of 1948.
190 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 873.
191 Other relevant instruments that have been consulted by arbitrators include the Hague Convention on the Law Applicable to International Sales of Goods (1955) and United Nations Convention on Contracts for the International Sale of Goods (1980).
192 See Thomson Reuters 2023 http://uk.practicallaw.thomsonreuters.com/.
193 Meier 2018 *StudZR* 23.

country has the closest connection to the dispute, the arbitral tribunal may look to general principles of private international law for guidance. The issue is that there exists no uniform set of general principles, importing a substantial degree of subjectivity into the determination of the most closest country to the parties' contractual relationship.[194] Nevertheless, in this scenario, the arbitral tribunal may conclude that the contract is most closely connected with the country where the party required to effect the characteristic performance of the contract has its habitual residence.[195] Here, assuming the arbitral tribunal relies on the widely accepted presumption in favour of the application of the law of the seller's place of business, then South African law would be applicable.

The application of conflict of laws rules by arbitrators in determining the applicable substantive law, in light of relevant policy considerations, reveals the following. First, the approach allows arbitrators to take advantage of the collective contributions that legal systems provide to guarantee the legitimacy and effectiveness of the international arbitration process. The arbitrators, for instance, may choose a conflict of laws rule that is generally accepted, such as that which is provided in the Rome I Regulation. Second, party expectations, on the other hand, might not always be achieved with this method. The conflict of laws rules arbitrators may ultimately decide to apply can lead to a substantive law that was not within the parties' legitimate expectations.[196] This can lead to an award being challenged on the grounds that the arbitral tribunal exceeded its mandate. Third, this approach does not augur well for consistency and predictability, which are crucial in commerce. Consistency is not guaranteed, as different arbitrators may apply different conflict of laws rules to the same set of facts. Predictability, which involves not only the predictability of outcome but also the overall stability of the regulatory framework, is greatly compromised under this approach. Finally, the indirect method can make the arbitrators' task of assigning the applicable substantive law cumbersome and difficult. Strictly speaking, it involves three steps: considering all possibly appropriate conflict of laws rules, then, consulting and evaluating the content of the conflict of laws rule, before finally selecting the applicable substantive law. This can be a laborious and time-consuming process, which is not desired by both arbitrators and parties. For the members of Group B,[197] when

194 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 873-875.
195 Blessing 1997 *JIntlArb* 52.
196 König 2015 *PYIL* 281.
197 See para 6.4.1 ii above.

arbitrators have to establish the substantive law, it is predicated on conflict of laws rules.[198] This method incorporates an international perspective into the search for the applicable substantive law and therefore is particularly apt for use in international arbitration. Conflict rules provide a clear and objective basis for the arbitrator to determine the applicable law, which in turn provides greater predictability for the parties. By resorting to conflict of laws rules, arbitrators can take into account the policies and normative values of different legal systems and select the law that best aligns with the parties' intentions and expectations.

c. Scenario 3

The facts of this scenario are that a sales contract between an Ivoirian export company (claimant) and an Egyptian import company (defendant) was signed in Côte d'Ivoire. The contract was for the sale and export of canned fish products from Côte d'Ivoire to Egypt. The contract contained an arbitration clause in terms of which the parties had agreed to submit to arbitration according to Cairo Regional Centre for International Commercial Arbitration (CRCICA) Rules[199] in case any dispute arose. The contract was, however, silent on the applicable law. The defendant had only made part payment of the full purchase price at the time of delivery. Upon the arrival of the food products in Egypt, the defendant realised that about 60% of the goods that had arrived were not what he had purchased from the claimant. The defendant subsequently refused to pay the full purchase price or to return the canned meat products to the claimant. Without reaching an amicable solution, the parties agreed to submit to arbitration. When the issue of the applicable law arose, each party argued for the application of their national law. They, however, also agreed that general principles of private international law may be used to resolve their dispute, without suggesting which principles should apply.

Since the parties submitted to arbitration under the CRCICA Rules, the arbitral tribunal may first look to its provisions for guidance on how to assign the applicable substantive law. The CRCICA Rules provide for the closest connection formula for assigning the applicable substantive law in the absence of the parties' choice.[200] This provision allows the arbitral tribunal to select the law with the closest connection to the parties' contractual

198 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 747-750.
199 See CRCICA 2022 https://crcica.org/.
200 Art 35 (1) of the CRCICA Rules of 2011.

relationship.[201] Unlike other methods where the arbitral tribunal has to first establish a conflict of laws rule to determine the applicable substantive law, here the formula given creates some certainty on the matter. To establish the closest connected country, however, the arbitrator can look to the Rome I Regulation for guidance.[202] Consequently, in this present scenario, the habitual residence of the party required to effect the characteristic performance of the contract may be considered. Here, since the seller resides in Côte d'Ivoire, Ivorian law may be applied to the merits of the dispute.[203] While the place of characteristic performance is typically used in determining the country with the closest connection to the dispute, other factors may also be taken into account.[204] These may include the parties' shared nationality or residence, as well as the language of the contract, the location of negotiations, the place of a signature and even the currency used in the transaction.[205]

In the present scenario, since the parties agreed that their dispute may be resolved by general principles of private international law, the arbitral tribunal may also seek out such principles that may be relevant in the particular case. They may, for instance, look to the UNIDROIT Principles to help interpret or supplement the identified substantive law.[206] Since in this scenario, the parties argued for the application of their own national laws to the substance of their dispute, the arbitral tribunal may decide to apply a neutral law to supplement the UNIDROIT Principles.[207] In fact, they may also consider rules of supranational and even transnational law considered as possibly having the closest connection with the case at hand.[208]

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201 Other variations of this formula direct that the arbitral tribunal decide a case according to the rules of law with which the case has the closest connection. An example of this variation is found in art 187 (1) of the Swiss Private International Law Act of 1987.

202 Art 4 of the Rome I Regulation (2008).

203 Under the Rome I Regulation, performance deemed characteristic of an international contract on sale of goods is the delivery of the goods. This performance creates the centre of gravity as well as a link between a commercial contract and socio-economic environment. Giuliano and Lagarde 1980 *OJ* 20.

204 Meier 2018 *StudZR* 10.

205 Meier 2018 *StudZR* 10.

206 This is one of the purposes of the UNIDROIT Principles (2016) as suggested under its Preamble.

207 In international commercial arbitration, arbitrators are known normally to resort to mixed choice of law approaches

208 This was the position adopted in an unpublished Partial Award given in the 1990 ICC Case No 6030 cited in Naón *Choice-of-Law Problems in International Commercial Arbitration* 228.

In cases where arbitrators are obligated to adhere to a particular choice of law rule, namely the closest connection rule prescribed by the arbitration seat, it is essential to take into account how policy considerations shape arbitral decisions. First, the flexibility of this rule allows the arbitral tribunal to consider laws free from the provincial influences of any particular national law. Arbitrators may search for a solution to international disputes specially adapted to the needs and multinational nature of the issues at stake, taking away the often-laborious search for an appropriate conflict of laws rule. Again, choice of law rules such as the closest connection rule provides guidance for arbitrators to sufficiently weigh points of contact between facts and legal assessments. This approach makes it more likely for party expectations to be met. A specified conflict of laws rule provides arbitrators with not only the basis for cogent reasons for the selection of a particular substantive law but also creates the impression that fairness and justice have been achieved. Also, a specified conflict of laws rule in a provision relating to the applicable substantive law makes the arbitration task of determining the applicable law arguably easy. It also makes the arbitration task of determining the applicable law predictable compared to the approach of first determining an appropriate conflict of laws rules.

Members in Group A have arbitration laws that provide a specific choice of law rule (the closest connection rule) for assigning the applicable substantive law in the absence of the parties' choice.[209] Such provisions provide a useful tool for arbitrators to make informed decisions regarding the applicable law. A pertinent issue, however, is the appropriateness of a specified choice of law rule for international commercial arbitration purposes. In this instance, although the closest connection rule can potentially lead to uncertainty in the choice of law process, its indication in some international arbitration laws is a positive step towards regulating the broad discretion afforded to arbitrators in assigning the applicable substantive law.[210]

6.5. Comments

Through various ways, and for various reasons, the transnational, party and jurisprudential policy considerations identified above are pertinent to the choice of law analysis in international commercial arbitration.[211] They guide and shape the choices that the arbitrator makes when it comes to the

209 See para 6.4.1 iii above.
210 See generally Hayward 2017 *SSRN Electronic Journal* 1-11.
211 See para 6.1 above.

applicable law — the three scenarios demonstrate this. Whether expressly stated or not, policy considerations are present and have an impact on arbitration determinations. Consider justice and fairness, for instance, even when arbitrators do not specifically mention that they strive for what is just or fair. In a particular case, their determinations will likely be made based on trade-offs between such policies. Each method prescribed in the arbitration rules (national and the selected institutional) found in contemporary Africa for assigning the applicable substantive law constrains the arbitrator's discretion to different degrees.[212] What this effectively means is that the influence of the policies on the choices made by the arbitrators, based on their discretion, would vary. The predictability of the choice of law process for instance, is deeply predicated on such provisions (as well as the facts of a particular case). It is, therefore, essential for arbitrators to be aware of these policies and carefully take them into account, in order to make well-informed decisions about the law applicable to the merits of a particular dispute. By doing this, arbitrators can effectively balance the competing interests at stake in international commercial arbitration and ensure that their decisions about the substantive law are well-founded and well-reasoned.

Section III: An Efficient Method for Assigning the Applicable Substantive Law

6.6. Introduction

The freedom of the arbitrator to assign the applicable law in the absence of the parties' choice has been beneficial in certain instances,[213] and also has resulted in unpredictability in others.[214] As international arbitration becomes more prevalent in Africa,[215] this unpredictability also becomes a cause for concern among parties and arbitrators.[216] Therefore, international commercial arbitration in Africa stands to benefit immensely from a

212 That is specifically those of Egypt, Ghana, South Africa and Côte d'Ivoire discussed in this section.

213 Arbitral discretion, for instance, allows arbitrators to consider various factors to make tailored and nuanced choices for more equitable results.

214 Arbitral discretion can also lead to different outcomes in similar cases, which can undermine the predictability and consistency of the arbitration process.

215 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 11.

216 From the perspective of the parties, the arbitral tribunal's broad discretions in conflict of laws issues leads to legal uncertainty and transaction costs. That is, the parties may experience significant costs in terms of time, resources and legal fees as they attempt to navigate the legal uncertainty created by the arbitrator's discretion.

standardised regulatory framework that would enhance party confidence in the arbitration process and its outcomes. While the current approaches used by arbitrators to assign the applicable law in contemporary Africa may be in line with modern arbitration practices, the question is, are they suitable for international commercial arbitration on the continent? This section of the chapter argues that to ensure and promote greater confidence in international commercial arbitration in Africa, it is essential to establish greater clarity and consistency in the methods used by arbitrators to assign the applicable law. Specifically, it is argued in this section that such an optimal method should be one that embraces the precepts of consistency, certainty and predictability.

6.6.1. Issues with the current regime from an African perspective

Flexibility is important to ensure that proper attention is given to the nuances of individual arbitration cases.[217] Yet, identifying the appropriate trade-offs between flexibility and certainty is difficult. It involves finding a balance between the constraints placed on arbitrator behaviour to ensure consistency and certainty and allowing sufficient discretion so that arbitrators can exercise good commercial judgment in light of particular facts.[218] The question often is, should there be detailed rules to promote certainty and consistency? Answering this question can be contentious because certainty and predictability can all too easily lead to rigidity, which could be unfair and inefficient.[219]

The main issue with the current regulatory regime for an arbitrator-assigned substantive law in international commercial arbitration is that the arbitrator often has broad and unfettered freedom to select the applicable law.[220] It is fair to say that parties cannot rely too heavily on a particular law being applied when they choose arbitration, and do not make an express choice of the applicable law. As pointed out throughout this discussion, different arbitration statutes and rules provide different choices to the arbitrators as to how to choose the applicable law and different directions as to whether they are bound to apply national law rather than non-national rules or both. It is doubtful that parties who choose particular institutional rules or agree to arbitrate in a particular place always understand the consequences and consciously opt for one system or another. Parties who do not indicate their

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217 Waincymer *Procedure and Evidence in International Arbitration* 23.
218 Waincymer *Procedure and Evidence in International Arbitration* 23.
219 Waincymer *Procedure and Evidence in International Arbitration* 23.
220 See generally Hayward 2017 *SSRN Electronic Journal* 1-11.

preferred applicable law, have no option but to rely on such general provisions in the rules or statutes to delimit the scope of the arbitrators' power. This essentially means that in the absence of the parties' choice of substantive law, their rights and obligations are left to the arbitrator's discretion. The issue is, should the outcome of arbitration be affected by the exercise of an unconstrained and effectively unreviewable discretion? Given that outcomes stand to be affected by the exercise of arbitral discretions, a more certain, stable and predictable process is preferred.

As indicated earlier, three distinct methods for assigning the substantive law can be identified in national and institutional arbitration laws found in Egypt, Ghana, South Africa and Côte d'Ivoire.[221] Each identified method confers arbitral discretion to varying degrees and may affect legal certainty and predictability differently. Although these existing rules represent the prevailing approaches to the arbitrator's discretion in conflict of laws issues, it does not necessarily mean they are preferred.[222] The direct application of the law or rules of law arbitrators consider appropriate method (*voie directe*), for instance, embodies the widest possible discretion and, as such, is more prone to produce arbitral awards which are based on the unpredictable and subjective instincts of the individual arbitrators.[223] The application of the law determined by the conflict of laws rules which the arbitrator considers applicable or appropriate (*voie indirecte*), on the other hand, although conferring significant discretion, is not as wide as that embodied in the *voie directe*.[224] Regardless of this, the fact is that the identification and application of conflict of laws may prove difficult, as profound differences in conflict rules remain.[225] The application of a specified choice of law rule of the seat, such as the closest connection rule, appeals to the notion that the law will be tailor-made for the particular contractual circumstance.[226] The key problem here, however, is that, in modem commerce, there are so many relevant factors, which make the application of the closest connection test uncertain and unpredictable.[227]

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221 See para 6.4.1 above.
222 See generally Hayward 2017 *SSRN Electronic Journal* 1-11.
223 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 867.
224 Gaillard and Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 871.
225 Greenberg, Kee and Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective 110*; Ma 2015 *Contemp Asia Arb J* 203.
226 Waincymer *Procedure and Evidence in International Arbitration* 996.
227 Waincymer *Procedure and Evidence in International Arbitration* 996.

In line with the aspiration of Africa to secure for itself a place on the global arbitration map,[228] arbitration laws need to embody minimum standards of predictability and consistency, particularly concerning the choice of the law applicable to the merits of a dispute.[229] Parties opt for arbitration precisely because they desire a more predictable and stable legal regime that will ensure their substantive legal rights.[230] To achieve a balance between party interests in flexible procedures, and stable substantive legal rights, it is vital to limit and clarify the arbitrators' discretion in identifying the governing law.[231] A predictable set of *a priori* legal rules that would provide arbitrators with a comprehensive regulatory framework for assigning the applicable substantive law is ideal.[232]

It should, nevertheless, be recognised that having a more certain process for assigning the substantive law will, to some degree, impair arbitration's flexibility.[233] This is a worthwhile trade-off considering the benefits to parties and arbitration as a whole. Should the process used by arbitrators become more certain, it affects not only legal outcomes but it can also improve how parties perform their contractual obligations in the first place, their decision-making around the settlement, and their ability to present and argue their cases in arbitration.[234]

6.7. What Should Matter, and Why Should it Matter?

To improve legal certainty and predictability in choice of law processes in arbitration, it has been proposed in the literature that arbitrators use bright-line rules (more specific rules) when identifying the applicable substantive law in the absence of the parties' choice.[235] Arguably, this can ensure that arbitrators apply a uniform and consistent approach to the different situations that may arise when they have to assign the applicable substantive law. It is, therefore, suggested in this section that the current regulatory regime found in national and institutional arbitration laws will

228 Albright 2019 *DEFA* 21.
229 Born *International Arbitration: Law and Practice* 4193-4194.
230 Born *International Arbitration: Law and Practice* 4193-4194.
231 Hayward 2017 *SSRN Electronic Journal* 9.
232 Hayward *Conflict of laws and Arbitral Discretion - the Closest Connection Test* 151,158-169.
233 Taking into considerations that identifying the applicable substantive law is a procedural function. Hayward 2017 *SSRN Electronic Journal* 9.
234 Hayward *Conflict of Laws and Arbitral Discretion - the Closest Connection Test* 25-42.
235 See generally Hayward *Conflict of laws and Arbitral Discretion - the Closest Connection Test*.

greatly benefit from adopting rules that are precise in nature. The question, however, remains: what should matter, and why should it matter, when formulating optimal choice of law rules to be used by arbitrators to assign the applicable substantive law?

6.7.1. The adoption of a conflict of laws rule

It is particularly evident in literature that the purpose of conflict of laws in court proceedings is found in the notion of the legal order.[236] According to Von Savigny, the main objective of private international law lies in the international harmony of solutions.[237] This means that where a specific private law situation is connected with two or more countries, it must be evaluated in the same way in all those relevant countries. Stone also posited that conflict rules are the only way in which a minimum order in international private law relationships can be achieved.[238] He argued that private international law offers some degree of justice, certainty and convenience to the private persons involved, and also provides some prospect of furthering the various policies which underlie ordinary rules of private law.[239] The fact that the resolution of international disputes necessarily involves the interaction of legal systems highlights the significance of conflict of laws rules.

The objectives of private international law are also relevant in the field of international commercial arbitration.[240] Although there may be instances where it is inappropriate to localise a legal issue,[241] modern conflict of laws rules are still relevant in the international commercial arbitration process.[242] They provide disputing parties with tools to predict the law that will be applied to their contracts or the manner in which it will ultimately be identified.[243] In international commercial arbitration, conflict of laws rules can be used to approximate party intentions and expectations. When the arbitral tribunal has to assign the applicable substantive law, its conflict of laws

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236 Hayward *Conflict of Laws and Arbitral Discretion - the Closest Connection Test* 42.

237 Von Savigny *Private International Law—A Treatise on the Conflict of laws, and the Limits of Their Operation in Respect of Place and Time* 6; Mayer 2013 *JIDS* 407, 419.

238 Stone *The Conflict of laws* 4.

239 Stone *The Conflict of laws* 4.

240 Hayward *Conflict of Laws and Arbitral Discretion - the Closest Connection Test* 42; Mayer 2013 *JIDS* 407, 419.

241 In international commercial arbitration, there may be no need to localise legal issues as many transactions and legal relationships may have contracts with several jurisdictions and are truly international.

242 Mayer 2013 *JIDS* 407.

243 Hayward *Conflict of Laws and Arbitral Discretion - the Closest Connection Test* 43.

analyses in international commercial arbitration are usually firmly grounded in party expectations and intentions.[244] To protect the expectations of parties who would suffer an injustice if their reasonable expectations were not to be met, for instance, an arbitral tribunal may use the law having the closest and most real connection to the parties' contractual relationship.[245] In this situation, the parties' expectations provide a basis for the conflict of laws analysis. When it comes to determining the applicable law for international commercial contracts where there is no express choice by the parties, a pertinent issue is which choice of law rule is most suitable for the situation.

i. The "closest connection" rule

The common law doctrine of the closest and most real connection test finds its basis in party expectations and intent.[246] As an objective standard, this test can be used to facilitate the identification of the applicable substantive law considering the connecting factors of a case. There are, however, no uniform rules to guide the arbitral tribunal as to the precise manner in which the country with close ties to the dispute is determined.[247] In some cases, an arbitral tribunal attached importance to finding the centre of gravity of the contract.[248] In other cases, an arbitral tribunal followed several other factors to determine the country with the closest and most real connection.[249]

Although the closest connection test may offer more certainty and predictability than the direct and indirect methods, it can still be a flawed mechanism for determining the applicable substantive law.[250] Assuming that the relevant factors of a contract are evenly distributed, or that the connecting factors are placed in a manner that does not point to any particular system, establishing the 'centre of gravity' of the contract may be almost impossible. The application of connecting factors in the search for the applicable substantive law can be nebulous.[251] There is no hierarchy *per se* among relevant connecting factors and arbitrators through their

244 Hayward *Conflict of Laws and Arbitral Discretion - the Closest Connection Test* 43.
245 Goode 2001 *Arbitr Int* 31.
246 This test is regarded as the third tier in the hierarchy of factors to determining the proper law of a contract when the parties have not explicitly indicated one. It was adopted by English courts after the judgement in Bonython v. Commonwealth of Australia 1951 AC 201; See generally Khanderia 2020 *J Priv Int Law* 423-450.
247 Khanderia 2020 *J Priv Int Law* 443.
248 ICC Award No. 7329 ICC Bulletin Volume 7 No.1 (1996).
249 Neels and Fredericks 2003 *SAMLJ* 69.
250 Khanderia 2020 *J Priv Int Law* 443.
251 Khanderia 2020 *J Priv Int Law* 443.

discretion may place different weight on them.[252] The weight given to a particular factor in a case may vary depending on the specific circumstances involved. In relation to this, the closest connection test does very little for the objectives of predictability, certainty and transparency, which are very important in international contractual matters.[253]

ii. The "lex loci contractus" rule

The *lex loci contractus* rule (law of the place where the contract was made) is based on theoretical considerations flowing from the territoriality doctrine.[254] According to this doctrine, the legal effects of an act done in a certain territory are under the exclusive control of the law of that territory and this is particularly true with contractual matters.[255] Consequently, the *lex loci contractus* rule requires that the law of the place where the contract was made be applied to the rights and obligations of disputing parties to an international contract.[256] In relation to this, the place of contract has been defined as the place in which the principal event necessary to make a contract occurs.[257] The goal here is not to establish if there is a contract but rather to determine the place where the principal event, if any, which would result in a legally binding contract, occurred. Despite the apparent straightforwardness of the *lex loci contractus* rule, it has faced significant criticism.

The overarching problem in applying the *lex loci contractus* rule remains constant how is the place where the contract was made to be determined? Artificial rules such as the postal rule (mailbox rule) have been relied on to establish the *locus contractus*.[258] This adds a layer of complexity to the application of the rule. Again, the *lex loci contractus* rule is not suitable for determining the applicable law in all contracts.[259] In a case where a contract for the sale of goods is made on the international seas, for instance, establishing the *locus contractus* can be complicated. The place of

252 Khanderia 2020 *J Priv Int Law* 443.
253 Khanderia 2020 *J Priv Int Law* 445.
254 Nussbaum 1942 *YLJ* 899.
255 This doctrine is no longer considered to be relevant when the parties have expressly selected the governing law of their contract. Nussbaum 1942 *YLJ* 899.
256 Brilmayer, Goldsmith and O'Connor *Conflict of laws: Cases and Materials* 63-64.
257 Brilmayer, Goldsmith and O'Connor *Conflict of Laws: Cases and Materials* 63-64
258 The rationale behind the postal rule is to create a clear and predictable standard for determining when acceptance of an offer takes place. According to the rule, a contract is formed at the moment when an offeree posts the letter, rather than when it is received by the offeror. See generally Adams v Lindsell (1818) 1 B & Ald 681; Charman *Contract Law* 28.
259 Obiri-Korang 2022 *Lex Portus* 25.

contracting could simply be a matter of chance or fortuitous, without bearing any significant relevance to the commercial transaction at hand.

In today's world, with its ever-increasing technological capabilities and global connectivity, the application of the *lex loci contractus* rule in international contract cases presents new concerns.[260] Assuming that a contract is concluded over the internet, for instance, and determining exactly where the contract was concluded often may be difficult. Identifying the place of contracting can pose challenges, especially when it involves multiple countries or when it takes place in more than one country at the same time. Actually, the place of contracting may be fortuitous in relation to the relevant contract. A strict application of the rule might lead to a law that has very little or no connection to the contract in question.

In modern international commercial arbitration practice, where disputing parties may have businesses and contracts which often undergo frequent changes in their location, the *lex loci contractus* rule at the very best only provides post-contractual certainty.[261] Such certainty, however, is significantly diminished when establishing the *locus contractus* becomes overly complicated. Obiri-Korang gives an example of entering into a contract while aboard an aircraft in transit across the sub-Saharan African region.[262] An arbitral tribunal, in such an instance, may find it difficult to establish where the contract was concluded. The arbitral tribunal's ultimate choice of governing law may appear arbitrary or unfair to the interests of at least one of the parties to the international transaction. As the location of modern businesses continues to change, the application of *the lex loci contractus* rule also becomes uncertain and subject to change.

iii. The "habitual residence" rule

The application of habitual residence as a connecting factor for choice of law purposes is an emerging trend in the field of private international law.[263]

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260 Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* 32.

261 This is because the *loci contract* for many modern contracts can only be definitively established once the contract has been fully concluded. Obiri-Korang 2022 *Lex Portus* 26.

262 Obiri-Korang 2022 *Lex Portus* 26.

263 It is also used as a connecting factor for the determination of jurisdiction. Obiri-Korang 2022 *Lex Portus* 30. One of the most notable distinctions between domicile and habitual residence is that domicile is a legal concept while habitual residence is based on factual circumstances. Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* 27.

Habitual residence was initially used to determine the personal law of an individual.[264] It was adopted by the Hague Conference on Private International Law (HCCH)[265] as the principal factor for determining the applicable law in matters concerning an individual's status.[266] Initially, the HCCH adopted the law of the place of habitual residence to determine the personal law in matters relating to child custody, guardianship, marital status and other family law issues.[267] Currently, however, the application of the habitual residence rule extends also to matters relating to contract and tort.[268] This is evident from the Rome I Regulation[269] and the *Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations* (Rome II Regulation),[270] where habitual residence is the principal territorial connecting factor for determining the applicable law in international commercial and tortious matters, respectively.[271]

In the context of international commercial arbitration, irrespective of the method used by arbitrators to assign the applicable substantive law in the absence of the parties' choice, the habitual residence is often considered a connecting factor when determining the closest connection of the contractual relationship.[272] Specifically, arbitrators frequently examine the habitual residence or place of business of the party that provides characteristic performance as connecting factors for this purpose.[273]

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264 The history of the habitual residence rule is intertwined with the development of the domicile and nationality concepts. In continental Europe, the use of domicile as a connecting factor became unpopular and was replaced by the nationality concept proposed by Mancini. Common law countries nevertheless continued to consider domicile as an important connecting factor. The habitual residence, however, has eventually become a major connecting factor for choice of law purposes, through the efforts of the Hague Conference on Private International Law (HCCH) — this represents the new trend in private international law. See generally Nadelmann 1968 *Tex L Rev* 766-788; Nadelmann 1969 *Am J Comp L* 418-451.

265 HCCH 2023 https://www.hcch.net/en/home.

266 Zhang 2018 *Me L Rev* 172-177.

267 Zhang 2018 *Me L Rev* 163.

268 Zhang 2018 *Me L Rev* 163.

269 See Thomson Reuters 2023 http://uk.practicallaw.thomsonreuters.com/.

270 Regulation (EC) No 864/2007 of the Europe Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (2007). See EUR-Lex 2023 https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864.

271 See generally Rogerson 2000 *ICLQ* 86-107.

272 Bělohlávek 2014 *Rev Rom Asig* 5.

273 See generally ICC Interim Award No. 5314 of 1988 Yearbook XX (1995) 35.

Arbitrators have often referred to the Rome Convention and the Rome I Regulation as the basis for making such a choice.[274]

Regardless of the frequent use of the habitual residence rule in international commercial arbitration, it should be noted that it may not be an appropriate primary connecting factor in the case of commercial contracts.[275] Consider, for instance, an international contract between a multinational South African company (seller) and an Ivorian businesswoman (buyer) in which the parties agreed for goods to be delivered and payments made in Germany. Assuming the arbitrators have to determine the applicable law because the parties failed to select one, the habitual residence of the characteristic performer (the seller)[276] would not be very appropriate. In this scenario, the habitual residence of the characteristic performer is mainly significant to the extent that it is the place where preparation may be carried out on how to execute the contract. The habitual residence of the characteristic performer does not have more significance over the place where the contract was executed, and its significance should not be confused with the place of characteristic performance. Okoli argues that, in a situation like this the habitual residence of the characteristic performer deviates too much from the place of characteristic performance and therefore becomes unsuitable for determining the governing law.[277] Where the party's habitual residence and place where his obligations are to be carried out coincide, however, the law of the habitual residence of the party in such a situation would be very suitable to govern an international commercial contract, in the absence of a choice of law by the parties.

Nevertheless, the habitual residence of the characteristic performer can be used to locate the place of performance in those situations where the place of performance cannot be easily identified. Take, for instance, in e-commerce where transactions can be concluded online, identifying the place of performance may not be so easy. Okoli argues that although the place of performance should be given considerable significance as a

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274 Bělohlávek "Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration" 43.

275 Obiri-Korang 2022 *Lex Portus* 29-33.

276 This assuming the seller is regarded as the characteristic performer based on the Art 4 of the Rome I Regulation (2008).

277 Art 19 of the Rome I Regulation (2008), provides sufficient clarity on the concept of habitual residence to regulate commercial contracts. Okoli *Place of Performance: A Comparative Analysis* 64,67.

connecting factor for commercial contracts, the habitual residence of the characteristic performer can be resorted to when the place of performance of the characteristic obligation cannot be easily identified.[278] Indeed, habitual residence is a question of fact and could vary depending on the case.[279] To effectively apply the habitual residence rule in international commercial arbitration, therefore, arbitrators must decide its appropriateness on a case-by-case basis.

In international commercial arbitration, where the arbitrators' decisions must appear fair and just, it should be noted that the application of the law of the habitual residence or place of business of the characteristic performer as a presumptive connecting factor can unfairly downplay the law of the other party.[280] Favouring the law of the habitual residence or place of business of the characteristic performer generally favours the interest of one of the parties of an international commercial transaction, particularly, if one party's legal position or rights are disadvantaged by the application of the rule. To maintain fairness and ensure the appearance of justice in international commercial arbitration, it is important that the arbitrators' decision to apply the habitual residence rule be justified considering the circumstances of the particular case and the legitimate expectations of the parties. All other relevant connecting factors must be considered and depending on the matter in dispute, be given appropriate weight.

iv. The "lex loci solutionis" rule

In several jurisdictions, the place of performance is the most important connecting factor for determining the proper law of a contract.[281] In most cases, the place of performance has a sufficient link with international contracts.[282] In international contractual matters, it is the place where an obligation is performed or is to be performed that can significantly affect a transaction. Apart from providing a high degree of legal certainty concerning the applicable law, the place of performance rule also ensures equity or justice.[283] This is because the law of a country with sufficient interest in the performance of the contract is ultimately applied. The place of performance

278 Okoli *Place of Performance: A Comparative Analysis* 62.
279 Okoli *Place of Performance: A Comparative Analysis* 66.
280 Okoli *Place of Performance: A Comparative Analysis* 91.
281 In South Africa (and at common law), for instance, the *locus solutionis* is considered to be an important factor for determining the proper law of a contract. Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* 55.
282 Okoli *Place of Performance: A Comparative Analysis* 63-64.
283 Neuhaus 1963 *Law Contemp Probl* 806.

allows for certainty and predictability of the applicable law while establishing a connection between a contract and the socio-economic environment in which such commercial contracts are to be performed.[284]

Regardless of the suitability of the law of the place of performance for international contractual matters, there are some legitimate concerns that may affect its proper application.[285] A first concern is seen where parties agree to have their respective obligations take place in different places — that is, where there are different places of performance, establishing the place of performance becomes an issue.[286] An example of this is where parties agree for delivery to be in one country and payment in another. A second concern has to do with instances where there are multiple places of performance in relation to a particular contract.[287] The difficulty becomes apparent when in a particular transaction, for instance, the parties' contract that the seller delivers goods to four different countries. A third and final concern seems to be more theoretical than practical, that is, instances where the place of performance is not provided by the parties and is hence unknown.[288] The occurrence of this situation, however, is highly improbable. Parties are very unlikely to enter into an international contract without indicating, whether expressly or tacitly, where obligations central to their contract are expected to be performed. The *lex loci solutionis* rule may be appropriate for designating the applicable substantive law in international commercial arbitration if these issues are effectively addressed.

To address the first concern, drawing from the Rome I Regulation, where the performance of the parties' obligations is to take place in different countries, it is suggested that the doctrine of characteristic obligation (also called characteristic performance) should be the preferred mechanism for determining the *lex loci solutionis.*[289] The characteristic performance is identical to the characteristic obligation owed in a contract which gives the type of contract its individual features. Under the Rome I Regulation, characteristic performance is understood as the performance for which payment is due.[290] This definition is based on the idea that performance creates a link between the international commercial contract and the socio-

284 Giuliano and Lagarde 1980 *OJEC* 20-21.
285 See generally Obiri-Korang 2022 *Lex Portus* 7-47.
286 Dickinson, Lein and James *The Brussels I Regulation Recast* 153.
287 Dickinson, Lein and James *The Brussels I Regulation Recast* 153.
288 Dickinson, Lein and James *The Brussels I Regulation Recast* 152-153.
289 Okoli 2015 *LMCLQ* 521.
290 Giuliano and Lagarde 1980 *OJEC* 20.

economic environment of which it is going to be part.[291] Concerning this, the Rome I Regulation provides that performance which is deemed characteristic of an international contract for the sale of goods is "the delivery of the goods"[292] and, for service contracts "the provision of the service".[293] These represent performances (non-monetary performances) that establish the centre of gravity of commercial transactions. This approach effectively establishes which performance is significant when dealing with the application of the *lex loci solutionis* rule.

In relation to the second concern, that is, instances where it is difficult to establish the governing law because there are multiple places of performance, one may look to the jurisprudence of the Court of Justice of the European Union (CEJU)[294] under the *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* (Brussels I Recast)[295] regime.[296] Despite the Brussel I Recast being an instrument that regulates jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, it can provide a useful solution to this issue. That is, to determine the main applicable law, a single law should be identified, in order to promote predictability, certainty, proximity and to avoid *dépeçage*.[297] In relation to this, based on the economic criteria,[298] the law of the place of substantial performance can be utilised to resolve the challenge of having multiple places of performance.[299] The place of delivery, for instance, should be understood as the closest linking factor between the contract and the country which will, as a general rule, be the place of principal delivery.[300] This approach effectively resolves the challenges that emerge where there are multiple places of performance.[301]

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291 Giuliano and Lagarde 1980 *OJEC* 20.
292 Art 5(1) of the Rome I Regulation; Giuliano and Lagarde 1980 *OJEC* 20.
293 Giuliano and Lagarde 1980 *OJEC* 20.
294 See CURIA 2023 http://158.167.241.123:8090/jcms/jcms/j_6/en/.
295 Regulation (EU) No 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (2012).
296 Case C-386/05 Color Drack GmbH v Lexx International Vertriebs GmbH (2007) ECR I-3699.
297 Okoli 2015 *LMCLQ* 523; Giuliano and Lagarde 1980 *OJEC* 23.
298 Giuliano and Lagarde 1980 *OJEC* 20.
299 Case C-386/05 Color Drack GmbH v Lexx International Vertriebs GmbH (2007) ECR I-3699.
300 Okoli 2015 *LMCLQ* 524.
301 Obiri-Korang 2022 *Lex Portus* 37.

The third concern regarding the parties not indicating the place of performance is relevant. However, it appears to be less likely to occur compared to the other concerns discussed so far. In rare instances, where parties agree on all aspects of their contract except the place of performance, the question of choice of law may only be relevant to a court or arbitral tribunal and not the parties themselves.[302] Since the parties did not agree on the place of performance, intentionally or unintentionally, they relinquish absolute certainty or authority on the matter. In exceptional circumstances like these, the court or arbitral tribunal may determine the place of performance by analysing extrinsic evidence gathered from the case.[303] In international commercial arbitration, for instance, the arbitral tribunal can rely on the terms of the contract and take into account the usages of the trade applicable to the transaction to establish the *locus solutionis*.[304]

With these relevant concerns about the *locus solutionis* addressed, the factor becomes more suitable for determining the applicable substantive law in the absence of an express or tacit choice of the parties. Specifically, the place of performance is preferred for establishing the applicable law absent the parties' choice because it is the place with the most real connection to a contract.[305] The application of the *lex loci solutionis* rule in international commercial arbitration, therefore, can assist arbitrators to give effect to the reasonable expectations of the parties in a particular case.

6.7.2. The consideration and application of non-national laws or standards

There is no doubt that non-national laws are important in international commercial arbitration. They have been used by parties and arbitrators to supplement the *lex contractus*[306] and, in some instances, used as the *lex contractus.*[307] Non-national laws provide parties with an option of neutral rules that can assist arbitrators to avoid any perceived bias towards one party or another. They can also be useful in cases where the subject matter

302 Obiri-Korang 2022 *Lex Portus* 37.
303 Obiri-Korang 2022 *Lex Portus* 37.
304 Art 28(4) of the UNCITRAL Model Law (1985), permits the application usages of trade and custom in all cases.
305 See generally Obiri-Korang 2022 *Lex Portus* 7-47.
306 See generally Elcin *Lex Mercatoria in International Arbitration Theory and Practice*.
307 Parties can, for instance, expressly authorised arbitrators to decide their case as equity and justice requires, unbound by the rigors of law. Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 740.

of the dispute is highly specialised or technical.[308] Caution has, however, been expressed that parties should only in relatively unusual cases agree on choice of law clauses selecting non-national laws.[309] This is because there can be substantial difficulties associated with determining the content of some of these non-national laws or standards. Also, significant questions of interpretation and, in some instances, validity or enforcement can be raised in relation to the application of non-national laws.[310] These concerns are particularly critical when discussing corporate and commercial matters, where certainty and predictability are cherished.

Depending on the arbitration regime, arbitral tribunals may have the authority to either apply non-national law directly or be required to first conduct a conflict of laws analysis.[311] In each case, however, the arbitral tribunal's choice should be substantiated and not completely arbitrary. When the arbitral tribunal decides to select non-national law in the absence of the parties' choice, they must do so in accordance with the terms of the contract, taking into account trade usages in regard to the transaction as well.[312] The arbitral tribunal may derive the parties' intentions by reference to the terms of the contract. As long as such a non-national law satisfies public policy and arbitrability requirements and contains sufficiently precise rules to resolve the dispute in question, an arbitral tribunal should be able to apply it (and should apply it) to effectively and efficiently resolve a dispute.[313]

6.7.3. Account for mandatory laws in arbitration laws

The interaction between mandatory rules and international commercial arbitration indeed raises several questions, especially concerning how arbitrators deal with the application of mandatory rules.[314] For instance, when should arbitrators apply or disregard mandatory rules that fall within the scope of the applicable substantive law, and when should they apply or disregard mandatory rules that are not part of the applicable substantive

308 See generally Ndlovu 2011 *CILSA* 205-224.
309 Born *International Commercial Arbitration* 4200.
310 Born *International Commercial Arbitration* 4200-4203.
311 It is currently widely accepted that international arbitrators can apply non-national laws to the merits of a dispute without putting the validity of the award into danger, even if the parties have not expressly selected such norms. Born *International Commercial Arbitration* 4123.
312 Arti 28(4) of the UNICTRAL Model Law (1985).
313 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 740.
314 Shehata 2017 *WAMR* 383.

law? Should the parties' intentions take priority over a country's interests reflected in their mandatory rules? When confronted with questions like these arbitrators often find few easy answers.[315] This is perhaps because the arbitrators' relationship with mandatory rules generally stems from the contractual nature of international commercial arbitration, which arises in the absence of a *lex fori*.[316]

It should be noted that, despite these concerns, no major international convention dealing with arbitration contains an express provision devoted to the issue of mandatory rules before the arbitrator.[317] This is particularly perplexing considering the fact that most international contracts contain arbitration clauses. Mayer has opined that a reason for this is that international scholarship that has addressed issues on mandatory rules usually has been academic work carried out from the perspective of classical private international law rather than a focus on fostering the growth of international commerce.[318]

The absence of provisions dealing with mandatory laws in international arbitration laws introduces an element of uncertainty to the arbitration proceedings. With no legitimate guidance on the matter, the decision of whether and when mandatory rules should be applied ultimately rests on the exercise of discretion.[319] Arbitrators have the discretion to apply mandatory rules according to the peculiarities of a particular case.[320] This implies that arbitrators may or may not choose to act after proper consideration of relevant factors. This approach to the application of mandatory rules subjects the process to the often subjective goodwill, intelligence and experience of arbitrators.[321] Parties are, therefore, not able beforehand to determine the extent to which such rules might affect their transaction. This situation needs to improve if certainty and consistency are to be achieved.

The best way forward is for national and institutional international arbitration laws to account for mandatory rules.[322] Indicating the context within which

315 Barraclough and Waincymer 2005 *MJIL* 243.
316 Zhilsov 1995 *NILR* 105.
317 Zhilsov 1995 *NILR* 106; Mayer 1986 *Arbitr Int* 276.
318 In the development of international commerce, interventions from mandatory laws of a particular jurisdiction have the potential to cause disruptions and they are, therefore, not particularly preferred. Mayer 1986 *ArbIntl* 276.
319 Waincymer 2009 *AIAJ* 5.
320 Waincymer 2009 *AIAJ* 5.
321 Waincymer 2009 *AIAJ* 5.
322 Greenawalt 2008 *ARIA* 118-119.

arbitrators can apply mandatory rules, for instance, will provide clarity and predictability in the international arbitration process. Perhaps, international arbitration laws may specify that arbitrators should only apply mandatory rules if they do not conflict with the parties' chosen substantive law or if they would not render the arbitral award unenforceable.[323] This will enable parties to anticipate the application of mandatory rules and tailor their transaction accordingly.

6.7. Comments

The current regulatory regime utilised by arbitrators to determine the applicable substantive law contains problematic features that stem from the inherent nature of arbitral discretion embodied in the regime. Under the regime, arbitrators are usually afforded broad and largely unfettered discretion to choose the applicable substantive law.[324] The result of this is that parties cannot predict with certainty the law that would be applied to the disputes when they did not expressly (or tacitly) choose one. This lack of clarity can be particularly undesirable in commercial matters, where the parties involved require a clear understanding of the legal framework that will be used to determine their rights and obligations. The situation is even more concerning because the arbitrator's determination of the applicable substantive law is subject to minimal judicial review in either annulment, recognition, or other proceedings.[325] As this sub-section has argued, in order to provide arbitrators and parties involved in arbitration with consistency and predictability, it is necessary to reform the current regulatory framework. This can be achieved by adopting a predictable set of *a priori* legal rules that will account for conflict of laws rules, mandatory and non-national rules or laws.

6.8. General Concluding Remarks

Overall, three key take-aways can be identified from the discussion in this chapter. First, there are some underlying policies that influence the arbitrator's determination of the applicable substantive law in the absence of the parties' choice. They can be categorised as transnational, party and jurisprudential policy considerations.[326] These policies shape and guide the arbitrator's decisions on such issues. They vary depending on the facts of a

323 Greenawalt 2008 *ARIA* 118-119.
324 Hayward *Conflict of Laws and Arbitral Discretion – the Closest Connection* 98.
325 The parties may have little recourse when they disagree the arbitrator's selected applicable substantive law. Born *International Commercial Arbitration* 4082.
326 See para 6.1 above.

particular case and their consideration is based on the arbitrator's discretion. It is vital that the impact of such policies is understood so that they can be better applied by arbitrators. Second, the chapter also reveals that the methods adopted in the arbitration rules (national or institutional) of Egypt, Ghana, South Africa and Côte d'Ivoire for the determination of the applicable substantive law allow for arbitrators to consider these pertinent policies. Irrespective of the method adopted, the policies are likely to influence the arbitral tribunal's determinations in relation to the law applicable to the merits of a dispute. When arbitrators have to decide on the approach to adopt when they are given the authority to assign the applicable substantive law, these policies can indicate how such an evaluation may legitimately occur. Third and final, the chapter suggests that an efficient method to be used by arbitrators to assign the applicable substantive law, is one that incorporates a conflict of laws rule, provisions on the application of mandatory rules and non-national rules. This has the potential of improving consistency, legal certainty and predictability for such issues in the choice of law process in arbitration. Promoting clarity, consistency and predictability in international commercial arbitration is essential for building confidence and trust in the arbitration mechanism, particularly in Africa where the development and growth of international commercial arbitration is critical.

CHAPTER 7

CONCLUSIONS AND PROPOSALS

7. General Introduction

This research was designed to determine the most efficient method used by arbitrators to assign the law applicable to substantive issues arising in international commercial arbitration in Egypt, Ghana, South Africa and Côte d'Ivoire. In order to make this determination, due regard had to be given to the existing provisions relating to the applicable substantive law under the national and selected institutional arbitration regimes within Egypt, Ghana, South Africa and Côte d'Ivoire. An important finding of the study was that in order to successfully determine the most efficient method used by arbitrators to assign the applicable substantive law, it is also important to factor in global trends and practices on the subject.

Against this premise, Chapter 1 introduced and set out the background of the present study. Chapter 2, then, provided a comprehensive overview of the theories, principles and historical development of international commercial arbitration generally and, particularly in selected jurisdictions in Africa. Chapter 3 explored the nuances associated with the notion of law applicable to substantive matters in the context of international commercial arbitration. Chapter 4 highlighted, compared and evaluated the different possible methods used by arbitrators to assign the applicable substantive law in international commercial arbitration, drawing on national and international sources. In Chapter 5, a comparative analysis was conducted to evaluate the methods used by arbitrators to assign the applicable substantive law in Egypt, Ghana, South Africa and Côte d'Ivoire. In Chapter 6, the most efficient methodology for assigning the applicable substantive law in international commercial arbitration was deduced.

All in all, these chapters aimed to answer the research questions set out in the prefatory chapter.[1] Chapter 7, which is this chapter, summarises the findings of the research, provides proposals and offers final remarks. Section I of the concluding chapter summarises the findings and conclusions of the present study. It explains how the research has answered the main research question by delving into the sub-questions raised in the study. Section II elaborates on recommendations and proposals regarding

[1] See 1.3 above.

the arbitrators' determination of the applicable substantive law in international commercial arbitration.

Section I: The Main Findings of the Study

7.1. The Research Questions

This research set out to answer a main question and its five sub-questions regarding the applicable substantive law in the context of international commercial arbitration, with the overarching goal of identifying the most efficient method used by arbitrators to assign the applicable law in Egypt, Ghana, South Africa and Côte d'Ivoire.[2] In this section, the main findings and conclusions stemming from the research conducted in relation to these questions are highlighted.

7.1.1. Conclusions on the laws used for international commercial arbitration in Africa, specifically in Egypt, Ghana, South Africa and Côte d'Ivoire

In Chapter 2, on the origins and development of arbitration, it was demonstrated that arbitration, a dispute resolution mechanism, comes from very obscure beginnings.[3] Regardless, it was also demonstrated that arbitration now occupies centre stage when it comes to international commercial dispute resolution. Another important conclusion drawn from evaluating the history and development of international commercial arbitration, specifically in Africa, is that its origins are intertwined with colonialism.[4] This observation helps to establish a baseline against which the development of international commercial arbitration in the region can be measured. First of all, from this baseline, it was demonstrated that a unique arbitration system peculiar to Africa is emerging, one marked by the region's cultural diversity and history. Again, from this baseline, it was deduced that the development of the legal framework for international commercial arbitration in the region has not been uniform. Whereas some countries in Africa have modern laws to regulate international commercial arbitration, others still may not have such laws or have outdated ones.[5]

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2 See para 1.3 above.
3 See para 2.1 above.
4 See para 2.2 above.
5 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 115-138.

Nevertheless, the current trend reveals that the legal framework for arbitration across the African region is steadily evolving to meet international standards and practices.[6] Current arbitration laws in Africa are greatly influenced by international arbitration instruments such as those provided by UNCITRAL. The arbitration rules of institutions such as the LCIA and the ICC Arbitration Court have also impacted current laws for international commercial arbitration in Africa. The impact of the New York Convention[7] on the development of international arbitration in Africa is also widely acknowledged.

It was also demonstrated that the myriad of laws, theories and principles, such as the principle of party autonomy and the limitation that these international instruments embody, do indeed manifest in the laws for international commercial arbitration in Africa. While different legal cultures may result in varying manifestations of these theories and principles, their fundamental nature remains the same. It was also specifically demonstrated that current national and selected institutional arbitration laws found in Egypt, Ghana, South Africa and Côte d'Ivoire, are largely influenced by international arbitration instruments such as those of the UNCITRAL,[8] the ICC Arbitration Rules[9] or the LCIA Arbitration Rules.[10] It was deduced that these countries and selected arbitration institutions have either fully adopted or modified these international arbitration instruments to suit their peculiar needs. In effect, what can be said is that there are similarities and differences in the international arbitration laws that exist in these jurisdictions despite their common sources. This conclusion establishes the rationale behind the need for further analysis and examination of the specific laws relating to the applicable substantive law in international commercial arbitration in Egypt, Ghana, South Africa and Côte d'Ivoire.

7.1.2. Conclusion on the nuances of the applicable substantive law in international commercial arbitration

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6 Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* 140-141.

7 See New York Arbitration Convention 2023 https://www.newyorkconvention.org/.

8 That is the UNCITRAL Arbitration Rules with art 1, paragraph 4, as adopted in 2013 and art 1, paragraph 5, as adopted in 2021 (1976) and the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (1985). See UNCITRAL 2023 https://uncitral.un.org/.

9 International Chamber of Commerce (ICC) Arbitration Rules (2021). See ICC 2023 https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/.

10 London Court of International Arbitration (LCIA) Rules (2020). See LCIA 2023 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

In Chapter 3 it was opined that the law applicable to substantive issues can and should be distinguished from other applicable laws in arbitration.[11] Its purpose, scope and role within the international commercial arbitration process, uniquely sets it apart. Considering how vital the applicable substantive law is in the international commercial arbitration process, the concept needs to be fully understood by its users. The fact is that parties and arbitrators have choices when they select the applicable substantive law. The parties may expressly or tacitly choose the applicable substantive law which may be from national and non-national sources. When the parties fail to make such a choice, the default position under most arbitration laws is that the arbitrator selects the applicable substantive law. The chapter demonstrates that the scope of the arbitrator's discretion in those instances can be broad and unfettered depending on the wording of such provisions.[12] The uncertainty that this presents for such matters is not desirable in commercial matters. Nevertheless, arbitrators may be authorised to directly select a particular substantive law or rules of law or to apply conflict of laws rules which they consider applicable in order to determine the substantive law to be applied. They may also be authorised to select national and/or non-national laws as the applicable substantive law.

Again, the chapter demonstrated that whether the parties or the arbitrators have to determine the applicable substantive law, mandatory laws and public policies constrain the choices they can make.[13] Although these two concepts are different, they may interrelate. They are both tools used by countries to protect the fundamental principles of their society. Determining the applicability or otherwise of mandatory laws in the absence of the parties' express or tacit choice is a matter of vital importance. The arbitrator would have to make a determination about its applicability by striking a balance between national and party interests; this might be a controversial issue. That is, do they prioritise national or party interests when making such a determination? It is proposed in this thesis that certain and predictable rules are, therefore, needed to guide arbitrators on how they should treat the applicability of mandatory laws in international commercial arbitration.

7.1.3. Conclusions on the possible methods used by arbitrators to assign the applicable substantive law drawing on sources originating outside Africa and encompassing both national and international origins

11 See para 3.1 above.
12 See para 3.3.3 above.
13 See para 3.3.4 above.

Chapter 4 reveals that modern international arbitration laws lean towards provisions that grant arbitrators wide discretion and flexibility to determine the applicable substantive law. The chapter demonstrates that national arbitration laws originating outside Africa typically provide one of three methods to be used by arbitrators to assign the applicable substantive law.[14] These include provisions specifying a conflict of laws rule to be applied (usually the closest connection rule) to arbitration seated within its territory, provisions authorising arbitrators to identify the conflict of laws rule they deem applicable or appropriate to assign the applicable substantive law (*voie indirecte*) and provisions authorising arbitrators to directly select the laws or rules they deem appropriate (*voie directe*). A fourth method can, however, exceptionally be identified in mandatory statutory instruments enacted with the aim of protecting parties in specific circumstances. The chapter shows that the method adopted in national arbitration varies from jurisdiction to jurisdiction according to their preferences. The methods available to arbitrators to assign the applicable substantive law in institutional arbitrational laws, on the other hand, have become very similar due to the legal harmonisation efforts of organisations such as UNCITRAL.[15] The chapter revealed that the current trend is that top arbitration institutions such as the LCIA and the ICC Court of Arbitration prefer the *voie directe* method.[16] In some instances though, institutional arbitration laws have specified a specific choice of law rule (usually the closest connection rule) to be applied by arbitrators to assign the applicable substantive law.[17]

Regional and national private international law regimes that provide guidelines on the choice of law for contractual relationships may also have a bearing on the choice of the substantive law in international commercial arbitration.[18] The Rome I Regulation,[19] the Restatement (Second) of Conflict of Laws,[20] the CISG,[21] the Hague Principles and the UNIDROIT Principles[22] have all been referred to by arbitrators when dealing with choice of law

14 See para 4.1 above.
15 Gastorn "Examination of Arbitration Related UNCITRAL Texts and their Adoption by African States" 5-6.
16 See para 4.1.2 above.
17 See art 35 of the Swiss Rules of International Arbitration of 2021.
18 See para 4.2.1 above.
19 Regulation (EC) No 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (2008).
20 Restatement (Second) of the Law, Conflict of Laws of 1971.
21 United Nations Convention on Contracts for the International Sale of Goods (1980).
22 UNIDROIT Principles on Choice of Law in International Commercial Contracts (2015).

issues in international commercial arbitration.[23] Although these legal instruments may not have been specifically designed for international commercial arbitration purposes, they may be effectively used in the process in appropriate situations. The support provided by these laws becomes evident, for example, when arbitration involves electronic contracts. Take the Rome I Regulation for example, which provides guidance for interpreting characteristic performance for electronic contracts concluded online.[24]

From this chapter, it can be concluded that there are two overarching methods to select the applicable substantive law in international commercial arbitration: the *voie directe* and the *voie indirecte* methods. The situation where a specific choice of law rule is specified (usually the closest connection rule), has been considered as either the *voie directe* or the *voie indirecte* method, depending on the scholar. In this thesis however, the method is considered to fall under the *voie indirecte* due to the consistent necessity for arbitrators, in both scenarios — where a specified conflict of laws rule in the arbitration law is followed or when arbitrators determine the applicable law using their chosen conflicts of law rule — to invariably apply a conflict of laws rule. The chapter also importantly reveals that the UNCITRAL Model Law[25] is associated with the *voie indirecte* method whereas the UNCITRAL Arbitration Rules[26] is associated with the *voie directe* method.[27]

The chapter also demonstrated that when arbitrators must apply the *voie directe* or the *voie indirecte* method, they have, among others, applied the conflict of laws rules of the place of arbitration, conflict of laws rules of the potential enforcement jurisdictions, non-national legal systems and conflict of law rules of countries with the closest connection to the dispute.[28] Some of these methods are outdated, rarely used and contemporarily based on the rationale behind their application. The broad and flexible nature of the arbitrators' discretion allows for them to use various strategies such as applying the closest connection test, the cumulative test and applying the *lex mercatoria* to determine either the appropriate conflict of laws rule to

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23 See para 4.2 above.
24 See para 4.2.2 above
25 UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (1985).
26 UNCITRAL Arbitration Rules with art 1, paragraph 4, as adopted in 2013 and art 1, paragraph 5, as adopted in 2021 (1976).
27 See para 4.2.3 above.
28 See para 4.4 above.

select the applicable substantive law or directly select an applicable substantive law.[29] It is suggested that arbitrators must leverage the strengths and weaknesses of these strategies in order to effectively select the applicable substantive law. Here the skill and expertise of arbitrators are the most crucial factors.

7.1.4. Conclusions on the methods used by arbitrators to assign the applicable substantive law in Egypt, Ghana, South Africa and Côte d'Ivoire

Chapter 5 leads to the conclusion that the harmonisation of international commercial arbitration laws has made the structure, content and text/ wording of most national and institutional arbitration laws similar.[30] Principles such as party autonomy and by extension expressly allowing arbitrators to decide as *amiable compositeur* or *ex aequo et bono* and the default authority of arbitrators to select the applicable substantive law in the absence of the parties' choice have become commonplace in national and institutional arbitration laws. This chapter demonstrates that this phenomenon can be attributed to the widespread direct or indirect adoption of the UNCITRAL arbitration instruments. In Africa, although a jurisdiction may not be considered to have adopted the UNCITRAL Model Law, it still has national arbitration laws that incorporate the indirect method that the model law provides. African arbitration institutions generally also adopt the indirect method or the direct method which the UNCITRAL Arbitration Law provides.[31] This trend is observed in the national and selected institutional arbitration laws found in Africa.

In Egypt, Ghana, South Africa and Côte d'Ivoire variations of the direct and indirect methods can be identified from their national arbitration laws.[32] The Egyptian national law which regulates international commercial arbitration provides a specific conflict of laws rule directing arbitrators to apply the law most closely connected to the dispute. The chapter also reveals that the Ghanaian and South African national laws for international commercial arbitration incorporate the indirect method. Côte d'Ivoire, which is a member of the OHADA, utilises the organisation's Uniform Act on Arbitration. This Act provides the direct method for arbitrators to assign the applicable substantive law in the absence of the parties' choice. From this synopsis

29 See para 4.4.4 above.
30 See para 5.1.2 above.
31 See para 5.1.4 above.
32 See para 5.3.1 above.

gathered, it can be concluded that the national arbitration laws in Egypt, Ghana, South Africa and Côte d'Ivoire follow the global trends when it comes to provisions relating to the applicable substantive law. It is evident that these countries are aligned with international standards in this regard.

The chapter also demonstrates that selected arbitration Institutions in Egypt, Ghana, South Africa and Côte d'Ivoire have incorporated variations of the direct and indirect methods in their arbitration laws.[33] The CRCICA[34] provides in its 2011 rules a specific conflict of laws rule, the closest connection rule, to be used by arbitrators to assign the applicable substantive law. The rules of the GAC[35] unfortunately do not provide any guidance on how the applicable substantive law is to be determined. In this situation, it is suggested that the indirect method adopted in the Ghana ADR Act[36] is likely to be used to fill this lacuna. The lack of guidance on the matter, however, demonstrates the relationship between national arbitration laws and institutional arbitration laws. The AFSA incorporates the direct method in its 2021 rules,[37] in line with current international practices. The Common Court of Justice and Arbitration (CCJA) of the OHADA incorporates the indirect method in its 2017 rules.[38] This synopsis facilitates the inference that, unlike top arbitration institutions worldwide, such as the ICC Court of Arbitration and the LCIA that currently favour the direct method, the selected arbitration institutions adopt either the direct or the indirect method. For this reason, the trend among top world-acclaimed arbitration institutions in relation to provisions on the applicable substantive law cannot be generalised. This is because different institutions have different preferences.

In the same vein, countries and institutions have preferences when it comes to the arbitrator's authority to select national and/or non-national laws as the applicable substantive law in the absence of the parties' choice.[39] Although there might be uncertainties arising from different language versions of the national and institutional arbitration laws, it is generally accepted that arbitrators may resort to non-national laws or rules even in the absence of

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33 See para 5.3.3 above.
34 Cairo Regional Centre for International Commercial Arbitration. See CRCICA 2022 https://crcica.org/.
35 Ghana Arbitration Centre. See GAC 2022 https://arbitrationcentregh.com/.
36 Ghana Alternative Dispute Resolution Act 798 of 2010.
37 Arbitration Foundation of Southern Africa. See AFSA 2022 https://arbitration.co.za/international-arbitration/international-rules/.
38 Common Court of Justice and Arbitration (CCJA) Rules of 2017.
39 See para 5.3.2 above.

a choice of law agreement. Nevertheless, the use of the expression "law" rather than "rules of law" in a provision relating to the arbitrators' authority to select the applicable substantive law can create the impression that their choice of applicable law must necessarily be a particular national law. In the interests of legal certainty and predictability, it is suggested that the expression "rules of law" should be used in international commercial arbitration laws to dispel any confusion on the matter. The fact is that arbitrators may face uncertainties when they have to identify and determine the applicability of mandatory and non-national laws in international commercial arbitration. Many of the solutions arbitrators will have in these situations are heavily predicated on their discretion which can be unpredictable. It is suggested that arbitration rules provide arbitrators guidance on how to properly deal with mandatory and non-national laws or rules in international commercial arbitration.

7.1.5. Conclusions on the efficient methodology for assigning the applicable substantive law

In Chapter 6, it was opined that there are some policy considerations that influence the arbitrator's discretion when assigning the applicable substantive law in international commercial arbitration.[40] The chapter demonstrated that these policies can be viewed from three perspectives — transnational perspective, party perspective and jurisprudential perspective.[41] These policies are likely to be evaluated by the arbitrator before an informed arbitral decision would be reached. It was opined that although these policies influence the arbitrator'' discretion, one policy is not more relevant than the other. On a case-by-case basis, the arbitral tribunal must carefully consider relevant policies and make decisions that are consistent with the expectations and needs of the parties.

The chapter concluded that three distinct methods used by arbitrators to select the applicable substantive law can be identified in the national and selected institutional arbitration rules found in Egypt, Ghana, South Africa and Côte d'Ivoire.[42] These methods are the application of a specified choice of law rule of the seat, the UNCITRAL Method: the application of a conflict of laws rule identified by the arbitrators and the direct application of the law or rules of law arbitrators consider appropriate. It can be deduced from the chapter that, when identifying the applicable substantive law using any of

40 See para 6.1.1 above.
41 See para 6.1.1. a above.
42 See para 6.4 above.

these methods, the arbitrator's choices are guided by policy considerations.[43] It is, therefore, crucial that arbitrators understand the relationship between the policies that underline their decisions and the methods they use to assign the applicable substantive law. This will help them to make well-reasoned decisions.

The chapter further opined that an optimal method to be used by arbitrators to assign the applicable substantive law is one that embraces the precepts of consistency, certainty and predictability. The chapter argued that the issue with the current regulatory regime found in the national and selected institutional arbitration laws found in Egypt, Ghana, South Africa and Côte d'Ivoire is that it confers broad and unfettered discretion on the arbitrators who have to identify the applicable substantive law.[44] Considering the potential impact of arbitral discretion on the outcome of disputes and the minimal judicial review of the merits of awards, there is a preference for a more certain and predictable legal framework.

To this end, the chapter suggests that the current framework that regulates how arbitrators assign the applicable substantive law, as found in the national and selected institutional arbitration laws found in Egypt, Ghana, South Africa and Côte d'Ivoire, needs reform. The chapter demonstrates that the current regime would benefit from the adoption of a specific conflict of laws rule (the *lex loci solutonis* rule) and the incorporation of rules to provide guidance on the applicability of both mandatory laws and non-national laws or standards in international commercial arbitration.[45] The reasons provided to justify the need for this reform include legal certainty, predictability and sound administration of justice. These elements are particularly crucial for the arbitration industry in Africa, which is still developing and evolving.

Section II: Recommendations and Proposals

7.2. Recommendations and Proposals for National and Institutional International Commercial Arbitration Laws

43 See para 6.4 above.
44 See para 6.6.1 above.
45 See para 6.7 above.

a. Adopt the *lex loci solutionis* rule in international commercial arbitration laws

From the discussion thus far, it is discernible that the direct application of the law or rules of law arbitrators consider appropriate (the direct method), and the application of a conflict of laws rule identified by the arbitrators (the indirect method), used by arbitrators to determine substantive law, are prone to producing uncertainty and unpredictability, contrary to the goals of international arbitration.[46] The closest connection method which is specified in some national and institutional arbitration laws also leads to uncertainty when the arbitrators have to assign the law applicable to the merits of a dispute.[47]

In the context of contemporary Africa, when the parties do not choose an applicable substantive law, the most efficient method for determining substantive law, therefore, is one that promotes fairness, consistency and predictability in the arbitration decision-making process. This section of the chapter argues that the *lex loci solutionis* rule is the optimal international conflicts rule to be used in international commercial arbitration. It is the preferred method because it increases certainty and predictability by narrowing the scope of the arbitrator's discretion when they have to assign the applicable substantive law. By clearly indicating that the *lex loci solutionis* rule applies, parties can also make a fair evaluation of how the arbitrators will proceed in the process of determining the applicable substantive law, in the absence of their choice.

To guarantee certainty, predictability and consistency in identifying the applicable substantive law and to promote outcomes favourable to arbitrating parties, it is, therefore, proposed that any variation of the direct, indirect or closest connection methods, found in national and institutional arbitration laws be replaced with the *lex loci solutionis* rule. This proposed amendment to the direct, indirect and closest connection methods, will provide arbitrators with some guidance to establish the applicable law. For this purpose, the law of the place of performance is preferred because it is naturally suitable for an international contract.[48] The *lex loci solutionis* rule on the one hand allows for a high degree of legal certainty with respect to applicable law and on the other hand ensures equity or justice — in the

46 See para 6.6.1 above.
47 See para 6.6.1 above.
48 Obiri-Korang 2022 *Lex Portus* 35.

sense that it is the law of the place with sufficient interest in the performance of a contract.[49]

Regardless of the suitability of the *lex loci solutionis* rule for commercial matters, it may only become appropriate for assigning the applicable substantive law in the absence of the party's choice. To refine the application of the *lex loci solutionis* rule in international arbitration, it is suggested that legislators or drafters consider implementing bright-line rules that at the very least serve three main purposes.

First, the rules they design must clearly make the *lex loci solutionis* rule the main objective criterion when arbitrators have to assign the applicable substantive law. Although the Brussel I Recast is an instrument that regulates jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, its article 7(1) provides a useful illustration of a bright-line rule that can be adopted in relation to the *locus solutionis*. It is suggested that adopting the *lex loci solutionis* rule will provide arbitrators with a more commercially sound approach to determining the applicable substantive law. This, in turn, will allow both arbitrators and parties to have more certainty about the choice of law rule to be applied.

To enhance the *lex loci solutionis* rule drafters or legislators should further incorporate the concept of characteristic performance, which finds a place in the Rome I Regulation.[50] The adoption of the concept would be beneficial for the determination of the *lex loci solutionis* in the absence of the parties' choice of law because the characteristic performer is the party who is more interested in carrying out the obligations of the contract.[51] The characteristic performance, however, can be hard to identify in certain complicated contracts.[52] Therefore, second, the rules designed by drafters or legislators must go further and clarify the precise manner by which the characteristic performance of the contract would be identified in the absence of a choice of law.[53]

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49 Obiri-Korang 2022 *Lex Portus* 34.

50 Giuliano and Lagarde 1980 *OJEC* 20.

51 Okoli and Arishe 2012 *J Priv Int Law* 516.

52 Fawcett, Carruthers and North *Cheshire, North & Fawcett: Private International Law* 727.

53 For this purpose, the characteristic obligations under a contract may constitute 'the centre of gravity' and the predominant 'socio-economic function of the contractual transactions. Giuliano and Lagarde 1980 *OJEC* 20. In order to clarify this issue, a similar provision such as Recital 19 of the Rome I Regulation (2008) can be adopted

By adopting the concept of characteristic performance, it is proposed that the drafters of national and institutional arbitration laws should stipulate certain fixed rules (more specific rules), as in article 4 of the Rome I Regulation, to highlight the relevant legal system that will govern certain important types of contracts such as *inter alia*, those involving the sale of goods, services, immovable property, franchise and distribution contracts.[54] This will lend precision and clarity to the concept of characteristic performance, in relation to the specified contracts.

It should be noted that the identification of the place of performance through the habitual residence of the characteristic performer, can be fallacious and amount to a legal fiction.[55] The habitual residence of a characteristic performer, for instance, does not have more significance over the place where a contract is to be executed. For this reason, it is suggested that international commercial arbitration laws adopt the mechanism of utilising the law of the place of characteristic performance as opposed to the law of the habitual residence of the characteristic performer.[56] Applying the place of characteristic performance considerably resolves the problem of classifying and identifying the obligation in question.

Regardless of this, in instances where the place of performance of a characteristic obligation cannot easily be identified, it is suggested that the habitual residence or place of business of the characteristic performer can be resorted to. Adopting the habitual residence or place of business of the characteristic performer for such situations will promote legal certainty and flexibility. Therefore, third and final, it is proposed that the rules designed must provide for the application of the law of the habitual residence of the characteristic performer to be used as a last resort in those fringe cases where the place of characteristic performance proves impossible to identify. The reason for this is that it may be easier to ascertain the habitual residence (or place of business) of the characteristic performer in those situations where the place of performance proves hard to identify.[57] The principal place of business, for instance, is usually the real place of

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to provide guidance as to how to identify characteristic performance in a complicated contract. See Regulation (EC) No 864/2007 of the Europe Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (2007).

54 Giuliano and Lagarde 1980 *OJEC* 20.

55 Okoli *Place of Performance: A Comparative Analysis* 64.

56 Okoli *Place of Performance: A Comparative Analysis* 62.

57 Lando 1974 *RabelZ* 30-31.

performance of most contracts made by an enterprise. It is the place where most of its contracts are prepared, decided upon and performed.[58]

The COVID-19 pandemic has had a profound impact on not only the civilised world but has also altered the operation of global businesses. The pandemic has led to a surge in e-commerce and accelerated digital transformation, as more and more business activities take place over the internet.[59] This invariably has increased the likelihood of disputes involving transactions concluded online — such as the sale and delivery of digitised goods. The approach suggested in this section is certain and predictable yet flexible enough to assist arbitrators to assign the applicable substantive law where the parties have failed to choose one and the place of performance is difficult to identify.

It is proposed that new and existing arbitration laws in Africa (and elsewhere) incorporate the *lex loci solutionis* rule as the main connecting factor in international commercial arbitration when the parties have failed to select an applicable substantive law, and only resort to the habitual residence (place of business) of the characteristic performer as a last resort. This proposed method for assigning the applicable substantive law in the absence of the parties' choice could be used not only by arbitrators but also legislators, judges and other decision-makers.

b. Alternatively, refine the closest connection rule

As can be deduced from the discussion so far, arbitrators do require guidance when they have to assign the applicable substantive law in the absence of the parties' choice. The direct and indirect methods which grant arbitrators broad and unfettered discretion on the matter are untenable. What is needed instead is predictable rules that would provide arbitrators with a comprehensive framework for assigning the applicable substantive law. The closest connection rule as it exists under some arbitration laws[60] does not provide arbitrators with any rules to guide them to precisely identify

58 Although is some sales contracts, like the F.O.B clauses may have located the technical place of performance elsewhere, the centre of the real obligation remains at the seller's place of business. Lando 1974 *RabelZ* 30-31.

59 See generally United Nations COVID-19 and e-Commerce: A Global Review.

60 See sec 39(2) of the Egyptian Law Concerning Arbitration in Civil and Commercial Matters No. 27 of 1994.

the applicable substantive law.[61] The fact is that, in arbitration practice, this closest connection formula can be vague and convoluted.[62]

Nevertheless, the arbitration laws that have incorporated the closest connection test have made a step in the right direction. That is, they provide some guidance for arbitrators to assign the applicable substantive law in the absence of the parties' choice instead of leaving the matter to the direct and indirect methods. Despite the progress made by incorporating the closest connection test into arbitration laws, there is still room for further refinement and improvement. Thus, as an alternative to the approach proposed above,[63] drafters or legislators may also opt to adopt a refined closest connection test in their arbitration laws to guide arbitrators to assign the applicable substantive law in the absence of the parties' choice.

To refine the closest connection test, some bright-line rules can be incorporated into international commercial arbitration laws.[64] First, the rules that incorporate the closest connection test must further adopt the concept of characteristic performance. Here, the precise manner by which characteristic performance would be identified must be specified. Concerning this, as earlier noted, the habitual residence (or place of business) of the characteristic performer, which is usually relied on because of its association with Rome I Regulation, is arguably not a connecting factor that best honours the objectives of the closest connection test.[65] Therefore, it is proposed that drafters or legislators of international commercial arbitration laws, should give significance to the law of the place of characteristic performance.

Second, to assist with the identification of the *locus solutionis*, fixed-styled rules, similar to those under article 7(1) of the Brussel I Recast, should be adopted by the countries and arbitration institutions that will opt for the closest connection test.[66] Provisions like this will promote legal certainty, predictability and foreseeability in the arbitration proceedings when arbitrators have to assign the applicable law in the absence of choice.

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61 See art 39 of the Egyptian Arbitration Law of 1994.
62 Khanderia 2020 *J Priv Int Law* 450.
63 See para 7.2 (a) above.
64 See generally *Hayward Conflict of laws and Arbitral Discretion - the Closest Connection Test*.
65 Okoli *Place of Performance: A Comparative Analysis* 63.
66 Khanderia 2020 *J Priv Int Law* 445-450.

Finally, drawing from the Rome I Regulation's rules, drafters and legislators can adopt an escape clause in such arbitration rules to balance predictability with flexibility.[67] The escape clause[68] can be incorporated by drafters or legislators to supplement the principal connecting factor (which in this case would be the law of the place of characteristic performance), especially where that law designated by the connecting factor has little or no connection with the dispute. Consequent to this, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, that law would be applied.[69] Based on a provision like this, arbitrators can, for instance, apply non-national rules or standards in the interest of justice and fairness.

In brief, although this refined closest connection rule may provide less certainty and predictability compared to adopting the method proposed above, it is still preferable to the direct and indirect methods which fail to provide guidance for the arbitrators' discretion on choice of law matters in international commercial arbitration.[70] Although this is not the preferred method, if drafters and legislators opt for the closest connection test, they need to postulate detailed guidelines to bring about enhanced predictability and certainty into the arbitration process.

c. Balance flexibility with predictability and legal certainty

Arbitrators are bound to decide the merits of a dispute based on the legal tools afforded to them by the parties.[71] The choice of a national or institutional arbitration law directly impacts on what the parties authorise arbitrators to do when it comes to determining the applicable substantive law. Arbitrators, therefore, may (and indeed should) apply any relevant mandatory laws or non-national laws or standards, in as much as the parties may properly be deemed to have subjected themselves to those laws by electing to conduct the arbitration in a particular country or through a specific arbitration institution. When making decisions regarding matters related to

67 Art 4(4) of the Rome I Regulation (2008).

68 An escape clause has been defined by Okoli as a provision incorporated or adopted in a legal document to supplement or cure the defect in the principal connecting factor, especially where the law designated by the principal connecting factor has little or no connection with the dispute to be resolved before the court. Okoli *Place of Performance: A Comparative Analysis* 109.

69 Hayward *Submission to the Public Consultation on Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules* 10.

70 Belohlavek 2014 *Rev Rrom Asig* 5.

71 Waincymer *Procedure and Evidence in International Arbitration* 3-4; Blackaby *et al Redfern and Hunter on International Arbitration: Student Version* 353.

non-national laws or standards and mandatory laws, arbitrators are entrusted with a significant degree of discretion, and it is incumbent upon them to exercise this freedom judiciously and prudently. It is suggested that clarity and consistency in the provisions that grant authority to arbitrators to either apply non-national laws or standards or mandatory rules is an effective way of improving legal certainty and predictability in these issues.[72]

It is, therefore, proposed that drafters and legislators implement provisions that can offer legitimate guidance to arbitrators regarding the exercise of their discretion in respect of mandatory rules. Drafters or legislators should, for instance, adopt provisions directing arbitrators on how they should treat applicability of mandatory rules of the *lex loci arbitri*, the governing law and foreign mandatory rules in international commercial arbitration. When considering how the arbitrator's discretion to apply mandatory rules should be exercised, it is logical and instructive to consider the approach taken by national courts. Therefore, drafters or legislators may draw inspiration from provisions such as article 19 of the Swiss Federal Act on Private International Law (PILA).[73] The article, which is titled, "Taking into account of mandatory provisions of foreign law" provides that:

> (1) If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated by this Code may be taken into account if the circumstances of the case are closely connected with that law.
> (2) In deciding whether such a provision must be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law.[74]

Under this provision, one of the conditions for the application of a mandatory law is the presence of legitimate and clearly overriding interests of a party in the application of the rule in question.[75] Therefore, according to this provision, the arbitrator must apply a mandatory law if he considers it a legitimate expectation of the parties. The applicability of a mandatory law is considered on the basis of the parties' legitimate expectations and not on the efficacy of the award. It is proposed that a similar provision should be

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72 See generally König 2015 *PYIL* 265-292; Greenawalt 2008 *ARIA* 118-119.
73 Swiss Federal Act on Private International Law of 1987. Drafters and legislators may also draw inspiration from art 9 of the Rome I Regulation when addressing the applicability of mandatory laws in international commercial arbitration.
74 Swiss Federal Act on Private International Law of 1987.
75 Zhilsov 1995 *NILR* 116.

adopted in arbitration laws to establish clear and definitive rules regarding mandatory rules.

It is also proposed that similar legal certainty should be embraced when dealing with the applicability of non-national laws in international commercial arbitration. It is proposed that the expression 'rules of law' as opposed to 'law' should be used in provisions relating to the applicable substantive law, for instance. This will send a clear signal to users of the particular national or institutional arbitration law that arbitrators are authorised to select not only national laws but also non-national laws or standards.[76] Arbitrators must be granted the authority to apply non-national laws with clear and definitive rules.[77] An arbitrator's authority to apply non-national laws or standards which it determines appropriate should be exercised within the legitimate expectations of the parties. The arbitrators should always take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.[78]

It is evident that a degree of flexibility is crucial when arbitrators address matters concerning non-national laws or standards and mandatory laws. This, however, should not come at the expense of legal certainty and predictability. Parties that choose arbitration expect the process to provide a fair and predictable outcome. Arbitrators should, therefore, exercise their discretion judiciously when dealing with these matters.

7.3. Final Remarks

In conclusion, this study thoroughly explored the legal frameworks governing international commercial arbitration globally and within selected countries in Africa. It scrutinised the various methods and strategies used by arbitrators to assign the applicable substantive law in the absence of the parties' choice. The study provides a comprehensive assessment of the efficiency, predictability, and legitimacy of these methods from an African standpoint.

The findings of this thesis contribute to existing knowledge on international commercial arbitration in Africa, while offering practical insights to policymakers and the users of arbitration. The proposals and

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76 Bantekas *et al UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 739.

77 For this purpose, drafters and legislators can use art 187 of the Swiss Federal Act on Private International Law (PILA) of 1987 as a valuable reference point.

78 See art 28 (4) of the UNCITRAL Model Law (1985).

recommendations put forth in this study aim to enhance predictability and legal certainty in assigning the applicable substantive law in international commercial arbitration. Examining the topic through the lens of countries like Egypt, Ghana, South Africa and Côte d'Ivoire fills a gap in the literature and highlights unique considerations and challenges when dealing with the topic in the African context.

More importantly, the proposals and recommendations in this thesis will serve as a valuable resource not only for arbitrators and the users of international commercial arbitration but also legislators, judges, decision-makers and others interested in reforming their choice of law rules on the law applicable in the absence of choice in international commercial contracts. At the very least, this study encourages further research and dialogue on the topic from an African perspective.

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