

Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration

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By; Helena Carlquist
Supervisor; Professor Svante O. Johansson



Department of Law
School of Business, Economics and Law
GÖTEBORG UNIVERSITY

Summary

A majority of international commercial contracts include an arbitration clause which in the event of a contractual dispute directs the parties to apply arbitral proceeding. One of the central motives for choosing arbitration is the right to choose which law or rules of law shall govern the parties' contractual relationship. The right to choose substantive law is often referred to as *party autonomy*.

Most parties entering into arbitration agreements believe that once a choice of law is made, that law exclusively determines the legal framework between the parties. However, this overlooks the fact that circumstances remain in which an arbitrator will be required to apply rules arising from a legal regime other than the one chosen by the parties. There exist in fact numerous of restrictions which in different ways limits the parties' choice of law. This thesis is an attempt to present a useful and efficient method when identifying which restrictions the parties' choice of law might be subject to.

Part I points out the basics of international commercial arbitration and presents an overview of the principle of party autonomy in the context of applicable substantive law. *Part II* shows that party autonomy is a conflict rule which in the event of a conflict between potential applicable laws designates the "correct" applicable law. As party autonomy in itself is a conflict rule, private international law must be applied to determine its scope. Accordingly, private international law and its conflict rules (other than party autonomy) might have to be applied even if the parties have chosen an applicable law. *Part III* examines current arbitration laws and rules of law in respect to conflict rules. The section shows that modern legislation often grant the arbitral tribunal a far-reaching freedom by letting the arbitrators use the conflict rules it deem appropriate (or even by giving the arbitrators the freedom not to use any conflict rules at all).

Part IV discusses *which* system of private international law governs party autonomy and determines its scope. It examines the different approaches available for the arbitral tribunal and shows that the most sufficient approach is an application of the so-called closest connection test, i.e. the scope of party autonomy must be determined by the system of private international law which has the closest connection to the subject matter of the dispute.

Part V summarizes the conclusions drawn in the foregoing discussions and reflects upon these. It underlines the fact that private international law still is a national phenomenon -consequently, the scope of party autonomy may vary depending on which system of private international law one applies.

Abbreviations

AAA	American Arbitration Association
DIS	German Institute of Arbitration
EU	European Union
ICC	International Chamber of Commerce
ICJ	International Court of Justice
NAI	Netherlands Arbitration Institute
LCIA	London Court on International Arbitration
UNCITRAL	United Nations Commission on International Trade and Commerce
SCC	Stockholm Chamber of Commerce
VIAC	Vienna International Arbitration Institute
UK	United Kingdom

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1 Introduction

1.1 General

Trade and commerce have always been international related phenomenon. The present era of globalization has seen an increased number of commercial agreements between two or more parties from different countries and legal systems. Most of these contracts now include an arbitration clause which in the event of a contractual dispute directs the parties to apply arbitral proceeding. The avoidance of courtroom proceedings is one of the primary reasons for parties to enter into an arbitration agreement. Another central motive for choosing arbitration is the right to choose which law or rules of law shall govern the parties' contractual relationship. This right is called *party autonomy*.¹

A majority of parties entering into arbitration agreements believe that once a choice of law is made, that law exclusively will determine the legal framework between the parties. However, this overlooks the fact that circumstances remain in which an arbitrator will be required to apply rules arising from a legal regime other than the one chosen by the parties. Where the dispute in question is international to its character, such restrictions on party autonomy may arise under several of the legal systems associated with the parties' transaction. The problem is, however, that there is no universally accepted legal method for resolving which set of restrictions on party autonomy must be applied by the arbitral forum. It is critical to resolve this question if parties are to be able to properly evaluate their rights and liabilities in an arbitral dispute.

1.2 Topic and Thesis Statement

The topic of this thesis is party autonomy in international commercial arbitration. The key question is *how to determine the scope of party autonomy in international commercial arbitration*.

This thesis recognizes that the scope of party autonomy should be determined by reference to private international law. It seeks to provide an appropriate method of determining *which* system of private international law that governs party autonomy and consequently decide the extent of the parties' freedom to choose applicable substantive law.

¹ When using the term *party autonomy* in this thesis, the author exclusively refers to the right for the parties of an arbitration agreement to choose applicable *substantive* law.

1.3 Method and Disposition

The analysis made in this thesis is based on existing national and international rules of law as well as on modern legal doctrine. At present there is no legislation which regulates how to determine the scope of party autonomy and legal scholars have not offered a satisfactory answer to the question posed. Therefore, the analysis in this thesis is to a large extent based on analogical interpretation of existing legislation and the author's own conclusions.

Further, as most awards of international commercial arbitration remain unpublished, it is almost impossible to know how arbitral tribunals act in practice. The analysis is therefore not an attempt to "map out" arbitral practice. Instead it identifies the most appropriate method for determining which system of private international law governs party autonomy by examine relevant legislation and other legal documents rather than arbitral practices. The intention of this thesis is to offer the reader an appropriate and useful method, rather than simply present a descriptive essay.

The *first part* of the thesis provides for relevant background information; pointing out the basics of international commercial arbitration and the principle of party autonomy in the context of applicable substantive law. The *second part* analyzes how to determine the scope of party autonomy by using private international law. The *third part* examines current arbitration laws and rules of law in respect to conflict rules designating applicable law. The *fourth part* discusses *which* system of private international law should govern party autonomy in international commercial arbitration. Finally, the *fifth part* summarizes the conclusions drawn from the previous analysis. It shows that the most appropriate method for determining the scope of party autonomy is to use the system of private international law which has the closest connection with the subject matter of the dispute.

PART I

2 International Commercial Arbitration

2.1 Introduction

In international trade and commerce most contractual disputes are not resolved in national courts. As an alternative parties often decide to use an arbitral proceeding.² An arbitral proceeding is a form of dispute resolution which often is regarded as a more efficient way of resolving international commercial disputes than a proceeding in national court. International commercial arbitration is a universally recognized and accepted method of resolving international business disputes.³ Defining arbitration as international is not based on the fact that international law will apply. Instead, an international arbitration is international in the sense that it deals with disputes that have some sort of an international connection.⁴ In its original form arbitration was a rather simple method of dispute resolution. While it has developed over time to become a complex system, it continues to retain its original character as a method for resolving disputes between parties.⁵

This section briefly outlines the fundamental features of international commercial arbitration. The most central characteristics will be presented as they are essential for the understanding of the following analysis concerning the scope of party autonomy. However, arbitration as a legal instrument for resolving disputes will not be analyzed as such.

2.2 Why Arbitration

As already mentioned, many parties to international commercial contracts prefer to use an arbitral proceeding rather than a court proceeding in the event of a dispute. Although the very avoidance of courtroom proceedings is a key advantage of arbitration, it is the freedom to choose applicable substantive law which also provides an important factor for parties who choose arbitration as a means of dispute resolution. Another reason for choosing arbitration is that the arbitral proceeding often is faster and therefore also cheaper than court proceedings. The arbitral proceeding is further private and confidential, which of course appeals to many actors within the field of international commerce and

² Bogdan, (2004), page 271.

³ Hunter and Redfern, (1999), page 1.

⁴ Cordero Moss, (1999), page 57.

⁵ Hunter and Redfern, (1999), page 2.

trade. The right of parties to appoint their own arbitrators is again an important advantage as parties can appoint arbitrators who are specially qualified for the dispute in question.⁶ Another element which attracts many parties is that the arbitral tribunal's decision is binding and final (within certain limits) and cannot be challenged on the merits.⁷

All the above mentioned factors add up to the most significant benefit of arbitration – the arbitral proceeding is flexible and it is therefore possible to tailor the proceeding to the parties wishes and the specific dispute at hand.⁸

2.3 The Arbitral Proceeding's Legal Framework

To understand the very core of international commercial arbitration one must keep in mind that the parties create the framework for the arbitration. They are the ones that set the standards of the proceeding since the arbitration as such is based on an agreement between them.⁹

Regardless of whether the arbitral proceeding is *ad hoc* or institutional the foundation of arbitration remains the same; arbitration is founded on the will of the parties. The arbitral tribunal is chosen by the parties to resolve a specific dispute and is given directions on how to proceed. It derives its authority from the parties and the scope of this authority is determined by the agreement between the parties.¹⁰ (See further section 2.4.)

In a majority of arbitral proceedings, the arbitrators do not have to look beyond the agreement to decide the outcome the dispute. The contract itself regulates the obligations and responsibilities and which party must be held liable if any failure to perform arises. However, it is essential to remember that the relationship that an international commercial contract creates exists within a legal framework (existing of one or many systems of law). This legal framework governs and regulates the legality and interpretation of the contract, the parties' duties and rights, the mode of performance and the consequences of any breach of the contract.¹¹ As these are questions of great importance it is critical to be able to identify the legal framework within which the contract exists.¹² Hence, even if the parties to a large extent are in charge of the proceedings, the idea of arbitration works and serves its purpose only because it exists within a rather complex legal framework. Furthermore, even if the parties' right to manage the arbitration

⁶ Heuman, (2004), page 1.

⁷ Hunter and Redfern, (1999), page 23.

⁸ Hunter and Redfern, (1999), page 23.

⁹ Hunter and Redfern, (1999), page 1.

¹⁰ Cordero Moss, (1999), page 158-159.

¹¹ Hunter and Redfern, (1999), page 93.

¹² Hunter and Redfern, (1999), page 94.

within this legal framework is far-reaching it is not unlimited.¹³ (See further section 3.7.)

Different systems of law may regulate different aspects of the proceeding. The recognition and enforcement of the arbitration agreement can be governed by one system of law while the recognition and the enforcement of the award may be governed by another. A third system might apply to the proceeding and a fourth to the substantive matters of the dispute.¹⁴ Hence, an arbitral proceeding's legal framework is often multifaceted.

If the tribunal cannot determine which system of law governs a specific area of the dispute it is impossible to continue the proceeding. Therefore, knowing the applicable law, or laws, is a matter of fundamental concern for both the arbitral tribunal and the parties. It is crucial that the parties with some degree of certainty can predict which rules of law govern the dispute since this enables them to evaluate the risks arising from the contract as well as to determine how to proceed in the event that a dispute arises.

2.4 The Nature of Arbitration

For a long time international arbitration was considered to be on the same level as domestic arbitration. It was regarded as a form of dispute resolution existing within the system of national law of the country where the arbitral tribunal was seated. However, during the last decades this approach has changed dramatically and the so-called delocalisation theory has won ground.¹⁵ The theory suggests that international commercial arbitration is detached from national laws. Instead, it is emphasized that international commercial arbitration entirely is dependent on the will of the parties.¹⁶

The nature of arbitration is not only a theoretical dilemma. It also creates problems of a practical importance as different understandings of the notion of arbitrations have an important impact on how the parties' rights and obligations are understood.¹⁷ Three different theories can be recognized in the legal debate relating to this issue; 'the contractual theory', 'the jurisdictional theory' and 'the hybrid theory'.

The contractual theory looks at arbitration purely as a contractual phenomenon. Its advocates argue that everything related to an arbitral proceeding is a product of an agreement between parties. They believe that arbitral proceedings are detached

¹³ Hunter and Redfern, (1999), page 1.

¹⁴ Hunter and Redfern, (1999), page 1-2.

¹⁵ Cordero Moss, (1999), page 181.

¹⁶ Cordero Moss, (1999), page 58.

¹⁷ Barraclough and Waincymer, (2005), page 208.

from *lex fori* and founded on “free enterprise”. In contrast, the jurisdictional theory emphasizes on national sovereignty. The theory argues that all elements of an arbitral proceeding are subject to and regulated by a domestic law, including its conflict of laws rules.¹⁸ The hybrid theory, which is the modern approach, stresses that to achieve a true understanding of arbitration one must realize that the nature of arbitration both is contractual and jurisdictional. Hence, arbitration is considered to be a hybrid of both the contractual theory and the jurisdictional theory.¹⁹

Even if the author of this thesis agrees with the idea that it is the will of the parties which creates the framework for the arbitral proceeding, it must be highlighted that it is impossible to keep the proceeding totally separated from national law. For example, situations may arise when the parties not obey with an award voluntary and it will be necessary to refer to a particular national legal system.²⁰ Generally, however, international commercial arbitration must be considered as a phenomenon based on the will of the parties and not subject to national legislation. One must nevertheless recognize that party autonomy is a conflict of laws rule [‘conflict rule’], and just like other conflict rules, private international law must be applied to determine its scope and to identify the formal conditions attached to it.²¹ (See further section 4.)

3 Choice of Substantive Law and the Principle of Party Autonomy

3.1 General

As one can conclude from the foregoing discussion, it is not enough to know what the parties of an international contract have agreed upon, it is also essential to know which law governs the parties’ contractual relationship.²² The general principle is that the parties have the freedom to choose which law shall govern the substance of their contract.²³

The choice of law is an essential decision as it determines the risks arising from the contract. Even if the avoidance of courtroom proceedings is the most significant reason for parties to enter into an arbitration agreement is it obvious

¹⁸ Barraclough and Waincymer, (2005), page 209.

¹⁹ Barraclough and Waincymer, (2005), page 210-211.

²⁰ Cordero Moss, (1999), page 59.

²¹ Cordero Moss, (1999), page 246.

²² Hunter and Redfern, (1999), page 94.

²³ Bogdan, (2004), page 271-272; see also Hunter and Redfern, (1999), page 94.

that many actors in the field of international commercial transactions choose arbitration because they wish to have the freedom to select applicable law.²⁴

Without a full understanding of the principle of party autonomy in respect of the right to choose applicable law, it is impossible to examine how to determine its scope. Thus, it is essential that the basics of the principle are recognized and comprehended. The following section therefore discusses and analyses the principle.

Party autonomy has gained acceptance in international law and has received recognition in almost all national jurisdictions.²⁵ The principle provides a right for the parties of an international commercial agreement to choose applicable substantive law. When the parties have made a choice of substantive law this choice generally refers to the law governing the parties' contractual relationship. Unless otherwise provided for, such choice does not refer to the conflict rules arising under private international law.²⁶

The modern view is that the parties have the freedom to choose any substantive laws or rules of law even if these do not have any connection to the parties or the specific dispute.²⁷ The parties are not only free to choose a system of national law, but may also choose to rely on trade usage, a-national rules of law, transnational law, *lex mercatoria*, general principles of law or general principles of international law.²⁸

3.2 The Codification of Party Autonomy

Party autonomy is recognized both in national legal systems and international conventions.²⁹ Article 7 of the European Convention on International Commercial Arbitration of 1961 ['the European Convention'] provides;

“[t]he parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute.”³⁰

Article 33.1 of the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 ['UNCITRAL Arbitration Rules'] states that;

“[t]he arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.”³¹

²⁴ Kühn, (1999), page 380.

²⁵ Chukwumerije, (1994), page 105-106; see further *n* 23.

²⁶ Blessing, (1999), page 393.

²⁷ Kühn, (1999), page 384.

²⁸ Blessing, (1999) page 400; see also Hunter and Redfern, (1999), page 98.

²⁹ Hunter and Redfern, (1999), page 95.

³⁰ Article 7, *the European Convention*, (1961).

Most arbitral institutions also recognize the principle of party autonomy, for example do the International Chamber of Commerce's Arbitration Rules of 1998 ['ICC Arbitration Rules'] provide;

"[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute"³²

Stockholm Chamber of Commerce's Arbitration Rules of 1999 ['SCC Arbitration Rules'] stipulate that;

"[t]he Arbitral Tribunal shall decide the merits of the dispute on the basis of the law or rules of law agreed by the parties."³³

The Rome Convention on the Law Applicable to Contractual Obligations of 1980³⁴ ['the Rome Convention'] – a central document from a European perspective – states in its third paragraph that;

"A contract shall be governed by the law chosen by the parties."³⁵

Not only has party autonomy been codified in legal documents, the principle has also been widely adopted in practice.³⁶ It has been argued that, "as a matter of transnational *ordre public* and *lex mercatorum*, arbitrators must respect the parties choice of law".³⁷ It has further been emphasized that party autonomy in the selection of applicable law shall be regarded as a "general principle of law" within the meaning of Article 38 of the Statute of the International Court of Justice of 1945 ['the ICJ Statute'].³⁸

³¹ Article 33(1), *UNCITRAL Arbitration Rules*, (1976); see also Article 28, *UNCITRAL Model Law*, (1985)

³² Article 17(1), *ICC Arbitration Rules*, (2003).

³³ Article 24(1), *SCC Arbitration Rules*, (1999).

³⁴ The Rome Convention does not apply to arbitration agreements and on agreements on the choice of courts, see Article 1(2)(d). However, it remains a cornerstone in European contract law and must therefore be referred to in *all* discussion relating to contractual relationships within EU.

³⁵ Article 3(1), *the Rome Convention*, (1980).

³⁶ Cordero Moss, (1999), page 52.

³⁷ Blessing, (1999), page 395.

³⁸ Plender and Wilderspin, (2001), page 87. Article 38(1) of *the ICJ Statute* reads; "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

3.3 The Primary Advantages of Party Autonomy

The primary advantage of party autonomy is that the parties can choose a law that they are familiar with and whose provisions are suitable for the agreement in question. The parties can further avoid the application of a law with a close connection to the transaction, and which therefore would apply, by choosing another applicable law. By making a clear choice of law the parties will know what they can expect from each other and the arbitral tribunal. Party autonomy is therefore often argued to provide for certainty and predictability.³⁹ However, as will be discussed later, the scope of party autonomy is limited and subject to restrictions. In fact, a choice of law may not set the legal standards the parties thought it would.

3.4 The Choice of Law

Parties to an international commercial contract will in most cases make a choice of law by including a choice of law clause in their contract.⁴⁰

Even if the parties not have made an explicit choice of law, the arbitrators may conclude that the parties have made a so-called implied or tacit choice of law. This is done by inferring a choice of law from the contract or the surrounding circumstances.⁴¹ However, according to the Rome Convention a choice of law “must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”.⁴² Hence, an implied choice of law can only be identified where it is reasonably clear that it is an authentic choice made by the parties.⁴³ Worth mentioning in this context is that the maxim *qui indicem forum elegit ius* (‘a choice of forum is a choice of law’) is rejected by most scholars and is almost totally abandon in arbitral practice. The choice of a particular forum is at present generally only considered to be *one* of many factors which may be relevant when trying to identify an implied choice of law.⁴⁴

In the absence of an explicit or implied choice of law, one approach is to apply more than one law. According to this so-called *trunc commun* doctrine the arbitrators must avoid applying the national law of one of the parties and instead apply the common parts of both parties’ national laws – this being closer to the intentions of the parties.⁴⁵

³⁹ Chuckwumerije, (1994), page 108.

⁴⁰ Blessing, (1999), page 395.

⁴¹ Hunter and Redfern, (1999), page 129; Blessing, (1999) page 396.

⁴² Article 3(1), *the Rome Convention*, (1980).

⁴³ Hunter and Redfern, (1999), page 129.

⁴⁴ Hunter and Redfern, (1999), page 130; see also Blessing, (1999), page 396; Chukwumerije, (1994), page 122-124; and Lew, (1999), page 453-454.

⁴⁵ Blessing, (1999), page 398-400

3.5 The Absence of a Choice of Law

As mentioned earlier, the parties in a majority of commercial agreements use their right to choose a substantive law. In the few situations where the parties have not made a choice of law there are different options open to the arbitrators when trying to determine which substantive law or rules of law to apply. The arbitrators can either focus on the silence of the parties and try to interpret the absence of a choice of law (the so-called subjective approach) or they can apply conflict rules of private international law and consider relevant connecting factors (the so-called objective approach).⁴⁶

The subjective approach has clearly lost ground even if occasionally applied by arbitral tribunals. The objective approach is more commonly used. It offers a “magic tool” for the arbitrators to use when deciding which substantive law to apply.⁴⁷

Even where the objective approach, referring to conflict rules, is used the question *which* conflict rules should be applied remains. This topic has been widely discussed and examined by legal scholars. It is also the main discussion point of this study: namely, *which system of private international law should govern party autonomy and be applied to determine its scope?*

3.6 The Effect of Party Autonomy

Party autonomy is a conflict rule designating which law the arbitral tribunal shall apply. It localizes a legal relationship within the legal framework chosen by the parties and precludes the application of rules of law other than the ones chosen. (See further section 4.2.)⁴⁸

When the parties choose an applicable law their legal relationship is moved from the framework of an otherwise applicable law to the framework of the chosen law. Party autonomy designates the governing law of the contract but does not regulate the substance of the contract; hence the principle of party autonomy is not equivalent to the principle of freedom of contract. The principle of freedom of contract is more limited than party autonomy and does not allow the parties to “escape” a whole system of applicable rules of law.⁴⁹

When establishing the effect of the parties’ choice of law, one must assume that the parties’ choice of law has put their legal relationship in the sphere of a certain legal system. Further, one must make the assumption that this prevents the

⁴⁶ Blessing, (1999), page 406.

⁴⁷ Blessing, (1999), page 406-408.

⁴⁸ Cordero Moss, (1999), page 73. (Regarding the recognition of party autonomy as a conflict of laws rule see further Cordero Moss (1999), page 75-84.)

⁴⁹ Cordero Moss, (1999), page 74.

application of any other rules of law than the one chosen. However, today the number of substantive rules that override conflict rules, such as party autonomy, are both numerous and increasing. As these rules apply regardless of the parties' choice of law, the parties' choice of law not always prevent the arbitral tribunal from applying other rules of law.⁵⁰ Therefore, the effect of party autonomy is difficult to predict with a hundred percent certainty.

3.7 Not an Unlimited Principle of Natural Law

3.7.1 General

“[A]n existence of a general transnational rule of law supporting the autonomy of the parties almost too good to be true.”⁵¹

“It would be wrong or overly euphoric to believe that the parties' autonomy to choose the law or rules of law applicable to their dispute is totally unlimited.”⁵²

These two quotes emphasize the common belief among actors in international commerce that the parties' choice of substantive law exclusively governs their contractual relationship. Parties and other actors trust that once the applicable law is chosen no other rules of law are relevant in respect of the legal relationship between the parties.⁵³

It is true that parties to international commercial contracts have a far reaching freedom to choose which law shall govern their contractual relationship and disputes related thereto.⁵⁴ However, although in principle the consequence of a choice of law is that all other potential laws are excluded from governing the parties' contractual relationship, the rejection of all other rules of law but the one chosen by the parties is not total. The principle of party autonomy is subject to a number of restrictions e.g. overriding mandatory rules and *ordre public* restrictions.⁵⁵ (See further section 3.8.2.)

3.7.2 Restrictions

As the parties' freedom to choose applicable law is not without limitations and one must therefore raise the question of *which* restrictions party autonomy is subject to. This is not the place for a detailed examination of which types of restrictions party autonomy may be affected by. However, to achieve a full understanding of the following discussion one must at least have a basic

⁵⁰ Cordero Moss, (1999), page 74-75.

⁵¹ Hunter and Redfern, (1999), page 97.

⁵² Blessing, (1999), page 402.

⁵³ Cordero Moss, (1999), page 73.

⁵⁴ Blessing, (1999) page 395.

⁵⁵ Cordero Moss, (1999), page 53; see also Blessing, (1999), page 395.

knowledge of the subject; if party autonomy was not subject to any restrictions a discussion regarding how to determine the scope of the principle would be unnecessary!

A rather common approach when trying to restrict the parties' freedom to choose substantive law is to designate certain fields of law where private parties have no right to choose law. These fields will set the outer limits for party autonomy and a choice of a foreign law will not affect the application of the national law in these fields. One way to do this is to adopt conflicts rules which exclude the application of party autonomy in those specific areas of law. Examples of such areas are competition law, labor law and consumer law. Another method is to give the substantive rule an overriding character.⁵⁶ National interests which are often given an overriding character include rules protecting the weaker contractual party,⁵⁷ rules protecting a third party,⁵⁸ rules adopted to regulate national economics⁵⁹ and rules protecting community interests.⁶⁰

There are numerous different methods available to national legislators to restrict the scope of party autonomy and the applicability of the rules of law chosen by the parties.⁶¹ Legal scholars have tried to classify and define these methods. However, there is yet no universally accepted classification. The general understanding, however, appears to be that the applicability of the chosen law, i.e. party autonomy, may be restricted due to *ordre public*, overriding mandatory rules and other conflict rules. Also, it seems to be a common opinion that the chosen law must be *bona fide* and legal.

Giuditta Cordero Moss suggests that it may be permissible to restrict party autonomy on three different grounds; (1) the choice of a foreign law must be rejected if its application violates fundamental principle of public policy, (*ordre public*); (2) the choice of applicable law is further inadmissible when other conflict rules apply; and, (3) the application of the chosen law may be limited because of overriding mandatory rules.⁶² *Alan Redfern* and *Martin Hunter* argue that as long as the intention expressed by the parties when choosing the applicable law is *bona fide*, legal and there is no reason to reject the parties choice because of public policy there should be no restriction of party autonomy.⁶³ (The Rome Convention has adopted provisions relating to *bona fide*⁶⁴ choice and no violation of public policy⁶⁵.)⁶⁶

⁵⁶ Cordero Moss, (1999), page 86.

⁵⁷ Cordero Moss, (1999), page 87.

⁵⁸ Cordero Moss, (1999), page 94.

⁵⁹ Cordero Moss, (1999), page 96.

⁶⁰ Cordero Moss, (1999), page 99.

⁶¹ Cordero Moss, (1999), page 84.

⁶² Cordero Moss, (1999), page 53.

⁶³ Hunter and Redfern, (1999), page 97-98; see also Bogdan (2004), page 250.

⁶⁴ Article 3(3), *the Rome Convention*, (1980).

⁶⁵ Article 7(1), *the Rome Convention*, (1980).

⁶⁶ Hunter and Redfern, (1999), page 98.

In a similar way, *Marc Blessing* identifies three limitations to the parties' freedom to choose applicable law; (1) a choice of applicable law shall be considered invalid if the intention is to defraud the law; (2) mandatory rules of a different legal system than the one chosen may in some situations apply; and, (3) public policy may in some cases restrict the parties' freedom of choice.⁶⁷

While *Cordero Moss*, *Redfern*, *Hunter* and *Blessing* take a rather similar approach, advocating that party autonomy in exceptional cases can be restricted, *Wolfgang Kühn* is of another opinion. Kühn emphasizes that "the overriding principle in international arbitration should be to follow the parties' choice of law even if such law is in conflict with the mandatory rules of another country connected with the contract". He argues that the arbitral tribunal shall apply the law chosen by the parties and the *ordre public* of the country of the chosen law. He further stresses that unless mandatory rules of another country also are part of public policy of the law chosen by the parties, they must be disregarded.⁶⁸ Kühn concludes that not only shall the arbitral tribunal respect the parties' choice of substantive law; they must also disregard mandatory rules of any other country.⁶⁹

3.7.3 In Summary

The principle of party autonomy is not unlimited. The foregoing has shown that national authorities in some situations restrict the principle e.g. by adopting overriding mandatory rules or referring to *ordre public*.

It is understandable that national legislators in some cases have the desire to determine which private actors shall be granted the right to remove themselves from the domestic law. However, one must bear in mind that any limitation of the application of the chosen law opens up a situation of uncertainty. It must be assumed that every choice of applicable law is based on a careful examination of the choice's implications. Furthermore, even if the parties did not make a cautious evaluation when the agreement was signed it must be assumed that they will evaluate the situation in light of the chosen law when a dispute arises.⁷⁰ The reason behind every limitation must therefore be balanced with the parties' interest in the predictable and consistent application of the rules of law.

Even if the potential application of mandatory rules and conflict rules (other than party autonomy) creates unpredictable factors this does not mean that the unpredictability cannot be reduced. By knowing which system of law will govern party autonomy and determine its scope at least the parties can make a high class evaluation regarding whether or not a specific rule, or *ordre public*, will limit their choice of law. This thesis therefore seeks to identify an appropriate method for identifying which system of private international law governs party autonomy and determine its scope.

⁶⁷ Blessing, (1999), page 402-404.

⁶⁸ Kühn, (1999), page 385.

⁶⁹ Kühn, (1999), page 389.

⁷⁰ Cordero Moss, (1999), page 144.

PART II

4 How to Determine the Scope of Party Autonomy; *the Use of Private International Law*

4.1 General

Several of international business transactions take place every day throughout the world. As already underlined, when a transaction is of international character there is a risk that a conflict of applicable laws will arise, (especially when the parties have not made a clear choice of law). If the relevant provisions of the possibly applicable laws do not differ in substance, a conflict of laws does not create any major difficulties as the outcome of the dispute will be the same irrespective of which law the arbitral tribunal applies. However, if the rules differ there is a genuine conflict of laws. Through the mechanism of private international law and its conflicts rules, such conflict of laws can be resolved.⁷¹

It is important to bear in mind that private international law is a national phenomenon. The legal structure and the substance of conflict rules vary among different countries. Therefore, the outcome of an international dispute may depend on which national system of private international law one applies.

4.2 Party Autonomy as a Conflict Rule

Conflict rules help identifying an applicable law when a conflict of laws arises. In respect of commercial contracts, party autonomy is the main conflict rule designating the applicable law. Other conflicts rules apply only if the parties have not made a choice of law.⁷² T

he applicable law governs the specific transaction and sets the standards for the parties' contractual relationship. The parties' behavior is therefore often a result of their understanding of this law (and which law this is).⁷³ For that reason it is preferable that the parties know in advance which substantive law the arbitrators will apply. It is further advisable that the parties know which conflict rules the arbitrators will use (in the event of a conflict of laws) since this will help them to predict which substantive rules the arbitrators will consider when resolving the dispute.

⁷¹ Cordero Moss, (1999), page 46-47 and page 73.

⁷² Cordero Moss, (1999), page 52.

⁷³ Cordero Moss, (1999), page 47-48.

For a conflict rule to ensure predictability it is important that it is clear and easy to apply. Party autonomy is a good example of a conflict rule which provides for a rather high degree of predictability (even if party autonomy is subject to restrictions which in some sense undermine the predictability).⁷⁴ As the predictability of applicable law is essential, it is recommendable that the contracting parties use their right to choose an applicable law; if they do not, other conflict rules than party autonomy may apply.

4.3 The Use of Private International Law

In a situation where the parties *have not agreed* on an applicable law, the arbitral tribunal must apply conflict rules to be able identify which substantive law to apply. However, even if the parties *have agreed* on an applicable law, a system of private international law has to be used to determine the degree to which the arbitral tribunal must comply with the choice made by the parties, i.e. to determine the scope of party autonomy.⁷⁵

The fact that a dispute is subject to an arbitral proceeding does not in itself assure a full application of the chosen law as the scope of party autonomy is subject to restrictions which are determined by a legal framework of private international law. Even if the principle of party autonomy is widely recognised, it is not a principle of “natural law” existing independent from all national legal systems.⁷⁶ Party autonomy is a conflict rule and like all other conflict rules its scope is determined by private international law. As the extent of the parties’ freedom to choose substantive law is determined by a system of private international law it is necessary to establish *which* system governs party autonomy in every specific case.⁷⁷ (See further Part IV.)

4.4 In Summary

In most international commercial arbitrations the parties’ have made a choice of law when signing the contract. In these situations there will be no need to apply private international law to identify an applicable law. However, party autonomy is in itself a conflict rule, designating the applicable law, and therefore private international law must be applied to determine its scope even if a choice of applicable law is made.⁷⁸

⁷⁴ Cordero Moss, (1999), page 52.

⁷⁵ Cordero Moss, (1999), page 246.

⁷⁶ Cordero Moss, (1999), page 297.

⁷⁷ Cordero Moss, (1999), page 297.

⁷⁸ See further *n* 75.

PART III

5 National Laws and Institutional Rules

5.1 General

As pointed out several times, party autonomy (even if universally recognized) is not unlimited. It is a conflict rule existing within a legal framework, and it is this legal framework which sets its limits. As concluded in the foregoing chapter, a system of private international law must be used to determine scope of party autonomy.

The following section examines the attitude of national arbitration laws and institutional arbitration rules with respect of the use of private international law and rules. It “maps out” the different methods available to arbitrators when trying to identify which conflict rules to apply.

The general effect of party autonomy is that laws otherwise applicable to the dispute will not govern this. However, as shown in the previous discussions, this is subject to the critical qualification that the effect and extent of party autonomy is determined by private international law. It is therefore crucial to identify *which* system of private international law governs party autonomy and determines the extent of the parties’ choice of law.

National arbitration laws and institutional arbitration rules direct arbitrators to which conflict rules to apply in situations where the parties *have not* chosen an applicable law. However, in a majority of international commercial agreements the parties *have* in fact agreed on an applicable law. In those situations it may nevertheless be necessary to identify an applicable system of private international law as this system governs party autonomy. However, there exist no rules of law directing arbitrators to which system of private international law to use when determining the limits of party autonomy. An analogical interpretation of existing provisions (which designate which conflict rules to apply when no choice of law is made) can however be useful as it present an overview of the different options available for arbitrators regarding the application conflict rules. An analysis of these provisions further offers a functional background when trying to establish an efficient technique to determine which legal system governs party autonomy and determines its scope.

One must remain aware that the relevant provisions in arbitration laws and institutional arbitration rules were not written as an attempt to direct arbitrators on how to determine the scope of party autonomy. They were written to offer the arbitrators an instrument to identify an applicable law. Nevertheless, as these

provisions include directions on which conflict of laws rules to apply they are valuable when trying to establish how to determine the scope of party autonomy (which is decided by a system of private international law). Once an analysis is made, a classification of the different methods can be made. The appropriateness of an application of these methods in respect of the determination of the scope of party autonomy can thereafter be discussed.

5.2 The Classical to the Modern Approach

5.2.1 The Territorial Approach

In general, both institutional arbitration rules and national arbitration laws reject the idea of an automatic determination of applicable law based on the place of the arbitral proceeding. The suggestion that the arbitral tribunal shall, just like courts of law, apply the private international law of the place of the proceedings has been criticized. This traditional assumption has been replaced by the so-called delocalisation theory.⁷⁹ The theory is based on the belief that an arbitral tribunal does not have a *lex fori*. According to the theory, because the reason behind a parties' choice of a place for arbitration in most cases not is for its conflict of law rules, arbitrators shall not be obliged (in contrast to judges of courts of law) to apply the conflict of law rules of the place for arbitration. The delocalisation theory has won a widespread acceptance and it has been emphasized that there has been an almost total desertion of the application of the conflict of laws rules of the arbitral *lex fori*.⁸⁰

Even if the general opinion at present is that it is not appropriate to use *lex fori* as the decisive factor when deciding which substantive law to apply, this traditional approach is adopted in some modern arbitration rules.⁸¹ Article 4 of the International Arbitration Rules of the Zürich Chamber of Commerce of 1989 states;

“If the parties have not chosen an applicable law, the Arbitral Tribunal decides the case according to the law applicable according to the rules of the Private International Law Statute.”⁸²

In a similar way, Article 13(2) of the Rules of Procedure of the Court of Arbitration of the Hungarian Chamber of Commerce of 1993 provides that;

“Failing stipulation by the parties, the arbitral tribunal shall apply the law which it considers to be applicable according to the rules of Hungarian private international law.”⁸³

⁷⁹ Cordero Moss, (1999), page 248-249

⁸⁰ Hunter and Redfern, (1999), section 2-81.

⁸¹ Blessing, (1999), page 416-417.

⁸² Article 4, *International Arbitration Rules of Zurich Chamber of Commerce*, (1989).

5.2.2 The European Convention of 1961

The European Convention was the first sign of a more liberal approach in respect of the determination of applicable law. Contrary to the traditional approach, the European Convention does not give the place for arbitration a decisive role. Article 7 of the European Convention reads;

“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.”⁸⁴

The use of the term “proper law” suggests that a national system of law must be selected by the arbitrators. Another feature which can be observed is that the arbitrators are not forced to refer to a specific conflict of laws system, they are free to use any conflict rule they deem “applicable”. It is however not clear whether the arbitrators must choose a specific conflict rule or if they can designate such rule without restraint. Overall the European Convention offers a liberal approach and must be recognized as an “important milestone towards a modern perception of international arbitration”.⁸⁵

5.2.3 The Washington Convention of 1965

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 [‘the Washington Convention’], just like a majority of modern arbitration conventions, recognizes the principle of party autonomy.⁸⁶ When no choice of law is made the Washington Convention provides that the arbitral tribunal shall apply the law of the contracting state party, including its conflict of laws rules. Article 43(1) of the convention states;

“The Tribunal shall decide the dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applied.”⁸⁷

The convention offers a rather exceptional solution; the state party is given a strong position but at the same time the reference to international law suggests that a violation of international law might lead to a result where the state party’s law not will apply after all. In most cases, however, the arbitrators’ obligation to

⁸³ Article 13(2), *Rules of Proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry*, (2000).

⁸⁴ Article 7, *the European Convention*, (1961).

⁸⁵ Blessing, (1999), page 419.

⁸⁶ Article 42(1), *the Washington Convention*, (1965).

⁸⁷ Article 43(1), *the Washington Convention*, (1965).

apply the law of the contracting state party means that they in fact will apply the law with the closest connection to the transaction.⁸⁸

5.2.4 The UNCITRAL Arbitration Rules of 1976

As mentioned earlier, the UNCITRAL Arbitration Rules of 1976 clearly recognize the parties' right to choose substantive law. If no choice is made the arbitrators shall apply the conflict of laws rules they consider applicable. Article 33(1) provides;

“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 considered applicable.”⁸⁹

The term “law” gives the impression that *one* law should be selected and that the arbitrators is not given the freedom to select transnational rules or rules of various national legal systems.⁹⁰ Despite this and the obligation to use conflict rules, the provision must be appreciated as a rather liberal and modern approach giving the arbitrators the right to apply any conflict of laws rules they consider “applicable”.

5.2.5 The Claims Settlement Declaration of 1981

An even more modern and liberal approach than the one taken by UNCITRAL in 1976 was taken in the Claim Settlement Declaration in 1981;⁹¹

“The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.”⁹²

The text provides for a major expansion of Article 33 of the UNCITRAL Arbitration Rules. The arbitral tribunal is to apply not only a system of national law, but is given the freedom to apply any principles of law originating from international or commercial law as well as the choice of law rules the tribunal determines to be “applicable”. The intention of this rather far-reaching freedom

⁸⁸ Blessing, (1999), page 420. (Regarding the so-called closest-connection-test see further section 6.2.4 and section 6.5.)

⁸⁹ Article 33(1) *UNCITRAL Arbitration Rules*, (1976).

⁹⁰ Blessing, (1999), page 421.

⁹¹ The settlement concerned the settlement of claims by the Government of the United States of America and the Government of Iran. The so-called Iran-United States Claims Tribunal was one of the measures taken to resolve dispute between the Islamic Republic of Iran and the United States of America having its origin in the detention of fifty two United States nationals at the United States Embassy in Tehran which commenced in November 1979.

⁹² Article 5, *the Claims Settlement Declaration*, (1981).

was to avoid a rule which forced the arbitrators to choose *one* of the domestic legal systems, i.e. the American or Iranian law.⁹³

5.2.6 The Rome Convention of 1980

The Rome Convention of 1980 lets the parties choose which rules of law will govern their contractual relationship, i.e. once again the principle of party autonomy is recognized.⁹⁴ In a situation where the parties have not made such choice, the arbitrators shall apply the law of the country which the contract is most closely connected to.⁹⁵ Even if the Rome Convention does not apply to arbitration agreements, (see section 3.2.), it offers a general principle of the closest-connection-test.⁹⁶ The test obliges the arbitrators to apply the substantive law of the country designated by a number of relevant connecting factors such as the place of business or the residence of the party which has to perform the “characteristic performance”.⁹⁷ Article 4(1) of the convention reads;

“To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected.”⁹⁸

The Rome Convention does not offer an entirely flexible method of determination as the arbitrators are asked to apply “the law of a country” and not “rules of law”. Hence, it appears as if the arbitral tribunal is forced to apply a specific national law.⁹⁹

5.3 Institutional Arbitration Rules

This section examines institutional arbitration rules in the context of applicable conflict rules. Many institutional systems of rules take a liberal approach, letting the arbitrators directly apply the substantive rule of law they deem “appropriate” or “applicable”. Some rules however promote the use of conflict rules. The study below does not provide for a comprehensive list of institutional rules and one must bear in mind that there are numerous of other institutional rules adopting other approaches. However, the rules presented represent the most central western arbitration rules and the most commonly adopted methods in respect of the application of conflict rules.

⁹³ Blessing, (1999), page 422.

⁹⁴ Article 3, *the Rome Convention on*, (1980).

⁹⁵ Article 4(1), *the Rome Convention*, (1980).

⁹⁶ Kühn, (1999), page 386. (The closest-connection-test has also been adopted by national legislation, see for example Article 187(1) of the Swiss Arbitration Act.)

⁹⁷ Blessing, (1999), page 422 and 413-414.

⁹⁸ Article 4(1), *the Rome Convention*, (1980).

⁹⁹ Blessing, (1999), page 422.

5.3.1 ICC Arbitration Rules of 1975 and 1998

Article 13(3) of the ICC Rules of 1975 provided;

“The parties shall be free to determine the law to be applied by the arbitrators to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrators shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.”¹⁰⁰

The provision forced the arbitrators to select “a proper law” which implies that they had to select a system of national law. In the process of selecting the proper law the arbitrators had to use conflict rules. Nevertheless, they were not obliged to refer to a particular system of conflict rules and were permitted to apply any conflict rules from one or various systems conflict rules – national or transnational. The only requirement was that the arbitrators should consider the application of the selected conflict rule “appropriate” in the particular situation. The use of the term “appropriate” suggests that some form of justification or connection to the specific case had to be made.¹⁰¹ In addition, the arbitrators have to take relevant trade usage and contractual provisions into account.¹⁰²

In 1998 ICC adopted new rules which further freed the arbitrators in the process of determining the applicable law. Article 17(1) reads;

“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.”¹⁰³

The arbitral tribunal is no longer obliged to apply conflict rules, neither is it requested to select a “proper law”. The only obligation the tribunal has is to apply the rules of law it believe is “appropriate”.

5.3.2 LCIA Rules of 1998

Article 22(3) of the LCIA Rules of 1998 states;

“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.”¹⁰⁴

¹⁰⁰ Article 13(3) *ICC Arbitration Rules*, (1976).

¹⁰¹ Blessing, (1999), page 423.

¹⁰² Article 13(5), *ICC Arbitration Rules*, (1975).

¹⁰³ Article 17(1) *ICC Arbitration Rules*, (1998).

¹⁰⁴ Article 22(3), *Arbitration Rules of the London Court of International Arbitration*, (1998).

The LCIA Rules of 1998 give the arbitral tribunal the freedom to apply the law or rules of law which it considers appropriate. As one can see, the tribunal is not forced to go through a system of conflict rules when designating applicable substantive law. The tribunal does not have to refer to a particular system of law and can apply rules from various legal systems. However, as mentioned earlier, the term “appropriate” indicates that some sort of justification and connection to the particular situation is required.

5.3.3 AAA International Arbitration Rules of 1998

Article 28 of the AAA International Arbitration Rules provides;

- (1) The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.
- (2) In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usage of the trade applicable to the contract.¹⁰⁵

Just like the ICC Rules of 1998, the AAA Rules adopts a rather liberal and flexible approach. The arbitrators are in principle free to apply any law or rules of law. No particular determination method is required. They have the freedom to directly apply a substantive rule of law without applying conflict rules, but can also choose to apply a particular conflict of laws rule or a whole system of conflict rules.

5.3.4 VIAC Rules of 2001

The VIAC Rules of 2001 does not grant the arbitrators the same far reaching freedom as the AAA and LCIA rules do. Article 16 of the VIAC Rules states;

“As to the substance of the case, the sole arbitrator (arbitral tribunal) shall apply the law that the parties have designated as applicable. Failing such designation by the parties, he (it) shall apply the law that is designated by the choice of law rules that he (it) considers to be applicable.”¹⁰⁶

The text implies that the arbitrators shall apply a particular system of national law. Hence, (if the term “law” was not given a very liberal interpretation) the VIAC Rules does not offer arbitrators the freedom to determine the dispute in accordance with a-national or transnational rule of law.¹⁰⁷ However, the arbitral tribunal is not forced to use conflict rules when designating the applicable law.

¹⁰⁵ Article 28, *International Arbitration Rules of the American Arbitration Association*, (1997).

¹⁰⁶ Article 46, *Rules of Arbitration and Conciliation of the Vienna International Arbitration Centre*, (2001).

¹⁰⁷ Blessing, (1999), page 425.

5.3.5 NAI Rules of 2001

The NAI Rules of 2001 provide for a perfect example of a modern and flexible solution taken by an arbitration institution. The arbitral tribunal is not obliged to use conflict rules neither is it forced to designate a particular system of national law Article 46 of the rules reads;

“If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law which it considers appropriate.”¹⁰⁸

5.3.6 DIS Arbitration Rules of 1998

Unlike the NAI Rules have the DIS Rules have adopted the closest-connection-test. Section 23(2) provides;

“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.”¹⁰⁹

The tribunal does not have to apply conflict rules. However, the use of the term “law of the State” indicates that the tribunal is required to select a national system of law. Hence, it does not have the freedom to apply rules of laws from various legal systems neither is it allowed to refer to a non national system of law.

5.3.7 SCC Arbitration Rules of 1999

The SCC Arbitration Rules of 1999 is yet another example of a modern and flexible approach taken by an arbitration institute. Article 24(1) stipulates;

“The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law or rules of law agreed by the parties. In the absence of such an agreement, the Arbitral Tribunal shall apply the law or rules of law which is considered most appropriate.”¹¹⁰

If the parties have not agreed on an applicable law, the chamber lets the arbitrators apply any rules of law they consider “appropriate”. They are not forced to take the passage through a system of conflict rules but should probably make some sort of justification for the law they select.

¹⁰⁸ Article 46, *the Rules of the Netherlands Arbitration Institute*, (1998) (amended 2001).

¹⁰⁹ Section 23(2), *Rules of the German Institute of Arbitration*, (1998).

¹¹⁰ Article 24(1), *SCC Arbitration Rules*, (1999).

5.4 National Arbitration Laws

The liberalizing of institutional arbitration rules has forced national legislators to take a more modern approach and to change their arbitration laws. There has been a widespread effort to harmonize national arbitration laws and make them subject to the same standards as the institutional arbitration rules. The countries that have not followed this trend have lost ground since many parties to commercial contracts choose not to use these countries as the seat for their arbitral proceedings.¹¹¹ However, as the following analysis will show, even if there has been some harmonization of national arbitration laws and institutional arbitration rules, yet many different approaches are taken.

The section below briefly analyzes and discusses a number of national arbitration laws in respect of conflict of laws rules. Only a few country's national legislation will be discussed as there is no place for a comprehensive examination. Just like in the previous analysis of institutional arbitration rules, the laws studied have been selected as they are central from a western point of view and offer a wide range of the most typical solutions presented by national arbitration laws.

5.4.1 The Dutch Code of Civil Procedure

The Dutch Code of Civil Procedure lets the arbitrators apply any rules of law and does not force them to designate a system of national law or to use conflict rules. Article 1054(2) provides;

“If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law which it considers appropriate.”¹¹²

5.4.2 The Swiss Private International Law Act

The Swiss Private International Law Act of 1987 provides for a rule which, just like the Dutch arbitration law, gives the arbitral tribunal the right to apply any “rules of law”. However, the legislator has chosen to use the closest-connection-test. Article 187(1) states;

“The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in absence of such a choice, according to the rules of law with which the case has the closest connection.”¹¹³

The reference to the “closest connection” sets an independent norm of private international law. It gives the arbitrators the full autonomy to apply any or no

¹¹¹ Blessing, (1999), page 429-430.

¹¹² Article 1054, *the Dutch Code of Civil Procedure*, Book IV, (1986).

¹¹³ Article 187(1), *the Swiss Private International Law Act*, (1987).

conflict of laws rules. Even if the provision does not as such offer a *voie directe* solution in the same sense as Dutch and French legislation, in practice the arbitral tribunal is likely to come to the same solution as it since the closest-connection-test is a universally accepted principle applied by the arbitral tribunal anyhow.¹¹⁴

5.4.3 The German Code of Civil Procedure

Article 1051 of the German Code of Civil Procedure reads;

“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.”¹¹⁵

The German Arbitration Act is similar to the Swiss Arbitration Act in the sense that it makes a reference to the closest-connection-test. However, Article 1051 is more restricted than Article 178(1) of the Swiss act and obliges the arbitral tribunal to apply the “law of the State” which the subject-matter of the proceeding is most closely connected. In contrast to the Swiss act, it does not give the arbitral tribunal the freedom to apply any rules of law; a national legal system must be applied.

5.4.4 The Italian Code of Civil Procedure

Article 834 of the Italian Code of Civil Procedure of 1994 is another example of a modern arbitration law which refers to the closest-connection-test. The article provides;

“The parties may agree among themselves upon the rules which the arbitrators shall apply to the merits of the dispute or provide that the arbitrators shall decide *ex aequo et bono*. In both cases the arbitrators shall take into account the provisions of the contract and trade usages. If the parties are silent, the law with which the relationship has its closest connection shall apply.”¹¹⁶

5.4.5 The UK Arbitration Act

The UK Arbitration Act takes a less flexible approach than most other national arbitration act, Article 46 stipulates;

“(1) The arbitral tribunal shall decide the dispute (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
(2)...

¹¹⁴ Blessing, (1999), page 431.

¹¹⁵ Article 1051, *the German Code of Civil Procedure*, Book X, (1998)

¹¹⁶ Article 834, *the Italian Code of Civil Procedure*, Book IX, (1994).

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”¹¹⁷

The arbitrators are required to apply conflict rules to identify the applicable law. The term “law” rather than “rules of law” implies that a whole system of law must be chosen and an application of rules from various systems appears to be prohibited.

5.5 UNCITRAL Model Law

The Model Law on Arbitration of the United Nations Commission on International Trade Law [‘UNCITRAL Model Law’] is a result of a long and broad discussion among national states world wide. Article 28 of the UNCITRAL Model Law stipulates;

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law chosen by the parties as applicable to the substance of the dispute...
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considered applicable.
- (3) ...
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, and shall take into account the usage of the trade applicable to the transaction.¹¹⁸

Party autonomy and the parties’ freedom to choose applicable substantive law is the basis of the model law. The parties are free to choose any “rules of law”. They have the right to select rules of one or various legal systems, and are free to pick rules from transnational law, international conventions, trade usage or general principles of international law. However, when the parties have not made a choice of law, the arbitrators must apply “the law” designated by applicable conflict rules. This implies that the arbitrators are obliged to identify a law of a particular country.¹¹⁹

The arbitrators are further forced to use conflict rules and can not apply a substantive law directly. Although, any conflict rules may be used as long as the arbitrators consider it to be “appropriate”. Hence, some sort of justification for the chosen conflict rule has to be made.¹²⁰

Several of national laws are based on the UNCITRAL Model Law, e.g. the Canadian Commercial Arbitration Act of 1986, the Australian International

¹¹⁷ Article 46, *the United Kingdom’s Arbitration Act*, (1996).

¹¹⁸ Article 28, *UNCITRAL Model Law*, (1985).

¹¹⁹ Blessing, (1999), page 436.

¹²⁰ See further Broches, (1990), page 141-154.

Arbitration Amendment Act of 1989 and the Russian Federation Law of International Commercial Arbitration of 1993.¹²¹

5.6 In Summary

The discussion above clearly shows that the legal documents regulating issues of applicable law and conflict of laws rules in international commercial arbitration not are harmonized. The substance as well as the applicability of different conflict rules varies depending on the relevant legal system and the subject matter of the dispute. However, all laws and rules of law have the same starting point; the arbitrators shall apply the law chosen by the parties. If no such choice is made the arbitrators shall apply the conflict rules chosen by the parties. Failing a choice of conflict rules, arbitral practice shows that numerous of different methods have been used. This is in line with institutional arbitration rules and national arbitration laws which have adopted different approaches.¹²² However, one must remember that most arbitral awards not are published and it is therefore difficult, if not impossible, to know how arbitral tribunals proceed in reality.

Modern laws and rules have evolved to take a flexible approach and freed the arbitrators from the obligation to use the conflict rules of *lex fori*. In fact, when the parties have made no choice of law the arbitrators are according to most provisions not obliged to use any conflict rules at all. The doctrine of *voie directe* has won ground and the use of conflict rules has almost been abandon. Most provisions allow the arbitrators to apply rules from one or several of systems of law. It is the rule as such, and not the legal system, which is relevant. This approach reflects the basics of the delocalisation theory which provides that arbitrators not ought to be tied to a specific system of law or jurisdiction.

A majority of the provisions that in fact force the arbitral tribunal to use conflict rules let the tribunal freely determine which specific conflict rule to apply. The arbitrators are not bound to select a whole system of private international law and are free to pick and choose rules from different systems (and perhaps even make up its own rules) as long as an application of that rule is “appropriate” or “applicable”. Hence, the modern approach appears to applaud the discretion of the arbitrators!

¹²¹ Blessing, (1999), page 433.

¹²² Cordero Moss, (1999), page 295.

PART IV

6 How to determine the Scope of Party Autonomy: *an Applicable System of Private International Law*

6.1 To Select a System of Private International Law

As the foregoing has shown, party autonomy is limited – it exists within a legal framework of private international law. The key question is therefore which system of private international law the arbitral tribunal should apply when determining the scope of party autonomy. This is not merely a theoretical question, but also a question of practical importance; if not knowing which system of private international law governs party autonomy it is impossible to establish the effect of the parties' choice of law.

The following analysis concerns the core of this thesis, namely; *which system of private international law governs party autonomy and determines its scope?* The analysis is based on the previous examination of existing laws and rules and on the authors own conclusions. It “maps out” different methods available to arbitrators when identifying which system of private international law shall govern party autonomy and discusses the appropriateness of an application of these methods.

6.2 Lex Fori as the Decisive Factor

None of the examined national arbitration laws or institutional arbitration rules supports the idea that the arbitrators automatically shall apply the private international law of the country where the arbitral tribunal is seated. To use the private international law of *lex fori* is in fact an almost totally abandoned approach. Instead, the modern approach is that the arbitral tribunal does not have a *lex fori*. The place for the arbitration only is *one* of many factors that the tribunal shall consider when determining which system of private international law governs the dispute at hand. The author agrees with this approach; *lex fori* should not be the decisive factor determining which system of private international law applies, and consequently determining the extent of the parties' freedom to choose substantive applicable law.

In most situations is the place for arbitration, if chosen by the parties, not selected because of the conflict rules of that place.¹²³ Therefore, that place's national system of private international law must not automatically set the limits for one of

¹²³ In many cases is a particular place chosen out of convenience such as good infrastructure.

the most important principles of international commercial arbitration; party autonomy. (In the situation where the parties *not* have chosen the place for arbitration, there is an even less of a reason to apply the conflict rules of *lex fori*.)

Moreover, a national court is per definition a national authority. Contrary to the arbitral tribunal's authority, the court is not a result of an agreement between two or more parties. The court derives its power from domestic laws. Private international law is applicable in national courts because of law, statute or court decision. In international commercial arbitration however, there is no national jurisdiction, no domestic *lex fori*, and no national system of private international law. The arbitral tribunal derives its authority from the agreement between the parties and not from national law. As the arbitral tribunal derives its authority from an agreement between private parties, and not a national legal system, there is no reason to force the arbitral tribunal to apply private international law of *lex fori*.¹²⁴

Nevertheless, there are two advantages with an application of the private international law of *lex fori*; (1) the parties will be able to predict which conflict rules the arbitrators will apply and (2) a whole system of private international law will be appointed. Although, these advantages must be balanced with the risk that an application of the conflict rules of *lex fori* might be inappropriate in the specific situation and lead to an unreasonable outcome. The arbitrators might for example not be competent to apply the rules of *lex fori* or the rules as such might not be suitable for the specific dispute. One must also bear in mind that the very core of an arbitral proceeding is the parties' agreement. The arbitrators must therefore look at the spirit of the agreement and the particular dispute matter (rather than the place for arbitration) when determine which conflict rules to apply. In some situations this might lead to an application of the rules of *lex fori*, however, this should not be presumed.

Just like Blessing stresses is there only one situation where an application of the territorial approach is appropriate; that is when the parties have made a particular choice of place for the arbitration and the arbitrators must interpret this choice to include the conflict rules of that place.¹²⁵ However, those situations are rare and the assumption must be that the private international law of *lex fori* not automatically governs party autonomy.

¹²⁴ Lew, (1999), page 447-448.

¹²⁵ Blessing, (1999), page 410.

6.3 Existing Laws and Rules

6.3.1 General

As the foregoing has shown, national laws and institutional rules provides for different methods regarding the application of conflict rules. Some provisions direct the arbitrators to apply conflict rules while others let the arbitrators directly apply a substantive rule. Yet, they all recognize the principle of party autonomy and the freedom for the parties to choose substantive law.

As mentioned earlier, it is crucial that the arbitrators can identify an applicable system of private international law even if the parties have made a choice of law as this system determines the scope of the party autonomy. However, none of the examined laws or rules provide for a provision which forces the arbitrators to identify a complete system of private international law.

Three different approaches can be recognized in national laws and institutional rules when no choice of law is made; (1) the arbitrators may be directed to apply conflict rules they consider “appropriate” or “applicable” to identify which rules of law to apply, (2) the arbitrators may be given the freedom to directly select which substantive rule to apply, (the so-called *voie directe* approach), or (3) the arbitrator may be obliged to use the closest-connection-test to designate applicable rules of law.

6.3.2 “Applicable” or “Appropriate” Conflict Rules

In a situation when the parties have not made a choice of law the English Arbitration Act, the VIAC Rules, the UNCITRAL Model Law as well as the UNCITRAL Rules stipulate that the arbitrators shall apply the conflict rules which they consider “applicable” or “appropriate”. As a result of these provisions have arbitrators in numerous of awards identified the substantive law by using conflict rules which they consider “appropriate” or “applicable”. Another reason for this rather common approach is that it was used by ICC between 1975 and 1997.

When establishing which rules that are “appropriate” or “applicable” practice shows that arbitrators have used a wide range of different methods. The most common approaches appear to be a cumulative application of all connected systems of private international law and an application of general principles of private international law.¹²⁶

The question to be answered is weather an application of conflict rules which the arbitral tribunal deem “appropriate” or “applicable” is suitable when determine

¹²⁶ Cordero Moss, (1999), page 255.

the scope of party autonomy. As pointed out several of times; party autonomy is determined by a *whole* system of private international law. However, by letting the arbitrators select which conflict rules to apply the need for a complete legal framework is overlooked. Hence, letting the arbitrators apply the conflict rules they believe are “appropriate” or “applicable” is not a satisfactory method when trying to identify which system of private international law governs party autonomy and determine its scope.

6.3.3 The *Voie Directe* Approach

The so-called *voie directe* approach provides that the arbitrators not should apply any conflict rules at all when identifying the applicable law.

Even if an increased number of national laws (e.g. the Dutch Civil Procedure Code) and institutional rules (e.g. AAA International Arbitration Rules, LCIA Rules and SCC Rules) have adopted the *voie directe* approach, arbitral practice shows that arbitrators very seldom refer to this method. However, since ICC adopted the method in 1998, it has received a wider support from arbitrators.¹²⁷

A provision which provides for a direct application of a substantive law or rule of law is not useful in a situation where the parties *de facto* has chosen an applicable law and the problem is to determine the scope of that choice. As emphasized earlier is it necessary to identify a complete system of private international law when determine the scope of party autonomy, however, the *voie directe* method does not satisfy this need.

Maybe would it be appropriate to use the *voie directe* approach in its broadest sense by letting the arbitrators freely select a system of private international law – not only a substantive rule – to govern the dispute. However, this opens up for a high degree of uncertainty and unpredictability which for obvious reasons is undesirable.

6.3.4 The Closest- Connection-Test

The Rome Convention, which often is considered to be a “cornerstone” of European contract law, provides for equal conflict rules for all members of EU. In a situation where the parties not have made a choice of substantive law, the convention states that the arbitrators should apply the law with the closest connection to the contract. Even if the Rome Convention not applies to arbitration, it establishes a general principle of law which is implemented in several legal documents.¹²⁸ The closest-connection-test is for example adopted by

¹²⁷ Cordero Moss, (1999), page 261.

¹²⁸ Kühn, (1999), page 386.

the Swiss Arbitration Act, the German Arbitration Act, the Milan Chamber of Commerce and the German Institute of Arbitration Rules.

In practise arbitrators frequently use the closest-connection-test to identify an applicable law when the parties have failed to make a choice of law. In many cases this is a result of either a cumulative application of connected systems of private international law or an application of general principles of private international law.¹²⁹

When trying to identify a system of private international law the closest-connection-test, when narrowly applied, is rather ineffective as it directly points out which substantive law to apply without going through the passage of conflict rules. As mentioned earlier, the test often results in a cumulative application of relevant and connected systems of private international law and does not as such offer an exact method for identifying a whole system of private international law.

Furthermore, even if the arbitrators directly refer to a cumulative application of different legal systems, it will not be a satisfactory approach as it does not identify an applicable system of private international law which is needed in the process of establishing the scope of party autonomy.

6.3.5 In Summary

As the previous analyze has shown, national arbitration laws and institutional arbitration rules take different approaches in respect of the application of conflict rules. Some provisions oblige the arbitral tribunal to use conflict rules while others advocate a *voie direct* approach. Even if different approaches are taken, most relevant exciting legal provisions are useful when identifying the applicable substantive law. However, as the foregoing analysis has shown, existing legal provisions are rather ineffective when trying to identify which legal system governs party autonomy.

One must keep in mind that an analysis concerning the arbitral tribunals' duties to apply, or *not* to apply, conflict rules when identifying the applicable law does not directly corresponds to the key questions of this thesis – *how to determine the scope of party autonomy*. The scope of party autonomy is governed and determined by a complete system of private international law. However, none of the analyzed provisions direct the arbitrators to identify a *whole* system of private international law. The modern approach to grant the arbitrators full discretion in applying the conflict rules they deem “appropriate” or “applicable” (or even worse, to use the so-called *voie directe* approach) does not provides for a full system of private international law and are therefore not helpful when determine the scope of party autonomy.

¹²⁹ Cordero Moss, (1999), page 259.

6.4 A Contractual Clause

Predictability is essential in all arbitral proceedings. It is therefore sometimes argued that the parties in advance shall determine which conflict rules should govern their contractual relationship. This can be done by including a clause in the contract which directs the arbitrators to apply a specific conflict rule. A contractual clause referring to a specific conflict rule will assist the parties to predict which substantive rules the arbitrators will apply. However, such clause does not provide for a complete system of private international law.¹³⁰

Party autonomy is not a principle living its own life without correlation to a legal framework. As stressed several times in this thesis, party autonomy is governed by a national system of private international law. Therefore, rather than including a clause referring to a specific conflict rule it would be more appropriate to incorporate a clause which refers to a whole system of private international law. However, when no such clause is included the question of which system of private international law governs party autonomy remains. Furthermore, it could be argued that the right to include such clause also is governed by a system of private international law. The question is then (yet again); which system of law governs the right to include such clause!

6.5 The Conflict Rules of the Chosen Law

There are those who advocate an automatic application of the private international law of the country of the chosen substantive law. However, such approach must be rejected on several grounds when trying to establish the extent of the parties' choice of law, i.e. the scope of party autonomy.

Firstly, the parties may have selected a non-national law. A non-national law does not provide for a whole system of private international law which is needed to determine the scope of party autonomy. *Secondly*, in a situation where the parties *de facto* have chosen a national legal system to govern their contractual relationship, one can not automatically assume that the intention of the parties' also was to apply that legal system's conflict rules. Therefore, except when provided otherwise, a choice of substantive law should *not* include conflict of law rules.¹³¹ *Finally*, determine the scope of party autonomy with reference to the chosen law is an obvious contradiction as it is the extent of this choice that is to be determined. Furthermore, the approach to include a clause in the contract which refers to the chosen law is not useful in situations where the parties' have made no choice of law at all. In those situations the question of which law governs party autonomy remains completely unsolved.

¹³⁰ Cordero Moss, (1999), page 297.

¹³¹ Blessing, (1999), page 393.

6.6 Private International Law with the Closest Connection to the Transaction

The closet-connection-test, which is one of the most central concepts of private international law, is frequently applied by arbitral tribunals in the process of identifying an applicable law.¹³² The arbitrators look at relevant connecting factors and seek to identify the law with the closest connection to the transaction in question. This law will then be applied.

The application of the test sounds rather uncomplicated. However, there exists a wide range of views regarding the qualification of relevant connecting factors. For example are there different opinions of what it is that constitute a “closest connection” and which connecting factors that in fact are relevant. In many situations the most appropriate technique is to look at *all* relevant connecting factors rather than giving a decisive role to *one* factor. The most common approach, at least in civil law countries, appears to be to give a significant weight to the place of business or to the normal residence of the party which has to perform the “characteristic performance”.¹³³

As emphasized several times, existing arbitration laws and rules are not useful in the process of determine the scope of party autonomy as they do not require the arbitrators to identify a whole system of private international law. This includes provisions referring to the closest-connection-test as arbitrators generally use the closest-connection-test directly to identify an applicable law without the use of conflict rules. (See above section 6.3.4.)

Even if one must reject an application of existing rules providing for the closest-connection-test, this does not mean that arbitrators not should use the test in a broad sense. Under the condition that the test is applied to identify a *whole* system of private international law, rather than a substantive law or rule of law, the closest-connection-test provides for a sufficient means to determine the scope of party autonomy. The primarily advantages with an application of the closest-connection-test are; (1) the flexible character of the arbitration remains, (2) a full system of conflict rules can be identified, and (3) the parties can make a fair evaluation of how the arbitrators will proceed in the process of determine the scope of the their choice of law.

The author of this thesis is convinced that the most appropriate method to determine the scope of party autonomy is to let the system of private international law with the closest connection to the transaction apply and govern the parties’ choice of law. It would be unfortunate if the legislature in advance granted one individual connecting factor a decisive function. The arbitral proceeding would then not be tailored to suit the specific dispute and therefore loose its flexibility.

¹³² Blessing, (1999), page 412.

¹³³ Blessing, (1999), page 414.

Therefore, all relevant connecting factors must be considered and, depending on the dispute matter, be given appropriate weight.

When applying the closest-connection-test the arbitrators decides which connecting factors that are relevant and how much weight they should be given. It is true that a rule which relies on the discretion of the arbitrators opens up for uncertainty. However, an application of the test is not fully arbitrary or random. Contrary to existing legal provisions which grant the arbitrators the full freedom to apply conflict rules they deem “appropriate” or “applicable”, the closest-connection-test obliges the arbitrators to consider certain connection factors. Therefore, if the test is applied to determine which system of private international law govern party autonomy the parties will at least be given a just opportunity to make a reasonable evaluation of the extent of their choice of law. Besides, one must balance the disadvantage of uncertainty with the need to keep the arbitration flexible. Furthermore, one must assume that the parties select arbitrators which they belief have good judgment and are competent to resolve the dispute at hand. If the parties trust the arbitrators to solve the entire dispute, it would be strange if they did not trust the arbitrators to apply the closest-connection-test when determine the extent of their choice of applicable law!

PART V

7 Closing comments

7.1 Conclusion

Party autonomy gives the parties the freedom to choose which law shall govern their contractual relationship. It is a conflict rule designating an applicable law. There is no uniform practice in respect of the application of conflict rules in international commercial arbitration. The only thing one can be sure of is that the arbitral tribunal will apply the universal principle of party autonomy to determine which substantive rules of law to apply.

It is advisable that the parties make a clear choice of substantive law when entering into an arbitration agreement as the chosen law sets the legal standards for the parties' contractual relationship. Knowing the applicable law will make it easier to analyze the risks arising from the contract and is therefore crucial when evaluating whether or not to commence an arbitral proceeding. If the parties *not* choose an applicable law, it is the arbitrators' task to identify one. This can be done directly or through the application of private international law.

Party autonomy is not a phenomenon living in a vacuum; it is a conflict rule existing within a legal framework. This framework is determined by a system of private international law. Therefore, even if a choice of law is made, a system of private international law must be identified. First when we are able to establish which specific system governs party autonomy will we know the extent and effect of the principle. However, existing national arbitration laws and institutional arbitration rules do not provide for a sufficient method when identifying which system of private international law governs party autonomy. Most of the provisions do not oblige the arbitrators to use conflict rules, and the ones that do only require the arbitrators to use the conflict rules they deem "appropriate" or "applicable". None of the current provisions require the arbitrators to identify a whole system of private international law (which is needed in the process of determining the scope of party autonomy).

It is necessary, or at least preferable, that the arbitrators and the parties in advance know which system of private international law governs party autonomy. Knowing only which single conflict rule that applies does not provide for a satisfactory solution. It is therefore advisable that a universal rule is adopted which designates which system of private international law applies.

The most appropriate method to use when establishing which system of law governs party autonomy is to apply a version of the closest-connection-test in its

broadest sense. Instead of applying the test to identify a substantive law, the arbitrators ought to use the test to identify an applicable system of private international law. This approach promotes the flexibility of the arbitral proceeding. It further makes it possible for the parties to make a reasonable certain evaluation of the extent of their choice of law. In order to fully predict which system of private international law governs the parties' choice of law a more exact method than the closes-connection-test might be required. However, the author of this thesis is convinced that a *too* precise rule will take away one of the cornerstones of commercial arbitration; flexibility!

7.2 Reflections

The practical importance of party autonomy and its widespread recognition has increased due to decades of increasing international business transactions. Economic and technological globalization has resulted in an even stronger belief that the parties' right to choose applicable law must be recognized. However, even if the principle of party autonomy is widely accepted, it is subject to several restrictions determined by private international law.

In this thesis it has been argued that the closest-connection-test is the most useful means to identify which system of private international law governs party autonomy. The importance of an appropriate method to determine the scope of party autonomy has been underlined. However, it is perhaps not the method as such which is most critical to agree upon. Maybe, it is even more important that a universal accepted rule, any rule, is adopted as this promotes predictability.

Furthermore, if private international law did not differ in substance it would not be necessary to identify which system applies – the application of any system would lead to the same result. This is where private international law has failed. Even if there has been some harmonization of conflict rules, private international law is still a national phenomenon. Different systems of private international law provide for different rules. The outcome of a dispute can therefore vary depending on which system of private international law the arbitral tribunal applies. Consequently, the scope of party autonomy may vary depending on which system the arbitral tribunal chooses to apply. A harmonization of conflict rules promotes a uniform practice which is crucial for the predictability of arbitral proceedings. However, there exists no uniform practice since no universal conflict rule, other than party autonomy, is adopted.

If the community of nations agreed on one harmonized system of private international law there would be less uncertainty in respect of the scope of party autonomy in international commercial arbitration. Therefore, in this era of globalization it is advisable that national legislators take one more step towards a total harmonization of private international law!

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