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Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose

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PROPER LAW IN INTERNATIONAL ARBITRATIONS INVOLVING CONTRACTUAL CLAIMS: WHEN PARTIES FAIL TO CHOOSE

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With the growing importance of international arbitrations in legal and commercial circles today, the legal foundations of this form of alternative dispute resolution have come under close scrutiny. Joining the body of academic writing that has analysed the working of international arbitrations, this article addresses the enduring question of what proper law is applicable to an international arbitration when the parties concerned have failed to make a choice. This article examines the practice of courts and arbitral tribunals across various national jurisdictions to find a pattern in their reasoning, and places emphasis on the position in Indian law, and the behaviour of Indian courts while answering this question.

I. INTRODUCTION

The greatest advantage that International Arbitration has over state court decisions is its trans-national currency.[1] It is one of the only dispute resolution mechanisms that gives a successful party the chance of enforcing the decision abroad.[2]

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1 Constantine Partasides, *International Commercial Arbitrations*, in BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE 653 (John Tackaberry & Arthur Mariott eds., 2003) [hereinafter PARTASIDES].

2 *Id.*

This is facilitated by the New York Convention,[3] signed by over 142 states today, which mandates the courts of signatory states to enforce a foreign award without reviewing the merits of the arbitrators' decision, except in certain limited circumstances.[4] The purpose of this article, however, is not to elaborate on the various advantages international arbitration has over other dispute resolution methods involving international elements. Rather, this article is an attempt to clear the air surrounding the proper law applicable to international arbitrations involving contractual claims in cases where parties fail to specify the same.

A dispute referred to international commercial arbitration can be subject to at least three different laws, namely, the 'proper law' which is the law governing the performance of obligations under the contract, the law governing the arbitration agreement, and the *lex arbitri*, which is the law governing the arbitration procedure.[5] The scope of this article is limited to the proper law or the substantive law applicable to international arbitrations involving contractual claims or international commercial arbitrations. The law applicable to the dispute is usually designated by the parties to the contract,[6] and the choice of the parties must be respected by the arbitral tribunal to the greatest possible extent.[7] Although, it is only seldom that international arbitrators have to deal with issues pertaining to the law chosen by the parties, the arbitrator must be suitably equipped when called upon to decide such an issue, in the event that parties have failed to agree upon the proper law.[8] While determining the proper law, though a national court is obliged to apply its national conflict of laws rules, an arbitral tribunal has more discretion.[9] This article attempts to examine the options available to an arbitrator in determining the law applicable to the substance of a dispute in international commercial arbitrations when the parties fail to make an express choice.

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[3] United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 38.

[4] *Id*, Article 5.

[5] Wang Shenchang & Cao Lijun, *The Role of National Courts and Lex Fori in International Commercial Arbitration*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 157 (Loukas A. Mistelis, Julian & D. M. Lew eds., 2006) [hereinafter SHENCHANG].

[6] O. P. MALHOTRA & I. MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 905 (2006) [hereinafter MALHOTRA].

[7] Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 75 (Loukas A. Mistelis, Julian & D. M. Lew eds., 2006) [hereinafter KESSEDJIAN].

[8] PARTASIDES, *supra* note 1, at 674.

[9] *Id.*

II. Making an Implied Choice

When the parties fail to make any express choice of law, the arbitral tribunal usually applies the law that the parties are presumed to have intended to have chosen.[10] In making such determination, the arbitrators are generally guided by the Rome Convention,[11] which provides that a choice of law must be "expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."[12] If no such choice is made, the contract is treated as being governed by the law of the country with which it is most closely connected.[13] This is determined by ascertaining which country the transaction in question had the closest and most real connection with.[14] A number of factors may be taken into consideration for this purpose, such as the place of contracting, the place of performance, the place(s) where the parties reside or carry on business and the nature and subject matter of the contract.[15] In international commercial arbitrations, there is a presumption that such a connection is most readily established with the law of the corporate seat or the principal seat of business of the party whose performance characterises the contract.[16]

Ordinarily, if the parties make no express choice of law in a contract but agree that any dispute between them shall be litigated in the courts of particular country, the maxim *qui indicem forum elegit ius* - which means that a choice of law is a choice of forum - mandates the court to apply the law of that country to the substance of their disputes.[17] However, it is imperative to point out here that this concept is not directly applicable to international commercial arbitration.[18] This is because a place of arbitration may be chosen on the basis of factors such as geographical convenience to the parties and the reputation of the arbitration services available there, which are unconnected with the law of that place.[19] Moreover, since the place of arbitration is often chosen by an arbitral institution, such as the International Chamber of

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[10] Alan Redfern et al., Law and Practice of International Commercial Arbitration 120 (4th ed. 2006) [hereinafter Redfern].

[11] Rome Convention on the Law Applicable to Contractual Obligations, Jun. 19, 1980, 19 I.L.M. 1492.

[12] *Id.* Article 3 (1).

[13] Partasides, *supra* note 1, at 674.

[14] 2 Dicey & Morris, The Conflict Of Laws 1232 (Lawrence Collins ed., 12th ed. 1993); Amin Rasheed Shipping Corp. v. Kuwait Insurance Co., [1983] 2 All E.R. 884 (House of Lords).

[15] Re: United Railways of Havana, [1960] Ch. 52, 91 (Court of Appeals).

[16] Partasides, *supra* note 1, at 674.

[17] Redfern, *supra* note 10, at 120.

[18] Partasides, *supra* note 1, at 675.

[19] Redfern, *supra* note 10, at 121.

Commerce,[20] the *situs* in such cases cannot be deemed to be selected by the parties. The preferred choice of the *situs* of the arbitration is, therefore, not sufficient to indicate a choice of governing law.[21] Inferring the choice of proper law from the choice of *situs* has, in fact, been labelled as 'unrealistic'.[22] For instance, in the United States, the earlier practice of applying the law of the seat of arbitration is now on the decline due to the practical and theoretical constraints outlined above.[23] Applying the law of *situs* as the proper law of the contract may lead to an illogical situation where the rights and obligations of the parties arising out of the contract are governed by a system of law they know nothing about. However, the ruling in Egon Oldendorff v. Liberia Corporation[24] is conspicuous for holding that a choice of a place of arbitration may be taken as an implied choice of the law governing the contract. This case involved a contract between a German company and a Japanese company, and was silent on the choice of legal jurisdiction. However, since the contract provided for arbitration in London and contained standard clauses from a well known English charterparty, the Court held that that the proper law of the contract was English law.

III. Choosing the Conflict Rules

When parties have failed to make any express choice regarding the law applicable to the substance of a dispute, the arbitral tribunal can either make a free choice guided by the above practice, or decide to follow the conflict of law rules of the seat of arbitration.[25] If the tribunal chooses the latter, the applicable law would vary from country to country since each country has its own system of conflict of laws for determining the proper law governing a contract.[26] In the United States, the proper law is determined by the place of contracting in some states, and the place of performance in others.[27] In Continental countries, the choice of selecting the proper law is left to the judges, who perform this function by examining various elements of the contract and the circumstances of the case.[28] English Courts have followed the

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[20] Russell on Arbitration 70 (David John Sutton et al eds., 21st ed. 1997).

[21] Stockholm Arbitration Report, 2002:1 at 59, in Redfern, *supra* note 10, at 121.

[22] Emmanuel Gaillard & Peter Griffin, *Transnational Rules in International Disputes*, N. Y. Law. J. 2, 3 (1995).

[23] *Id.*

[24] [1995] 2 Lloyd's Rep. 64 (Federal Court of Australia).

[25] Redfern, *supra* note 10, at 121.

[26] Redfern, *supra* note 10, at 122.

[27] Cheshire & North, Private International Law 534 (Sir Peter North & J. J. Fawcett eds., 13th ed. 1999).

[28] *Id.*

test of the 'closest and most real connection', which has already been discussed above.[29] Therefore, if the arbitral tribunal decides to look into the relevant conflict of laws rules, the same question may produce different answers, depending upon where the judge or arbitral tribunal happens to be sitting.

As per one view, since the arbitrator seated within a certain state acts under the legal auspices of that particular state, he must apply the local conflict of law rules of that state.[30] This suggests that international arbitration has a *lex fori* at the place of arbitration.[31] However, it is well accepted that unlike the judge of a national court, an international arbitral tribunal has no *lex fori*.[32] International arbitration has, therefore, been held to be "floating in the transnational firmament",[33] detached from the municipal system of law. While applying the conflict of laws rules of the place of arbitration might appear to be a practical and less time-consuming solution to the problem, it is a solution that suffers from certain inherent fallacies. Arbitrators and judges of a national court stand on different footing. While judges derive their power to adjudicate from their national legislators, arbitrators derive their authority from the will of the parties to the dispute.[34] State conflict of laws rules are made after years of development and are underscored by different political and juridical considerations.[35] They cannot possibly have any bearing on an international arbitration with no *lex fori*. This practice of delineating arbitration from the laws of a particular state now finds acceptance and is known as 'denationalisation of arbitration'.[36]

Another option available to an international arbitrator is to ascertain whether the conflict of laws rules of the various national systems connected with a particular case converge towards one single domestic law, and to apply such law to the substance of the dispute.[37] In one case for instance, after looking into the Convention on the Law Applicable to the International Sale of Goods (CISG) in addition to the private

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[29] *Supra* notes 15 to 17.

[30] Simon Greenberg, *The Law Applicable to the Merits in International Arbitration*, 8 V.J. 315, 319 (2004) [hereinafter GREENBERG].

[31] *Id.*

[32] REDFERN, *supra* note 10, at 122.

[33] Bank Mellat v. Helliniki Techniki S. A., [1984] Q.B. 291, 301, cited in GREENBERG, *supra* note 30, at 319.

[34] GREENBERG, *supra* note 30, at 317.

[35] *Id.*

[36] KESSEDJIAN, *supra* note 7, at 74.

[37] Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Commercial Arbitration'* in ICCA COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES NO.3 227, 233 (Pieter Sanders ed., 1987).

international law provisions of Switzerland, France, and Yugoslavia, the arbitral tribunal found that Yugoslavia had the closest connection with the contract involved in the dispute and thus applied its law.[38] In fact, this method has now become a common feature in international arbitral practice.[39] Such a method ensures that the conflict of laws rules of all legal systems connected with the case are respected, making the award of such arbitration less susceptible to an attack based on the choice of applicable law. Such an approach, though, suffers from its limited applicability – it may not provide a solution in cases where the conflict of laws rules of all the countries related to the dispute do not converge towards one single set of rules.[40] In certain cases however, though the various conflict of laws systems in question point towards different national laws, the material result of the dispute would be the same, regardless of which law is deemed applicable.[41] In such a case, a statement by the arbitral tribunal to that effect should be a sufficient justification for any choice so made.[42]

According to a second theory, an arbitral tribunal may also resort to the law of the "country that would have been able to exercise jurisdiction in the absence of the arbitration agreement."[43] However, since this approach requires the arbitral tribunal to carry out a thorough analysis of various conflict of laws rules to determine the country which has jurisdiction, it is no less cumbersome than the above methods.[44] It is also suggested that the arbitral tribunal should apply the law of the State where enforcement of the arbitration award is likely.[45] G.B. Born proposes that whenever feasible, the arbitral tribunal should ask the parties to delve into the matter and suggest the law they deem appropriate for governing the contract, if they have not already done so.[46] If both the parties have similar views on the proper law applicable, it can prove to be useful for the final determination of the applicable law by the arbitral tribunal.[47]

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[38] ICC Case No. 2930 of 1982, 9 Y. B. COMM. ARB. 105, 106 (1982).

[39] DAVID D. CARON ET AL., THE UNCITRAL ARBITRATION RULES 132 (2006) [hereinafter CARON].

[40] C. Croff, *The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?*, 16 INT'L LAW 613, 630 (1982).

[41] *Id.*

[42] 12 Iran-US CTR 139, 144-145 (1986-III).

[43] Rachel Engle, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 TRANSNAT'L LAW 323, 347 (2002) [hereinafter ENGLE].

[44] *Id.* at 348.

[45] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 105 (1994).

[46] CARON, *supra* note 39, at 133.

[47] *See* ICC Award No. 1434 of 1975, 103 J.D.I 978 (1976).

IV. International Conventions

International Conventions can become guiding factors for the arbitrators in the event that a country, whose law is identified as applicable to the dispute, is a party to a particular treaty or convention. Hence, a brief overview of some of these conventions becomes important from the perspective of international arbitrations. In the absence of any choice of law by the parties to a contract, the Washington Convention 1965, which is mainly concerned with nations, requires the arbitral tribunal to apply the law of the contracting state along with other applicable rules of international law.[48] The European Convention of 1961 gives the arbitrators the freedom to apply the rules of conflict of laws that they deem applicable.[49] The arbitrators acting under this convention may, therefore, select the conflict of laws rules of any legal system. Similarly, the UNCITRAL Rules state that when the parties fail to designate the law applicable to the dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.[50] According to one interpretation, an arbitrator acting under the Model Law is free to apply any conflict of laws rule he deems appropriate, and that the same need not emanate from the legal system of a state.[51] Moreover, since the Model Law does not provide for court review of an award on the ground of wrong application of Article 28, it serves as little more than a guideline for the arbitral tribunal.[52] The practice related to the Rome Convention on the Law Applicable to Contractual Obligations has already been discussed above. Some arbitral tribunals may find it necessary to support their reasoning with a conflict of laws rule found in a convention, but there is nothing that obliges them to do so.[53]

V. National Laws: Making a Direct Choice

In the absence of a clear choice by the parties in respect of the proper law of the dispute, and in the absence of any obligation by the arbitral tribunal to apply an international treaty or convention, the tribunal should first ascertain the national

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[48] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42, Mar. 18, 1965, 575 U.N.T.S. 159.

[49] European Convention on International Commercial Arbitration, art. 7, Apr. 21, 1961, 484 U.N.T.S. 349.

[50] UNCITRAL Model Law on International Commercial Arbitration, art. 28(2), Jun. 21, 1985, 24 I.L.M. 1302.

[51] Greenberg, *supra* note 30, at 321.

[52] Report of the UN Commission on International Trade Law on the Work of its Eighteenth Session, UN GAOR, 40th Session, Supp No.17, U.N. Doc. A/40/17, at 47, ¶238 (1985).

[53] Kessedjian, *supra* note 7, at 81.

law applicable.[54] An examination of some national laws relating to the issue thus becomes relevant. Article 1496 of the French New Code of Civil Procedure provides that failing a choice of law by the parties, the arbitrator "shall decide according to those rules which he considers to be appropriate."[55] The Dutch Civil Procedure Code contains an analogous provision.[56] Similarly, Article 187(1) of the Swiss Private International Law Act, 1989 states that in the absence of a choice of law by the parties, the case shall be decided "according to the rules of law with which the case has the closest connection."[57] § 28(1)(b)(iii) of the Indian Arbitration and Conciliation Act, 1996 also provides that failing a choice of law by the parties, the arbitral tribunal can apply "rules of law it considers appropriate given all the circumstances surrounding the dispute."[58] An arbitral tribunal governed by any of the above laws can thus choose such rules of law as it deems appropriate. Whether this choice is reached through conflict of laws rules or directly is for the arbitral tribunal to decide.

If the arbitrator tribunal arrives at the proper law applicable to the contract directly, without relying on the conflict of laws rule of any particular system, it makes what is known as *voie directe*, or a direct choice.[59] *Voie directe* is, in fact, a special conflict of laws rule developed by arbitration practice, whereby the tribunal determines the legal system the contract in question had the most significant relation with.[60]

In Saudi Arabia v. Arabian American Oil,[61] a case involving a concession agreement between a United States oil company and Saudi Arabia, the arbitrators found that while some disputed issues were governed by the law of Saudi Arabia, as provided for in the contract, the law governing the remaining matters would have to be decided upon by them. The tribunal decided to apply the law which corresponded "best to the nature of the legal relationship between the parties, without looking for the tacit or presumed intention of the contracting parties."[62] This, according to the arbitral tribunal, was the law of the country with which the contract had the closest connection, and also the law of the place where the operation was to be

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[54] KESSEDJIAN, *supra* note 7, at 77.

[55] CODE CIVIL [C. CIV.] art. 1496 (Decree Law No. 81-500, May 12, 1981) (Fr.).

[56] CODE CIVIL [C. CIV.], art. 1054 (1986) (Neth.).

[57] GREENBERG, *supra* note 30, at 320.

[58] MALHOTRA, *supra* note 6, at 906.

[59] REDFERN, *supra* note 10, at 123.

[60] KESSEDJIAN, *supra* note 7, at 81.

[61] 27 I.L.R 117 (1963).

[62] *Id.* at 167.

carried out.[63] This case shows how an arbitral tribunal can make a direct choice without burdening itself with a detailed conflict of laws analysis.

As the practice of making a direct choice appears to be in consonance with an arbitral tribunal being trusted to decide a dispute, there is no reason for doubting its competence in deciding the rules on which it will base its decision.[64] Moreover, had the parties intended otherwise, nothing prevented them from denying this choice to the arbitral tribunal by virtue of their arbitration agreement itself.

In addition to the national laws discussed above, the rules of many modern arbitral institutions also prefer to leave the decision of determining the appropriate law applicable to the substance of the dispute to the arbitral tribunal itself. Article 17(1) of the ICC Rules of Arbitration 1998 provides that in the absence of an agreement by the parties, "the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate." Similarly, failing any express agreement, Article 22.3 of the London Court of International Arbitration Rules 1998 allows arbitrators to apply any "rules of law" to the merits of a dispute.

In determining the proper law of the dispute in an international commercial arbitration, as per the above approach, the arbitral tribunal may also have regard for international *lex mercatoria* or customary international commercial law. *Lex mercatoria* evolved from a set of laws relating to commercial transactions of traders living under the Roman Empire.[65] Among the sources of modern *lex mercatoria* are customs and usages of trade, general principles of law, international conventions, acts of international organisations, and codes of conduct.[66] In 1994, the International Institute for the Unification of Private Law (UNIDROIT) sought to give form and substance to the *lex mercatoria* by publishing the 'Principles of International Commercial Contracts'.[67] The arbitral tribunal can thus have recourse to these principles as well. In fact, the UNIDROIT principles are being frequently referred to in international commercial arbitrations.[68]

Another interesting case that highlights an extreme stand taken by an arbitral tribunal while making a direct choice is the *Sapphire arbitration* case.[69] This case involved

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[63] *Id.*

[64] REDFERN, *supra* note 10, at 124.

[65] PARTASIDES, *supra* note 1, at 677.

[66] Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 272 (1986) [hereinafter DANILOWICZ].

[67] PARTASIDES, *supra* note 1, at 678.

[68] Fabrizio Marrella, *Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts* 36 VAND. J. TRANSNAT'L L. 1137, 1157 (2003).

[69] 35 I.L.R. 136, 137-76 (1967).

a contract between a state organ and a foreign company. The tribunal based the award on general principles of international law recognised by the civilised nations, as defined in Article 38 of the Statute of the International Court of Justice, while holding the contract to be quasi-international in character. According to the tribunal, this released it from the bounds of a particular legal system, and differentiated it from an ordinary commercial contract.[70] The tribunal went on to observe that it was "in the interest of both parties to such agreements that any disputes between them should be settled according to the general principles universally recognised and should not be subject to the particular rules of national laws, which are very often unsuitable for solving problems concerning the rights of the State where the contract is being carried out, and which are always subject to changes by this State and are often unknown or not fully known to one of the contracting parties."[71]

VI. The Indian Perspective

As already pointed out above, in the absence of any choice of proper law by the parties to a dispute, § 28(1)(b)(iii) of the Indian Arbitration and Conciliation Act, 1996 leaves it to the arbitral tribunal to apply any law it considers appropriate, given all the circumstances surrounding the dispute. Although the wording of the provision gives wide discretion to the arbitrator, one author notes that given such a situation, the arbitrator must try to find out the law which the parties intended to apply.[72] In order to ascertain the intention of the parties, the arbitrator may resort to apply the test of 'closest and most real connection'.[73] The author also suggests that with the consent of the parties, a reference could be made to a High Court for the determination of the proper law.[74] The author is of the opinion that such a practice would save the parties the expenses they would incur in the event that one of the parties chooses to challenge the arbitrator's determination of the proper law before a court.[75]

When such a case reaches an Indian court, it is likely to guided by the decision of the Supreme Court in National Thermal Power Corporation v. Singer Co.[76] The Supreme Court observed that where the parties have not expressly or impliedly

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[70] *Id.*

[71] *Id.*

[72] P. C. Markanda, Law Relating To Arbitration & Conciliation 496 (6th ed. 2006).

[73] *Id.*

[74] *Id.* at 497.

[75] *Id.*

[76] A.I.R. 1993 S.C. 998.

selected the proper law of the contract, the courts would impute an intention by applying the objective test to determine what law the parties would have, as just and reasonable persons, intended to apply had they applied their minds to the question.[77] It went on to observe that indices such as the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction could be looked into for determining the proper law.[78] Although the Supreme Court made these observations in relation to the determination of the proper law of an international commercial contract by a judicial authority, interestingly, it also fleetingly observed that the selection of the place of arbitration has little relevance for drawing an inference as to the proper law of the contract.[79] It is very important to note here that since the dispute in the above case was in relation to the choice of proper law of the arbitration agreement and not the proper law of the contract, the above observations of the Supreme Court are nothing but *obiter dicta*.[80]

The Delhi High Court, in a later case, held that in ascertaining the proper law of the contract, the court must have regard to the connecting ties which point to the country in which the centre of gravity of the contract lies.[81] The Supreme Court in a relatively recent case has held that where there is no express choice of the law governing the contract, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the international commercial contract is the same as the law of the country in which the arbitration is agreed to be held.[82] Not only is the ruling in this case contrary to the one in the case of National Thermal Power Corporation,[83] it also goes against the well accepted norm that international arbitration has no *lex fori* at the place of arbitration. However, since this judgement was delivered under the framework of the 1996 Act, it certainly has more value than the previous judgments.

The above discussion suggests that if a case is brought before an Indian court, where the parties have not chosen the proper law of the contract and the arbitrator makes a direct choice, without entering into a conflict of law analysis, it is highly likely that such a determination would be overturned by the court by way of an interim measure under § 9(e) of the 1996 Act. In light of the recent judgment of the

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[77] *Id.* at 1007.

[78] *Id.*

[79] *Id.* at 1007.

[80] *See generally,* SMITH, BAILEY AND GUNN ON THE MODERN ENGLISH LEGAL SYSTEM 480 (S.H. Bailey et al. eds., 4th ed. 2002).

[81] Gas Authority of India Ltd. v. SPIE CAPAG, S.A., A.I.R. 1994 Del. 75 [Delhi High Court].

[82] Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc., (2003) 9 S.C.C. 79.

[83] *Supra* note 76.

Supreme Court, the determination would be more susceptible to being struck down, especially when the choice of law made by the arbitrator is not the law of the place where the arbitration was agreed to be held.

VII. Conclusion

It is quite clear from the above discussion that according to modern practice, failing any agreement by the parties, the proper law of the dispute brought to international commercial arbitration is to be determined by the arbitral tribunal which may do so without being bound by any specific set of rules. It is now widely accepted that arbitral tribunals are free to define the applicable law without resorting to any specific conflict of laws rule.[84]

In determining what rules of law would be applicable to the substance of the dispute, arbitral tribunals can now have recourse to classical conflict of laws analysis, to general principles of private international law and also to the recent UNIDROIT Principles. In choosing the conflict of laws rules, international arbitrators are not bound to have regard for *lex fori,* since international arbitrations definitionally do not have a forum law.

While the direct approach *(voie directe)* may appear to give more flexibility to the arbitral tribunal, resulting in speedy decisions, it can also cause certain problems. When an arbitrator does not refer to a specific system of conflict of laws rules, a party aggrieved by the arbitral award will hardly find solace in coming to understand that the award was not based on any established principle of conflict of laws.[85] To the contrary, if the award is based on a conflict of laws analysis which selects a rule emanating from a specific legal system connected to the dispute, the award would have greater acceptability. Moreover, when an arbitrator does not make his decision in a transparent manner, his decision becomes susceptible to being termed arbitrary and unfair.[86] While making a direct choice, the arbitrator exercises tremendous discretion in determining the relative weight of the connecting factors to a system of law. An abuse of this discretion will frustrate the parties' expectations with respect to the applicable law.[87] It must also be borne in mind that in some jurisdictions, a flagrantly arbitrary determination of the applicable law may be a ground for rejecting the recognition and enforcement of the award for public policy reasons under Article

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[84] Kessedjian, *supra* note 7, at 81.

[85] Greenberg, *supra* note 30, at 325.

[86] *Id.*

[87] Danilowicz, *supra* note 66, at 282.

V(2)(b) of the New York Convention.[88] Therefore, even when the law governing the arbitration allows the arbitral tribunal to decide upon the proper law, it should first resort to a conflict of laws analysis not only for the sake of enhancing the consistency of the international commercial arbitration system, but also to avoid undermining the enforceability of the award. This would go a long way in establishing security in the international trading community, which time and again resorts to international commercial arbitration.

As discussed before, if the national law accepts that some other rules of law, other than the conflict of laws rules may be applied to the matter, the tribunal can look at other rules like the UNIDROIT principles.[89] Even if the arbitrators find the conflict of law analysis to be too cumbersome and time consuming, they must at least resort to the UNIDROIT principles for the sake of ensuring uniformity and predictability.

Individuals invest in long-term arrangements to maximise their welfare under the relevant legal rules.[90] If these rules change frequently, this may erode the value of these long-term arrangements.[91] This implies that if different arbitral tribunals are not uniform in their approach towards determining the proper law of contract in international commercial arbitrations, the value of this arrangement of getting a dispute settled by arbitration may be eroded over time. Unpredictability in this sense corresponds closely to the 'hard case' in legal jurisprudence, where "no settled rule dictates a decision either way".[92] In the context of arbitration, hard cases are the ones where the parties have not expressly chosen the proper law of the contract and the arbitral tribunal is faced with the problem of determining it in the absence of any single universally accepted rule. Given the existing situation, it would be very naïve on our part to expect all the arbitrators of the world to act as slot machines and apply the same method for determination of proper law in a similar set of facts. The only way of improving the system is to tinker with the conflicting approaches, "to make them compatible and clear."[93]

Owing to the availability of different methods for determining the law to govern a contract, the choice of law in international arbitration where parties have

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[88] *See* O. Lando, *The Law Applicable to the Merits of the Dispute*, 2 ARB. INT'L. 104, 110 (1986).

[89] KESSEDJIAN, *supra* note 7, at 81.

[90] Nicholas L. Georgakopoulos, *Predictability and Legal Evolution*, 17 INT'L REV. L. & ECON. 475, 480 (1997).

[91] *Id.*

[92] Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975).

[93] HILAIRE MCCOUBREY & NIGEL D. WHITE, TEXTBOOK ON JURISPRUDENCE 214 (3rd ed. 1999).

failed to make an express choice "remains unstable and uncertain".[94] Moreover, since this issue has been subjected to very little litigation, there are no authoritative rules or guidelines available to international commercial arbitrators acting under vague national laws. Therefore it is high time that the international arbitration community comes out with a set of specific guidelines on this issue, to be followed in all international commercial arbitrations taking place across frontiers.

[94] ENGLE, *supra* note 43, at 349.