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"The Substantive Rights of Parties in Arbitration: Voie Directe and Voie Indirecte"

Professor Doug Jones AO[1]

1. Introduction

It is said that party autonomy is fundamental to international commercial arbitration; the freedom to choose the laws and rules of law that dictate the substantive rights and obligations of parties is at the crux of such autonomy. Often, however, tensions arise where parties neglect to make an express choice of law in their contractual agreements, leaving the tribunal to determine the applicable substantive law in accordance with either national procedural laws or the rules of the institution under which the arbitration is conducted.

In proceedings which require determination of choice of law, it is not uncommon for there to be many points in contention relating to this issue. Indeed, the resolution of the choice of law issue may be as complex as the resolution of the actual substance of the dispute'. Particular complications arise where multiple aspects of the arbitration are governed under different laws from multiple jurisdictions.

In laying the foundation for this paper, it is important to identify that arbitrations are usually concerned with two categories of laws, the first being the law governing the substance of the dispute, and the second being the procedural law governing the arbitration (the "*lex arbitri*").

The former refers to those laws or rules of law governing the contract out of which the dispute arises. The applicable substantive law determines the legal rights and obligations of the parties. In particular, however, it may also affect the causes of action that may be advanced, the substantive remedies available, the types of damages recoverable, limitation defences, the calculation of the quantum of damages and even the burden of proof in some cases.

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

While some parties may choose the substantive and procedural laws to fall under a single legal system, it is also not uncommon for parties to choose different systems for the two categories.

If a tribunal must determine the substantive law of a dispute, they are endeavouring to ascertain the applicable law or rules of law of the contract. They may be a single law of origin, or they may be made up by the laws of several nations, of transnational laws, international law principles, rules of international conventions and trade usages, among many others. Whilst the process by which the tribunal lead their analysis may be limited by the provisions of the *lex arbitri*, there are two recognised methodologies by which they determine the choice of law: *voie directe* and *voie indirecte*.

This paper seeks to explore these two concepts in turn.

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[1] Independent International Arbitrator, CArb (www.dougjones.info). The author gratefully acknowledges the assistance provided in the preparation of this paper by my legal assistant, Jason Corbett. This paper is an adaptation of my earlier published paper, 'Choosing the Law or Rules of Law to Govern the Substantive rights of the Parties - A Discussion of *voie directe* and *voie indirecte*' (2014) 26 *Singapore Academy of Law Journal* 911.

I will firstly lay out the background to *voie directe and voie indirecte* in terms of the functions of the approaches, and the circumstances in which they will be prescribed in proceedings. I will then, in the next two parts, consider both concepts in more detail, exploring the substance of the approaches and the elements relevant to a tribunal's decision-making. Lastly, I will conclude the paper with a suggestion in favour of *voie indirecte*, due to its relative certainty and more comprehensive testing.

2. *Voie directe* and *voie indirecte*

2.1 Background and prescription

Under the *voie directe* approach, the tribunal is empowered to select the law or rules of law applicable to the merits of the dispute directly. Elements the tribunal may consider include the contract, the factual matrix of the case, and the submissions of the parties. When using the direct application method, the arbitral tribunal should prioritise the law most relevant to the commercial circumstances of the case, that is, the law or rules of law which best suit the international transaction, taking into account the circumstances of each case. This method is directly prescribed under a variety of institutional rules,[2] and under some national statutes.[3]

The *voie indirecte* approach is one of the oldest methods of determining the applicable law.[4] Under *voie indirecte*, the tribunal must first determine the appropriate conflict of laws rule to apply, before ascertaining the appropriate substantive law of the dispute. The particular rule, of course, naturally varies across tribunals and the factual circumstances of each case. The terms of the instrument or rules from which the tribunal's power is derived may give the tribunal a discretion to apply the conflicts rule it considers "applicable" or "appropriate".[5] Conversely, the instrument may prescribe how the conflicts rule is to be ascertained by application of a particular jurisdiction's choice of law rules or by application of the closest connection test (discussed shortly).

In terms of prescription of *voie indirecte*, institutional and national rules do so in one of two ways, either by giving the tribunal the discretion to select a set of conflict of laws rules, or by prescribing the specific conflict of laws rule to be used. The UNCITRAL Model Law is an example of the former,[6] which is significant given that a large number of national arbitration statutes give effect to, or are based on, the Model Law.[7] Where the rules or statutes elects the specific conflicts rule to use, the closest connection test is most common,[8] though a variety of the conflict of laws rules will be explored in this paper.

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[2] International Chamber of Commerce Rules of Arbitration 2012 ('ICC Rules'), Art 21; United Nations Commission of International Trade Law ("UNCITRAL") Arbitration Rules 2010, Art 35(1); American Arbitration Association ("AAA") 2009 Rules, Art 28(1); World Intellectual Property Organization ("WIPO") 2002 Arbitration Rules, Art 59(a); Singapore International Arbitration Centre ("SIAC") 2013 Rules, r 27; London Court of International Arbitration ("LCIA") Arbitration Rules (1998), Art 22.3; Australian Centre for International Commercial Arbitration ("ACICA") Arbitration Rules (2011), Art 34; Arbitration Rules of the Stockholm Chamber of Commerce (2010), Art 22(1); Vienna International Arbitral Centre Rules of Arbitration (2013), Art 27(2).

[3] For example, French Code of Civil Procedure, Art 1511.

[4] It can be traced back as far as the 1961 European Convention on International Commercial Arbitration, Art VII (1). International Chamber of Commerce Rules of Arbitration1975, Art 13(3).

[5] For example, 1961 European Convention on International Commercial Arbitration, Art VII (1); the UNCITRAL Model Law on International Commercial Arbitration, Art 28; English Arbitration Act 1996, s 46 (c 23); New Zealand Arbitration Act 1996, Art 28; Danish Arbitration Act 2005, s 28.

[6] UNCITRAL Model Law on International Commercial Arbitration, Art 28(2).

[7] For example, see English Arbitration Act 1996, s 46(3); Singapore International Arbitration Act 2002, Art 28(2).

[8] Swiss Arbitration Law 2012, Art 33; German Code of Civil Procedure, s 1051(2); Japanese Arbitration Law 2003, Art 36; Italian Code of Civil Procedure, Art 834; Egyptian Arbitration Law 1994, Art 39(2).

In practice and principle, there are many cases where the application of either a *voie directe* or *voie indirecte* method will lead to the same result. The chief difference between the methods is, after all, in the *process* by which the tribunal arrives at their decision, not in the decision itself. It has been noted, for example, that *voie directe* most often consists of finding a significant connecting factor between the contract and the law which the tribunal decides to apply.[9] The similarities between this procedure and the "closest connection" test under the conflicts rule (the first step in *voie indirecte*) are easily discernible. Further, in situations where a *lex arbitri* or institutional rule has prescribed *voie directe* but has omitted the particular factors to be taken into consideration in decision making, it is always open to the tribunal to consider the same factors as they would in determining the appropriate conflicts rule, which often manifest into the rules themselves. In these circumstances, a similar conclusion is not unlikely.

That is not to say, however, that there are no situations in which *voie directe* and *voie indirecte* will lead to the application of different laws. Where the tribunal is directed to apply a specific conflicts rule in a *voie indirecte* model, or are referred to particular factors under the *voie directe* model, it is foreseeable that a different outcome may arise.

2.2 The need for reasons

Irrespective of the similarities or disparities in the outcomes of both tests and regardless of which test is ultimately adopted by the tribunal, it is imperative that in all cases where choice of law is an issue in dispute, the tribunal provides detailed reasons for their decision.

With respect to *voie directe*, this may take the form of a careful explanation of why the law determined to be applicable is the most appropriate law to decide the parties' dispute. With respect to *voie indirecte*, this may take the form of a clear application of a conflict of laws rule. In general, a discussion of the implications of different approaches and results may also benefit parties and tribunals.

In the case of *voie directe*, however, reasons are particularly important as the omission of a comprehensive, reasoned analysis of the path to the tribunal's conclusion risks the tribunal's conclusion being perceived as an arbitrary decision in favour of the most convenient or familiar law, or rule of law, for the arbitrators (for example, the laws of the country of which the members of the tribunal are nationals).

Under both approaches, reasons are also important for the enforceability of the award. In some cases the tribunal may be subject to an express duty to render a valid and enforceable award.[10] In this regard, the tribunal should be cognisant of any potential issues arising out of the mandatory substantive laws which may be determined to be applicable, and should consider any public policy implications which may affect the enforceability of the award when determining the applicable substantive law.

3. *Voie indirecte* in practice

It is well within parties' rights to specify a particular conflict of laws rule for the tribunal to apply in the *lex arbitri* in the event of a choice of law dispute. In the absence of such a specification, the applicable rules or the *lex arbitri* generally provide that the arbitral tribunal is to choose a conflict of laws rule that it deems "appropriate" or "applicable". Some of these rules will be explored below.

3.1 Rules of the seat

Historically, many arbitral tribunals applied the conflict of laws system of the seat of arbitration. This approach has seen declining popularity, however, given that conventional commercial practice is to select the seat of the arbitration for reasons of neutrality, rather than for its specific legal system. As legal

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

[10] For example the ICC Rules, Art 35(6).

scholars have noted, “this trend was another aspect of the development of ‘delocalised arbitration’, which saw the mandatory application of the choice of law rules of the forum as an unnecessary fetter on party autonomy”.[11] The same has been asserted in international arbitral awards. An ICC arbitral tribunal, for example, found that “the most authoritative present day doctrine and international arbitration jurisprudence admit that in determining the substantive law, the arbitrator may leave aside the application of the conflict rules of the forum”.[12] That being the case, there are still few examples of this method being applicable, and parties should be wary on this when considering the question of seat.[13]

3.2 Most closely connected to the dispute test

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

For example, when considering potential enforcement as a determinant of law, the tribunal must be prepared to deal with the possibility of multiple jurisdictions where enforcement may occur. The same applies when considering the State that would have had jurisdiction but for the arbitration. When looking to the place of conclusion or performance of the contract, many national laws prioritise the place of business or habitual residence of the party that performs the major contractual obligations. Tribunals in this context should be prepared to deal with the uncertainty that externalities can create, for example by electronic commerce or ongoing negotiations with a range of potential counter-offers. There is also the possibility that a circular proceeding may result, as it may be necessary to know the applicable law to know where and when the acceptance took place.

3.3 Closest connection test

Tribunals often apply the closest connection test even where not required to, considering the test a transnational principle of private international law and thus one of the "most appropriate" conflict of laws rule. This method appeals to the notion that the law will be tailor-made for the particular contractual circumstance. However, in modern commerce there can be too many relevant factors connected to the dispute which can lead to *depecage,* where different laws apply to different parts of the contract. Notably, the operation of the closest connection test can be quite similar to the *voie directe* approach, with the tribunal needing to determine a relevant element of circumstance to determine the closest law or rule of laws to be applied.

3.4 The domicile of the person exercising characteristic performance

There is mixed commentary concerning whether the domicile of the person exercising characteristic performance is but one aspect of the closest connection test, or a conflict of laws rule in itself.[14]

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

[12] *Award in ICC Case No 2930* IX YB Comm Arb 105 (1984); see also *Award in ICC Case No 7375* 11(12) Mealey’s Int’l Arb Rep A-1 at A-37 (1996); see also, *Award in ICC Case No 6030* in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 228 n 227 (2001): "[The] conflict rules of the place of the arbitration are by no means binding on international Arbitral Tribunals sitting in Switzerland"; *Partial Award in ICC Case No 8113* XXV YB Comm Arb 324 at 325 (2000): “…not only is the Tribunal, sitting in Zurich, not bound to apply the Swiss rules of conflict of laws, but the application of such rules to the dispute would not be appropriate or justifiable since the contractual relationship between the parties has no connection whatsoever with Switzerland.”

[13] International Arbitration Rules of the Zurich Chamber of Commerce 1989, Art 4; Rules of Proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry 2000, Art 14.

[14] Marc Blessing, “Regulations in Arbitration Rules on Choice of Law” in Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration (ICCA Congress Series, 1994 Vienna vol 7) (Albert Jan van den Berg

The 2008 European Union Regulation on the Law Applicable to Contractual Obligations ("Rome I Regulation") attempts to combine this method with the closest connection test. Article 4(2) of that Regulation stipulates that, in the absence of choice by the parties, the domicile of the person exercising characteristic performance is the preferred method of resolving choice. However, Article 4(3) stipulates that where it is clear on the facts that the contract is "manifestly more connected with a country other than indicated" by the domicile test, or where the law cannot be determined pursuant to the domicile test, then the closest connection test should be preferred.

A number of issues arise when applying the characteristic performance test. For one, the nature of modern international commercial exchanges has developed dramatically with the advent of technology and globalised businesses such that it is not always possible to determine what constitutes the characteristic performance. Further, the application of this method may result in favouring the laws of one type of contracting party. As stated by Petsche, "while the characteristic performance test does provide some degree of precision, it does not usefully apply to complex contractual settings devoid of a characteristic performance".[15] Such complex contractual settings might include turnkey agreements, technology transfers, mining concessions and joint ventures.

3.5 Cumulative method

Perhaps most intuitively, the cumulative method is an approach that is frequently utilised by tribunals. This method consists of simultaneously considering all of the choice of law rules of all legal systems with which the dispute in question is connected. If these rules result in the same substantive law, the tribunal will apply this law to the merits of the dispute. In theory, this method applies a "false conflict" ideology to demonstrate that all analyses would lead to the same applicable law. Conversely, however, the cumulative method is obviously of limited value to a tribunal where the outcome is different for each method applied.

A classic example of the application of this method is contained in a 1997 ICC award where a tribunal, seated in Paris, considered whether to apply French, Yugoslav or Egyptian conflict of laws rules. All the conflict of laws rules determined the applicable substantive law differently; the French conflicts rules referred to the substantive law of the Yugoslav seller's domicile, the Yugoslav conflicts rules referred to the substantive law at the principal office of the seller, and the Egyptian conflicts rules referred to the substantive law of the place of signature. Despite the differences in analysis, all three conflicts systems lead to the conclusion that Yugoslavian substantive law was the most applicable to the dispute.[16] In another ICC example, an arbitral tribunal applied "both the Irish and the French rules of conflict, given that these are the only ones having a direct connection with the parties and the dispute", with both sets of rules producing the same result.[17]

3.6 International conflict of laws rules

To escape the peculiarities of national laws, some tribunals have considered that there might exist international conflict of laws rules that are not connected to any national conflicts rules. In those terms, an

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ed) (Kluwer Law International, 1996), 415; *ICC Case No 7205* in *Collection of ICC Arbitral Awards 1991–1995* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer Law International, 1997) at p 622 where the arbitral tribunal applied the law of the country in which the party that effected the characteristic performance had its central administration.

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

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

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

ICC arbitral tribunal found that the implied choice of Austrian law was confirmed by the "general rules" of conflicts, making reference to the existence of such international rules.[18]

Furthermore, an ICC arbitral tribunal in its award of 2001 established that there is:[19]

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

Arbitral tribunals have relied on several occasions on the 1980 United Nations Convention on Contracts for the International Sale of Goods[20] ("CISG"), the 1955 Convention of the Law Applicable to International Sales of Goods, the Rome I Regulation and its predecessor the 1980 Rome Convention. However, it is important to note that there is no such body or single set of international conflict of laws rules which apply universally and specifically in the context of international commercial arbitration.

4. *Voie directe* in practice

The laws which a tribunal may apply under *voie directe* need not be exclusively national law. They may instead apply laws resulting from several sets of rules, such as the general principles of private international law, the *lex mercatoria*, trade usages or particular principles, or international regulations regarding a specific subject such as intellectual property in copyright or patents-related disputes. They may even apply a combination of these rules.

Although there is nothing to exclude the application of these principles under a *voie indirecte* method, in practice they are more likely to be applied where the tribunal has a discretion to determine the applicable law directly, rather than where they must determine the choice of laws rule as the application of which is more likely to point to a particular national law. This is significant when it is considered that, in some cases, the application of accepted private international law principles may be more aligned with the parties' expectations than the application of a foreign national law.

4.1 General principles of private international law

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

Several advantages can be highlighted from the application of general principles of private international law. For example there may be matters where two or more legal systems may be equally connected to the dispute, although they may lead to significantly different results. It may also be the case that the parties have sought to avoid the application of a national law which contain provisions contrary to the

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

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

[20] 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

expectations of their agreement. In this context, it is clear that a tribunal's reasoning should evidence some priority to the commercial considerations held by parties at the time of contracting.[21]

By the same merit, the tribunal may also opt for the application of such international principles as a means of interpreting and supplementing the applicable national law. Concurrent application may also be established, as occurs in arbitrations within the International Centre for Settlement of Investment Disputes. The Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention") in Art 42(1), establishes that in the absence of an agreement of the parties on the applicable law, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". Additionally, as explained by Blessing, "a reference to international law is made as a corrective means to test the authority of the national law".[22] In this way, the ICSID Convention opens the possibility for the arbitral tribunal to refer to general principles of law to avoid local standards of the applicable domestic law that may be contrary to the parties' expectations.[23]

4.2 Validity and party autonomy

As party autonomy forms the foundation of international commercial arbitration, the efficiency of the approaches to determining choice of law can be, to some degree, measured by the outcome and its reflection of the parties' expectations at the time of contracting. In this context, the application of the *voie indirecte* method can sometimes produce an unexpected result, as the variety of conflict of laws rules that tribunals can elect to use render any outcome unpredictable. By contrast, the application of the *voie directe* method may prove more predictable, and accordingly may better balance the rights and expectations between the parties.

One way in which *voie directe* achieves this result is in allowing the tribunal to choose a law to promote the validity of the contract (assuming that the parties' original intent was to have a valid agreement). By way of example, when confronted with this issue, an ICC tribunal applied Swiss law rather than the laws of the Arab claimant given that their application "might partially or totally affect the validity of the Agreement", and that it was "reasonable to assume that from two possible laws, the parties would choose the law that would uphold the validity of the Agreement".[24] In another ICC decision, it was found that an agency contract between an Italian company and a French agent should be governed by French rather than Italian law, because the latter's requirement, according to which all commercial agents need to be registered in Italy, would have invalidated the contract.[25]

Such decisions demonstrate that the question of validity is an extension of a tribunal's prioritisation of the business and commercial interests of parties engaging in arbitration. After all, given the sheer complexity

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[21] See Yves Derains, "Transnational Law in ICC Arbitration" in *The Practice of Transnational Law* (Klaus Peter Berger ed) (Kluwer Law International, 2001) at pp 43 and 47 citing an ICC dispute between a Japanese manufacturer and a Middle Eastern distributor held that the contract should be governed by "principles of international business law"; see also *The Practice of Transnational Law* (Klaus Peter Berger ed) (Kluwer Law International, 2001) at p 228 quoting *ICC Case No 8385* which applied "what is more and more called *lex mercatoria*" as the application of international principles that "take into account the particular needs of international relations"; see generally *Norsolor v Pabalk Ticaret* (18 November 1982) (Austrian Supreme Court), 1993 Rev Arb 516; *Banque du Moyen-Orient v Fougerolle* (9 December 1981) (Cour de Cassation, France) 1982 Rev Arb 183; *Deutsche Schachtbau- und Tiefbohrgesellschaft v Ras al Khaimal National Oil Co* [1987] 3 WLR 1023.

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

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

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

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

and size of transactions which utilise arbitration as their preferred dispute resolution mechanism, there should be no doubt that the parties intended for the contract to be a valid and binding agreement between them. A decision to contrary would make little commercial sense.

4.3 Parties' expectations and intentions

Observing the parties' expectations when deciding the applicable law might well be a successful commercial formula for arbitral tribunals. In practical terms, however, the tribunal may not have any firm indications of what these expectations are, or may have been. Several considerations may be taken into account in this situation.

First, the arbitral tribunal may find that there has been a negative choice, or a rejection of a particular law or set of laws, by the parties. Such a determination necessarily requires an unequivocal rejection by both parties. In general, failure to agree on a particular choice of law would not in itself satisfy the threshold for unequivocal rejection.

However, in circumstances where an unequivocal rejection is not obvious on the facts, tribunals have resolved the dispute by applying those general principles of international private law related to the business interests of parties. For example, a 1996 ICC tribunal considered nine contracts made in the 1970s between Iran and a US supplier which did not contain a choice of law clause. The tribunal concluded that at the time of entering into the agreement that neither party would have agreed to the use of the other party's national laws, noting:

> The Tribunal will apply those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a *lex mercatoria*, also taking into account any relevant trade usages as well as the UNCITRAL Principles, as far as they can be considered to reflect generally accepted principles and rules.[26]

In *Compañía Valenciana de Cementos Portland (Spain) v Primary Coal Inc (New York)*,[27] the arbitral tribunal concluded that neither of the two national laws were the most appropriate for resolving the dispute. They held that the absence of a choice of law clause in the contract was a "deliberate, tacit omission" and an indication that the parties did not want a domestic law applied to their contract. Ultimately, the tribunal concluded that the parties had intended to have a "purely international law" as the applicable law; the "ensemble of the usages of international commerce". On appeal, and upheld by the French *Cour de Cassation*, the Paris Court of Appeals confirmed the tribunal's decision, holding that an ICC tribunal is not bound to apply conflict rules stemming from a domestic legal system, and that it can resort to general international principles of conflict of laws.

It is also available to tribunals to hold that the choice of law of a dispute had been implied by the parties in their agreement. In these cases, the tribunal assesses whether there are strong connecting factors to a particular law revealed in the analysis of the *lex arbitri* which would suggest that the parties held an implied intention to rely on that law. However, significant care must be taken by a tribunal in such a determination, as it must be appreciated that an explicit choice of the *lex arbitri* by the parties does not imply, *per se*, a preference to have that rule as the applicable law to the substance of the dispute.

In *ICC Case No 8502*, the arbitral tribunal heard a dispute regarding a contract between a Vietnamese seller and a Dutch buyer acting through a French company as its agent and held that although the contract contained no choice of law clause, it referred to international trade usages which should be applied as the law of the dispute. Indeed, the contract included some provisions imposing the application

[26] The award has been reported in 11(12) Mealey's Int'l Arb Rep A-1 *ff* (1996) and is available in excerpts at UNILEX.

[27] (13 July 1989) (Cour d'appel de Paris) (1Ch suppl), (1990) 3 Revue de l'Arbitrage 663–674; Klaus Peter Berger, "Lex mercatoria in der internationalen Wirtschaftsschiedsgerichtsbarkeit; Der Fall 'Compañía Valenciana'" (1993) 13 Praxis des Internationalen Privat-und Verfahrensrechts 281–288.

of the Incoterms 1990 and the clause of the Uniform Customs and Practice for Documentary Credits 500 to specific contractual obligations. The arbitral tribunal was of the view that:

> ... by referring to both the Incoterms and the UCP 500 the Parties showed their willingness to have their Contract governed by international trade usages and customs … in particular, the Arbitral Tribunal shall refer, when required by the circumstances, to the provisions of the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by UNCITRAL, as evidencing admitted practices under international trade law.[28]

5. Conclusion

It is no exaggeration to say that tribunals strive to protect the fundamental principles of party autonomy and commercial interests which form the foundations of international arbitration. Binding parties to domestic laws is often avoided if to do so would unnecessarily interfere with what the tribunal can infer to be the parties' reasonable expectations. It is by this same token that the application of general principles of international private law may, more accurately, establish the real intent of the parties than the application of conflict of laws rules which seek to impose a single choice of national law.

There is no definitive dividing line between *voie directe* and *voie indirecte.* It is common for both methods to be applied concurrently, as tribunals may consider the same elements when selecting the applicable law to the merits of the case. However, in my view, there are great advantages in the *voie indirecte* approach. Tribunals in many cases perform a comparative analysis of national legal systems, arbitral case law, international conventions, and compilations of general principles of law, and apply such analysis in a meaningful way against the particular facts of each case. The application of such a rigorous decision-making process is beneficial for parties, especially in cases where the commercial interests that underpin *voie directe* are also engaged.

This paper has sought to give readers a succinct analysis of the ways in which *voie directe and voie indirecte* may influence proceedings. In their application of either approaches, tribunals will always aim to deliver a decision that champions certainty, foreseeability, and neutrality if arbitration is to remain the chief mechanism of dispute resolution for international transactions.

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