31 Private international law and international commercial arbitration – a role for the HCCH?

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INTRODUCTION

Which law is applicable in a dispute with a foreign element is one of the central questions that private international law seeks to answer. However, this answer depends largely on the method used to resolve a dispute. Several problems related to the choice of law are applicable to various aspects of the proceedings of international commercial arbitration, which are caused by the wide discretion given to the arbitrators in the conflict-of-laws field. In some cases (for example, when determining the rules of a procedure), the wide discretion of arbitrators is beneficial. However, when choosing the applicable substantive law, the freedom mentioned undermines predictability and reduces the attractiveness of arbitration for both parties.

Private international law is involved in the arbitration procedure at every step: from resolving the issue of the tribunal's jurisdiction and arbitrability, to the recognition and enforcement of the final arbitration award. However, the most important stage where the conflict of laws invariably manifests itself is determining the substantive law applicable to the merits of the case.

For a long time, the Hague Conference on Private International Law (HCCH) has had insufficient intersecting points with international commercial arbitration,[1] but with the adoption of the 2005 Choice of Court Convention[2] and the 2015 Choice of Law Principles,[3] the name of this intergovernmental organisation has been referenced more often to solve various conflict issues in international arbitration. Moreover, it was international arbitration proceedings where the 2015 Choice of Law Principles received a kind of approbation, since it was here that the use of non-binding instruments is much more common and not constrained by the restrictions that exist in relation to such sources in most state courts. In addition, the Principles are the first HCCH instrument to be officially endorsed by the United Nations Commission on International Trade Law (UNCITRAL).[4]

The 2015 Choice of Law Principles take the form of a non-binding instrument, unlike other HCCH tools. Commentators attribute this to the fact that many HCCH Member States still do

[1] Jürgen Basedow, 'The Hague Conference and the Future of Private International Law' (2018) 82 *Rabel Journal of Comparative and International Private Law* 922.

[2] Sometimes, this Convention is referred to as a tool that creates competition for the international arbitration regime in its current form. See the discussion in Louise Ellen Teitz, 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) LIII *American Journal of Comparative Law* 543; Neil Newing and Lucy Webster, 'Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post-Brexit? And What Would This Mean for International Arbitration' (2016) 10 *Dispute Resolution International* 105.

[3] Hereinafter – the Principles.

[4] UNCITRAL, 'Report of the United Nations Commission on International Trade Law' (2015) UN Doc A/70/17.

not recognise the full autonomy of the contracting parties when determining the law applicable to their contract.[5] The Principles stipulate the possibility of their application by arbitral tribunals explicitly.[6] These tribunals are in a privileged position compared to state courts since they do not have *lex fori* and can apply these Principles fairly freely, while state courts are bound by their own conflict of laws rules and have less practical scope for applying non-binding instruments.

To date, the use of HCCH tools in arbitration has not received serious coverage in the doctrine. The purpose of this short chapter is to outline which topical issues related to the choice of law in arbitration can be informed by the 2015 Choice of Law Principles, and which of the unresolved problems require HCCH intervention.

Primarily, the chapter will consider situations where the choice of applicable law is governed by an agreement between the parties, including issues related to so-called tacit or implied agreements, as well as restrictions in choice-of-law agreements related to overriding mandatory rules and public policy. Secondarily, situations where the parties have not made a choice of law that is applicable will be considered. Such situations give rise to numerous legal conflicts, some of which are currently being resolved using the 2015 Choice of Law Principles. In this case, various methods will be analysed that allow arbitrators to make a choice, including direct and indirect methods. Also, tribunals' possible use of transnational law in the absence of the choice of an applicable law will be considered. In conclusion, certain choice of law aspects of the arbitration procedure will be discussed, as well as the elements on which the arbitration agreement is based.

PROBLEMS ENCOUNTERED BY TRIBUNALS AND PARTIES SUBJECT TO CHOICE OF LAW AGREEMENTS

At first glance, it seems that in a situation where the parties have concluded a choice of law agreement, the problems associated with the conflict of laws should not even arise. Indeed, in a case where the parties have identified the law applicable to their contract or other legal relations, the arbitrator generally follows the indicated choice, taking into account the principle of party autonomy. However, in some situations, disputes may arise about the validity and enforceability of the choice of law agreement itself, its interpretation, as well as the overriding mandatory rules and public policy that may impede the application of the law chosen by the parties.

The right of parties to choose the applicable substantive law to varying degrees is now practically universally acknowledged. At the level of international treaties, this right is confirmed by the 1961 European Convention on International Commercial Arbitration.[7] Along with contractual obligations, the European Convention also confirms the possibility of applying the law chosen by the parties to non-contractual relations. The UNCITRAL Model Law on International Commercial Arbitration expressly permits choosing the applicable substantive

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[5] Katharina Boele-Woelki, 'Party Autonomy in Litigation and Arbitration in View of the Hague Principles on Choice of Law in International Commercial Contracts' (2016) 379 *Collected Courses of the Hague Academy of International Law* 35, 53.

[6] Preamble, para 4.

[7] Article 7(1).

law for an arbitration procedure. Such a choice may cover both contractual and non-contractual obligations.[8] This provision is reproduced in almost all national statutes on international commercial arbitration based on the Model Law, as well as in some others.[9] Finally, Article 2 of the Principles also confirms the principle of party autonomy with minor exceptions.

Nevertheless, it should be remembered that not all choice of law agreements can be enforced. The autonomy of the parties in this matter is limited simultaneously by public order and related restrictions, which are based on *lex arbitri*, as well as by the conflict of laws rules applicable to these agreements.

It is now recognised that a choice of law agreement, just like an arbitration agreement, is autonomous from the main contract between parties. The 2015 Choice of Law Principles detail this provision as follows: '[a] choice of law cannot be contested solely on the ground that the contract to which it applies is not valid'.[10] This provision is of particular importance to international arbitration, since the objections about the validity of the contract are often stated to undermine the jurisdiction of the tribunal. The competence of the tribunal to respond to such actions depends on the arbitration agreement's principle of autonomy and the '*Kompetenz-Kompetenz*' doctrine. Therefore, the arbitrators also should consider applying the law defined in the contract to the dispute.

However, as in the case of an arbitration agreement, the validity of the choice of the applicable law may be questioned, provided that the parties refer to the invalidity of the contract *ab inicio*. Such a situation creates certain difficulties for the tribunal, due to the need to initially select a statute to resolve the issue of the validity of the agreement itself. One of the consequences of the autonomy of a choice of law agreement is that an independent conflict of laws question also arises and the agreement itself can be governed by an independent law.

The most common approach to the choice of law applicable to such an agreement is to refer to the *lex arbitri* conflict of laws rules.[11] The second approach is the use of the law that the parties have identified as applicable to the main contract in the choice of law clause itself.[12] Finally, as a third approach, the validation method is highlighted, where the tribunal tries to find a law applicable to the choice of law agreement that will allow it to remain valid.[13] Each method has its advantages and disadvantages, and the problem does not have a universal solution, therefore it can be addressed by one of HCCH's future tools, or a revised version of the Principles.

Another issue with choice of law agreements is the long-standing requirement in common law countries which limits the parties' choice of the applicable law due to the need for a rea-

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[8] Article 28(1).

[9] English Arbitration Act 1996, Section 46 (1)(a); French Code of Civil Procedure, Article 1511; Hong Kong Arbitration Ordinance, Article 64; Singapore Arbitration Act, Section 32; Swedish Arbitration Act, Section 27a; Swiss Federal Act on Private International Law, Article 187(1).

[10] Article 7.

[11] Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell, 2007) para 682.

[12] *M, LLC (United Arab Emirates) v D*, SAS (France), Award, ICC Case No 16655/EC/ND (2012) 4 The International Journal of Arab Arbitration 127); *Principal v Distributor*, Final Award, ICC Case No. 6379 (1992) XVII Yearbook Commercial Arbitration 212.

[13] The validation method is widely discussed in Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) para 1439.

sonable connection between the chosen law and the relationship itself. It has been assumed that parties would bypass the imperative norms of the state by choosing a foreign law. This practice was enshrined in some historical precedents of English law.[14] Subsequently, these positions have changed partially. Article 46(1) of the Arbitration Act 1996 provides parties with the opportunity to choose the applicable law without the need for a reasonable connection with the legal relationship. At the same time, the Uniform Commercial Code (Section 1-301 (a)) still limits the choice of a foreign law as applicable when it comes to purely internal relations between entrepreneurs. The Restatement Second Conflict of Laws (Articles 109, 187) contains the rule which stipulates that the chosen law must be applied unless 'the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice'. Although such restrictions are unknown to most jurisdictions of civil law, Article 2 of the Principles clearly indicates that there is no need for any reasonable connection between the chosen law and the legal relations of the parties. Fixing such a rule in relation to international commercial arbitration is of particular value, since one of the reasons for choosing an applicable law that has no connection with the parties to the dispute, or their legal relations, might be the need to resolve the dispute in accordance with a neutral set of substantive rules, which is often a condition of the transaction between the parties.

IMPLIED CHOICE OF APPLICABLE LAW

In addition to the express agreement of the parties, arbitrators may also establish an 'implied' or 'tacit' choice of law agreement which is generally recognised by modern legal systems. The implied choice of the applicable law in relation to arbitration has been recognised even at the level of the United Nations.[15]

However, the 2015 Choice of Law Principles contain quite conservative wording about this issue. The first sentence of Article 4 of the Principles states: 'A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances'. Such a provision, in particular the expression 'expressly or appear clearly', has been regarded in the doctrine as a strict test[16] and a potential limitation of party autonomy.[17] Some commentators even argue that such a formulation does not permit the possibility of applying an implied choice.[18] However, in contrast to the statements of the commentators, the Principles speak in favour of the possibility of an implied choice. Thus, under Article 5 of the Principles, there is no form requirement for the choice of law, unless otherwise agreed by the parties. Therefore, the choice of law can be both express and tacit.

It should not be forgotten that due to the historical approach that has long prevailed in England and the United States, the choice of the seat of arbitration testifies to the implied

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[14] *Re Helbert Wagg & Co Ltd* [1956] Ch 323.

[15] See the historical review on this issue in Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2014) 2731–32.

[16] Lauro Gama Jr., 'Tacit Choice of Law in the Hague Principles' (2017) 22 *Uniform Law Review* 342.

[17] Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) 358.

[18] Born (n 15) 2732.

choice of applicable law. However, at present, recent decisions of the High Courts[19] have begun to undermine this approach, which is greatly facilitated by the second sentence of Article 4 of the Principles: 'An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law'.

RESTRICTIONS OF CHOICE OF LAW AGREEMENTS CONNECTED TO OVERRIDING MANDATORY RULES AND PUBLIC POLICY

Public policy (*ordre public*), as well as overriding mandatory rules, can have a direct impact on the validity and enforceability of choice of law agreements.[20] The need for arbitrators to consider these norms follows from the provision of many arbitration rules, which oblige arbitrators to render an enforceable award.[21] It is clear that ignoring the overriding mandatory rules of the state where the arbitral award needs to be recognised and enforced, may result in the refusal of such recognition and enforcement, which is contrary to the arbitration task.

The choice of overriding mandatory rules and public policy to be applied during arbitration, despite the existence of the choice of law agreement, is no less difficult than the choice of law in the absence of an agreement between the parties. In this sense, the task of the arbitral tribunal is much more complex than that of the state courts. State courts generally apply the mandatory rules and public order of their own state, only permitting the application of foreign mandatory rules and public order in a strictly limited list of situations.[22]

By analogy, one approach to determining applicable mandatory rules is to assume that an arbitral tribunal is entitled, and sometimes obliged, to apply the exclusive mandatory rules and public policy of the *lex arbitri*. However, this approach cannot be justified in each case, since the seat of arbitration is often chosen by the parties solely for its neutrality, which means that the parties do not seek any connection between the substance of the dispute and the seat of arbitration; on the contrary, they wish to exclude any such connection.

In some situations, the arbitral tribunal is faced with the question of the admissibility of the overriding mandatory rules and public policy of States other than the seat of arbitration. An important contribution to the resolution of this issue is made in the 2015 Choice of Law Principles, according to which the arbitral tribunal may apply foreign public policy and mandatory rules, while the Principles do not provide similar powers to state courts: 'These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so'.[23] It appears that the Principles adopt a balanced approach whereby tribunals apply

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[19] *Cas. & Sur. Co. of Europe Ltd v. Sun Life Assur. Co*. [2004] EWHC 1704 (Comm).

[20] Christopher Ward and Philip Santucci, 'Has the "very unruly horse" bolted: the effect of 'ordre public' and mandatory forum law on the work of the HCCH', Chapter 11 in this volume, at [xx].

[21] ICC Rules, Article 42; New York Convention, Article V(2)(b).

[22] Rome I Regulation, Articles 9(2), 21; Swiss Law on Private International Law, Article 19(1); Restatement (Second) Conflict of Laws, s 187.

[23] Article 11(5).

foreign overriding mandatory rules and public policy only when provided for by the relevant norms. If the Principles contained no such limitation, the application of foreign overriding mandatory rules might have been too broad, bordering on abuse and the over-extension of foreign legal regulations.

The views of some authors differ from those of the Principles. They believe that only the rules of international public policy, and not the public policy of any individual state or its mandatory provisions, may be applied in arbitration.[24] However, the approach taken by the 2015 Choice of Law Principles appears to be more balanced. The application of international public policy alone does not guarantee the protection of participants' rights in international commerce since these rights are closely linked to the overriding mandatory rules of individual States.[25]

At the same time, it seems fair to argue that foreign public policy and overriding mandatory rules, unlike the applicable law, are often unpredictable for participants in international commercial arbitration.[26] It is interesting whether it might be permissible for the parties to exclude the application of such rules and policies to arbitration, where the degree of autonomy is traditionally higher. It seems that the answer to this question at this stage must be negative. During their activities, arbitrators are obliged to perform their jurisdictional function in accordance with the law. In this regard, the consideration of overriding mandatory rules corresponds to the arbitrator's task to apply legal norms. Such rules will often be applied regardless of the parties' desire to exclude their application, because otherwise the arbitration award cannot be considered legitimate and justified.

GENERAL APPROACHES TO DETERMINING THE APPLICABLE LAW IN THE ABSENCE OF AGREEMENT BETWEEN THE PARTIES

Arbitrators have the broadest authority to determine the conflict of laws rules they deem applicable. The first time the classic (or indirect) approach established the power of arbitrators to apply the law under the conflict of laws rules the arbitrators deemed applicable, appeared in the European Convention on International Commercial Arbitration 1961.[27] A similar provision is contained in UNCITRAL Model Law[28] and UNCITRAL Model Law-based legislation on arbitration in many jurisdictions. However, neither the European Convention, nor the other sources mentioned, provide information on the principles to be followed by arbitrators when deciding on the choice of such conflict of laws rules, which is a serious problem.

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[24] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) para 1533.

[25] For example, international public policy does not include the norms for the protection of employees and consumers, as well as competition or securities laws protection.

[26] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in Peter Sanders (eds), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series, 1987) 257, 273.

[27] Article VII(1).

[28] Article 28.

Many researchers consider the approach taken in the French and Dutch legislation[29] as the most progressive, which permits an arbitral tribunal to resolve a dispute in accordance with the rule of law it deems appropriate. This approach eliminates recourse to any conflict of laws rules and is referenced in the doctrine, as *voie directe* or *méthode directe*, and is reflected in many modern arbitration rules.[30] However, it also has critics who argue that it excludes legal certainty and uniformity in law enforcement, which are achieved through recourse to conflict of laws rules.[31]

Some legal systems (for example, Switzerland)[32] attribute, in the absence of an agreement between the parties, the settlement of a dispute to arbitrators in accordance with the substantive law of the state with which the dispute is most closely connected.[33] A similar rule is found in some institutional arbitration rules.[34]

The most archaic, but still applicable approach is that arbitrators prefer to choose them in accordance with the principle of '*Qui elegit judicem elegit jus*', although there is no mandatory requirement to follow the substantive rules of the seat of arbitration. This approach has a strong tradition, including in the US and England.[35] Currently, most legal systems deviate from this approach, rightly determining that the choice of arbitration forum and seat of arbitration most often has no connection with the applicable substantive law.

Finally, some national legal orders require arbitrators to resolve disputes in certain areas of regulation, such as antitrust, securities, labour, and several others, using mandatory rules, which in general also involves the use of a conflict of laws method.

CONFLICT OF LAWS RULES VERSUS MÉTHODE DIRECTE

At present, perhaps the most common approach continues to be that reflected in Article 7(1) of the European Convention. This approach permits the arbitral tribunal to choose the conflict of laws rules of any jurisdiction, which expands the possibilities, but does not exclude the need for a conflict of laws analysis. The use of conflict of laws rules in international arbitration increases the legitimacy of the whole process, as these rules are part of the legal system and have all the properties of legal norms. From this point of view, the direct choice of the applicable law is not so attractive.

Another view is that such an approach is archaic, a relic of a historical approach where the choice of applicable law has always been determined by the place of arbitration. However, the second approach, associated with UNCITRAL Model Law, does not suggest which alternative rule should govern the parties' relations.

So how are the conflict of laws rules to be applied defined at the present stage? It would be quite fair to note that the approach the arbitrators usually apply is the conflict of laws rules

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[29] French Code of Civil Procedure, Article 1511; Netherlands Code of Civil Procedure, Article 1054(2).

[30] UNCITRAL Arbitration Rules 2010, Article 35; ICC Rules 2017, Article 21.

[31] Born (n 15) 2635.

[32] Swiss Federal Act on Private International Law, Article 187(1).

[33] Among these States are Germany, Italy, Mexico, Egypt.

[34] Swiss Rules, Article 33(1); DIS Rules, para 23(2).

[35] Comments to Restatement (Second) Conflict of Laws, s 218, comment b (1971); *C v D* [2007] EWCA Civ 1282, para 29.

of the seat of arbitration, despite the 'freedom of choice' that has appeared. Its popularity is explained by the fact that the arbitrators, trying to find the implied intention of the parties, believe that the choice of the seat refers to the conflict of laws rules.[36]

The following approach is also quite common: arbitrators analyse the conflict of laws rules of each state that has a particular connection with the dispute between the parties.[37] This cumulative approach quite often leads to the conclusion that all relevant conflict of laws rules point to the same applicable national law. As an alternative to this approach, an attempt is made to consider the provisions of all potentially applicable national statutes (meaning the laws of various States).[38] As a result of each of the two approaches described, a so-called false conflict is revealed. However, a problem arises when a cumulative analysis leads to the use of the norms of opposite content. In such a situation, a cumulative analysis does not solve the identified collision.

The next approach is based on the choice of conflict of laws rules of the state which is most closely connected with the essence of the dispute between the parties. This approach has been criticised because it can be a form of remission (*renvoi*), which is not advisable when choosing the applicable law in arbitration.[39]

In addition, the following approaches should be mentioned: (i) a very exotic approach to resolving a conflict of laws issue, where the arbitrators choose the conflict of laws rules of their own nationality; (ii) an approach where the choice is made in favour of the conflict of laws rules of a state that would have jurisdiction in the absence of an arbitration agreement; (iii) an approach where the conflict of laws rules are chosen from the state where the contract was executed, or from the state territory where the potential arbitral award is expected to be executed.

A modern view is that the conflict of laws rules are not appropriate and should not be applied to international arbitration.[40] This is based primarily on the theory of the delocalisation of arbitration, and the assertion that the use of national law is unacceptable for arbitration, because it is wrong to locate issues arising from an international contract in one national legal order.

At the same time, one approach that is becoming increasingly popular in arbitration rules permits arbitrators to make a direct choice of the applicable law without recourse to conflict of laws rules, and has been criticised in the doctrine for the lack of predictable results.[41] Consequently, in several cases, arbitrators directly apply the principles of private international law, which derive from the general provisions of the conflict of laws of various States. In other cases, arbitrators determine conflict of laws rules based on international treaties, which may also contain general principles shared by all legal orders.

It seems expedient to think about creating a universal set of conflict of laws rules that could be applied in international commercial arbitration, since, compared with *méthode directe*, such rules could introduce greater predictability, and increase the level of legal certainty. In this

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[36] See the examples in Grigera Naón, 'Choice-of-Law Problems in International Commercial Arbitration' (2001) 289 *Collected Courses of the Hague Academy of International Law* 230.

[37] Partial Award in ICC Case No. 7319 (1999) XXIVa Yearbook Commercial Arbitration 141.

[38] Grigera Naón (n 36).

[39] Born (n 15) 2654.

[40] Yves Derains, *Chronique des Sentences Arbitrales* (Clunet, 1986) 1109–10.

[41] Born (n 15) 2647.

area, there is plenty of room for HCCH activities. The idea of an international code of conflict of laws rules applicable in international arbitration is key to commercial arbitration, since it will increase its attractiveness and enhance the positive qualities that are valued by participants in arbitration: neutrality, efficiency, predictability, and possibility of recognition and enforcement of final awards. Such a set of conflict of law rules would also reduce uncertainty, which is caused by the need to analyse the potential conflict of laws rules of various legal orders, as well as the additional costs associated with this process.

In relation to international arbitration such a task is within the power of HCCH, since, according to the HCCH Statute, the purpose of HCCH is to work for the progressive unification of the rules of private international law.[42] Moreover, the authority of this intergovernmental organisation at the international level could provide the future instrument with the necessary reputational impetus. This instrument, in our opinion, should be embodied in a form similar to the 2015 Choice of Law Principles, since one characteristic of international commercial arbitration is the wide use of soft law. The potential instrument could address a broad scope of relations and deal with different types of cross-border agreements.

APPLICATION OF NON-NATIONAL LEGAL SYSTEMS

Is a choice in favour of non-state law admissible in arbitration and is it possible to use the 2015 Choice of Law Principles to justify the use of non-state applicable law as an exclusive statute, without reference to national legal systems?

Article 28(1) of the UNCITRAL Model Law provides a tribunal with the opportunity to apply the rules of law if a choice in their favour is made by the parties. The reference to 'rules of law' instead of 'law' is now interpreted as referring to the possibility of making a valid choice in favour of non-national legal systems.[43] In turn, Article 28(2) of the UNCITRAL Model Law, in the absence of a choice made by the parties, obliges the arbitrators to apply the law determined in accordance with the applicable conflict of laws rules. The difference in the wordings of paragraph 1 and 2 of Article 28 means that in the absence of a choice made by the parties, non-state rules of law cannot be used by the arbitrators. At the same time, national jurisdictions are currently divided into those that provide arbitrators with an opportunity to apply the rules of law (Switzerland, Canada, India, Algeria, Lebanon) and those who have opposed this approach (England, Germany, Japan, Hungary, Denmark, Greece, Mexico).

Also, some arbitration rules, such as the Arbitration Rules of the International Chamber of Commerce,[44] allow arbitral tribunals to apply not just the law that they deem appropriate in the absence of a parties' agreement, but also the rules of law.

In cases where the parties did not choose the applicable law, the resolution of their dispute in accordance with the rules specifically provided for regulating international contracts, cannot cause any objections. The use of such neutral statutes is much more reasonable in these situations than the application of the law of the state of any party to the contract.[45]

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[42] HCCH Statute, Article 1.

[43] These systems include general principles of law; PICC; the Principles of European Contract Law, etc., which can be attributed to modern lex mercatoria.

[44] Article 21(1).

[45] See the discussion in Boele-Woelki (n 5) 67.

According to Article 3 of the 2015 Choice of Law Principles, the law chosen by the parties may be rules of law if the forum's law does not provide otherwise. In our view, in case of international arbitration, a forum does not exist that permits arbitrators to use rules of law even when the law of the seat of arbitration does not contain provisions that would allow such a choice to be made. At the same time Article 3 of the Principles establishes several important conditions for the application of such 'rules of law': (i) they must be generally accepted on an international, supranational, or regional level; (ii) they are understood as a set of rules, not individual provisions, and (iii) this set should be balanced and neutral to fully meet the goals of international arbitration.

One cannot agree with those authors[46] who believe that the Principles have not introduced anything new to international arbitration due to the possible choice of non-state law. In many cases previously, when applying non-state law, tribunals had to verify its provisions with domestic law which would be applied by virtue of conflict of laws rules in the absence of a parties' choice. In this sense, the importance of the 2015 Choice of Law Principles is difficult to overestimate, since they exempt tribunals from the need to conduct additional conflict of laws analysis.

LAW APPLICABLE TO THE PROCEDURE

Depending on the qualification of legal issues as substantive or procedural, either the chosen substantive law or the law intended to govern the proceedings will be applicable. One of the elements concerned is the allocation of the burden of proof. The HCCH proposed its own solution to this problem in the 2015 Choice of Law Principles: the law chosen by the parties regulates the burden of proof.[47]

However, this approach finds its critics.[48] They note that attributing the burden of proof to substantive elements and subordinating it to substantive law cannot be considered satisfactory, because some procedural issues related to the allocation of the burden of proof are also affected by procedural elements (availability of a wide disclosure procedure, as well as the ability to require documents from third parties). Instead, they propose developing their own rules, combining both substantive and procedural approaches.

DETERMINATION OF THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

Determining the law applicable to the arbitration agreement is one of the most difficult tasks associated with international arbitration. Arbitration agreements are subject to the separability doctrine, which means that the law applicable to them may be different from the law chosen by the parties as applicable to the main contract. The parties rarely specifically designate the

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[46] Ibid.

[47] Article 9(f).

[48] See discussion in, e.g., Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Studies and Materials on the Settlement of International Disputes)* (Springer, 1995) 53.

law applicable to the arbitration agreement. As a result, in international arbitration practice, two main approaches to the determination of such a law have arisen.

The first approach relates to the application of the New York Convention,[49] the European Convention of 1961[50] and the UNCITRAL Model Law,[51] which state that the validity of the arbitration agreement is determined by the law to which the parties have subjected it or, failing any indication thereon, the law of the country where the award was made (*lex arbitri*).

The second approach is an approach taken in common law countries, particularly in England.[52] Accordingly, the arbitration agreement should be governed by the same law that the parties have chosen as applicable to the main contract. This approach is based on the presumption that the parties determining the law applicable to the contract, as a rule, do not divide the contract into the main contract and the arbitration agreement, assuming that all the terms of the contract will be subject to one selected statute.

As can be seen, if the issue of the choice of the law applicable to the arbitration agreement has not been settled properly, its decision may give rise to numerous conflicts. In this sense, the HCCH approach to the choice of court agreements in the 2005 Choice of Court Convention[53] may be of some interest. The validity of a choice of court agreement shall be determined under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid. It appears that the rule enshrined in the 2005 Choice of Court Convention resembles to the one set forth in the New York Convention. This does not mean that the parties cannot choose any other law applicable to questions of validity. However, this approach rightly assumes that the 'centre of gravity' of the legal relations stipulated in the arbitration agreement is located where the dispute is resolved.

CONCLUSION

There are still a number of unsettled issues in international commercial arbitration related to private international law: how conflict of laws rules making the choice of substantive law should be determined, whether arbitrators should apply overriding mandatory rules and non-state legal systems on their own initiative, and which law should govern an arbitration agreement etc. This article presents an attempt to fill the gap that existed until now and to show that the HCCH has an effective instrument for resolving contradictions in many different approaches to choice of laws problems in international commercial arbitration – the 2015 Choice of Law Principles. Not all of the existing problems can be solved by them, and the remaining problems also require appropriate instruments. For example, the creation of a universal set of conflict of laws rules to be applied in international commercial arbitration could be the focus of HCCH activities in the future.

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[49] Article V(1)(a).

[50] Article 9(1)(a).

[51] Article 34(2).

[52] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334. *Sulamerica Cia Nacional de Seguros S.A. v Enesa Engenharia S.A.* [2012] EWCA Civ 638. However, it should be noted that this approach may be changed under the influence of the decision of the Court of Appeal in the recent case *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors* [2020] EWCA Civ 574.

[53] Article 9(a).

The success of the 2015 Choice of Law Principles, as well as HCCH instruments in the field of international civil proceedings, shows that contrary to previous opinion, this international organisation has the necessary resources and experience to effectively regulate commercial relations, including those that become subject to international arbitration, which today remains the leading mechanism for the resolution of cross-border commercial disputes.