

WHAT'S LAW GOT TO DO WITH IT?: THE ROLE OF GOVERNING LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

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The next generation of international arbitration practitioners is coming "of age" at a time when international arbitration is firmly established as a practice in its own right. It is no longer necessarily the case that international arbitration practitioners will have practiced extensively before the courts of their respective national jurisdictions; their experience may have included more disputes involving the laws of other nations than it has the laws of their own. At the same time, the international arbitration community continues to develop practices and procedures intended to bridge jurisdictional divides, and recently has embarked upon a series of efforts to harmonize "transnational" rules of law, or *lex mercatoria*.

In the face of this increasing "internationalization" of arbitration, it is worth re-examining what role the national law² selected by the parties to govern their international transaction plays in resolving international disputes. Is international arbitration headed down a path of truly internationalized jurisprudence, with decisions only loosely connected to national legal principles? Some would embrace this notion, viewing international arbitration as an inherently transnational and commercial system of dispute resolution in which arbitrators are neither bound nor expected to follow the precise letter of national law. Others entirely reject the idea, insistent that the governing law comprises a critical piece of the party's contractual intent, which arbitrators are obliged to apply.

This article considers the role of national law in providing substantive legal

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2 References to "national law" in this article are intended encompass "all rules belonging to the legal system in question, with each source (including statute, case law and custom) having the authority attributed to it by that legal system". See FOUCHARD, GALLIARD, GOLDMAN, "Part 5: Chapter 1 – Applicable Law Chosen By The Parties" in "Fouchard, Galliard, Goldman on International Commercial Arbitration", E. Gaillard and J. Savage (eds.) (Kluwer Law International [1999]), p. 791.

rules of decision in international commercial arbitration.³ It begins by exploring whether modern arbitral practice treats arbitrators as bound to apply the national law chosen by the parties to govern their contract. It then examines the role governing law plays in modern international transactions, including whether parties who select international commercial arbitration desire or expect a more flexible approach to the application of governing law in resolving the dispute.

The article observes that, while some question whether arbitrators are strictly required to apply the national law governing the contract, this may be at odds with what parties to international transactions expect or desire. It concludes that international arbitration practitioners should strive to apply both national and any applicable transnational law standards with precision in their arbitral awards, thereby ensuring that the next generation of arbitrators continues to provide a predictable, and fundamentally law-based, framework for the resolution of international commercial disputes.

1. ARE ARBITRATORS BOUND TO APPLY THE GOVERNING LAW CHOSEN BY THE PARTIES?

Arbitral commentary has long recognized that parties to international contracts are free to choose the law applicable to the substance of the dispute. "The right of the parties to themselves identify the law to apply and the obligation on arbitrators to respect that choice is the one overwhelming and truly international conflict of laws rule which has developed in international commercial arbitration".⁴ It is also commonly accepted that arbitrators derive their power entirely from the consent of the parties, and must base their decisions on the "common will of the Parties," including as to applicable law.⁵ "An arbitrator who decides according to some other law, whether anational or otherwise, presumes to rewrite the bargain".⁶

³ This article considers contracts in which the parties have specified a particular national law to govern their disputes, rather than those which lack any choice of law, leaving the arbitrators to select the applicable law. It does not address the role of governing law in investment treaty or public international law disputes, or those involving state contracts, which may be subject to decidedly different considerations. For an analysis of the role of governing law in investment treaty arbitration, see M.N. KINNEAR, "Treaties as Agreements to Arbitrate: International Law as the Governing Law", in A. J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Vol. 13 (Kluwer Law International, 2007), pp. 401-443.

⁴ J. LEW, "Applicable Law in International Commercial Arbitration" (Oceana 1978), p. 582.

⁵ G. BORN, "International Commercial Arbitration" (Wolters Kluwer, 2nd ed., 2014), p. 2672.

⁶ RT. HON. LORD JUSTICE M. MITCHELL, "The New Lex Mercatoria: The First Twenty-five Years", in "Liber Amicorum for the Rt. Hon. Lord Wilberforce", Maarten Bos. & Ian Brownlie (eds.) (Clarendon Press, Oxford, 1987), p. 154.

Yet arbitral scholarship and practice also reveals a wide variety of views regarding the extent and nature of an arbitrator's obligation to decide a dispute in strict accordance with the national law chosen by the parties. Some commentators have suggested that arbitrators may be willing to de-emphasize national law principles in favor of commercially reasonable and internationally "just" results.⁷ The idea that arbitrators are not strictly bound to apply the law has its historical origin in the view of arbitrators as operating within a system of private adjudication, selected solely to resolve the dispute before them, with no greater obligation to public policy considerations or consistency of jurisprudence.⁸ Some have expanded on this thesis to offer a variety of theories to warrant a de-emphasis in arbitral decision-making on the governing law chosen by the parties.

1.1. ARBITRATORS SHOULD DECIDE BASED ON CONTRACTUAL INTENT

The first theory is that an arbitrator's primary duty is to interpret the terms of the parties' contract in accord with their expectations.⁹ Because arbitrators are not "attached to any particular legal system," they are bound only to decide the dispute before them, which exists within an international framework.¹⁰ National law may provide some guidance as to how to interpret the contract, but arbitrators are equally free to draw from other sources, including their own experience, in order to achieve a commercially reasonable result.¹¹ Some commentators go so far as

7 "The field of international arbitration has long been subject to both criticism and praise to the effect that arbitrators pay more attention to the equities of a dispute or the particularities of a contract than to the applicable law. Some writers have gone so far as speak of arbitral "lawlessness"." See J. KARTON, "The Arbitral Role in Contractual Interpretation", *Journal of International Dispute Settlement* (OUP, Vol. 6, Issue 1 (2015)), p. 13.

8 See P. MCCONNAUGHAY, "The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration", *Northwestern University Law Review* (Vol. 93, 1999), p. 453 ("Precisely because matters of important national interest, as typically expressed in mandatory laws, rarely were implicated in international commercial arbitrations, national legislatures and national courts simply saw no need to impose their parochial notions of procedure or justice on international arbitrations. If arbitral lawlessness occasionally resulted in unjust outcomes, the consequences of the injustice ordinarily were confined to the parties to the dispute and were not significant to the state.").

9 See LEW, *see supra* note 4, p. 581 ("The answer to every dispute is to be found *prima facie* in the contract itself.").

10 M. DE BOISSÉSON, "Substantive Law in International Arbitration: an Arbitrator's Perspective", in F. Bortolotti and P. Mayer (eds.), "Dossier of the ICC Institute of World Business Law: The Application of Substantive Law by International Arbitrators" (International Chamber of Commerce, 2014) [hereinafter "Dossier on Substantive Law"], p. 116.

11 In his 2015 article, Karton provides a fascinating account of attitudes towards arbitral contract interpretation gleaned from interviews with practicing arbitrators. KARTON, *see supra* note 7, pp. 7-12. Many of the interviewees did not consider themselves strictly bound by national law, and considered their role to be a commercial and common sense application of what they perceive to be the parties' intent.

to suggest that domestic law concepts may be inappropriate for the resolution of international disputes, and a "common sense" approach that extracts from the contract the common intent of the parties makes arbitral reasoning superior to judicial reasoning.¹² As one scholar describes it:

The arbitrator's intuition will lead him to the community expectation, which will dictate the best choice he can make out of the diverse rules and principles. In the arbitrator's decision-making process, his "reason and logic", rather than the statutory rulebook of interpretation, are considered the guiding light for his interpretation of the disputing parties' contract.¹³

Or, in the words of another arbitrator: "Done properly, reaching solutions by interpreting the parties' intentions rather than by sophisticated juridical reasoning deserves praise".¹⁴

1.2. ARBITRATORS MAY APPLY NON-NATIONAL LEGAL PRINCIPLES

The second theory is that arbitrators are free to consider sources of transnational and international law in addition to the national law rules chosen to govern the contract. This argument finds some support in some arbitral institution rules that expressly authorize arbitrators to consider "trade usages" and, sometimes, "international practices" in their decision-making.¹⁵ Yet there is significant disagreement regarding the content of transnational law and the extent to which it may be relied upon by arbitrators.

12 See M.A. PETSCHKE, "Choice of Law in International Commercial Arbitration" in "Private International Law", S.R. Garimella and S. Jolly (eds.), (Springer Nature Singapore Pte. Ltd., 2017), p. 36, discussing the views of Klaus Peter Berger, taken from K. P. BERGER, "The Creeping Codification of the New Lex Mercatoria" (Kluwer Law International, 2d rev. ed., 2010), pp. 19-20 (suggesting that domestic laws are often inadequate to provide a normative framework for international business transactions, may unduly interfere with the party autonomy expected in international transactions, and will sometimes lead to unpredictable, and therefore unexpected, outcomes).

13 A. MANIRRUZZAMAN, "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?", *American University International Law Review* (Vol. 14, No. 3 (1999)), p. 714.

14 KARTON, *see supra* note 7, p. 16, citing L. LEVY and F. ROBERT-TISSOT, "L'interprétation arbitrale", 4 *Rev. l'Arb.* 861 [2013], p. 902 (Karton's translation from the original French).

15 See, e.g., United Nations, Commission on International Trade, UNCITRAL Model Law on International Commercial Arbitration (2006) [hereinafter "UNCITRAL Model Law"], Art. 28(4) ("In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."); 2012 Rules of Arbitration of the International Chamber of Commerce [hereinafter "ICC Arbitration Rules"], Art. 21.2 (the arbitrator "shall take account of the provisions of the contract, if any, between the parties, and of any relevant trade usages").

The incorporation of "trade usages" – that is, rules of conduct that have developed between the parties or within the particular trade in which the parties have transacted¹⁶ – is relatively uncontroversial; many posit that national law would take similar theories into account in connection with contract interpretation.

The definition of *lex mercatoria* is more contentious, but the concept is commonly understood as referring to a "third" legal system, representing "a convergence of rules drawn from several legal systems or [. . .] a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community".¹⁷ Some suggest that the inclusion of the arbitration clause in an international contract by itself implies the application of *lex mercatoria*.¹⁸ The more commonly accepted view is that the *lex mercatoria* should only apply where the parties have expressly bargained for it.¹⁹

Although efforts have been made to develop and give meaning to *lex mercatoria*,²⁰ most agree that such rules are insufficiently developed to supersede or replace domestic law principles.²¹ Perhaps as a result, some arbitrators have resorted to a hybrid method, mixing the concepts of trade usages, general international principles, and *lex mercatoria* into a sort of interpretative stew, arriving at what they consider to be a commercially reasonable result without identifying precisely which legal principles led them there.²²

16 See UNIDROIT: Principles of International Commercial Contracts, (International Institute for the Unification of Private Law ed., 1994) [hereinafter "UNIDROIT Principles"], Art. 1(9); see also DE BOISSÉSON, *supra* note 10, p. 5.

17 See MANIRRUZZAMAN, *supra* note 13, p. 660 (quoting R. GOODE, "Usages and Its Reception in Transnational Commercial Law", *International & Comparative Law Quarterly* (Vol. 46 [1997]), pp. 2-3). Maniruzzaman also discusses a number of alternative formulations of *lex mercatoria*. *Id.*, p. 660 et seq.

18 *Id.*, p. 678.

19 See E. GALLIARD, "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", *ICSID Review – Foreign Investment Law Journal* (Vol. 10 [1995]), pp. 215-16.

20 The most significant effort to codify *lex mercatoria* to date is the UNIDROIT Principles, which collate general principles considered suitable for application to cross-border transactions. The Preamble states that they may be applied "when the parties have agreed that their contract be governed by "general principles of law", the "*lex mercatoria*" or the like." UNIDROIT Principles, see *supra* note 16, Preamble.

21 MANIRRUZZAMAN, see *supra* note 13, p. 733 ("In the present state of development of law, the application of *lex mercatoria* to an international contract contrary to an express choice of a different law is not to be tolerated.").

22 In one published ICC award, the arbitrator described his "reservations as to the real existence of anything that can be described as *lex mercatoria*." Stating that the "right course for me to adopt is to apply general principles of international commercial law here", he noted that such principles would lead to the same result as English law (the substantive law proposed by the buyer), *lex mercatoria*, or "any principle of common sense." He then went on to decide certain contract formation issues through an examination of the negotiations and correspondence between the parties, without further reference to any particular principle of law, whether international, English, or *lex mercatoria*. See *Buyer v. Seller*, Award, ICC Case No. 13129, in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2009 – Volume 34* (Kluwer Law International (2009)), p. 239 et seq.

1.3. ARBITRATORS CANNOT BE OVERTURNED FOR LEGAL ERROR

Most legal systems provide that that arbitrators' determinations on the substance of the dispute are not subject to judicial review. On this premise, some have suggested that arbitrators are free to disregard certain principles of governing law,²³ and even to replace the law chosen by the parties in favor of a different domestic law or transnational principles, without fear of repercussion.²⁴

One of the most contentious features of United States arbitral law is the doctrine that permits vacatur of an arbitral award based on a "manifest disregard of the law" by the arbitrators. Historically, U.S. federal courts have limited the doctrine to make clear that it may not be invoked to vacate an award based on mere errors of law, but instead only in those limited circumstances where an arbitrator knowingly and deliberately ignores a governing and outcome-determinative legal standard.²⁵ Yet even this more limited formulation has been the subject of severe criticism.²⁶

23 "An arbitrator runs practically no risk of having its award set aside based on its legal analysis; even where an arbitrator ignores, deliberately or otherwise, a specific rule of the applicable substantive law." F. PERRET, "Resolving Conflicts between Contractual Clauses and Specific Rules of the Governing Law – Strict Application of the Law or Flexible Approach", in *Dossier of Substantive Law*, *see supra* note 10, p. 2.

24 BORN, *see supra* note 5, p. 3303 ("Most national courts have also held that awards may not be annulled merely because the arbitrators applied a substantive law other than that chosen by the parties."); *see also* Interim Award, ICC Case No. 1364 (ICC International Court of Arbitration Bulletin, Vol. 25, No. 1 (2014)), para. 82 (overriding the parties' contractual choice of New York law in favor of German law). The Svea Court of Appeal in Stockholm refused to annul a decision in which the arbitrators were criticized for not having applied Czech law, holding that the tribunal had not openly disregarded the law and instead had "applied relevant sources of law, primarily international law." *See Czech Republic v CME Czech Republic B.V.*, Svea Court of Appeal, Stockholm (15 May 2003), discussed in J. HOPE and M. ROSENGREN, "Arbitrators: A Law unto Themselves?", (3 Dec. 2013), available at <https://www.cdrnews.com/categories/expert-views/4616-arbitrators:-a-law-unto-themselves>.

25 *See, e.g., T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010) (requiring that the legal principle was both "clear" and directly applicable to the arbitration and that the arbitrator knew of the applicability of the principle but "intentionally" disregarded it).

26 Although the manifest disregard doctrine is rarely invoked to overturn international arbitration awards in the United States, *see* Report of the Bar of the City of New York, "The "Manifest Disregard of Law" Doctrine and International Arbitration in New York" (August 2012), available at <https://www2.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf>, a New York court recently did vacate an international arbitration award based on a finding of manifest disregard of the law. In *Daesang Corp. v. Nutrasweet Co.*, 55 Misc. 3d 1218(A) (N.Y. Sup. Ct. 2017), the court disagreed with an ICC tribunal's interpretation of the New York law standard on fraudulent inducement, stating that the tribunal's analysis of the law to preclude relief "disregarded" a governing legal principle and deprived the affected party of what otherwise would have been a viable remedy under New York law. At the time of this writing, the decision is on appeal.

There do appear to be some recognized limits on arbitrators' treatment of the law, though it is not clear whether these principles are applied consistently among New York Convention courts. First, most commentators concede that arbitral awards may be reviewed where the decision would violate national or international public policy, which could encompass situations where an arbitrator's decision not to apply "mandatory rules" of national law is considered to violate a public policy of the enforcing state.²⁷ There are also at least a handful of examples of cases in which awards have been annulled for an excess of power where the arbitrator's approach to the law is said to have so completely disregarded legal principles as to have amounted to a decision in *equity*, rather than in law.²⁸

In principle, the level of judicial review should be immaterial to the arbitrator's duty – i.e., it should not be considered to allow arbitrators to disregard the chosen law of the parties.²⁹ Nonetheless, commentators and practitioners have acknowledged that the privacy of the arbitral process and the absence of full scrutiny of arbitrators' substantive decisions may incentivize some international arbitrators to depart from legal decisional norms.³⁰

2. DO PARTIES EXPECT ARBITRATORS TO APPLY THE GOVERNING LAW?

If, as the above discussion suggests, arbitration practitioners have divergent views on the role of national law in resolving disputes, do parties who choose international arbitration understand or expect that they may be subordinating their choice of governing law when they select international arbitration as a mechanism for dispute resolution?

²⁷ BORN, *see supra* note 5, p. 2777.

²⁸ In 2011, the French Cour de cassation annulled an arbitral award in which the arbitrators had applied an interest rate that was neither the contractual rate nor the rate established by law, finding that, in so doing, the arbitrators had improperly rendered a decision in equity and not in law. DE BOISSÉSON, *see supra* note 10 (discussing Cour de cassation, First Civil Chamber, 12 October 2011, *Societe Groupe Antoine Tabet v. Republique du Congo*). *See also Klöckner Industrie v Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 12 (Annulment Committee found that the tribunal exceeded its powers by acting as amiable compositeur: "The Award's reasoning and the legal grounds on this topic ... seem very much like a simple reference to equity, to "universal" principles of justice and loyalty, such as amiable compositeurs might invoke."), discussed in J. HOPE and M. ROSENGREN, *see supra* note 24.

²⁹ *See* W. PARK, "Arbitration in Autumn", *Journal of International Dispute Settlement* (Vol. 2, No. 2 (2011)), p. 291 ("Arbitration would provide poor justice if arbitrators aspired to nothing higher than to meet the minimum grounds for annulment.").

³⁰ P. CARRINGTON AND P. HAAGEN, "Contract and Jurisdiction", 1996 *Supreme Court Review* (1997), p. 346 ("Whether the arbitration is domestic or foreign, and whether duty foreign law might or might not impose on arbitrators to apply controlling law, there is inherent in the institutions of private dispute resolution an endemic disinclination to enforce legal rights vigorously."); *see also* MCCONNAGHAY, *see supra* note 8, p. 495.

2.1. PARTIES TO INTERNATIONAL TRANSACTIONS MAY HAVE DIFFERING VIEWS ABOUT THE ROLE OF GOVERNING LAW

Some commentators take the view that the nature of modern international transactions has made the choice of governing law far less relevant than it might be in the domestic context. Choice of law can sometimes be perceived as a last-minute compromise; in some instances, one party may accept the national law of its counterparty despite a lack of familiarity with it, or the parties may agree to apply a third-party law that is perceived as neutral. In other instances, parties may view the governing law as distinctly secondary to the international and commercial nature of their transaction. One scholar argues that the very idea of national law as "binding" on parties' contractual relationships is a distinctly Western concept, and antithetical to the approach toward commercial transactions prevailing in East Asian nations:

The goal of "legal predictability" in the outcomes of international commercial arbitrations, however, is uniquely Western. It assumes, as do Western common-and civil-law traditions, that commercial disputes arise when one party or another to a transaction arguably departs from some preordained, codified, or contractual standard of conduct, and that the appropriate way to resolve such disputes is to compare the conduct in question to the relevant legal standard for the purpose of determining and attributing breach, blame and fault.

[. . .]

But Western assumptions regarding the role of codes and contracts in commercial relationships are not shared throughout most of Asia and much of the developing world, regions that are home to increasing numbers of participants in major international transactions. The traditions in these regions subordinate the role of "law" and "contracts" in the ordering of commercial relationships, and in fact attribute to those concepts meanings that are substantially different from the meanings of those terms in the West. Asian and Western parties to a commercial transaction may clearly understand the terms of their business agreement, yet differ radically in their respective conceptions of their contract and its legal consequences. For the Asian party, the relationship giving rise to the contract and the actual circumstances of its performance likely will have far greater significance than the contract itself.³¹

31 MCONNAUGHAY, *see supra* note 8, pp. 494–95.

On this approach, the incorporation of international arbitration in the parties' contract may be more meaningful than their choice of governing law. Parties may rely on the neutrality, flexibility, and transnational nature of the arbitrators' decision-making as a bulwark against unfamiliar and potentially prejudicial consequences of the governing law's regime.

There is also some resonance to the argument that parties expect arbitrators to apply the terms of their contract as written, and would be surprised by a result that would override a provision of the parties' agreement based on a mandatory rule of national law or an obscure domestic law interpretative doctrine. These parties might more readily expect that the arbitrator will get to the "right" result through an examination of the parties' actual expectations, as evidenced by their contractual choices. In such instances, strict application of the national law could contradict the parties' expectations by altering their intended bargain.³²

2.2. NATIONAL LAW REMAINS CRITICAL TO PARTIES, PROVIDING A FRAMEWORK AND BASIS FOR DECISION-MAKING

Although the above arguments provide some support for an internationalized approach to legal reasoning, there is little evidence that parties choose international arbitration in order to avail themselves of a system that permits deviations from the national law chosen to govern the contract.³³ The most oft-cited reasons for choosing international arbitration include avoiding "home court advantage," as well as difficulties in obtaining enforcement of foreign court judgments, confidentiality, and perceived efficiency.³⁴ In the overwhelming majority of cases, parties choose lawyers to act as their arbitrators, rather than industry experts, and awards are required to be reasoned and in writing, suggesting a system that values decisions based in legal reasoning.

The "internationalists" also ignore the role that governing law is intended to serve in achieving predictability, certainty and neutrality with regard to any future dispute.³⁵ The "vast bulk of ordinary commercial disputes. . . could not

32 In the context of an international transaction, "the primacy of the parties' agreement may lead arbitrators to conclude that the litigants intended to invoke only part of a national legal system." See W. PARK, *The Predictability Paradox: Arbitrators and Applicable Law*, in *Dossier of Substantive Law*, *see supra* note 10, p. 69.

33 See W. PARK, "Control Mechanisms in the Development of a Modern *Lex Mercatoria*", in "Lex Mercatoria and Arbitration", Thomas E. Carbonneau (ed.) (1990), p. 115 (parties to international commercial arbitrations are "not opting for the abandonment of legal rules").

34 See Irene M. Ten Cate, "International Arbitration and the Ends of Appellate Review", *New York University Journal of International Law and Policy* (Vol. 44 [2012]), p. 1123.

35 See M. ZHANG, "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law", *Emory International Law Review* (Vol. 20 [2006]), p. 512.

be resolved without reference to national law".³⁶ At its most basic, governing law can offer predictability of result, or at least a meaningful and experience-rich body of law and precedent to guide the substantive result. The selection of domestic law can also serve as a reference point for the *way in which* legal decisions are reached. Parties who choose common law will expect to be able to draw from analogous case law to reason their way to an outcome. The selection of civil law, on the other hand, suggests that the arbitrator will usually reference his/her decision-making against a particular code-based framework.

On countless issues national law also supplies substantive rules of decision, which can vary significantly from country to country. It is not always clear that parties to international transactions have thought through and specifically anticipated each of those substantive rules, even though they can affect outcome in significant ways. For example, national law may provide:

- a) Criteria to determine whether a contract is binding, valid, or enforceable;
- b) Rules of interpretation for contracts; e.g., how to address ambiguous contract terms; how to address standard terms or collateral agreements; whether or not to consider extrinsic evidence;³⁷
- c) Extra-contractual obligations which may apply regardless of the parties' contractual intent; e.g. fiduciary obligations, implied duties of good faith;
- d) Mandatory rules of law which protect public interest or the weaker party; e.g. securities and antitrust laws, intellectual property rules, laws regarding illegality and fraud;
- e) Corporate, contractual and representational formalities;
- f) Gap-filling principles in order to supply terms and meaning that are not specifically delineated by the contract; e.g., when "waiver" of a right has occurred or the definition of "materiality;"
- g) Doctrines permitting adjustment or alteration of contract terms; e.g., force majeure, impracticability/impossibility, or abuse of rights.

Arbitrators who ignore these components of national law in service of "common sense" interpretation or lesser-developed transnational principles may

³⁶ BORN, *see supra* note 5, p. 2658.

³⁷ Karton suggests that modern arbitral practice tends towards the civil law, subjective approach of contract interpretation, looking at evidence outside the four corners of the contract even where the parties have specifically contracted for a common law "objective" regime. KARTON, *see supra* note 7, p. 7.

be disregarding the parties' expressed intention to rely on these established legal principles in the event of a dispute arising out of their commercial relationship. The better assumption is that the parties' choice of governing law includes these and other national legal principles unless the contract expressly states otherwise.

3. A CONSISTENT APPROACH TO GOVERNING LAW

As the practice of arbitration becomes increasingly "internationalized", practitioners may continue to debate the role national law should play in arbitral decision-making. Perhaps the very lack of judicial review of arbitrators' substantive decision-making has contributed to a lacuna in this area; we have developed clear and nearly universally accepted standards to address various procedural issues in arbitration, but leave the scope and nature of legal decision-making distinctly to the individual arbitrator. Yet there is little doubt that arbitrators should strive to achieve just results, and would prefer to be perceived as having reached those results through the application of legal reasoning. As one prominent arbitrator puts it:

Law is the basis for international arbitration, without which the arbitral process loses both its legitimacy and efficacy, and instead disserves its most fundamental purpose of finally resolving disputes in an adjudicative, legally binding manner.³⁸

Arbitration practice and procedure already does offer certain guidance regarding the approach to national law, as well as a variety of tools that can be employed by arbitrators to ensure a legal result that comports with the parties' chosen legal framework. This section discusses three areas that may contribute to achieving consistency and clarity in the approach to governing law.

3.1. GUIDANCE FROM INSTITUTIONAL RULES

Nearly all arbitral institutions, as well as the UNCITRAL Model Law and UNCITRAL Arbitration Rules, provide that arbitrators "shall" or "will" apply the law or rules of law designated by the parties in their agreement.³⁹ This is equally the case among institutions based in East Asia;⁴⁰ the CIETAC Arbitration

³⁸ BORN, *see supra* note 5, p. 2657.

³⁹ UNCITRAL Model Law, Art. 28.1; UNCITRAL Arbitration Rules, Art. 35.1 (2013); *see also* International Centre for Dispute Resolution, Rules Amended and Effective June 1, 2014, Art. 31.1.; The London Court of International Arbitration, Arbitration Rules 2014, Art. 22.3; JAMS Mediation, Arbitration and ADR Services, JAMS Comprehensive Arbitration Rules & Procedure (2014), Art. 24(c).

⁴⁰ *See, e.g.*, Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules, 6th Edition (2016) [hereinafter "SIAC Arbitration Rules"], Rule 31.1; Hong Kong International Arbitration Centre, 2013 Administered Arbitration Rules, Art. 35.1.

Rules, for example, start from the broad premise that "The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices," but then go on to state that "Where the parties have agreed on the law applicable to the merits of their dispute, the parties' agreement *shall prevail*".⁴¹ The ICC Rules similarly envision the application of the law chosen by the parties, stating that the "parties shall be free to agree upon the rules of law *to be applied* by the arbitral tribunal to the merits".⁴² Many domestic arbitration laws contain similar principles.

Some institutional rules contain additional guidance, including that the arbitrators shall also decide "in accordance with the terms of the contract," or permitting reference to "trade usages".⁴³ There is no indication, however, that these supplementary directions are intended to supplant the requirement to apply the governing law in the first instance.

While it is not clear that these directives go so far as to preclude reference to principles falling outside of national law, there is no reason that they should be considered any less indicative of party intent than, for example, the "clear and unmistakable evidence" to allow arbitrators to decide their own jurisdiction that is commonly found by U.S. courts when parties refer their dispute to arbitral rules containing provisions regarding competence-competence. In extreme cases, then, it might be argued that the arbitrator has exceeded the bounds of her authority or has acted outside the scope of the arbitration agreement where her approach to legal decision-making falls well outside that contemplated by the applicable national law.

3.2. ACHIEVING CONSISTENCY IN THE APPLICATION OF TRANSNATIONAL PRINCIPLES

If arbitrators are to consider transnational law or "international" principles in their decision-making, it is important that they clearly articulate what those rules are, and provide a basis for resorting to them. As discussed above, the prevailing view is that arbitrators should not resort to *lex mercatoria* where not expressly authorized to do so by the parties in their contract. An alternative approach suggests that arbitrators should avoid relying on principles derived

41 2015 Rules of Arbitration of the China International Economic and Trade Arbitration Commission (CIETAC), Arts. 49(1) and 49(2).

42 ICC Arbitration Rules, Art. 21.1 (emphasis added).

43 *See supra* note 15.

from transnational law where doing so would exclude or amend provisions of the selected governing law.⁴⁴ This is not to say that national legal rules cannot or should not be adjusted to the particular "needs and characteristics of international commerce;"⁴⁵ but arbitrators must be clear as to whether they are merely taking cross-border considerations into account in order to interpret national law standards, or are resorting to transnational law as a separate and distinct legal basis for their decision. In addition, if arbitrators intend to supplement national law with transnational law, they should endeavor to carefully define the content of the standard they have applied and consider whether it is consistent with or contrary to the result that the national law would dictate. These steps will contribute to clarity in the application of transnational principles, and ensure that their relevance to international commercial arbitration is not diminished by using them to justify what are otherwise "intuitive" decisions by arbitrators.

3.3. INCREASED EMPHASIS ON APPLICATION OF LEGAL STANDARDS

Modern arbitral procedure tends to focus on facts and procedure over the application of legal standards; counsel and arbitrators share responsibility for this trend.⁴⁶ Submissions to arbitral tribunals may focus on the arbitrator's attention on the factual *what happened*, to *whom*, and *how*, as opposed to the legal *whether* those facts give rise to cognizable rights and remedies. Witness statements and subject-matter expert opinions are often the focus of the parties' submissions; memorials may be light on citation to statutes or law, with legal standards largely relegated to footnotes or discussed in a cursory manner. Not all arbitrators require counsel to detail how the facts fit within the law, and some commentators have suggested that arbitrators do not adequately cite or analyze applicable legal standards in their awards.⁴⁷

44 See FOUCHARD, GALLIARD, GOLDMAN, *see supra* note 3, p. 846.

45 BORN, *see supra* note 5, p. 2657.

46 N. BLACKABY, C. PARTASIDES, ET AL., Chapter 3. Applicable Laws, in "Redfern and Hunter on International Arbitration", 6th ed. (Kluwer Law International, 2015), p. 150. ("Many disputes that are referred to arbitration are determined by arbitral tribunals with no more than a passing reference to the law. They turn on matters of fact: what was said and what was not said; what was promised and what was not promised; what was done and what was not done.")

47 "In arbitral practice it seems to be a striking feature that in many cases arbitrators leave out the analysis or any discussion while applying any principle of law." MANIRUZZAMAN, *see supra* note 13, p. 721; *see also* A. AL-HIBRI, "Decisions of the Iran-United States Claims Tribunal", *The American Journal of International Law* (Vol. 78, (1984)), pp. 227-28 (discussing remarks made by Ted Stein regarding the lack of reference to legal principles in the jurisprudence of the Iran-U.S. Claims Tribunal); KARTON, *see supra* note 2, p. 12 (finding that, of a sample of 73 ICC awards, nearly 40% "make no reference to any interpretative principle, not even a bare citation to a relevant code provision or precedent or a statement explaining how the arbitral tribunal would proceed.").

Although arbitration is often praised for its emphasis on commercial considerations, parties surely do not believe arbitration to be an essentially arbitrary method of decision-making, unhinged from legal order. Every case must involve a decision – be it express or implied – as to whether the facts give rise to a legal remedy. It is commonly accepted that arbitrators may not decide disputes *ex aequo et bono* unless the parties have expressly permitted them to do so.⁴⁸ Yet the difference between a decision at law and one at equity may be merely a matter of degree where legal principles are not clearly articulated in an award.⁴⁹

There are myriad ways in which these issues can be addressed, all of which first and foremost rely on attention, rigor, and care from arbitrators and counsel alike. A few specific proposals for ways in which legal decision-making might be elevated and prioritized include:

Reference to burdens/standard of proof and evidentiary standards in order to place emphasis on those facts relevant to the legal dispute at hand. Burden of proof is not always addressed in international arbitral awards, and arbitrators tend not to exclude evidence prior to the hearing (often not at all), which may make them prone to hearing evidence and argument that has marginal, if any, relevance to the legal decision they are required to make.⁵⁰

Consideration of early dismissal of claims without legal merit. Although there is an increasing recognition of the importance of summary procedures,⁵¹ arbitration still strongly disfavors the early dismissal of claims and defenses. Such processes may serve to re-focus attention on legal principles and separate meritorious claims from meritless ones, by demonstrating that a party cannot satisfy the legal elements to sustain a particular claim.

48 See, e.g., UNCITRAL Model Law, Art. 28.3.

49 See MANIRUZZAMAN, *see supra* note 13, pp. 687-90 (describing the differences between *lex mercatoria* and *ex aequo et bono* and noting that “the overbearing application of equity may prove a decision to be one *ex aequo et bono*.”).

50 See J. PERMESLY, C.D. GUEVARA, P. PERALES, “La Carga de la Prueba y La Admisibilidad en Arbitraje Internacional: Asuntos Que Merecen Una Temprana Audiencia,” *Spain Arbitration Review* (Vol. 30 (2017)) (proposing that arbitrators place additional focus on the applicable burden and standard of proof).

51 SIAC was the first major institution to incorporate summary procedures into its arbitration rules, which permit any party to apply for the early dismissal of a claim or defense on the basis that it is “manifestly without legal merit.” SIAC Arbitration Rules, Rule 29.1(a). The latest rules of the Stockholm Chamber of Commerce (“SCC”) also provide such a procedure, noting as one possible ground that “even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law.” SCC Rules of Arbitration (1 January 2017), Art. 39. Other arbitral institutions have also adopted such procedures.

Constitution of a tribunal familiar with the law and/or reliance on legal experts, where necessary. Parties and institutions regularly appoint arbitrators who do not have their background in the governing law of the contract. While a good arbitrator can of course learn the applicable legal standards through party advocacy, they remain outsiders to the governing legal constructs and, as a result, may unduly defer to testimony from a legal expert or the opinion of another arbitrator on the tribunal more familiar with the applicable law.⁵² Arbitrators unfamiliar with the law should expect and require that counsel provide them with the authorities and explanation they require to base their decision on the applicable legal principles.⁵³ In some cases, they might consider requesting legal experts to describe relevant standards or orient the arbitrator within the appropriate legal framework.

4. CONCLUSION

The idea of international arbitration as an inherently private mechanism for dispute resolution is giving way to the notion that arbitrators and arbitration practitioners are responsible for ensuring the integrity of the system for decades to come. Just as rules have been developed to regulate conflicts of interest and evidentiary submissions in international arbitration, so too should the international arbitration community consider placing increased focus on examining the role of the national governing law chosen by the parties in resolving international commercial disputes.

Modern arbitral practice may contribute to a de-emphasis on the governing law in perhaps unintentional ways – not from a conscious effort to deviate from national law, but from a lack of attention to legal standards, an overzealous

⁵² See K. KIM and J. BANG, “Commentary on Using Legal Experts in International Arbitration, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* ICCA Congress Series, Vol. 13 (Kluwer Law International (2007)), pp. 779-785 (nothing that a legal expert may balance variations in knowledge among tribunal members). See also A. ROSS, “Let counsel not the experts argue the law, Donovan argues,” in *Global Arbitration Review* (Jan. 5, 2018), available at <https://globalarbitrationreview.com/article/1152192/let-counsel-not-experts-set-out-the-law-donovan-argues> (last visited Mar. 20, 2018) (quoting D. Donovan stating that whether the law is set out by counsel or an expert, the arbitrator needs to engage in that reasoning and adopt the legal theory that he or she finds “most compelling, most persuasive, in light of the available legal authorities that stand independent of the case being presented.”).

⁵³ See “International Law Association International Arbitration Committee’s Report and Recommendations on “Ascertaining the Contents of the Applicable Law in International Commercial Arbitration”, *Arbitration International* (Vol. 26(2) (2010)), pp. 217-218 (“Arbitrators should primarily rely on the parties to articulate legal issues and to present the law, and disputed legal issues. They should give appropriate weight to information so obtained. Arbitrators must through the proceeding develop a sufficient understanding of the applicable law that they can fulfill their mandate to decide the dispute according to law.”).

attitude toward the extent to which transnational legal principles can supply the necessary content to make legal decisions, and a potentially misinformed view regarding the authority to enter into intuitive or 'commercially-based' decision-making. Increased attention to the governing law chosen by the parties, including by insisting that a party's claims and defenses be framed within the applicable legal construct and by providing clear and consistent reasoning as to when and how transnational principles will be applied, are small steps that could go a long way in re-elevating the role of "law" in arbitral decision-making.