This is the authors’ final peer reviewed (post print) version of the item published as:


Available from Deakin Research Online:

http://dro.deakin.edu.au/view/DU:30083575

Reproduced with the kind permission of the copyright owner.

Copyright : 2016, The Author
I. INTRODUCTION

On 26 – 27 April 2016, the Rules Revision Committee of the Arbitration Institute of the Stockholm Chamber of Commerce published the Draft SCC Arbitration Rules 2017 and the Draft SCC Expedited Arbitration Rules 2017, and invited comment by the profession on or before 23 May 2016. This submission has been prepared for the Rules Revision Committee for the purposes of this consultation process.

This submission addresses one particular aspect of each of the Draft SCC Arbitration Rules 2017 and the Draft SCC Expedited Arbitration Rules 2017 – the way in which arbitrators identify the substantive law governing the merits of the parties’ dispute, where the parties have not themselves made a choice of law. In this submission, this issue is referred to as the conflict of laws. It is noted for the purposes of clarity that though the literature sometimes uses the term conflict of laws in a wider sense,¹ to include a range of other issues such as party choice of law, jurisdiction, and the international enforcement of decisions, in this submission the term conflict of laws is used in a more narrow sense – specifically to refer to arbitrators’ identification of the governing substantive law, absent any relevant party choice.

II. THE CONFLICT OF LAWS POSITION TAKEN UNDER THE DRAFT SCC ARBITRATION RULES 2017 AND THE DRAFT SCC EXPEDITED ARBITRATION RULES 2017

Both the Draft SCC Arbitration Rules 2017, and the Draft SCC Expedited Arbitration Rules 2017, contain provisions addressing the applicable substantive law. In addition to addressing party choice of law, both set out parameters for the resolution of conflict of laws issues.

¹ See, eg, Lord Lawrence Collins (ed), Dicey, Morris and Collins on the Conflict of Laws (Sweet & Maxwell, 15th ed, 2012) 3 [1-001].
Pursuant to the Draft SCC Arbitration Rules 2017 (emphasis added):

Article 27: Applicable Law
(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate.

Pursuant to the Draft SCC Expedited Arbitration Rules 2017 (emphasis added):

Article 28: Applicable Law
(1) The Arbitrator shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitrator shall apply the law or rules of law that the Arbitrator considers most appropriate.

These provisions both embody what is known as the voie directe. This is a methodology whereby arbitrators may make a direct choice of the governing substantive law, without the necessity of applying conflict of laws rules—though arbitrators may still apply conflict of laws rules in their discretion. This is in contrast to the methodology known as the voie indirecte, where arbitrators are required to apply conflict of laws rules in some way in identifying the governing substantive law. Some voie indirecte provisions, such as Art. 28(2) Model Law 2006, require arbitrators to use a conflict of laws rule but do not specify (or provide any constraints around) which conflicts rule must be used. Other voie indirecte provisions, such as Art. 33(1) Swiss Arbitration Rules 2012, identify a specific conflict of laws rule that must be applied – the closest connection test.

III. THE CONFLICT OF LAWS POSITION TAKEN UNDER PREVIOUS VERSIONS OF THE SCC ARBITRATION RULES

The conflict of laws methodology set out under the existing SCC Arbitration Rules 2010 provides as follows:

Article 22: Applicable Law
(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.

Similarly, pursuant to the SCC Arbitration Rules 2007:

Article 22: Applicable Law
(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.

---

2 Linda Silberman and Franco Ferrari, ‘Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong’ in Franco Ferrari and Stefan Kröll (eds), Conflict of Laws in International Arbitration (Sellier European Law Publishers, 2010) 257, 265.
And additionally, pursuant to the SCC Arbitration Rules 1999:

Article 24: Applicable Law
(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law or rules of law agreed by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.

With respect to conflicts of laws, the position taken under all of these provisions is substantially the same as that set out under Art. 27(1) Draft SCC Arbitration Rules 2017, and Art. 28(1) Draft SCC Expedited Arbitration Rules 2017.

IV. COMMENTS ON THE PROPOSED CONFLICT OF LAWS POSITION

The position taken in Art. 27(1) Draft SCC Arbitration Rules 2017, and in Art. 28(1) Draft SCC Expedited Arbitration Rules 2017, is largely in line with modern trends. Nevertheless, there are three key problematic features of this proposed methodology which justify the Rules Revision Committee considering an alternative text.

The first relates to the width of the discretion conferred upon arbitrators by the voie directe.

Though the voie directe is the prevailing methodology for resolving arbitral conflicts of laws, the width of its discretion stands in stark contrast to the ideals of substantive certainty which underpin international commercial arbitration. There are no effective fetters on the exercise of arbitrators’ discretions under voie directe provisions – the approach ‘could hardly be more liberal’ and it can rightly be criticised for the production of uncertainty. However, as explained by Gary Born, ‘[p]arties often choose international arbitration to resolve their disputes because they desire enhanced certainty and predictability concerning their legal rights’. Party expectations are recognised as an important consideration in resolving conflicts of laws in international commercial arbitration.

It is true that procedural flexibility is a highly valued norm in international commercial arbitration. Nevertheless, procedural flexibility is a very different issue to flexibility with respect to the parties’ substantive rights and obligations. As explained by Simon Greenberg:

6 Emmanuel Gaillard and John Savage (eds), Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer, 1999) 867 [1540].
Flexibility is certainly one of the reasons for which parties choose arbitration, but ‘flexibility’ means procedural flexibility relating to how the arbitration is run, and surely not flexibility or arbitrariness in substantive outcomes. Parties do not choose arbitration because of its flexibility in the determination of which party wins.\(^{11}\)

The practical result of the wide discretion embodied in the *voie directe* methodology is that arbitrators may effectively make a decision as *amiable compositeur* for the conflict of laws.\(^{12}\) This is theoretically inconsistent with the strict controls which are placed on arbitration *ex aequo et bono*, which is recognised as an exceptional form of arbitration,\(^ {13}\) and which requires specific party agreement – a requirement recognised both in Art. 27(3) Draft SCC Arbitration Rules 2017, and in Art. 28(3) Draft SCC Expedited Arbitration Rules 2017.

To summarise the implications of this first problematic feature, the *voie directe* methodology embodied in Art. 27(1) Draft SCC Arbitration Rules 2017 and in Art. 28(1) Draft SCC Expedited Arbitration Rules 2017 confers an undesirably wide degree of discretion upon arbitrators, which is inconsistent with the interests of arbitrating parties in substantive certainty.

The second key problematic feature of the proposed methodology relates to the availability of recourse with respect to arbitrators’ conflict of laws determinations.

The starting point for an analysis of this problematic feature of the *voie directe* is the general rule that there are no appeals on the merits in international commercial arbitration. Arbitrators’ decisions as to the facts and the law are generally not subject to appellate review.\(^ {14}\) Though it is not possible to contract-in to appellate review in State courts, as this would involve conferring jurisdiction on courts that they would not otherwise have,\(^ {15}\) there are some exceptional appeal mechanisms available in some cases, such as those set out under the AAA & ICDR Optional Appellate Arbitration Rules 2013. These provide for appeals on matters of fact and law to a second-tier tribunal, rather than to State courts.\(^ {16}\) Nevertheless, these kinds of appeal mechanisms operate in a limited fashion, and require parties to affirmatively opt-in. The 2015 empirical study of the School of International Arbitration at Queen Mary University of London confirmed that the prevailing view is that there should not be mechanisms for appeals on the merits in international commercial arbitration.\(^ {17}\)

---


\(^{13}\) Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 185 [3.91].


\(^{15}\) See generally *Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008).


The reason why this is an important starting point is that arbitrators’ identification of the governing substantive law involves the application of procedural law – the application of the framework set out in the relevant arbitral law or arbitration rules for resolving conflicts of laws. A party aggrieved with a tribunal’s resolution of a conflict of laws issue therefore will generally have no right of appeal – even though conflict of laws questions can ‘sometimes directly determine the outcome of a case’.18

The only recourse that may be had against arbitral awards consists of a setting-aside application in the seat of arbitration – under, for example, Art. 34(2) Model Law 2006 – or a challenge to the recognition and enforcement of an arbitral award pursuant to the grounds in Arts. V(1) & (2) New York Convention.

Where a conflicts determination is made pursuant to a voie directe provision, there is no possibility of invoking any of the grounds available for setting aside or challenging the enforcement of an award. Even if a conflicts determination is made based on ‘esoteric reasons’19 – such as in a case where arbitrators simply apply the law that they ‘happen to know best’20 – such a determination is within the scope of the broad discretion that voie directe provisions such as Art. 27(1) Draft SCC Arbitration Rules 2017 and Art. 28(1) Draft SCC Expedited Arbitration Rules 2017 confer. Since an unconstrained and unguided discretion is at issue, it is hard to conceptualise the exercise of that discretion as ever being incorrect in any event.21

On the other hand, where a voie indirecte methodology is implicated – a requirement to use a conflict of laws rule, or a requirement to use the closest connection test – very limited recourse will be available to ensure that the required procedural conflicts framework is applied. Pursuant to Art. 34(2)(a)(iv) Model Law 2006, and Art. V(1)(d) New York Convention, an award is susceptible to challenge where the procedure applied was not that agreed upon by the parties (or otherwise applicable by default, pursuant to the relevant arbitration law). Therefore if a voie indirecte methodology required arbitrators to apply a conflict of laws rule (any conflict of laws rule) but arbitrators instead purported to make a direct choice of law, a challenge on the basis of defective procedure would potentially be open. Similarly, if a voie indirecte methodology required arbitrators to apply the closest connection test but arbitrators instead applied a different conflict of laws rule, or made a direct choice of law, a challenge would also potentially apply. The voie indirecte, in contrast to the voie directe, therefore ensures that some controls are placed around the resolution of conflict of laws questions – though if the correct procedural framework is applied, the ultimate decision of a tribunal is still not susceptible to complaint.

To summarise the implications of this second problematic feature, the voie directe methodology embodied in Art. 27(1) Draft SCC Arbitration Rules 2017 and Art. 28(1) Draft SCC Expedited Arbitration Rules 2017 leaves scope for objectively undesirable approaches to resolving conflict of laws issues that are not subject to any kind of appeal or review.

---

Finally, it is noted for completeness that although the *voie directe* methodology (embodied in the proposed provisions) represents the prevailing approach to resolving arbitral conflicts of laws, the ‘most appropriate’ criterion that the proposed provisions use is close to unique to the Arbitration Institute of the Stockholm Chamber of Commerce. Very few other sets of institutional arbitration rules use this criterion.22 The typical wording used in equivalent provisions in other arbitration laws and rules is either (simply) ‘appropriate’23 or ‘applicable’.24 Given the extremely wide discretion incorporated into the *voie directe*, it is doubtful whether the ‘most appropriate’ criterion adds anything to the otherwise-commonly-used ‘appropriate’ (or ‘applicable’) criteria.

V. A PROPOSED ALTERNATIVE TEXT

Putting aside the last of these three issues, the first two key problematic features of the *voie directe* identified in Part IV undermine the conflict of laws methodologies proposed in Art. 27(1) Draft SCC Arbitration Rules 2017, and in Art. 28(1) Draft SCC Expedited Arbitration Rules 2017.

An alternative conflicts methodology that avoids all three issues identified in Part IV is the closest connection test. The closest connection test is internationally recognised, it is well-understood, and it is reflected in some existing arbitration laws and arbitration rules.25 It is sometimes (but not necessarily always)26 applied by arbitrators pursuant to their prevailing broad *voie directe* discretions in any event.27 Commercial parties, having an interest in substantive certainty with respect to their commercial relationships and also being the ultimate users of SCC arbitration, stand to benefit from the (finalised) SCC Arbitration Rules 2017 and the (finalised) SCC Expedited Arbitration Rules 2017 providing a more certain approach to arbitrators’ conflict of laws determinations.

The closest connection test appropriately balances considerations of certainty and flexibility. Commercial parties would be provided with a knowable framework within which arbitrators will identify the governing substantive law. No such knowable framework exists when the *voie directe* is adopted, as it is proposed to be in Art. 27(1) Draft SCC Arbitration Rules 2017 and in Art. 28(1) Draft SCC Expedited Arbitration Rules 2017. Commercial parties using SCC arbitration would be able to better predict the outcome of arbitrators’ conflicts analyses. Not only would they have greater foreseeability as to their substantive rights and obligations, they would even benefit before any dispute arises – with respect to the performance of their contractual obligations – and they would also be better able to present and argue their cases (which necessarily depends upon the applicable substantive law) and would be better able to

---

22 See, eg, Art. 33(1) DIAC Arbitration Rules 2007; Art. 24(c) JAMS Comprehensive Arbitration Rules 2014; Art. 24(c) JAMS Construction Arbitration Rules 2014; Art. 18(1) JAMS Arbitration Rules 2011.


26 See, eg, ICC Case No. 10303 / 2000 (2008) 19(1) ICC International Court of Arbitration Bulletin 114, 114. The Tribunal in this case applied the closest connection test as it is particularly and uniquely embodied in Art. 4 Rome Convention 1980, but only because of its primary decision to apply the conflict of laws rules of the seat of arbitration, rather than the closest connection test *per se*.

conduct settlement negotiations (which requires an understanding of the likely or possible outcomes of arbitration).

At the same time, some discretion remains in applying the closest connection test. Arbitrators are required to exercise discretion in identifying relevant connecting factors, and then in determining the weight that they are to be given. Superscript 28 Both tasks involve an assessment of the particular circumstances of a given case. In this way, the closest connection test remains capable of providing solutions that are properly adapted to the needs of individual cases.

Though the closest connection test would usually lead to the application of State law, if adopted by the Arbitration Institute of the Stockholm Chamber of Commerce, the ‘rules of law’ terminology currently contained in Art. 27(1) Draft SCC Arbitration Rules 2017 and in Art. 28(1) Draft SCC Expedited Arbitration Rules 2017 should be maintained. Though the phrases ‘law’ and ‘rules of law’ seem similar, the terminological difference is important – ‘rules of law’ is a ‘coded reference’ to a broader concept which encompasses both State law and also non-national bodies of rules such as the *lex mercatoria*. Superscript 29

The reason why the ‘rules of law’ terminology should be retained alongside the closest connection test is because, as reflected in Swiss law, the closest connection test can be used to apply the *lex mercatoria* where it can fairly be said that the closest connection lies ‘with international commerce in general’ rather than with a particular State. Superscript 30 One problem experienced with the closest connection test in some jurisdictions, such as its embodiment in the English common law, is how to apply the test in the case of evenly distributed connecting factors. Superscript 31 Providing that arbitrators may apply rules of law following application of the closest connection test would allow arbitrators to apply the *lex mercatoria* (perhaps as codified in sources such as the Trans-Lex Principles or in the UNIDROIT Principles) in these very limited cases where the connecting factors are genuinely evenly distributed, avoiding this unusual but not entirely unlikely practical problem associated with the closest connection test.

This submission does not make any comment as to the first sentence of either Art. 27(1) Draft SCC Arbitration Rules 2017, or Art. 28(1) Draft SCC Expedited Arbitration Rules 2017, concerning party choice of law. However, with respect to the conflict of laws, the second sentence of each provision should be amended to read as follows:

> In the absence of such agreement, the Arbitral Tribunal [or the Arbitrator, in the case of the expedited rules] shall apply the rules of law which are most closely connected to the parties’ case.

---


Superscript 31 See, eg, *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, 44 (Lord Denning MR).
It is proposed that the closest connection be sought with reference to the parties’ case, rather than to the parties’ contract or the dispute. This is because reference to the parties’ case is apt to allow a consideration of all contextual factors relating to their controversy that has led them to arbitration, and which might be relevant in assessing where the relevant legal centre of gravity lies.

To further the interests of certainty which lie at the heart of this submission, the Rules Revision Committee may also consider adding a further sentence, based on the closest connection test as it is embodied in Art. 4 Rome Convention 1980. This sentence would incorporate the characteristic performance presumption adopted in that instrument:

It shall be presumed that the closest connection lies with the law of the State of the party who is to effect characteristic performance of the contract, unless characteristic performance cannot be determined or the circumstances of the case as a whole show that other rules of law are clearly more closely connected.

Though Art. 4(1) Rome I Regulation now takes a different approach to the conflict of laws within the European Union by adding a preliminary step (on top of a characteristic performance rule) involving the application of hard-and-fast rules, the characteristic performance presumption formerly adopted in Art. 4(2) Rome Convention 1980 is well-understood, has a broader application across more types of contracts than the eight hard-and-fast rules contained in Art. 4(1) Rome I Regulation, and would provide for a clear presumptively-applicable law in many common categories of case. Where the characteristic performance presumption does not assist, the residual closest connection test would then be used to then identify the governing substantive law in any event.

V. CONCLUSION

In conclusion, this submission recommends amendments to the conflict of laws methodologies proposed in Art. 27(1) Draft SCC Arbitration Rules 2017, and in Art. 28(1) Draft SCC Expedited Arbitration Rules 2017.

Rather than adopting the voie directe, which implicates two key problematic features in particular, these provisions should instead adopt the closest connection test – possibly including a presumption based on the concept of characteristic performance. This alternative methodology – a form of the voie indirecte – is better adapted to meet the needs of substantive certainty of the commercial parties who are the ultimate users of arbitration conducted through the Arbitration Institute of the Stockholm Chamber of Commerce. They are also the parties to whom the (finalised) SCC Arbitration Rules 2017 and the (finalised) SCC Expedited Arbitration Rules 2017 will ultimately be addressed.