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NON-STATE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

Abstract:

The feature that most attracts private parties from different states to referring their dispute to an arbitral tribunal is the flexibility of the procedure. However, the differences between arbitration and court litigation are not only procedural, but they concern the substance of the parties' cases. This is because in the realm of international arbitration the law applicable to the merits of the case is determined according to other provisions than the statutory conflict of laws rules. Depending on the arbitration law of the seat, the entire private international law statute can be captured in a single provision – “absent the parties' choice, the arbitral tribunal shall apply the rules of law which it determines to be appropriate”. It follows that arbitral tribunals, unlike state courts, are not bound by the conflict of laws rules of the forum. What's more, the merits of a dispute submitted to arbitration may be governed not only by some national body of law (e.g. the Polish Civil Code) but also by a non-state, non-national set of provisions – “rules of law” (e.g. the UNIDROIT Principles of International Commercial Contracts).

The aim of this article is to analyze how the parties and tribunals may make use of their autonomy in determining the law applicable to a dispute. Furthermore it examines whether there are any limits thereto in light of the Rome I Regulation.

Keywords: arbitration, Rome I, rules of law, *lex mercatoria*, non-state law, applicable law, UNIDROIT, *lex arbitrii*

INTRODUCTION

This article deals with the issue of the application of non-state law in international commercial arbitration from the private international law perspective. Out of the many differences between arbitral tribunals and state courts, one is of great importance when it comes to resolving a dispute having an international element: arbitral tribunals are not bound to apply the conflict of laws rules of *legis fori*. This does not mean, however,

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that national legislations are silent on the issue of choice of law in international arbitration. To the contrary, arbitration laws contain autonomous provisions in this respect, which are distinct from those intended for the courts. It should therefore be stressed that an arbitral tribunal is not bound by the ordinary conflict of laws rules because the law of the seat of arbitration says so. This has some further implications – tribunals may apply as the *legem contractus* not only the binding law of a certain state (e.g. the Polish Civil Code, German *Bürgerliches Gesetzbuch* (BGB), etc.) but also rules which are of a non-binding and non-national character. It follows that the same case, depending on whether it is referred to a state court or an arbitral tribunal, could reach a different outcome. This particular aspect makes the topic even more interesting.

In addressing the issue, reference is also made to the set of uniform law instruments, such as the UNIDROIT Principles of International Commercial Contracts, uniform substantive law conventions in cases where they do not apply by virtue of their own provisions, and to other sources of non-national, non-state rules: *lex mercatoria*, trade usage, and general principles of contract law. Although the application of these instruments is not frequent, various arbitral awards show that in international commercial arbitration these rules may be chosen either by the parties or, absent such a choice, by the arbitrators themselves to govern the merits of the dispute. For example, in 2004 eight contracts giving rise to new ICC arbitration provided for the application of “anational” rules.¹ Similarly, in several ICC arbitrations non-state law was applied by the arbitrators without it being the parties’ previous choice.² According to a study carried out by CENTRAL of Münster (Germany), there are also an increasing number of parties which subject their contracts to sources of rules such as *lex mercatoria*, general principles of law, or transnational principles of law.³ Thus, the choice of non-state law in international commercial arbitration is not just a theoretical issue, but has a significant practical importance.

The aim of this article is to analyze the theoretical and practical implications of the choice of non-state law as applicable to the merits of a dispute subject to international commercial arbitration. The analysis is divided into following parts: part 1 gives an insight into what can be understood as non-state law, while part 2 is devoted to an analysis of the possibility of the parties to expressly choose non-state law, and a distinction is drawn between applying the rules as governing the contract and incorporating them by reference as the substantive provisions thereof. Furthermore, part 3 examines the circumstances in which arbitrators are allowed to apply non-state law in the absence of a choice by the parties. A distinction is also made between applying the rules indi-

¹ Y. Derains, E. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer Law International, The Hague: 2005, p. 237.

² See e.g. Award of International Court of Arbitration, case no. 3131 of 1979, Yearbook Commercial Arbitration, vol. IX (1984) 109, p. 110; Award of International Court of Arbitration, case no. 8547 of 1999, Yearbook Commercial Arbitration, vol. XXVIII (2003) 27, pp. 32-33.

³ P. Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8(3) European Law Journal 400 (2002), p. 404.

rectly – by following conflict of laws rules; and applying them directly, as the arbitrators determine appropriate. In this part it is also shown that non-state conflict of laws rules may be used by arbitrators following the indirect approach. Finally, part IV contains remarks concerning the applicability of European Union law (the Rome I Regulation⁴) in arbitration seated in an EU Member State.

1. SOURCES OF NON-STATE LAW

Before going deeper into an analysis from the conflict of laws perspective, it is first useful to describe the sources of the non-state rules which the parties and the arbitrators may make use of. It is suggested that these rules were developed by merchants and for merchants, with a view toward breaking down the whole body of law into more specific sections and increasing specialization within the legal profession. In such circumstances, particular groups of bankers, merchants, or traders developed “their own special rules of conduct which gradually acquire the force of law, either by themselves or by incorporation into national law or international treaty.”⁵ It must be noted, however, that this article is concerned only with rules that have not been transposed into national law or which do not form a binding set of provisions due to particular circumstances (uniform substantive law conventions applicable by virtue of choice).

1.1. *Lex mercatoria*

The history of *lex mercatoria* (merchant law) goes back as far as the Middle Ages. At first it was a “system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century.”⁶ Today, however, a modern version of “merchant law” may be distinguished. It consists of rules and practices established in the course of international business by the agents and communities involved in it.⁷ The development of INCOTERMS, the ICC Code of Practices, and the UNIDROIT Principles of International Commercial Contracts manifest the emergence of new uniform international standards.⁸

There are certain reservations which argue against treating *legem mercatoria* as a body of norms. The problem arises from the difficulty in identifying the legal principles to

⁴ Regulation 593/2008/EC of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177.

⁵ A. Redfern, M. Hunter, N. Blackaby, C. Partasides, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, London: 2004, p. 216.

⁶ *Black's Law Dictionary* (9th ed.), WestlawNext, New York: 2009.

⁷ N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, Oxford: 2009, p. 216.

⁸ F. Schwarz, Ch. W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer Law International, The Hague: 2009, p. 605.

which the merchant law refers.⁹ However, it is also said that deciding on the basis of “global law without a state”¹⁰ does not mean deciding in the absence of “rules”. By applying general principles deduced from various legal systems, the arbitral tribunal makes a decision “pursuant to a ‘content driven application of equitable principles’ (*inhaltlich präzisierete Billigkeit*) taking into account trade practices.”¹¹

1.2. UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles are a restatement of the general principles of contract law and comprehensively cover issues of interpretation, performance of contractual obligations, contract formation, conducting of negotiations, and remedies. They represent a system of rules of contract law. Their aim is to establish a neutral set of rules which may be used throughout the world without any bias towards a particular national system.¹² As has been stated: “The Principles are intended to be neutral. They were not drafted in the interest of a specific party or lobbying group. They will strike a fair balance between the rights and obligations of all parties to contracts.”¹³

1.3. Uniform law conventions which do not apply by virtue of their own provisions

A uniform substantive law convention, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG),¹⁴ may be chosen by the parties as a set of provisions or law governing the contract without meeting its application requirements. In such a scenario, the Convention no longer forms a part of any state’s law. It is similar, as will be discussed later below, when an arbitral tribunal applies a convention based on its general authority to find the “appropriate” law or rules of law to govern the merits of a dispute. Since it is not binding on the parties *per se*, the Convention must be considered as a source of non-state law, along with the UNIDROIT Principles or any other set of provisions created by private individuals.

The above example should be juxtaposed with a general instance when uniform substantive law conventions apply only when they are in force in the forum state or in the state whose law governs the contract and when the contract falls within their sphere of application. For example, the CISG applies *per se* only when the internationality requirement set forth in the Art. 1(1)(a) is satisfied, or when the conflict of law rules of

⁹ K. Böckstiegel, S. Kröll, P. Nacimiento, *Arbitration in Germany: The Model Law in Practice*, Kluwer Law International, The Hague: 2007, p. 351.

¹⁰ G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in: G. Teubner (ed.), *Global Law without a State*, Ashgate Publishing Company, Burlington: 1997, p. 21.

¹¹ Böckstiegel et al., *supra* note 9, p. 352.

¹² Blackaby et al., *supra* note 7, p. 221.

¹³ H. van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, 11 *Arbitration International* 373 (1995), p. 373.

¹⁴ United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988), 1489 UNTS 58.

the forum lead to application of the law of a contracting state. The CISG is then applied as binding law, being part of a particular domestic legal system.

2. RIGHT OF PARTIES TO CHOOSE NON-STATE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

It is now generally accepted that parties are free to choose the law applicable to their contract.¹⁵ This right may only be constrained by the arbitration law in force at the seat of the tribunal, i.e. *legem arbitrii*, which may set forth some limitations, e.g. that the law chosen must be connected to the merits of the dispute or to the parties themselves. This doctrine of parties' autonomy is now recognized in most national arbitration laws¹⁶ and usually takes the form of an obligation placed on the tribunal to decide the dispute according to law chosen by the parties.

2.1. Distinction between “law” and “rules of law”

The crux of the analysis of the application of non-state law focuses on the notion of “rules of law”. As described further below, “rules of law” refer not only to national legal systems, binding state law or binding international conventions, but also denote provisions which the parties to a contract decided should bind them in particular instances. To compare, it is established that “law” refers only to a set of provisions which bind the parties by virtue of a state's legislation. Hence, the notion “rules of law” has a broader semantic scope than the “law”, and in fact the latter is included in the former.

This distinction is of major importance, as most arbitration laws allow the parties or tribunals to apply either “law” or “rules of law”, i.e. use one term or the other. It follows that, depending on the jurisdiction, the freedom to apply non-state law will be greater or lesser.

For instance, section 46(1) of the English Arbitration Act provides that “the arbitral tribunal shall decide the dispute in accordance with *the law* chosen by the parties as applicable to the substance of the dispute.” There are, as already mentioned, arbitration laws which go further in establishing parties' autonomy in this respect and allow them to choose not only “law” but also “rules of law” (or use another equivalent term). Art. 1051(1) of the German Code of Civil Procedure, for instance, directs the arbitral tribunal to decide the dispute “in accordance with *the rules of law* chosen by the parties.” Similarly, Art. 603 of the Austrian Code of Civil Procedure states that “the arbitrators shall decide the dispute in accordance with *the law or the rules of law*

¹⁵ Blackaby et al., *supra* note 7, p. 194.

¹⁶ *E.g.*: Arbitration Act 1996, c. 23, § 46(1) (UK); *Code de Procedure Civile* (Code of Civil Procedure), J.O. du 9.12.1975, p. 12521, art. 1496 (France); *Zivilprozessordnung* (Code of Civil Procedure), 2005 BGBl. I S. 3202, Art. 1051(1) (Germany); *Bundesgesetz über das Internationale Privatrecht* (Private International Law Act), AS 1988 1776, Art. 187(1) (Switzerland); *Kodeks postępowania cywilnego* (Code of Civil Procedure), O. J. 1964, no. 43, item 296 as amended, Art. 1194 (Poland).

which have been agreed upon by the parties.” The wording of these provisions reflects the structure of Art. 28(1) of the UNCITRAL Model Law on International Commercial Arbitration.

The legislative history of the UNCITRAL Model Law and its Art. 28(1) sheds some light on the meaning of the term “rules of law”. From the beginning of the work on the draft of the Model Law it was understood that “rules of law” were meant to give the parties more autonomy in making a choice as to the rules governing their contract. At the beginning, according to the United Nations Commission on International Trade Law parties could agree to have a given national law apply with an exclusion of the provisions on a specific matter, or decide on the application of law as drafted at a particular time, disregarding any subsequent amendments. There was also a clear indication that parties could choose provisions different than “law” as such, e.g. international conventions not yet in force.¹⁷

Despite the initial intention to broaden the parties’ autonomy, the UNCITRAL Working Group decided at an early stage that the term “rules of law” should not extend to general legal principles or the law developed in arbitration awards. The rationale behind this was that the chosen rules “should be reasonably ascertainable by the arbitral tribunal.”¹⁸ Nevertheless, in the years following the promulgation of the Model Law “rules of law” have tended to be construed more broadly. Commentators agree that this term has a much broader meaning than the term “law”, at least insofar as concerns the Model Law and arbitration laws following it.¹⁹ Reference to “law” usually designates a particular national law or the law of a given state.²⁰ The expression “rules of law” means “that the parties’ choice is not limited to a national system of law but may include uniform law instruments to govern their dispute, whether or not they are part of a national system.”²¹ Some authors go even further in describing “rules of law” and suggest that they also include custom, trade usages, the rules of business associations, codes of conduct, general principles of law, *legem mercatoria* and rules of law and practice recognized and developed by international arbitral tribunals.²²

The modern approach seems to be an appropriate solution in the field of choice of law since there are strong reasons to permit the parties “to agree on whatever normative

¹⁷ H. Holtzman, J. Neuhaus, *A Guide to UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Wolters Kluwer Law and Business, The Hague: 1989, p. 768.

¹⁸ *Ibidem*.

¹⁹ E.g. S. Shackleton, *The Applicable Law in International Arbitration Under the New English Arbitration Act 1996*, 13(4) *Arbitration International* 375 (1997), p. 376; Blackaby et al., *supra* note 7, p. 226; G. Born, *International Commercial Arbitration*, Kluwer Law International, The Hague: 2014, p. 2661; Holtzman & Neuhaus, *supra* note 17, p. 764; E. Gaillard, J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Wolters Kluwer Law and Business, The Hague: 1999, para. 802.

²⁰ M. Blessing, *Choice of Substantive Law in International Arbitration*, 14(2) *Journal of International Arbitration* 39 (1997), p. 56; F. Ferrari, L. Silberman, *Getting to the Law Applicable to the Merits*, in: F. Ferrari, S. Kröll (eds.), *Conflict of Law in International Commercial Arbitration*, Sellier, Munich: 2010, p. 268.

²¹ Ferrari & Silberman, *supra* note 20, p. 269.

²² Holtzman & Neuhaus, *supra* note 17, p. 766; Shackleton, *supra* note 19, p. 376.

framework they deem appropriate.”²³ The basis for this statement is the fact that the parties may even authorize the arbitrators to decide in equity as an *amiable compositeur*. In such a case, there is no reason to prevent them from subjecting their dispute to a set of rules other than national laws.²⁴

2.2. Application of non-state law as the *legem contractus*

If the choice as described above is permissible under the arbitration law of the forum, the arbitral tribunal will usually be bound to apply to the dispute the rules of law chosen by the parties. This will be subject to overriding mandatory provisions of the forum and, possibly, overriding mandatory provisions of states where enforcement of the award will likely be sought. However, when parties choose to submit their contract to set of non-state rules, such as the UNIDROIT Principles (which Preamble itself indicates that parties may choose the Principles to govern their contract), does this mean that these rules only supplement the proper law (national law) of the contract and are applicable in lieu of its dispositive provisions? Or “Do the Principles replace the national law otherwise applicable to the contract? In other words, are the Principles the proper law of the contract?”²⁵

Arbitrators will apply the chosen rules so long as they are exhaustive in the sense that the dispute may be resolved on their basis without resorting to the otherwise applicable national law. At this point it should be noted that a contract cannot exist in a legal vacuum. If a certain issue, such as legal capacity, is not covered by the chosen rules, the tribunal needs to conduct a conflict of laws analysis or directly apply the relevant national law.²⁶ This would be the case, for instance, when the parties choose the UNIDROIT Principles as applicable to the dispute, since those rules do not form an exhaustive system.²⁷ Although the Comments to the Principles state that “the Principles represent a system of principles and rules of contract law”,²⁸ they do not necessarily constitute a real legal system addressing all potential issues which may arise during a contractual dispute. While it is true that a legal system “does not have to contain a full set of rules and that new rules may be added to it permanently (i.e. that it may be an ‘open’ system), a legal system should nevertheless endeavor to address all the legal issues which may arise.”²⁹ Applying this postulate to the Principles, they explicitly state that they do not govern issues of capacity and form. And further, their choice is subject to mandatory rules applicable in accordance with the relevant rules of private international law (Art. 1.4).

²³ Schwarz & Konrad, *supra* note 8, p. 604.

²⁴ G. Born, *International Commercial Arbitration*, Kluwer Law International, The Hague: 2014, p. 2760; P. Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts*, MANZ'sche, Wien: 2002, p. 109.

²⁵ van Houtte, *supra* note 13, p. 380.

²⁶ Or rules of law if the *lex arbitri* allows for that.

²⁷ S. Vogenauer, J. Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, Oxford: 2009, p. 84.

²⁸ Comment to the Preamble, 4(a).

²⁹ van Houtte, *supra* note 13, p. 380.

For this reason, it is often recommended to indicate in the choice of law provision that the chosen rules of law are to be supplemented by the relevant national law. For example, the official footnote to the UNIDROIT Principles suggests the following clause: “This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X].” Such a choice leaves open the possibility of a conflict between the chosen rules of law and the law of certain jurisdictions due to their overlapping application. It will be up to the tribunal to determine the hierarchy the parties had in mind. The parties may have chosen the UNIDROIT Principles “as *lex specialis*, or may have derogated from the [UNIDROIT Principles] in favor of domestic law in accordance with Art. 1.5. They may also have chosen to apply domestic law to issues not covered by the [UNIDROIT Principles], as recommended by the official Comment.”³⁰

Similarly to the UNIDROIT Principles, parties may choose as the *legem contractus* a uniform substantive law convention which is not applicable to the contract *per se*. None of these conventions have an unlimited scope of application and none solves all the problems that may arise in connection with a contract that is subject to it.³¹ The CISG, for instance, expressly excludes from its scope of application the issue of validity of contract; it is also not concerned with the effect the contract may have on the transfer of title (Art. 4) or with the issue of liability for personal injury (Art. 5). Furthermore, the CISG does not govern other matters: set-off, assignment of receivables, agency, or the limitation period.³² In all these circumstances, issues not dealt with by the Convention will be subject to the relevant national law as determined in accordance with the choice of law rules of the *legis arbitrii*.³³

Some arbitration rules explicitly foresee the possible need to apply national law apart from the “rules of law” agreed upon by the parties. The Arbitration Rules of the Chinese European Arbitration Centre (CEAC) in Hamburg offer a choice of law provision to the potential parties (Art. 35(1)(b)) which stipulates that:

This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law.

The problem of the non-exhaustiveness of a given set of “rules of law” provisions may also be solved by the parties themselves, who are free to amend, derogate or supplement the chosen rules. For instance, the parties may wish to apply the CISG as

³⁰ Vogenauer & Kleinheisterkamp, *supra* note 27, p. 86.

³¹ F. Ferrari, ‘Forum Shopping’ Despite International Uniform Contract Law Conventions, 51 International and Comparative Law Quarterly 689 (2002), p. 699.

³² *Ibidem* and the vast literature cited there.

³³ Judgment of Tribunale di Padova, dated 25 February 2004, *SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG*, available at: <http://cisgw3.law.pace.edu/cases/040225i3.html#cabc> (accessed 20 April 2016).

the *legem contractus* and stipulate that the convention should also govern the issue of validity. The parties would only have to come up with and provide for additional rules in this respect, as they are free to do so. The choice will be subject only to overriding mandatory provisions of the forum, which is the case with any *lex contractus* indication – whether national or non-national. There is no need, however, for the newly-created rules on validity to conform to the mandatory provisions of the “otherwise applicable law” to which the choice of law rules of the *legem arbitrii* refer. For the same reasons, the parties may derogate from mandatory provisions of the CISG itself; for example Art. 12 which stipulates that rules on formation do not apply where any party has its place of business in a contracting state which made a reservation pursuant to Art. 96. Such derogation is possible in the discussed scenario because the CISG is applied in this instance according to the will of the parties in the form of an otherwise-non-binding set of rules, and not as international or state law.

Another example of choosing non-state law as the *legem contractus* was referred to in the ICC Arbitral Award case no. 8331,³⁴ where the parties had decided that the dispute should be governed in accordance with the terms of their contract supplemented by the UNIDROIT Principles. Thus in this instance the terms of the contract and the UNIDROIT Principles constituted “rules of law” applicable to the relationship between the parties. The tribunal, therefore, adjudicated the case only on the basis of said rules and without reference to any other national law. Had the rules chosen by the parties been insufficient for the disposal of the case, only in such a circumstance would the tribunal apply the law (or rules of law) determined as applicable in accordance with the conflict of laws rules provided for in the *lege arbitrii*.

Interestingly enough, and similarly to investor-state arbitrations, there are instances where parties choose general principles of law (or similar ones) to govern their contracts. One such example is the construction agreement concluded in the course of construction of the Eurotunnel under the English Channel. The concessionaire, Eurotunnel S.A., incorporated in France, let a contract for the construction of the tunnel to a consortium of Anglo-French companies – TransManche Link (TML). Although the contract was concluded between two private entities, i.e. not between a state and an investor, it referred not to the national laws of either party but to the common principles of both systems of law, which was an illustration of a *tronc commune* doctrine. In fact, the choice of law clause provided that the contract would “in all respects be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals.”³⁵ The agreement provided as well for arbitration in Belgium. One of the disputes, however, reached the English courts because of the Eurotunnel’s

³⁴ ICC International Court of Arbitration, case No. 8331 of 1996, available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=647&step=FullText> (accessed 20 April 2016).

³⁵ Redfern et. al., *supra* note 5, p. 106.

application for an injunction against TML. Both the Court of Appeal³⁶ and the House of Lords³⁷ were skeptical as to the effectiveness of choosing common principles of both legal systems, but they also accepted that “this conspicuously neutral, ‘anational’ and extrajudicial structure may well have been the first choice for the special needs of the Channel Tunnel venture.”³⁸

The many disputes that have arisen under the contract have proven the difficulties in applying the chosen clause. As stated by one of the lawyers of TML:

[t]he main reason for the difficulty in applying a clause providing for the application of common principles between English and French law is that although both systems tend to produce the same or very similar results, they fall short of providing the set of common principles which is necessary to cover all contractual disputes.³⁹

In effect, in every dispute teams of French and English lawyers were needed to determine how particular question would be answered under either law and whether common principles exist in this respect. It was, therefore, suggested that in ordinary commercial contracts parties should try to agree on a given national law rather than make a hybrid out of two.⁴⁰ In the case of the Eurotunnel, however, the choice made could be justified due to the scale of the project.

2.3. Non-state law incorporated into the contract

Applying non-state law as the *legem contractus* is not the only choice available to the parties. There is another possibility of making use of “rules of law”, i.e. incorporating them into the contract by reference. The effect of such a choice is entirely different from that explained above: the rules are binding on the parties only to the extent that they do not conflict with the mandatory rules of the national law applicable to the contract and from which the parties may not derogate.⁴¹ Consequently, they do not form the *legis contractus* but simply become part of the contract itself, and their relevance remains on the same level as that of other contractual terms. Furthermore, the rules will have to be interpreted in accordance with the relevant national law applicable to the dispute, thus losing much of their universal appeal.⁴² It is, therefore, doubtful whether the obligation of their uniform application provided for in many uniform contract law conventions will be preserved and the goal of their drafters achieved if the parties agree on such an application thereof.

³⁶ Judgment of Court of Appeal of England and Wales dated 17 February, 1992, *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1992], Q.B. 656.

³⁷ Judgment of the House of Lords dated 21 January 1993, *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993], A.C. 334.

³⁸ *Ibidem.* at 368.

³⁹ P. Duval, *English and French Law: The Search for Common Principles*, 25 International Business Lawyer 181 (1997), p. 182.

⁴⁰ Redfern et. al., *supra* note 5, p. 107.

⁴¹ See e.g. van Houtte, *supra* note 13, p. 8.

⁴² *Ibidem.*

The distinction between incorporating “rules of law” by reference and choosing them as the *legem contractus* has also been made on the international level. Article 3(2) of the Rome I Regulation allows the parties to subject their contract only to “law”, which has to be understood as “national law”. At the same time, Recital 13 of the Preamble to the Regulation states that “[t]his Regulation does not preclude parties from incorporating by reference into their contract a non-state body of law or an international convention.” It is therefore agreed that under the Rome I Regulation the choice of non-state law does not have a conflict-of-laws effect (*kollisionsrechtliche Rechtswahl*).⁴³ Further analysis of this issue is made in part 3 below.

3. AUTHORITY OF A TRIBUNAL TO DETERMINE THE APPLICABLE LAW ABSENT THE PARTIES’ CHOICE

In its previous part this paper addressed the parties’ right to subject their dispute to a set of ‘anational’ provisions – “rules of law”. Most national arbitration laws allow for such choice, which is in accord with the UNCITRAL Model Law. The situation changes, however, in those instances where the parties have failed to include in their contract (or conclude at the arbitration stage) a choice of law agreement. In the absence of a valid choice by the parties, various arbitration laws provide for various approaches to determining the governing law applicable to the dispute.

Firstly, the indirect approach requires application of a conflict of laws analysis. Under some legislations, arbitrators are required to follow a specific conflict of laws rule, which makes the process similar to the court-model of choice-of-law analysis. The German Code of Civil Procedure, for instance, stipulates that in the absence of the parties’ choice the tribunal shall apply the law of the state with which the object of the proceedings is the most closely connected.⁴⁴ Similarly, albeit with different consequences, Art. 187(1) of the Swiss Private International Law Act (PILA) also adopts the closest connection rule and provides that arbitrators should decide the dispute according to the rules of law with which the dispute has the closest connection. A different version of the “*voie indirecte*” approach is contained in the UNCITRAL Model Law and the English Arbitration Act of 1996, which provide for the application of the conflict of law rules which the tribunal considers applicable or most appropriate.

Under such arbitration laws, where arbitrators must first resort to conflict of laws analysis, there are several methods of determining which law or rules of law are “appropriate”, “most closely connected”, etc. As described below, arbitrators may wish to apply either: the choice of law rules of the forum; rules of the court which would have had

⁴³ P. Mankowski, *Die Rom I-Verordnung*, 1 Zeitschrift für Europarecht 2 (2009), p. 3.

⁴⁴ Art. 1051(2) of the German Code of Civil Procedure (“Haben die Parteien die anzuwendenden Rechtsvorschriften nicht bestimmt, so hat das Schiedsgericht das Recht des Staates anzuwenden, mit dem der Gegenstand des Verfahrens die engsten Verbindungen aufweist”).

jurisdiction absent the arbitration clause; conflict of laws rules contained in uniform substantive law conventions; or even apply several different rules cumulatively.

The second approach in determining the applicable law in the absence of the parties' choice eliminates the necessity of using a conflict of laws analysis and allows arbitrators to directly apply the substantive law. For example, Art. 34(2) of the Spanish Arbitration Act calls for application of the law which the tribunal deems appropriate. Similarly, Art. 17 of the ICC Arbitration Rules stipulates that the tribunal ought to apply the "rules of law which it determines to be appropriate." It is suggested that this approach has an advantage over the indirect approach as it avoids "the complicated mechanisms of private international law."⁴⁵

It is worth noting that Art. 1197 § 2 of the Polish Code of Civil Procedure, which is based on the UNCITRAL Model Law, is less specific about which approach it calls for and directs the tribunal "to solve the dispute in accordance with the law applicable to the relationship." Some authors argue that such an expression amounts to the indirect approach in determining the applicable law⁴⁶ while others suggest the opposite.⁴⁷ A similar divergence is also reflected in the arbitration rules of the leading Polish arbitration institutions. According to § 6(1) of the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce (as of 1 January 2015), absent a parties' choice the tribunal should apply the law most closely connected with the legal relationship being considered. By contrast, according to § 38(2) of the Arbitration Rules of the Court of Arbitration at PKPP "Lewiatan" (as of 1 March 2012), the tribunal "shall apply the substantive law which it determines to be appropriate."

In my opinion, the Polish Code of Civil Procedure follows the direct approach, as the laconic wording of the relevant provision thereof should be interpreted as giving the arbitrators full autonomy in determining the applicable law. Such autonomy is to some extent broader when the two-step analysis required under the indirect approach may be omitted in the process. However it should be noted that the scholars are in agreement that Polish system allows only for application of the "law" and not "rules of law".⁴⁸

3.1. Authority of a tribunal to apply non-state law absent the parties' choice

Although a majority of arbitration laws leave the issue of applicable law to be determined by the arbitrators, this is not the case with respect to the right to apply a non-

⁴⁵ Ferrari & Silberman, *supra* note 20, p. 22, citing A. Lopez-Rodriguez, *New Arbitration Acts in Denmark and Spain. The Application of Transnational Rules to the Merits of the Dispute*, 23 *Journal of International Arbitration* 125 (2006), p. 128.

⁴⁶ See, e.g. T. Ereciński, *Kodeks postępowania cywilnego. Komentarz. Tom V. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)* [Code of civil procedure. Commentary. Part V. International civil procedure. Arbitral tribunal] (4th ed.), LexisNexis, Warszawa: 2012, art. 1194.

⁴⁷ See, e.g. M. Pilich, *Prawo właściwe dla meritum sporu zawisłego przed sądem arbitrażowym w braku wyboru prawa* [Law applicable to the merits of a dispute before an arbitral tribunal in case of a lack of choice of law], in: J. Gudowski, K. Weitz (eds.), *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego*, LexisNexis, Warszawa: 2011, p. 1795.

⁴⁸ Ereciński, *supra* note 46; Pilich, *supra* note 47, p. 1794.

state body of law. The previously referred-to Art. 187(1) of the Swiss PILA gives the tribunal the authority to apply the “rules of law” that are most closely connected to the subject of the dispute. It is accepted that this allows for resorting to non-state law even in the absence of a choice of law agreement, even though different language versions of the statute may raise some doubts.⁴⁹ Similarly Art. 1511 of the French *Code de procédure civile* gives the tribunal authority to apply the “rules of law” (*règles de droit*) which it determines appropriate. On the other hand, there are arbitration laws which allow only for the application of the “law” rather than “rules of law”. Art. 603(2) of the Austrian Code of Civil Procedure, for instance, stipulates that in the event the parties did not choose the applicable law or rules of law, the tribunal may apply the “law” which it considers appropriate. A similar approach may be found in the English Arbitration Act. The German Code of Civil Procedure gives even less flexibility to an arbitral tribunal by allowing not only for application of the “law” absent a choice by the parties, but also providing that the closest connection rule is to be applied as well.

3.2. Non-state law applied in the indirect approach

As follows from the general remarks above, one method of determining the law applicable to the dispute by the arbitral tribunal is to conduct a conflict of laws analysis. Under different arbitration laws, a tribunal may be obliged to apply a specific conflict of laws rule, or be free to decide in this matter. An example of the former may be found in the Swiss PILA calling for application of the “closest connection” rule. It was suggested that this rule has some advantage over the broader alternative approach due to the fact that it provides for more certainty.⁵⁰ The effectiveness of the closest connection rule is also evidenced by the fact that it is part of the Rome Convention⁵¹ and some systems of the United States of America. On the other hand, it is also submitted that closest connection rule is not exhaustive and has some limitations owing to the frequent need to determine the mandatory rules of a specific forum that might have to be applied.⁵² This remark, however, could be addressed to every conflict of laws rule as the international mandatory rules of the forum where the award would be enforced or mandatory rules of the seat must be taken into account in all arbitral proceedings.

A second, more flexible, form of the indirect approach can be found in the arbitration laws following the UNCITRAL Model Law or in the English Arbitration Act. In such circumstances, the tribunal should first make a choice which conflict of laws rules it will apply in order to find the appropriate substantive law of the dispute (e.g. whether to apply the “closest connection” rule or maybe the *lex loci contractus*). It is, therefore,

⁴⁹ E. Geisinger, N. Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners, Volume Second*, Kluwer Law International, The Hague: 2013, p. 153 and fn 22; Born, *supra* note 24, p. 2662.

⁵⁰ Ferrari & Silberman, *supra* note 20, p. 279.

⁵¹ Convention on the law applicable to contractual obligations (adopted 19 June 1980, entered into force 1 April 1991) 1605 UNTS 59.

⁵² *Ibidem*.

necessary to apply a two-step analysis, thus creating what has been called a ‘second degree conflict’.⁵³ The tribunal has to first determine which rule is appropriate and then apply it and, accordingly, determine the law applicable to the dispute.

Deciding which conflict of laws rule is “appropriate” is left for the tribunal’s own understanding and determination, with regard for the specifics of the case. In such an instance, the tribunal is not bound to apply any statutory choice of law provisions. First of all, a tribunal “is not part of any national court system, and thus has jurisdiction only over the dispute which, by the will of the parties, it is appointed to adjudicate, and therefore has no state-imposed conflict of laws rules.”⁵⁴ It is, therefore, not bound by the conflict of laws rules of the forum. In practice, however, the tribunal will not completely avoid any choice of law analysis. Rather, it will “select some system of choice-of-law rules and not merely ‘directly’, without application of choice-of-law rules, analysis, or explanation, apply some substantive law.”⁵⁵ Arbitrators wish to render an award which is reasoned and understandable.

Any errors in applying this approach, or a failure to apply it and proceeding directly to the substantive law would be subject to the same level of scrutiny (if any) during the judicial review in annulment proceedings as errors of a purely contractual or statutory interpretation.⁵⁶ In the case of arbitral proceedings seated in the U.S., this means that an award could be potentially set aside according to the “manifest disregard of law” principle. Although divergent approaches exist among U.S. courts with respect to whether the FAA allows for invoking this ground to annul a non-domestic award,⁵⁷ it is at least possible that a “manifest disregard of law” could be found in instances where tribunals err in the process of determining the applicable law.⁵⁸ In different jurisdictions, however, it is very doubtful whether errors in applying conflict of laws rules could lead to annulment or non-enforcement of an award. Another problem related to the choice of the appropriate conflict of laws rules is whether arbitrators should apply an exhaustive system of conflict of laws rules or may rely on single, separate rules whenever there is a need to apply one. Under the first approach, arbitrators should only look into national systems, as they provide for a complete and exhaustive set of choice-of-law rules. In such circumstances, there would be no instance where arbitrators would have to look outside the system in order to find a solution to a problem not addressed by a particular conflict rule. In relation to the issue of a *depeçage*, the dispute would still be governed (indirectly) by the same system of conflict of law rules, e.g. Polish Private International

⁵³ The expression used is “conflit au deuxième degré”, see e.g. C. Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16(4) *International Lawyer* 613 (1982), p. 629.

⁵⁴ J. Delvolvé, J. Rouche, G. Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, Kluwer Law International, The Hague: 2009, p. 142.

⁵⁵ Born, *supra* note 24, p. 2633.

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem*, p. 2968.

⁵⁸ Since the FAA does not contain provisions regulating the choice of law process, it would be left to the applicable institutional rules or arbitrators’ discretion.

Law or Swiss PILA. All this seems to favor the application of one of the national systems of rules, with the freedom however to choose between them. Some scholars even suggest that the choice of a “system” is mandatory. Yves Derain suggests that the plurality of “conflict of law rules” in the Model Law points to a set of rules and, hence, a system. The system in this case could be either domestic or international.⁵⁹ On the other hand, Mark Blessing submits that the application of a conflict of laws system is not required and that a single rule is sufficient.⁶⁰ Furthermore, it should be noted that an unduly technical reading of the Model Law provisions would be inappropriate.⁶¹

Since arbitral tribunals may not abandon the conflict of laws analysis altogether, they must apply some rule which would successfully lead to a finding of the appropriate substantive law. In this respect, the tribunals have been following different approaches to determining the appropriate conflict of laws rules, which range from methods similar to those adopted by courts to solutions emphasizing the denationalized nature of international commercial arbitration.⁶² The various methods adopted by arbitral tribunals depend as well on their approach towards definition of the term “conflict of law rules”. Some tribunals have applied a system of conflict of laws rules, whether of the arbitral seat or of another jurisdiction, while others have relied on single rules appropriate in a given circumstance.

If the tribunal is to apply a conflict of laws system, it may choose to rely on the rules of the place of arbitration. Accordingly, the tribunal acts in an analogous way as a court sitting in the same jurisdiction. This also implies a juridical conception of international arbitration where, in the legal sense, there is no truly denationalized dispute resolution system and every arbitration is subject to the national laws of a specific system.⁶³ This theory also assumes that the arbitrator is acting almost like a judge, i.e. within a certain state and under the legal auspices of that state. Since an arbitrator’s power to decide which law applies derives from the arbitral procedural law, and ultimately from the *legis arbitrii*, the local conflict of laws rules must be applied. This argument necessarily implies that international arbitration has a *legem fori* at the place of arbitration.⁶⁴ Another argument is that by applying state conflict of laws rules, the tribunal creates a correspondence of these rules with the procedural law of arbitration.⁶⁵ Traditionally this has been one of the most common approaches in determining the law applicable to the dispute.⁶⁶ For

⁵⁹ Y. Derains, *Possible Conflict of Laws Rules and the Rules Applicable to the Substance of the Dispute*, in: P. Sanders (ed.), *ICCA Congress Series No. 2*, Kluwer Law International, The Hague: 1984, p. 190.

⁶⁰ M. Blessing, *Regulations in Arbitration Rules on Choice of Law*, in: A.J. van den Berg (ed.), *ICCA Congress Series No. 7*, Kluwer Law International, The Hague: 1996, p. 436.

⁶¹ S. Greenberg, *The Law Applicable to the Merits in International Arbitration*, 8 *Vindobona Journal of International Commercial Law & Arbitration* 315 (2004), p. 320.

⁶² Ferrari & Silberman, *supra* note 20, p. 25.

⁶³ F. Mann, *Lex Facit Arbitrum*, reprinted in 2 *Arbitration International* 241 (1986), pp. 243-244, 247.

⁶⁴ Greenberg, *supra* note 61, p. 319.

⁶⁵ B. Wortmann, *Choice of Law by Arbitrators: The Applicable Conflict of Laws System*, 14 *Arbitration International* 97 (1998), p. 106.

⁶⁶ *Ibidem*.

example it was followed in the UK before adoption of the 1996 English Arbitration Act, and was also recommended in 1957 by Institute of International Law.⁶⁷ It also received some support from scholars and it has been asserted that “it must be mentioned that this solution furthers one of the major advantages of arbitration because a strict application of this ‘seat theory’ entails the predictability and uniformity of disputes’ results.”⁶⁸

However, even in the times when this approach was prevailing, some aspects of denationalization could also be found. In the *BP v. Libya* award, although made in the realm of investment arbitration, it was held that “it is erroneous to assume, as has been done doctrinally, on the basis of the territorial sovereignty of the State where the physical seat of an international arbitral tribunal is located, that the *lex arbitri* necessarily governs the applicable conflicts of law rules.”⁶⁹ Today the strict view supporting the “seat theory” is much less supported.⁷⁰ Although international commercial arbitration is not completely detached from the national law of the seat, the idea of delocalization has attracted the attention of most modern commentators and tribunals.⁷¹ Furthermore, certainty is achieved only in cases where the seat of arbitration has been agreed by the parties. Absent such a choice, its identification is left for the arbitrators to decide, or even for an arbitral institution such as the ICC. The choice of the seat is then fortuitous⁷² and may lead to an application of conflict of laws rules which have no connection with the dispute and thus could lead to an application of substantive law unintended by either party.⁷³ It has also been asserted that conflict of laws rules are adopted in each state’s jurisdiction to regulate that state’s scope of legislative competence. That purpose is not advanced by requiring a non-state organ – an international arbitrator – to apply these same rules.⁷⁴ As a consequence, in today’s practice the application of the conflict of laws rules of the forum’s courts is generally abandoned.

Alternatively to the law of the forum, arbitrators may apply the conflict of laws system of the state where courts would have had jurisdiction absent an arbitration agreement.⁷⁵ The theoretical basis for this approach is a suggestion that such “country has been in reality dispossessed of its jurisdictional authority by the arbitration clause and therefore it may reaffirm its control over arbitration in this way.”⁷⁶ This theory, despite its appeal, has been widely criticized. Created over hundred years ago, it does

⁶⁷ G. Sauser-Hall, *Annuaire de l’Institut de droit international*, L’institut de droit international, Paris: 1957, p. 394.

⁶⁸ Wortmann, *supra* note 65, p. 105.

⁶⁹ Ad hoc tribunal award, *British Petroleum v. Libya (Merits)*, dated 10 October 1973 and 1 August 1974, reprinted in 53 *International Law Reports* 297 (1979), p. 30.

⁷⁰ Ferrari & Silberman, *supra* note 20, p. 282.

⁷¹ See e.g. *Ibidem*.

⁷² Croff, *supra* note 53, p. 624.

⁷³ Wortmann, *supra* note 69, p. 106.

⁷⁴ V. Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 *Hastings International & Comparative Law Review* 235 (1986), p. 237.

⁷⁵ Croff, *supra* note 53, p. 624.

⁷⁶ *Ibidem*.

not recognize the denationalized character of the modern model of international commercial arbitration, which is different from state court proceedings.⁷⁷ Furthermore, this method does not remedy the problem of different courts' conflicting jurisdictions. Absent international jurisdictional rules (e.g. like those found in the Brussels I Regulation), national legislations of two or more states could grant their courts jurisdiction over the same matter. Consequently, if several courts would be empowered to adjudicate over a particular case in accordance with their own rules on jurisdiction, there would be several conflicting rules on the choice of law.

Arbitrators might also choose to apply the conflict of laws system of the country most closely connected with the dispute. This method was applied in the ICC award no. 8113, where the tribunal decided to apply Syrian conflict of laws rules because of the following connecting factors: "The claimant is a Syrian citizen whose place of business is Syria, and the services corresponding to his 'monetary dues' are supposed to have been performed in Syria, with a view to obtain a Syrian contract with a Syrian authority."⁷⁸ This approach, however, requires an analysis which is close to a form of *renvoi*, which "aggravates the uncertainties of conflict of law analysis by effectively requiring two such analyses, while producing no discernible benefits."⁷⁹ It generates an increased risk of leading to application of a substantive law unintended by either party – similarly to the previous examples. This is due to the fact that arbitrators are required first to identify state the most closely connected to the dispute; later to interpret the meaning of that state's rules on choice of law; and finally apply these rules, which may involve further complex analysis.

As a further alternative, a tribunal may wish to adopt a cumulative application of the conflict of laws rules connected to the dispute.⁸⁰ This method, however, is useful only in the limited number of cases where the conflict of laws rules of different states rely on the same set of connecting factors in the given circumstances.⁸¹ If, during an examination, these different rules call for the application of the law of a single state, that law should be applied to the substance of the dispute. Again however, this approach is not entirely objective, as it requires to firstly determine which states are sufficiently connected to the dispute in order to consider the application of their rules on the choice of law. Furthermore, an arbitrator applying that state's conflict of laws rules would be acting as a judge of these states. It requires an in-depth analysis of phrases such as "most closely connected", "center of gravity" and alike, leading in fact to a multi-step *renvoi*.⁸²

⁷⁷ See e.g. Ferrari & Silberman, *supra* note 20, p. 281.

⁷⁸ Award of International Court of Arbitration, case No. 8113 of 1995, XXV Yearbook Commercial Arbitration 324 (2000), 324, p. 325.

⁷⁹ Born, *supra* note 25, p. 2653.

⁸⁰ See e.g. award of International Court of Arbitration, case No. 7319 of 1992, XXIV Yearbook Commercial Arbitration 141 (1999), p. 142.

⁸¹ Greenberg, *supra* note 61, p. 322.

⁸² *Ibidem*.

So far, all the possible approaches presented for determining, through the indirect approach, the applicable substantive law absent a parties' choice do not allow for application of non-state law, such as the UNIDROIT Principles or general principles of law. Firstly, arbitrators are applying state conflict of laws rules which, by definition, form part of a domestic legal system. Secondly, these sets of rules allow only for the application of state law, as state courts are bound to apply only binding law adopted by authorized state organs. Hence, an arbitral tribunal acting in accordance with the conflict of laws rules applied by courts would also have to apply only state law. Finally, arbitration laws following the UNCITRAL Model Law permit the tribunals to find the appropriate conflict of laws rules only in order to find the "law" applicable to the dispute. Therefore, non-state law would rarely be applied in the indirect approach (as might be possible, for example, in the case of the Swiss PILA, which allows for application of rules of law in accordance with the closest connection rule).

There are, however, other instances where arbitrators could apply non-state law using the indirect approach. These include application of non-state conflict of laws rules, such as general principles of private international law or provisions of international conventions (e.g. the 1980 Rome Convention) in circumstances where the tribunal is not bound to apply them *per se*. Of course, in such scenario non-state law would only be applied in the first step of the analysis, i.e. only as "conflict of laws rules which the tribunal deems appropriate". and not as the substantive law applicable to the dispute. Nevertheless, this scenario is worth examining as state courts are not allowed to apply non-state law even at this level of adjudication.

When applying an international convention on conflicts of laws, such as the 1980 Rome Convention, the tribunal might accept the "inherent quality of the solutions and [its] particular usefulness in the field of international arbitration [...] due to the mixture which the Convention makes of connecting factors of Anglo-American origin, such as the closest connection or the most significant relationship, and connecting factors of Continental-European inspiration, such as the characteristic performance."⁸³ If the tribunal applies the Convention not as a *legem fori* but simply as an "appropriate" set of conflict of laws rules, it underscores the denationalized nature of international commercial arbitration.⁸⁴ The approach itself is based on an assumption that the more neutral (in this case – separated from national/state conflict of laws rules) is the choice of law, "the greater the chances that the substantive solution attained will be free from the parochial influences of any particular national legal system."⁸⁵ If the tribunal applies a convention which is not binding in the

⁸³ A. Giardina, *International Conventions on Conflict of Laws and Substantive Law*, in: A.J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ICCA Congress Series No. 7, Kluwer Law International, The Hague: 1996, p. 4.

⁸⁴ Ferrari & Silberman, *supra* note 20, p. 290.

⁸⁵ H. Grigera Naon, *Choice-of-Law Problems in International Commercial Arbitration*, 289 *Recueil des Cours* 9 (2001), p. 174.

proceedings⁸⁶ it is, in fact, applying a non-state body of law. It is true that the choice of law provisions of such convention would direct the application of national substantive legislation, but nonetheless at this particular stage of the proceedings only non-state law is being applied.

Apart from conventions dedicated to pure choice of law issues, an arbitral tribunal may decide to apply conflict of laws rules contained in uniform substantive law treaties. The leading example is the CISG, which includes two provisions setting out the requirements for its application. According to the Art. 1(1)(a), the Convention applies to contracts of sale of goods between parties whose places of business are in different contracting states. Hence, arbitrators may apply the CISG in the indirect approach if they rely on the conflict of laws rules contained in the Art. 1(1)(a) when its requirements are met.⁸⁷ One example of such an application is the decision rendered in ICC arbitration no. 8962,⁸⁸ where the parties failed to choose the law applicable to their contract. The tribunal relied on the ICC Rules of Conciliation and Arbitration, according to which it should apply the conflicts rules it determines appropriate. In this case, Art. 1(1)(a) CISG was found by the tribunal to be such a rule. Consequently, since both parties had their places of businesses in contracting states, the tribunal later applied the rest of the provisions of the CISG to the substance of the dispute.

Application of the CISG by virtue of the Art. 1(1)(b) is however, in my opinion, more problematic. First of all, it leads to application of the Convention when the rules of private international law lead to the application of the law of a contracting state. In this scenario, arbitrators should first find the relevant “rules of private international law” and only afterwards consider the applicability of the CISG. Therefore, Art. 1(1)(b) is not *per se* a conflict of laws rule which the tribunal may consider “appropriate” and make use of it in the first stage of the proceedings, i.e. in determining the law applicable to the dispute.

Another possibility to apply non-state law at the stage of searching for appropriate conflict of laws rules is the application of “general principles of conflict of laws”.⁸⁹ In the

⁸⁶ An obvious example would be application of the Rome Convention by a tribunal seated outside the EU (whether the Rome Convention or the Rome I Regulation are binding upon tribunals seated inside the EU is left for discussion later in this article).

⁸⁷ Although it may seem doubtful whether Art. 1(1)(a) CISG is a conflict of laws provision, it should be noted that its structure is similar to a typical conflict norm. It contains a hypothesis, *i.e.*, sale of goods between parties whose places of business are in different contracting states; and a disposition, *i.e.* application of a substantive law contained in the CISG. Regardless, in the international arbitration practice Art. 1(1)(a) CISG has been treated on several occasions as a conflict of laws provision. *See e.g.* N. Schmidt-Ahrends, *CISG and Arbitration*, LIX(3) *Belgrade Law Review* 211 (2011), p. 215; K. Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 *Pace International Law Review* 237 (1996), p. 244.

⁸⁸ Award of International Court of Arbitration, case No. 8962 of 1997, available at <http://cisgw3.law.pace.edu/cases/978962i1.html>; *see also* award of Court of Arbitration Attached to the Hungarian Chamber of Commerce & Industry, case No. VB 99144 of 2000, available at <http://cisgw3.law.pace.edu/cases/000000h1.html> (both accessed 20 April 2016).

⁸⁹ Ferrari & Silberman, *supra* note 20, p. 34.

course of such an analysis, the tribunal would look for some widely accepted principles in the main systems of private international law, as in the ICC case no. 4237, where the tribunal applied “those conflict rules which are generally followed in international arbitrations of the kind under consideration.”⁹⁰ One general rule found by a tribunal was the “closest connection with the country in which the characteristic performance of the contract is to take place.”⁹¹ Another tribunal reached a conclusion that the law of the seller in sales contracts could also be treated as a general rule.⁹² It should be noted, however, that it may be difficult for arbitrators to identify a “general rule” applicable to the merits of every arbitral proceeding. This is due to the fact that different legal systems have adopted different solutions, which may contradict each other in particular instances.

As has been shown, in the indirect approach the arbitrators may apply either state conflict of laws rules, thus acting as state courts, or reach out to non-national rules, such as general principles of private international law or conventions containing conflict of laws provisions. In the latter case, however, non-state law is being applied only at the stage of determining the appropriate conflict of laws rules, as the vast majority of arbitration laws allow only for application of “law” in the indirect approach.

3.3. Non-state law applied in the direct approach

Another method of determining the law applicable to the dispute is the direct application of the law or rules of law which the tribunal determines appropriate. Arbitration laws and rules which provide for the direct approach have, consequently, avoided the complicated mechanism of private international law.⁹³ Among the existing *arbitration laws* which have adopted the direct approach, some allow for the application of non-state law, i.e. Art. 21 of the current ICC Arbitration Rules directs the tribunal to apply “the rules of law which it determines to be appropriate.” A similar solution is found in the French Code of Civil Procedure. In accordance with these rules, arbitrators may apply a non-national set of provisions to the substance of the dispute even without the explicit choice of the parties.

The question arises whether the tribunal must justify its choice of law or the rules of law which it determines appropriate, as many arbitration rules contain a provision requiring the tribunal to state the reasons upon which the award was rendered.⁹⁴ It has been suggested⁹⁵ that in light of such an obligation a tribunal cannot directly apply

⁹⁰ Award of International Court of Arbitration, case No. 4237 of 1985, 52 Yearbook Commercial Arbitration, 4 (1985), p. 5.

⁹¹ Award of International Court of Arbitration, case No. 8672 of 200112(1), ICC Ct. Bull. 117 (2001), p. 118.

⁹² Award of International Court of Arbitration, case No. 3894 of 1981, in: *Collection of ICC Arbitral Awards 1974-1985*, Kluwer Law International, The Hague: 1994, p. 450.

⁹³ A.M. Lopez-Rodriguez, *New Arbitration Acts in Denmark and Spain: The Application of Transnational Rules to the Merits of the Dispute*, 23 Journal of International Arbitration 125 (2006), p. 128.

⁹⁴ See e.g. Art. 31 of the ICC Arbitration and Mediation Rules (2012).

⁹⁵ Ferrari & Silberman, *supra* note 20, p. 296; Derains & Schwartz, *supra* note 1, p. 242.

a certain law without providing any explanation for this decision. Although it is correct to extend the obligation to state reasons for an award to the issue of determining the applicable law, a failure to do so should not, in my opinion, lead to annulment or non-enforcement of the award. This is because the departure from the agreed rules of procedure is neither material nor prejudicial to either party.⁹⁶

In accordance with the direct approach the tribunal may decide, for instance, to apply the UNIDROIT Principles as the *legem contractus* directly, without recourse to a conflict of laws analysis.⁹⁷ In ICC case no. 8547,⁹⁸ decided in Paris, the tribunal considered a dispute concerning an international sale of goods transaction. The parties chose the 1964 Hague Convention as the law governing their contract but did not stipulate what law should govern matters falling outside its scope. Relying on the Art. 17(1) of the ICC Arbitration Rules (1998), the tribunal applied the UNIDROIT Principles to the substance of the dispute as a supplementary law to the 1964 Hague Convention. In this case, however, the tribunal did not explain why it considered the UNIDROIT Principles to be appropriate, stating only that they “provide a useful complement to fill the lacuna and allow to find proper solutions.”

Another example of the application of the UNIDROIT Principles is the award rendered in the dispute between the member firms of the Andersen Worldwide Société Coopérative.⁹⁹ The firm’s practice was divided into two business units: “Arthur Andersen” for audit, tax and other financial advisory services, and “Andersen Consulting” for strategic services and other consulting. Claims were submitted by member firms of “Andersen Consulting” against the member firms of “Arthur Andersen”, alleging breach of agreements concluded between all the companies of the holding. On the issue of applicable law the tribunal held that the agreements themselves, concluded between the member firms, together with the bylaws of the holding company are to be considered as the relevant rules of law chosen by the parties to govern their arbitration. Further, the tribunal held that in case the agreements and bylaws are insufficient for the decision, it shall, pursuant to Art. 17(1) of the ICC Rules (1998), apply the rules of law it deems appropriate. These rules of law were declared to be

the general principles of law and the general principles of equity commonly accepted by the legal systems of most countries. The UNIDROIT Principles of International Commercial Contracts are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those “principes directeurs”

⁹⁶ See e.g. Born, *supra* note 24, p. 3267, stating that “[d]epartures from the parties’ agreed arbitral procedures will also often be countenanced unless they are both extreme and prejudicial.”

⁹⁷ R. Sen, *I’m an Arbitration Lawyer... Get Me out of Here! A Practitioner’s Guide to the Complexities of International Commercial Arbitration Under the Indian Arbitration and Conciliation Act 1996*, 13 *Vindobona Journal of International Commercial Law & Arbitration* 331 (2009), p. 343.

⁹⁸ Award of International Court of Arbitration, case No. 8547 of 1999, XXVIII Yearbook Commercial Arbitration 27 (2003), p. 30.

⁹⁹ Award of International Court of Arbitration, case No. 9797 of 2000, Mealey’s International Arbitration Report, vol. 15, pp. 515-633.

that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice.¹⁰⁰

Hence, similarly to ICC case no. 8547, the tribunal used the UNIDROIT Principles as supplementary law governing the dispute, this time however while substantiating its choice.

Other examples of the direct approach include the application of *legem mercatoria* to the substance of the dispute. In ICC proceedings seated in Austria, the tribunal was hearing claims related to the termination of an agency agreement which contained no choice of law provision. Although Austrian arbitration law provided for application of “law” in such circumstances, the tribunal applied international *legem mercatoria*.¹⁰¹ The tribunal later derived from it the principle of good faith “which must preside in the formation and the performance of contracts. The emphasis placed on contractual good faith is moreover one of the dominant tendencies revealed by ‘the convergence of national laws on the matter.’”¹⁰² On that basis, the tribunal concluded that the respondent was at blame for termination of the agreement. In another case involving an agency agreement the tribunal also applied *legem mercatoria*, referring to it as “body of rules of international commerce which have been developed by practice and affirmed by the national courts.”¹⁰³ Presumably based on such body of rules, the tribunal ruled that the interest rate proposed by claimant was unjustified and applied a lower rate, set independently.

Another ICC tribunal applied *legem mercatoria* to a dispute relating to the cost of transportation of rolling mills. The party which was in charge of shipment requested a higher price due to the fact that the goods weighed more than was initially expected, which made the transportation more costly. When analyzing whether the increase of payment was justified, the tribunal resorted to three principles of *legem mercatoria*: first, that when parties to an international transaction wish their contractual obligations (performance) to remain balanced, they usually agree on a provision allowing for certain modifications due to external circumstances, which reflects the principle of *rebus sic stantibus*; second, that contracts should be interpreted *bona fidae*; and third, that parties are obliged to exercise normal, effective and reasonable diligence in safeguarding their interests.¹⁰⁴

Lex mercatoria has also been applied by arbitral tribunals in the form of international substantive law conventions, like the CISG or the Hague Convention. In ICC proceedings no. 5713, the tribunal decided to take into account the “relevant trade usages” as

¹⁰⁰ *Ibidem*, pp. 519-520.

¹⁰¹ Further analysis of this issue is conducted in a later part of this article.

¹⁰² Award of International Court of Arbitration, case No. 3131 of 1979, IX Yearbook Commercial Arbitration 108 (1984), p. 109.

¹⁰³ Award of Arbitration and Mediation Centre of Paris, case No. 9246 of 1996, XXII Yearbook Commercial Arbitration 28 (1997), p. 30.

¹⁰⁴ Award of International Court of Arbitration, case No. 2291 of 1975, in: *Collection of ICC Arbitral Awards 1974-1985*, Kluwer Law International, The Hague: 1994, pp., 274-277.

appropriate rules of law and concluded that “there is no better source to determine the prevailing trade usages than the terms of the [CISG].”¹⁰⁵ The tribunal applied the convention regardless of the fact that neither party to the proceedings had its place of business in a contracting state. Had that been the case “the Convention might be applicable to this case as a matter of law and not only as reflecting the trade usages.”¹⁰⁶ In another ICC proceeding the tribunal stated that “general principles of international commercial practice, including the principle of good faith, should govern the dispute. The Tribunal believes that for the present dispute, such principles and accepted usages are most aptly contained in the United Nations Convention on Contracts for the International Sale of Goods.”¹⁰⁷ Similarly, albeit in an investor-state dispute, the Iran-United States Claims Tribunal applied the CISG as “reflecting international law of commercial contracts.”¹⁰⁸ In another case, a tribunal applied the 1964 Hague Convention as reflecting the international trade usages; specifically, it differentiates between the time of passing of risk and moment of passing of title.¹⁰⁹

As has been shown, non-state law is being applied in international commercial arbitration at various stages of the proceedings. The frequency of this application depends not only on the particular substantive characteristics of a particular case but also, more importantly, on the approach adopted in the applicable arbitration laws. Not all of them allow the parties to agree on a non-state law in their contract. Similarly, in case of states’ arbitration laws which have incorporated the *voie indirect* approach, the vast majority lead to the application of “law”, and not “rules of law”. If, however, the arbitral seat is located in Switzerland, which adopted the more flexible version of the *voie indirect*, or in France which provides broad discretion in applying the direct approach, tribunals may more easily resort to non-state law. In short, everything depends on the provisions of the arbitration law of the seat dealing with the conflict of laws issues. Therefore, even the principle of denationalization of international arbitration, mostly recognized today, still gives some place for the law of the seat.

4. APPLICATION OF NON-STATE LAW IN LIGHT OF THE ROME I REGULATION

If the parties’ ability to choose non-state law as governing their contract, and arbitrators’ authority to apply it absent a choice, depend on the provisions of the *legem arbitrii*,

¹⁰⁵ Award of International Court of Arbitration, case No. 5713 of 1989, XV Yearbook Commercial Arbitration 70 (1990), p. 71.

¹⁰⁶ *Ibidem*.

¹⁰⁷ Award of International Court of Arbitration, case No. 7331 of 1994, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=140&step=FullText> (accessed 20 April 2016).

¹⁰⁸ Award of Iran-U.S. Claims Tribunal, case No. 370 of 1989, Yearbook Commercial Arbitration 220 (1990), 6.

¹⁰⁹ Award of International Court of Arbitration, case No. 2879 of 1978, in: *Collection of ICC Arbitral Awards 1974-1985*, Kluwer Law International, The Hague: 1994, p. 348.

the situation is quite complicated in proceedings seated in an EU Member State. As already indicated the Rome I Regulation, which deals with the law applicable to contractual obligations, does not allow for the application of non-state law to a contract. There is, therefore, a clear inconsistency between the Regulation and certain national arbitration laws. Taking into account the superiority of the European law over national legislation one may ask the following two-pronged question: Is the Rome I Regulation applicable in arbitration proceedings; and if so, what are the consequences of disobeying its provisions?

The issue of the applicability of the Rome I Regulation has not, until recently,¹¹⁰ been thoroughly analyzed. Some authors generally assume the potential applicability of the Regulation in arbitration proceedings, but they do not provide a comprehensive analysis in this respect.¹¹¹ Others suggest that it should be applied in the same manner as the national choice of law rules are being applied.¹¹² Arbitral practice, as well, considers the regulation as being only potentially applicable, and reflecting general principles of private international law.¹¹³ In my opinion, however, tribunals seated in an EU Member State should follow the provisions of the Rome I Regulation because of its binding effect, and not only because of its attractiveness. At the same time I take the view that breach of the provisions of the Regulation by a tribunal, or not applying it at all, does not effect on the validity of the award.

It is today widely accepted, as discussed above, that arbitral tribunals are not bound by the *lege fori* and are not acting in an analogous way as state courts. As a consequence, tribunals do not have to follow state conflict of laws rules.¹¹⁴ This proposition is correct, but only if one refers to conflict of laws rules contained in codes of civil procedure, private international law acts and the like, which are intended to be used by courts. It has to be noted, however, that there are arbitration laws which direct the arbitrators to apply state conflict of laws rules in the absence of parties' choice, e.g. Art. 37(2) of the Czech Arbitration Act or § 31 of the Norwegian Arbitration Act. It is therefore left entirely for the law at the seat of the proceedings to establish what provisions tribunals should follow in order to find the law applicable to the dispute. Arbitral tribunals are hence obliged to follow the rules contained in the arbitration laws which are enforced at the seat of the proceedings. While the reach of party autonomy may be arguable, it

¹¹⁰ P. Mankowski, *Rom I-VO und Schiedsverfahren*, 57 *Recht der Internationalen Wirtschaft* 30 (2011).

¹¹¹ See e.g. J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague: 2003, p. 420.

¹¹² Born, *supra* note 24, p. 2626.

¹¹³ E.g. Award of International Court of Arbitration, case No. 9771 of 2001, XXIX Yearbook Commercial Arbitration 46 (2004), p. 53; award of International Court of Arbitration, case No.7472 of 1996, discussed in H. Grigera Naon, *Choice-of-Law Problems in International Commercial Arbitration*, 289 *Recueil des Cours* 9 (2001), p. 174.

¹¹⁴ See e.g. W. Craig, W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publications, New York: 2000, para. 17 (01); P. Lalive, *Les règles de conflits de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1 *Revue de L'arbitrage*. 155 (1976), p. 159.

is incorrect to say that arbitral tribunals are not bound by the *lege fori* at all. Conflict of laws rules designed for arbitration are part of the law of the seat and are binding upon tribunals. The question remains, however, how the Rome I Regulation affects the choice of law rules of the forum contained in national arbitration laws.

The first argument which speaks for the applicability of the Rome I Regulation in arbitration is that there is no express exclusion to this effect. The only potentially relevant provision excludes arbitration *agreements* from the scope of the Regulation, not arbitration *proceedings*. The roots of this exclusion may be found in the preparatory works and reports on the 1980 Rome Convention – the predecessor of the Regulation, which contains the same provision concerning arbitration agreements. As we know from the Guliano/Lagarde Report, this exclusion relates to procedural aspects of the arbitration agreements and their formation and validity. Also, the doctrine of separability was recognized at the time the Convention was being drafted.¹¹⁵ The reason for exclusion was, therefore, the procedural character of arbitration agreements, because the convention was dealing with conflict of laws issues. Furthermore, it was suggested that the matter of arbitration agreements was already governed by existing international conventions (e.g. the New York Convention). This however, justifies even more the argument that the exclusion relates solely to procedural aspects of arbitration agreements because the New York Convention does not contain any provisions concerning the choice of substantive law. Regard may also be given to the 1961 European Convention¹¹⁶ which in its article VII provides for the conflict of laws rules to be used in international commercial arbitration. If, however, the Convention were to take precedence over the Regulation, it would have to be pursuant to the Art. 25 of the Rome I Regulation. Application of this article, however, assumes in the first place that the Convention and Regulation regulate the same matter; ergo that arbitration is in principle governed by the Regulation. Therefore, the existence of international conventions cannot serve as a justification for the extensive interpretation of the exhaustive catalogue found in Art. 1(2) of the Regulation.

Furthermore, arbitration agreements are excluded from the scope of the Rome I Regulation, together with agreements on the choice of court. Similarly, the reason for this exclusion was that the matter of choice of court “lies within the sphere of procedure and forms part of the administration of justice (exercise of State authority).”¹¹⁷ Both types of agreements are of a procedural nature and that is their major effect: derogation and prorogation.¹¹⁸ Hence, the interpretation of the exclusions should be conducted in the same way with respect to both. So far, it is understood that the exclusion of choice of court agreements refers only to the agreements themselves and does not mean that the Regulation should not apply in court proceedings. Hence, a similar effect should be

¹¹⁵ Report on the Convention on the law applicable to contractual obligations, O.J. C 282/1, art. 1, para. 5.

¹¹⁶ European Convention on International Commercial Arbitration (adopted 21 April 1961, entered into force 7 January 1964) 484 UNTS 349.

¹¹⁷ *Ibidem*.

¹¹⁸ Mankowski, *supra* note 110, p. 31.

attributed to the exclusion of arbitration agreements. A more extensive interpretation goes far beyond the wording of the provision, which in clear terms refers only to “agreements” and is inconsistent with the principle that exceptions should be interpreted restrictively.

A potential argument against the applicability of the Rome I Regulation in arbitration proceedings could be Member States’ understanding of Art. 1(2)(e) and consistent state practice. If a Member State adopted arbitration law which is not in conformance with the Regulation, this could indicate that such state does not recognize applicability of the Regulation to arbitration. In the case of the EU law, however, adoption of a non-conforming law cannot have an impact on the interpretation of a regulation, directive or a treaty. Taking into account the hierarchy of norms within the EU, national legislation must be interpreted in favor of the EU law, and not vice versa. Furthermore, the only official organ that may issue binding interpretations of EU law is the Court of Justice of the European Union, and not Member States. A regulation is an example of an absolute harmonization and there is no room for a states’ own initiative in the regulated matter. Finally, even if it was possible, a *consistent* state practice is required in order to accept the existence of a quasi-authentic interpretation. As has been demonstrated however, only some arbitration laws depart from the Regulation by allowing the use of non-state law, while others are in conformity with it. It is also worth noting that the German Code of Civil Procedure provides for application of the closest connection rule in the absence of parties’ choice.¹¹⁹ Presumably, the German law-maker wished to achieve some conformity with the 1980 Rome Convention, which was in force at the time of adoption of the relevant provisions of the Code of Civil Procedure.

The conclusion that national arbitration laws should be in compliance with the Rome I Regulation raises the question whether tribunals should give priority to the Regulation, or nevertheless follow the *legem arbitrii*. At first glance it may seem the latter, as an arbitral tribunal is not an organ of the state.¹²⁰ Hence, it should not be bound by the EU law in the same way states are bound. This issue, however, was addressed by the European Court of Justice¹²¹ in the *Eco Swiss* case, which indicates otherwise.¹²² The Court held that tribunals must give regard to the provisions of the EC Treaty (now the Treaty on the Functioning of the European Union), which declares that all agreements and decisions distorting competition are prohibited. More specifically, the Court ruled that a national court deciding on annulment of an award which did not comply with these provisions of the Treaty must set aside such an award on the basis of violation of public policy (in cases where such grounds for annulment exist). It has been suggested that the *Eco Swiss* judgment speaks also for the applicability of the Rome I Regulation

¹¹⁹ German Code of Civil Procedure, Art. 1051(2).

¹²⁰ E.g. Danilowicz, *supra* note 74, p. 261.

¹²¹ Now: Court of Justice of the European Union.

¹²² Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int’l NV* [1999], ECR I-3055.

in arbitration.¹²³ This matter, however, is not so straightforward. There is a significant difference between the provisions of a Treaty establishing the most fundamental principles of the European Union, and a regulation being a secondary source of law. Furthermore, the Court in the *Eco Swiss* case was expressly underscoring the importance of the competition regulations, which it found to be “essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.”¹²⁴ Although the Rome I Regulation was introduced as a development in the area of the common market, being the primary objective of the EU, it is doubtful that its importance should be treated as equivalent to that of the Treaty. A generalization that the whole of European law is to be interpreted as part of public policy for the purposes of annulment of an arbitral award is, therefore, unjustified.

On the other hand, even if the Rome I Regulation is not to be considered as part of public policy, it nevertheless forms part of the *legis arbitrii*. Unlike directives, regulations are directly applicable and do not require transposition or separate enactment. They automatically become part of Member States’ laws. Thus, arbitrators should be bound by the Rome I Regulation at least in the same manner as by other norms of the *legis arbitrii*. Similarly, any departure from the rules of the Regulation should have at least the same consequences as departure from other rules of the arbitration law. In this respect, however, at least three courts did not consider the departure from conflict of laws rules contained in the arbitration law or terms of reference as a basis for annulment or non-enforcement.

The first case arose from an ICC arbitration seated in Vienna.¹²⁵ In the absence of a choice by the parties, the tribunal applied *legem mercatoria*, while the conflict of laws rules enforced at the seat (i.e. the Austrian Code of Civil Procedure) called for the application of “law”. The award-debtor challenged the award in the Austrian courts alleging, *inter alia*, that by applying *legem mercatoria* the tribunal had violated mandatory provisions of the Austrian Code of Civil Procedure and public policy. The Austrian Supreme Court upheld the award, stating that the application of inherent principles of private law (in this case the decision was based on the principle of good faith) cannot be perceived as violation of mandatory rules or public policy.¹²⁶ The award-debtor tried later to contest enforcement in France on similar grounds, but the *Cour de Cassation* confirmed the award.¹²⁷

In another case, the U.S. District Court for the Southern District of California was called upon to decide on a motion to deny enforcement of an ICC award issued

¹²³ Mankowski, *supra* note 110, p. 36.

¹²⁴ *Eco Swiss China Time Ltd v. Benetton Int’l NV*, para. 36.

¹²⁵ Award of International Court of Arbitration, case No. 3131 of 1979, IX Yearbook Commercial Arbitration 109 (1984), p. 110.

¹²⁶ Judgment of Austrian Supreme Court, dated 18 November 1982, *Norsolor SA v. Pabalk*, available at <http://bit.ly/1NnG0mI> (accessed 20 April 2016)

¹²⁷ Judgment of French Cour de Cassation, dated 9 October 1984, *Société Pabalk Ticaret Limited Sirketi v. Norsolor S.A.*, 3 ASA Bulletin 197 (1984), p. 198.

in France, on the basis of Art. V(1)(c) of the New York Convention. The award-debtor alleged that by applying the UNIDROIT Principles, the tribunal had exceeded the scope of the Terms of Reference. The court disagreed and enforced the award.¹²⁸

Based on the above, it is unlikely that the non-application of the rules of the Rome I Regulation by arbitrators would constitute a basis for annulment or non-enforcement of the award. This does not change the fact, however, that the Regulation is binding upon arbitral tribunals seated within the EU and in the event of inconsistencies its rules should take precedence over the provisions of domestic arbitration laws.

CONCLUSION

The choice of non-state law in international commercial arbitration reflects the different role of arbitral tribunals from that of state courts. Specific conflict of laws rules are designed for arbitration to give the parties more flexibility in shaping their relationship. They allow in many cases for agreement on the application of rules of law which encompass much more than just state law. Parties which wish to achieve the highest level of neutrality in their potential dispute may agree on the application of the UNIDROIT Principles, international substantive law conventions, or even general principles of law. Some arbitration laws also authorize the tribunal to apply non-state law in the absence of the parties' choice. Depending on the *arbitration law*, tribunals may either apply non-state law directly, or be required to first conduct a conflict of laws analysis. In each case, however, the tribunal's choice should be substantiated and not completely arbitrary.

Failure to conduct the necessary conflict of laws analysis in the indirect approach could be treated as a non-compliance with the parties' agreement and, thus, constitute a basis for challenge of the award. Existing case-law suggests, however, that annulment of an award in such circumstances is unlikely. Similarly, a tribunal seated in an EU Member State which disregards the provisions of the Rome I Regulation should not unduly fear that its award could be set aside. This does not mean, however, that the tribunal can freely disobey the Regulation. To the contrary, it is a binding legislative act which applies in both court and arbitration proceedings. Lack of consequences for the breach of its provisions should not be treated as a justification for its non-application. In all cases arbitral tribunals should do their best to resolve the disputes before them in accordance with the relevant rules. Otherwise, arbitration proceedings would become too unpredictable and lose much of their attractiveness.

¹²⁸ Judgment of the United States District Court for the Southern District of California, dated 7 December 1998, *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 29 F. Supp. 2d 1168, p. 1170.