

Law Applicable to the Merits of International Commercial Arbitration: MAL, PAL and KCCCP Compared*

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* Mal refers to the 1985 Uncitral Model Law on International Commercial Arbitration, PAL Means the 2000 Palestinian Arbitration Law, KCCCP means he 1980 Kuwaiti Code of Civil and Commercial Procedures.

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Abstract

This research deals with the law applicable to the merits of International commercial arbitration under the 1985 Uncitral Model Law on International Commercial Arbitration (MAL), the 2000 Palestinian Arbitration Law (PAL) and the 1980 Kuwaiti Code of Civil and Commercial Procedures (KCCCP). It shows how the parties to the arbitration agreement may choose the substantive law applicable whether explicitly or implicitly. It makes clear whether the party can only choose a State law or whether they may also select a non-State law, e.g. *lex mercatoria*, to be applicable. This research also shows to which extent shall the parties, when choosing the law applicable, respect the mandatory rules, i.e. public policy rules whether they belong to the law chosen by the parties, the law closely connected to the dispute (e.g. the law of the seat of arbitration or the law of the State or States in which enforcement is prospected), or even if they are international public policy rules in nature.

This research also tackles the selection of the law applicable to the merits by the arbitral tribunal when the parties do not define it. The research shows the means through which the arbitral tribunal may select the law applicable in such cases. The arbitral tribunal may in this regard define the law applicable according to the conflict-of-laws rules it deems appropriate (MAL), apply the conflict-of-laws rules of the forum (PAL), or apply the conflict-of-laws rule that generally defines the law applicable to contracts (KCCCP). In all events, the arbitral tribunal shall take into consideration terms of the contract and trade usages.

Finally, the research concludes with certain remarks to make the definition of the law applicable to the merits of international commercial arbitration in both Palestine and Kuwait in line with the internationally accepted norms.

I. Introduction

In 1985, Uncitral made the Model Law on International Commercial Arbitration.⁽¹⁾ MAL is made “ready to enact”.⁽²⁾ So, it does not have legal effects in any country unless it is adopted by its legislator. Expecting a potential increase in foreign investment,⁽³⁾ Palestine enacted its Law No. 3 on Arbitration in 2000.⁽⁴⁾ Generally, this law is not directly inspired by MAL. Rather, PAL is influenced on one hand by the laws that were in force in Gaza Strip and West Bank. On the other hand, some provisions of PAL are taken from the arbitration laws in Jordan and Egypt.

In Kuwait, the rules on arbitration are contained in the 1980 Code of Civil and Commercial Procedures namely Articles 173-188.⁽⁵⁾ This law is mainly modeled on Egyptian law No. 13 of

(1) This law had been subject to certain amendments that came into force in 2006.

(2) Luttrell, Sam, *An Introduction to Conflict of Laws in International Commercial Arbitration*, 14 *Int'l Trade & Bus. L. Rev.* 404, (2011), at 406.

(3) Breger, Marshall J & Quast, Shelby R, *International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority*, 32(2) *Case Western Reserve Journal of International Law* 185, (Spring 2000), at 228.

(4) Besides, Palestine is party to the 1987 Arab Convention on Commercial Arbitration. This Convention entered into force in 27.06.1992 for Iraq, Jordan, Lebanon, Libya, Sudan, Tunis, Yemen and Palestine. According to Article 2 of this Convention, it ‘applies to commercial disputes between natural or juristic persons of any nationality, linked by commercial transactions with one of the contracting States or one of its nationals, or which have their main headquarters in one of these States.’ See the text of this Convention (in English) at: <http://www.jus.uio.no/english/services/library/treaties/11/11-05/arab-commercial-arbitration.xml#treaty-header1-1>.

(5) It is worth mentioning, on one hand, that Kuwait promulgated a new enactment in 1995 titled ‘Judicial Arbitration in Civil and Commercial Matters (Law No. 11/1995)’. See this law in 2 *Y. B. Islamic and Middle E. L.* (1995), at 557-561. An in-depth review of this law (by Osman, El-Fatih E.) can also be found in 2 *Y. B. Islamic and Middle E. L.* (1995), at 192-195. It should be mentioned, however, that this type of arbitration is limited to matters of Kuwaiti law not exceeding KD 500,000, with proceedings conducted in Arabic only.

On the other hand, Kuwait is a party to the GCC Commercial Arbitration Center=

1963, whereas Egypt itself enacted its law on arbitration in 1994 which is in turn inspired by MAL.

As the title suggests, MAL only deals with international commercial arbitration.⁽⁶⁾ PAL covers not only international commercial arbitration, but also local (and foreign) arbitration.⁽⁷⁾ By

=headquartered in Bahrain. The Charter of the Centre was adopted by leaders of the member-states of the GCC (i.e., Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates) in December 1993. Its Arbitral Rules of Procedure came into effect in 1994 and, in March 1995, the Centre began to accept references. By the Law No. 14/2002, dated 3.2.2002, Kuwait agreed to the construction of the GCC Commercial Arbitration Center and its Charter. According to Article 2 of the Charter the Centre is empowered 'to examine commercial disputes between GCC nationals, or between them and others, whether they are natural or juristic persons, and commercial disputes arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions issued for the implementation thereof if the two parties agree in a written contract or in a subsequent agreement on arbitration within the framework of this Centre.' See the text of this Charter and the Arbitral Rules of Procedure of the GCC Commercial Arbitration Center (in English) at: <http://sites.gcc-sg.org/DLibrary/index-eng.php?action=ShowOne&BID=189>.

(6) See also Article 1(1) MAL. According to Article 1(3) thereof, an arbitration is international if the parties have their places of business in different States, the place of arbitration or substantial part of the commercial relationship is situated outside the State in which the parties have their places of business, or 'if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country'. Pursuant to paragraph (4) of the same Article: '(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; (b) if a party does not have a place of business, reference is to be made to his habitual residence.'

(7) According to Article 3 PAL, '[f]or the purposes of this law, arbitration shall be, first, local if it does not relate to international trade and is taking place in Palestine. Secondly, arbitration shall be international if it involves a dispute relating to an economic, commercial or civil issue in the following cases: 1. If the headquarters of the parties in arbitration are in different countries at the time of conclusion of the arbitration agreement; if any of the parties has several places of business, the place of business that is more closely linked to the arbitration agreement shall be taken into consideration; if any of the parties does not have any place of business, his place of habitual residence shall be considered. 2. If the subject-matter of the dispute included in the arbitration agreement is linked to more than one country. 3. If the principal place of business of each of the parties in arbitration is located in the same country at the time of conclusion of the arbitration agreement and that one of=

contrast, KCCCP does not include an express provision on international commercial arbitration.⁽⁸⁾

The question of the law applicable to the merits of the dispute (i.e., ‘the rights asserted by claimants and the defenses raised and counterclaims asserted by defendants’⁽⁹⁾) normally appears in the field of international commercial arbitration. Thus, MAL and PAL include an explicit provision (Article 28 in the former and Article 19 in the later) on how to select the law applicable to the merits, whether through the parties or the arbitral tribunal. Article 28 MAL gives the parties a wide freedom to select the law or rules of law applicable. Failing such a choice, the arbitral tribunal applies the law determined according to the conflict-of-laws rules it considers appropriate.

Under Article 19 PAL the parties may choose the law applicable. Failing such a choice, it is not clear which law the arbitral

= the following places is in another country: a. the place of arbitration as is determined or referred to by the arbitration agreement; b. the place in which an essential part of the obligations resulting from the parties’ commercial or contractual relationship is to be performed; c. the place that is closely linked to the subject-matter of the dispute. Thirdly, arbitration shall be foreign if it takes place outside Palestine. ...’ (Translation into English of this provision, as well as all other Arabic legal provisions used in this paper, is freely made by the present author). Thus, as for the international commercial arbitration, PAL provides a broader definition than MAL. See Breger & Quast, *supra* n. 3, at 249.

(8) Al-Ahdab, Abd El-Hamid, *Arbitration Encyclopedia Arbitration in Arab Countries*, 3rd Book (in Arabic), (3rd revised ed., Al-Halabi Al-Hoqouqiya Publication, 2008), at 739, “the legislator does not include this new code [i.e. KCCCP] ... any provision dealing with arbitration in the field of private international relationships”. However, Article 182(3) KCCCP differentiates between local and foreign arbitrations according to whether or not the arbitration is done in Kuwait.

(9) Silberman, Linda & Ferrari, Franco, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, in *Conflict of Laws in International Commercial Arbitration*, Ferrari, Kröll, eds., European Law Publishers, Munich; NYU Law and Economics Research Paper No. 10-40, 2010, available at SSRN: <http://ssrn.com/abstract=1674605> (accessed 20 Oct. 2014), at I.

tribunal will apply to the merits of international commercial arbitration. While paragraph (1) of Article 19 says: “Parties in international arbitration may agree on the law applicable to the merits of the dispute. In the absence of such agreement, the arbitral tribunal shall apply the Palestinian law”, paragraph (2) thereof says in part: “In case of international arbitration taking place in Palestine, if the parties do not reach agreement on the law applicable, substantive rules referred to by the conflict-of-laws rules in the Palestinian law shall apply.”

In Kuwait, the question of the law applicable to the merits is not settled by KCCCP. Article 182(2) KCCCP only says: “The arbitrator’s award shall be according to the rules of law”. However, Al-Ahdab argues that, failing a choice of law by the parties, the law applicable to the merits of arbitration done in Kuwait is Kuwaiti law.⁽¹⁰⁾ With regard to international (commercial) arbitration, he continues, one shall apply the Kuwaiti conflict-of-laws rules to define the law applicable.⁽¹¹⁾

The purpose of this paper is two-fold: identifying the law applicable to the merits of international commercial arbitration under the laws in question and finding out to which extent PAL and KCCCP are in conformity in this regard with MAL.

(10) Al-Ahdab, *supra* n. 8, at 763.

(11) *Ibid*, at 763-764. See also Al-Samdan, Ahmad, Law Applicable in International Commercial Arbitration (in Arabic), 17(1) *Journal of Law – Kuwait University*, Kuwait 173, (1993), at 182. Cf. Al-Fadhel, Respect for Party Autonomy under Current Saudi Arbitration Law, 23 *Arab L. Q.* 31, (2009), at 46.

It is worth emphasizing here that KCCCP itself does not contain an express provision on the law applicable to the merits of the arbitral dispute. Article 182(2) only contrasts the arbitrator with the amiable compositeur: Whereas the former is obliged to apply “rules of law”, the latter is not. Thus, the arbitral tribunal shall define this law according to Article 59 of the Kuwaiti Law No. 5/1961 on Regulation of the Legal Relationships with Foreign Element (hereinafter: Kuwaiti Law No. 5/1961).

At the parties' discretion, the arbitral tribunal may - under the three laws at issue - settle the dispute either by application of rules of justice or rules of law.⁽¹²⁾ Since the arbitral tribunal is not bound, in the first case, to apply rules of law,⁽¹³⁾ this paper only considers the law applicable to the merits in the second case. Under Article 28 MAL,⁽¹⁴⁾ Article 19 PAL and Article 182(2) KCCCP,⁽¹⁵⁾ the parties to the dispute may choose the law applicable to the merits (Part II). In absence of such a choice, the arbitral tribunal shall determine the law applicable (Part III). This paper ends up with concluding remarks (Part IV).

(12) Article 28(3) MAL says: 'The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.' (Emphases original) Article 36 PAL says in part: 'The parties to the dispute may delegate the arbitral panel to proceed with conciliation among them on the bases of justice.' Article 182(2) KCCCP says: 'The arbitrator's award shall be according to the rules of law unless the arbitrator is authorized to proceed with conciliation in which case he may not apply such rules except when they relate to public policy'.

Cf. Decision of the Cassation Court of Egypt No. 5539, judicial year 66, dated 11.07.1998, in Eastlaws at: <http://www.eastlaws.com/>.

(2) Sheaan, Firas Kareem, *The Limitation of the Arbitrator's Authority in Arbitration in Accordance With Justice* (in Arabic), 2(1) AL- Mouhakiq Al-Hilly Journal for Legal and Political Science - Babylon University (Iraq) 58, (2010), at 60. Luttrell, supra n. 2, at 408. Ruzik, Andy, *Die Anwendung von Europarecht durch Schiedsgerichte*, in: *Beiträge zum Transnationalen Wirtschaftsrecht*, Tietje, C., Kraft, G., Sethe, R. (eds.), Heft 17, (August 2003), at 11.

See also *Coderre v. Coderre*, 2008 QCCA 888 (CanLII), para. 66, <http://canlii.ca/t/27jm8>, '[t]he difference between ordinary arbitrators and amiables compositeurs... resides primarily in the fact that the former are required to apply the rules of law, the foremost of these being the "positive law of the State", ... whereas the latter, bound by rules of public order and natural justice, may modulate the application of supplementary rules or even set them aside in the name of equity and decide in a manner that "complies with general principles of law"'.

(14) This provision was not amended in 2006.

(15) Al-Samdan, supra n. 11, at 182. Atiya, Azmi, A., *Kuwaiti Arbitration Law, A Study of the Local Arbitration Rules in the Kuwait Procedures Law* (in Arabic), (2nd ed., Dar El-Kitab Foundation, Kuwait, 2012), at 305.

II. Choice of Law by the Parties

Arbitration depends upon the party autonomy,⁽¹⁶⁾ i.e. the will of the parties.⁽¹⁷⁾ The parties are free to shift their legal relationship, whether contractual or not, from the supervision of a national court to an arbitral tribunal.⁽¹⁸⁾ Also, they are free to subject to the law of their choice.⁽¹⁹⁾ This choice can be direct or indirect: In most cases, the parties designate the substantive law or rules of law applicable (direct choice). They may also select a conflict-

(16) The parties have the autonomy to agree on: the number of the arbitral tribunal's members (Article 10(1) MAL, Article 8(1) PAL and Articles 174, 175 KCCCP); the procedure appointing the arbitral tribunal (Article 11(2) MAL, Article 8(2) PAL and Articles 174, 175 KCCCP); the procedure to be followed by the arbitral tribunal in conducting the proceedings (Article 19(1) MAL, Article 18 PAL and Article 182(1) KCCCP); the language to be used in the arbitral proceedings (Article 22(1) MAL, Article 22(1) PAL and Article 183(2) KCCCP); and the place of arbitration (Article 20(1) MAL and Article 21 PAL).

According to the Cassation Court of Egypt, 'the parties' will creates the arbitration and defines its limits in terms of issues subject to arbitration, law applicable, constitution of the arbitral tribunal and its authorities, arbitration procedures ... etc.' See Decision No. 196, judicial year 74, 23.2.2010, in Eastlaws at: <http://www.eastlaws.com/>.

(17) Breger & Quast, *supra* n. 3, at 250, '[p]arty autonomy ... is defined as "the autonomy of the parties to decide on all aspects of an international arbitration procedure, subject only to certain limitations of mandatory law"'. As for mandatory law, see II.4.infra.

(18) Article 7 MAL; Article 5 PAL.

For the advantages of arbitration over the litigation before a national court, see Priocopi, Adrian & Droc, Bianca, *New Legal Perspectives Regarding Mandatory Laws in the Field of International Arbitration*, 4(1) *Contemporary Readings in Law and Social Justice* 213, (2012), at 213. Wülfing, Thomas, *Internationale Handelsschiedsgerichtsbarkeit im Nahen und Mittleren Osten*, WZR Group, 2009, at 3, <http://www.wzr-legal.com/wp-content/uploads/2011/04/Internationale-Handelsschiedsgerichtsbarkeit-im-Nahen-und-Mittleren-Osten.pdf>.

(19) Kjos, Helge Elisabeth, *Oxford Monographs in International Law: Applicable Law in Investor-State Arbitration: The Interplay between National and International Law*, (Oxford, GBR: OUP Oxford 2013), at 68. Petsche, Markus A., *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 *Mich. St. U. Coll. L. J. Int'l L.* 453, (2009-2010), at 465. Luttrell, *supra* n. 2, at 406.

of-laws rule of a specific arbitration institution⁽²⁰⁾ or of their own (indirect choice).⁽²¹⁾

This doctrine of party autonomy has been clearly acknowledged by MAL, PAL and KCCCP. Article 28(1) MAL expressly says in part: ‘The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute’. Article 19(1) PAL says in part: ‘Parties in international arbitration may agree on the law applicable to the merits of the dispute.’⁽²²⁾ Jurists argue that this is also the case under KCCCP, namely by the application of Article 59 Kuwaiti Law N. 5/1961.⁽²³⁾ Because the authority of the arbitral tribunal is based on the parties’ will,⁽²⁴⁾ the arbitral tribunal has to respect their choice.⁽²⁵⁾ Otherwise, the arbitral tribunal may

(20) Kjos, *supra* n. 19, at 65.

(21) Cf. Al-Masri, Husni, *International Commercial Arbitration – A Comparative Study* (in Arabic), (Dar Elkutob Elmasriyya – Dar Shatat, Egypt), at 358.

(22) Likewise, Article 21(1) of the 1987 Arab Convention on Commercial Arbitration says in part: ‘The arbitral tribunal shall settle the dispute in compliance with ... the provisions of the law on which they might expressly or tacitly have agreed ...’

(23) Al-Ahdab, *supra* n. 8, at 763. Atiya, *supra* n. 15, at 305. Also, under Article 12 of the GCC Centre’s Charter and Article 29 of its Arbitral Rules of Procedure, the law applicable to the merits shall be the law chosen by the parties.

(24) Federal Court of Australia [2013] HCA 13, *TCL Air Conditioner (Zhongshan) Co. Ltd. v. The Judges of the Federal Court of Australia*, 13.3.2013, CLOUT Case No. 1246, in A/CN.9/SER.C/ABSTRACTS/130, ‘the essential distinction between judicial power and arbitral authority is that arbitral authority is based on the voluntary agreement of the parties, whereas judicial power is conferred and exercised by law and coercively, and operates independently of the consent of the parties’.

(25) Atiya, *supra* n. 15, at 308. Al-Zubi, Mohammad A., *Law of Arbitration as a Legal, Judicial and Contractual System of a Special Nature, Attached with the Important Conventions and Legislations on International Arbitration* (in Arabic), (Al-Maaref Press, Alexandria, 2010), at 282.

be considered as acting in excess of authority that might lead to the award being set aside or not enforced.⁽²⁶⁾

This choice of law applicable can be explicit or implicit (as will be clarified soon). This paper will also explain what the law chosen (whether explicitly or implicitly) means. In addition, it will clarify whether the arbitral tribunal is bound to apply the law chosen in all cases, or whether the public policy rules limit such an application.

1. Explicit Choice

Explicit choice by the parties is practically the main criterion for identifying the law applicable to the merits. Generally, such a choice 'meets no objections and is openly favored'.⁽²⁷⁾

The parties can practice their freedom to explicitly choose the law applicable to the merits in different ways: For instance, the contract may contain an explicit clause on the law to be applied to disputes arising therefrom.⁽²⁸⁾ The parties can also agree on this law in a separate written agreement after concluding the main contract.⁽²⁹⁾ Such an agreement by the parties may include

(26) Zhilsov, A. N., *Mandatory and Public Policy Rules in International Commercial Arbitration*, 42(1) *Netherlands International Law Review* 81, (May 1995), at 84. *Uncitral, Digest of Case Law on the Model Law on International Commercial Arbitration*, United Nations, New York, 2012, <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> (accessed 10 Nov. 2014), at 123. Al-Romh, Abd Alla E. A., *Arbitral Award According to the Law of Civil and Commercial Procedures and the Judicial Arbitration Law, A Study in Kuwaiti and Egyptian Laws Compared with Islamic Jurisprudence* (in Arabic), (2nd ed., Dar El-Kitab Foundation, Kuwait, 2009), at 447.

(27) Rubino-Sammaratano, Mauro, *International Arbitration Law and Practice*, (2nd ed., Kluwer Law International, the Hague, 2001), at 418.

(28) Pricopi & Droc, *supra* n. 10, at 214. Kjos, *supra* n. 19, at 71. Al-Samdan, *supra* n. 11, at 181, 192. Al-Fadhel, *supra* n. 11, at 43.

(29) Al-Hajaya, Nour Hamad, *The Applicable Law to the Subject-Matter of Arbitration* (in Arabic), 3(3) *Jordan Journal of Law and Political Sciences* 67, (2011), at 70. Husein, Muthaffar Naser, *Law Applicable in the Awards of International Arbitral Tribunals* (in Arabic), 2(7) *Tikrit University Journal of Legal & Political Science* 1, (2010), at 16. Kjos, *supra* n. 19, at 71. Al-Samdan, *supra* n. 11, at 181, 192. Al-Fadhel, *supra* n. 11, at 43.

a submission to an arbitration of a preexisting dispute (i.e. the so-called compromise).⁽³⁰⁾ In addition, the parties can express their choice before the arbitral tribunal,⁽³¹⁾ even after choosing the law by the arbitral tribunal.⁽³²⁾

The parties can choose a national law,⁽³³⁾ whether the law of one of them or a neutral one.⁽³⁴⁾ The arbitral tribunal shall – under Article 28(1) MAL and Article 19 PAL – apply the law explicitly chosen by the parties, ‘whether or not [this] law chosen is that of a country linked to the dispute or there is a closer link with a law other than that chosen’;⁽³⁵⁾ this is also the rule in Kuwait according to Article 59 Kuwaiti Law No. 5/1961.⁽³⁶⁾ It also makes no

(30) Pricopi & Droc, *supra* n. 18, at 214.

(31) Al-Samdan, *supra* n. 11, at 181. Al-Fadhel, *supra* n. 11, at 42, 43.

In the ICC Case No. 1110 of 1963, the parties have agreed, during the course of arbitration procedure, that Argentine law is the law applicable to their (commission) agreement. See this case at: <http://translex.uni-koeln.de/output.php?docid=201110>

(32) Uzelac, Alan, *Autonomy of the Parties and Autonomy of the Arbitrators: Supremacy vs. Collaboration*, 1(1) *Slovenska arbitražna praksa* 26, (2012), http://al-anuzelac.from.hr/pubs/B54_Slo_arb_Autonomy_arbitrators.pdf (accessed 24 Sep. 2014), at 27, ‘[i]f both parties, after finding about the arbitrators’ designation of law, agree on different law, it should be binding for the arbitrators’.

(33) Al-Samdan, *supra* n. 11, at 180. Al-Romh, *supra* n. 26, at 447. Karton, Joshua D. H., *Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of its own Drummer?* 60 *U.N.B.L.J.* 32, (2010), 41.

(34) Rubino-Sammaratano, *supra* n. 16, at 419. Kjos, *supra* n. 19, at 70. Chukwumerije, Okezie, *Choice of Law in International Commercial Arbitration*, (Westport, CT, USA: Greenwood Press, 1994), at 110. Cf. Al-Samdan, *supra* n. 11, at 182. Atiya, *supra* n. 15, at 306. Petsche, *supra* n. 19, at 475.

(35) Silberman & Ferrari, *supra* n. 9, at II.2.a. See also Lando, Ole, *The Law Applicable to the Merits of the Dispute*, in: Sarcevic (ed.), *Essays on International Commercial Arbitration*, (Boston, London 1991), at 129 et seq, <http://www.trans-lex.org/114900> (accessed 22 Sep. 2014), at 135. Al-Rufaiiee, Ali Kazem, *Authorities of the International Commercial Arbitrator*, 25(1) *Journal of Science for Law - Baghdad University* 36, (2010), at 75.

(36) Al-Samdan, *supra* n. 11, at 180. Al-Ahdab, *supra* n. 8, at 763-764. See also the Cassation Court of Kuwait, Decision No. 198, judicial year 1989, in *Eastlaws* at: <http://www.eastlaws.com/>, (as the parties selected in the contract Kuwaiti law, the court applied the Kuwaiti law of commerce).

difference ‘whether [the arbitral tribunal agrees] with the choice or whether [it considers] it appropriate for the legal relationship in question’.⁽³⁷⁾

Though Article 28(1) MAL, Article 19 PAL and Article 59 Kuwaiti Law No. 5/1961 do not explicitly allow *dépeçage*, it is generally accepted that the parties can choose different laws applicable to different aspects of the contract.⁽³⁸⁾ This outcome is in accord with ‘the broad autonomy that parties enjoy in international commercial arbitration’.⁽³⁹⁾

Based on the same reasoning, i.e. the broad autonomy that parties enjoy in international commercial arbitration, the parties may change the law originally chosen by them to govern the merits of the dispute.⁽⁴⁰⁾ However, the parties may not, when doing so, prejudice the rights already acquired by third parties under the law originally chosen.⁽⁴¹⁾ The parties may not also change the

(37) Belohlavek, Alexander J., *Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration*, in *Czech Yearbook of International Law, Vol. I, Second Decade Ahead: Trading the Global Crisis*, A. Belohlavek & N. Rozehnalova, eds., (Juris Publishing, Inc., 2010), pp. 25-46, available at SSRN: <http://ssrn.com/abstract=1723715> (accessed 29 Oct. 2014), at 30.

(38) Lando, *supra* n. 35, at 140. Rubino-Sammaratano, *supra* n. 27, at 435. Al-Samdan, *supra* n. 11, at 182-183. Al-Fadhel, *supra* n. 11, at 44. See also Article 3(1) of the 1980 Rome Convention on the law applicable to contractual obligations (Rome Convention) which says in part: ‘By their choice the parties can select the law applicable to the whole or a part only of the contract’.

(39) Silberman & Ferrari, *supra* n. 9, at II.2.a.

(40) *Ibid.* See also Article 3(2) of the Rome Convention which says in part: ‘The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention’.

(41) Silberman & Ferrari, *supra* n. 9, at II.2.a. Al-Hajaya, *supra* n. 29, at 69. See also Article 3(2) of the Rome Convention which says in part: ‘Any variation by the parties of the law to be applied made after the conclusion of the contract shall not ... adversely affect the rights of third parties’.

law originally chosen at a time when the arbitral tribunal is not able any more to consider the new law chosen in rendering the award.⁽⁴²⁾

2. Implicit Choice

When the parties do not explicitly choose the law applicable, the question of an implicit choice always has to be considered. Indeed, both Article 28 MAL and Article 19 PAL are silent on this possibility.⁽⁴³⁾ They only contrast the explicit will of the parties with the case in which there is an absence of such a will, and do not expressly say anything about the implicit intention. Accordingly, these instruments do not clarify the factors to be taken into consideration in identifying the parties' implicit intention. Therefore, contrary to cases of explicit choice, the role of the arbitral tribunal becomes more difficult when it has to establish whether an implicit choice exists or not.⁽⁴⁴⁾

Anyway, it can be assumed that, since the provision of Articles 28 MAL & 19 PAL is general, the will of the parties includes both the explicit and implicit ones.⁽⁴⁵⁾ By contrast, Article 59 Kuwaiti

(42) Silberman & Ferrari, *supra* n. 9, at II.2.a.

(43) In contrast, the conflict-of-laws rule of the forum expressly allows the national court to infer the implicit choice of the law applicable by the parties to their contract. For instance, Article 19 of the Egyptian Civil Code clearly says: 'The contractual obligations are governed by the law of the parties' common domicile if this domicile is the same for both parties, and, if there is no common domicile, by the law of the country where the contract is concluded. This rule is not applicable if the parties have agreed on another applicable law or that another applicable law results from the circumstances'. Also, Article 25 of the Palestine Civil Law Draft adopts this provision almost word for word.

(44) Rubino-Sammaratano, *supra* n. 27, at 422.

(45) Cf. Al-Fadli, Ahmad M. & Obiedat, Moayad A., *The Applicable Law on the Arbitration Dispute* (in Arabic), 12(1) *Jordan Journal of Applied Sciences: Humanities Series* 41, (2010), at 47. Al-Hajaya, *supra* n. 29, at 76. Also, Article 21(1) of the 1987 Arab Convention on Commercial Arbitration says in part: 'The arbitral tribunal shall settle the dispute in compliance with ... the provisions of the law on which they might expressly or tacitly have agreed ...'

Law No. 5/1961 expressly provides for the implicit choice by the parties of the law applicable to the merits.⁽⁴⁶⁾ The implicit choice may be expressed by the parties in the form of words or actions which illustrate that they have chosen a certain law or rules of law⁽⁴⁷⁾ as the law applicable to the merits.⁽⁴⁸⁾ For example, an agreement referring to a standard-form contract (known to be governed by a certain national law) can be construed as including an implicit choice of this law. The parties' implicit choice may be concluded from an explicit choice made in a related transaction, too. Likewise, a contract whose elements establish a certain link between it and a specific national law can be considered as containing an implied choice of this law. The extraneous elements (such as place of contracting, place of performance, or the domicile or place of incorporation of the parties) could also manifest the parties' intention to choose a specific law. The parties' expectations will not be disrupted if the arbitral tribunal takes into consideration the close link they themselves have created between their contract and a specific law.⁽⁴⁹⁾

Obviously, the implicit choice of law applicable results from the respective will of the parties and not from their hypothetical will;⁽⁵⁰⁾ implicit choice is distinct from the inferred choice in terms of the intention which is true in the former while it is inferred in

(46) See the Cassation Court of Kuwait, Decision No. 198, judicial year 1988, 30.01.1989, in Eastlaws at: <http://www.eastlaws.com/>, 'the legislator subjects the contractual obligations to the law chosen by the parties in the contract, whether explicitly or implicitly'.

(47) Al-Hajaya, supra n. 29, at 82. Kjos, supra n. 19, at 74. Al-Samdan, supra n. 11, at 193, 195. Al-Romh, supra n. 26, at 447. Al-Fadhel, supra n. 11, at 43.

(48) Marshall, Brooke Adele, Reconsidering the Proper Law of The Contract, 13 Melbourne Journal of International Law 505, (2012), at 518, '[the arbitral tribunal] may infer intention from the terms of the contract The parties' intention can equally be inferred from the circumstances of the case'. Al-Masri, supra n. 21, at 343.

(49) Al-Hajaya, supra n. 29, at 81.

(50) Silberman & Ferrari, supra n. 9, at II.2.a. Al-Masri, supra n. 21, at 344. Kjos, supra n. 19, at 71. Al-Fadhel, supra n. 11, at 44.

the latter.⁽⁵¹⁾ Thus, the scope of the implicit choice ‘must be narrowed to exclude purported choices that do not reflect the true will of the parties’;⁽⁵²⁾ otherwise, the mechanism of determining the law applicable in the absence of the parties’ choice would be undermined. For example, the parties’ choice of an arbitration seat does not necessarily mean the choice by them of the law of that seat is applicable to the merits;⁽⁵³⁾ the parties might have chosen this seat for completely independent reasons⁽⁵⁴⁾ (e.g. convenience or neutrality with respect to the parties).⁽⁵⁵⁾

However, in its Award No. 0291-1 of September 2004, the China International Economic and Trade Arbitration Commission (CIETAC) concluded that, based on the parties’ agreement that ‘[a]ll disputes arising out of or in connection with the present Contract including disputes on its conclusion, binding effect, amendment and termination shall be resolved by China International Economic and Trade Arbitration Commission in Beijing in accordance with its rules of arbitration’, ‘there has been an implied choice by the parties of Chinese Law as the proper law of the Contract’.⁽⁵⁶⁾ Likewise, the Schiedsgericht der Handelskammer - Hamburg, Germany applied German law on the ground that the agreement of the parties to refer disputes to a German arbitral tribunal includes a choice of the German law.⁽⁵⁷⁾

(51) Marshall, *supra* n. 48, at 513. Cf. Kjos, *supra* n. 19, at 74.

(52) Marshall, *supra* n. 48, at 513.

(53) Kjos, *supra* n. 19, at 74.

(54) Al-Hajaya, *supra* n. 29, at 82.

(55) Husein, *supra* n. 29, at 15. Ruzik, *supra* n. 13, at 15. von Hoffmann, Bernd, “Lex-mercatoria” vor internationalen Schiedsgerichten, 4 IP_Rax 106, (1984), at 109. Rubino-Sammaratano, *supra* n. 27, at 422. Chukwumerije, *supra* n. 34, at 125.

(56) <http://www.unilex.info/case.cfm?pid=2&do=case&id=1441&step=FullText>.

(57) It concluded: ‘Das anwendbare Recht bestimmt sich aus Sicht des Forums nach deutschem internationalen Privatrecht Nach diesem ist gemäss Article 27 des Einführungsgesetzes zum Bürgerlichen Gesetzbuch (EGBGB) aus der Schiedsklausel mit der Vereinbarung eines deutschen Schiedsgerichts - hier des Schiedsgerichts der Handelskammer Hamburg - auf die Wahl deutschen Rechts zuzuschliessen’, <http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=FullText>.

3. Meaning of the Law Chosen

In this regard, two questions are of concern. First, should the law chosen by the parties always be a State law? Or could the parties also select a non-State law to apply to the merits of the dispute? Second, once the law chosen by the parties is a State law, is such a choice confined to the substantive law of that State? Or would it also entail the conflict-of-laws rules of that State's law?

Concerning the first question, it is generally admitted that the parties can also govern their dispute with a non-State law,⁽⁵⁸⁾ particularly in cases in which a State is a party.⁽⁵⁹⁾ Courts in many countries have recognized and enforced arbitral awards that were based on a-national law.⁽⁶⁰⁾ In fact, such law has an advantage over the national law, 'for national laws may suffer from a variety of shortcomings in the context of international trade and investment'.⁽⁶¹⁾ This understanding has been directly endorsed by

(58) Emmerlich-Fritsche, Angelika, *Die lexmercatoria als durchsetzbares transnationales Handelsrecht und Weltgesellschaftsrecht*, 17*NWiR*, (Herbst 2011), <http://www.nwir.de/archiv/NWiR17/emmerichfritsche1121.pdf> (accessed 20 Sept. 2014), at 10. Rubino-Sammaratano, *supra* n. 27, at 421.

(59) Levine, Judith, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, *Dispute Resolution Journal* 60, (Feb-Apr 2006), at 62, 'unlike most private arbitration proceedings, which involve the application of domestic law identified by the parties in their arbitration agreement, investor-state arbitration usually involves the application of evolving body of international law'. Cf. also Kjos, *supra* n. 19, at 70.

(60) Raeschke-Kessler, Hilmar, *Die Unparteilichkeit und Unabhängigkeit des Schiedsrichters – eintransnationalesRechtsproblem?*26(1) *ASA BULLETIN* 3, (2008 MARS), at 3.von Hoffmann, *supra* n. 55, at 107.

(61) Note, *General Principles of Law in International Commercial Arbitration*, 101 *Harv.L.Rev.* 1816, (1987/88), <http://www.trans-lex.org/127400> (accessed 18 Aug. 2013), at 1821. Cf. Chukwumerije, *supra* n. 34, at 110.

See also Lando, *supra* n. 35, at 145, '[b]y choosing the lex mercatoria the parties avoid the technicalities of national legal systems as well as rules which are unfit for international contracts'. Melkopian, Gayaneh Melkom, *Choice of Non-State Law in International Commercial Contracts*, *International Business Law*, CMPL 604, http://www.luys.am/images/scholars/attachments/Gayaneh_Melkom_Melkopian-IBL_paper_final.pdf (accessed 18 Oct. 2014), at 10. Al-Rufaiee, *supra* n. 35, at 75.

Article 28(1) MAL which expressly allows the parties to choose “rules of law”. This term includes not only national laws but also non-State laws;⁽⁶²⁾ the parties may choose uniform law instruments, regardless whether they are part of a national system or not.⁽⁶³⁾ Hence, the law chosen by the parties can be, not only the *lex mercatoria*, general principles of law, international customary law, or transnational law,⁽⁶⁴⁾ but also the European principles on contract law, the 1980 United Nations Convention on the International Sale of Goods (hereinafter: CISG), the Unidroit principles of international commercial contracts (hereinafter: Unidroit principles) or the like.⁽⁶⁵⁾ In such cases, the parties clearly avoid the application of the law of a particular State. In other cases, however, they can supplement their choice of a State law with reference to

(62) Uncitral, *supra* n. 26, at 122, ‘by referring to the choice of “rules of law” instead of “law”, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute’. Gailard, Emmanuel, *The Role of the Arbitrator in Determining the Applicable Law*, in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrator’s Guide to International Arbitration*, (Juris Publishing, Inc. 2004), at 185-216, http://www.academia.edu/618130/Law_applicable_to_the_merits_of_the_arbitration_dispute_an_overview_of_the_English_Swiss_and_French_arbitration_laws_ (accessed 5 Sep. 2014), at 203, ‘the parties are free to choose any body of legal rules, even without any national origin’. Kjos, *supra* n. 19, at 70, ‘[t]he term “rules of law” is understood to be wider than the term “law”’. Emmerlich-Fritsche, *supra* n. 58, at 13. Al-Masri, *supra* n. 21, at 349. Karton, *supra* n. 33, at 35. Petsche, *supra* n. 19, at 477.

(63) Uncitral, *supra* n. 26, at 122. Silberman & Ferrari, *supra* n. 9, at II.2.a. Al-Masri, *supra* n. 21, at 337. Al-Fadhel, *supra* n. 11, at 44. Al-Zubi, *supra* n. 25, at 282.

Cf. Decision of the Cassation Court of Egypt No. 9584, judicial year 80, dated 13.11.2012, in Eastlaws at: <http://www.eastlaws.com/>. Decision of the Cassation Court of Egypt No. 9450, judicial year 80, dated 13.11.2012, in Eastlaws at: <http://www.eastlaws.com/>. Decision of the Cassation Court of Egypt No. 86, judicial year 70, dated 26.11.2002, in Eastlaws at: <http://www.eastlaws.com/>.

(64) Chukwumerije, *supra* n. 34, at 111-112.

(65) Cf. Melkomian, *supra* n. 61, at 10-11. Karton, *supra* n. 33, at 35-37. Petsche, *supra* n. 19, at 488. Luttrell, *supra* n. 2, at 408.

a non-State law.⁽⁶⁶⁾ Since some of these sources are vague and ambiguous, it is the parties' task to choose the instruments that affords legal certainty, e.g. CISG or Unidroit principles.

However, Article 19 PAL and Article 59 Kuwaiti Law No. 5/1961 (that regulate the parties' freedom to choose the law applicable to the merits) only speak about the (State) law;⁽⁶⁷⁾ it does not mention the phrase "rules of law". Nevertheless, Article 3(5)PAL allows the parties to agree on the application of arbitration rules of a certain arbitration institution that use the direct approach that allows the arbitral tribunal, failing the parties' choice, to select the substantive law / rules of law applicable to the merits; hence, the arbitral tribunal is allowed for the default application of a-national law.⁽⁶⁸⁾ The parties may also come to this conclusion under Article 173 KCCCP.

In addition, Article 43(5) PAL clearly permits each party of arbitration to appeal against the arbitral award before the competent court for any 'violation of what the parties had agreed on regard-

(66) Note, supra n. 61, at 1820. Al-Hajaya, supra n. 29, at 77.

In a case involved an Emirati applicant and a Saudi respondent, the Cassation Court of Egypt found the contract between them included an agreement to submit their disputes to arbitration and to delegate the arbitrators the broad authority to apply laws, trade usages and principles of justice. The court ruled that there was no excess of authority by the arbitral tribunal when it applied the law of the United Arab Emirates as it is the law of the applicant and the law of the state in which the contract was concluded and performed. See Decision No. 145, judicial year no. 68, 28.5.2007, in Eastlaws at: <http://www.eastlaws.com/>.

(67) This is also the case under both the Arab Convention on Commercial Arbitration, to which Palestine is a party, and the Charter and Rules of the GCC Arbitration Centre, to which Kuwait is a party. Article 21(1) of the convention says in part: 'The arbitral tribunal shall settle the dispute in compliance with ... the provisions of the law on which they might expressly or tacitly have agreed ...' Pursuant to Article 12 of the GCC Centre's Charter and Article 29 of its Arbitral Rules of Procedure, the law applicable to the merits shall be 'the law chosen by the parties'.

(68) Cf. Kjos, supra n. 19, at 86.

ing the application of rules of law to the merits of the dispute'. This provision applies to any arbitration taking place in Palestine, particularly the international one. Thus, it is obvious that the arbitral tribunal must – in international arbitration - apply to the merits of the dispute the “rules of law” chosen by the parties. This is the case under Article 59 Kuwaiti Law No. 5/1961, too.⁽⁶⁹⁾ Otherwise, the arbitral award may be challenged.

Likewise, Article 28(1) MAL allows a court to consider if the arbitral award was based on the law or rules of law chosen by the parties; however, a court may not consider whether the arbitral tribunal had misinterpreted or misapplied the law or rules of law chosen to the substance of the dispute. The Bayerisches Oberstes Landesgericht in Germany concluded that the award may be set aside ‘if the arbitral tribunal had applied a different law to the substance of the dispute than the one agreed to by the parties. However, in this case the arbitral tribunal considered application of Italian law (instead of German law, which the parties had agreed on initially) *peremptory*, since the applicant had relied on an Italian patent, and the extent of the patent rights could only be determined by Italian law. The tribunal communicated its views to the parties, who accepted it and were given an opportunity to argue on Italian law.’⁽⁷⁰⁾ Also, in the CLOUT Case No.1246, the High Court of Australia ruled that ‘article 28 MAL, contrary to

(69) Al-Samdan, *supra* n. 11, at 193. Al-Romh, *supra* n. 26, at 447.

(70) Case No. 4 Z Sch 23/99, dated 15.12.1999, <http://www.dis-arb.de/de/47/datenbanken/rspr/bayoblg-az-4-z-sch-23-99-datum-1999-12-15-id16>.

Similarly, in its Decision No. 11 Sch 1/01, dated 8.6.2001, the Hanseatisches Oberlandesgericht (Hamburg-Germany) ruled that ‘state courts must refrain from a *revision au fond*, i.e. from an examination of the substantial correctness of the application of the law chosen by the parties, their power being limited to verifying whether the said law was applied at all’. See CLOUT Case No. 569, in A/CN.9/SER.C/ABSTRACTS/50.

what [was] argued by the Chinese company, does not require an arbitral tribunal to decide a dispute in a manner that a competent court of law would determine to be correct. Such article allows the parties to choose the rules of law according to which the substance of the dispute is to be determined, it has nothing to do with the correct or incorrect application of those rules.⁽⁷¹⁾

Similarly, the Cassation Court of Egypt made it clear that the mere agreement by the parties to apply to the merits the Egyptian law permits the arbitral tribunal to select the branch of law in Egypt most closely connected to the dispute. Any mistake by the arbitral tribunal in selecting the proper branch of law shall not be considered disregard of the parties' choice; rather, it is a fault in applying the law which is not a ground for annulment of the arbitral award.⁽⁷²⁾

In all events, the choice by the parties of the national law applicable to the merits may involve the choice of a non-State law, e.g. CISG.⁽⁷³⁾ According to Article 1(1-b) CISG, this convention may apply if the conflict-of-laws rules, applied by the arbitral tribunal, indicate operation of a Contracting State's national law. In such a case, the CISG will be applied for the reason that the Convention is part of the domestic law of each country that has ratified it and also it is the *lex specialis* in connection with international sale of goods.⁽⁷⁴⁾

(71) A/CN.9/SER.C/ABSTRACTS/130.

(72) Decision No. 9584, judicial year 80, dated 13.11.2012, in Eastlaws at: <http://www.eastlaws.com/>. See also Decision of the Cassation Court of Egypt No. 9450, judicial year 80, dated 13.11.2012, in Eastlaws at: <http://www.eastlaws.com/>.

(73) Luttrell, *supra* n. 2, at 408.

(74) See Dawwas, Amin et al., "Applicability of the CISG to Arab Countries", *Uniform Law Review*, (2011/4), also available at: <http://digitalcommons.pace.edu/pilronline/21/>, at 825-826.

As for the second question, the parties' choice of a State law is always concerned with the substantive law of that State regardless whether such a choice is explicit or implicit.⁽⁷⁵⁾ It does not extend to the conflict-of-laws rules of that State law; the so-called renvoi is excluded, because it undermines legal certainty.⁽⁷⁶⁾ This position has been expressly adopted by MAL. Article 28(1) thereof says in part: 'Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules'. By contrast, Article 19 PAL and Article 182(2) KCCCP do not expressly govern this matter.⁽⁷⁷⁾ However, it is generally accepted that the choice by the parties of the law applicable to their contract excludes renvoi. The law applicable in such a case is only the substantive law chosen, not also its rules on conflict-of-laws.⁽⁷⁸⁾ Otherwise, the party autonomy would be endangered.

(75) Cf. Al-Fadhel, *supra* n. 11, at 44. Decision of the Cassation Court of Egypt No. 9584, judicial year 80, dated 13.11.2012, in Eastlaws at: <http://www.eastlaws.com/>. Decision of the Cassation Court of Egypt No. 9450, judicial year 80, dated 13.11.2012, in Eastlaws at: <http://www.eastlaws.com/>.

(76) Silberman & Ferrari, *supra* n. 9, at, II.2.a.

(77) By contrast, Article 19(2) PAL clearly regulates the question of renvoi when the law applicable is to be chosen by the arbitral tribunal. However, this Article does not entirely reject the doctrine of renvoi. It only avoids the so-called transmission, and endorses remission. It clearly says in part: 'If the parties do not reach agreement on the law applicable, substantive rules referred to by the conflict-of-laws rules in the Palestinian law shall apply, and the rules of renvoi cannot apply unless they stipulate for application of the Palestinian law'. Thus, if the conflict-of-laws rules of the law applicable to the merits refer to the application of the Palestinian law, the arbitral tribunal shall apply this Palestinian law. If reference is made by these conflict-of-laws rules to the law of a third country, the arbitral tribunal shall apply the law applicable by virtue of the conflict-of-laws rules in the Palestinian law.

(78) Dawwas, Amin, *Conflict of Laws in Palestine – A Comparative Study in Light of Jurisprudence*, (in Arabic), 2nd ed., Shorok Press, 2014, at 241, and references cited. See also Article 72 Kuwaiti Law No. 5/1991 which clearly excludes renvoi.

Contra: Silberman & Ferrari, *supra* n. 9, at II.2.a, who argue that the principle of party autonomy 'is not particularly helpful in answering the question of whether the parties' choice of the law of a State is to be construed as referring solely to the substantive law of that State'. To answer this question, they say, 'it is necessary to resort to conflict of laws rules even where the parties have made a choice of applicable law.'

4. Disregard by the Arbitral Tribunal of the Parties' Choice

The arbitral tribunal is generally bound to respect the law or rules of law chosen by the parties. Nevertheless, there are situations in which the arbitral tribunal shall consider mandatory rules,⁽⁷⁹⁾ i.e. public policy rules.⁽⁸⁰⁾ Once there is a real connection between a mandatory rule (not being a part of the law chosen) and the dispute⁽⁸¹⁾ and, thus, a real public policy issue is at stake, the arbitral tribunal should (partially) disregard the parties' choice.⁽⁸²⁾ This would 'safeguard the credibility of arbitration as an effective mechanism for the settlement of disputes arising from commercial contracts'.⁽⁸³⁾ Lando argues that the arbitral tribunal

(79) Breger & Quast, *supra* n. 3, at 250. Al-Masri, *supra* n. 21, at 344. Schütze, Rolf A. et al., *Handbuch des Schiedsverfahrens Praxis der deutschen und internationalen Schiedsgerichtsbarkeit*, (2., neubearbeitete Auflage, Walter de Gruyter, Berlin – New York, 1990), at 320.

(80) Barraclough, Andrew & Waincymer, Jeff, *Mandatory Rules of Law in International Commercial Arbitration*, 6 *Melbourne Journal of International Law* 205, (2005), at 206, '[m]andatory rules can reflect states' internal or international public policy, and generally protect economic, social or political interests'. Baniassadi, Mohammad Reza, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration*, 10 *Int'l. Tax & Bus.Law.* 59, (1992), <http://scholarship.law.berkeley.edu/bjil/vol10/iss1/2> (accessed 30 Sept. 2014), 62, 'mandatory rules protect the social and economic interests of a society'. Ruzik, *supra* n. 13, at 17, '[z]um ordre public zählen alle jene Vorschriften des zwingenden Rechts, welche die Grundlagen des staatlichen und wirtschaftlichen Leben berühren und aus bestimmten staatspolitischen, sozial- oder wirtschaftspolitischen Zielsetzungen heraus erlassen worden sind'. Zhilsov, *supra* n. 26, at 95, 'public policy may be understood as a set of normative principles which, as a whole, form the basis of the social organization and legal system of a particular country'.

(81) Barraclough & Waincymer, *supra* n. 80, at 238.

(82) Silberman & Ferrari, *supra* n. 9, at I.1., 'arbitral tribunals may also have to comply with particular mandatory rules that override the law chosen by the parties'. Baniassadi, *supra* n. 80, at 63, '[a]lthough party autonomy is a general principle of private international law which arbitrators should respect, party autonomy is subject to limits imposed by other equally important general principles of law and public policy'. Cf. also Zhilsov, *supra* n. 26, at 95. Petsche, *supra* n. 19, at 466. Al-Fadhel, *supra* n. 11, at 45.

(83) Baniassadi, *supra* n. 80, at 66.

shall not have ‘regard to [the parties’] interests only’ but also to those of ‘commercial arbitration as an instrument for settling international disputes’.⁽⁸⁴⁾ If, Lando asserts, arbitration is used as a device for evading the public policy of States which have an interest in the subject-matter of the dispute, ‘the reputation of arbitration will suffer’.⁽⁸⁵⁾

It goes without saying, first of all, that the arbitral tribunal applies the mandatory rules of the law chosen by the parties⁽⁸⁶⁾ simply because such rules are part of the parties’ choice.⁽⁸⁷⁾ It is also worth mentioning in this regard that, if the law applicable to the merits is determined by the arbitral tribunal, ‘the orthodox approach is for arbitrators to then automatically apply all of this law’s mandatory rules’.⁽⁸⁸⁾

However, there could be a situation in which the arbitral tribunal is not bound to apply a mandatory rule of the law chosen by the parties. For example, this would be the case if ‘the underlying purpose and objective of the rule indicate that it is aimed at purely domestic situations as opposed to cases involving inter-

(84) Lando, *supra* n. 35, at 159. See also Nicholas, *Striking a Balance Between Public Policy and Arbitration Policy in International Commercial Arbitration*, *Singapore Journal of Legal Studies* 185, 2012, at 190.

(85) Lando, *supra* n. 35, at 159. See also Chukwumerije, *supra* n. 34, at 179-180, ‘[t]he integrity of international arbitration and its endurance as a viable alternative to litigation would seem to rest on arbitrators’ continual respect for public policy of States whose legitimate interests are implicated in arbitration disputes’.

(86) Barraclough & Waincymer, *supra* n. 80, at 219, ‘[i]t is generally agreed that if the *lex contractus* has been chosen by the parties, its mandatory rules must be applied’. See also Chukwumerije, *supra* n. 34, at 184.

(87) Baniassadi, *supra* n. 80, at 68, 71. Cf. also Al-Hajaya, *supra* n. 29, at 73. Al-Fadli & Obiedat, *supra* n. 45, at 49-50.

(88) Zhilsov, *supra* n. 26, at 109, ‘the arbitrator should apply [the governing] law as it stands, including its mandatory rules’. Barraclough & Waincymer, *supra* n. 80, at 222. Raeschke-Kessler, *supra* n. 60, at 9.

national disputes.⁹⁽⁸⁹⁾ In addition, if in rare cases the mandatory rules of the law chosen by the parties are not in conformity with international public policy rules, the later rules shall prevail over the former ones.⁽⁹⁰⁾

The international public policy rules, i.e. those involving fundamental principles that are widely admitted⁽⁹¹⁾ by commercial nations,⁽⁹²⁾ must also be taken into consideration by the arbitral tribunal.⁽⁹³⁾ These rules include, but are not limited to, matters ‘involving corruption, customs offences, embargo, apartheid, drug trafficking and antitrust violations’.⁹⁴ The arbitral tribunal should refuse to apply the parties’ chosen law that conflicts with such rules.⁽⁹⁵⁾

The arbitral tribunal may apply such rules *ex officio*⁽⁹⁶⁾ since such an application is justified within the facts of the dispute. In

(89) Chukwumerije, *supra* n. 34, at 184.

(90) Gaillard, *supra* n. 62, at 214. Chukwumerije, *supra* n. 34, at 184, 193.

(91) Gaillard, *supra* n. 62, at 213, ‘these principles being derived from the comparison of the fundamental requirements of various domestic legal systems and from public international law’.

(92) Lando, *supra* n. 35, at 158. Chukwumerije, *supra* n. 34, at 191. See also Barraclough & Waincymer, *supra* n. 80, at 218, ‘[t]ransnational public policy reflects the fundamental values, the basic ethical standards, and the enduring moral consensus of the international business community’. Cf. also Kjos, *supra* n. 19, at 100.

(93) Fry, James D., *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8(1) *Chinese Journal of International Law* 81, (2009), at 115, ‘international public policy is relevant to the work of international arbitrators, who lack a *lex fori* and are obliged to apply truly international concepts’. Zhilsov, *supra* n. 26, at 114. Emmerlich-Fritsche, *supra* n. 58, at 10. Chukwumerije, *supra* n. 34, at 192.

(94) Gaillard, *supra* n. 62, at 212. See also Al-Hajaya, *supra* n. 29, at 74. Poon, Nicholas, *Striking a Balance Between Public Policy and Arbitration Policy in International Commercial Arbitration*, *Singapore Journal of Legal Studies* 185, (2012), at 188-189.

(95) Barraclough & Waincymer, *supra* n. 80, at 218-219.

(96) Baniassadi, *supra* n. 80, at 81.

the ICC Case No. 1110 of 1963,⁽⁹⁷⁾ although neither party raised the issue of public policy, the arbitral tribunal found the contract to be null and void. The sole arbitrator, namely Mr. G. Lagergren (Sweden), was addressed to determine a claim by Argentine engineer (claimant) for a commission on a contract obtained by a British company in Argentina (respondent). The arbitrator found that officials from the respondent asked claimant, who had considerable influence in governmental as well as in commercial and industrial circles, to promote the placing of an order (or orders) for electrical equipment with the respondent. The parties concluded an agreement whereby the respondent was to pay the claimant a percentage of the price of the electrical equipment contract to be concluded between the respondent and the Argentine authorities. The arbitrator declined his jurisdiction in this case, because ‘a case like this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilised country, nor in any arbitral tribunal’. He concluded that ‘although these commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one’s eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.’

(97) See this case at: <http://translex.uni-koeln.de/output.php?docid=201110>

In addition, the arbitral tribunal may— likely upon the request of one of the parties -apply the mandatory rules of the law closely connected to the dispute,⁽⁹⁸⁾ e.g. the law of the seat of arbitration or the law of the State or States in which enforcement is prospected.⁽⁹⁹⁾ This would avoid any proceedings to challenge the award in the country of seat of arbitration⁽¹⁰⁰⁾ and increase the possibility of recognition and enforcement of arbitral awards in different jurisdictions.⁽¹⁰¹⁾

(98) Lando, *supra* n. 35, at 158. Chukwumerije, *supra* n. 34, at 183. Al-Hajaya, *supra* n. 29, at 72-73, 75. Sheaan, *supra* n. 13, at 76. See also Article 7(1) of the Rome Convention that says: 'When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application'.

(99) Raeschke-Kessler, *supra* n. 60, at 9. Al-Zubi, *supra* n. 25, at 287.

Under both Article 34(2-b-ii) MAL and Article 48 PAL, the competent court may, even *ex officio*, set aside / refuse to enforce the arbitral award if the award is in conflict with the public policy of the State in which it is situated.

(100) Zhilsov, *supra* n. 26, at 108.

(101) Gaillard, *supra* n. 62, at 213. Ruzik, *supra* n. 13, at 17. Baniassadi, *supra* n. 80, at 68. Zhilsov, *supra* n. 26, at 112.

Similar to most, if not all, national arbitration legislations,⁽¹⁰²⁾ Article 43(3) PAL permits either party to challenge against the award in case of violation thereof of the public order in Palestine⁽¹⁰³⁾ Hence, enforceability of the award in Palestine should give Palestinian mandatory rules a strong claim to be applied by the arbitral tribunal sitting in Palestine.⁽¹⁰⁴⁾ Indeed, such a claim could be even stronger in cases in which the public order violated in Palestine has an ‘international focus’.⁽¹⁰⁵⁾

It is also true that, on the one hand, Article 43(5) PAL explicitly allows either of the parties to appeal against the arbitral award (i.e. that made in Palestine in an international commercial arbitration) before the competent court on the ground that this award fails to apply the “rules of law” chosen by them to govern the

(102) Poon, *supra* n. 94, at 188.

(103) Also, under Article 35 of the 1987 Arab Convention on Commercial Arbitration ‘[t]he Supreme Court of each contracting State must give leave to enforce to awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public order.’

Notably, ‘the public policy exception to the finality of arbitral awards ought to be construed narrowly, as relating to the forum’s most basic and explicit principles of justice and fairness’ [see Superior Court of Quebec, Nos. 500-05-017680-966 and 500-05-015828-963, *Louis Dreyfus S.A.S. v. Holding Tusculum B.V.*, 8 .12.2008, CLOUT Case No. 1049, in A/CN.9/SER.C/ABSTRACTS/106]. In addition, if the law applied by the arbitral tribunal to the merits is the law of its seat, there will be no possibility of claiming a violation of the public policy of that seat. In the CLOUT Case No. 638, the applicant alleged that in issuing the award the arbitral tribunal violated the public policy of the Russian Federation, which is a ground for setting aside an award in accordance with Article 34(2) of the Russian Federation International Commercial Arbitration Law. The Moscow District Federal Arbitration Court held that application of the norms of domestic law by the international commercial arbitration court precluded the possibility of claiming a violation of the public policy of the Russian Federation. See A/CN.9/SER.C/ABSTRACTS/58.

(104) Cf. Pricopi & Droc, *supra* n. 18, at 216. Kjos, *supra* n. 19, at 96.

(105) Cf. Poon, *supra* n. 94, at 189, the public order ‘must be one which is not only so fundamental to domestic matters, but also to matters with foreign elements’. Chukwumerije, *supra* n. 34, at 189.

subject matter in dispute.⁽¹⁰⁶⁾ On the other hand, however, the arbitral tribunal should respect its obligation to render an effective award, i.e. an award capable of being enforced in all potential jurisdictions,⁽¹⁰⁷⁾ e.g. the country in which the losing party has its habitual residence (or place of business) or assets that can be seized.

Again, if – in rare cases - the mandatory rules of the domestic law that has a close connection to the dispute are not in conformity with international public policy rules, the latter rules shall prevail.⁽¹⁰⁸⁾ This result is completely in accord with the nature of international commercial arbitration.⁽¹⁰⁹⁾

It should be noted that the mandatory rules (whether the international public policy rules or those of the law closely connected to the dispute) do not entirely exclude the law chosen by the parties; indeed, they would only be applied to a certain point of the dispute. Without such an option, the arbitral tribunal ‘would not be in a position to fulfill [its] obligation to render an enforceable award meeting the requirements of international public policy’.⁽¹¹⁰⁾ Hence, the application of such mandatory rules clearly results in *dépeçage*.⁽¹¹¹⁾

(106) Also, under Article 34(1) of the 1987 Arab Convention on Commercial Arbitration ‘[e]ach party may, by a request sent to the Chairman of the Centre, request that the award be set aside in one of the following cases: (a) if it is obvious that the arbitral tribunal exceeded the scope of its functions’. Under Article 36 (2-A) of the GCC Center’s Rules, the relevant judicial authority in any GCC member State, e.g. Kuwait, may not order the enforcement of the arbitral award if one of the parties files an application for the annulment of the award as the arbitral panel ‘goes beyond the scope of the Agreement’.

(107) Sheaan, *supra* n. 13, at 76.

(108) Baniassadi, *supra* n. 80, at 79. Barraclough & Waincymer, *supra* n. 80, at 218, 219.

(109) Gaillard, *supra* n. 62, at 213.

(110) *Ibid.* See also Silberman & Ferrari, *supra* n. 9, at III.3.

(111) Zhilsov, *supra* n. 26, at 90. Cf. also Kjos, *supra* n. 19, at 96.

III. Choice of Law by the Arbitral Tribunal

As shown above, the parties may choose the substantive law applicable to the merits of arbitration. However, this 'party autonomy only offers the possibility of selecting the applicable law'.⁽¹¹²⁾ So, it sometimes occurs that the parties do not utilize their freedom to choose the law applicable to the merits, whether explicitly or implicitly. The parties, i.e. the businessmen, may consider this issue unimportant and, thus, leave it to their lawyers. The parties' lawyers may be incompetent and, thus, omit a choice of law clause. When negotiating the bargain, the parties may also pay no attention to the matter of the law applicable with which they are not so familiar. In all similar situations, the task of choosing the law applicable to the merits is transferred to the arbitral tribunal.⁽¹¹³⁾

According to MAL and PAL, the arbitral tribunal shall, in such cases, determine the law applicable pursuant to certain conflict-of-laws rules.⁽¹¹⁴⁾ Nevertheless, the determination of the law applicable to the merits of an arbitral dispute is not identical with identifying the law applicable to contracts by domestic courts,⁽¹¹⁵⁾ where such courts 'are strictly bound by the applicable conflict-of-laws rules ... as a part of the national law'.⁽¹¹⁶⁾ In Kuwait, by contrast, the arbitral tribunal has to apply in such cases the law generally applicable to contracts by courts under Article 59 Kuwaiti

(112) Petsche, *supra* n. 19, at 465.

(113) Rubino-Sammaratano, *supra* n. 27, at 426, '[w]hen the arbitrators choose the applicable law, this means there has not even been a tacit choice by the parties'. Al-Fadhel, *supra* n. 11, at 45.

(114) Also, Article 21(1) of the 1987 Arab Convention on Commercial Arbitration says in part: 'The arbitral tribunal shall settle the dispute in compliance with ... the provisions of the law on which they might expressly or tacitly have agreed, else with the law which has the closest relation with the subject matter of the dispute ...'

(115) Al-Rufaiee, *supra* n. 35, at 47. Al-Samdan, *supra* n. 11, at 195.

(116) Belohlavek, *supra* n. 37, at 26.

Law No. 5/1961 as the Kuwaiti arbitration law (i.e. KCCCP) does not include a special provision in this regard.⁽¹¹⁷⁾ In all events, the arbitral tribunal is generally bound to apply to the merits of the dispute terms of the parties' contract and the usages of the trade applicable to the transaction. In fact, the arbitral tribunal bears this obligation no matter whether the parties have chosen the law applicable or not.

1. Choice of Law Pursuant to Certain Conflict-of-Laws Rules

MAL and PAL agree that the arbitral tribunal shall, in the absence of any choice by the parties of the law applicable, determine such law pursuant to certain conflict-of-laws rules. However, MAL allows the arbitral tribunal to apply the conflict-of-laws rule or rules it considers appropriate. PAL, it seems, binds the arbitral tribunal setting in Palestine to apply the conflict-of-laws rules of the forum.⁽¹¹⁸⁾

Under Article 59 Kuwait Law No. 5/1961, the arbitral tribunal, failing a choice by the parties of the law applicable, shall apply to the merits the law of the State in which both parties have their domiciles, if any, or the law of the State in which the agreement to arbitrate is concluded.⁽¹¹⁹⁾ In fact, such a provision does not provide a legal framework that supports international commercial arbitration: Unlike domestic courts, arbitral tribunals must not ap-

(117) However, under Article 12 of the GCC Centre's Charter and Article 29 of its Arbitral Rules of Procedure, the law applicable to the merits shall be the law chosen by the parties or else the law having most relevance to the issue of the dispute pursuant to the conflict-of-laws rules deemed fit by the arbitral tribunal.

(118) Nevertheless, Article 21(1) of the 1987 Arab Convention on Commercial Arbitration gives the arbitral tribunal, failing the parties' choice of law, the power to apply 'the law which has the closest relation with the subject matter of the dispute'.

(119) According to Article 12 of the GCC Centre's Charter and Article 29 of its Arbitral Rules of Procedure, the arbitral tribunal, failing the parties' choice of law, shall however apply to the merits the law that has most relevance to the issue of the dispute pursuant to the conflict-of-laws rules deemed fit by the arbitral tribunal.

ply national conflict-of-laws rules. Even if the arbitral tribunal has to apply a set of conflict-of-laws rules, it shall have much more flexibility than domestic courts.⁽¹²⁰⁾

Article 28(2) MAL expressly says: 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'. According to this approach, the arbitral tribunal shall first identify the appropriate conflict-of-laws rule, then apply this rule and, finally, apply to the merits of the dispute the law referred to by this rule.⁽¹²¹⁾ The arbitral tribunal is not obliged to apply a given conflict-of-laws system.⁽¹²²⁾ Rather, it may apply one of the following approaches:⁽¹²³⁾ conflict-of-laws system of the State in which the arbitral tribunal has its seat;⁽¹²⁴⁾ conflict-of-laws system of the State whose courts would have jurisdiction absent an agreement to arbitrate;⁽¹²⁵⁾ con-

(120) Cf. Luttrell, *supra* n. 2, at 407.

(121) Silberman & Ferrari, *supra* n. 9, at II.2.a. Gaillard, *supra* n. 62, at 202.

(122) Gaillard, *supra* n. 62, at 203, 'this approach gives arbitrators absolute freedom over the choice of the specific choice of law rule they will apply'. Cf. also Schütze et al., *supra* n. 79, at 319.

(123) For advantages and disadvantages of all these approaches, see Silberman & Ferrari, *supra* n. 9, at II.2.b.

(124) Al-Hajaya, *supra* n. 29, at 84. Husein, *supra* n. 29, at 19. Zhilsov, *supra* n. 26, at 85. Chukwumerije, *supra* n. 34, at 126 et seq.

In its award of 21 March 1996, the Schiedsgericht der Handelskammer - Hamburg, Germany applied German law on the ground that the agreement of the parties to refer disputes to an arbitral tribunal sitting in Germany includes a choice of German law. See <http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=FullText>. In its Award No. VB 96074, dated 10.12.1996, the Arbitration Court of the Chamber of Commerce and Industry of Budapest found ' - based upon the separate agreement of the process parties - that it has jurisdiction for the present case' (para. 7). 'The Court of Arbitration - based upon §25 of Law Decree 13 of 1979 [that defines the law applicable to contracts] - stated that for judgment of the present case the Yugoslav material law [including CISG] is applicable' (para. 8). See: <http://cisgw3.law.pace.edu/cases/961210h1.html>.

(125) Husein, *supra* n. 29, at 19. Al-Masri, *supra* n. 21, at 359. According to Silberman & Ferrari (*supra* n. 9, at II.2.a.), 'this approach has not formed the basis of any known arbitral award'.

flict-of-laws system of the State to which the arbitrator belongs;⁽¹²⁶⁾ conflict-of-laws system of the State where the arbitral award will be enforced;⁽¹²⁷⁾ conflict-of-laws system of the State to which the parties' dispute is most closely connected;⁽¹²⁸⁾ and conflict-of-laws rules contained in international instruments,⁽¹²⁹⁾ such as the Rome Convention or the 1955 Hague Convention on the Law Applicable to Contracts for International Sale of Goods⁽¹³⁰⁾ (the Hague Convention). In all events, the law chosen by the arbitral

(126) Husein, *supra* n. 29, at 19. Al-Masri, *supra* n. 21, at 359.

(127) Husein, *supra* n. 29, at 19. Al-Masri, *supra* n. 21, at 359.

(128) See for instance: ICC Partial Award in Case No. 8113 of 1995, in *Collection of ICC Arbitral Awards 1996-2000*, edited by Jean-Jacques Arnaldez, Yves Derains, and Dominique Hascher, (International Chamber of Commerce – 2003), at 385-386. In this case, a Syrian agent and a German trading company entered into an agreement aimed at concluding a contract to open a plant. When a dispute arose between the parties regarding paying by the trading company of monetary dues, the agent – based on an arbitration clause in the agreement – initiated ICC arbitration in Zurich, Switzerland. In a partial award on the applicable law, the arbitral tribunal rejected the defendant's argument that Swiss or German conflict-of-laws rules should apply, choosing Syrian rules of conflict of laws as Syria offered the most connecting factors to the agreement.

Also, in the contract concluded in 1999 between the Kuwaiti owner of an oil refinery and a Korean construction contractor to build the refinery in Indonesia, the law governing the contract was Indonesian law. Any dispute arises between the parties had to be settled through arbitration to take place in Singapore under the Uncitral rules. After seven years of completion of the work, the principal discovered that the construction of the refinery is defective. As negotiations prove fruitless, the principal commenced arbitration against the contractor. The contractor insisted that the limitation of time is a matter of procedural law, and as such the arbitral tribunal has no jurisdiction since the principal's claim was pared under Singapore law which sets a six year time limit for civil claims. The principal argued that the limitation of time is a matter of substantive law, and thus his claim is not bared under Indonesian law that sets a twenty year time limit for civil claims. Since Singapore is a Model Law country, the arbitral tribunal defined the law applicable according to the approach adopted by Article 28(2) MAL. It came to the conclusion that the Indonesian law is applicable because it was the closely connected one to the matter at dispute. See Luttrell, *supra* n. 2, at 411-412.

(129) Lando, *supra* n. 35, at 140. Petsche, *supra* n. 19, at 482.

(130) See, *infra*, the text accompanying fn. 103.

tribunal shall be appropriate to the subject-matter of the dispute according to the surrounding circumstances.⁽¹³¹⁾ This law shall have some connection to the dispute.⁽¹³²⁾

Besides, the arbitral tribunal may apply the so-called “cumulative or comparative method” or “the method of general principles of private international law”.⁽¹³³⁾ Pursuant to the first method, the arbitral tribunal considers all systems of conflict-of-laws with which the parties’ dispute is connected.⁽¹³⁴⁾ In the Interim Award in ICC Case No. 6149, the arbitral tribunal examined the conflict-of-laws rules of the states connected to the dispute and concluded that Korean (seat of seller; place of contracting), Jordanian (place of buyer), Iraqi (place of delivery of goods) and French (place of arbitration) conflict-of-laws rules all pointed to the application of the Korean law. This conclusion, the arbitral tribunal found, is also supported by the conflict-of-laws rule in the Hague Convention and in the Rome Convention.⁽¹³⁵⁾

The second method involves finding common or widely-accepted principles in the main systems of the private international law.⁽¹³⁶⁾ This method was adopted by the China International Economic and Trade Arbitration Commission (CIETAC) in its award dated September 2, 2005. In this case, a French seller and a Chinese buyer entered into a contract for the sale of freezing facilities. During the performance of the contract a dispute regarding

(131) Al-Masri, *supra* n. 21, at 359.

(132) Ruzik, *supra* n. 13, at 8.

(133) Gaillard, *supra* n. 62, at 203. Note, *supra* n. 61, at 1823. Al-Hajaya, *supra* n. 29, at 84. Zhilsov, *supra* n. 26, at 85.

(134) Silberman & Ferrari, *supra* n. 9, at II.2.b. Al-Masri, *supra* n. 21, at 359. Chukwumerije, *supra* n. 34, at 128. Petsche, *supra* n. 19, at 480. Luttrell, *supra* n. 2, at 410.

(135) See *Conflict of Laws in International Arbitration*, edited by Franco Ferrari, Stefan Kröll, Sellier, (European Law Publishers, 2011), at 288-289.

(136) Gaillard, *supra* n. 62, at 204. Zhilsov, *supra* n. 26, at 85. Kjos, *supra* n. 19, at 82-83. Chukwumerije, *supra* n. 34, at 129.

payment of the contract price arose. After negotiations, the parties failed to reach an agreement - prompting the seller to commence arbitration proceedings in accordance with the arbitration clause in the contract. CIETAC found that '[t]he parties did not stipulate either applicable substantive law or procedural law. According to the general principles of international private law and international trade custom, the procedural law of the arbitration place shall apply; as to the substantive law, since France and China where the [Seller]'s and the [Buyer]'s respective places of business are Contracting States of the CISG, the Arbitration Tribunal determined that the provisions of CISG governing the rights and obligations of buyer and seller shall apply'.⁽¹³⁷⁾

As for PAL, Article 19 distinguishes in this respect between two situations:⁽¹³⁸⁾ First, according to paragraph two of this Article, the arbitral tribunal shall, in cases of international arbitration taking place in Palestine (in which the parties did not choose the law applicable), determine this law applicable to the merits pursuant to the Palestinian conflict-of-laws rules. Second, according to paragraph one thereof, however, in cases of international arbitration generally (in particular, that does not take place in Palestine) the arbitral tribunal shall apply the (substantive) Palestinian law if the parties did not choose the law applicable.

Both paragraphs of Article 19 PAL agree that, in the absence of the parties' choice, the arbitral tribunal must select the law applicable. However, they differ in the method according to which

(137) See this case at: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1355&step=FullText>.

(138) It says in part: '1. Parties in international arbitration may agree on the law applicable to the merits of the dispute. In the absence of such agreement, the arbitral tribunal shall apply the Palestinian law. 2. In case of international arbitration taking place in Palestine, if the parties do not reach agreement on the law applicable, substantive rules referred to by the conflict-of-laws rules in the Palestinian law shall apply.'

this law applicable shall be selected by the arbitral tribunal.

It is true that, contrary to the national court, the arbitral tribunal does not have a *lex fori*.⁽¹³⁹⁾ However, it is subject to a *lex arbitri*, i.e. the law governing international commercial arbitration in the country of seat.⁽¹⁴⁰⁾ Thus, since the arbitral tribunal is bound – in cases of international commercial arbitration - to apply PAL as the *lex arbitri* only when such an arbitration takes place in Palestine, it seems that the second paragraph of Article 19 of this law has more relevance. Accordingly, the arbitral tribunal shall determine the law applicable, in the absence of the parties' choice, pursuant to the conflict-of-laws rules in the Palestinian law.⁽¹⁴¹⁾

Obviously, Article 28(2) MAL gives unlimited liberty to the arbitral tribunal to choose the law applicable pursuant to the set of conflict-of-laws rules it considers appropriate. Article 19(2) PAL obliges the arbitral tribunal to apply one set of conflict-of-laws rules, i.e. those of its seat in Palestine.⁽¹⁴²⁾ In fact, this (Palestinian) method was widely held in the past.⁽¹⁴³⁾ However, this method

(139) Rubino-Sammaratano, *supra* n. 27, at 426. Karton, *supra* n. 33, at 33. Petsche, *supra* n. 19, at 479.

(140) Schütze et al., *supra* n. 79, at 320. Kjos, *supra* n. 19, at 65.

(141) As far as tort is concerned, it is generally accepted under Article 3 of the 1944 Civil Wrongs Ordinance, still applicable to Palestine, that the law applicable is the local law of the State in which the illegal act occurs. As for contract, by contrast, there is no effective legal provision according to which the *lex contractus* may be determined. According to the prevailing view amongst doctrine and jurisprudence, supported by the provision of Article 25 of the 2003 Palestine civil law draft, the law applicable to the contract shall be the law chosen by the parties explicitly or implicitly. In the absence of such a choice, the law applicable shall be the law of the State in which both parties have a common domicile. Otherwise, the local law of the State in which the contract is concluded shall apply.

(142) It is worth mentioning here that Article 45 of the 1992 Yemenite Arbitration law, Article 37(2) of the Czech Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitral Awards and Article 31(2) of the 2004 Norwegian Arbitration Act also adopt this method.

(143) Gaillard, *supra* n. 62, at 191. Note, *supra* n. 61, at 1823. Chukwumerije, *supra* n. 34, at 127.

is already abandoned⁽¹⁴⁴⁾ by most modern arbitration instruments, whether domestic laws, international conventions or institutional arbitration rules.⁽¹⁴⁵⁾ Anyway, contrary to the parties, the arbitral tribunal is not permitted – under MAL and PAL – to choose any law ‘without reflecting on the contract and without referring to the contract’.⁽¹⁴⁶⁾

In addition, it is not explicitly determined whether the arbitral tribunal can, under both Article 19 PAL and Article 28 MAL,⁽¹⁴⁷⁾ apply

(144) Karton, *supra* n. 33, at 34. Petsche, *supra* n. 19, at 476. Luttrell, *supra* n. 2, at 408, 410.

(145) Some arbitration instruments adopts the MAL’s approach, i.e. giving the arbitral tribunal unfettered discretion to apply the conflict-of-laws rules it considers appropriate. Examples would be: Article VII, para. 1 of the 1961 European Convention on International Commercial Arbitration, Sec. 46(3) of the 1996 English Arbitration Act, Article 28(2) of the Russian Federation Law on International Commercial Arbitration and Article 33(1) of the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration. Other arbitration instruments require the arbitral tribunal to apply to the international arbitration dispute the law or rules of law with which the dispute has the closest connection. Examples of this group would be: Article 187 of the Swiss Private International Law, Article 1051(2) of the German Civil Procedures Code, Article 12(C-2) of the Turkey International Arbitration Law, Article 39(2) of the 1994 Egyptian Arbitration Law, Article 28(3) of the Arbitral Rules of Procedure for the Gulf Co-operation Council Commercial Arbitration Centre and Article 33(2) of the Arbitration Rules of the German Institute of Arbitration. Yet another group of arbitration instruments allows the arbitral tribunal to directly apply to the merits of the dispute the law or rules of law it considers appropriate, i.e. without explaining their choice through a conflict-of-laws rule. Examples would be: Article 1496(1) of the French Civil Procedures Code, Article 1054(2) of the Netherlands Civil Procedures Code, Article 73(2) of the Tunisian Arbitration Code, Article 28(1) of the 1977 AAA International Arbitration Rules, Article 34(1) of the Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules and Article 16(3) of the Rules of the Conciliation and Arbitration Centre of Tunis.

(146) Belohlavek, *supra* n. 37, at 30.

(147) In contrast, arbitration laws of other jurisdictions clearly permit the arbitral tribunal, failing a choice of law by the parties, to select as governing law the “rules of law” it deems appropriate. See for instance Article 1496(1) of the French Civil Procedures Code, Article 1054(2) of the Netherlands Civil Procedures Code, Article 29(3) of the Ugandan Arbitration and Conciliation Act, and Article 36(2) of the Bangladesh Arbitration Act.

rules of law in the absence of choice of the parties.⁽¹⁴⁸⁾ Surely, the arbitral tribunal may not directly choose such rules of law to apply them to the merits. Without authorization from the parties, the application of rules of law could be regarded as an excess of power or procedural irregularity⁽¹⁴⁹⁾ that might result in rendering of an invalid, unenforceable award. Likewise, the arbitral tribunal may not apply a-national law 'to cases where the tribunal finds that the contents of the applicable law have not been ascertained'.⁽¹⁵⁰⁾ Nevertheless, if the conflict-of-laws rules applied by the arbitral tribunal (particularly under Article 28 MAL) leads to the application of a-national law, the arbitral tribunal may, in such rare cases, encounter no opposition to the application of such rules of law.⁽¹⁵¹⁾

In all events, this rule of both MAL and PAL is criticized. It prevents the arbitral tribunal from directly applying the (a-national) law that fits to international commercial arbitration. Though the arbitral tribunal is bound, in all cases, to apply trade usages under both laws,⁽¹⁵²⁾ it is preferable that they expressly allow it to apply "rules of law" absent the parties' choice.⁽¹⁵³⁾ Indeed, both laws should adopt the direct approach that allows the arbitral tribunal,

(148) Some commentators on MAL even say that the arbitral tribunal cannot, in such cases, apply a non-State law; rather, it must apply a national law. See Uncitral, *supra* n. 26, at 122. Lando, *supra* n. 35, at 155. Melkorian, *supra* n. 61, at 4.

(149) Silberman & Ferrari, *supra* n. 9, at III.3.b.

(150) Lando, *supra* n. 35, at 156.

(151) Silberman & Ferrari, *supra* n. 9, at II.2.b., 'non-State rules should rarely be applied since the vast majority of national conflict of laws rules, or those set forth in international conventions for that matter, do not allow for the application of non-State rules absent a choice by the parties'.

(152) See, *infra*: III.2.b.

(153) See Article 36(2) of the 2001 Bangladesh Arbitration Act, Article 1496(1) of the French Code of Civil Procedure, Article 28(1-iii) of the 1996 Indian Arbitration and Conciliation Act, Article 29(3) of the 1995 Kenyan Arbitration Act, and Article 1054 of the Netherlands Code of Civil Procedure. All these provisions allow the arbitral tribunal, absent the parties' choice, to apply the rules of laws which it considers appropriate.

failing the parties' choice, to select the substantive law / rules of law applicable to the merits.⁽¹⁵⁴⁾

It is noteworthy that, when choosing a law applicable, the arbitral tribunal may consult with the parties on this law; 'their failure to designate it in the arbitration agreement need not be interpreted as the definite waiver of the right to exercise any influence on this matter'.⁽¹⁵⁵⁾ Otherwise, the door may be open to challenge the award on the basis of the violation of the right to be heard.⁽¹⁵⁶⁾

In Kuwait, KCCCP includes no provision in this regard. Thus, the arbitral tribunal shall apply Article 59 Kuwaiti Law No. 5/1961 that generally defines the law applicable to contracts with foreign element. Accordingly, in the absence of any choice by the parties (whether explicit or implicit) of the law applicable, the arbitral tribunal shall in the first place apply the law of the State in which the common domicile of the Parties exists. Failing such a law, the arbitral tribunal shall apply the law of the State in which the arbitration agreement is concluded. Obviously, the arbitral tribunal does not have under Kuwaiti law a discretionary power in determining the law applicable to the merits.⁽¹⁵⁷⁾ Thus, it is recommended that the legislator in Kuwaiti adds a new provision to KCCCP that expressly defines the law the arbitral tribunal has to apply to the merits, particularly when the parties do not choose this law.⁽¹⁵⁸⁾

(154) Notably, Breger & Quast already suggested that the Palestine Arbitration Act provides that, 'where the parties have not specifically stated which law is to be used in their agreement, the arbitral tribunal has the freedom to determine, in its discretion, the rules of law to be applied'. See Breger & Quast, *supra* n. 3, at 254-255.

(155) Uzelac, *supra* n. 32, at 27-28.

(156) *Ibid*, at 28.

(157) Cf. Al-Samdan, *supra* n. 11, at 200, 205.

(158) It is true that Article 12 of the GCC Arbitration Centre's Charter and Article 29 of its Arbitral Rules of Procedure give the arbitral tribunal the power to select in such cases the law applicable to the merits pursuant to the conflict-of-laws rules it deems fit. Nevertheless, having such a new provision in Kuwaiti national law would apparently encourage international commercial arbitration in Kuwait.

Again, the Kuwaiti legislator may adopt in this regard the aforesaid direct approach, too.

2. Application of Terms of the Contract and Trade Usages

In all cases where the dispute relates to a contract⁽¹⁵⁹⁾ (i.e. regardless whether the law applicable is chosen by the parties or the arbitral tribunal), the arbitral tribunal is also bound to take into consideration terms of the contract and trade usages.⁽¹⁶⁰⁾ Article 28(4) MAL says: ‘In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.’⁽¹⁶¹⁾ Article 19(2) PAL says in part: ‘In all cases, the arbitral tribunal shall take into consideration the customs applicable to the relation between parties to the dispute.’⁽¹⁶²⁾

a. Terms of the Contract

Article 28(4) MAL expressly obliges the arbitral tribunal to consider the terms of the contract. A Canadian court of appeal concluded that ‘the arbitrator’s striking of two of the clauses from the settlement goes beyond both the “contractual moderation” apparently inherent to amiable composition and any suppletive action he may have been authorized to carry out. Instead, he set aside the clauses of the contract he deemed to be inexpedient, thereby undoing the “initial balance of the contract”, disturbing the “originally planned proportionality of the prestations”, and

(159) Uncitral, *supra* n. 26, at 122-123.

(160) Atiya, *supra* n. 15, at 308-309.

(161) It should be remembered that also the arbitrator – amiable compositure (governed by Article 28(3) MAL) shall consider the terms of the contract and the usages of the trade applicable to the transaction.

(162) Notably, Article 21(1) of the Arab Convention on Commercial Arbitration and Article 12 of the GCC Arbitration Centre’s Charter and Article 29 of its Arbitral Rules of Procedure requires the arbitral tribunal to take into consideration contract terms and trade usages.

modifying the economy of the contract, even though the parties had spent a great deal of effort developing each of its terms. The arbitrator, although stating that “[t]his is not a question of amending the settlement but of supplementing the failure of the parties to anticipate the effect of the acquisitions”, in actual fact did more than mitigate the strict enforcement of the rights flowing from the contract and chose instead to substantially rewrite the contract despite his lack of clear authorization.⁽¹⁶³⁾

By contrast, Article 19 PAL and Article 182(2) KCCCP do not expressly govern this matter.⁽¹⁶⁴⁾ However, it is generally accepted that the contract is the law of the parties. The terms of the main contract bind, not only the parties to this contract, but also the arbitral tribunal.⁽¹⁶⁵⁾ Since arbitration is basically based upon party autonomy, the arbitral tribunal shall take into consideration the terms of the contract.

In fact, in international commercial arbitration ‘the contract is usually more important than the substantive law that governs it’⁽¹⁶⁶⁾ Once the parties choose the law applicable, the arbitral tribunal shall also take into account the terms of the contract unless they contravene with imperative provisions of that law.⁽¹⁶⁷⁾

(163) *Coderre v. Coderre*, 2008 QCCA 888 (CanLII), para.104, <http://canlii.ca/t/27jm8>.

(164) However, Article 21(1) of the Arab Convention on Commercial Arbitration explicitly says: ‘The arbitral tribunal shall settle the dispute in compliance with the contract entered into between the parties’. Similarly, Article 12 of the GCC Arbitration Centre’s Charter and Article 29(1) of its Arbitral Rules of Procedure compel the arbitral tribunal to consider the contract concluded between the two parties as well as any subsequent agreement between them.

(165) Cf. *Al-Masri*, supra n. 21, at 360. *Chukwumerije*, supra n. 34, at 125. *Atiya*, supra n. 15, at 308-309, 311.

(166) *Luttrell*, supra n. 2, at 409.

(167) *Baniassadi*, supra n. 80, at 71-72, ‘an arbitrator must apply such substantive law [chosen by the parties] including its mandatory rules, even if they run contrary to the contractual stipulations of the parties’. *Al-Zubi*, supra n. 25, at 285. *Al-Fadhel*, supra n. 11, at 45.

In the absence of such a choice, the arbitral tribunal may decide that the rules of law applicable to the contract are the terms of the contract themselves unless the parties agree otherwise.⁽¹⁶⁸⁾ This is due to the close link between the agreement by the parties on the main contract and their agreement on arbitration.⁽¹⁶⁹⁾ Indeed, the ultimate purpose of the arbitration agreement is to solve disputes relating to the main contract.

It is a well-known principle that the arbitration clause is separable from the main contract;⁽¹⁷⁰⁾ and the law applicable to the arbitration agreement may be different from the law that governs the main contract.⁽¹⁷¹⁾ Nullity of the main contract has nothing to do with the arbitration clause⁽¹⁷²⁾ unless the ground of nullity is the absence of consent of the parties to the main contract.⁽¹⁷³⁾ The arbitral tribunal shall not apply the terms of the contract if it is null and void. In such a case, the arbitral tribunal may consider the usages of the trade applicable to the transaction between the parties.

b. Trade Usages

The obligation of the arbitral tribunal to apply the usages of the trade applicable to the transaction between the parties⁽¹⁷⁴⁾ (i.e.

(168) Al-Fadli & Obiedat, *supra* n. 45, at 48.

(169) *Ibid.*

(170) Luttrell, *supra* n. 2, at 406.

(171) Uzelac, *supra* n. 32, at 28. Al-Samdan, *supra* n. 11, at 187. Luttrell, *supra* n. 2, at 406.

(172) Baniassadi, *supra* n. 80, at 80.

(173) Al-Fadli & Obiedat, *supra* n. 45, at 48. Luttrell, *supra* n. 2, at 406.

(174) von Hoffmann, *supra* n. 55, at 108, 'Handelsbräuche sind im Rahmen der Rechtsentscheidung stets anzuwenden'. Emmerlich-Fritsche, *supra* n. 58, at 13. Chukwumerije, *supra* n. 34, at 131.

lex mercatoria)⁽¹⁷⁵⁾ is expressly accepted by both MAL and PAL.⁽¹⁷⁶⁾ Furthermore, in cases of conflict between trade usages and the law chosen, the former prevails.⁽¹⁷⁷⁾ Since the arbitral tribunal does not have a *lex fori*, it is easier for it to apply trade usages than for the national court.⁽¹⁷⁸⁾

In fact, usages are not defined by all laws in question; however, they may be determined based on previous transactions concluded in the same field.⁽¹⁷⁹⁾ In this regard, Article 9(2) CISG says: 'The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.' Likewise, Article 1.9(2) Unidroit principles says: 'The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.' The latter provision goes further than the former: It explicitly stipulates that applicable usages and practices will not be considered if their application is unreasonable. In all

(175) Emmerlich-Fritsche, *supra* n. 58, at 13.

(176) Also, Article 21(1) of the Arab Convention on Commercial Arbitration explicitly says: 'The arbitral tribunal shall settle the dispute in compliance with ... provided that the well-established rules of international commercial usages are respected'. Similarly, Article 12 of the GCC Arbitration Centre's Charter and Article 29(1) of its Arbitral Rules of Procedure compel the arbitral tribunal to consider the local and international business usages and practices.

(177) Al-Hajaya, *supra* n. 29, at 83. Cf. also Ruzik, *supra* n. 13, at 8.

Al-Masri (*supra* n. 21, at 375) argues that usages may not contravene the imperative rules of the law chosen; in cases of conflict between usages and interpretative rules of the law chosen, however, the former prevails.

(178) Al-Rufaiee, *supra* n. 35, at 47-48.

(179) Al-Fadli & Obiedat, *supra* n. 45, at 49.

cases, the arbitral tribunal is not allowed to apply trade usages if the parties exclude them in their contract.⁽¹⁸⁰⁾

The Supreme Court of Switzerland found that, although the parties chose the Swiss law to be applied, the arbitral tribunal drew from the practice prevailing under CISG and Unidroit Principles. It interpreted the contract term “material breach” (which is not known in Swiss law) according to Article 25 CISG and Article 7.3.1 Unidroit principles. The Court rejected the challenge against the arbitral award. It concluded that such reference to transnational rules was acceptable because the parties have a longstanding international commercial relationship.⁽¹⁸¹⁾

Usages differ from the practices which the parties have established between themselves. However, the arbitral tribunal might find it necessary to apply such practices failing any applicable legal, contractual or customary rule.⁽¹⁸²⁾

(180) Al-Masri, *supra* n. 21, at 364.

(181) Decision 4A_240/2009, dated 16.12.2009, <http://www.globalsaleslaw.com/content/api/cisg/urteile/2047.pdf>, ‘Das Schiedsgericht hat ausgehend von der Erwägung, dass der von den Parteien verwendete Begriff des “material breach” im traditionellen schweizerischen Vertragsrecht nicht verwendet werde, dafür gehalten, dass für dessen Auslegung die Umschreibung der wesentlichen Vertragsverletzung (“fundamental breach”) nach Article 25 WKR beigezogen werden könne, obwohl das Wiener Kaufrecht grundsätzlich nicht auf die Vereinbarung anwendbar sei und hat gleichzeitig auf Article 7.3.1 der Unidroit Principles of International Commercial Contracts verwiesen. Es hat damit beurteilt, wie die Parteien als im internationalen Handelsverkehr tätige Unternehmen den von ihnen verwendeten Begriff verstanden bzw. Verstehen durften. Das Schiedsgericht hat damit eine Vertragsauslegung nach Schweizer Recht vorgenommen und nicht entgegen der Rechtswahl der Parteien ausländisches Recht angewendet. Der Vorwurf, das Schiedsgericht habe die eindeutige Rechtswahl der Parteien missachtet und damit seine Zuständigkeit gemäss Article 190 Abs. 2 lit. b IPRG überschritten bzw. Unter Verletzung von Article 190 Abs. 2 lit. c IPRG eine Frage entschieden, die ihm nicht unterbreitet wordens ei, ist damit unbegründet.’

(182) Al-Masri, *supra* n. 21, at 361.

It should be noted that, since the arbitral tribunal must apply trade usages in all cases, it is not of great importance that the governing law, whether chosen by the parties or by the arbitral tribunal, be a national law or just “rules of law”. In both cases, the result would most likely be the same.⁽¹⁸³⁾

IV. Conclusion

In conclusion, it can be emphasized that both MAL and PAL acknowledge the principle of party autonomy in international commercial arbitration. In the absence of the parties’ choice of the law applicable to the merits, however, the former allows the arbitral tribunal to apply the conflict-of-laws rule(s) it considers appropriate, whereas the latter obliges the arbitral tribunal sitting in Palestine to apply the Palestinian conflict-of-laws rule.

In Kuwait, Article 182(2) KCCCP and Article 59 of the Law No. 5/1961 recognize the party autonomy, too. Failing a choice by the parties of the law applicable, Article 59 leads to the application to the merits of the law of the State in which the parties’ common domicile exist, or else the law of the State in which the agreement was concluded. This provision does not clearly cope with the norms accepted in the international commercial arbitration.

(183) Cf. Silberman & Ferrari, *supra* n. 9, at II.2.a.

In this regard, it is also worth saying the following remarks:

1. Article 19 PAL must be amended with regard to the law applicable to the merits failing the parties' choice. It must entail only one method. The Palestinian legislator is advised to adopt the direct approach. Likewise, MAL may be amended to this effect, too.⁽¹⁸⁴⁾
2. Article 19 PAL needs to explicitly provide for the choice by the parties of "rules of law". Also, Article 19 PAL and Article 28 MAL need to make it clear that the arbitral tribunal can, in absence of the parties' choice, apply "rules of law".
3. In order to cope with recent developments in international commercial arbitration, Article 19 PAL must entirely reject renvoi, i.e. both remission and transmission.
4. Article 19 PAL must explicitly oblige the arbitral tribunal to take into account the terms of the contract.
5. Trade usages have to be considered by the arbitral tribunal in all cases; they have priority over the law chosen by the parties. Article 19 PAL and Article 28 MAL should be amended to make it clear that the arbitral tribunal can exclude the law chosen only if trade usages constitute part of the international public policy.

(184) It should be mentioned in this regard that Article 35(1) of the Uncitral Arbitration Rules (as revised in 2010) clearly adopts the direct approach. It says in part: 'Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.'

6. The legislator in Kuwait is advised to reform and modernize the law on arbitral procedure to bring it into line with internationally accepted norms, e.g. MAL. Such a new law shall, inter alia, contain a provision through which the law applicable to the merits of international commercial arbitration can be defined. This provision shall meet all recommendations mentioned above with regard to Article 19 PAL and Article 28 MAL.

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