

CHOICE OF LAW IN INTERNATIONAL
COMMERCIAL ARBITRATION

by

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ABSTRACT

The problems faced by an arbitrator in determining which law to apply to the substance of the dispute before him are considerable. His problems are alleviated when he finds a contractual clause specifying an express choice of law; he therefore gives effect to the parties' choice of law. However, when parties fail to indicate in their contract a law to govern their disputes, an arbitrator, unlike a judge does not have national rules to guide him in determining this law.

The problems faced by an arbitrator has been subject to extensive debates and many authors have advocated solutions to these problems which daily face the arbitrators.

These discussions have centered around the issue whether an arbitrator should apply conflict of law rules, non-national rules or base his decision on an autonomous legal order, commonly referred to as the New Lex Mercatoria. The proponents of the latter view argue that arbitrators should not take into consideration any conflict of law rules or base their decisions on a national legal order.

This concept of New Lex Mercatoria, appears to be gaining considerable support amongst arbitrators. It is argued by the supporters of this view that the principle of party autonomy, which is universally recognized by all trading nations, allows arbitrators to base their decisions on this non-national legal order.

This thesis too is also directed to the study of the above mentioned issues.

An analysis of the above mentioned views show that the New Lex Mercatoria is still vague and uncertain. It will be argued that it is premature to advocate an autonomous legal order which is yet to be recognized by national legal systems. It is shown that party autonomy is greatly affected by protective legislation of the state and by issues of public policy. Therefore this thesis concludes that an arbitrator ought to refer to conflict of law rules in order to ensure enforceability of the arbitration award. While the present state of affairs is hardly conducive to international trade, an autonomous legal order requires the joint efforts of not only the business world but of national legal systems acting as international legislators.

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INTRODUCTION

International commercial arbitration [1] is regarded as the most suitable means for the settlement of disputes that arise out of international transactions.[2]

The increased use of arbitration provisions in international commercial contracts has begun to produce a significant increase in arbitration cases pending world-wide.[3] This, however, is hardly surprising in view of the purported advantages of arbitration over litigation in settling international disputes.[4] Moreover, litigation in foreign courts frequently involves disadvantages such as unfamiliar procedures, hiring of local counsel and apprehension of discriminatory treatment by some courts.[5]

Despite the progress made so far in international commercial arbitration, it is still in its infancy and commentators have recently started to denounce the "Pitfalls in International Commercial Arbitration." [6]

An issue which has attracted a lot of debate and comment is the question of the applicable law in international commercial arbitration.

An international arbitrator when faced with the question of applicable law to a contractual dispute does not have a means of determining this law. The national judge on the other hand will decide this issue on the grounds of national choice of law rules.[8]

How does an arbitrator then determine the applicable law in an existing dispute? An arbitrator in deciding which law to apply to the dispute may find a contractual clause specifying an express

choice of law by the parties. It is obvious however, that where no choice of law clause is stipulated by the parties, the rights, duties and obligations of the parties can only be determined on the basis of some measuring standard.

Should an arbitrator determine what the governing law is by relying on the conflict of law rules of the national courts? or should he decide the case on the ground of a non-national system of law? These and other issues will be the subject of this thesis. The thesis therefore to be developed will look into the conflict aspects in international commercial arbitration.

Part I of this study deals primarily with one aspect of the choice of law rules, the autonomy principle. It ascertains the limitations on party autonomy under the Anglo-Canadian [9] and American [10] systems. This section also demonstrates how arbitrators have interpreted the autonomy rule.

Part II of this study analyses the methods by which arbitrators determine the applicable law, where parties have failed to make a choice.

Part III deals with the concept of Lex Mercatoria.

PART I

I Choice of Law by Parties

The power of the parties to a transnational contract to stipulate the law that will govern their transaction can be said to be widely recognized.[11] The concept of party autonomy [12] has been adopted in all major international conventions dealing with contracts [13] or arbitrations.[14] While the doctrine of party autonomy seems to be widely accepted, the limitations on the parties' rights are less defined and vary from country to country.

A. Party Autonomy under the Anglo-Canadian System

There is no doubt that both English [15] and Canadian [16] legal systems subscribe to the autonomy principle and in particular the Vita Food Prods. Inc. v. Unus Shipping Co. [17] has become the touchstone for both English and Canadian law. The defendant, in this case a Nova Scotian company, agreed in Newfoundland to carry a cargo of herrings from Newfoundland to New York in a Nova Scotian ship. Bills of lading were signed in Newfoundland. The Newfoundland Carriage of Goods by Sea Act provided that the Hague rules applied and governed every contract of carriage from Newfoundland, and every bill of lading regarding such carriage had to contain a clause making the Hague Rules applicable. In this case the bills of lading contained the statement, "This contract shall be governed by English Law." Both the Hague Rules and the bills of lading however exempted the defendant from liability for negligence

of the master. The ship ran aground and the goods were damaged. The plaintiff sued the defendant in Nova Scotia. The defendant pleaded that the bills of lading or Hague Rules exempted them from liability and also pleaded that the contract was governed by Newfoundland law. Plaintiff alleged that the bills of lading were illegal and void, since they did not contain a clause making the Hague Rules applicable as required by s. 3 of the Newfoundland Carriage of Goods by Sea Act.

The Privy Council rejected the plaintiff's claim and held inter alia that failure to comply with s. 3 did not make the bills illegal by Newfoundland law and illegality by the *lex loci contractus* was ineffective. The Privy Council also held that the English law was the proper law of the contract. The position of the law both in England and Canada was clearly stated by Lord Wright in the *Unus* case when he said,

"Where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal (emphasis added) and provided there is no reason for avoiding the choice on the ground of public policy,"[18] (emphasis added).

B. Limitations

(i) Bonafide and Legal

It is unclear what meaning is to be attached to the words "bona fide and legal." While other judges have re-echoed the words of Lord Wright there doesn't appear to be much discussion as to what the terms mean.[19] It has been argued by some commentators that

the requirement of legality begs the question.[20] Another writer is of the view that legality "may mean no more than that the choice must be in accordance with the conflicts rule of the forum".[21]

McLeod is of the view that for the parties' choice to be bona fide and legal their right must be exercised for a proper purpose. There must be sound commercial financial or practical reasons justifying the express choice of law.[22]

It has also been suggested that a choice of law (whether local or foreign) is not bona fide where it is made with the intention of evading provisions of the law which would have applied in the absence of a choice.[23]

Such was the decision in the Australian case of Golden Acres Ltd. v. Queensland Estates Pty. Ltd. [24]

A Hong Kong company carrying on business in Queensland, Australia, entered into a contract with the defendant, a Queensland company, providing for a commission to be paid to the plaintiff for the sale of land in Queensland. The prospective purchasers of the land were resident in Hong Kong. The agreement provided that "for all purposes arising under the agreement, it shall be deemed to be entered into the colony of Hong Kong".

The court concluded that an express choice of law in favour of the law of Hong Kong was not bona fide as it was specifically intended to avoid the Queensland statutory requirement that all contracts of this type made with real estate agents not licensed by the state of Queensland were illegal.[25]

While it may be true that parties will sometimes try to evade mandatory provisions of the law of the country to which the

transaction is closely connected, such choice may be for reasons other than evasion. Where parties to a contract however choose a law which has some factual connection with the transaction, the parties should not be regarded as evading the mandatory provisions of the law of the place which is substantially connected with the contract simply because it excludes certain requirements of that law. The terms of the contract are generally the best indication of the parties' intentions. However, where the parties' choice has no connection whatsoever with the law of the country chosen except for the choice of law clause and such clause contravenes the mandatory laws of the country with which the contract is substantially connected,[26] this may no doubt be evidence of evasion.

(ii) Public Policy

Among the oldest [27] and most strongly established principles of private international law is the public policy principle. The express choice of law by the parties is of course limited in Britain [28] and Canada [29] by the principle that the forum may refuse to apply the stipulated law on the ground that it infringes the forum's stringent public policy. The principle was stated by Fry J. in a case Rousillon v. Rousillon [30] when he said

"It has been insisted that, even if the contract was void by the law of England as against public policy, yet inasmuch as the contract was made in France, it must be good here, because the law of France knows no such principle as that by which unreasonable contracts in the restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made." [31]

While there is a general agreement that a choice of law is subject to the requirement of public policy, the limits to this public policy exclusion are unclear and there are few reported cases on this issue. It might therefore be difficult to assess how this exception to the autonomy rule works in practice. It however appears that public policy in international contracts has a narrower meaning than that accorded purely domestic contracts. A commentator said that not every rule of law which belongs to the "ordre public interne" is necessary part of the "ordre public externe or international." [32] Courts are known to have given effect to contracts governed by foreign law when such contracts were void according to the principles of the forum's domestic law. [33]

There are few situations where English or Canadian law will invalidate a claim based on foreign law on the ground of public policy.

Prebble [34] categorised the situations when the English courts would refuse to give effect to foreign law, under the following heads:

- (i) Where the fundamental conceptions of English justice are disregarded. [35]
- (ii) Where the English conceptions of morality are infringed. [36]
- (iii) Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers. [37]
- (iv) Where a foreign law or status offends the English conception of liberty and freedom of action. [38]

The above mentioned categories are of course not exhaustive. Any particular foreign law will have to be examined in the context of the case at bar to determine if it will produce a result which is unacceptable. If it does, it will not be applied.[39]

The position of the Canadian law was succinctly expressed by Martin C.J.S. in Canadian Acceptance Corp. v. Matte,[40] where he stated that authorities demonstrated that the public policy rule had a limited application. He observed that the types of contracts to which the rule had been applied were those concerning matters such as restraint of trade, champerty, interference with criminal prosecution and collusion for the purposes of obtaining a divorce.

The same view was recently adopted by Medhurst J. in Greenshields Inc. v. Johnson. [41]

Against this background, it should therefore not be regarded as an exaggeration to state that in Canada and Britain, the concept of public policy in international contracts has little or no effect on the doctrine of party autonomy. The law in Canada and Britain as can be deduced from various commentators,[42] stated briefly, is that an express choice of law by the parties, even one that is unwholly connected with the contract, will be given effect to by the courts, provided it is bona fide and legal and it does not attempt to evade the mandatory provisions of the law with which the contract has its closest and most real connection.

This certainty is however marred in England by comments from some English judges who do not ascribe to such unlimited freedom of choice for the parties. Upjohn J. stated obiter in Re Helbert Wagg & Co. Ltd. [43] "The court will not necessarily regard" an express

choice of law "as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked upon as a whole." [44] Denning L.J. said too in Boissevain v. Weil, [45] "notwithstanding what was said in Vita Foods Products v. Unus Shipping Co. I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. The intention is only one of the factors to be taken into account." [46]

These comments by the courts do not in this writer's opinion state the true position of the law in England. These comments were not only made obiter but recent decisions of the House of Lords have reiterated the principle in the Unus case. [47]

While doubts have been cast on the position of the law in England the law in Canada appears to be clearer. Although courts in Canada have regularly given effect to the express choice of law clause without an involved discussion of the rule, [48] they have continuously reiterated the principle in the Vita case and a scholarly authority on Canadian law states, "It appears that in Canada the parties are free to select any system of law applicable to their contract even if it is totally unconnected with the transaction apart from the choice of law clause. Their choice is not restricted to the system of law of any of the jurisdiction with which the transaction is factually connected." [49]

C. Party Autonomy and the Law in the U.S.

It is common for American conflict scholars to refer to the choice of law rules in the contract area as the most complex and confused area of choice of law problem.[50]

This however is hardly surprising since American courts have grappled more with this problem and have evolved more conflict law methods than any other country.

The determination of the law by parties to govern their contractual rights and obligations is one of the important problems that has generated a lot of comment from leading writers.[51] Since it will be impossible to undertake a detailed analysis of the various American jurisdictions and of the conflict of law methods applied by the courts, this study shall examine how the courts in New York have dealt with the question of party autonomy in the state.

It will however be proper before looking into the principle of party autonomy in New York to briefly take a look at a few provisions in the Second Restatement. It is worth special attention because as an embodiment of American law [52] the Second Restatement is a "convenient organizing point for a discussion of the American Law." [53]

The Second Restatement adopts the autonomy principle in section 187(2). It states,

"The Law of the state chosen by the parties to govern their contractual rights and duties will be applied even if the particular issue is one which the parties could not have resolved by an explicit provision in their contract directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of

a state which has a materially greater interest than the chosen state in the determination of the particular issue, and which under the rule of s. 188(4) would be the state of the applicable law in the absence of an effective choice of law by the parties."

The terms of s. 187(2) clearly shows that parties' discretion to select the law to govern their contracts is not unlimited. This section contains built in limitations upon party autonomy. There must be substantial or otherwise reasonable basis for the parties' choice and this law must not be contrary to the fundamental policy of the law that would be applicable in the absence of a choice of law clause.

(i) Party Autonomy and the Courts in New York

While there is a clear articulation of the principle of party autonomy under the Second Restatement on the conflict of law rules, a review of some New York cases [54] show a morass of confusion and uncertainty in this area of the law.

Whether a court upholds a choice of law when stipulated as being valid and effective depends on the test applied by the courts in determining which jurisdiction law applies. New York courts have not stuck to one rule or criteria but have combined acceptance of about three different rules. (1) A grouping of contacts or the interest analysis test; (2) the rule of applying the law of jurisdiction chosen if the transaction bears a reasonable relationship to that jurisdiction (otherwise known as the common law rule; (3) The rule of validation in cases of agreement which are allegedly usurious.[55]

This study shall further limit itself to the examination of party autonomy under the reasonable relation test.

(ii) Reasonable Relation Test and Party Autonomy.

A number of cases [56] have in recent times followed the rule that a provision setting forth the choice of law in a contract will be followed as long as the transaction bears a reasonable relation to the law chosen and is not against public policy. In Gambar Enterprises, Inc. v. Kelly Services, Inc. [57] the Appellate Division upheld a governing law clause in a service contract stipulating Michigan law, and stated inter alia, "Jurisdiction whose law the parties to a contract intended to apply must bear reasonable relation to the agreement ... and the enforcement of the provision applying a foreign rule of law must not violate a fundamental public policy of New York." [58]

The court found a reasonable relation to Michigan because the contract was accepted in Michigan, performance of the contract was partly to be performed in Michigan.

Several federal district courts sitting in New York and applying New York conflict rules have also applied the reasonable relation test. In B.M. Heede Inc. v. West India Machinery and Supply Co., [59] a case involving a breach of contract by a New York company against a Puerto Rican company, the court upheld the choice of law stipulated by the parties: The court stated,

"The parties may stipulate in the contract the law to be applied in determining questions of validity (or at least, closely related subjects) and interpretation, where the law chosen has some reasonable relationship with the contract and where the fundamental public policy of the forum is not vitiated ... the New York State Court decisions require no different result." [60]

The court found a reasonable relationship with the contract because plaintiff's principal place of business was in New York and

the agreement was partly executed in New York and partially to be performed there.

One is however led to ask what meaning should be given to the words, "reasonable relation to the contract". While a clear statement of the courts' stance cannot be found, an examination of the cases reveal that contact with a jurisdiction is necessary before a choice of law is given effect.[61] In Levey v. Saphier,[62] the court gave effect to a stipulation of New York law in an option and voting agreement among shareholders and former shareholders of a Delaware corporation. The court found the contacts with New York to be "substantial".

By requiring a nexus with a particular jurisdiction, the courts however appear to give a narrow interpretation to the term 'reasonable relation'. This, however, is seen as undesirable by some commentators. Tuchler comments, "In some cases the parties to an essentially international arrangement might wish to bargain in relation to the rules of law of an otherwise unrelated state. ... It would seem quite proper to give this kind of 'relationship' the label 'reasonable' if the relationship was established in a fair and proper manner by parties in equivalent bargaining position..."[63]

Professor Reese [64] has also expressed doubts as to the usefulness of restricting the parties' choice to laws which have some connection with the contract. He would require that there be some reasonable basis for making the decision.

It may be inferred from some recent cases that New York courts will give a liberal interpretation to the term 'reasonable relation' to include the term 'reasonable basis'. In a case Joy v. Heidrick

and Struggles Inc. [65] the court cited Second Restatement s. 187(2) as representing New York law and held that Illinois law had no "substantial relationship to or reasonable basis for" the parties' choice.[66]

In Weight Watchers of Quebec Ltd. v. Weight Watchers International Inc., [67] the judge in a footnote stated, "The court will honor a choice-of-law rule consented to by the parties where there is a reasonable basis for the choice or that the chosen state has some relation to the agreement." [68]

In the case of Reger v. National Association of Bedding Manufacturers Group Insurance, [69] the plaintiff, a widow of the insured decedent and beneficiary of a terminated group life insurance policy sued the group policy sponsors for negligence. The policy was governed by Illinois law. The insurance terminated when the employer went out of business and the insured decedent (plaintiff's deceased husband) was not informed of his right to convert the group life insurance into individual life insurance and therefore failed to do so.

Despite the fact that the insured decedent and the plaintiff were New York residents, the employer of the insured which had sponsored the group insurance for its employees was located in New York, and the certificate of insurance was delivered to the insured in New York, the court held that Illinois law applied. The court citing s. 187 in support of its decision said, "However, as noted in comment f to section 187 of the Second Restatement on the conflicts of laws: "The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no

substantial relationship" [70] and it concluded that the parties' choice had a reasonable basis to support the application of Illinois law, since it will serve the desirable objective "to achieve uniform and juridical symmetry".[71]

(iii) Public Policy

Before looking into the concept of public policy in New York, it is important to note that in the U.S.A., statutory laws [72] have developed which are closely related to, but not actually part of public policy. One such statutory law, the Securities Exchange Act of 1934 was a premise of the decision by the U.S. Supreme Court in Scherk v. Alberto-Culver Co. [73] In this case, action was brought by Alberto-Culver Company, an American corporation and purchaser of European business entities, against a German citizen, Scherk, as seller of the business entities, to recover damages and other relief based on the claim that the purchaser had defrauded, in violation of the Securities Exchange Act, in connection with representations concerning trade marks which were transferred as part of the sale. Scherk however moved the court for stay of proceedings pending arbitration in Paris. The U.S. District Court for northern Illinois refused to stay arbitration. The order was affirmed by the U.S. Court of Appeals for the Seventh Circuit (Note: Both courts relied on an earlier case Wilko v. Swan, 346 U.S. 427 (1953) where the Supreme Court held that an arbitration clause to which the 1934 Securities Exchange Act was exclusively applicable was invalid. (Parties were U.S. citizens.) The Supreme Court reversed the judgment of the Court of Appeals. The Supreme Court distinguished the Wilko case from Scherk's case. It was the opinion of the Court

that while the agreement in Wilko involved parties in the U.S., Alberto- Culver's contract "was a truly international agreement" and therefore such a contract involves considerations and policies different from that in Wilko.

The court further pointed out that invalidation of the arbitration agreement would reflect a "parochial concept that all disputes must be resolved under our laws and ... we cannot have trade and commerce in world markets and international waters exclusively on our terms, [and] governed by our laws." [74] Scherk's case clearly shows that securities issues which would be non-arbitrable in a domestic context will nevertheless be arbitrable if such an issue arose in international arbitration.

The United States Court of Appeals for the First Circuit has recently decided that the decision in Scherk's case does not apply to anti-trust issues. [75]

In this case Soler Chrysler-Plymouth (Soler), a Puerto Rican corporation, became a Chrysler-Mitsubishi dealer in 1979 when it entered into a "Distributor Agreement" with Chrysler International S.A. (Chrysler). Soler also entered into a separate "Sales Procedure Agreement" with Chrysler and Mitsubishi Motors Corporation (Mitsubishi). [76] The sales procedure agreement contained an arbitration clause providing that "all disputes, controversies or differences which may arise between Mitsubishi and Soler out of certain portions of the agreement would be "settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." [77]

In 1981 Soler failed to meet minimal sales commitments and desired therefore to sell some of the vehicles outside of its territory by shipping them to South and Central America and to the United States. Mitsubishi denied Soler the permission to do so and as Soler's inventory increased, Mitsubishi withheld shipment of additional vehicles, storing them in Japan. Soler disclaimed responsibility for the stored vehicles and Mitsubishi brought suit, alleging breach of several provisions of the sales procedure agreement. Pursuant to this agreement, Mitsubishi petitioned for an order to compel arbitration. Soler denied the allegations and counterclaimed, alleging violations of the Sherman Anti-trust Act and the Puerto Rico Anti-trust and Unfair Competition Statute.[78] The District Court ordered the parties to arbitration. Soler appealed. On appeal the Court ruled that Soler's trans-shipment allegation fell within the scope of the arbitration clause but, however, held that anti-trust issues could not be arbitrated. The court observed that federal courts generally do not subject anti-trust issues in contract disputes between United States citizens to arbitration. The Court gave four reasons for this stance. First, anti-trust law is so important to the functioning of a free economy that its enforcement is delegated by statute to private parties as well as the government. Second, it is likely too that contracts generating antitrust claims are contracts of adhesion, and forum selection by such contracts is undesirable. Third, antitrust issues often involve extremely complex legal doctrine and economic data, the analysis of which is anathema to the qualities of expediency, simplicity, resort to basic concepts of

equity and common sense, and minimal requirements of written rationale which are the strengths of arbitration. Finally, decisions regarding the regulation of business are viewed as inappropriate for delegation to arbitrators chosen from the business community not only of the United States, but also of foreign states having no experience with or exposure to the United States law or values in the antitrust area. The Court also held that this decision is compatible with the convention on the recognition and enforcement of foreign arbitral awards and does not conflict with the Supreme Court's ruling in *Scherk v. Alberto-Culver Co.* The Court distinguished the case in point with *Scherk's* case. It stated inter alia that the public policy basis of the securities laws are designed primarily to protect a fairly small "special interest" group of investors in a particular security, whereas antitrust violations could "affect hundreds of thousands - perhaps millions of people and inflict staggering economic damage."

The Mitsubishi case therefore represents an expansion to the use of the public policy exception in international trade.

The limitation of public policy is clearly too a rule in New York. In *Compania de Inversiones Internacionales v. Industri Hypotekshanken, Finland A/B.*[79], the plaintiff, an Argentinian corporation, had purchased bonds of defendant Finnish bank. This bond purchase agreement contained a clause stipulating that payment was to be made in gold coin of the U.S.A. The Court held that this agreement violated the public policy of New York since there was a joint resolution of Congress which nullified such clauses.

A commentator [80] observed that although the public policy limitation of the governing clause has frequently been mentioned, there are only a few cases which actually denied enforcement of a contract which was subject to a foreign law on the basis that the contract violated a strong New York policy.

A thorough perusal of the foregoing would indicate that in New York, the courts under the common-law rule recognize the autonomy principle so long as the parties' choice of law bears a reasonable relation to the transaction and does not violate the public policy of New York.[81] Despite the fact that the autonomy doctrine seems settled and decisive both in theory and practice under the common law conflict rule, recent decisions of the courts seem to cast doubt not only on the continued application of the common law rule but also on the autonomy doctrine. These decisions led one critic, R. Bauerfeld, to comment, "The courts' reluctance to give determinative weight for a choice-of-law clause is especially apparent in New York where the courts do not even purport to follow the autonomy rule." [82] He further on states, "Choice-of-law clauses simply are not followed by the courts. New York courts are candid in this respect." [83]

Does Bauerfeld's statement reflect the true position of New York law? I shall attempt to answer this question by reviewing a number of these controversial cases.

Haag v. Barnes [84] involved the question whether New York or Illinois law should be applied to determine the validity of an agreement for the support of an illegitimate child. Judge Fuld (as he then was) stated,

"The traditional view was that the law governing a contract is to be determined by the intention of the parties [citations omitted]. The more modern view is that "the courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place, 'which has the most significant contacts with the matter in dispute' But, even if the parties' intention and the place of the making of the contract are not given decisive effect, they are nevertheless to be given heavy weight in determining which jurisdiction 'has the most significant contacts with the matter in dispute'".[85]

The import of this remark was left unclear, since it would appear that some consideration too was given to the intention of the parties, for the court stated, "Whichever of those views [that is the traditional and modern view] one applies in the case, however, the answer is the same, namely that Illinois law applies." [86] Subsequent decisions seem to echo the opinion of Judge Fuld. In the case of La Beach v. Beatrice Foods Co. [87] an action was brought by Lloyd La Beach against his former employer, Beatrice Foods Company and G. Amachree, a Nigerian attorney. The complaint alleges that the defendants wrongfully coerced La Beach into giving up his controlling interest in Express Dairy Ltd., a Nigerian Company. His contract of employment provided that it was to be "construed and governed by the laws of the State of Illinois, regardless of the fact that the performance of [La Beach's] duties [was to] take place principally in Nigeria."

The question before the court was whether Illinois or Nigerian law should govern the contract.

The Court held,

"A number of New York cases have held that where the parties to a contract have included a choice of law provision, effect is to be given to their choice as long

as there is a reasonable relation between the transaction and the jurisdiction whose law was chosen [citations omitted]. The New York Court of Appeals has suggested, however, that this doctrine need not be strictly followed. Instead, it has held that while parties' choice of law is to be given considerable weight, the law of the jurisdiction with the "most significant contracts" is to be applied." [88] [citing Haag v. Barnes]

In another case, Southern International Sales Co., Inc. v. Potter & Brumfield [89] the Court stated as follows:

"There are, as defendant notes, a number of New York cases that hold the parties' choice of law to control where their contract has a reasonable relation to the jurisdiction whose law they choose. But this begins rather than ends inquiry. There is also authority from the New York Court of Appeals suggesting that the parties' intention and stipulation as to the law governing their contract is but one factor, albeit a weighty one, in deciding the ultimate question - namely, which jurisdiction has the most significant contacts with the matter at issue." [90] [citing Haag v. Barnes]

A conclusion that may be drawn from a review of these cases is that, while parties could choose a law to govern their contractual obligations, this choice is only upheld if it is the law of the jurisdiction with the most significant contact. The reasonableness of the choice is not the determining factor.

No clear-cut direction however can be deduced from these cases that purportedly followed the decision in Haag v. Barnes. While in Potter's case the parties' intention was regarded as one of the factors to be taken into consideration and therefore not conclusive, in La Beach's case, the court it would appear regarded the reasonable relation test as the general rule but which can be deviated from under certain circumstances.

It is this writer's view that although there is a bewildering inconsistency of judicial decisions, [91] the New York courts do

generally recognize the autonomy rule under the common law conflict rule.[92]

It cannot be doubted that Mr. Bauerfeld has the force of a number of authorities to back up his opinion. Yet a review of other New York cases [93] overwhelmingly show that party autonomy is recognized subject to the reasonable relation test and public policy considerations.

Another reason which could counter Mr. Bauerfeld's assertion is the fact that New York has enacted the Uniform Commercial Code,[94] and this code specifically upholds the party autonomy rule.[95] If we are to agree with Mr. Bauerfeld, we are in essence saying that New York has two conflicting laws, one upholding the principle of party autonomy, while the other does not recognize it. This is not only absurd but unlikely.

D. An Overview of Anglo Canadian and New York Approach

An overview of the discussion above would suggest that there is a marked difference between the Anglo-Canadian conflict of law rules and the common law conflict rule of New York. From a review of both Canadian and English cases stated above, it seems true to say that under both legal systems, the parties' choices are upheld and are also unfettered by the substantial relation test. The same may not be true under the common law rule in New York. In reality, this difference may not be great and may be narrowed down substantially. This depends on how the courts in New York interpret the term 'reasonable relation'. If this term is deemed to include the term 'reasonable basis', parties could therefore chose the law of a

country which would be unconnected to either of the parties. While the position in Canada and Britain is clear, the position of the law in New York is clouded with uncertainty. It is generally accepted, however, that there should be a reasonable relationship between the law chosen and the transaction and the choice should not be against the public policy of the forum. The limitations therefore on the autonomy principle in England and Canada would appear to be relatively mild when compared to New York law.

Having established the fact that party autonomy is qualified under the various legal systems by their conflict of law rules, it will be interesting to examine the views of a number of commentators on party autonomy and the application of conflict rules by arbitrators in international commercial disputes. This however is not merely theoretical but could be of practical importance since the enforcement of an award may depend on the conduct of the arbitral proceedings. The question which has been the subject of debate is, should the arbitrator give effect to the parties' choice per se, or should he check the validity of the parties' choice against the conflict of law rules of a state. If so, to which conflict of law rules should he refer? The solutions suggested by various commentators is the subject of the following section.

E. Scholarly Views on Party Autonomy in International Commercial Arbitration

A solution to the arbitrators' dilemma was suggested by Professor F.A. Mann in an article "Lex facit Arbitrum" [96]. Professor Mann stated,

"No act of the parties have any legal effect except as the result of the sanction given to it by a legal system. Hence, it is unavoidable to ascertain such system before the act of the parties can be upheld ... Whatever the intentions of the parties may be, the legislative and judicial authorities of the seat control the tribunal's existence, composition and activities." [97]

He therefore concludes that just as the judge has to apply the private international law of the forum, so also the arbitrator has to apply the private international law of the arbitration tribunal seat which he calls the "Lex arbitri." [98] The first task therefore for an arbitrator according to Mr. Mann would be to test the validity of an express choice of law by the parties by the law of the seat of arbitration. Mann recognizes the autonomy of the parties to the extent that it accords with the provisions of the lex fori so that if the conflict rules of the lex fori points to another law as the proper law, the arbitrator must disregard the parties' choice. [99]

Wetter [100] also appears to agree with Mann that party autonomy is limited by national or territorial considerations. He does not agree with the view that the autonomy principle has "a generative force of its own". He takes a more flexible position than Mann. He is of the view that in international arbitration, the laws of at least two jurisdictions are relevant, the forum state and the seat of eventual enforcement of the award. He also observes that the laws of the following jurisdictions may play a role: the laws of the jurisdiction where a stay may be sought, the jurisdiction whose procedural law is to govern (if different from that of the forum designated by the parties), and the jurisdiction whose substantive law is to govern the contract.

In contrast, Lew [101] argues that there is neither need or justification for the parties' choice of law to conform with the conflict of law rules of a national system. The arbitrator he points out owes no duty or allegiance to any state or national law but only to the parties and to international trade in general, the arbitrator should therefore give effect to the choice per se. He also observes that since the autonomy principle is recognized in most jurisdictions, it will be superfluous for the arbitrators to further consider the law to apply to the dispute for this will also negate the intentions of the parties. Party autonomy he further argues should be considered as a distinct legal order, a "transnational conflict of law rule" for he said,

"with no national conflict of laws systems and no forum law on which to fall back, on what basis should the arbitrators determine the rights, obligations and duties of the parties' presumably on the basis of some non-national conflict of laws system. What could be more non-national than the will of the parties." [102]

Jean Robert argued in the same vein when he said,

"It is first of all proper to leave the parties the full right to choose the applicable law. In our view, it would be a mistake to make such autonomy subject to its admission by some rules connecting it to some other law. The contractual character dominates arbitration to such an extent, especially international [arbitration], that the autonomous law has to be considered as being the superior rule of this institution which can only be limited by public policy. Thus, in order that it be otherwise, the international public policy of the law of arbitration must prohibit the parties from expressing their choice of the basic law applicable to them. To our knowledge, however, no such prohibition exists in any legal system normally applicable. Consequently one should consider that the liberty of the parties to express their choice constitutes the first and foremost rule." [103]

While the view expressed by Mann appears to be very restrictive, Lew on the other hand takes a very liberal stance. Mann's view is based on the premise that a single system must give binding effect to the choice of law by the parties. This, according to Mann is the law of the seat. While parties' rights it is agreed may be limited by the law of the seat or *lex arbitri*, it is difficult today to regard an international arbitral process as nothing more but a purely domestic process.[104] To equate the role of an arbitrator with that of a judge appears artificial and highly contestable.[105] The objection to Mr Mann's thesis is that he fails to recognize the objective difference between a national court and an arbitral tribunal.

Lew on the other hand fails to separate a vision of what is to be from the present day realities. It may be that arbitral practice has run ahead of the evolution in legislation. To be effective an arbitral award may require a national court to enforce it and enforcement may depend on some national considerations or requirements.

F. Arbitrators and Party Autonomy: Practice

We have seen from the above treatment of the party autonomy principle that it is generally recognized that there are limitations to this principle. This section of the study will try to ascertain the weight accorded choice of law clauses by arbitrators in their decisions. The principle of party autonomy takes a greater perspective in arbitrations in the sense that an arbitrator's authority to act is derived from the parties.

An analysis of how the arbitrators act in practice will be attempted from a review of a number of arbitral awards.[106] While any conclusion that will be drawn from this analysis may be far from complete, since very few awards have so far been reported, it will however give us an insight into arbitral practice.

In an I.C.C. arbitration [107] that took place in Switzerland, the arbitrator rejected Swiss law which was the proper law according to Swiss private international law rules and applied the law chosen by the parties. He stated, "In the present case, Swiss law would be applicable. However, on several occasions, the parties have invoked the law of Yugoslavia. It would therefore not be acceptable to apply Swiss law if the parties themselves want the law of Yugoslavia applied." [108]

In another case [109] a dispute arose from the failure by a Pakistani bank to execute a guarantee in favour of an Indian company. The arbitrator held inter alia

"The Bank Guarantee expressly provided for the application of Indian law. Since the parties have made an express choice, it is irrelevant to examine authorities or doctrinal writings on the question of tacit or implied intention, or of the power of the court to infer a selection of law, or what facts and incidents of the case should be examined and taken into account in order to decide with which legal system the contract is 'most substantially connected'. The arbitrator has no power to substitute his own choice to that of the parties, as soon as there exists an expressed clear and unambiguous choice." [110]

In a dispute between a Swedish manufacturer and a Phillipine buyer the arbitrator observed, "In clause 13 of the contract of January 26, 1963 the parties agreed that disputes arising from the contract should be dealt with according to Swedish law. As from the

legal point of view, there is no objection to such an agreement, the arbitrator is bound to apply Swedish law."[111]

An interesting decision was reached in an ad hoc [112] arbitration held in Paris. This arbitration arose out of a dispute concerning a concession contract between a Belgium company, S.A. Mines Mineraux et Metaux (MMM), the world exclusive distributor for the products of company E and an English company, Mechema. MMM granted part of this exclusive distributorship for the United Kingdom and Ireland to Mechema. The concession contract contained an arbitration clause empowering the arbitrators to decide as Amiables Compositeurs. On the question of the applicable law, the arbitrators stated,

"Lacking any serious indication as to the intention of the parties to apply a specific law, the only element worth considering would be the objective localization of the contract in view of the characteristic performance, the criterion which is most generally acknowledged - in this case, England - whereas English law does not allow amiable composition.

However, it appears that the parties have clearly expressed as their intention, that they have indeed sought to give the amiable composition an extremely comprehensive meaning and sought to help possible litigations escape from any national law."[113]

A similar decision was arrived at in an ad hoc arbitration that took place in Netherlands concerning an agency agreement. The arbitrators stated inter alia, "Arbitrators refrain from pronouncing themselves on whether Belgian or Norwegian law is applicable on the contract between the parties. The contract itself stipulates that arbitrators are to decide in equity and in conformity with international standards. Arbitrators will do so."[114]

The party autonomy principle was given effect per se, in a dispute involving a licence agreement between a Swiss and a French corporation. The arbitrators held, "This decision on the substance [of the dispute] must be reached in accordance with the Swiss law which the parties have agreed to make applicable by Article XVI of the licence contract concluded between them." [115]

There are however, other awards where the choice of law by the parties was upheld because they were in accordance with the conflict rules of a national system.

In one I.C.C. arbitration [116] held in Switzerland, the parties expressly agreed that Swiss law is to be applied to their case. The arbitrator stated inter alia, "If a concrete rule of conflict rules has to be applied, the law in force at the seat of the arbitral tribunal must be followed." He therefore upheld the choice of the law by the parties since it was in accordance with the Swiss rule of private international law which required that every choice of law should be justified by a reasonable interest.

He observed,

"in the present case, it should be taken into account that the parties come from countries which have different social systems and the matters of the contract were destined for a country of the third world. They have avoided the conflicts which were likely to arise under these circumstances, by stipulating the application of Swiss law. As the seat of the arbitral tribunal is stipulated in Switzerland, the choice is justified by a lawful interest. Under these conditions, the application of Swiss law does not counter any objection." [117]

In a dispute concerning an agency agreement between a German and an Austrian party, the arbitrator in upholding the parties' choice of law justified his stance in the following words,

"First of all, it has to be borne in mind that the dominant opinion in Germany, Austria and Switzerland recognizes the rights of the parties to choose the applicable law. We are not governed here with determining the simple hypothetical will of the parties as they have clearly expressed their will before the tribunal if not at the time of concluding the contract." [118]

A review of the arbitral awards noted above reveals a distinct pattern. It seems an arbitrator will invariably uphold the parties' choice of law and that the most important consideration for him is the intention of the parties expressly and unambiguously indicated. This attitude of the arbitrator is hardly surprising. Contractual provisions are looked upon by arbitrators as more or less 'sacred' and the need for certainty and predictability is strongly felt by the business communities. [119] This attitude however appears to be in contradistinction with that of a judge of a municipal court dealing with an 'international' case. He may have to ascertain that the chosen law is not capricious but reasonably related or substantially connected with the contract, and also not against public policy of the forum. It is important that the concept of party autonomy is given a broad interpretation by national legal systems in order to enhance predictability which is necessary in an international contract. The requirements of substantial connection, or words to like effect, between the chosen law and the transaction ought not to affect the parties' choice as long as there is a factual connection between the chosen law and the transaction, and this law does not try to evade mandatory laws of the country to which the contract is substantially connected.

On the other hand while there is a need for arbitrators to uphold the parties' choice of law, it is important that they do not

give effect to a choice of law clause which is capricious, for this could be a device formulated by unscrupulous businessmen trying to evade mandatory provisions of the law. Public policy considerations too should be given a very narrow interpretation. It is unfortunate that this concept is of such an uncertain nature. This defense is usually explained in words similar to the following, "A law will not be upheld if it violates the forum state's most basic notions of morality and justice." These words are so unspecific in nature and offer little practical guidance to either a judge or an arbitrator. It is unfortunate too that no specific guidelines to its interpretation have been provided by any of the international conventions.

Because of its uncertain nature, a number of countries have enacted laws which, though would not fall within this definition, are considered as important statutes embodying national policies. The antitrust laws and security regulations are examples. It is encouraging that some courts have given liberal interpretations to these statutes. The U.S. Supreme Court, for instance, has held that the Securities Exchange Act, a statute embodying important national policies would not apply to a purely international contract.[120] Such an approach however may not be taken by other national courts. While the concept of public policy itself does not appear to be an effective limitation on the principle of party autonomy, what is to be feared is the development of these national statutory laws. There is a need to remedy the conceptual and pragmatic shortcoming caused by the interpretation of public policy. The present state of affairs requires a more analytical evaluation of the defense of

public policy. It is this writer's view that guidelines should be drafted to aid both the judges and arbitrators in defining this concept.

PART II

II. Where Parties Have Not Chosen a Law

Stipulating a choice of law in an arbitration agreement is usually a means for achieving the orderliness and predictability essential to any international business transaction.[1]

But oftentimes, parties fail either for reasons of convenience or mistake to include such an important clause. Where parties fail to do so, the task falls on the arbitrator to ascertain the law intended by the parties to govern their rights and obligations. This task is not an easy one. The arbitrator, unlike a judge dealing with a transnational dispute usually encounters problems which are rarely faced by a judge. A judge of a national court would rarely encounter problems of conflict of laws with respect to the procedural law to be applied by him to a dispute. A national court would normally apply its rules of procedure to the case. This is not the case with an arbitrator. For him the question of applicable law will arise with respect to procedure.[2] The determination of this law is very important because of the following considerations: whether the arbitrator is relieved from the observances of rules of law [for instance where the arbitrators are given the power to act as amiables compositeurs by the parties], questions of the nationality of the arbitral award, the law applicable to the substance of the case, and the law applicable to the arbitral agreement. That these matters should be determined by procedural law has been strongly advocated.[3]

The judge of a national court faces little problem with respect to the law to be applied by him to the substance of the case. The judge solves this problem by resorting to its domestic rules of conflict of laws. The problem faced by an arbitrator was succinctly expressed by one arbitrator in a dispute involving a Federal German corporation and a Yugoslavian state trading corporation. He said,

"There are no rules of conflicts of laws in force that would indicate to an arbitrator of a third country, without any link with regard to the law existing between the parties, according to the private international law of what country he has to determine the law applicable to the substance [of the dispute]. There is furthermore no criterion susceptible of weighing the balance in the favour of either German private international law or that of Yugoslavia, criticisms and the results would always have the appearances of an arbitrary preference...".[4]

Another problem of conflict of laws usually encountered by an arbitrator concerns question of his competence to hear the case. For the judge however, reference is made by him to his national law.[5]

Therefore, with no criteria to guide the arbitrator in determining which conflict rules to apply to the problems enumerated above, theory and practice have given varied solutions. These solutions shall be the theme of discussion in the following section.

A. Solutions Available to An Arbitrator

(i) The arbitrator's country of origin or residence.

An arbitrator it is maintained should have recourse to the rules of conflicts of his country of origin or residence because these are the rules with which he is most familiar. By choosing an

arbitrator, the parties have indirectly chosen the conflict rules of his legal system, or are presumed at least to have consented to his applying them.[6] This argument as LaLive himself points out is hardly serious.[7]

Klein [8] also rightly argues that if one views the intention of the parties as the most important consideration, it would be inappropriate to refer to the law of the arbitrator's country of origin or domicile in the absence of more precise indications.[9] It is also crucial to add that oftentimes parties fail to appoint an arbitrator and a choice is therefore made by an appointing authority, which may be an individual or an organization. One is led to ask, why should the conflict rules of an arbitrator whom the parties did not choose be imposed upon them? How is it possible to argue that the parties have implicitly agreed to be bound by the conflict rules of the arbitrator?

It has also been argued that since the advantage claimed by this theory is that the arbitrator has the best knowledge of his personal law, his substantive personal law should be applied and not his conflict of law rules.[10]

While this connecting factor may have as its advantage its simplicity, it is too rigid and impractical.

(ii) The country the jurisdiction of whose courts is ousted by submission to arbitration.

This theory was first promulgated by a renowned Italian scholar, Dionisio Anzilotti, when arbitration was still in its infancy.[11] The idea that the arbitrator should apply the conflict rules of the country whose courts would have had jurisdiction is

based on the fact that if arbitration is to oust the jurisdiction of a national court, its validity and effects can only be evaluated if regard is made to the law that the court would have applied if the dispute had been submitted to it.[12] This solution is circular. An arbitrator must at first resort to a conflict of law rules in order to know which country would have had jurisdiction. There is then a vicious circle.[13] This theory too proceeds on the assumption that only one country has jurisdiction to try a particular case.

However, this is usually not the case in an international dispute where two or more courts could have jurisdiction over the same subject matter.

(iii) The rules of conflict of the country of exequatur.

It has been suggested that an arbitrator should apply the conflict rules of the state where the award will be enforced.[14] No doubt such a criterion ensures the enforcement of the award. While this may be a practical solution to the arbitrators' dilemma, this method is hardly satisfactory.[15] It is usually difficult to determine with any degree of certainty the place of eventual enforcement.[16] It may also happen that the award is to be enforced in more than one country.[17]

(iv) Conflict of law rules chosen by the parties.

Where parties have expressly chosen the conflict of law rules to apply to their contract, the arbitrator should give effect to their choice. This choice of conflict rules manifests the intention of the parties. An express choice of conflict rules by the parties

is rather unusual and it is no wonder that only one arbitration award has been found in which the parties have made such a choice.[18]

In a dispute between an Italian and Belgian party [19] the parties entrusted the arbitrator with the task of determining the law applicable to the dispute on the basis "of the rules of French law governing conflict of law in matters of international private law". Furthermore, the contract signed between the parties stipulated that "the arbitrator shall decide, seeking to bring into agreement the rules of Belgian law and of Italian law which govern this matter". The question of the applicable law was however resolved on this latter provision.

The choice of a system of conflict rules no doubt frees the arbitrator from the task of selecting the conflict of law rule to apply.

However, parties noted LaLive and Lew [20] should expend their energies on choosing the substantive law to govern their contractual relationship rather than selecting a conflict of law system. This mode is not only cumbersome, states Lew, but it is also haphazard. Parties, before choosing a law, will make themselves familiar with the relevant provisions of that law and will also give thought to the implications arising therefrom. [Lew however rightly notes that this research is usually not undertaken in practice]. He notes that where parties wish to choose a system of conflict rules, they will not only have to research into the various laws which they would like to apply to their contracts, but would also have to determine which conflict methods points to the law they wish to govern their

disputes. This, he maintains, is difficult and can be haphazard in view of the fact that conflict rules are uncertain or ambiguous.[21]

(v) The conflict rules of the seat of arbitration.

The thesis that the arbitrator should resort to the conflict rules of the seat of arbitration was given authority by Sauser Hall as rapporteur of the Institute of International Law.[22]

This solution simply stated is that the arbitrator like the judge must apply the conflict rules of the seat. This view found support among other commentators like Mezger [23] and Mann [24]. Mann strongly stated that where the parties fail to indicate a choice of law, the arbitrators cannot proceed with the case otherwise than by application of the law of the seat, the *lex arbitri*. [25] The advantages of this theory are predictability and simplicity. Besides, it is maintained that the will of the parties is respected. The parties in choosing the seat are deemed to have indirectly selected the applicable conflict of law rules.

This conflict of law rule has been applied by some arbitrators for finding the applicable law. In an ad hoc arbitration [26] in Sweden concerning a dispute for the sale of a motor vessel "Mare Liberum" by a Dutch company to Swedish buyers, the arbitration tribunal had to decide whether the contract was governed by Dutch or Swedish Law, as the contract did not contain an express choice of law. The arbitrators reasoned that notwithstanding the fact that the vessel was registered in Holland and the sellers were domiciled in Holland, the fact that there is a clause calling for arbitration

in Sweden is an indication that the question of applicable law must be decided according to Swedish conflict of law rules.

In yet another arbitration held in Paris, involving a Swiss and a Spanish party, the arbitrator stated,

"The agreement between the parties does not state the law which must be declared applicable in this case. Therefore, it is first of all important to determine the national law with respect to which the contract will have to be examined within the framework of the validity of its arbitration clause. To this effect, the arbitration tribunal has ruled, from the outset, that the "lex fori" is French law. According to French private international law, the legal order applicable to the contracts is determined... ."

Finally in a case between an Italian and a German, a three man arbitration panel sitting in Switzerland held, "Where concrete rules of conflict of laws have to be observed, it is advisable to apply the standards of the legal system valid at the place where the tribunal sits. In the present case, it is thus on the basis of the rules and the practice of Swiss private international law that decisions have to be taken." [28]

This criterion however has been subject to many criticism. This standpoint has been criticised by a number of commentators on the ground that this method is divorced from reality and facts of international practice. [29]

One of the criticisms levied against this method is that the selection of a seat of arbitration might be merely fortuitous. Parties may select a venue because it is socially or geographically convenient. This does not indicate in any way a desire by the parties that the conflict of law rules of that country should govern the arbitration. An illustration will drive this point home.

Assume an agreement was entered into by a Chinese and a Canadian. The parties desiring to choose a neutral forum select Sweden as the seat of arbitration. The argument therefore of the critics of this method is that there is no logical justification for the arbitrator to determine the applicable law by resorting to the Swedish conflict of law rules since it cannot be assumed that the parties knew or had any desire to be so bound by these rules.[30] What also constitutes a seat under certain situations is left unclear by proponents of this theory. If, for instance, the parties do not specifically provide for a venue but adopt the arbitration clause recommended by any of the arbitral institutions, for example, the I.C.C. or the American Arbitration Association (A.A.A.), would the seat of arbitration be presumed to be the headquarters of the I.C.C. (Paris), or New York in the case of A.A.A.?

The 1957 and 1959 Resolution of the Institute of International did not touch on this point. Mann, too, it would appear, has not clearly defined the 'seat' in this respect. In his article, "Lex Facit Arbitrum", he indicated that in such a situation the seat is determined only when the arbitrator or umpire is appointed. The residence of such an arbitrator becomes the seat of arbitration, for that is the implied intention of the parties.[31] In another article [32] he however stated that where the seat is not expressly chosen, "It may be impliedly selected in that the parties define the institution under whose auspices the arbitration is held (London Metal Exchange, American Arbitration Association, and so forth)."[33]

The first view expressed by Mann can only be workable where there is a sole arbitrator. If there are three arbitrators, which usually is the case in international commercial disputes, how then do we determine the seat? It can easily be argued that the residence of the president or chairman would be the seat of arbitration. However, it is not uncommon for arbitrators to resign their appointments during the pendency of an arbitration. Where the president resigns his appointment and is replaced by another arbitrator, resident in a different country, does the seat of arbitration therefore change? Going by Mann's analysis, our answer ought to be in the affirmative. Although Mann points out in the course of his discussion that a seat of arbitration usually remains constant,[34] this viewpoint does not adequately answer the question posed above, for if the determining factor is the residence of the arbitrator, no other conclusion than the one expressed above can be arrived at.

His latter view is also contestable. It cannot be said that the desire of the parties to submit their dispute to the I.C.C. necessarily indicate that the parties have impliedly chosen Paris as the seat of arbitration. It would appear that under the I.C.C. the seat of arbitration is not determined by virtue of the fact that the parties submit to arbitration under its auspices but is determined subsequently by the court.[35] This viewpoint finds support in Article 12 of the I.C.C. rules which states, "The place of arbitration shall be fixed by the court, unless agreed upon by the parties." Let us for the sake of argument assume that Mann had not contemplated an 'international' organization such as the I.C.C. when

he made his statement but rather a 'national' organization such as the A.A.A. and the London Court of Arbitration (L.C.A.). Even so, the same argument still holds. Arbitration under the auspices of the A.A.A. or the L.C.A. should not imply that the parties desired the conflict rules of New York or England to govern their disputes.

The mere fact therefore that an arbitration is taking place within a country does not mean that the arbitrator has to determine the law by applying the conflict rules of the seat. The country wherein an arbitration is held may not even regard an arbitration having no connection with the country as subject to its law, save for the locale. The weakness of this thesis can be seen in a recent arbitration initiated under the auspices of the I.C.C. Gotaverken Arendal A.B., a Swedish shipbuilder, brought an action against Libyan General National Maritime Transport Company on account of the refusal of the latter to pay the balance of the sales price for the construction of three tankers. An award was rendered in favour of Gotaverken. Gotaverken then sought to enforce the award in Sweden but this was challenged by Libyan Maritime Co. on the grounds that an application was before the court in France to set aside the award. Libyan Maritime Co. argued that under French Law the fact that an application for setting aside was before the court caused the award to be suspended and the enforcement in Sweden could not be granted. The court rejected this argument and upheld the award. The Court of Appeals in Paris also declined to take jurisdiction to hear the challenge on the ground that the arbitration between Gotaverken and Libyan Maritime Co. had an international character and the mere fact that the arbitration took place in Paris did not

make it a French award. Moreover, the arbitration had no links whatsoever with the French legal system.

The court therefore stated that the place of arbitration chosen in the interest of geographical neutrality may not "be considered an implicit expression of the parties' intent to subject themselves even subsidiarily to the Loi procedurale francaise"[36]. This case clearly shows that the mere fact that an arbitration takes place within a territory does not presuppose that an arbitrator is bound by the conflict of law rules of the lex fori or seat of arbitration, nor is the choice of a seat an implicit intention of the parties to be bound by the conflict rules of the seat.

The advantages of this criterion therefore appear to be illusory and the test is definitely not conducive to modern international trade practices.

(vi) The conflict of law rules deemed appropriate.

The only reasonable solution to the arbitrator's problem, states a commentator, is for the arbitrator to determine the applicable law by choosing the conflict of law rules he "deems appropriate"[37]. This, too, is the solution provided by the European Convention on International Commercial Arbitration [38] and a number of arbitral institutions.[39]

This interesting approach has been adopted in several arbitral awards. In an I.C.C. arbitration [40], the arbitrators in considering the law to be applied to the substance of the dispute stated, "In conformity with the terms of reference the arbitrators have to determine the proper law by the rules of conflict which they deem appropriate." The arbitrators considered Belgian law to be the

proper law of the contract in view of the fact that the contract is most closely connected with Belgian law. Moreover it was pointed out by the arbitrators that this law also accords with the prevalent view that a guarantee is governed by the law of the guarantor.

Similarly in a dispute between Austrian and Swiss parties [41] concerning an agency contract to be performed in Austria, the arbitrator had three options open to him: the law of the place where the principal has his permanent place of business, the law of the place where the agent has his permanent place of business, or the place where the agency was to take place.[42] The arbitrator, however, regarded the latter option as the appropriate choice of law rule. The arbitrator said,

"As concerns the question brought up by the parties, of the applicable law, the following should be observed: it is today a legal concept widely admitted that the legal relations between principal and his agent are submitted to the laws of the country where the agent exercises his activities. It thus follows, it is the law of the territory conceded, this seems logical from the sole fact that the centre of gravity of the legal relations are situated there [in the place] where the agent operates."

This approach, although flexible, leaves a lot of questions unanswered. The phrase, "rule of conflicts deem appropriate", is unclear. What would be the basis on which the conflict of law rules could be determined? Would it be on the basis of the subject matter or geographical connections with the case?[43] Should these conflict rules, states Fouchard, be borrowed from a system of national conflict rules or can an arbitrator directly spell out these rules without a direct reference to a national law.[44]

This problem, highlighted by Phillipe Fouchard, surfaced recently in the case of Norsolor S.A. v. Pabalk Ticaret Limited Sirket.^[45] The case centered on the interpretation of Article 13(3) of the I.C.C. rules which provides that in the absence of any indication by the parties as to the applicable law, the arbitrators should apply the rule of conflict which he deems appropriate. In this case a French company, Norsolor S.A. previously Ugilor, entered into a contract of agency with the Turkish Company, Pabalk Ticaret Limited Sirket, under which the product acrylomitrite was delivered by Ugilor to the Turkish company, Aska, for the transformation of this base product in Turkey. Difficulties arose between Ugilor and Aska, and a dispute arose between Pabalk and Ugilor as to the payment of commission to the former, as well as a claim for breach of contract which Ugilor repudiated.

Pabalk made a request to the I.C.C. in accordance with the arbitration clause in the contract. Vienna was chosen as the seat of arbitration, but the parties neither indicated the law to be applied to their dispute, nor did they give the arbitrators the power to act as amiables compositeurs. The arbitrators were therefore left with the task of determining the law by the rule of conflict they deemed appropriate. The arbitrators, rather than choose either Turkish or French law, decided to apply the International Lex Mercatoria. The arbitrators stated that one of the principles on which the choice is based is that of good faith which must exist in the formation and performance of contract; and the accent put on good faith is furthermore one of the dominant

tendencies to be found in the convergence of substantive national laws.

An award was made which found in favour of Pabalk for the amounts set out in the following four points:

1. 3,965.97 French francs, U.S. \$12,429.65 and U.S. \$1,320.02 with interest at the rate of 6% due under the contract;
2. 22,650 ff. payable in respect of partial non-performance of a contract of sale;
3. 800,000 ff. as damages for wrongful termination of the contract;
4. Each party to bear its own cost.

Pabalk lodged the award with the tribunal de grande instance in Paris which granted an order of exequatur. Norsolor however lodged its opposition to this order on the ground that the arbitrators had gone beyond the term of reference and had acted in fact as amiable compositeurs since they had applied the principle of good faith which led to the application of *lex mercatoria* by the arbitrators. Furthermore they argued that the arbitrators acted in equity in making the award of 800,000 ff. which they stated was very difficult to quantify. The court rejected this contention and held instead that the arbitrators had applied the law designated by the rules of conflict which they considered appropriate, namely, the general principles of obligations applicable in international commercial transactions.

The court also maintained that the arbitrators had calculated the damages not in accordance with equity but in accordance with the general principles of the law of usage in international commerce.

Norsolor brought an action in Vienna for the annulment of the award. The case came before the Vienna Handelsgericht. Norsolor complained that the arbitral tribunal had decided in equity and not in accordance with any particular system of law. The award was therefore invalid under Section 595 of the Vienna Civil Code of procedure. This court considered the four points on which the award was made. It considered that points I and II were determined by the tribunal as a matter of interpretation of the contract. With regard to point III, the court held that the tribunal had discussed the issue of the substantive law to be applied and had made its decision in accordance with the *lex mercatoria*.

On appeal, the Oberlandesgericht affirmed the findings of the court below on points I and II, but annulled points III and IV of the award on the ground that the arbitral tribunal had exceeded its jurisdiction under s. 595(5) on the ground that the arbitrators had not determined the national law to be applied by reference to the rules of conflict as required by Article 13(3) of the I.C.C. Rules, but instead based their decision on the *lex mercatoria*. However, the non-application of the rules of conflict, the court stated, did not constitute an infringement of any mandatory rule of law under section 595(6).

On further appeal to the supreme court, this court resolved the decision of the court of first instance on grounds III and IV.

The decisions of the French court and the court of appeal in Austria are interesting, for they indicate the different interpretations that can be given to the phrase "deem appropriate".

Article 1496 of the new French rules on international

arbitration of 12 May 1981 [46] appears to be clearer than the solution provided by Kopelmanas and adopted in the various conventions and arbitral rules, for it provides that the arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice he shall decide according to the rules he deems appropriate. Professor P. Fouchard in an article [47] correctly states that the term "rules of law" is a wider expression and may include common rules of both national laws present, the general principles of law, international law (particularly where a state is involved), the usages of international trade, and rules (including *lex mercatoria*).

(vii) Application of cumulative conflict of law rules.

Arbitrators have determined the applicable law by means of a cumulation of conflict of law rules. This is a process by which arbitrators, rather than applying a single connecting factor, (for instance, the seat of arbitration in determining the applicable law), would look to all the systems that have any contact with the dispute to see if they point to the same solution. The arbitrator in this case grounds his decision on this common conflict rule. Such an approach was taken by an arbitrator in a dispute involving a French company and a German individual.[48] In this case the French company and the German jointly purchased shares in a German corporation. The German defaulted in providing his contribution. The arbitrators were asked to annul the contract and to give effect to a penalty clause in the contract. The level of the penalty however depended on whether or not the defendant was a merchant. The arbitrators held that both German and French international law

pointed to the law of the place of execution as determining the question in point. They therefore held that Saar law, (i.e. German law) applied.

A clear application of this approach can be seen in an arbitration held in Switzerland involving a West German and a Greek party.[49] The arbitrator held

"In order to decide as to the substance whether the claim is justified, the law applicable to the substance of the dispute should first be determined. As the contract of the parties does not give any indication in this respect we should first find out where to find the rules of conflict which decide this question. The answer to the question is much facilitated by the fact that the principles of private international law, as they are developed under German law and Greek law (as well as under Swiss law), lead to the same result."

This criterion, Derain [50] observes, has its advantages and disadvantages. An obvious advantage is the fact that the award will be recognized in any country where it might be enforced. The effectiveness of this criterion however is limited only to situations where the countries connected to the dispute have similar conflict of law rules. It is also to be observed that since the arbitrator has to decide which countries are connected with the dispute, the discretion of the arbitrator comes into play and the conflict rules deemed applicable may differ from arbitrators to arbitrators.

(viii) Application of international conflict of law rules.

If arbitrators have to apply conflict of law rules, states Goldman,[51] at the very least they ought to apply international conflict of law rules.

Fouchard [52] too agrees that it is not impossible to establish international conflict of law rules. Furthermore, he maintains that there is a trend towards this practice or in any case a co-ordination of national systems. This method presupposes a comparison of several bodies of private international law from which an arbitrator can choose a general set of rules.[53]

Arbitrators have sometimes found it unnecessary to determine the applicable law by resorting to particular conflict of law rules. They have resorted to the international conflict of law rules instead.

In a number of awards reported, the arbitrators based their decisions on general principles of conflict rules. In an I.C.C. arbitration [54] concerning the recovery of a risk exposure bank guarantee [55], the arbitrators stated inter alia,

"In its reminder the defendant expresses the opinion that in the absence of any explicit clause in the text of the Risk Exposure Bank Guarantee, the guarantee is governed by the generally accepted rules of conflict of law with regard to legal acts, according to which one had to look for the legal system to which the act is the most closely related. In this case the undertaking has been underwritten in Belgium by a Belgian Bank to be eventually performed in Belgium. ... Therefore the arbitrators consider that the applicable law proposed by the defendant is one that actually prevails with regard to the general rules of conflict of law and that in the present case there is no element which could justify the choice of another solution."

In another dispute involving a breach of contract, a Swiss arbitrator compared the Swiss system with other private international law systems and subsequently based his decisions on some general accepted principles of conflict of laws.[56]

Finally in one I.C.C. arbitration the arbitrators referred to the common rules of conflict.[57]

Nevertheless, arbitrators have sometimes determined the applicable law by directly applying a substantive law without having recourse to any conflict of laws system. There is also apparent in this method a process of denationalization of the arbitral process.

(ix) The place where the contract was concluded.

The law of the place where the contract was concluded has been applied by arbitrators as the law governing the contractual obligations of the parties.

In a dispute [58] between French exporters and Dutch importers concerning the payment of some outstanding amount, the arbitrators held, "Taking note that in the absence of the parties having expressed their intention, it falls [to the arbitrator] to make a preference for the law of the place where the contract has been formed."

Similarly in a dispute which arose between parties from Netherlands and France concerning the construction of a ship in Netherlands, the arbitrator applied French law since the contract was concluded in Paris.[59]

This connecting factor is very unsatisfactory and criticism of this method abounds in legal literature. A very common criticism is that it is difficult to determine where a contract is deemed to have been concluded. That the Restatement Conflict of Laws (1934) devoted twenty sections to this subject attests to this difficulty. Furthermore, the making of any particular contract may be

fortuitous. This could result in the fact that the parties would be governed by a law which was not even contemplated by them.

(x) The closest connection test.

Another criterion used by arbitrators to find the applicable law is what is called the closest connection test or proper law [60] and referred to in the American jurisdictions as the centre of gravity test.[61]

In an I.C.C. arbitration [62] held in Zurich concerning a licensing agreement between a Japanese corporation and a Swiss corporation, J.G. Castel sitting as sole arbitrator stated, "In the absence of an express choice, the law applicable to a contract having an international character is the law of the country with which it has the closest territorial connection. In this case, it is Switzerland, because it was the country where the plaintiff and the defendant had to perform their contractual obligation."

Similarly, a Belgian arbitrator seized of an agency contract,[63] determined the applicable law on the basis of the closest connection criteria. He stated "...German law must receive application by reason that the center of gravity of the contract (signed in Cologne and in Paris) and its place of execution are found in the F.G.R."

This criterion too has not passed unchallenged. It is definitely more flexible than the method discussed above, since it allows an objective determination of the applicable law by the arbitrator. There is however a real danger that the arbitrators engage in a process of counting contacts rather than evaluating them qualitatively.[64] A problem is also bound to arise where the

contract is closely connected with two legal systems. The intention of the parties may under such a situation be difficult to ascertain. The relevance of this criterion may be limited to situations where the factors weigh heavily on one side.[65]

(xi) Application of general accepted principles of law

Some arbitrators, in a bid to solve the problem of the applicable law, have had recourse to the general principles of law. In one I.C.C. arbitration which arose out of a dispute between an Indian and Pakistani corporation, Professor LaLive was faced with conflicting choice of law provisions and had to decide which should be relied on to interpret a clause in the contract. He stated,

"In my view, it is not useful to ... decide on the question of the law applicable, ... for the reason that, simply, the general principles of interpretation of contract should be applied as well as the rules of common sense, which are common to the principal legal systems of civilised countries, and specially to the English common law and to the legal systems of India and Pakistan." [66]

A similar situation arose in an I.C.C. arbitration [62] concerning a breach of a licence and exclusive sales agreement between an Italian claimant and Spanish respondent. The arbitrator stated inter alia that since the general principles of Italian and Spanish law are practically identical, the question of the validity on the rescinded contract "can therefore be resolved without a preliminary decision on the applicable law."

As this section reveals, there is no single method to which arbitrators have resorted in determining the applicable law. Commentators too are not agreed as to the appropriate criteria to be employed by the arbitrators.

Some arbitrators, as we saw earlier, have used single connecting factors to determine the applicable law. Others had gone to the other end of the spectrum by applying 'international conflict rules.'

A few applied a substantive law without having recourse to any conflict of laws system.

Resorting to a single connecting factor, like the seat of arbitration may at times be impractical. The law of the place of contracting does not afford us with any better solution as the determination of this place is difficult and uncertain. The choice of law deemed appropriate by the arbitrator does not promote foreseeability. There is a need for certainty and foreseeability not only at the time a contract is concluded but also at the time when parties resort to arbitration. Despite the shortcoming of resorting to the conflict rules of the seat of arbitration or the law of the place of contracting it may be stated that these methods at least have the advantage of predictability or foreseeability. Having recourse to the conflict rules which he deems appropriate offers no guideline whatsoever to the arbitrator. Most arbitrators, being businessmen, would require more guidance in resolving legal issues. Fluidity and flexibility no doubt is important in the development and progress of international trade but allowing the arbitrator to choose any conflict of law rules he deems appropriate allows him too much discretion which may be dangerous.

The application of international conflict rules may have been the most appropriate solution to the arbitrators' dilemma but as already pointed out there is a great diversity in the conflict of

law rules of the different legal systems. Very few principles are of common application. This diversity can be attested to by the several attempts made so far towards the unification of the rules of private international law.[68]

Having examined the various solutions available to the arbitrator, it is this writer's view that the most reasonable criterion for determining the applicable law is for the arbitrator to resort to the rule of law commonly called the proper law of the contract. Here the arbitrator applies the law of the country with which the contract has its closest connection.

This criterion enables the arbitrator to objectively determine the intention of the parties. It is highly probable that, where factors weigh heavily towards a particular jurisdiction, the parties may have intended the law of that place to govern their contract. A fear earlier expressed is that the applicable law might be difficult to determine where the facts are closely connected with two legal systems. It is submitted however that the arbitrator is likely to solve this difficulty, if he meaningfully weighs the factors in the contract and also examines the purposes behind the competing rules of law.[69] This particular criterion has also gained considerable support in a number of countries.[70] It also appears to reflect the present trend of the private international law of contracts.[71] The closest connection test has been adhered to by the American Restatement (Second) of the Conflict of Laws, 1977, [27] by the Austrian Federal Act on Private International Law of June 15, 1978, by the E.E.C. Convention on the Law Applicable to Contractual Obligations, 1980 [73], and a number of national courts.

The problem faced by the arbitrator has not gone unnoticed. The I.C.C. commission on law and commercial practices has set up a Working Group with the task of drafting guidelines which would be used by arbitrators in determining the applicable law in case of failure by the parties to make an express choice of law.[74] Early in 1980, the guidelines proposed by this group were submitted to the I.C.C. National Committees for comment. This group, in conformity with the recent trend of the private international law of contract, provided in Article 2(1) [75] of the draft recommendation on the law applicable to international contracts that the arbitrator should determine the applicable law by choosing the law with which the contract has its most significant connection. Article Two also lists some connecting factors which should be taken into consideration by the arbitrator when determining this law.

This undertaking by the I.C.C. is praiseworthy especially in view of the problems now faced by an international arbitrator. When the Working Group completes its task, these guidelines will go a long way in easing the dilemma of the international arbitrator.

B. Amiable Compositeur

A situation which is not uncommon in international commercial arbitration is that parties may not stipulate a law in their agreement but would authorise an arbitrator to adjudicate disputes *ex aequo et bono*, as *amiabile compositeur*. [76]

The institution of *amiables compositeurs*, though still subject to a number of uncertainties [77], can be defined simply as an institution where an arbitrator is free to base his decision

on considerations other than strict legal principles but subject to any imperative rules and rules of public policy.[78] Therefore, the right of an amiable compositeur to depart from the established procedure and from the rules of law is no way an obligation but a mere faculty. Occasionally, it does happen that the clauses which purport to confer such authority on the arbitrator may be stipulated by such provisions as "the arbitrator shall be entitled to decide according to equity and good conscience and shall not be obliged to follow the strict rules of law" or simply "the arbitrator shall be entitled to act as amiable compositeur."

This concept of amiable compositeur has been given effect in all the major international conventions and in some arbitral rules.[79] Article 33(2) of the UNCITRAL rules states, "The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration." A practical application of this concept can be seen in an ad hoc arbitration award of November 3, 1977 concession contract.[80] The arbitrators in that case, in the exercise of their power as amiable compositeur decided the dispute on the grounds of *lex mercatoria*.

In another ad hoc arbitration of 17th February, 1971 [81], arbitrators, deciding as "amiable compositeurs" annulled a contract by which the total issued capital of a company was bought for a price exceeding five times the value of the shares estimated by the accountant. This price was obviously based on the intention to run a casino on the premises rented by the company. After a few months

the casino had to be closed. The risks, according to the arbitrators, were not sufficiently indicated by the sellers to the buyer and the excessive price, in disproportion to the actual value of the shares, justified dissolution of the contract, since the real purpose of the transaction could not be met. The sellers argued that, according to law, a disproportion to the "lustum pretium" cannot lead to a rescission of the contract. This argument was rejected by the arbitrators. They maintained that they were not obliged to decide according to rules of law but rather according to equity.

Despite the fact that the institution of amiable compositeur has been recognized by major international conventions and some arbitral institutions, this institution has not had an equal success with national legal systems. I shall in the following subsections examine the concept of amiable compositeur under three legal systems, the English, Canadian, and American legal systems.

Amiable Compositeur and the English Law

The Institution of Amiable compositeur has not only been ignored by the English legal system but very few English cases [82] touch on this matter, and there has virtually been no academic discussion.[83]

This is not surprising because until recently [84] the English law gave the courts supervisory jurisdiction over arbitration proceedings, under what was termed the 'special case' procedure.[85] Thus arbitrators could be compelled under this procedure by either the parties or an English court to refer to the court for advice and decision on any question of law arising from the proceedings.

Prior to the amendment of the Arbitration Act in 1979, the position of the English law with respect to the concept of amiable compositeur can be seen in a number of cases. In Orion Cia, Espanolo de seguros v. Belfort Maats,[86] a case concerning a reinsurance treaty, a clause in the treaty referred to arbitration and it provided inter alia, "... the arbitrators and umpire are relieved from following the strict rules of the law. They shall settle any dispute under this agreement according to an equitable rather than a strictly legal interpretation of its own terms and their decision shall be final and not subject to appeal." An award was made in favour of Orion, and Belfort Maats brought a motion to set aside the award on the ground of misconduct. Mr. Justice Megaw was of the view that such a clause was invalid and of no effect. Megaw J. held inter alia,

"...Arbitrators must in general apply a fixed and recognizable system of law which primarily and normally would be the law of England, and they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire an abstract justice or equitable principles, which of course, does not mean "equity" in the legal sense of the word at all.... .

The essence of the matter as I see it, is that, so long as the courts of this country have a statutory supervisory jurisdiction over arbitrators in England, it must remain a firm principle of law governing arbitrations, that that which is in English law, a question of law, shall remain in all respects and for all purposes a question of law; and it cannot be turned into something other than a question of law by any agreement of the parties in their agreement to arbitrate otherwise."[87]

In Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.,[88] a reinsurance treaty contained an arbitration clause which provided inter alia, "if any question or dispute shall arise ... the same shall ... be referred to ... arbitration ... The arbitrators

and umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of this agreement. ..."

Eagle, ignoring the arbitration clause, started court proceedings and Yuval applied for a stay of proceedings. The court refused a stay and gave judgment for Eagle. On appeal, one of the issues tackled by the Court of Appeal was the arbitration clause. Lord Denning, in the course of the judgment made reference to Mr. Justice Megaw's decision in the Orion case. He stated,

"I cannot accept that view. I do not believe that the presence of such a clause makes the whole contract void or a nullity. It is perfectly good contract. If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy for the parties to so agree. I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me entirely reasonable. It does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators can properly do today under such a clause as this." [89]

This case clearly show the position of the English law prior to 1979. It expresses the view that there is a strong distinction between disregarding the strict and technical rules of law and disregarding rules of law per se. In this also lies the distinction between an amiable compositeur and an 'ordinary' arbitrator. An amiable compositeur, if he thinks it fair, will depart from the rules of law in deciding the case. [90] An 'ordinary' arbitrator cannot depart from the rules of law; he may only depart from the strictnesses of the law. [91]

However, fundamental changes were introduced by the New Arbitration Act of 1979. The Act abolished the special case procedure [92] and made provisions for appeals to be made by parties under special conditions to the high court.[93]

Another important change in this new act is that parties to an international arbitration may exclude, subject to certain restrictions, judicial review of the award completely.[94] An interesting question which might arise in this respect is whether parties to an international commercial arbitration can empower an arbitrator to act as an amiable compositeur by also providing an exclusion agreement in their contract? Can we therefore say that the provisions in the new Arbitration Act have brought a fundamental change to the institution of amiable compositeur under the English law? No precise answer can be given to the above question, since no English case directly touching on this matter is available. Nevertheless, I shall attempt to give an answer to this question. It should be stated from the onset that the Arbitration Act of 1979 has to be read together with the Arbitration Act of 1950.[95] The new act still retains s. 23 of the 1950 Act which allows the setting aside of an award where the arbitrator has misconducted himself. If the court interprets section 3 of the new act as not relieving the arbitrator of his duty to apply rules of law, any award decided ex aequo et bono will be set aside on the ground of misconduct.

It is however this writer's view that an exclusory clause will not relieve an arbitrator of the duty placed on him to apply rules of law. An indirect authority for this proposition is a statement of Lord Diplock in a recent English case, B.T.B. Tioxide Limited v.

Pioneer Shipping Ltd. and Armada Marine S.A. (The Nema).[96] He states,

"...in weighing the rival merits of finality and meticulous legal accuracy there are, in my view, several indications in the Act [1979] itself of a parliamentary intention to give effect to the turn of the tide in favour of finality in arbitral awards (particularly in non-domestic arbitrations...) at any rate where this does not involve exposing arbitrators to a temptation to depart from "settled principles of law".[97] (emphasis added)

The statement that arbitrators should not be tempted to depart from "settled principles of law" is an indication, albeit indirectly, that the arbitrator may still be required to apply rules of law in reaching his decision. It is plausible to argue that these words may mean no more than that the arbitrator should apply imperative rules and rules of public policy in reaching his decision.

The first view however appears to be given an added force by Sir Mustill and S. Boyd, for they stated,

"...It must be considered whether the 1979 Act, by abolishing the two existing mandatory methods of judicial review and creating another, which is subject in some instances to exclusion by consent, has carried away the previous obligation to comply with the law, thereby giving the arbitrator a power to bind the parties by his own ideas of what appears just. It is, we suggest, quite clear that the enactment of the legislation cannot in itself have had this effect. No trace of change can be seen in the words of the Act, or in those preliminary works which are publicly available. Moreover, quite apart from what the legislation may or may not have intended, a release of the arbitrator from his duty to follow the law is not a necessary implication from the change in the law relating to judicial control over arbitrations."[98]

In view of the aforementioned authorities it would be correct to say that English law still does not recognize the institution of amiable compositeur. The current position of the law is still that expressed by Lord Denning in *Eagle State Insurance Co.* [99]

To conclude I will borrow from the words of another commentator who stated, "He would be a bold draftsman who included an ex aequo et bono clause in a contract stipulating English arbitration".[100]

Amiable Compositeur and Canadian Law. [101]

As in Britain, there appears to be virtually no indepth academic discussion in Canada on this subject. Academic discussion on this point [102] may be considered unnecessary since Canadian law does not recognize the institution of amiable compositeur. The arbitrator in Canada must apply rules of substantive law to cases submitted to him.[103] So crucial is this task that any error of either law or fact on the face of the award renders the award void.[104] In addition, the parties or the court could direct the arbitrator to state in the form of a special case any question of law for the opinion of the court.[105] A provision purporting to prevent a party from exercising this right is void as this is regarded as an attempt to oust the jurisdiction of the court.[106]

While arbitrators are required under Canadian Law to render their decisions in accordance with legal principles, they are however not bound by the strict rules of law.[107] In Re Walker v. N. Grimsby the court stated,

"Arbitrators, traditionally have been allowed considerably more leeway as to the procedure and as to the conduct of the proceedings than has been the case in the ordinary civil suit in litigation. This by no means entitles an arbitrator to disregard ordinary and clearly enunciated judicial principles, nor does it permit him non judicial or biased conduct." [108]

The position of the law in Canada with regards to the institution of amiable compositeur appears to be similar to that of Britain.[109]

This law briefly stated is that an arbitrator is required to decide a dispute in accordance with established principles of law, so that any error on the face of the award renders it unenforceable.

While Canadian law appears strongly to oppose the concept of amiable compositeur, it is very doubtful if this law is actually effective.

An arbitrator, although required to apply principles of law, can dispense with evidentiary matters and probably other questions of procedure. The question then is, how possible is it for courts to identify an error on the face of an award? We may also recall that arbitrators are not required to give reasons for their awards. Whether an arbitrator has decided in accordance with the law or not will be difficult to discern.

Amiable Compositeur in the United States (U.S.) [110]

The leading American author on arbitration stated that an arbitrator in the United States is not bound to apply substantive law in deciding issues before him unless commanded to do so by the terms of the arbitration agreement.[111] The phrase "amiable compositeur" is not typically used in American practice although a similar concept to this institution does exist.[112]

In Lentine et al. v. Fundaro,[113] the Court of Appeals of New York stated that arbitrators are not bound by principles of

substantive law or rules of evidence, without a provision to the contrary in the arbitration agreements.

Similarly there was a case [114] on appeal before the Supreme Court of Alaska concerning an arbitral award rendered in a dispute which arose out of a construction agreement. The court held inter alia, "The general rule in both statutory and common law arbitration is that arbitrators need not follow otherwise applicable law when deciding issues properly before them, unless they are commanded to do so by the terms of the arbitration agreement." [115]

Authority on this point abounds in other decided cases. [116] An overview of the authorities cited above shows that in the U.S.A. a concept similar to the amiable compositeur exists, even though not called by that name. An arbitrator in the U.S.A. may base his decision on considerations other than strict legal principles and he is required to observe fundamental rules of public policy. [117]

While the Canadian, English, and American legal systems do not recognize the concept of amiable compositeur, this institution has been recognized in a number of countries, amongst which are France, Netherlands and Belgium. [118]

Article 1497 of the New Code on Civil Procedure in France indicates that arbitrators will act as amiables compositeurs when the parties so agree.

Similarly Article 636 of the Dutch Code of Civil Procedure provides the like effect.

Arbitrators in these countries could depart from rules of law and base their decision on equity. There is without doubt a marked difference between the position of the law in Britain and Canada on

the one hand and the law in France, Belgium, Netherlands, and the U.S.A. on the other hand. However, this difference may be blurred at times in practice. Although English and Canadian arbitrators are bound to apply the law in reaching their decisions, they are not required to give reasons for their awards.[119] Where no reasons are given by the arbitrators it would be very difficult to determine if they applied rules of substantive law or decided on principles of justice and equity; since every arbitrator, whether deciding according to the rules of law or according to the principles of justice or equity, strives to arrive at an equitable solution. There does not appear to be any difference in the laws of the countries that recognize the institution of amiable compositeur and the law in the U.S.A. An amiable compositeur may decide disputes in accordance with the principles of justice and equity. The same is true also of an arbitrator in the U.S.A. Both are also compelled to observe fundamental rules and public policy. Therefore one wonders if any difference exists in essence between an arbitrator deciding as an amiable compositeur and an arbitrator in the U.S.A. deciding on principles of justice and equity. Is the difference legal or merely a question of terminology?

PART III

III. Lex Mercatoria, the New Law of International Trade?

The preceding section has shown us the difficulties experienced by arbitrators in attempting to solve the question of the applicable law in transnational commercial disputes. The idea of a unified substantive law taking over from conflicts law has therefore been advocated by a number of commentators.[1] An arbitrator under this situation not only does not take into consideration any conflict rules but also does not apply any national law.[2] He grounds his decision on an extra legal order. This legal order is called the New Lex Mercatoria or the Law of the Merchants.

What is this New Lex Mercatoria? In order to fully understand this concept, it is necessary to refer back to its origin in the middle ages. Lex Mercatoria or the Old Lex Mercatoria, as it is often referred to, was a special law developed by the merchant class in Italian cities and the special courts of the markets and fairs. This law subsequently spread out from these cities to other parts of Europe, and to North America. This law had special characteristics. It was a transnational law [3] and was distinct from the local or municipal law. It had as its principal source, mercantile customs; and it was administered by merchants. The procedure was informal and speedy; and equity was stressed as the overriding principle.[4]

While this law may be termed a 'universal law', it was not transnational in the sense that a uniform law applied in all the different countries. This universality was threatened at times by

the differences in local customs, trade and adjudicative values. Local merchant judges were sometimes unduly influenced by local customs because of their familiarity with them. Variations also appeared in procedures, rules, and attitudes among merchant courts. As a result of these inconsistencies, the Great Fairs of Champagne for instance developed their own distinctive usages and customs, which diverged from practices maintained elsewhere.[5] Therefore, the most fundamental concepts of the law merchant were not always applied with consistency within different merchant courts. Thus the universality of the law merchant gave way at times to principles of law peculiar to domestic courts and legal systems. The vast majority of the decisions reached, however, were still in touch with the practices of merchants themselves.[6]

But starting from the 18th century, this 'universal law' was incorporated into the various national legal systems and therefore ceased to exist as a separate law administered by merchants. This incorporation was carried out largely on the continent of Europe by statutes and in England it was accomplished by the courts, mainly by two chief justices, Sir John Holt and Lord Mansfield. As this transnational law came to be supplemented either by state enacted uniform laws or precedent, it became divorced from the experiences of the merchant class.[7]

This trend was to change again. The 20th century has seen the revitalisation of the concept of Lex Mercatoria by the international community of merchants engaged in transnational commercial trade. Goldstajn described this situation when he said, "Notwithstanding the legal systems of the world, a new law merchant is rapidly

developing in the world of international trade. It is time that recognition be given to the existence of an autonomous commercial law that has grown independent of the national systems of law."[8]

What is this new Lex Mercatoria that has developed? What is the basis on which it exists? What are its sources and what is its position in international commercial arbitration? Unfortunately these questions cannot be answered with certainty, since the law is still unclear in legal literature.

A. The New Law Merchant: What is it?

Supporters of the New Lex Mercatoria all agree that it is an autonomous commercial law which is independent of the national legal system. Schmitthoff aptly described the New Lex Mercatoria when he stated, "The New Law Merchant is in the nature of an 'autonomous' law and, as such, it attempts to provide its own legal regulation without reference to, and independent of, any municipal system of law."[9]

This New Lex Mercatoria is however different from the medieval one. While the old one was haphazard and unplanned, and developed from customs into law, the New Lex Mercatoria is a deliberate creation of formulating trade agencies or associations and international organizations.[10]

B. Basis of the Lex Mercatoria

The question therefore arises, what is the basis on which this 'independent law' is founded? This law appears to be based on both legal and sociological grounds.

(i) Legal basis

The Lex Mercatoria, writes Schmitthoff, is based on the principles of freedom of contract and pacta sunt Servanda. He also notes that, as most countries recognize these principles, none of them objects to the attempts of the parties to choose a law which is outside a national system of law.[11]

(ii) Sociological basis

Professor M. Bonell [12] observes that the "autonomists", as he refers to the proponents of Lex Mercatoria, usually attempt to justify their stance on sociological or institutional concept of law. They have made attempts to show how any group or body sufficiently organized, with a view to pursuing a common interest, constitutes a legal order, capable of producing its own objective and general rules which are valid and binding. Bonell therefore observes that commentators like Goldman, basing themselves on these general theoretical premises, have affirmed that the international business community is a genuine private international order distinct from and independent of the different states.[13] Other commentators [14] have not gone as far as Goldman in regarding the general business community as a distinct legal order but they have stated that at least certain professional categories such as the "Societe Internationale des Vendeurs et de acheteurs," market sectors such as the silk trade, markets dealing with agricultural products or raw materials, transport (especially Maritime) sectors, and banking business (in particular with regard to documentary credits) amount to genuine private international orders distinct from and independent of the different states.

It is their view that the governing bodies of these professional or commodity associations, composed of well qualified personnel, constitute what is usually described by sociologists as the "governing class" or "social government". It is further argued, that, when these groups formulate usages or customs or even revise existing ones, they are performing a legislative function. Although these customs and usages may be considered as optional, since in theory the various practitioners may accept or reject them, in practice the usages and customs are imposed upon the latter, as a refusal to adopt these rules would involve their being excluded from the organized sector or market in question.

These commodity associations or professional bodies set up arbitration tribunals to which their members may or sometimes resort for the settlement of their disputes. The arbitrators in these cases regularly apply the rules, usages, and customs of these organizations. At times they combine them with other rules and practice followed in the same professional sectors even though they have not yet been codified. The argument runs that these rules, usages, and customs are not lacking in sanctions. Their application will be assured by arbitration.[16] Moreover it is stated that the most effective sanction towards contract compliance in most transactions is the necessity for the trader to preserve his reputation for reliability and business morality.[17] Honnold notes that any assumption that trade depends on legal sanctions will be quickly dislodged by working with a foreign trader, "for trade does move in vast quantity and under circumstances where legal sanctions are unnecessary or unworkable." [18]

C. Sources of Lex Mercatoria

International trade law or lex mercatoria is derived from the following sources: mercantile customs and usages, international legislation and general principles of law.

(i) Mercantile Customs

Mercantile commercial customs are made up of commercial practices, usages or standard regulations which have been formulated by international agencies such as the I.C.C., the U.N. Economic Commission for Europe and other International Trade Associations. Notable examples of these formulated commercial customs are the incoterms 1980, the uniform customs and practice for Documentary Credits [19] (1974 revision).

(ii) International legislation

International legislation [20] is enacted by two methods, the adoption by states of a multilateral international convention and the formulation of a uniform model code. Illustrations of international legislation are the Hague rules relating to the Bills of Lading, as amended by the Brussels Protocol of 1968; Convention of International Sales of Goods 1966, revised in 1980; The Convention on the Carriage of Goods by Sea 1968; Uniform law for Bills of Exchange and Promissory Notes 1930; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and European Convention on International Commercial Arbitration 1961.[21]

However, it may be asked, what is the position of the Lex Mercatoria in international commercial arbitration? Unfortunately, this important question can hardly be answered with certainty since the majority of arbitral awards remain unpublished. The views of a

number of commentators and the decisions of some arbitrators could provide us with a partial answer.

D. The Position of the New Lex Mercatoria in International Commercial Arbitration.

The Lex Mercatoria has been described by a commentator as the Lex Fori of arbitration and therefore to be equated to a municipal lex contractus. Furthermore, he noted that as a national judge faced with a dispute without any foreign element applies national law, so an arbitrator dealing with an international contract should apply the Lex Mercatoria.[22] This concept of New Lex Mercatoria is apparently recognized in international commercial arbitration. Several awards have been settled on the basis of lex mercatoria.

In an ad hoc arbitration [23] held in Paris between a Belgian company, S.A. Mines, Mineraux et Metaux (M.M.M.) and the English company Mechema concerning a concession contract, the parties did not choose any law to govern their contract. However, they had a clause in their contract providing that the arbitrators decide as amiables compositeurs. An issue which arose in the course of proceedings was the question whether a letter by Mechema to M.M.M., asking him if it still agreed to arbitration, had given M.M.M. the option to request a decision according to the rules of law. M.M.M. had interpreted the letter as such and had exercised this option.

The arbitrators in deciding this question had to establish whether the provision concerning amiables compositeurs in the contract should still be complied with. The arbitrators noted that although under English law amiable compositeur cannot effectively

take place, and under Belgian law its validity is dependent on the confirmation prescribed in Article 1700 of the Code Judiciaire, which confirmation is lacking in this case, since French law (the place where arbitration took place) accepts the concept of amiable compositeur and this excludes an obligatory application of either Belgian or English law, they would abide by the Lex Mercatoria in the exercise of their power as amiable compositeurs.

In another arbitration, [24] a dispute arose between a French enterprise and a Yugoslavian sub-contractor concerning a project in the U.S.S.R. for a soviet principal. The arbitrators held *inter alia*,

"Considering that the arbitrator, in an international arbitration governed by the I.C.C. Rules, for the decision on the applicable substantive law in the absence of an agreement by the parties 'shall apply the law designated as the proper law by the rule of conflict which he deems appropriate' ... Considering that in this field the most recent and authoritative doctrine as well as the jurisprudence of arbitrators especially that of the I.C.C. acknowledge that, in determining the substantive law, arbitrators may avoid the rules of conflict of the forum ... in practice, one of the methods used by international arbitrators is that of the 'direct approach' (*voie directe*), either by the direct determination of an applicable national law chosen in view of the circumstances of the contract and of the dispute, or by basing themselves uniquely on the contract and the general and common legal principles; "that the arbitral tribunal, upon careful consideration, holds that this latter principle, that is, the application of the 'Lex Mercatoria,' should be used here... ." [25]

Finally in another dispute which arose between a Japanese seller and a Lebanese buyer, the contract was silent on the applicable law. The arbitrators stated,

"The parties have not reached an agreement on a law which they assert, in the silence of the contract, be applied to regulate the difficulty of performance which has arisen out

of the contract ... but on the contrary, they requested the application of their national law.

The contract had to be executed in three different countries. The fixing, for its application, of a particular law would present some difficulties. The parties have however manifestly agreed to refer to the general principles and to the usages of International commerce in the case in question."[26]

There are several other reported awards where arbitrators have based their decisions entirely on the Lex Mercatoria or more often called the "Usages du commerce International." Some arbitrators therefore appear to recognize the fact that the Lex Mercatoria may amount to a complete or self-sufficient legal order. The question then is: Has a new Lex Mercatoria actually emerged? This shall be the subject of the following subsection.

E. Has a New Lex Mercatoria actually emerged?

As noted, various commentators [27] have answered this question in the affirmative, and international commercial arbitration has given effect to this new legal order.[28]

The existence of this new legal order has been disputed by a number of commentators. Mustill and Boyd have stated:

"With all deference to those who support it [Lex Mercatoria], we find this idea hard to accept. Indeed, we doubt whether a Lex Mercatoria even exists, in the sense of an international commercial law divorced from any state law: or, at least, that it exists in any sense useful for the solving of commercial disputes."[29]

This appears also to be the opinion of Professor G.S. Wetter.[30]

Another commentator only sees a Lex Mercatoria coming into existence only as far as it is made by states jointly or individually. He therefore states, "The term Lex Mercatoria must be rejected,

however, if it is to be understood in the sense that the international business community establishes its own legal regulation which excludes the intervention of states." [31]

It is my aim therefore in this section to look into the assertions of the Lex Mercatoristes and see if they are justified.

To begin with, one can quote from Mann, "No one has ever or anywhere been able to point to any provision or legal principle which could permit individuals to act outside the confines of a system of municipal law." [32]

It is therefore difficult to comprehend the fact that the new law of international trade can exist outside municipal law especially in view of the fact that foreign trade constitutes an important part of the economic policies of sovereign states.

Whether Lex Mercatoria does exist as a new legal order depends on one important consideration, that is, the recognition of Lex Mercatoria by the national legal systems or an internationally recognized body. Some supporters of Lex Mercatoria appear to agree with this view. Clive Schmitthoff states, "It is wrong to attribute the character of international or supranational law to international trade law. It acquires its autonomous character by leave and license of all national sovereigns." [33] Do national legal systems recognize the Lex Mercatoria? Lagen, in an examination of a number of cases from different jurisdictions, came to the conclusion that courts are solidly opposed to Lex Mercatoria. [34] He states, "Even to the present day, there has been no softening in the rigid adherence of the regular courts to the principle enunciated in Serbian loans." [35] [This principle is based on the assumption that

any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country.] Professor Klein similarly notes that Lex Mercatoria is far from being universally accepted. He observes, too, that it is firmly opposed by the socialist countries.[36] We may also recall in the previous chapter that the English and Canadian legal systems have rejected the idea of a supranational law.

However, it might be asked whether the recognition of the Lex Mercatoria by the states is a necessary precondition for the existence of the Lex Mercatoria?

The answer may well depend on an individual's stance on the subject matter. If, as it is argued, arbitration is the substratum on which Lex Mercatoria is built,[37] would it not be plausible to further argue that Lex Mercatoria could in practice exist as a separate legal order even though not formally recognized by the states?

It has repeatedly been observed by proponents of arbitration that awards are usually complied with by disputants without any challenge. It could therefore be argued that as long as arbitral awards grounded on Lex Mercatoria are complied with, the question of formal recognition by the states becomes unimportant. International arbitrators, as we have noted earlier, recognize the existence of Lex Mercatoria as an autonomous legal order. However, to adopt this stance would only be masking the problem. While arbitral awards are usually complied with, there will always be a party who would not comply with the award, despite threat of sanctions to be imposed on

him by the 'merchant association' or 'community'. Under such a situation recourse to a national legal system becomes necessary. Where the losing party is not prepared to accept the award, that award grounded on Lex Mercatoria may not stand up to the test of judicial review.

Therefore, it is this writer's view that one should hesitate to speak of a New Lex Mercatoria at present.

I think the Lex Mercatoristes are putting the cart before the horse. Arbitration which is regarded as the substratum of this legal order is still under state control. Legal sanction still remains the most effective machinery for enforcing arbitral awards. The existence of a new legal system also requires acceptance by all trading states.

Arbitral practice without doubt appears to have given recognition to this supranational legal concept as an autonomous legal system. Arbitral practice in this respect is unimportant since it does not provide us with an authoritative interpretation of the position of Lex Mercatoria under municipal law. In the absence of approval of this legal order by states, arbitral case law is merely an extra-legal phenomenon. While Lex Mercatoria may not be regarded as an autonomous legal system, it cannot be denied that there certainly has developed a body of rules and practice which have a special character in international commercial transactions. Evidence of this abounds in practice. The Hague's rules relating to the Bills of Lading of 1924 and amended by the Brussels Protocol of 1968, the various codes of practice, and standard clauses or contracts are testimony to this fact.

It is proper to ask if these could displace the application of municipal law. In other words, are these sets of rules or customs and practices self-sufficient or complete enough to deal with most of the problems in international commerce? There are varied views on this issue. Klein says that there are so many questions which cannot be answered by these extralegal rules.[38] Goldman on the other hand regards Lex Mercatoria as a sufficient legal order and actually equates it to the Municipal Lex Contractus and therefore regulated only by the Municipal public policy.[39] Pieter Sanders appears to hold the same opinion as Professor Goldman, for he said,

"In my opinion denationalisation of the decision in international commercial arbitration is to a large extent possible. This also corresponds with the practice of international commercial arbitration. In many cases the arbitrators do not decide at all which law is applicable as there was no need to do so. The award is simply based on the terms of the contract and customs of the trade concerned." [40]

An objective answer to this question can only be given by examining the sources of the Lex Mercatoria. These sources have been noted as international conventions, customs and usages, and general principles of law. We shall look at each of these sources separately.

International conventions generally have not been successful. There are few conventions and fewer still have been ratified. One commentator was of the view that, because of the time it takes a convention to come into being, the vigorous development of case law can be expected to produce better effects more rapidly.[41]

If we turn our attention to usages and customs of trade, they too will solve only a portion of the problems encountered in

international business. Customs and usages are usually recognized after they have been widely accepted by the merchant class, and these take a considerable length of time to become an authoritative source of law.

International commercial transactions too, have become more complex in recent times. After the Second World War, new forms of international commercial transactions such as joint undertakings, foreign capital investments, patents, know-how purchase, etc., came into being.[42]

While usages and customs in the traditional sale of goods may be regarded as common place, it is doubtful whether there are any widely accepted customs and practices dealing with the new types of contracts that have emerged.

The same argument runs with respect to the general principles of law. There are, in the first instance, very few principles that have universal application. Notable examples are the principle of *pacta sunt servanda* and *rebus sic stantibus*. Even these, Mustill and Boyd noted, are not enough to solve any but the simplest problem. They stated, [giving as example the wide divergence between Anglo-saxon and continental laws on the concept of *force majeure*] "As soon as one tries to make the principles [*pacta sunt servanda*, and *rebus sic stantibus*] more particular, it is seen that there is no unanimity as to the way in which they should be applied." [43]

An examination of the sources of 'Lex Mercatoria' shows that it cannot even be regarded as a selfsufficient body of rules. A leading exponent of this theory has recently admitted that Lex

Mercatoria cannot claim to be a complete and autonomous system of law and that consequently the existence of the Lex Mercatoria cannot eliminate the need for a choice of law clause in an international contract.[44] Schmitthoff's statement would seem to agree with that of Henri Batiffor when he stated that to this day, only national laws are constituted in systems sufficiently complete to answer each problem of law.[45] It is this writer's view that Henri Batiffor's statement is basically correct.

I see the role of these rules or customs and usages as a secondary source of material which would aid both the courts and the arbitral tribunals, as the case may be, in reaching a decision consistent with international trade or practice. Professor Schmittoff is right in saying that parties do still require a choice of law clause in their agreement. These bodies of rules, practices, and customs could be regarded as the basis or the framework on which a law of international trade could develop. Despite the flaws in the Lex Mercatoristes' theory, it is evident that there is a continuous trend by the business world, "to move away from the restrictions of national law to a universal, international concept of the law of international trade." [46] This trend can be seen in the increased activities of formulating agencies. The recent U.N. Convention on Contracts for the International Sale of Goods, prepared by UNCITRAL, is a case in point. This trend however is not surprising. The vast diversity in the national legal systems is a factor unfavourable to the existence of an international market. The national legal system is usually inadequate to deal with the problems of international commerce.

Statutes are usually more difficult to change and as a result they are more difficult to adjust to the needs of international trade.[47] A writer notes, "a court's construction of a mercantile contract continues to embody the understanding of merchants of a later day when the practice of merchants has changed." [48]

The inadequacy of municipal law to deal with problems in international trade appears to be universally recognized. To this end, customs and usages of traders are usually admissible in courts in international commercial disputes.[49] Some trading nations have even gone further by enacting rules which are in line with the practice of international trade. The Uniform Commercial Code of the U.S.A. and Czechoslovak International Trade Code are examples.[50]

Some of these attempts are sometimes still inappropriate to deal with the needs of international business. There is therefore a need to reconcile national law to development in international trade. Batiffol rightly notes, "It is reasonable to believe that it is not the business of law to set up a static system which is rigid in certain matters against a liberty which could easily turn to anarchy in others. What is needed is a synthesis and continuity." [51]

Enderlein puts it clearly when he stated, "the way out of this difficulty must be seen in creating a legal regulation meeting the requirements of the specific nature of international economic relations and adequate for the relations to be regulated, while at the same time ensuring that all states concerned carry out this task jointly." [52]

This task however will not be an easy one,

"Profound difficulties [will] arise in establishing the parameters of an all-encompassing modern law merchant. National systems of law remain jealous of their jurisdiction over world trade law and [will] hesitate to lose such business to foreign systems. Mercantile customs are often difficult to unify within a single international system of commercial law. Trade practices differ from industry to industry. Legal rules vary from legal systems to legal systems, while business convention is seldom stable in the face of international economic and social instability. Moreover, dissimilarities in approach among legislators, administrators, judges and merchants are capable of complicating this movement towards the 'harmonization' of international trade law." [53]

In spite of these difficulties, it is important that there is a compromise between national attitude and international commerce. Failure to do so, warns Rene David, would perpetuate the situation of intolerable anarchy into which society and international law have fallen. Lawyers and legislators "will expound fossilized theories while international commerce will have found the solution to its problems elsewhere. Their only consolation will be to tell themselves that the new development does not partake of the nature of law." [54]

CONCLUSION

This study could be said to have dealt simply with the principle of party autonomy. This principle as Denis Tallon pointed out is applied in the law of international trade in two different ways, the traditional way and the revolutionary way. [1]

Party autonomy in the traditional way means that, although parties have a discretion to choose the proper law governing their contract, this discretion is subject to a number of limitations.

Party autonomy in its revolutionary form assigns to this principle a value in itself. It is independent of any support in national legal systems, and therefore self-regulatory.

The application of this principle as we saw has been given a very broad interpretation in international commercial arbitration. The arbitrators invariably gave effect to a choice of law clause when stipulated by the parties. Where parties failed to include a choice of law clause in their contracts, the awards showed that there was no one single conflict of law rule to which the arbitrators resorted to. Varied formulas were applied by them. These methods ranged from an application of national conflict of law rules to international conflict rules. Because of this confused state of affairs, some commentators prefer that the arbitrators abandon the problems of conflict rules by basing their decisions on an autonomous legal order, the new *Lex Mercatoria*. The basis for this autonomous legal order is traced to the doctrine of party autonomy. It is argued that since municipal legal systems recognize this doctrine, parties can regulate their contractual arrangements in a fashion designed to make it independent of any municipal law. This law can only find concrete application to the extent that contractual autonomy is complemented by an arbitral agreement.

It is argued by this writer that party autonomy does not exist in this unlimited way. National courts, as already pointed out, do not recognize such party autonomy which is pushed to the extremes.

The Lex Mercatoria cannot therefore exist as an autonomous law without the joint recognition of national legal systems. It was pointed out by this writer that while there are norms or customs and practices of merchants which have grown out of international commercial practice, it is, to borrow the words of Denis Tallon, "premature ... to conceive of a contract governed by a complete system of international norms - standard form of contract, customs, and, possibly, common general principles - and self-sufficient, with no necessity for recourse to a supplemental national law." [2]

Schmitthoff, one of the fore-runners of the Lex Mercatoria, has also admitted its inadequacy. He noted, "In the present state of affairs, I would consider a normal international commercial contract as defectively drafted if it did not contain a choice of law clause and also a jurisdiction or arbitration clause." [3] Since Lex Mercatoria cannot be deemed to exist at present, the dilemma of the arbitrator in determining the applicable law still remains. It may be recalled that this writer (in part two of this study) opted in favour of the law of the place which is significantly connected to the transaction as the most reasonable criterion to be employed by the arbitrator in determining the applicable law. This, moreover, appears to reflect the modern trend of private international law of contract. This writer's view should not be regarded as a rejection of the concept of Lex Mercatoria per se, but rather to point out that the vigour with which the arguments for the existence of Lex Mercatoria have been presented does not appear to be in tune with a few basic facts, especially in view of the fact that national

courts, whose blessings must be acquired to give legal backing to this concept are strongly opposed to it.

However, there is a need for joint action by the states, acting with other formulating agencies. States must duly exercise their role as international legislators in order to exert direct influence upon the creation of the Lex Mercatoria. Although the joint creation of a new Lex Mercatoria is not an easy task, and the experience acquired so far in the field of unification and in the ratification and adoption of conventions has not been encouraging, it is this writer's view that the future will present a different picture. There is at present an increased coordination and cooperation among formulating agencies. The setting up of UNCITRAL has made a major breakthrough in international trade. Countries with different social and economic policies and at different stages of development are all represented in this body and it is likely that, with the increased activity of UNCITRAL in the field of international commercial transaction, the goal of the business community will be realised. Schmitthoff writes,

"If the Unidroit project on the Code of International Trade Law, and the I.C.C. scheme on trade usages are joined together with the United Nations Convention on Contracts for the International Sale of Goods, the I.C.C. Uniform Customs and Practice on Documentary Credits and the Uniform Rules for Collections, the United Nations Hamburg Rules on the Carriage of Goods by Sea, and the UNCITRAL Arbitration Rules, the basis of a world code on international trade is already laid. What has to be done, is to weld together these disjointed pieces of unification into a logical, integrated work and to supplement it by unifications which are still extant, such as the proposed uniform law on international bills of exchange and promissory notes, the regulation of the international contracts of forwarding and warehousing and other relevant topics. The task of unifying the various measure of uniform law will fall to UNCITRAL. When - and not if -

this task is accomplished, our time will have what it needs: a transnational code of international trade law of world-wide application.[4]"

Is this an idle dream? If so, international commercial arbitration will continue to be fraught with the problems of choice of law.

FOOTNOTES

PART I

1. "International Commercial Arbitration may be defined as an agreement between two parties to a transnational commercial transaction to submit differences arising between them out of that transaction to the decision of a third party and to abide by that decision."

See Evans and Ellis, "International Commercial Arbitration: A Comparison of Legal Regimes" (1973) 8 Texas Int'l L.J. 17.

2. Smedresman, "Conflict of Laws in International Commercial Arbitration: A Survey of Recent Developments" (1977) 7 Cal. W. Int'l L.J. 263.

Chun Pyo Jhong, "The Settlement of Disputes Arising from International Trade and Investment" (1969-71) 1-2 LAWASIA, p. 21.

Yaeger, "International Commercial Disputes: The Alternative of Arbitration (1976-78) 1-3 N.C.J. Int'l L. & Comm. Reg. 142.

Croff, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?" (1982) 16 Int'l Law. 613.

3. The increasing use of arbitration can be seen from the caseload of a number of arbitral institutions. Between July 1972 and July 1975, 458 disputes from 74 countries were submitted to the I.C.C. Court of arbitration. In the five years from 1977 to 1981, the average number of cases was 199. By comparison, for the three year period from 1962 to 1965, the average was 64 cases per year. The total number of cases pending as of May 1982 was 567. By July 1976, 2,978 requests for arbitration had been filed with the I.C.C. from the time it adopted its first rule in 1922. By April 29, 1982, in less than six years, the figure had risen to 4,402.

By comparison, only a handful of international cases come before other arbitration institutions. There has, however, been an increase in the number of cases submitted to them. The American Arbitration Association estimates that about 120 International cases are lodged with it in a given year; the figure was 50 in 1974. In mid-1982, the London Court of Arbitration had 56 international cases pending.

Totaling the number of cases handled by these arbitral institutions cannot present a true picture of the extent to which commercial arbitration clauses are being utilized, since only a handful of these cases come before arbitration and others are sometimes withdrawn before an award is made.

Statistics about ad-hoc arbitration are lacking completely and the frequency of its use cannot be ascertained.

See Paulsson, "The Contemporary Role of I.C.C. Arbitration in Resolving International Business Disputes" in *Droit et pratique du Commerce International, International Trade Law and Practice*, 323 at pp. 324-325 (éditions scientifiques Internationales Publications, 1983).

Thompson, "Procedure Under the Rules of the I.C.C.," in Schmitthoff (ed.), *3 International Commercial Arbitration, collected Papers, Part 2 at 2* (1980).

Fowler et al., "A Survey of Arbitral Forums: Their Significance and Procedure" (1980) 5 N.C.J. Int'l L. 219 at 226.

4. The advantages of arbitration over litigation are said to be speed, less expense, procedure is flexible and informal and therefore more conducive to the continuance of business relations. It is also considered preferable because disputes involving complicated financial and technical matters are generally more suitable for the determination by financial and technical experts than by the Judiciary. It is also private. These advantages however have been exaggerated. The cost of arbitration is known to be substantially higher than that of litigation especially in institutional arbitral proceedings where the expenses include the administrative fees charged by such institutions, even the advantage of speed may be illusory especially if one party is intent on dragging its feet. The most probable factor leading to arbitration is that it is perceived by parties in an international agreement as the only available means to settle their differences, since there could be no competent court acceptable to both parties. International arbitration therefore fills the vacuum left by the lack of an international judicial system for the solution of disputes between private parties.

See Chun Pyo Jhong, op. cit supra note 2, p. 21.

Vickers, "Why arbitrate," in materials prepared for the Continuing Legal Education, April 22 and 23, 1982 Vancouver, p. 33.

Sanders, "Trends in International Commercial Arbitration," (1975) 11 *Recueil des cours*, 213 at 216.

Orsini, How to Resolve that Dispute: Commercial Arbitration in Ontario and in Canada, 39 (1979).

Redfern, "Arbitration: Myth and Reality" (1976) 4 Int'l. Bus. Law. p. 450 ff.

5. Smedresman, op. cit supra note 2, 263.

6. Higgins, Brown & Roach, "Pitfalls in International Commercial Arbitration," (1980) 35 Bus. Law. 1035.
7. See Sauser-Hall, "L'arbitrage en droit international privé," (1952) 44-11 Ann. Inst. dr. Int'l. 469; 47-11 Ann. Inst. dr. Int'l 394; 48-11 Ann. Inst. dr. Int'l 264.

Goldman, "Les conflits de Lois dans l'arbitrage International de droit privé," (1963-111) 109 Rec. des cours 349.

Haardt, "Choice of Law Clauses in Arbitration Agreements," in Essays on the Law of International Trade, 215, Hague-Zagreb Colloquium, (Asser Institute, The Hague, 1976).

Determan, "The Law in Arbitration," (1981) 94 Nov. 6 L.A. Daily J. 9.

Mann, "Lex Facit Arbitrum," in Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke, 157 (The Hague, 1967).

Lew, Applicable Law in International Commercial Arbitration: A Study in Decided Arbitration Awards. (Oceana Pub. Inc., New York 1978).

LaLive, "Les règles de conflit de lois appliquées au fond du litige Par l'arbitre International siégeant en Suisse," (1976) Rev. Arb. 155.

8. See Croff, op. cit supra note 2, at 613.
See also Lew, op. cit supra note 7, para. 4 at 2.
9. This study will deal only with the common law provinces of Canada en bloc.
10. Only the New York law shall be dealt with. New York law is chosen for the simple reason that New York is the leading international commercial centre, it's courts are likely to have the heaviest volume of cases involving foreign parties and therefore the most experienced in the conflict of laws area.
11. Canada, (2 Castel, Canadian Conflict of Laws, 532 (1975)).

United States Jurisdictions (The American Law Institute, The American Restatement (Second) Conflict of Laws, s. 187(2) (1971)).

United Kingdom (2 Dicey and Morris, The Conflict of Laws, 10th ed., 753 (1980)).

South Africa (Spiro, The Conflict of Laws, 150 (1973)).

Greece, Civil Code (1940) art. 25

Japan, International Private Law art. 7.

Eastern socialist countries too recognize the principle of Party Autonomy.

See Tallon, "The Law Applied by Arbitration Tribunals-11," in Schmitthoff (ed.), *The Sources of the Law of International Trade*, 154 at 155 (Stevens, London, 1964).

See also Réczei, "The Autonomy of contracting Parties in International Trade Relations in I UNIDROIT: New Directions in International Trade Law 55 at 67 (New York 1977).

12. General discussions on Party autonomy may be found in, James, "Effects of the Autonomy of the Parties on Conflict of Laws," (1959) 36 *Chi-Kent L. Rev.* 34.

Levin, "Party Autonomy: Choice of Law Clauses in Commercial Contracts," (1957-58) 45 *Geo. L. J.* 260.

Pounds, "Party Autonomy-Past and Present," (1970) 12 *S.T.L.J.* 214.

13. See S. 2, *The Hague Convention on the Law Applicable to International Sale of Goods 1955*. Reproduced in, "Register of Texts Conventions and Other Instruments Concerning International Trade Law." U.N. (E. 71.V3) (1971) Vol. 1 at 5.

1980 E.E.C. Convention on the Law Applicable to Contractual Obligations Section 3. Reproduced in Volume 11 Delaume "Transnational Contracts," Appendix 1, Booklet A, (New York, 1983).

14. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, provides in Article V (1) (a) that the recognition and enforcement of a foreign arbitration award may be refused if the arbitration "agreement is not valid under the law to which the parties have subjected it." U.N. Doc. E/Conf. 26/8/Rev.1-10 June 1958.

Article VII of the 1961 European Convention on International Commercial Arbitration states "the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute". 484 *U.N.T.S.* 364.

See also Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States. Reproduced in 4 Delaume, "Transnational Contracts," Appendix II Booklet B1 (New York 1981).

15. Dicey and Morris, The Conflict of Laws, 10th ed., pp. 753-54 (Sweet and Maxwell, London 1980).

Cheshire and North, Private International Law, 10th ed., 199 (Butterworth, London 1979).
16. See 2 Castel, Canadian Conflict of Laws 532 (Butterworth, Toronto 1975).

McLeod, The Conflict Laws 474 (Carswell Legal Publications, Calgary 1983).
17. (1939) A.C. 277.
18. Ibid., at 290.
19. See for instance Locke J. in Nike Infomatic Systems Ltd. v. Avac Systems Ltd. et al. (1980) 105 D.L.R. (3d) 455 at 459 (B.C.S.C.).
and
Medhurst J. in Greenshields Inc. v. Johnston et al., (1981) 119 D.L.R. (3d) 714 at 720 (Alta. Q.B.).
20. Morris and Cheshire (1940) 56 L.Q.R. 320 pp. 335-6.

Falconbridge, Essays on the Conflict of Laws, 413 (Toronto 1954).
21. Thomson, "A different Approach to Choice of Law in Contract" (1980) 43 M.L.R. 650 at 659.
22. Op. cit supra note 16, p. 478.
23. Dicey and Morris, op. cit supra note 15, p. 755.

See also Castel op. cit supra note 16 p. 537.
24. [1969] Qd.R. 378 (S.C.).
25. Contrast however, with Nike Infomatic Systems Ltd. op. cit note 19. This case concerned an agreement by which a British Columbia company granted a franchise to an Alberta company to lease and service the British Columbia firm's audio visual equipment in Alberta. The law of British Columbia was expressly stated to be the governing law. The contract however was void by Alberta law as it had not complied with registration and prospectus requirements imposed by the Franchises Act of Alberta and was to be performed in Alberta. The B.C. Court however upheld the choice of the parties.

See also Greenshields Inc. v. Johnson et al. op. cit supra note 18.

26. See Dicey and Morris op. cit supra note 15, p. 755 and also Castel, op. cit supra note 16, at 537.
27. The general principle of public policy appears in Roman Law as the prohibition of derogations from public law by way of contract. The concept of public policy can be seen in the writings of Savigny and Story. Although neither Savigny nor Story made express reference to the term "Public Policy" the notion they expounded was clearly that of public policy.

Anglo-Saxon use of the Public Policy concept can be traced in municipal law to the 15th century and in conflicts to the 18th century.

See generally Dolinger, "World Public Policy: Real International Public Policy in the Conflicts of Laws," (1982), 17 Texas Int'l L.J. p. 167 et seq.

28. See Dicey and Morris, op. cit note 15, p. 802.
Cheshire and North. op. cit supra note 15, p. 224.
29. Falconbridge op. cit supra note 20, 386-388.
Castel, op. cit supra note 16, 550.
McLeod, op. cit supra note 16, p. 500 et seq.
30. (1880) 14 Ch. D. 351.
31. Ibid., 369.
32. Lloyd, "Public Policy," (1953) p. 79 et seq. cited in Dicey and Morris op. cit supra note 15, p. 804.
33. Shrichand v. Lacon (1906) 22 T.L.R. 245.
Saxbly v. Fulton (1909) 2 K.B. 208 (C.A.)
- In the later case, the court of appeal held that money lent for gambling in a country where gambling was legal was recoverable notwithstanding that the English gaming laws would have made such a loan unrecoverable in a domestic case.
34. Prebble, Choice of Law to Determine the Validity and Effect of Contracts: A comparison of the English and American Approaches to the Conflict of Laws, pp. 69-70 (Michigan 1972).
35. See Kaufman v. Gerson [1904] 1 K.B. 591 [contract obtained by coercion was held unenforceable].
36. Robinson v. Bland (1760) 2 Burr. 1077, 1084.

37. Foster v. Driscoll (1929) 1 K.B. 470. [Agreement to import Tiquor into the United States, a friendly country in time of prohibiton, is unenforceable].
38. Somerset v. Stewart (1722) Lofft. 1.
39. See Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws," (1953) 39 Grotius Society 39 at 57.
40. (1957) 9 D.L.R. (2d) 304 (Sask. C.A.).
41. Greenshields Inc. op. cit supra note 19, at 721. Other Canadian cases which dealt with the question of Public Policy are National Surety Co. v. Larsen [1929] 4 D.L.R. 918 (B.C.C.A.), Block Bros. Realty Ltd. v. Mollard [1981] 4 W.W.R. 65 (B.C.C.A.).
42. Dicey and Morris op. cit supra note 15, at 755.
43. [1956] Ch. 322.
44. Ibid., at 341.
45. [1949] 1 K.B. 482 (C.A.).
46. Ibid., at 491. See also Lord Denning M.R. in The Fehrnar [1958] 1 W.L.R. 159, at 162, where he said "I do not regard the choice of law in the contract as decisive, I prefer to look to see with what country is the dispute most closely connected", but contrast Denning M.R. in Tzortzis v. Monark Line A/B [1968] 1 W.L.R. 406, 411 (C.A.). "It is clear that if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary".
47. See James Miller & Partners v. Whitworth Street Estates (Manchester) [1970] A.C. 583 at 603 (H.C.).

See Cie Tunisienne de Navigation S.A. v. Cie d'Armement Maritime S.A. ([1971] A.C. 572 at 603 where Lord Diplock said: "English Law accords to the parties to a contract a wide liberty to choose both the proper law and the curial law which is to be applicable to it...the English Courts will give effect to their choice unless it is contrary to public policy to do so."
48. See op. cit supra note 19. See also Drew Brown Ltd. v. The Orient Trade [1974] S.C.R. 1286.
49. Castel, op. cit supra note 16, at 536.
See also McLeod, op. cit supra note 16, at 475 and 482.
50. Weintraub, op. cit supra note 12, p. 399.

Oliver, "Standardization of Choice of Law Rules for International Contracts: Should There Be a New Beginning" (1959) 53 AM. J. Int'l L. 385.

51. James, op. cit supra note 12;
Levin, op. cit supra note 12;
Weintraub, op. cit supra note 12;
Pounds, op. cit supra note 12;
Vaughter, "Choice of Law for International Contracts: An American Critique," (1966) 2 Texas Int'l L. F. 227.
52. Prebble, op. cit supra note 34, at 140.
53. Blom "Choice of Law Methods in the Private International Law of Contract," (1979) Can. Y.B. of Int'l L. 206 at 207.
54. These cases will be referred to when appropriate in the context of the discussion.
55. See generally, Gruson, "Governing Law clauses in Commercial Agreements - New York's Approach," (1979/80) 18 Colum. J. Trans'n'l Law p. 323 at 327 et seq.
56. A.S. Rampell, Inc. v. Hyster Co., 165 N.Y.S. 2d 475 (1957).
Kahn v. Great-West Life Assurance Co. 307 N.Y.S. 2d 238 (1970).

See Sears, Roebuck & Co. v. Enco Associates 370 N.Y.S. 2d. 338 at 348 (1975). Where the court stated, "It has been held that where the contract provides that the law of another state is to apply that law will be applied so long as the contract has a reasonable relation to it".

Levey v. Saphier, 370 N.Y.S. 2d 808 (1975).
57. 418 N.Y.S. 2d 818 (1979).
58. Ibid., at 822.
59. 272 F. Supp. 236 (S.D.N.Y. 1967).
60. Ibid., at 241.
See also Fleischmann Distilling Corp. v. Distillers Co. Ltd. 395 F. Supp. 221 (S.D.N.Y. 1975).

In Skandia America Reinsurance Corp. v. Schenck, 441 F. Supp. 715 (1977) the Court stated obiter dictum, "New York courts will uphold choice of law clauses in insurance contracts provided that the law chosen bears a reasonable relationship to the transaction and violates no substantial state policy." at 723.

Nakhleh v. Chemical Construction Corp., 359 F. Supp. 357
(S.D.N.Y. 1973).

61. See Fleischmann Distilling Corp. ibid.

See Boyd v. Curran, 166 F. Supp. 193, at 196 (S.D.N.Y. 1958)
where the court stated that choice of law clauses will be
given effect if there are pertinent contacts with New York.

See also B.M. Heede Inc. op. cit supra note 59.

Gambar Enterprises Inc. op. cit supra note 57.

62. Op. cit supra note 56.

63. Tuchler, "Boundaries to Party Autonomy in the U.C.C.: A
Radical View," (1966/67) 11 St. Louis U.L.J. p. 180 at pp.
198-99.

Note however, that although Tuchler was commenting on the
language of s. 1-105 of the U.C.C., it is this writer's view
that the same argument can be put forward on the common law
position, since the first sentence in the code and the common
law rule are couched in similar terms.

Section 1-105(1) of the New York Uniform Commercial Code
(U.C.C.) states

"When a transaction bears a reasonable relation to this
state or nation the parties may agree that the law
either of this state or of such other state or nation
shall govern their rights and duties."

See McKinney 1964 (supp. 1979-80).

64. Reese, "The power of the parties to choose the law governing
their contracts," (1960) Am. Society Int'l L. Proc. 54.

65. 403 N.Y.S. 2d 613 (1977) (Civil Court of the City of New York,
N.Y. County).

66. Ibid., at 615.

67. 398 F. supp. 1047 (E.D.N.Y. 1975).

68. Ibid., at 1051 N. 17.

69. 372 N.Y.S. 2d 97 (1975) (S.C. Westchester County).

70. Ibid., 116-117.

71. Ibid., 117.

72. e.g. Securities regulations and Antitrust Laws.

73. 94 S. Ct. 2449 (1974).
74. Ibid., at 2457 citing Burger C.J. in M/S Bremen v. Zapata Off-shore Corp. 92 S. Ct. 1907 at 1913 (1972).
75. Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc., 723 F. 2d 155 (1st cir. 1983).
76. Mitsubishi Motors Corporation (Mitsubishi) is a joint venture between Chrysler and Mitsubishi Heavy Industries, inc., 723 F. 2d at 157.
77. 723 F. 2d at 157.
78. Soler's counterclaim under the Sherman Antitrust Act alleged that Mitsubishi and Chrysler had unlawfully divided markets for their vehicles and that pursuant to such agreement, Mitsubishi had refused to permit trans-shipment of vehicles to North, Central and South America. It also alleged that Mitsubishi had illegally attempted to drive Soler out of business. 723 F. 2d at 157.
79. 269 N.Y. 22 (1935).
Dougherty v. Equitable Life Assurance Society, 193 N.E. 897, 903 (1934).
Reger v. Nat. Ass'n of Bedding Manufacturers, op. cit supra, note 69, 166.
80. M. Gruson, op. cit supra note 55, at 375, citing Compania de Inversiones Internacionales' case ibid., and F.A. Strauss v. Canadian Pacific Railway Co., 254 N.Y. 407 (1930).
81. One writer comments, "To the extent that such choice [of laws by the parties] is recognized at all, it is almost uniformly qualified by a requirement of substantial contractual connection with the stipulated law ... Invocation of the public policy of the forum is a frequent deterrent to party autonomy..."

Note: "Conflict of Laws: Party Autonomy in Contracts," (1957) 57 Colum. L.R. 553 at 566.

Gruson also said, "Today the reasonable relationship requirement is clearly a rule of New York Law" op. cit supra note 55, at 352.
82. R.J. Bauerfeld, "Effectiveness of choice-of-law clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?" (1982) 82 Colum. L.R. 1659 at 1670.
83. Ibid., at 1673.

84. 216 N.Y.S. 2d 65 (1961).
85. Ibid., at 68-69.
86. Ibid.
N.B. This decision was criticised by Professor W.L.M. Reese in an article "Chief Judge Fuld and Choice of Law," (1971) 71 Colum. L.R. 548 at 551-552.
87. 461 F. supp. 152 (1978).
88. Ibid., 155 - 156.

It is to be noted that while the courts in La Beach and The Haag case each applied the law stipulated in the contract, they nevertheless explicitly refused to give effect to the choice of law clause and arrived at their decisions on other reasons. Bauerfeld sees the courts' attitude as an "intent on serving notice that they would not follow choice-of-law clauses" op. cit. supra note 82, at 1672.
89. 410 F. supp. 1339 (S.D.N.Y., 1976).
90. Ibid., at 1341.
91. See e.g. La Beach op. cit supra note 87.
92. See Gruson's comment, supra, note 81.
93. See e.g. A.S. Rampell Inc.; Kahn; Sears Roebuck & Co.; Levey v. Saphier; op. cit supra note 56.
94. N.Y.U. C.C. (McKinney 1964).
95. Ibid., s. 1-105(1).
96. "Lex facit Arbitrum," in Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke, 157 (Nijhoff, The Hague 1967).
97. Ibid., 161.
98. Ibid.
99. Same views were re-echoed by Mann in a recent article "Schiedsrichter und Recht" in Festschrift fur Werner Flume, p. 593 at 595 et seq. (1978).
100. Wetter, "The Legal Framework of International Arbitral Tribunals-Five Tentative Markings," in Hans Smit et al. (ed.), International Contracts 271 at 272-273 (Matthew Bender, New York 1981).

101. Lew, op. cit supra note 7, paras. 97-102.
102. Ibid., para. 100.
103. Robert, Arbitrage: civil et commercial en droit interne et International Privé, Para. 354. 4th ed. (Dalloz, Paris 1967) quoted from Lew, op. cit supra note 7, Para. 106 p. 84.
104. Mr. Mann stated, "It is not uncommon and on the whole, harmless to speak, somewhat colloquially, of international arbitration, the phrase is a misnomer. In the legal sense no international commercial arbitration exists ... every arbitration is a national arbitration, that is to say, subject to a specific system of national law". op. cit supra note 96, at 159.
105. See Lord Diplock in Bremer Vulkan v. South India Shipping Corporation (1981) 2 S.L.R. 141, where he stated that there are considerable differences between the position of a judge and an arbitrator.
106. Reference is made mostly to I.C.C. awards since the bulk of International Commercial arbitrations are conducted by the I.C.C. court of arbitration.
107. I.C.C. award No. 893, Doc. No. 410/330 March 10, 1955. The extract of the award is reported in Lew, op. cit supra note 7, para 106 pp. 88-89.
108. Ibid., 89.
109. I.C.C. award No. 1512, 1971. Extract of award is reported in (1976) 1 Y.B. Comm. Arb. 128.
110. Ibid., at 130.
111. I.C.C. award No. 1315 Doc. No. 410/1316, 13 October, 1965. Extract of the award is reported in Lew, op. cit supra note 7, para. 106 p. 88.
112. Ad hoc Award of 3 November, 1977. Extract of award is reported in (1982) 7 Y.B. Comm. Arb. Part II p. 77.
113. Ibid., at 79.
114. Ad hoc Award of 23 July, 1981. Extract of award reported in (1983) 8 Y.B. Comm. Arb. Part II 89 at 91.
115. I.C.C. Award No. 1103, Doc. No. 410/774, 28 September, 1960. Extract of award reported in Lew, op. cit supra note 7, para. 106.
116. I.C.C. award No. 1598, 1971. Reported in (1978) 7 Y.B. Comm. Arb. 216.

117. Ibid.
118. I.C.C. award No. 1255, Doc. No. 410/1185 13 March 1964. Reported in Lew, supra note 7 Para. 116 pp. 98-99.
119. Sanders, op. cit supra note 4, at pp. 241-242.
120. See Scherk's case op. cit supra note 73.

Part II

1. Iwasaki, "Effective Use of Model Arbitration Clauses in International Contracts," in Schmitthoff (ed.), International Commercial Arbitration, Collected Papers, Part III 160 (1974-80).

McClelland, "International Arbitration, A Practical Guide for the Effective Use of the System for Litigation of Transnational Disputes," (1978) 12 Int'l Law 83 at 94.

Glossner, "International Commercial Arbitration: Some Practical Aspects," in Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke, 95 (The Hague 1967).
2. Mezger, "The Arbitrator and Private International Law, in Domke (ed.), International Trade Arbitration, 229 at 232 (1958).
3. Ibid.
4. I.C.C. Award, No. 1455 Doc. No. 410/1561 20 September 1967. Extract of award reported in Lew, Applicable Law in International Commercial Arbitration: A Study in Decided Arbitration Awards, (New York 1978).
5. Mezger, op. cit supra note 2, at 234.
6. La Live, "Les Règles de conflit de Lois Appliquées au Fond du Litige par l'arbitre International Siegeant en Suisse," (1976) Rev. Arb. 155 at 160.
7. Ibid.
8. Klein, "The Law to be Applied by the Arbitrators to the Substance of the Dispute," in Schultz (et al. eds.), The Art of Arbitration: Essays on International Arbitration, Liber Amicorum Pieter Sanders, 189 (Kluwer Law & Taxation Pub., 1982).
9. Ibid., 191.

10. Croff, "The Applicable Law in an International Commercial Arbitration: Is it still a Conflict of Laws Problem?" (1982) 16 Int'l. L. 613 at 628.
11. Anzilotti, Rivista Di Diritto Internazionale 467 (1906) cited from LaLive, op. cit. supra note 6 at 16.
12. Klein, op. cit supra note 8, at 191.
13. LaLive, op. cit supra note 6, at 161; Croff, op. cit supra note 10, 1 at 624.
14. LaLive, ibid.
15. LaLive op. cit supra note 6, at 162.
16. Ibid.
17. Croff, Op. cit supra note 10, at 628.
18. Lew, Applicable Law in International Commercial Arbitration: A study in Decided Arbitration Awards, para 211 (Oceana Publications Inc., 1978).
19. I.C.C. Award made in case No. 2272. Extracts reported in (1977) 2 Y.B. Comm. Arb. 151.
20. LaLive, op. cit. supra note 6, at 162; Lew, op. cit supra note 18, para 210 at 232.
21. See Lew ibid., para 210 at 233.
22. (1957-11) Ann. Inst. dr. Int'l, 394 ff.
23. Mezger, op. cit supra note 5, at 239.
24. Mann, "Lex Facit Arbitrum," in Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke 157 at 165 (The Hague 1967).
25. Ibid., 167.
26. Ad hoc arbitration, July 1966. Extracts reported in (1976) 1 Y.B. Comm. Arb. 141.
27. I.C.C. Award No. 1913, Doc. No. 410/2073 15 December 1971. Extracts of award, reported by Lew op. cit supra note 18, Para. 242 at 268-269.
28. I.C.C. Award, No. 1592, Doc. No. 410/1914, 18 November 1970. Extracts reported in Lew op. cit supra note 18, Para. 240.

N.B. Other awards on this subject are to be found in Lew para. 265 passim and Yearbook of Commercial Arbitration.

29. See Lew, op. cit supra note 18, para 228 at 248;

Fouchard, "L'Arbitrage Commercial International," at 360 (Dalloz-Paris 1965);

Goldman, "Les Conflits de Lois dans l'arbitrage International de droit Privé," (1963-111) 109 Rec. des Cours 351 at 413.
30. Fouchard, ibid., para. 551. Lew, op. cit supra note 18, para 233 at 254.
31. op. cit supra note 24, at 163.
32. Mann, "English Procedural Law and Foreign Arbitrations," (1969) 18 I.C.L.Q. 997.
33. Ibid., at 1000.
34. Mann, op. cit supra note 24, at 163.
35. It is important to point out that the I.C.C. Court is not a court in the ordinary sense of the word, it does not decide cases and parties never appear before the court. It has the general responsibility of ensuring the smooth functioning of all I.C.C. arbitration, although it has other specific functions allotted to it.

See Paulsson, "The Contemporary Role of I.C.C. Arbitration in Resolving International Business Disputes," in Droit et Pratique du Commerce International, 323 at 328 (E.S.I. Publications, 1983).

See also Stevenson, Jr. "Why I.C.C. Arbitration," (1980) 14 J. Int'l L. & Econ. 381 at pp. 389-390.
36. Extract of case in Jan Paulsson, "Arbitration Unbound: Award Detached from the Law of its Country of Origin" in Schmitthoff (ed.), International Commercial Arbitration, collected Papers, part 1, p. 1 at 7 ff (New York, 1982).
37. Kopelmenas, "Quelques Problèmes Recents de l'arbitrage commercial International," (1957) Revue Trimestrale De Droit Commercial 985.
 "...devant la difficulté, voire l'impossible de fixer des regles Internationales de conflit. ...La Seule solution raisonnable du problème consistant à laisser à l'arbitre le soin de déterminer, ...La Loi applicable selon la règle de conflit qu'il jugera appropriée a l'espece."
38. See Art. VII of the European Convention on International Commercial Arbitration, 1961.

39. See Articles 33 (1) and 13(3) of the UNCITRAL and I.C.C. Rules' respectively.
40. I.C.C. Award No. 953, 18 January, 1956. Extracts reported in (1978) 3 Y.B. Comm. Arb. 214.
41. I.C.C. Award No. 1449, Doc. No. 410/1583, 8 November 1967. Extract of award reported in Lew, op. cit supra note 18 para 265.
42. See Lew ibid.
43. Cf. Lew, op. cit supra note 18, para 254.
44. Fouchard, op. cit supra note 29, para 563 at 384.
45. Extracts of case reported in Notes: "The Lex Mercatoria in Paris and Vienna", (1983) 17 J.W.T. Law. 358 ff.
46. The English translation of the 1981 Decree is produced in (1982) 7 Y.B. Comm. Arb. 271.
47. Fouchard, "L'arbitrage International en France après le décret du 12 Mai 1981", J. du dr. Int. (1982), No. 2 p. 374.
48. I.C.C. award, No. 986, Doc. No. 410/461 13 March 1957 Extracts reported in Lew, op. cit supra note 18, para. 288.
49. I.C.C. award No. 953, Doc. No. 410/385 18 January, 1956 Extract in Lew Para 289.
50. Derains, "L'application cumulative par l'arbitre des Systemes de conflit de Lois Intérèssés au litige," (1972) Rev. Arb. 99 at 121.
51. Goldman, op. cit supra note 29, at 413.
52. Fouchard, op. cit supra note 29, para 564.
53. This argument is similar to the concept advocated by Hoff and Von Mehren. It is their view that rather than select an appropriate municipal law to govern a multi-state dispute, a special rule should be developed to accommodate views of all concerned jurisdictions. This proposition therefore advocates the development of substantive rules which would take into consideration conflicting rules and then compromise the difference.

Cf. Hoff, "Adjustment of Conflicting Rights: A suggested Substitute for the Method of Choice-of-Law" (1952) 38 Va. L. Rev. 745 at 747;

Cf. Von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology", (1974/75) 88 Harv. L.R. 347.

54. I.C.C. award No. 2172, Doc. 410/2384 1974. Extracts reported in Lew, op. cit supra note 18, para. 304 at 376.
55. I.C.C. Award No. 3316, 23 October 1979. Extracts reported in (1982) 7 Y.B. Comm. Arb. 160.
56. I.C.C. award, 1959. Extracts reported by Fouchard, op. cit supra note 29, at 389.
57. I.C.C. arbitration award No. 1776 1970. Extracts reported in Sanders, "Trends in International Commercial Arbitration," (1975) 11 Rec. des Cours, 213 at 259.
58. I.C.C. Award, No. 1621, Doc. No. 410/2022, 22 September 1972. Extracts, reported in Lew, op. cit supra note 18, para. 307.
59. I.C.C. Award No 1472, 1968. Extracts reported in Sanders, op. cit supra note 57, 252.
60. For a definition of the concept of the proper law see Dicey and Morris, The Conflict of Laws, 10th ed., Rule 146 (Sweet and Maxwell, London 1980).
61. See Leflar, American Conflicts Law, 3rd. ed., 308 (The Bobbs-Merrill Company, Inc., 1977).
62. I.C.C. Award No 2114, 29 December 1972. Extracts of Award reported in (1980) 5 Y.B. Comm. Arb. 186 at 189.
63. I.C.C. Award, No. 1532, Doc. No. 410/2069, 15 Dec. 1971. Extract reported in Lew op. cit supra note 18, para. 265 p. 303.
64. Cf. Leflar, op. cit supra note 61, at 309.
65. Cf. Polonsky, "Arbitration of International Contracts," (1971) J.B.L. 1 at 8.
66. I.C.C. Award No 2172, Doc. 410/2384 1974. Extracts reported in Lew, op. cit. supra note 18, para 304 at 376.
67. I.C.C. Award, No. 1990, 1972. Extracts reported in (1978) Y. B. & Comm. Arb. pp. 217-218.
68. There is no need to enumerate all the attempts made at unifying the conflict of law rules. Suffice it to say that the Hague Conference which was first convened in 1893 and has as it's objective the unification of the rules of private International Law has made several attempts toward this goal. One such attempt is the Hague Convention on the Law Applicable

to International Sales of Goods of 15th June 1955. This Convention has yielded little results. So far, very few countries have adopted it.

A convention which can be deemed to be successful in unifying the rules of private international law is the European Communities' Convention on the Law Applicable to Contractual Obligations of 1980. This convention codified a set of choice of law rules in contract to govern the relationship of contracting parties within the E.E.C. nations.

69. Such was the approach taken by the arbitrators in a dispute involving a Lebanese firm and a western European car manufacturer. In this case a Lebanese firm and the Western European car manufacturer concluded a contract under which the Lebanese firm was to act as distributor for the European firm in Lebanon. The contract stipulated that the claimant would not only sell the cars but would also provide after-sales service and maintain a stock of spare parts for this purpose, the distributor was to construct a garage and storeroom. Having failed to do so, the manufacturer terminated the contract in accordance with the terms of their contract.

The Lebanese distributor thereafter started arbitration proceedings against the car manufacturer.

The arbitrators in a bid to determine the applicable law analysed the economic aspects of the contractual operation. The arbitrators considered that if the contract had had as sole object the sale of cars, the law of the Western European car manufacturer would have been applicable, since the contract was negotiated in that country, the respondents (Western European Car Manufacturer) had signed the contract in their country, after it had been signed by the buyer in Beirut. Moreover, the delivery by virtue of Art. 7 of the contract was deemed to have been effected at the place of shipment [a harbour within the Western Europeans' Country]. The arbitrators, however, found that the contract had a broader object, namely the distribution of the products of the respondents in Lebanon. Although, the claimant bore the risk of poor sales, as his remuneration was the difference between purchase and sales price, he nevertheless had assumed a whole series of obligations to ensure the distribution of the respondents' production in Lebanon. The sale was therefore only one element of an entire operation which had its economic and legal performance in Lebanon. It was also significant that the dispute between the parties arose out of the performance of the claimant in Lebanon. The arbitrators therefore applied Lebanese law.

70. e.g. England, Canada.
71. See Ole Lando, "Conflicts-of-Law Rules for Arbitrators," Festschrift fuer Konrad Zweigert, 1981, 157 at 160.

72. See s. 187(2).
73. Art. 4(1).
74. Ole Lando has devoted an entire article on this working group and the preliminary set of rules drafted by them. op. cit supra note 71, 157 ff.
75. Draft provisions of Guidelines produced, in Ole Landa, supra note 71 at 174 ff.
76. For a detailed treatment of the concept of amiable compositeur see Simont "Amiable Compositeurs and their Reasoning" in 2 International Commercial Arbitration, Collected Papers 109 ff (1974-80).
- See also R. Marx, "Amiable Compositeur" (1942) 2 Arb. J. 211 et seq.
77. Simont ibid., at 126.
78. Simont, supra note 76, at 124.
79. See Article VII (2) of the 1961 European Convention on International Commercial Arbitration; Article 13(4) of the I.C.C. rules; Article 39 of the Arbitration Rules of the E.C.E. 1966.
80. Ad hoc Award of 3 November, 1977. Extracts of award is reported in (1982) 7 Y.B. Comm. Arb. Part II p. 77.
81. Extract reported in (1976) 1 Y.B. Comm & Arb. 136.
82. See Orion Compania Espanola De Seguros v. Belfort Maats (1962) 2 Lloyd's L.R. 257.
- Radio Publicity Universal Ltd. v. Compagnie Luxembourgeoise [1936] 2 All E.R. 721 (Ch.).
- Eagle Star v. Yuval (1978) 1 Lloyd's L.R. 357.
83. Two English authors who have gone into any considerable discussion on this matter are Russell and Mann. Other authors like C.J. Cohn made only passing remarks.
- See Russell, On the Law of Arbitration 186-187 (London, 1970 18th ed.).
- Mann op. cit supra note 6;
- Cohn, "The Rules of Arbitration of the International Chambers of Commerce" (1965) 14 1 C.L.Q. 132 at 156.

84. A new Arbitration Act was enacted by the parliament in 1979. This Act abolished certain provisions in the 1950 Arbitration Act of the United Kingdom.
 85. See s. 21 of the 1950 Arbitration Act.
 86. Op. cit supra note 82.
 87. Ibid., at 264.
 88. Op. cit supra note 82.
 89. Ibid., 362.
 90. Simont op. cit supra note 76, at 118.
 91. See Lord Denning in Eagle Star v. Yuval, op. cit supra, note 82, at 362 and Scrutton L.J. in Czarnikow v. Roth, Schmidt & Co. (1922) 2 K.B. 478.
 92. S. 1(1) 1979 Arbitration Act.
 93. S. 1(2) - (6).
 94. S. 3.
 95. The New Act did not abolish the 1950 Act but only sought to amend it by abolishing certain provisions.
 96. (1981) 2 Lloyds L.R. at 239.
 97. Ibid., 245.
 98. Cf. Mustill & Boyd op. cit supra note 77, at 612.
 99. Ibid.
 100. Prebble, Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of the English and American Approaches to the Conflict of Laws, at 200.
 101. The Common-Law Provinces alone will be treated and the laws in force in the nine Common-Law Provinces and territories are all very similar following closely the English Arbitration Act of 1889, although there are numerous minor variations.
 102. The concept was touched by Davidson, in "Dispute Settlement in Commerical Law Matters," (1982-83) 7 Can. Bus. L.J. 197.
 103. See Kos-Rabcewicz-Zubkowski, "National Reports: Canada", (1977) 2 Y.B. Comm. Arb. 16 at 22.
- Davidson, op. cit supra note 102, at 204.

Grand Trunk Railway Company of Canada v. Amable Coupal (1898)
28 S.C.R. 531.

Bar Point Land Co. v. Chappus, (1922) 23 O.W.N. 130 (H/C).

Beach-Hydro-Electric Power Commission of Ontario (1924) 4
D.L.R. 995.

N.B. However, the position of the law is different in Quebec. Article 948 of the code of Civil Procedure provides that parties to a dispute may exempt the arbitrators from the rules of law, which are not of public policy, and may empower them to act ex aequo et bono or according to their concept of equity.

104. See Kos-Rabcewicz-Zubkowski op. cit supra note 103, at 25.

See also International Woodworkers of America v. Weldwood of Canada, (1970) 74 W.W.R. 568, 15 D.L.R. (3d) 200 (B.C.C.A.).
105. See Art. 21 of B.C. Arbitration Act. R.S.B.C. 1979. C. 18.
N.B. Where it may be necessary to refer to provisions in the Arbitration Acts, the provisions of B.C. Legislation will be stipulated as typical of the Common Law Legislations.
106. Cf. Beach Hydro-Electric Power op. cit supra note 103.
107. Jekyll v. Wade (1860) 8 Gr. 363 at 365.
108. [1958] O.W.N. 269, at 270.
109. Despite the fact that major changes have been made in Britain under the 1979 Act, this hasn't affected the duty imposed on the arbitrator to decide according to the general principles of law.
110. It is a misnomer to discuss the concept of amiable compositeur in the United States of America, since there is no "American Legal System" but distinct legal systems. It is however submitted that the law appears to be similar in most jurisdictions and therefore any conclusions which will be arrived at would be correct for most jurisdictions.
111. Domke, Commercial Arbitration, 25:01 (Rev'ed, 1984).
112. See Holtzmann, "United States of America: the American Arbitration Association", in Cohn (et al. eds.), Handbook of Institutional Arbitration in International Trade (North-Holland Publishing Co., 1977).
113. 328 N.Y.S. 2d 418 (C.A. New York, 1972).

114. University of Alaska v. Modern Construction Inc., Alaska. 522 p. 2d 1132.
115. Ibid., at 1140.
116. See Re Reynolds Estate 20 S.E. 2d 348 at 349.
Matter of Granite Worsted Mills [Cowen] 306, N.Y.S. 2d 934, 937.
Matter of Exercycle Corp. [Moratta] 214 N.Y.S. 2d 353, 357-358.
Fudickar v. Guardian Mutual Life Ins. Co. 62 N.Y. 392, 399-400.
117. Botein J. stated in Publishers' Association of N.Y. City v. Newspaper and Mail Deliverers' Union of N.Y. and Vicinity, 111 N.Y.S. 2d 725 at 731 (S.Ct.) "The rule that arbitrators need not follow legal principles as enunciated by the courts, in making their awards is subject to an exception where the award would require action contrary to a penal statute or where the performance would be contrary to public policy".
118. See Derains, "France National Reports," (1982) 7 Y.B. Comm. Arb. 3 at 12.
Sanders, "Netherlands National Reports," (1981) 6 Y.B. Comm. Arb. 60 at 75 (1981).
Me. Lambert Matray, "Belgium National Reports" (1980) 5 Y.B. Comm. Arb. 1 at 18-19.
119. See 1(6) of the 1979 Act of the United Kingdom.
See Kos-Rabcewicz-Zubkowski op. cit supra note 103, at 22.

Part III

1. See Goldstajn, "The New Law Merchant," (1961) J.B.L. 12.
Schmitthoff, "International Business Law: A New Law Merchant," (1962) 11 Curr. L. Soc. Prob. 129.
Schmitthoff, "The Law of International Trade, its Growth, Formulation and Operation," in Schmitthoff (ed.), Sources of the Law of International Trade, 3 (Stevens, London 1964).
Kopelmenas, "International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law" in Schmitthoff (ed.), ibid., at 118.

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Fragistas, "Arbitrage étranger et arbitrage International en droit privé," (1960) Rev. Critique, 1.

Sanders, "Trends in International Commercial Arbitration," (1975) 11 Rec-des cours 213 at 263.

2. Croff, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?" 16 Int'l L. 613 at 634.
3. See Berman & Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)," (1978) 19 Harv. Int'l L.J. 211 at 226.
4. Ibid.
5. Trakman, The Law Merchant: The Evolution of Commercial Law at 18-19 (Colorado 1983).
6. Ibid., at 20.
7. Schmitthoff, Commercial Law in a Changing Economic Climate at pp. 19-20 (London 1981).
8. Goldstajn, op. cit supra note 1, at 12.
9. Schmitthoff, op. cit supra note 1, at 44.
10. Schmitthoff, op. cit supra note 7, at 21.
11. Op. cit supra note 1, at 144-145.
12. Bonell, "The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts" in 1 UNIDROIT: New Directions in International Trade Law, 107 (New York 1977).
13. Ibid., at 114.
14. Kahn, La Vente Commerciale Internationale (Paris, 1967) 6 et seq., 365 et seq.

Ishizaki, Le droit corporatif International de la vente des soies, (Paris 1928) I P. 4 et seq. 330 et seq.

Kopelmenas, "La codification des coutumes du commerce International dans le cadre des commissions Régionales des Nations Unies," in Annuaire Français de droit International (1955) p. 375 et seq.

Cesarini - Sforza, "Il diritto dei privati" (Milan 1928) p. 96.

All the aforementioned authorities are cited from Bonell supra note 12 at 114.

15. Op. cit supra note 12, at 114.
16. Generally see Bonell, op. cit supra note 12, at 114 ff.
17. Ross observes that parties feel bound by the arbitration agreement and award. They will also face the many social and moral constraints which bind them to keep the "rules of the game". This he maintains is sufficient for international business.

Cf. Ross, om ret ogretfaerdighed (1953) pp. 66 et seq. Cited from Lando, "Conflict-of-Law Rules for Arbitrators" in Bernstein (ed.), Festschrift fuer Konrad Zweigert zum 70. Geburtstag, 157 at 171 (1981).

18. Honnold, "The Influence of the Law of International Trade on the Development and Character of English and American Commerical Law" in Schmitthoff (ed.), The Sources of the Laws of International Trade, 70 at 76 (Stevens, London 1964).
19. See Schmitthoff, op. cit supra note 7, at 23.
20. Schmitthoff admits that the term 'International Legislation' is a misnomer since the power to create legal rules in a particular territory can only be exercised by or by authority of a national sovereign.

Op. cit supra note 7, at 22.

21. For a list of other conventions, see Schmitthoff, Export Trade, 6th ed. XXXIII et seq. (London 1980).
22. Goldman, "Les Conflits de lois dans l'arbitrage International de droit privé," (1963-111) 109 Rec. des Cours 351 at 483.

The same argument was re-echoed by him at the Basle conference of October 1980.
23. Ad hoc award of 3 November 1977. Extract reported in (1982) 7 Y.B. Comm. Arb. 77.
24. I.C.C. Award No. 3540 of 3 October 1980.
25. Ibid., in (1982) 7 Y.B. Comm. Arb. 125 at pp. 127-129.
26. I.C.C. Award No. 1859, 1973. Extract reported by Derains, "Le Statut des Usagés du Commerce International devant les juridictions arbitrales," (1973) Rev. Arb. 122, pp. 133-4.

27. See supra note 1.
28. See supra notes 23ff.
29. Mustill & Boyd, Commercial Arbitration, 611 (Butterworths, London 1982).
30. Wetter, The International Arbitral Process: Public and Private. 403-4 (1979).
31. Enderlein, "The Law of International Trade: A New Task for National Legislators or a New "Lex Mercatoria"?" in 11 UNIDROIT: New Direction in International Trade Law. 447 at 451 (1977).
32. Mann, "Lex Facit Arbitrum," in Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke, 157 at 160 (The Hague 1967).
33. Op. cit supra note 7, at 22.
34. Langen, Transnational Commercial Law, 12 (1973).
35. Ibid., at 13.
36. Klein, "The Law to be Applied by the Arbitrators to the Substance of the Dispute," in Schultz (et al. eds.), The Art of Arbitration: Essays on International Arbitration-Liber Amicorum Pieter Sanders, 189 at 196.
37. Trakman, op. cit supra note 5, at 42.
38. Klein, "De L'authorité de la loi les Rapports Commerciaux Internationaux in Internationales Recht und Wirtschaftsordnung, Festschrift fuer F.A. Mann 617 (1977).
39. Op. cit supra note 22, at 483.
40. Op. cit supra note 1, at 264.
41. Cf. Langen, op. cit supra note 34, at 22.
42. Reczei, "The Autonomy of the Contracting Parties in International Relations" in 1 UNIDROIT: New Directions in International Trade 55 (New York 1977).
43. Op. cit supra note 29, at 612.
44. Schmitthoff at the Basle conference of October 1980, cited from von Hecke, "Contracts Subject to International or Transnational Law" in Hans Smit et al. (ed.), International Contracts 25 at 37 (Matthew Bender, New York 1981).

45. Batiffol, "Pluralisme des Methodes en droit international privé" (1973) 11 Rec des cours 131 cited from Klein, *op. cit supra*, note 38 at 633.
46. See Schmitthoff, *op. cit supra* note 7, at 21.
47. See generally, Goldstajn, "A New Law Merchant Reconsidered" in Fabricus (ed.), *Law and International Trade* at 174 ff.
48. Honnold, *op. cit supra* note 18, at 80.
49. See Kungling Jarnvagsstyrelsen v. Dexter and Carpenter, 299 F. 991 (S.D.N.Y. 1924).
Dixon, Irmaos and Cia 19 v. Chase National Bank. 144 F. 2d 759 (2d cir. 1944).

In these cases the court gave effect to the practices of merchants rather than the existing municipal law.

50. Goldstajn states, "There are few laws of a more recent date which strive to meet the needs of international trade to such extent as the Uniform Commercial Code of U.S.A. and Czechoslovak International Trade Code". Op. cit supra note 48 at 176.
51. 120 RDC., 1967-1. p. 188, cited from Langen op. cit supra note 34, at 13.
52. Op. cit supra note 31, at 448.
53. Op. cit supra note 5, at 42.
54. David, "The Methods of Unification," (1968) A.J.C.L. 13 at 24.

Conclusion

1. Dennis Tallon, "The Law Applied by Arbitration Tribunals - II," in Schmitthoff (ed.), *The Sources of the Law of International Trade*, 154 at 156 (1964).
2. Ibid., at 156.
3. Schmitthoff, "Nature and Evolution of the Transnational Law of Commercial Transactions: in *The Transnational Law of International Commercial Transactions*. (N. Horn and Schmitthoff, ed., 1982) 19 at 22.

4. Schmitthoff, Commercial Law in a Changing Economic Climate, at 30 (London 1981).

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