INTRODUCTION

The parties to an investment agreement, i.e., a State or its controlled enterprise and a foreign private entity, often fail to reach an agreement as to the substantive law applicable to any dispute that may arise during the course of their contractual relationship. Sometimes, such disagreement occurs owing to the conflicting interests of the parties. As a distinguished jurist has aptly put it:

'While the host State is primarily interested in subjecting foreign investments to its national legal system because it wishes to retain the fullest legislative freedom in pursuance of its national economic policies, the foreign investor is primarily interested in excluding the application of the law of the host State because he fears that the host State may use its sovereign legislative power to change the legal environment to the detriment of his investment.'

Thus, in the face of the opposing views of the parties when agreement with regard to the selection of applicable law turns out to be impossible, the parties prefer to leave the issue open so that it should be determined by the prospective arbitrator or arbitrators in case any dispute arises in the future. This explains the

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reason why many of the more recent investment agreements are silent on the applicable law clause. In order to settle the dispute, the arbitrator then has to discharge the difficult task of determining the law applicable to the contract. It cannot be denied that whoever, whether the parties or the arbitrator, determines the applicable law which governs an investment agreement, the determined applicable law plays an important role in the interpretation of such an agreement and the rights and obligations of the parties flowing therefrom.

The purpose of this article is to examine the different methods of conflict of laws or private international law that arbitrators follow in order to determine the proper law or applicable substantive law of a contract when the choice of law provision is absent in it. It will be shown that there are two principal trends in those methods that lead respectively to the theories of localization and delocalization or denationalization of international arbitration. The arbitrator’s freedom of will plays an important role towards such denationalization. To what extent arbitrators can exercise that freedom is a matter of some controversy. It should be mentioned that the present study bears closely upon Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985) which authorises the arbitrator to apply conflict of laws rules in determining the proper law of the contract when this has not been designated by the parties. The Model Law is now being increasingly adopted in many developed and developing countries. On the question of choice of applicable conflict of laws rules, the discussion will try to offer some practical insights.

2. THE ARBITRATOR’S TASK IN DETERMINING THE APPLICABLE LAW

In the complete absence of an express choice of law provision by the parties, the arbitrator is entrusted with the task of determining the proper law of the

3. In this article 'conflict of laws' and 'private international law' have been used interchangeably, so have 'conflict of laws' and 'conflicts of law'.
4. The terms 'delocalization' and 'denationalization' used in this article are interchangeable.
7. See Redfern and Hunter, op. cit. n. 6, at pp. 525-527.
contract by following conflict of laws rules as he deems appropriate. It is considered that in this process the arbitrator has the freedom of will to choose the conflict rules. However, if the existence, validity, meaning or scope of choice of law by the parties is called into question, that question must be resolved by application of further legal rules. In addition, if no valid and complete choice is found, the arbitrator must resort to other conflict rules, requiring characterization of the matters in dispute and determination of the proper law.

In this context the question may arise whether the presence of a State or a State-controlled enterprise as one of the parties bears any special significance.


Examining the recent arbitral practices, an experienced arbitrator has recently concluded that:

"In international commercial arbitration involving State enterprises, the same principles are nominally applied to solve conflict of laws as are applied in international commercial arbitration between private parties."\(^{14}\)

However, he is mindful of the fact that only in a minority of cases and in relation to certain aspects of the dispute will additional specific criteria have to be considered because one party is a State or State enterprise.\(^{15}\) This matter will be discussed later in this article.

Arbitrators have adopted a great variety of solutions to the choice of law question in the absence of an express choice of law clause. As mentioned earlier, the different approaches made to the conflict of laws rules have principally led to two theories: 'Localization' and 'delocalization' or 'denationalization'. Under the theory of 'localization', recourse will be had mainly to the rules of private international law which lead to the application of the host State's law as the proper law of the contract.


2.1 **The localization theory**

In the search for the objective proper law, in the absence of an express choice, an arbitrator may resort to a variety of connecting factors: the place of the execution of the contract, the place of performance, the nationality or domicile of the debtor, and the fact that one party is a State (letting in international law) coupled with the possibility of dépeçage.


See also Foreign Trade Arbitration Commission, Moscow: Award 4 May 1957 Necton S.A. (Belgium) v. Prodintorg, Collected Arbitration cases FTAC No. 61, also in Journal du droit international (1960) p. 880; see also Collected Arbitration Cases FTAC (4 vols. covering 1934-1965) Nos. 18, 29, 34, 36, 40, 44-46, 50, 52-54, 56, 60, 62, 68, 75-78, 125, 131.


Some authorities suggest that arbitrators should apply the rules of choice of law of the forum which the parties have designated for their arbitration. This is known as the theory of the *lex fori*. Under this theory, a contending host State can possibly ensure the application of its own law if it can make the private party agree to insert provisions for arbitration to take place within its own jurisdiction. As Rapporteur of the *Institut de Droit International*, Professor Sauser-Hall advocated that arbitrators’ and arbitral parties’ choice of applicable law should be governed by the conflict of laws system of the forum of arbitration. In the absence of choice of law by the parties, the arbitrator must apply the conflict rules of the tribunal’s forum or seat. This approach was also reflected in Article 11 of the Resolution adopted by the Institut at its 1957 session in Amsterdam. It provided as follows:

‘The rules of choice of law in force in the State of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference. Within the limits of such law, arbitrators shall apply the law chosen by the parties or, in default of any express indication by them, shall determine what is the will of the parties in this respect having regard to all the circumstances of the case. If the law of the place of the seat of the arbitral tribunal so authorises them, the parties may give the arbitrators power to decide *ex aequo et bono* or according to the rules of professional bodies (emphasis added).’

Later, in 1959, the Institut’s Neuchatel session also endorsed this view. Mann was a strong proponent of this theory. In his view ‘every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex*


W.L.M. Reese, ‘Dépeçage: A Common Phenomenon in Choice of Law’, 73 Columbia LR (1973) p. 58: ‘Dépeçage can be defined broadly to cover all situations where the rules of different States are applied to govern different issues in the same case. It can be defined more narrowly to be present only when the rules of different States are applied to govern different substantive issues, and most restrictive definitions would confine the term to situations where by applying the rules of different States to different issues a result is reached which could not be obtained by exclusive application of the law of any one of the States concerned’.


fori'. 27 Arbitrators may follow this traditional approach, 28 though they are not bound to do so 29 in the sense that an arbitrator is not to be labelled as a national judge 30 who is compelled to follow the rules of conflict of laws of the forum; 31 we shall shortly turn to this issue. Critics of the traditional approach suggested that not too much importance should be given to the accountability of the law of the forum of arbitration in view of the fact that sometimes the dispute concerned may not have, in reality, any genuine connection with the forum. The choice of forum may be a matter of convenience and not a matter of connection. 32 The most important objection relates to the totally accidental character of such forum in cases where it has not been fixed in advance by the parties to the arbitration clause or agreement. It has been remarked thus:


31. See the Kuwait v. Aminoil arbitration case, Aminoil Counter-Memorial (5 January 1981), vol. I (Text), Pleadings, Book 4, pp. 103-111, para. 226 et seq. [The Pleadings are available at the Research Centre for International Law, University of Cambridge, UK].

It does not seem permissible to determine the applicable substantive law of the contract on the basis of the *lex fori* of that seat of arbitration, because that would mean that the parties — not knowing of course which seat might be determined later — would have no possibility of finding out the applicable substantive law while performing the contract.  

Here our main concern is to examine whether the conflict rules sometimes applied by arbitrators and as found in the private international law legislation in most States lead to the application of the host State’s law to an investment agreement. There is no denying that in the search for the objective proper law, the law of the place of contracting and of performance appear to have had some support in practice.

One of the important rules in private international law as to the choice of law is the principle of most significant relationship. That is to say, when there is no explicit expression of the governing law or proper law in a contract, the proper law of the contract shall be that with which the transaction has its closest and most real connection. Thus, ‘the search is not for the State but for the system of law with which the contract has the closest connection’. The rule dates back to the 1890s when it was accepted in favour of Westlake amidst the long-standing academic battle between him and Dicey. This theory has slowly spread round the world, being advocated by Batiffol in 1938 under the name of the ‘localisation’ theory. This is what a Resolution of the *Institut de Droit International* confirmed more than a decade ago. The Resolution reads, *inter alia*, as follows:

33. Böckstiegel, op. cit. n. 14, at p. 27.
36. This is also known as the ‘Centre of gravity’ or ‘most significant contacts’ theory of the contract conflict of laws.
'Article 1: Contracts between a State and a foreign private person shall be subjected to the rules of law chosen by the parties or, failing such a choice, to the rules of law with which the contract has the closest link.'

Article 5: In the absence of any choice by the parties, the proper law of the contract shall be derived from indications of the closest connection of the contract (emphasis added).’

In the same vein, Denning LJ (as he then was) ruled on the matter in Boissevain v. Wei as follows:

‘The proper law of the contract depends not so much on the place where it is made, not even on the intention of the parties or on the place where it is to be performed, but on the place with which it has the most substantial connection (emphasis added).’

Later, in 1961, Lord Denning, then in the House of Lords, said straightforwardly, ‘in the absence of an express clause ... the test is simply with what country has the transaction the closest and most real connection’. 41

Lord Simmonds also pronounced the judicial definition of the proper law in the leading case Bonython v. Commonwealth of Australia that ‘the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection’.

Thus, in English law the ‘closest connection’ or ‘closest link’ is known as the ‘proper law test’. Also Article 4(1) of the Rome Convention on the Law Applicable to Contractual Obligations provides that:

42. [1951] AC 201, 219; see also Tomkinson v. First Pennsylvania Banking and Trust Co. [1961] AC 1007; Rossano v. Manufacturers Life Insurance Co. Ltd. [1963] 2 QB 352, per McNair, J.
43. F.A. Mann, 'The Proper Law of the Conflicts of Law', 36 ICLQ (1987) p. 437, at pp. 437-438: ‘The expression “the proper law” is peculiar to the law of England and the Commonwealth. It does not seem to be usual in the United States and it means little, if anything to a Continental lawyer, for it makes sense only in an uncodified system of law. Taken literally, the term simply denotes the appropriate legal system. It says nothing about the all-important question how you find that system, how you identify it. There is, however, room for the impression that if you ask an English lawyer for a definition he will go a little further and mention the legal system with which the matter in issue is closely or, perhaps, most closely connected. John Morris certainly used the phrase in this sense’.
See also Dicey and Morris on The Conflict of Laws, vol. 2, 11th edn. (1987) pp. 1190-1197: ‘When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection’. Rule 145 sub-rule 3, ibid.; R.H. Graveson, ‘The Proper Law of Commercial Contracts as Developed in the English Legal System’, in Lectures
‘To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected.’

The second restatement of Conflict of Laws of the United States of America, 1971, provides this principle in Section 188. The Uniform Commercial Code of the United States of America, 1978, also produces this result (Section 1-105). The Foreign Economic Contract Law (1985) of the People’s Republic of China provides in the same way, ‘... where parties fail to make a choice, the law that is the most closely related to the contract shall apply’.


The test is sometimes described as the converging connecting factors test.48 Such a description is found in international arbitral practice. An international arbitrator may apply this test in order to avoid a rigid conflict of laws rule. While applying the test the arbitrator aims at the substantive law pointed to by the preponderant number of, or what he considers the most important, connecting factors.49 Thus, amongst the connecting factors he takes into account the law of the place of contracting, the law of the place where the subject-matter is situated, the law of the place of different transactions, the law of the place where the principal has his main business establishment and, after he decides to which most connecting factors point, he then applies the law of that country. Thus, for instance, in an award50 by the Arbitration Court Chamber of Commerce, Budapest, it was observed that the contract was concluded at the defendant’s domicile, Pakistan. The place of performance was also Pakistan. Payment of the purchase price was also effected in Pakistan. In consequence, the connecting principles generally recognized in private international law (lex loci contractus, lex loci executionis, lex loci solutionis) pointed unanimously to the fact that Pakistani law should be applied to the contract. As a result of such consideration the Arbitration Court held that the dispute which had arisen should be decided according to the substantive law valid in Pakistan. In another ICC case,51 the tribunal held, after weighing a number of factors argued by the parties, that the place of destination of the goods, the place of payment and the nationality of the buyers were all France, and, therefore, French law was the proper law of the contract. The tribunal said:


... in my view the destination of the goods, the nationality of the buyers and the place for payment of the price of the goods are factors which can and should be given individual weight (though the amount to be attributed to each may not be very substantial). It is common to find goods being sold to a national of one country for delivery to another, with payment being effected in a third. Here a single country (i.e., France) linked these matters. Taken together, it seems to me that these indicia far outweigh the considerably more technical and accidental considerations upon which the claimants relied, and lead inevitably to the conclusion that the proper law of this contract is French law.52

Lew thus remarks, ‘this development is due to the movement away from rigid conflict of laws presumptions towards a more flexible and realistic conflict of laws methodology’.53

While applying the test, whether it is called the closest link or the converging connecting factors test, to an investment agreement, it may be found that most of the connecting factors lie with the host State. Generally, the seat of the subject matter of the contract, loci contractus54 and loci solutionis,55 seat of the offeror,56 seat of the place where the enterprise is established, and the seat of business, etc., are within the territory of the host State.57 It has been rightly observed that:

52. Ibid., at p. 229.
57. J. Cherian, International Contracts and Arbitration (1975) p. 22; M.H. Arsanjani, International Regulation of Internal Resources (1981) p. 200. When different rules of conflict all point to the same applicable law, the arbitrator is inclined to consider a choice as superfluous. See also K. Ramazani, ‘Choice-of-Law Problems and International Oil Contracts: A Case Study’, 11 ICLQ (1962) p. 503, who observed in the context of the oil contract concluded between the National Iranian Oil Company and the Pan American International Oil Company that: ‘... the application of the (objective) tests of sovereignty, nationality of the agent, the place of contracting, and the place of performance would indicate that the applicable law is Iranian Law. Furthermore, other tests such as the nature of the subject-matter and the place where it is situated, lex loci rei sitae, would also indicate the same because the subject-matter is Iranian Petroleum located within the Iranian domain’ (p. 509).
In most cases, at least where the investment involved relates to the exploitation of mineral or other resources in the territories of the host country, all connecting factors point to the applicability of the law of the host State. Whether that law should be applied as *lex loci contractus* or *lex loci solutionis* is in fact irrelevant.\(^{58}\)

Thus, to the extent that the contract is primarily concerned with transactions which, to a greater or lesser degree, are to be performed in the territorial domain of the State party, the law of the State party normally governs the relationship when the closest link test is applied in the absence of any choice of law provision. Apart from mining concessions including oil concessions, it also happens to be the case with construction and management contracts,\(^{59}\) turnkey contracts,\(^{60}\) licensing agreements concerning transfer of technology\(^ {61}\) or some other types of licensing agreements.\(^ {62}\)

### 2.1.1 *Application of the host State’s law: subjectivist v. objectivist approach*

It has already been seen that the host State’s law may apply as a matter of ‘objective consideration’ derived from ‘the closest connection/most significant relationship’ or ‘the converging connecting factors’ test of conflict of laws. There also remains, on the other hand, the sole inclination of some jurists towards the subjectivist approach which leads to the presumption of the application of the law of the State party to the contract. For the authority lying behind this

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approach, recourse is often had to the Serbian dictum. There are also some jurists who support this position. But such a presumption is counter-productive. Thus in the Kuwait v. Aminoil arbitration case, Aminoil argued as follows:

'The old dictum of the Serbian Loans Case, always of doubtful value in the particular case of loan contracts, can hardly be relied upon as representing modern law and practice... In long-term investment contracts — such as oil concession agreements — there can be no such presumption. Indeed, the presumption, if any, should be the other way round: for common sense and experience show that no private party to a long-term contract with a State can be presumed to have implicitly accepted the law of the State as the "proper law", with the obvious risks following therefrom.'

However, there is no denying that the application of the host State's law to an investment agreement results from both the subjectivist and objectivist approaches of conflict of laws. It is interesting to note that the modern arbitral practice

63. See the Serbian Loans case, PCIJ Series, A. Nos. 20/21 (1929); see also Messageries Maritimes case, Arrêt de la Cour de Cassation, Ch. Civ. 21, Juin 1950, D. 1951, p. 749. The Government of Kuwait, in Kuwait v. Aminoil, stated in its Memorial that there was 'a strong presumption, not only in French law but also in other legal systems too, including public international law, that, where a State is a party to a contract, the law of that State is the proper law of the contract'. See the Government's Memorial (May 1980), Pleadings, Bk. 3, para. 3.37, at p. 60; see also the Government's Reply (April 1981), Pleadings Bk. 9, paras. 2.40-2.41, paras. 2.42-2.54, at p. 22, pp. 23-27.

64. See Mann, in Revue Belge, loc. cit. n 27, at p. 564: 'The rule that in looking for the proper law of transactions with States very great, though by no means overriding, weight has to be given to the character of the State party is universal, supported by common sense and applicable to legislative instruments with particular force'. See also in Mann, Further Studies in International Law (1990) p. 264, at p. 266; M. Sornarajah, The Pursuit of Nationalized Property (1986) p. 103. G. Schwarzenberger, Foreign Investments and International Law (1969) p. 5. Schwarzenberger and Delaune have argued that a sovereign State cannot be presumed to have subjected a contract to which it is a party to any legal system other than its own: G. Schwarzenberger, 'The Arbitration Pattern and the Protection of Property Abroad', in Sanders, ed., op. cit. n. 27, pp. 317-318; G. Delaune, Transnational Contracts: Applicable Law and Settlement of Disputes, re-issue (1985) vol. 2, Ch. 14; J.D.M. Lew, Applicable Law in International Commercial Arbitration (1978) pp. 348-349: 'In international law, it is beyond question that a sovereign State is entitled to regulate the rights pursuant to and the conditions of investment within its territory. A person investing in a foreign country does so knowing he is subject to the laws of that country; he accepts the laws of the country of investment as regulating the taxation payable and his right to remit to his own country the benefits of its investment; he also accepts the risk — as he does in his own country — of changes which may occur in government and the policy towards foreign investors and their property'.


66. See Lalive, loc. cit. n. 15, p. 987, at p. 993. As is well-known to both the Anglo-American and Civil law systems, 'according to the "objectivist theory" the proper law is that of the country with which the contract has "the most real connection", while under the "subjectivist theory" it is contended that the applicable law is that to which the parties intended, or may fairly be presumed to submit themselves'. See also R.K. Ramazani, 'Choice-of-Law Problems and International Oil
is more inclined to support the view that in the absence of a choice of law clause in an investment agreement the law of the State party applies more as an objective consideration. However, if for some reason or other the objectivist approach does not lead to the application of the host State’s law, then the subjectivist approach remains important as far as the State party is concerned.  

2.2 The delocalization theory

In modern arbitral practice the trend towards the delocalization or denationalization of conflict rules, hence international arbitration, may be noticed in the practice of arbitrators. As mentioned earlier, an arbitrator, unlike a judge of a national court, derives his authority from a contractual arrangement between the parties, and the mechanical relation between the arbitrator and a national conflict of laws today does not arise because arbitration is an independent and autonomous institution. Under the contractual and autonomous theories of international arbitration, an international arbitrator is considered to have no lex fori. This conviction has led modern arbitrators increasingly towards the trend to detach international commercial arbitration as far as possible from any national law.

Thus, Goldman has advocated the development of some ‘supra-national’ private international law rules, such as would obviate the problem of resorting to the


67. Sometimes, the State or its controlled enterprise is mandatorily required by law to contract by reference to its own law, for instance in Saudi Arabia. This will probably be an advantage for the State contracting party. See Böckstiegel, op. cit. n. 14, at pp. 29–30; M. Sornarajah, The Pursuit of Nationalized Property (1986) p. 103.


private international law rules of the siège of the tribunal, or the nationality of the arbitrators. The move towards delocalization of international arbitration has gained support in the legal literature as well as in arbitral practice. As one arbitration lawyer has noted:

‘In recent years, it has become fashionable to seek to “detach” international commercial arbitrations from the control of the law of the place in which they are held. Such “detached” arbitrations go by many names. They may be called “supra-national”, or “a-national” or “transnational” or even “ex-patriate”. They may be called “de-nationalized” or “de-localized”. More poetically, they are also referred to as “floating” arbitrations, which result in “floating awards”.’

But the question still remains whether there is any truly ‘detached’ or ‘floating’ arbitration or award.

The trends toward the delocalization of international arbitration will now be examined.

3. THE ARBITRATOR’S FREEDOM TO ESTABLISH CONFLICT OF LAWS RULES

As a party-appointed judge, there is no doubt that an arbitrator enjoys sufficient freedom to decide which conflict of laws rules he should apply in order to determine the law applicable to the merits of the case taking all relevant circumstances into account. This freedom of the arbitrator appears as an important factor in the process of ‘denationalization’ of arbitration. The logic behind the parties’ choosing an international arbitration, instead of a national court, for the settlement of their disputes may be that one or either of them may not be satisfied with the rigidity of a national court in the matters of conflict of laws and as well as the overall settlement of the dispute. Thus, in the expectation of a future friendly business relationship the parties mutually expect to settle their dispute amicably which calls for a more flexible approach than that of a national court. As mentioned earlier, the arbitrator’s freedom to select his own conflict of laws rules has also been formally recognized in many international legal instruments.

70. Goldman, loc. cit. n. 11, p. 351.
73. See also C. Shaikh, ‘Proposed New Approach to Resolving Disputes in the Oil Industry’, 8 Oil & Gas L. and Taxation Rev. (1990) no. 5, pp. 119-120.
In the *BP* Award, Sole Arbitrator Lagergren also supported this approach as he said:

'If the parties to the agreement have not provided otherwise, such an arbitral tribunal is at liberty to choose the conflict of laws rules that it deems applicable, having regard to all the circumstances of the case.'\(^{75}\)

The arbitrator's free choice should not be flawed by arbitrariness. Rather, he should ensure the best possible choice in the circumstances. In an ICC Award,\(^ {76}\) the arbitrator had this to say:

'Si les arbitres peuvent mettre en lumière que, sur le point soulevé, les règles de conflit des différents États avec lesquels le litige qui leur est soumis a des liens sont de la même teneur ou conduisent au même résultat, ils sont habilités à appliquer les règles de conflit commun, étant ainsi certains de satisfaire l'intention implicite ou supposée des parties dont ils reçoivent leur pouvoir.'

In another ICC arbitral Award, in a dispute between a Bulgarian State enterprise and a Swiss buyer, the arbitrator held that 'in this matter [the applicable law] the arbitrators consider that it would be proper to apply Swiss private international law'.\(^ {77}\) The special characteristic of the case was that the arbitration itself as well as the activities under the contract were connected with several countries. Thus, France was the seat of arbitration, Bulgaria was the State of nationality of the seller and the place where the contract was concluded, Switzerland was the State of nationality of the buyer, Egypt was the place where the contract was to be performed, and Sweden was the State of nationality of the arbitrator. However, the arbitrator decided to apply Swiss private international law, which led to the application of Bulgarian law, because it was the most appropriate for the case at hand. The arbitrator avoided giving any reasoned explanation for that choice.

In an arbitral Award under ICC\(^ {78}\) auspices the arbitrator found:


76. ICC Arbitration No. 1776, Award 1970.
77. ICC Award No. 1048, Doc. No. 410/802, 11 January 1960.
78. See Goldman, loc. cit. n. 11, p. 409.
dudit contrat à l’arbitrage d’une institution internationale, telle que la Chambre de commerce internationale, exprime la volonté des parties de placer leur litige sur un plan international et de le faire trancher par un arbitrage vraiment international, se déroulant au-dessus de tout ordre juridique national;

Considérant qu’en pareil cas l’arbitre, pour résoudre le problème des conflits de loi, inhérent à cette sorte de litige, et pour déterminer le droit substantiel au contrat en cause, doit, tout d’abord, chercher la volonté, expresse ou tacite, des parties;

Considérant que, faute d’une pareille volonté, l’arbitre doit, statuant ex aequo et bono, déclarer applicable la loi qui, compte tenu des éléments objectifs et des circonstances particulières des cas litigieux, convient le mieux au contrat.

It is thus clear that an international arbitrator may exercise great freedom in the matter of applicable law. However, he exercises such freedom in the way he thinks most appropriate under the practical circumstances of the case.

In the BP Award,79 Sole Arbitrator Lagergren decided to apply Danish conflict of laws rules not because they were the lex loci arbitri80 but because as a matter of fact he considered that they were convenient in view of the arbitration’s close connection with Danish law which would ensure the effectiveness of the award bearing a national character as such.81 Further, Danish rules were likely to give effect to the intentions of the parties, since they contained few restrictions upon the freedom of contracting parties to select the proper law of their agreement. Thus in choosing the Danish conflict rules, the arbitrator


81. ‘The arbitrator exercised his discretionary authority by selecting the law of the seat of arbitration (in that case Denmark) as the law applicable to the arbitral procedure. He apparently considered that an advantage of localizing the law in this way was that enforcement would be facilitated since the award made under the law of a contracting State would fall within the terms of the Convention on Enforcement of Foreign Arbitral Awards of 1958 (the so-called New York Convention). Attaching the award to the law of a particular State also provided the arbitrator with a developed procedural law for supplementary reference’. This point is brought out by J.G. Wetter (who was Secretary of the tribunal) in The International Arbitral Process: Public and Private, vol. 2 (1979) pp. 409-410; see also the ICC Arbitration rules (reproduced in 13 YB Comm. Arb. (1988) p. 185) which stress in Art. 26 that the arbitrator ‘shall make every effort to make sure that the award is enforceable at law’.
exercised his freedom of choice.\textsuperscript{82} Those rules led the arbitrator to assume that the parties were free to choose a non-national proper law.\textsuperscript{83}

To ensure that the freedom of the arbitrator to choose the applicable conflict of laws rules is not exercised arbitrarily, attempts have been made in arbitral practice to draw up certain guidelines which an arbitrator should follow. As in the \textit{Kuwait v. Aminoil} arbitration case, Aminoil stated in its Memorial that:

\begin{quote}
'... as a matter of course it is for the judge or arbitrator to determine the applicable law in any proceeding conducted "according to law". In making this determination, he cannot of course act in a purely arbitrary manner but must necessarily follow certain principles.'\textsuperscript{84}
\end{quote}

These principles or guidelines may be considered to be embedded in three competing views: one favours the cumulative application of the conflict of laws systems to which the subject matter of the arbitration proceedings has close contacts; a second view favours the application of international conflict of laws rules or general principles of private international law; a third view favours the determination of the applicable law by the arbitrator directly, even without any express reference to a conflict of laws rule; this means dispensing with the conflict rules.\textsuperscript{85}

Because these three methods borrow from the technique of conflict of laws, although they correspond in their formal aspect to different theoretical approaches, they can be used, by the same arbitrator, either alternatively, depending on the particular circumstances, or concurrently. A combination of the first two above-mentioned methods is also often used.\textsuperscript{86}

The three different methods may be distinguished as follows:

\begin{itemize}
\item \textsuperscript{82} Cf., \textit{Kuwait v. Aminoil} arbitration case, the Government of Kuwait's Reply (April 1981), Pleadings Bk. 9, para. 2.47, at p. 25; P. Fouchard, \textit{L'arbitrage Commercial International} (1965) paras. 554, 555.
\item \textsuperscript{83} 53 ILR, p. 297, at pp. 327-329.
\item \textsuperscript{84} Pleadings, Bk. 1, The Aminoil Memorial (2 June 1980), vol. I (Text) at p. 37, para. 104.
\item \textsuperscript{86} See Y. Derains' Report to the International Council for Commercial Arbitration Congress (Series No. 2, P. Sanders, ed., \textit{UNCITRAL's Project for a Model Law on International Commercial Arbitration} (1986) p. 169, at p. 189, 'These methods (i.e., the three methods as mentioned) all tend to show that the parties had to expect that the law eventually chosen by the arbitrator would be applied. This is undeniably the case with respect to the cumulative application and the recourse to general principles of private international law, these two methods point to a law which a community to which the parties belong is unanimous in recognizing as applicable, whether it is a limited community, in the first case, or the international community, in the second. But this desire to meet the legitimate expectations of the parties is also not foreign to the method \textit{voie directe}'.
\end{itemize}
3.1 Cumulative application of interested conflict of laws systems

The arbitrator may consider all the ‘interested’ conflict of laws systems with which the contract has links in various respects, rather than applying only one system of ‘interested’ conflict rules. In this process he would have to apply rules which are common to these systems. It may well happen that the systems under consideration lead to the same result according to their common rules: they all select the same national law as applicable to the agreement. Therefore, an arbitrator does not need to choose one system of conflict of laws rules, but can base his decision on this cumulative choice where the application of different connecting conflict systems all lead to the same applicable law. As Derains has said about the method:

‘... the arbitrator considers the conflict of laws rules of the various national legal systems concerned to the disputes submitted to him one by one. If these rules, whose contents are nearly always different, converge towards one single domestic law, the arbitrator declares that this is the applicable law.' 87

The recent literature in the field is replete with enthusiastic support for the theory of cumulative choice. 88 The same trend is also found in international arbitral practice.

In an ICC case between a West German and a Greek, the arbitrator, sitting in Switzerland, held that:

'To resolve whether the substance of the claim is justified it is necessary to determine initially the substantive law applicable to the dispute. If the agreement of the parties does not express itself on the subject, it is necessary in the first place to research from where to draw the conflict of laws rules to resolve the question. The answer to the question is sensibly facilitated by the fact that the principles of private international law developed in German law, as well as in Greek law and in Swiss law, lead to the same result (emphasis added).' 89

The arbitrator in this case considered the connecting factors concerning the dispute in three jurisdictions, viz., Greece (the place of conclusion and perfor-


mance of the contract and the residence of the buyer), Germany (the place of domicile of the seller), and Switzerland (the seat of the arbitration). For the applicable law the arbitrator turned to the three conflict of laws rules of these countries since they led to the same outcome. This method shows a trend towards the denationalization of international arbitration. The Iran-United States Claims Tribunal has also recently resorted to this method. Thus, Lew remarked, 'the fact that the conflict systems with which they are connected adopt the same solution gives that solution a special character for the non-national plane’. In an ICC Award, it was observed:

'Even if it is generally admitted that judges decide on the applicable law according to conflict of laws rules of the State for which they render justice, the arbitrators cannot have recourse to such rules to the extent that they do not derive their power from any State. But if they can show on the question in issue that the conflict rules of the different States with which the matter submitted to them has any ties are similar or lead to a same result, they have the power to apply these common conflict rules since they can be sure of satisfying the implicit or supposed intention of the parties from which they derive their power.'

However, usually this approach appears to be quite reasonable for transactions in which typically no more than two parties are involved. Concession contracts are, however, very often embedded in a multilateral setting in which more than two parties are involved. This is especially the case where the concessions are held by interest-holders. At least in these situations a cumulation of more than two conflict of laws systems would be required.

There is another aspect, however, which supports an even broader approach: the fact that one and the same State grants concessions on identical terms to a great variety of foreign concessionaires leads to the reasonable assumption that these concessions should all be subject to the same legal rules. This result cannot be achieved and would probably even be prevented by a mere cumulation of a restricted number of ‘interested’ conflict of laws systems.

3.2 Applicability of an international conflict of laws system

The denationalization process of international arbitration may also take place through the application of an international conflict of laws system. Since the arbitrator’s freedom to apply any conflict of laws rule as he deems appropriate

90. See, e.g., Carolina Brass Inc. v. Iran, 12 Iran-USCTR (1986 III) pp. 139, 144. Cf., Iran v. United States (Case B I), 10 Iran-USCTR (1986 I) p. 207, at p. 216.
91. Lew, op. cit. n. 32, at p.335.
92. See ICC Case No. 1176.
93. Goldman, op. cit. (1963) p. 347, at p. 414; Fouchard, op. cit. n. 82, for arguments in favour.
or suitable is not denied, there should not be any reason why he should not be
allowed to develop a conflict of laws rule with an international character that is
suitable for its application to the particular case concerned. As one scholar has
noted, 'one cannot argue that public international law requires the application
of foreign law without also arguing that public international law lays down choice
of law rules, because otherwise there is no satisfactory way of resolving conflicts
between competing systems of foreign law'.\textsuperscript{94} In the \textit{Liamco} Award, Sole Arbi-
trator Mahmassani said, '(i)n a case involving a foreign litigant, the tribunal to
which it is submitted has to refer for guidance to the general principles govern-
ing the conflict of laws in private international law'.\textsuperscript{95}

It may be noticed that the practice of international tribunals over the last
century has developed independent rules of private international law which may
be called 'rules of international conflict of laws'.\textsuperscript{96} Such international tribunals
do not have a \textit{lex fori} in matters of private law so they have to rest their decisions
regarding problems of private international law on an international system of
conflict of laws distinct from the municipal one.\textsuperscript{97} The \textit{lex fori} of such interna-
tional tribunals consists of public international law as developed by custom and
treaties.\textsuperscript{98}

The most apposite method for the implementation of the international conflict
of laws system is, it has been suggested, the comparative law method'.\textsuperscript{99} The

\textsuperscript{94.} M. Akehurst, 'Jurisdiction in International Law', 46 BYIL (1972-1973) p. 145, at p. 222.
\textsuperscript{95.} \textit{Lianco} v. \textit{Libya}, 62 ILR pp. 140-219, at p. 171; see also \textit{Saudi Arabia} v. \textit{Aramco}, 27 ILR
p. 117, at pp. 161-162.
p. 320, with comments by Schwebel. \textit{Aramco} case (1958), 27 ILR p. 117, at p. 153 et seq.;
of Libyan Arab Republic} (1979), 53 ILR p. 442 et seq.; \textit{BP} v. \textit{Libya} (1979), 53 ILR p. 297,
VII, 484 UWTS (1963-64) p. 364, at p. 374. See also K. Lipstein, 'The General Principles of Private
\textsuperscript{97.} See ICC Award No. 1512/1971, 1 YB Comm. Arb. (1975) at p. 129. It has been observed
by K. Lipstein that 'an international system of conflict of laws differs in substance from municipal
private international law in four essential respects. It cannot rely on \textit{lex fori} in matters of private
law; renvoi is incapable, public policy is determined by international law; conflicts of classification
are rare – see 29 Transactions of Grotius Society (1944) p. 76; see also pp. 62-67. However, in
other respects 'rules of international conflict of laws' do not appear to differ much from domestic
rules of private international law (ibid.).
\textsuperscript{98.} See the \textit{Williams} case, The American-Venezuelan Claims Commission, in J.B. Moore,
\textit{History and Digest of the Arbitrations to which United States has been a Party} (1898) vol. IV, p.
4181, at p. 4182.
\textsuperscript{99.} Böckstiegel, op. cit. n. 14, at p. 27. Cf., A.T. von Mehren, 'Special Substantive Rules for
Multistate Problems: Their Role and Significance in Temporary Choice of Law Methodology', 88
arbitrator may analyse comparatively several bodies of private international law of the major and representative legal systems of the world for the purpose of establishing a set of general principles of conflict of laws. In this process the arbitrator would attempt to determine ‘general conflict rules’ common to many systems and simply apply that rule to determine the proper law or applicable substantive law of the contract. As a distinguished jurist has noted, ‘the “internationalists” have argued, however, that there is an international consensus on certain rules of private international law, in the sense that domestic systems adopt and apply them, so that they may be said to be general principles of law and thus of public international law’.

The reference to ‘general principles of private international law’ may be found in a number of arbitral awards. In the Economy Forms case, Chamber I of the Iran-United States Claims Tribunal referred to general principles of ‘conflicts of law’ to find that the validity issue of the contract concerned was governed by a national law and not by the general principles of law. It held that United States law applied, since ‘the centre of gravity of these dealings was in the United States, that being the test under general principles of conflicts of law’. Similarly, in Harnischfeger Corp. v. Ministry of Roads and Transportation, the Tribunal held that:

‘The agreement ... makes no reference to governing law; however, under general choice of law principles, the law of the United States, the jurisdiction with the most significant connection with the transaction and the parties, must be taken to govern in this specific case ... (emphasis added).’

Further, one may note that in both the Texaco and Liamco cases the arbitral tribunals expressly referred to the general principles of conflict of laws.

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101. ICC Award 1959, see as reported in Fouchard, op. cit. n. 82, at p. 389; ICC Award No. 3880/1982, 110 Clunet (1983) p. 897 and see Lew, op. cit. n. 32, No. 283, pp. 327-335.
104. 7 Iran-USCTR (1984-III) p. 90.
106. Texaco v. Libya, 53 ILR at p. 442.
107. Liamco v. Libya, 62 ILR at p. 171
Thus, in the latter the arbitrator held that the search for the applicable law should be guided by 'the general principles governing the conflict of laws in private international law'.

It has been recently observed:

'During the last half-century, comparative law studies have revealed the existence of conflict of laws rules, not only common to several States, but also reflecting principles shared by the major systems of the world community. The formation of certain general principles of private international law has become so deeply rooted in the legal conscience that domestic legal systems have recognized those general principles as a source to be relied upon by the national courts to supplement conflict of laws rules. Accordingly modern doctrine and case law are currently referring to general principles of conflict of laws as the appropriate source to determine the applicable law in relation to contractual relationships, whether of a private law nature or characterized as public contracts.'

A considerable number of awards concerning both categories of contracts, i.e., private and public, are reported to have supported the proposition that '(t)he general or universal recognition of a particular conflict rule justifies per se the application of that rule in an international arbitration'.

The general conclusion drawn from a comparative study of the conflict of laws rules of the various municipal law systems was succinctly summarised by Ernst Rabel as follows:

'Among the multitude of conflicts principles that, according to various claims, should determine the law applicable to all contracts, only two have resisted the test of critical analysis. These, indeed, form an adequate groundwork. First, the freedom of parties to choose the law applicable to their contract must be recognized as a general rule without petty restraint. Second, in the absence of such agreement, a contract should be governed by the law most closely connected with its characteristic feature (emphasis added).'

108. Idem; in the Aramco Award the parties' choice of law was approached in terms of the general principles of private international law, 27 ILR p. 117, at pp. 154, 156.
110. Lew, op. cit. n. 32, at p. 327.
There is no denying the fact that there are very few established principles or rules of international conflict of laws which are universally acknowledged.\(^{112}\) Besides the above-mentioned, viz., rules of party autonomy and the closest connection, others such as *locus regit actum*, the concept of mandatory public law rules and the recourse to the concept of public policy to evict solutions contrary to the basic principles prevailing in the field of development agreements,\(^{113}\) *lex rei sitae*, and *lex loci actus* may be worth mentioning.\(^{114}\) Besides the role of international tribunals in seeking the rules of private international law common to several States, international conventions or customs may establish rules of international conflict of laws, and it cannot be denied that in the latter case these may possess the character of true international law.\(^{115}\) An eminent jurist has concluded that:

>'International arbitrations between a State and nationals of another, being hybrid in character, can either follow as a framework the technique of international law (either customary or conventional) and employ rules of international conflict of laws developed by inter-state international courts and tribunals ...'\(^{116}\)

### 3.3 Dispensation with the application of conflict of laws rules

It has already been noticed above that, in the process of determining the applicable law, the application of conflict of laws rules is a cumbersome process, and it may sometimes lead to uncertainties. In many cases arbitrators have to base their decisions upon the peculiarities of different cases and to consider according to the practical exigencies in each case. With regard to international conflict of laws rules, Akehurst's comment is not to be taken lightly when he said, 'attempts to discover choice of law rules laid down by public international law have not been successful'.\(^{117}\) Another scholar has noted, 'purporting to choose the conflict rules of international law is, in reality, nothing more than a veiled

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112. See K. Lipstein in *135 Hague Recueil* (1972-I) p. 97, at p. 168; Kahn-Freund in *143 Hague Recueil* (1974-III) p. 20 et seq.; Lew, op. cit. n. 32, at p. 328, who observes: 'several conflict rules have attained a wide acceptance in many sovereign private international systems and such have been applied as rules generally accepted'.


attempt to allow the arbitrators to choose any substantive law they wish, for international law can provide no real guidance.\textsuperscript{118} It may well be that such an approach allows for appropriate flexibility and that it encourages due sensitivity to the underlying political realities of arbitration.\textsuperscript{119} Indeed, the argument is being increasingly advanced that arbitrators need not rely on any conflict of laws rule in order to determine the applicable law, but that they should choose an appropriate law directly.\textsuperscript{120} In practice, it also appears that an arbitrator sometimes does not deem it necessary to apply any conflict of laws system, whether national or international.\textsuperscript{121} As Judge Bellet, the former First President of the \textit{Cour de Cassation}, France, has observed: 'The modern view seems to be that international arbitrators need no longer be bound by strict rules of conflicts of law'.\textsuperscript{122}

The truth of this view has been reflected clearly in Article V of the Iran-United States Claims Settlement Declaration.\textsuperscript{123} The Article establishes a range of possibilities for determining the governing law. The Tribunal can apply 'such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable'.\textsuperscript{124} In contrast with other familiar international arbitration rules mentioned earlier,\textsuperscript{125} this formula does not require the application of any system of conflict of laws rules. The Tribunal is free to select rules of substantive law from whatever sources and through whatever processes.

\begin{itemize}
  \item \textsuperscript{118} S.J. Toope, \textit{Mixed International Arbitration} (1990) p. 51.
  \item \textsuperscript{119} Idem.
  \item \textsuperscript{120} Lew, op. cit. n. 32, p. 225.
  \item \textsuperscript{121} Idem, No. 302 et seq.
  \item \textsuperscript{122} P. Bellet, 'Forward', 16 \textit{Law & Policy Int. Bus.} (1984) at p. 673. Bellet, an original member of the Iran-US Claims Tribunal, remarked, with regard to the applicable law issue to be faced by the Tribunal, that: 'It would have been extremely awkward for these arbitrators to have resorted to classic rules of conflict of law, forcing the arbitrators to choose between Iranian law and American law. With tensions running high, it was worth avoiding such choices, particularly in cases where the parties alleged political or economic coercion in the execution of certain contracts. In this way claimants and their opponents were practically always in agreement not to invoke any rigid conflict of law rules' (p. 673).
  \item \textsuperscript{123} Under Art. V of the Claims Settlement Declaration, the Iran-US Claims Tribunal has great flexibility in its choice of law. Accordingly, the Tribunal has sometimes rejected the application of municipal law and has applied general principles of law. It has also adopted its own procedural law and choice-of-law principles. With regard to the Iran-US Claims Tribunal, Stein pointed out that the Tribunal has generally declined the invitation of the Claims Settlement Declaration to enter into subtle and academically satisfying discussions of conflict of laws principles, see the remarks made by T.L. Stein in ASIL: Proceedings of the 78th Annual Meeting (1984) pp. 229-233.
  \item \textsuperscript{125} For example, Art. VII(I) of the European Convention on International Commercial Arbitration, Art. 13(3) of the ICC Arbitration Rules, Art. 33 of the UNCITRAL Arbitration Rules and Art. 28 of UNCITRAL's 1985 Model Law on International Commercial Arbitration all require arbitrators to act within some system of conflict of laws rules (as they deem applicable or determine appropriate).
\end{itemize}
it chooses. One method of avoiding the complexity of conflict of laws rules is known as the comparative approach.\textsuperscript{126} The particular merit of the method consists in dispensing altogether with the application of conflict of laws or private international law. If either the rules of the respective countries concerning conflict of laws or the rules of the substantive law are identical, there is no need to apply an international system of conflict of laws. On this ground the arbitrator may compare the substantive rules of the various countries connected with the dispute which may eventually lead him to the same outcome.\textsuperscript{127}

In the practice of the Mixed Arbitral Tribunals it may be noticed, as Lipstein observed five decades ago,\textsuperscript{128} that in resorting to the comparative approach, the tribunals either applied the method of expressly coupling municipal systems,\textsuperscript{129} or they invoked a conception of \textit{droit commun} which in reality consists of a cumulation, comparison and merger of the national systems concerned.\textsuperscript{130} The method commends itself from a practical point of view, at least in some cases, and it provides international tribunals with a more solid basis for their decisions than the international approach. It may serve the needs of an international arbitral tribunal between a State and the nationals of another in dealing with the specific topics of concession or loan agreements.\textsuperscript{131} However, it is also to be accepted that when neither the respective municipal rules concerning conflict of laws nor the substantive rules are identical, it is of no avail. Very recently, Lipstein has concluded that ‘in the absence of an express choice, comparative law in the form of general principles of law provides the rule of decision often eclectic and vague rather than a particular system of laws’.\textsuperscript{132} Von Mehren, after a thoughtful analysis of the issue from different perspectives, has also recognized the practical difficulties and unsoundness of the comparative law method.\textsuperscript{133}

\begin{itemize}
\item[126.] See for a good discussion: Von Mehren, loc. cit. n. 99, p. 347.
\item[128.] See 27 \textit{Transactions of the Grotius Society} (1942) at p. 151.
\item[129.] The decisions of the Mixed Arbitral Tribunals (MAT) are cited according to G. Gidel, \textit{Recueil des décisions des Tribunaux Arbitraux Mixtes}, 9 vols. (1921-1930) (references are to the volume and page of the Recueil): (1) p. 587; ibid., p. 847; ibid., p. 899 (903). (2) p. 89; ibid., p. 235; ibid., p. 247; ibid., p. 753; ibid., p. 786. (3) p. 155; ibid., p. 220; ibid., p. 286; ibid., p. 296; ibid., p. 328; ibid., p. 340; ibid., p. 387; ibid., p. 408; ibid., p. 534; ibid., p. 570; ibid., p. 872; ibid., p. 988 (991); ibid., p. 1020. (4) p. 366; ibid., p. 417. (5) p. 200 (213); ibid., p. 224; ibid., p. 346; ibid., p. 637; ibid., p. 790. (6) p. 565; ibid., p. 671. (7) p. 221; ibid., p. 429; ibid., p. 589; ibid., p. 792; ibid., p. 881. (8) p. 933; ibid., p. 1000. (9) p. 424; ibid., p. 560.
\item[131.] Lipstein, loc. cit. n. 13, at p. 194.
\item[132.] Ibid.
\end{itemize}
Another way of avoiding conflict of laws questions by the arbitrator may be by having recourse directly to the substantive law of a non-national standard\textsuperscript{134} such as international law, international law of contracts,\textsuperscript{135} the \textit{lex mercatoria}\textsuperscript{136} or the customs and usages of the trade, or the general principles of law.\textsuperscript{137}

In order to avoid the conflict of laws issues, recent developments in national legislation indicate a preference for making a direct choice of the national law

\begin{itemize}
\item \textsuperscript{134} \textit{Lena Goldfields} case (\textit{Lena Goldfield Ltd. v. USSR}) Award of 2 September 1930, note by Nussbaum in 36 Cornell LQ (1950) p. 51; \textit{Abu Dhabi} case (\textit{Petroleum Development Ltd. v. Sheikh of Abu Dhabi}) Award of 28 August 1951 in ICLQ (1952) p. 247; ILR (1956) p. 144.
\item \textsuperscript{137} For instance, in \textit{Elf Aquitaine Iran} v. \textit{NIOC}, 9 YB Comm. Arb. (1986) at pp. 97, 99, the sole arbitrator confirmed the parties’ choice of equity, the general principles of law and international law without reference to any system of conflict of laws.
\end{itemize}
or other standards which the arbitrator's common sense and commercial experience suggest to be the most appropriate for the particular circumstances.138

4. THE ARBITRATOR'S SILENT APPROACH TO CONFLICT OF LAWS RULES

It may be noticed that sometimes arbitrators do not, in fact, mention which particular conflict of laws system they have followed to determine the applicable law.139 Thus, the Aminoil award does not explicitly state which body of conflict rules it followed. It may well be that the Aminoil tribunal proceeded implicitly on the basis of general principles of private international law. This is evidenced by the absence of any reference to a particular private international law, particularly that of France, being the place of arbitration, which the Government of Kuwait suggested should be applied140 while, on the contrary, Aminoil advocated the application of the general principles of private international law.141

138. See, for example, the French Arbitration Decree of 14 May 1981 which amended Art. 1496 of the Code of Civil Procedure, 20 ILM (1981) p. 917. Art. 1496 of the French New Code of Civil Procedure reads: '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 rules he deems appropriate. In all cases he shall take into account trade usages' (emphasis added). See also ICC Award No. 1422/1966, Lew, op. cit. n. 32, no. 270. The 1984 Djibouti Code on International Arbitration contains in its Art. 12a a provision in similar terms: 'The parties are free to determine the rules of law which the arbitrators shall apply to the substance of the dispute. Failing agreement by the parties, the arbitrators shall apply the rules of law which they consider appropriate' (emphasis added). In all cases, the arbitrators shall take into account 'contractual provisions and shall apply international trade usages' (as quoted by Y. Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration', in Sanders, ed., op. cit. n. 114, p. 227, at p. 230). See also, for similar provisions, the Swiss Private International Law Act, ch. 12, Art. 187, and the Netherlands Arbitration Act 1986, Art. 1054. See the United Nations Commission on International Trade Law (UNCITRAL) Model Law adopted on 21 June 1985, Art. 28; see also C. Croff, 'The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?', 16 Int. Lawyer (1982) p. 613, at p. 633.

139. See, e.g., ICC Award No. 2735/1976, 104 Clunet (1977) p. 947; see also two cases cited at p. 949, and ICC Award No. 2870/1978 (not reported). These cases provide evidence that, in practice, arbitrators sometimes rely upon a conflict of laws rule without disclosing from which legal system or other source it has been derived. See also ICC Award No. 1048, Doc. No 410/802, 11 January 1960.


It is presumed that the Tribunal adopted Aminoil's suggestion in fact, though not expressly.

5. INTERNATIONAL INVESTMENT AGREEMENTS, A SPECIAL CASE?

On the basis of the 

\textit{sui generis} \space nature of concession and other similar investment agreements,\footnote{142. See \textit{Amco Asia Corporation v. Indonesia} [1988] LAR at pp. 38-40. See also J.N.D. Anderson and N.J. Coulson, 'The Moslem Ruler and Contractual Obligations', 33 NY Univ. LR (1958) p. 917, at pp. 921-922.}\, and their fundamental difference from ordinary commercial contracts,\footnote{143. See the \textit{Sapphire Award} (1963), 35 ILR p. 136, at pp. 171-176. See also A.F.M. Maniruzzaman, 'State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law', 9 J. Int. Arb. (1992) no. 4, pp. 141-171.}\, application of different principles to the former for the purpose of determining the applicable law has been favoured in a number of arbitral awards\footnote{144. Idem; \textit{Texaco v. Libya}, 53 ILR at p. 441 et seq.; \textit{Revere Copper v. OPIC}, 56 ILR p. 258, at pp. 272-279; \textit{Sapphire International Petroleum Ltd. v. NIOC}, 35 ILR p. 136, at pp. 170-176.}\, as well as in the literature.\footnote{145. See, e.g., Ramazani, loc. cit. n. 57, p. 503, at p. 505; Lalive, loc. cit. n. 15, p. 987, at p. 994.} It cannot be denied, however, that in the case of the aforementioned types of state contract many arbitral tribunals have applied traditional rules of private international law in order to determine the 'proper law' without distinguishing between state contracts and ordinary commercial contracts.\footnote{146. See, e.g., the \textit{Alsing} case, 23 ILR p. 633, where the private international law of the seat of the arbitral tribunal, i.e., the \textit{lex fori}, was applied to determine the applicable law; see also the ICC case \textit{Mojzesz Lobelski v. State of Burundi}, Award of 30 October 1968, in \textit{Jurisprudence du Port d'Anvers} (1969) pp. 82, 89, 90.}\,

However, in the absence of an express choice of law provision, the search for a single legal system does not seem to occur frequently in the context of such contracts. This trend has been well recognized in the 1989 Santiago Resolution of the International Law Institute.\footnote{147. For the text of the Resolution on 'Arbitration Between States and Foreign Enterprises' (1989), see 5 ICSID Rev. (1990) p. 139 (Art. 6).}\, The resolution seems to confirm the modern arbitral practice. Thus, in the words of Lalive:

'Yet in spite of all the obvious links between the contract and the domestic law of the State concerned, it happens that in a great number of these international contracts there are overriding reasons to show that the parties intended to reach a different result.'\footnote{148. Lalive, loc. cit. n. 15, at p. 994; see also \textit{Kuwait v. Aminoil}, The Aminoil Counter-Memorial (5 January 1981), vol. I (Text), Pleadings Bk. 4, para. 240, at p. 109.}
There appears to be a consistent trend in arbitral practice to apply the notion of *dépeçage* or split proper law \(^{149}\) in the absence of any express choice of law by the parties. \(^{150}\) In the *Kuwait v. Aminoil* arbitration case, the Government of Kuwait stated in its Memorial that:

'It should be recognized, of course, that an agreement as complex as a concession agreement may be subject to more than one system of law, in that certain matters may fall to be determined under one system, others under another. Thus, for example, activities which take place outside the territory of the contracting State may be governed by another system of law. This was a conclusion reached in the *Aramco* arbitration.' \(^{151}\)

Usually, it appears that arbitral tribunals apply the municipal law of the contracting State to the matters falling exclusively within the jurisdiction of that State and as regards other matters such as the State’s right to exercise legislative authority or any other prerogatives to interfere with contractual rights, or to modify or terminate them, or as regards the question of remedies or compensation, they apply or tend to apply some non-national standard such as public


\(^{151}\) See Pleadings Bk. 3, *The Government’s Memorial (Text)* (May 1980), S. 3.38, at p. 60; see also *The Government’s Counter-Memorial (December 1980)*, Pleadings Bk. 5, paras. 3.85-3.86, at p. 84; also paras. 3.87-3.89, at pp. 84-85; para. 3.97 (5), at pp. 88-89.
international law, general principles of law, or other non-national standards. 152 To the latter category of issues, the tendency to apply a non-national standard is said to be justified by the parties' implied choice or intention deduced from certain elements in the contract such as good faith clauses, 153 stabilisation clauses, an arbitration clause, and the nature of the contract itself, i.e., falling within the category of economic development agreements. 154 These contractual elements are considered to internationalize such contracts requiring the application of some non-national standard to certain specific issues as stated earlier. Besides this subjectivist approach, the objectivist approach of private international law also supports this position. As it is clearly reflected in the Aminoil Memorial in the Kuwait v. Aminoil case 155 that:

'... even if the parties in the present case had not chosen these general principles (or transnational law) as the applicable law, it is submitted that the selection of general principles of law would result from an "objective determination" by the arbitrators in accordance with the general principles of private international law. Such a selection would be the most appropriate for the subject matter, should be presumed to be the preference of reasonable persons in the position of the parties, and would best serve the needs of justice and of international commerce in the modern world (emphasis added). 156

152. Ibid.; see also E. Paasivirta, Participation of States in International Contracts and Arbitral Settlement of Disputes (1990) at pp. 105-113; ICCA Report (Series No. 2) at pp. 188-189.

153. See the Lena Goldfields case, 36 Cornell LQ (1951) p. 31 (Art. 89 of the agreement concerned between the parties); see also Kuwait v. Aminoil, The Aminoil Memorial (2 June 1980), Pleadings, vol. I (Text), Bk. 1, paras. 114-117, at pp. 40-41. But see The Government's Counter-Memorial (December 1980), Pleadings Bk. 5, para. 3.35; Delaume, op. cit. n. 64.


156. Ibid., para 113, at pp. 39-40; see also the Aminoil Reply (27 April 1981), Pleadings Bk. 7, paras. 50-76, at pp. 20-30. Aminoil suggested that, in view of Art. III(2) of the Arbitration Agreement (that '... the specific terms of Article III(2) taken in the context of the Arbitration as a whole and of the contractual relations between the parties'), the applicable law should be the general principles of law. Ibid., Aminoil Memorial, vol. I (2 June 1980) (Text), Pleadings Bk. 1, p. 39, para. 113. Art. III(2) of the Arbitration Agreement between Kuwait and Aminoil provides that: 'The law governing the substantive issues between the parties shall be determined by the Tribunal, having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world'. See also CMI International Inc. v. Ministry of Roads and Transportation et al., 4 Iran-USCTR (1983) p. 263, at p. 268; G.A. Bermann, 'Contracts between States and Foreign Nationals: A Reassessment', in H. Smit et al., eds., International Contracts (1981) Ch. 7, pp. 183-212; W.L.M. Reese, 'The Law Governing International Contracts', ibid., Ch. 1, pp. 3-50. See also ICCA Report (Series No. 2) p. 190: 'The concern to apply the law best corresponding to the expectations of the parties therefore seems to be the central element in the determination of the legal norms which the international arbitrator must apply in solving a dispute. When the parties have expressly chosen the applicable law, the object of this expectation is a priori known and, therefore, becomes useless.
6. ABSENCE OF CHOICE OF LAW AND ICSID PRACTICE

The ICSID Convention (sometimes called the Washington Convention) has opened a new dimension in the matter of applicable substantive law when the parties did not or failed to choose the same. Article 42(1) of the Convention provides that:

'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules of the conflict of laws) and such rules of international law as may be applicable (emphasis added).'

There is no doubt that in the first sentence of the above provision the Convention firmly confers on the contracting parties to an investment agreement unlimited autonomy as to the applicable law, and makes their choice binding on the Tribunal. Thus, the provision confirms the universal rule of 'the autonomy of the will of the parties'. Here, we are concerned, in particular, with the second sentence of the article, i.e., the matter of applicable law in the absence of choice of law by the parties. In favouring the application of the law of the host State in the first instance in the absence of a choice of law clause, the second sentence confirms the principle that the law of the place where the investment is made or where the investment operations have their closest connections would be prima facie applicable. This formulation of the first instance application conforms to the result which in most cases would be reached in any event by the application of conflict rules. The formulation also goes along the same lines that the Permanent Court of International Justice in the Serbian and Brazilian Loans case declared and which was later affirmed by the Aramco Tribunal. The latter Tribunal found different laws to govern the different aspects of the concession simultaneously, and in support of its application of Saudi Arabian law to the effects of the concession in Saudi Arabia, the Tribunal stated as follows:

'The law in force in Saudi Arabia should also be applied to the content of the Concession because this State is a Party to the Agreement, as grantor, and because it is generally admitted, in private international law, that a sovereign State is presumed, unless the contrary is proved, to have subjected its undertakings to its own legal system. This principle was mentioned by the Permanent Court of International Justice in its Judgments of July 12th, 1929 concerning the Serbian and Brazilian loans.'

Failing such a choice, the arbitrator tends to show what this expectation could legitimately be, either in concreto, or in consideration of a certain international consensus'.

157. See also ICSID Model Clauses, Doc. ICSID/S/Rev. 1., 7 July 1981.
158. Serbian & Brazilian Loans cases, Judgments 14 and 15 (1929) PCIJ, ser. A. No. 20, at p. 42, No. 21, at p. 121.
159. Saudi Arabia v. Aramco, 27 ILR at p. 117.
160. Ibid., at p. 167.
In the face of the wording of the second sentence of Article 42(1) of the ICSID Convention, which mentions two systems of law, viz., national law first and international law second, it appears as a logical consequence that the role of the latter law is that of a corrective standard for the former. The view was also endorsed by Broches, the leading man behind the Convention, when he expressed his opinion explaining the presumed relationship between the law of the host State and international law in the same context. Thus, he had this to say:

'The Tribunal will first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State’s law, but may result in not applying it where that law, or action taken under that law, violates international law.'

The travaux préparatoires and the Convention as a whole bear the evidence that this corrective role of international law vis-à-vis the host State’s law in the absence of choice of law by the parties is attributed to the fact that ICSID is an international arbitration institution which was intended by the parties to treat the matter as such. The Convention in that provision thus gives effect to the presumed intention of the parties that, absent a choice of law clause in the agreement, the submission itself to the ICSID tribunal would require it to apply the host State’s law in the light of international law. The Tribunal has already applied this formula in a number of cases.

With regard to the method of applying the formula in the second sentence of Article 42(1) and the operational relationship between the two systems mentioned therein, the ICSID Ad hoc Committee in the Klöckner v. Cameroon case clarified the position with some precision. The Committee had to review an
earlier award of the ICSID tribunal on the ground of exercise of excess of power by the tribunal with regard to the applicable law in the context of the second sentence of the aforementioned article. The Committee stated as follows:

‘Article 42 of the Washington Convention provides . . . that “in the absence of agreement between the parties, the Tribunal shall apply the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable”. This endows these principles (leaving aside, perhaps, the case where it could be ascertained whether the internal law conforms to international law) with a double role, either complementary (in the case of a lacuna in the law of the State) or corrective, in the case where this law does not conform in all respects to the principles of international law. Be that as it may, and in both cases, the arbitrators can have recourse to the “principles of international law” only after having reached and established the contents of the law of the State party to the dispute . . . and after having applied the relevant rules of that law (emphasis added).’

Later, another ICSID Ad hoc Committee in the Indonesia v. Amco Asia Corp. case endorsed the same explanation in the following words:

‘Article 42(l) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of applicable domestic law are in collision with some norms.’

The above views clarify the position that according to Article 42 of the Convention, international law has a supplemental and corrective role in relation to the law of the host State as the applicable substantive law in the absence of any choice of law by the parties. The Convention thus strikes a balance between the theories of localization and delocalization of applicable substantive law. The ICSID formulation and practice appear to have had some influence upon the decisions of other international arbitral tribunals.

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165. Ibid., at p. 170.
167. Idem.
168. See, e.g., the ICC Award in S.P.P. (Middle East) Ltd. and S.P.P. Ltd. v. Egypt and Egoth, 22 ILM (1983) p. 752, at pp. 768-770; an the Ad hoc Tribunal Award in Kuwait v. Aminoil, 66 ILR p. 518. In recent contract practice, the ICSID formula is sometimes found to be explicitly incorporated in concession contracts. Thus, a 1987 Ghanaian agreement provides that: ‘This Agreement shall be governed by and construed in accordance with the laws of Ghana and such principles of international law as may be applicable’.
7. CONCLUSIONS

In the foregoing survey certain trends have been noticed in international commercial arbitral practice with regard to the application of conflict of laws rules in determining the applicable substantive law in the absence of the contracting parties’ choice as such in an investment agreement or in a compromis. From these, some conclusions may be drawn as follows:

(1) In international commercial arbitration involving a State or a State enterprise, the same principles are normally applied to solve choice of law issues as are applied in international commercial arbitration between private parties. However, there is a trend in arbitral practice in a growing number of cases to apply additional specific criteria to determine a non-national standard to be applicable to certain aspects of the dispute under consideration because of the involvement of the State or its controlled enterprise as a party.

(2) The traditional conflict of laws rule of the lex fori, according to which the arbitral parties’ as well as the arbitrator’s choice of applicable law should be governed, has lost its attraction in modern arbitral practice, the principal reason being, inter alia, that an international arbitration is considered to have no lex fori of its own; its authority derives from the parties’ agreement.

(3) In the absence of a choice of law provision in the agreement or in the compromis, the arbitrator may apply the ‘closest connection’ or ‘most significant relationship’ rule, sometimes known as the converging connecting factors test, of conflict of laws. This would lead to the objective localization of an investment agreement in the host State’s law because most of the connecting factors in the context of such an agreement would indicate that law. This is equally true in the cases of most investment agreements. The rule is considered to be a general principle of law because of its being common to most legal systems, hence part of public international law.

(4) The ‘closest connection’ or ‘most significant relationship’ rule may be considered to satisfy both subjectivist and objectivist tests of conflict of laws.

(5) The arbitrator’s freedom to choose conflict rules for the purpose of determining applicable substantive law represents an important ingredient of the theory of delocalization of international arbitration.

(6) The move towards the theory of delocalization of international arbitration has been reflected in the different approaches to conflict rules developed in arbitral practice. These approaches or methods guide an arbitrator in exercising his freedom to choose conflict rules for the purpose of determining applicable substantive law.

169. Redfern and Hunter, op. cit. n. 6, at p. 12: ‘... an agreement to arbitrate represented a compromise on the part of the parties; and this is reflected in the language of the civil law which refers to a submission agreement as a compromis and to an arbitration clause as a clause compromissoire’. See also fn. 44: ‘The secondary meaning of compromis is given as ‘an agreement under which the parties make mutual concessions’. Robert’s Dictionnaire de la langue française.'
substantive law to the merits of the dispute in hand. The approaches, such as (i) cumulative application of interested conflict of laws systems, and (ii) an international conflict of laws system, are meant to commend acceptance by both the disputing parties because of the neutrality of the approaches, and the realization of the legitimate expectations of the parties that an international arbitrator is not bound by any particular national conflict rules. It should be noted, however, that a recourse to either of the approaches would lead to the application of a single legal system. In some cases it is possible that a concurrent or an alternative recourse to these two approaches may result in the application of the ‘closest connection’ or ‘most significant relationship’ rule of conflict of laws. It has been remarked, ‘In looking for the legal system which has the closest points of contact to the relation created by the parties, the arbitrator shows that the links between this relation and the legal system are such that the parties cannot be surprised by its application’.  

The rule of direct application of the suitable substantive law by the arbitrator allows him comparatively wide discretion by virtue of which he can apply the theory of denationalization stricto sensu in practice.

(7) Article 42(l) of the ICSID Convention and the practice of the ICSID tribunals have struck a balance between the theories of localization and delocalization of applicable substantive law in the context of an international arbitration concerning investment disputes. Such a compromise formula between the two theories may turn out to be a model for the future in the situation of the absence of choice of law.

170. See ICCA Report (Series No. 2) p. 189.