HOW DO INTERNATIONAL CONSTRUCTION ARBITRATORS MAKE THEIR DECISIONS? THE STATUS OF SUBSTANTIVE LAW*

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ABSTRACT

International construction projects have become widespread in today's globalised and complex world. This modern phenomenon could not have been possible had international arbitration not been there. International arbitration is the fundamental dispute resolution method that ensures that all parties have access to justice. To realise a properly functioning justice system, it is vital to have common knowledge on the mechanism of determining the parties' rights and obligations. Otherwise, lacking an adequate degree of certainty, the justice system would be incomplete, inefficient, unsatisfactory and perhaps unsustainable. A game with no rules, or without rules known by all players, is not a game at all. Unfortunately, empirical knowledge concerning how arbitrators make their decisions on the substance of disputes arising from international construction projects is lacking. Therefore, this research, which commenced with documenting and problematising this lack of knowledge, aims to bring empirical insight into the substantive grounds of arbitral decision-making process in international construction disputes. This article, constituting the second publication of this research, aims to examine to what extent international arbitrators apply the law as the substantive norm and to provide an explanation for that. It relies on in-depth semi-structured interviews with 28 international construction arbitrators. It also draws on evidence from international construction arbitration awards and the relevant literature. This article argues that arbitrators follow the proper law to determine the parties' disputes. However, the devil always lies in the detail.

Keywords: International construction arbitration – Decision making – Substantive law – Contract interpretation – Mandatory law

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1. INTRODUCTION

As international construction arbitration expands, and has indeed become the default and fundamental dispute resolution method,[1] contracting parties and their counsel have become more concerned about the standards arbitrators apply to decide on their disputes.[2]

However, the authors, in their paper published in the ICLR journal in 2017,[3] argue that knowledge on arbitral decision-making in international construction disputes is lacking. The reasons for this lack of knowledge are multi-fold. For example, arbitral decision-making has received scant attention by scholars, with most attention being given to procedural and conceptual matters. Also, most literature related to arbitral decision-making is theoretical (i.e. non-empirical) which involves debates on how arbitrators should decide rather than how arbitrators do in fact decide. The ongoing debate reflects a lack of consensus on the underlying normative standards that should guide arbitral decision-making. Further, the inherent privacy of arbitration proceedings and confidentiality of awards contribute to the shortage of empirical research. These block any academic attempts to have access to this primary source of data, which is vital to draw meaningful conclusions and develop empirical knowledge concerning arbitral decision-making. The sparse quantitative and doctrinal studies that are related to international construction arbitration decision-making have methodological drawbacks and give inconclusive answers. A comprehensive review concerning the lack of theoretical and empirical knowledge on arbitral decision-making in international construction disputes can be found in a previous article published by the authors.[4]

The authors are undertaking research in response to the documented lack of knowledge[5] and repetitive calls by leading arbitration scholars and practitioners[6] for a paradigm shift onto evidence-based research to offer empirical insight into arbitral decision-making. The research aims to construct an arbitral decision-making conceptual framework that

[1] Friedland, P and Mistelis, L, *International Arbitration Survey: Improvements and Innovations in International Arbitration.* Queen Mary University of London and School of International Arbitration (2015).

[2] Schneider, M, "President's Message: Arbitral Decision Making – A Look into the Black Box", [2012] *ASA Bulletin* 30(3), 509; Turner, R, *Arbitration Awards: A practical approach* (Blackwell Publishing Ltd (2005)); Brekoulakis, S, "Systemic bias and the institution of international arbitration: a new approach to arbitral decision-making", [2013] *Journal of International Dispute Settlement*, 4(3), 553–585.

[3] Besaiso, H, Fenn, P and Emsley, M, "International construction arbitration: a need for decoding the black box of decision making", [2017] ICLR 288.

[4] *Ibid.*

[5] *Ibid.*

[6] Coulson, R, "Do We Know How Arbitration Panels Decide?", [1989] *Journal of International Arbitration* 6, 7; Coulson, R, "The Decisionmaking Process in Arbitration", [1990] *Arbitration Journal* 45(3); Blackaby, N, Partasides, C, Redfern, A and Hunter, M, *Redfern and Hunter on International Arbitration* 5th Edition (Oxford University Press (2009)); Schneider, M, "President's Message: Arbitral Decision Making – A Look into the Black Box", [2012] *ASA Bulletin* 30(3), 509.

identifies the substantive norms that influence arbitrators' decisions on the substance of international construction disputes, and explains why arbitrators follow these norms. This paper examines to what extent international arbitrators apply the law as the substantive norm and to provide an explanation for that.

This paper has three objectives and therefore is organised in three main sections. First, it briefly reviews arbitrators' duty to apply the law (Section 3). Secondly, it examines the effect of the substantive law on arbitrators' decisions on the substance of international construction disputes (Section 4). Thirdly, this article provides an explanatory framework for arbitrators' decision-making behaviour (Section 5).

2. METHODOLOGY

This research uses an empirical approach that draws on interpretivism, as the underlying epistemology, and interviews, as the primary data collection method, in order to empirically contribute towards a theory of decision-making in international construction arbitration.

Primary data for this research were gathered from two sources: semi-structured interviews and international construction arbitral awards. This research heavily relies on data collected through interviews undertaken with 28 international construction arbitrators. The following table shows the interviewees' countries of nationality.

Country of nationality	Number of interviewees
UK	6
Canada	5
USA	3
Ireland	1
Australia	2
Switzerland	4
Germany	1
Denmark	1
Egypt	3
Lebanon	1
Palestine	1

Although the interviewees come from 11 countries, all of them practice in a wide range of jurisdictions and some of them were trained in various legal systems. They sit in major international or regional arbitration institutions such as ICC, LCIA, SIAC, HIAC, AAA/ICDR, DIAC and CRCICA. As such, most major trading regions and in particular major hubs for international

construction are represented. The combined experience of those who participated in the research amounted to hundreds of international construction arbitrations (~ 400 cases) in addition to several hundreds of international commercial arbitrations. While some are generalist international arbitrators, most of them work mostly or exclusively in international construction arbitration. Supplementary and complementary data were obtained from international construction arbitration awards. These awards were obtained from four sources: Christopher Seppälä commentaries,[7] Mohi-Eldin Alam-Eldin collections,[8] ICCA Yearbook Commercial Arbitration,[9] and the ICC Dispute Resolution Library.[10]

In addition to these primary sources, secondary data were obtained from scholarly commentaries and academic writings.

3. ARBITRATORS' DUTY TO APPLY THE LAW

The duty of international arbitrators to apply the law,[11] the exact scope of such duty,[12] the extent to which they should adhere to the law,[13] and whether arbitrators do actually apply the law[14] are the subjects of an ongoing debate. The literature is not short of arguments that arbitrators do not have to

[7] Seppälä C, "International Construction Contract Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contract", [1998] *ICC International Court of Arbitration Bulletin* 9(2); Seppälä C, "International Construction Contract Disputes: Second Commentary on ICC Awards Dealing Primarily with FIDIC Contracts", [2008] *ICC International Court of Arbitration Bulletin* 19(2); Seppälä C, "International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts", [2012] *ICC International Court of Arbitration Bulletin* 32(2); Seppälä C, "International Construction Contract Disputes: Fourth Commentary on ICC Awards Dealing Primarily with FIDIC Contracts", [2013] *ICC International Court of Arbitration Bulletin* 24(2).

[8] Eldin, A, *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I*, (Kluwer Law International, (2000)); Eldin, A, *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II*, (Kluwer Law International, (2003)); Eldin, A, *Construction Arbitral Awards Rendered Under the Auspices of CRCICA*, (Lambert Academic Publishing, (2010)); Eldin, A, *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration IV*, (Kluwer Law International, (2014)).

[9] *The International Council for Commercial Arbitration (ICCA) Yearbook Commercial Arbitration (1976 – to date)* published by Kluwer Law International.

[10] https://library.iccwbo.org/dr-awards.htm?AGENT=ICC_HQ (last accessed 2 June 2020).

[11] Mitchell, R, "Must Arbitrators Follow the Law?", [2012] JAMS Global Construction Solutions Newsletter; Kirsh, H J, "Pitfalls, Perceptions and Processes in Construction Arbitration", [2012] *The Advocates' Quarterly* 40(3); Rau, A, "The Arbitrator and Mandatory Rules of Law", [2007] *The American Review of International Arbitration* 18, 51–88.

[12] Moses, M L, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press (2008)); Karton, J, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press (2013)).

[13] Levin, M S, "The Role of Substantive Law in Business Arbitration and the Importance of Volition", [1997] *American Business Law Journal* 35(1), 105–180.

[14] Thomson, D B, "Arbitration theory and practice: A survey of AAA construction arbitrators" [1994] *Hofstra Law Review* 23**,** 137; Stipanowich, T and Ulrich, Z, "Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators" [2014] *Columbia American Review of International Arbitration International* 25; Karton [cited] above fn 13; Mentschikoff, S, "Commercial Arbitration", [1961] *Columbia Law Review* 61(5), 846–869.

follow the law in determining the parties' dispute.[15] Some scholars[16] argue that it is the arbitrators' duty to apply the governing law of the contract to decide the parties' disputes. Kaufmann-Kohler[17] notes that the status of the substantive law (i.e. how arbitrators apply it) is one of the few areas that is still unresolved and lack consensus in international arbitration practice. Similarly, Sakr[18] opines that what is missing in arbitration scholarship is a glimpse of light into the way arbitrators apply national laws.

Against this background of the debate, the researchers asked arbitrators whether they apply the substantive law strictly. All arbitrators affirmed they do so unless the parties have agreed otherwise i.e. to apply non-legal criteria. This is the case despite reservations expressed by some of them that the law is rarely black or white. To put it simply, some interviewed arbitrators assert that legal questions rarely have an incontestable objectively correct solution. They seem to embrace legal realism thinking which views the law as seldom supplying determinate answers to legal questions.[19] Hence, the notion of a "strict application" could be inaccurate.

The arbitrators' affirmation that they apply the law to construe the parties' contract concurs with anecdotal evidence provided by leading authorities in international arbitration that arbitrators apply the substantive law in the vast majority of cases.[20]

However, the finding that arbitrators follow the law in their decisions must be further analysed since "how arbitrators apply the law" comprises a key part of the inquiry. As such, after establishing, as a point of departure, that arbitrators do follow the law in their decision-making, the researchers moved forward to inquire how they interpret the parties' contract (see section 4). The answer to this question provides insight into the arbitrators' conceptualisation of what their duty to apply the law entails.

[15] Weidemaier, W M C, "Toward a theory of precedent in arbitration", [2009] *William and Mary Law Review* 51**,** 1895; Brunet, E, "Arbitration and Constitutional Rights", [1992] *North Carolina Law Review* 71, 81.

[16] E. g., Kurkela, M and Turunen, S, *Due process in international commercial arbitration* 2nd Edition (Oxford University Press (2010)); Landolt, P, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence", [2012] *Arbitration International* 28(2)**,** 173–224; Mitchell [cited] above fn 11; Caron, D, "Regulating Opacity: Shaping How Tribunals Think", [2015] King's College London Dickson Poon School of Law Legal Studies Research Paper Series, Paper No 2015-07.

[17] Kaufmann-Kohler, G, "The arbitrator and the law: does he/she know it? Apply it? How? And a few more questions", [2005] *Arbitration International* 21(4)**,** 631–638.

[18] Sakr, M, "Turnkey Contracting under the ICC Model Contract for Major Projects: A Middle Eastern Law Perspective", [2009] ICLR 146.

[19] Schultz, T, "Arbitral Decision-Making: Legal Realism and Law & Economics", [2015] *Journal of International Dispute Settlement* 6(2)**,** 231–251.

[20] Gaillard, E and Savage, J, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International (1999)).

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4. THE IMPACT OF THE GOVERNING LAW ON CONTRACT INTERPRETATION

So far, this article finds that international arbitrators hold the opinion that they have a duty to apply the substantive law even though the boundaries of this duty are by no means uncontroversial. This section discusses how the substantive law affects the parties' obligations and hence the arbitrators' decisions on the substance of disputes concerning contract interpretation.

4.1 Rules of Interpretation in the Governing Law

When a construction dispute is referred to an arbitral tribunal, the first source of substantive norms or rules to look at are those provided in the contract. Parties to an international construction project normally enter into a comprehensive contract that provides a detailed regulation of their obligations and allocation of risks that may materialise.[21] It follows that acquiring knowledge on how international arbitrators apply the parties' contract is fundamental to understanding arbitral decision-making process. However, according to the conversations with the interviewees, it has become crystal clear that any inquiry about how arbitrators apply the contract will swiftly travel to the territories of contractual interpretation. The parties often have different interpretations of the contract, so they submit different arguments on how the contract should be interpreted and consequently applied.

In this instance, arbitrators may need to rely on rules of substantive law to guide the interpretation of the meaning of contract provisions.[22] Typically, contract interpretation is a matter of law and hence follows the governing law of the parties' contract.[23] This research finds that international arbitrators tend to adhere to rules of interpretation laid out in the substantive law. This finding concurs with Karton's conclusion[24] on international arbitrators' approaches to contract interpretation.

The assertion that contractual interpretation depends on the substantive law was a theme running throughout the interviews. An English arbitrator clarified how the contractual interpretation exercise differs according to the law the contract is subject to:

> "… when you are interpreting the contract … it depends on the legal system under which you are functioning … you use different tools depending on the tool box the parties have given you… it can be an English tool box or an Egyptian tool box, but

[21] Moss, G, "Introductory Materials on International Commercial Law", [2004] *Transnational Dispute Management* 1(3).

[22] Gaillard and Savage [cited] above fn 20; Moss [cited] above fn 21.

[23] Rosengren, J, "Contract Interpretation in International Arbitration", [2013] *Journal of International Arbitration* 30(1).

[24] Karton, J, "International Commercial Arbitrators' Approaches to Contractual Interpretation", [2012] *International Business Law Journal*, 383.

> you use the tools in each case to interpret the contract… each legal system has its own rules as to the way you can interpret the contract … so the common law system is more geared towards the literal words of the contract … whereas the civil law system looks for the spirit of the contract and the subjective intention of the parties …"

The differences between national laws in contract interpretation methodologies concern not only the approach (objective versus subjective) for ascertaining the parties' intention and the type of evidence that is admissible in this process, but also the effect of legal doctrines or principles available under each system of law.[25] For instance, some interviewees clarified that in civil law countries, there is emphasis on an implied duty of good faith and fair dealing. In the common law countries, courts have read a number of implied duties into construction contracts.

According to this perceived difference in the approach, some interviewees contend that outcomes of contract interpretation may be widely different depending on the governing law. They assert that different national laws have different emphasis on the parties' objective vis-à-vis subjective intentions and therefore have different interpretive rules and guidelines on whether certain categories of extrinsic evidence can be considered to assist an arbitrator in interpreting what a contract means. In their opinion, this difference in the method and its accompanying rules on evidence can lead to different outcomes.

Moreover, some participants maintain that the "outcome" of interpretation can be different depending on the governing law because national laws sometimes have legal principles affecting the interpretation or interpretive rules that are genuinely different. A prime example of a legal principle that heavily influences contract interpretation is good faith in contract performance that exists in many but not all jurisdictions. The application of this principle could allow an arbitrator to reach a construction that would not have been possible without it.[26] Contrary constructions could also result from the application of interpretive rules concerning ambiguous clauses. For example, most civil law codes have an interpretive rule that directs a judge or an arbitrator to construe the contract in favour of the debtor in case of doubt. Common law jurisdictions, on the other hand, have a *contra proferentem* rule which provides that an ambiguous term shall be construed against the party that drafted the contract.

On the other hand, there are contrary views expressed by the interviewed arbitrators and in scholarly writings that the practical effect is overstated.[27] It is true that common law and civil law have conceptual differences as to

[25] Rosengren [cited] above fn 23.

[26] *Ibid*.

[27] *Ibid*; Vogenauer, S, "Interpretation of Contracts: Concluding Comparative Observations" in Burrows, A and Peel, E (eds) *Contract Terms* (Oxford University Press (2007)).

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the purpose of interpretation (attain certainty and predictability vs. reveal the true intent of the parties) and therefore methodological differences in the approach to contract interpretation (objective versus subjective).[28] However, the outcomes of the interpretation appear to be substantially similar in practice.[29]

The scepticism about the actual difference in the outcomes of contractual interpretation in practice due to the methodological differences between legal systems was also raised by a number of interviewed arbitrators from the common law world. They argue that the common law system claims objectivity while at the same time it looks at the intention of the parties but in the form of the "intention of a reasonable person in the position of the contracting parties". In addition, interpreting the contract based on the objective test of "what a reasonable person having all the background knowledge which would have been available to the parties would have understood", in one sense, allows custom and usage to creep in. Further, looking at the "matrix of facts" surrounding the entry into a contract might influence the objectivity of contract interpretation. So, the process of looking at a clause and thinking about its meaning ultimately brings all that in, whether arbitrators are doing it consciously or not. An American arbitrator described the difference between common law and civil law approaches to contract interpretation as follows:

> "I think it is more of a cosmetic distinction … It could be that arbitrators will arrive at the same result but simply express different paths to reach the same result."

Overall, although different systems of law may follow different approaches and apply different rules, maxims or canons of construction, it is neither easy to say in the abstract nor to empirically verify the extent to which the practical effect differs.[30]

In addition to the scepticism shown in the accounts of some arbitrators towards the practical effect that is claimed to result from the difference in the legal approach to contract interpretation (objective versus subjective), the relaxed rules of evidence in international arbitration bring the two legal systems even closer to each other.[31] Also, arbitrators tend to be liberal in letting a wide range of evidence in, including evidence that could be

[28] Karton, J, "The Arbitral Role in Contractual Interpretation", [2015] *Journal of International Dispute Settlement* 6(1), 4–41.

[29] Vogenauer [cited] above fn 27; Valcke, C, "Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric", in Neyers, J W, Bronaugh, R and Pitel, S (eds) *Exploring Contract Law* (Hart Publishing (2009)); Knutson, R, "Recent Treatment of Construction Awards by the ICC International Court of Arbitration", [2004] *A paper given to a meeting of the Society of Construction Law*. London.

[30] Rosengren [cited] above fn 23.

[31] Karton [cited] above fn 24.

inadmissible under the governing law, because they are concerned about procedural challenges in case of dismissing evidence.[32]

Further, Karton[33] presents evidence from arbitral awards and interviews that suggests that international arbitrators play down the role of the substantive law in contract interpretation. He quoted a French scholar and practitioner asserting that rules of interpretation are not really rules of law but they are guidelines for a sound and reasonable interpretation. Likewise, in ICC Case No 12745/2010, the arbitral tribunal noted that rules for the construction of contracts set out in the French Civil Code are not mandatory but they are sensible guidelines to ascertain the intent of the parties.[34] Besides, some scholars consider that rules of contract interpretation are malleable and flexible enough to enable arbitrators to reach, more or less, similar reasonable interpretations.[35]

Furthermore, assertions on the extent to which substantive laws guide or control the interpretation give the impression that interpretation is a ratio-technical mechanistic process. This neglects the significant influence of an arbitrators' background (legal, commercial and cultural) on both the process and outcome of contract interpretation.[36] From this perspective, Rosengren[37] suggests that an arbitrator's own view of common sense may have a greater impact than the rules or principles of interpretation set out in a substantive law.

This research finds that the majority of arbitrators follow the rules of interpretation laid down in the substantive law. However, there are a few exceptions. Some arbitrators seem to be less attached to the substantive law in questions of contract interpretation and more attentive to commercial practice or transnational interpretation in an attempt to achieve a commercially sensible result. This will be discussed in a forthcoming paper.

4.2 Contract Supplementation: Non-Mandatory Law

In addition to its interpretation rules, the governing law of the contract matters because the set of obligations of the parties and the remedies the parties are entitled to claim are not limited to those available under the contract's provisions. In addition to the 'contractual' claims, a party may assert "legal claims" under the law governing the contract. The most

[32] Karton, J, "The Arbitral Role in Contractual Interpretation", [2015] *Journal of International Dispute Settlement* 6(1), 4–41; Drahozal, C R, "A Behavioral Analysis of Private Judging", [2004] *Law and contemporary problems* 67(1), 105–132. Sussman, E, "What Lurks in the Unconscious: Influences on Arbitrator Decision Making", [2014] *Alternatives to the High Cost of Litigation* 32(10), 149–155; Moses [cited] above fn 13.

[33] Karton [cited] above fn 33.

[34] *Ibid.*

[35] Rosengren [cited] above fn 23.

[36] *Ibid.*

[37] *Ibid.*

important type of legal claims are claims related to a breach of contract.[38] The outcome of these legal claims can be different depending on the substantive law. The substantive law the parties choose to govern their obligation provides a default allocation of risks in the form of legal rules.[39] This risk allocation varies depending on the substantive law.

The body of legal rules under any system of law is classified into two types. These legal provisions can be non-mandatory i.e. regulatory or can be mandatory. Different legal systems may regulate the same matter in different ways. This shows the importance of the choice of law decision and that a contract should be drafted having in mind the law that will govern it.[40]

The non-mandatory law is used only to fill gaps in the parties' contract when the contract is incomplete i.e. silent on the issue in dispute.[41] Unless the parties include an express term to the contrary, non-mandatory legal provisions are part of the parties' set of obligations even though they may not be aware of their existence.[42] This is particularly relevant to civil law jurisdictions that intend to provide a comprehensive codification of the law on certain matters. As such, they provide a default set of rules should the parties fail to include express terms.

4.3 Mandatory Rules of Substantive Law

4.3.1 The Dilemma of Mandatory Law's Application in International Arbitration

One key aspect of the substantive law that may affect the arbitral construction of contracts involves mandatory provisions of the substantive law. According to the respondents and some authors,[43] most construction law rules are non-mandatory. They maintain that mandatory rules in private law relations such as contract law are rare and have narrow applications in practice, whether in civil law or common law jurisdictions, because the legislator respects the autonomy of contracting parties to stipulate whatever they like. However, there are some mandatory rules the parties cannot derogate from and a judge has to apply regardless of the wishes of the parties.[44] National laws may have mandatory provisions that have different effects on the parties' set of obligations, and the validity

[38] Seppälä, C, "Contractor's Claims under the FIDIC Contracts for Major Works", [2005] *Construction Law Journal* 21(4), 278.

[39] Knutson, R, *FIDIC: An Analysis of International Construction Contracts* 2nd Edition (Kluwer Law International (2005)).

[40] Moss [cited] above fn 21.

[41] *Ibid*; Charrett, D, "A common law of construction contracts – or vive la différence?" [2012] ICLR 72.

[42] *Ibid.*

[43] E.g., Charrett [cited] above fn 41.

[44] Moss [cited] above fn 21; Charrett [cited] above fn 41.

and enforceability of their contractual terms.[45] A contractual clause might be binding or not depending on what the governing law is.[46]

Given that, there could be a situation in which a contract term is in conflict with a mandatory provision of the governing law. In this case, the parties' intention could arguably be best reflected in the express terms of their contract. However, at the same time, they agreed on a law to govern the interpretation and construction of their contract, which invalidates one of their contract terms.[47] In this instance, a national judge would normally interpret such a term under the governing law, which renders it ineffective (i.e. the mandatory law supersedes contrary contractual provisions). An international arbitrator, on the other hand, is not a national judge. There are institutional differences between the two. After all, arbitrators derive their power from the parties, are often selected and paid by the parties and hence they should presumably give more consideration to their "private law" which is their contract.[48] Consequently, arbitrators may depart from the mandatory provisions of the governing law in favour of the parties' *ex ante* expectation that their contract terms will be enforced.

In light of this, the interviewed arbitrators were asked on how they would deal with this dilemma, and if they would be concerned about applying the law in a manner that resembles a national judge's approach. The following sections (4.3.2 to 4.4.4) discuss the interviewee's responses and show that different approaches to this problem are possible.

4.3.2 The Prevailing View: Apply the Mandatory Law

Almost all participants stated that they would normally apply the law in "the correct way" i.e. the mandatory law supersedes contrary contractual provisions. Most interviewed arbitrators affirmed that they would not attempt to ascertain the parties' expectations and apply it in disregard of the law.

For example, an Egyptian arbitrator stated that the choice of law is one of the most important clauses in the contract that has a direct impact on the parties' obligations and risks allocation:

> "… if there is a fair provision of the contract that is contrary to a mandatory provision of the substantive law, I have to apply the law and strike down the contractual provision … It is not our job to change the law. It is not our function to undermine the law … my view is to uphold the substantive law agreed by the

[45] Moss [cited] above fn 21.

[46] *Ibid.*

[47] Moss [cited] above fn 21; Park, W W, "The Predictability Paradox - Arbitrators and Applicable Law", [2015] *Transnational Dispute Management* 12(6); Gélinas, F, "Trade Usages as Transnational Law", in Gélinas, F (ed) *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press (2016)) Gélinas, 2016b.

[48] Park, W W, "Arbitrators and accuracy", [2010] *Journal of International Dispute Settlement* 1(1), 25–53.

> parties, regardless of what is written in the contract because the choice of law is one of the most important things on which the parties agreed. Unfortunately, there are arbitrators who consider the rules of arbitration as the key thing, followed by the seat of arbitration as an important thing, and place the substantive law at the bottom of the list as something of a minimal concern, and I think that is ridiculous …"

On the other hand, there is an argument in the literature that international arbitrators should be more concerned about the parties' expectations than upholding a national law that governs their contract. Sometimes, the parties may choose a neutral law to govern their contract, which they are not aware of or familiar with its content. In this sense, they cannot reasonably choose a governing law that makes their contract or part of it null and void. This outcome will probably be contrary to the parties' intentions and hence the tribunal should live up to the parties' expectations.[49] This reasoning seems to have more merit and to be more convincing in international arbitration as opposed to national litigation, as arbitrators derive their power from the parties.[50] After all, arbitrators make their awards for the parties and not for the society at large. They are "problem solvers" and not "policy makers".[51] Nevertheless, this research finds that this argument has not been widely accepted in the arbitration practice.

The counterargument as expressed by many participants is that the choice of law also reflects the parties' expectation and it is in fact an objective indication of their expectations. For instance, an English arbitrator asserts that the choice of law clause is to be treated no less than any other clause in the contract. Moreover, he argues that it is an objective expression of the parties' intentions and hence has a greater weight than contrary subjective intentions claimed *ex post*:

> "… the parties might not know what the implications of their choice of law are but as I understand it they said that the proper law is X and we want our agreement to be construed as if it was made in country X by reference to law X … so you know it is their choice … I do not see there is a conflict between the parties' expectation and the right application of mandatory law … and if there is a choice of law clause, then the parties have chosen that proper law as much they have chosen any other term in the contract…"

This arbitral approach accords with arbitration jurisprudence as developed by arbitration awards and arbitrators' writings. The current arbitration jurisprudence largely considers that mandatory provisions of the substantive law chosen by the parties shall prevail over the terms of

[49] Moss [cited] above fn 21; Gaillard and Savage [cited] above fn 20; Gélinas [cited] above fn 47; Cuniberti, G, "The International Market for Contracts: The Most Attractive Contract Laws" [2014] *Northwestern Journal of International Law & Business* 34(3), 455.

[50] Gaillard and Savage [cited] above fn 20.

[51] Karton [cited] above fn 13.

the parties' contract and shall be applied even if the parties may not be aware of the legal effect or even their very existence.[52] Likewise, Born[53] proposes that the arbitral duty to apply the law includes a duty to apply its mandatory provisions.

However, it is contentious whether arbitrators must apply mandatory provisions of the governing law in all circumstances. The next sub-sections show that arbitrators might not always apply mandatory provisions of the substantive law. The rationale for this dissenting opinion is also presented.

4.3.3 The Qualifying View: The Contract Might Prevail Over the Mandatory Law

The mainstream arbitral opinion, as found in this study, is to apply the mandatory provision as it takes precedence over the parties' contract. However, some arbitrators maintained that they would approach this issue with an open mind. Although their starting point would be to give effect to the mandatory provision, they might shift their position and enforce the contract term in certain circumstances. A number of Swiss arbitrators rationalised this flexible approach by reference to the fact that the parties sometimes choose a national law because it is neutral. In this case, the law chosen by the parties might include rules that were not considered by the parties and hence might lead to a result that was not intended by the parties. If both parties were not aware of the mandatory provision that contradicts a term in their contract, then it is compelling to argue for enforcing the term they negotiated and agreed on as it better represents the parties' common intention. It is not compelling to apply mandatory rules that were not intended by the parties and belong to a country that neither party has any particular relation to. In addition, if a party contends it was aware, during contract negotiation, of a mandatory provision that contradicts contract terms, but demands its application during or after contract performance, then arbitrators might construe this as "negotiating in bad faith" and hence would be reluctant to support the application of this mandatory provision.

This point of view, which is to enforce a contractual clause that is contrary to a mandatory rule of the governing law, has support in the literature. This argument is built on three premises.

[52] Gaillard and Savage [cited] above fn 20; Charrett [cited] above fn 41; Barraclough, A and Waincymer, J, "Mandatory rules of law in international commercial arbitration" [2005] *Melbourne Journal of International Law* 6**,** 205; Mayer, P, "Mandatory rules of law in international arbitration" [1986] *Arbitration International* 2(4)**,** 274–293; Derains, Y, "Public Policy and the Law Applicable to the Dispute in International Arbitration", in Sanders, P (ed) *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International (1987)).

[53] Born, G, *International Commercial Arbitration* 2nd Edition (Kluwer Law International (2014)).

First, this view derives its merits from the distinction between two classes of mandatory provisions of law: those that govern the obligations of private parties and those that also relate to the state's public policy.[54] Although the parties cannot derogate from the application of mandatory provisions of private law (e.g. contract law, tort law etc.) in domestic court litigation,[55] it is arguable that these provisions may not be mandatory, in the traditional sense, in international arbitration. This is because the parties may opt out of them by subjecting themselves to any other law. As such, it is not radical to argue that these provisions become elective in international arbitration and hence could be treated as akin to non-mandatory provisions, the non-application of which has almost no risk for challenge.[56]

Secondly, this view derives its merits from the principle of party autonomy that imposes limits on arbitrators' authority. It seems sensible to argue that a contractual provision directing the tribunal to not apply mandatory provisions of the governing law that are contrary to their contract imposes a limit on the tribunal jurisdiction and mandate, the disregard of which may put the award in danger of challenge.[57]

Thirdly, this view derives its merits from a need to meet the parties' expectations. As usually a specific stipulation trumps general ones, the parties' clause in the contract is more specific than a general reference to a governing law. Therefore, an arbitrator may decide to give more weight to the parties' intentions as specifically written down in their contract. The argument based on the parties' intent is particularly relevant to international contracts where two foreign parties may agree on a third law merely because of its neutrality.[58]

4.3.4 The Lack of Consensus Over the Effectiveness of a Contractual Clause Excluding Any Contradictory Rules in the Substantive Law

What appears to be also contentious is when the parties explicitly direct the tribunal to not apply mandatory provisions of the governing law.[59] Due to the considerable freedom the parties enjoy in international arbitration by virtue of the principle of party autonomy, a question arises as to whether the parties are free to go as far as to exclude mandatory

[54] Rau [cited] above fn 11; De Ly, F, di Brozolo, L and Friedman, M, *Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*. International Commercial Arbitration Committee of the International Law Association (2008).

[55] Moss [cited] above fn 21; McConnaughay, P J, "The Risks and Virtues of Lawlessness: A Second Look at International Commercial Arbitration", [1999] *Northwestern University Law Review* 93(2), 453.

[56] McConnaughay [cited] above fn 55; De Ly *et. al.* [cited] above fn 54; Derains [cited] above fn 52; Voser, N, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", [1996] *American Review of International Arbitration* 7, 319.

[57] Park [cited] above fn 48.

[58] *Ibid.*

[59] Waincymer, J, "International Arbitration and the Duty to Know the Law", [2011] *Journal of International Arbitration* 28(3), 201–242.

provisions of the governing law. To be more specific, what if the parties agree that in case of contradiction between a contractual clause and a mandatory provision of the substantive law, then the contract clause shall prevail? This question is not academic as similar clauses with similar wordings are sometimes inserted in international contracts (e.g. ICC Case No 6257, ICC Case No 6136).[60]

Based on that, the participants were asked the following question: "If the parties agree that in the event of contradiction between a contractual clause and a mandatory provision of the substantive law, then the contract provision takes precedence … how will you decide?". This question, or other questions of a similar effect, raised a thorny debate about the very concept of arbitration and the exact role of an arbitrator. As far as arbitration is concerned, is it an alternative dispute resolution method or supplementary to court justice? As far as arbitrators are concerned, is their allegiance to the parties or to the proper application of the law under consideration? The arbitrators interviewed in this research have put forward two views to address the validity of such clauses: one against and one in favour.

For many arbitrators, this anomaly clause alters the classical hierarchy between a contract and its governing law and changes upside down how the law works. They asserted that mandatory provisions of the law, by definition, cannot be derogated from by the parties' consent. For them, this is not how a court of law would decide and arbitrators should decide in accordance with the law as judges normally do. Further, they questioned the enforceability of the award in this case. The following quote from an interview with an Australian arbitrator reflects this opinion:

> "… it is a general principle of law that … if there are mandatory provisions of the substantive law, then the parties are not allowed to derogate from them… as an international arbitrator, I would make a decision on the same basis as a judge would, applying the governing law of the contract…you cannot apply this clause based on an assumption that there is no risk of a challenge, annulment or non-enforcement … so, why would I hand down an award that has a basic legal flaw?"

Gaillard and Savage[61] agree with the view that contractual clauses aiming to evade the application of mandatory provisions of the substantive law will not necessarily be effective. The reason is that to give effect to such a clause which is in conflict with the governing law means that the clause will no longer be governed by any law. Despite the parties' broad freedom to select the law or the rules of law to govern their contract, this does not extend to choosing no law at all. The option of a self-sufficient contract that is governed by no law at all is not available to the parties. Contracts cannot exist in legal vacuum and international arbitration cannot be

[60] Gaillard and Savage [cited] above fn 20.
[61] *Ibid.*

fully detached from all legal jurisdictions. They asserted that even arbitrators, who support the theory of floating contracts or contracts with no governing law, do in fact resort to general principles of law in their awards. Accordingly, based on these premises, Gaillard and Savage[62] argue that a clause the parties insert to exclude contrary mandatory provisions of the governing law breaks down and will have no effect.

Based on the above, it is clear that many participants endorse the position that arbitration is to supplement but not to supplant court litigation and hence arbitrators should decide like judges in giving effect to the mandatory provisions' higher precedence over contract terms. However, this research reveals an exception to this majority view. Few participants stated that they may enforce a contractual clause changing the classical hierarchy between the law and contracts; making the parties' contract supersedes mandatory provisions in the law. In so doing, they pronounce that they are not gatekeepers of any state's mandatory provisions as the state's judges are. As such, their respect of the principle of party autonomy, their concern of not exceeding their mandate, and their dedication to meet the parties' expectation may trump other considerations to apply the law in a manner consistent with that of a national judge as a matter of arbitral duty.

It is noteworthy that some of these arbitrators linked the possibility to enforce a clause pertaining to exclude a contrary mandatory provision in the governing law to the award enforcement. They stated that if there was no threat for annulment at the seat or non-enforcement at the place where parties intend to enforce, then they would probably apply this clause.

5. EXPLANATORY FRAMEWORK FOR ARBITRAL DECISION-MAKING

This study finds that arbitrators apply the parties' contract and the governing law. In so doing, they do not attempt to re-write the parties' contract or ignore the governing law in favour of their own notions of fairness or reasonableness. Rather, they are keen to apply the law properly taking into consideration procedural limitations and party-autonomy constraints.

This section aims to provide an answer to the "why" question. In other words, it intends to unpack arbitrators' motivation and incentive to adhere to the law in their decisions on the merits. This research finds nine reasons that explain the dominant legal model of arbitral decision-making.

[62] *Ibid.*

5.1 Arbitral Duty to Apply the Law

The interviewed arbitrators asserted that it is their mission to apply the law unless the parties have authorised them not to. There is no shortage of scholarly opinion that arbitrators have a duty to apply the law unless the parties have agreed otherwise.[63]

The problem here concerns the source of this obligation. In national litigation, judges have a duty towards the state to apply its law on its citizens. In international arbitration, it is highly unlikely that arbitrators have the same duty.[64] This study finds that this duty stems from the arbitration's social institution as explained in the next sections.

5.2 Arbitration's Institutional Framework

Arbitration, as a private dispute resolution method, is not governed by an institution. However, it operates within a framework of institutional rules, national laws and international conventions. These altogether set out the rules of the game i.e. arbitration decision-making.

Some participants and scholars[65] noted that their duty to apply the law is expressed in various institutional rules (e.g. ICC, LCIA) and national arbitration acts.

For instance, the ICC 2012 arbitration rules provides in Article 21.1 that:

> "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate".

Also, the UNCITRAL Model Law provides in Article 28.1 that:

> "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."

Nevertheless, the absence of a mechanism to ensure arbitrators' compliance with their duty to apply the law is problematic. The New York Convention, the UNCITRAL Model Law and most national arbitration acts do not provide a supervisory mechanism to sanction arbitrators' disregard or misapplication of the law. This gap or defect in the international arbitration regime is problematic.[66] It is rather hard to see the point of laying down obligations that cannot be enforced.

[63] E.g., Natanson, R, *The Choice of the Applicable Law as a Strategy in International Commercial Arbitration*, M.Sc., Toulouse Capitole University (2013); Mayer, P, "Reflections on the International Arbitrator's Duty to Apply the Law – The 2000 Freshfields Lecture", [2001] *Arbitration International* 17(3), 235–248; Buys, C G, "The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration", [2005] *St John's Law Review* 79(1), 59.

[64] Mayer [cited] above fn 63; Park [cited] above fn 48.

[65] E.g. Buys [cited] above fn 63; Mitchell [cited] above fn 11.

[66] Besaiso *et. al.* [cited] above, fn 3.

Nonetheless, it is challenging to "get it right" and "get it done" at the same time. The correctness of the arbitral award and its finality seem to be irreconcilable aims that made the architects of international arbitration content with a compromise that favours finality. Further, to open the door for courts' review on the merits will bring back national courts to the resolution of the parties' dispute which the parties wanted to avoid in the first place because of neutrality concerns.[67]

5.3 Valid and Enforceable Award

Arbitrators' duty to provide an enforceable award is widely recognised in arbitration scholarship and institutional rules as the value of an unenforceable award is negligible.[68] For many arbitrators, the duty to apply the law is independent from the duty to render a valid and an enforceable award. However, the majority of arbitrators interviewed in this study implied a subtle connection between the two duties in the sense that not complying with the former could lead to a breach of the latter. In other words, they are concerned that making a decision that deviates from or contravenes the stipulations of the governing law might put their award in danger of annulment or non-enforcement.

This is in contrast to the overwhelming opinion in arbitration scholarship which concedes that arbitral awards are virtually immune from challenge based on erroneous legal conclusions or mistakes of law.[69] Although they vary from one jurisdiction to another, there are limited grounds for challenge of arbitral awards in the seat of arbitration or in the jurisdiction where enforcement is sought. According to the UNCITRAL Model Law and the arbitration laws of most countries, courts have no power to review awards on the merits i.e. arbitrators' conclusions of law or findings of facts.[70] Similarly, the New York Convention, and hence courts of acceding countries, has no grounds for non-recognition or non-enforcement based on a mistake of law, however serious or blatant.[71] The premise behind this

[67] Cuniberti, G, "Beyond Contract – The Case for Default Arbitration in International Commercial Disputes", [2008] *Fordham International Law Journal* 32, 417.

[68] Natanson [cited] above fn 63; Karton [cited] above fn 13; Moses [cited] above fn 13; Platte, M, "An Arbitrator's Duty to Render Enforceable Awards", [2003] *Journal of International Arbitration* 20(3), 307–313.

[69] Natanson [cited] above fn 63; Park [cited] above fn 48; Rubino-Sammartano, M, "Decision-Making Mechanism of the Arbitrator vis-a-vis the Judge", [2008] *Journal of International Arbitration* 25(1), 167; McConnaughay [cited] above fn 55; Moses [cited] above fn 13; Weidemaier [cited] above fn 15; Blackaby, N, Partasides, C, Redfern, A and Hunter, M, *Redfern and Hunter on International Arbitration* 6th Edition (Oxford University Press (2015)); De Ly *et. al.* [cited] above fn 54.

[70] Cuniberti [cited above] fn 67; Gaillard and Savage [cited] above fn 20; Andrews, N, *Arbitration and Contract Law* (Springer (2016)); Moloo, R and King, B, "International Arbitrators as Lawmakers", [2014] *New York University Journal of International Law and Politics* 46(3).

[71] Park [cited] above fn 48; Gaillard and Savage [cited] above fn 20; McConnaughay [cited] above fn 55; da Silveira, M and Levy, L, "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention", in Gaillard, E and Pietro, D (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May (2008)).

limited judicial review is to maintain an essential feature of arbitration which is the finality of the award.

There are two areas of concern that make arbitrators cautious of their substantive decisions because of fear of non-enforcement. These concerns are primarily directed towards courts of enforcement jurisdictions because they normally have significant connection with the losing party. Courts of the seat are of less concern in this respect because the seat is normally chosen due to its neutrality.[72]

First, some arbitrators and scholars[73] are concerned that a disregard of the governing law provisions might be construed as an excess of authority by the tribunal that entitles a reviewing court to set aside or refuse to enforce the award. However, this argument has been criticised as it would undermine the purpose of arbitration in providing a final and enforceable award.[74] da Silveira and Levy[75] argue, based on a series of courts' decisions in various jurisdictions, that arbitrators' misapplication of the law cannot be broadly construed as an excess of the limits of their mandate or the scope of their jurisdiction and hence is not reviewable by courts at jurisdictions where enforcement is sought. Likewise, Moss[76] finds that, based on an analysis of arbitral awards concerning the application of the UNCITRAL Model Law and the New York Convention, an excess of power has rarely been successful to challenge arbitrators' determinations of law.

Second, despite all this protection afforded to arbitrators' decisions on the substance, some arbitrators still feel insecure and prefer not to venture an improper application of the law due to two concerns.

The first concern is that courts can invoke public policy to challenge arbitral awards. The states' right to do so is recognised by the New York Convention and the UNCITRAL Model Law. In the opinion of some arbitrators, it is against public order not to enforce the law especially in civil law countries. However, there is a general agreement in arbitration scholarship that public policy should be applied restrictively and construed narrowly to refer to procedural or substantive defects that contradict the fundamental principles of the society and natural justice.[77] There is also evidence from practice that courts decisions setting aside or refusing to enforce arbitral awards on the ground of public policy are not

[72] McConnaughay [cited] above fn 55.

[73] Moses [cited] above fn 13; Van den Berg, A J, "Failure by Arbitrators to Apply Contract Terms from the Perspective of the New York Convention" in Aksen, G, Böckstiegel, K H, Mustill, M J, Whitesell, A M and Patocchi, P M (eds) *Global Reflections on International Law, Commerce and Dispute Resolution: liber amicorum in honour of Robert Briner* (ICC Publishing (2005)).

[74] da Silveira and Levy [cited] above fn 71.

[75] da Silveira and Levy [cited] above fn 71.

[76] Moss [cited] above fn 21.

[77] Cuniberti [cited above] fn 67; McConnaughay [cited] above fn 55; Moss [cited] above fn 21.

many. In these limited cases, courts have, generally speaking, consistently interpreted public policy to refer to matters violating state's rules on bribery, corruption and the like.[78] It follows that public policy would not be used to scrutinise the soundness of an arbitrator's conclusions of law.[79] Nevertheless, the concept of public policy remains elastic and indeterminate under many jurisdictions.[80] As such, in practice, it seems that some arbitrators feel more comfortable to not take the risk, even if a risk with a small chance of occurring, of departing from the law.

The second concern is that few jurisdictions, England and the United States in particular, might review an arbitrator's application of the law. However, arbitration scholarship and courts' practice suggest that this review will only occur in exceptional circumstances under both jurisdictions. In England, a court may review the merits of the tribunal's decision according to the English Arbitration Act 1996. However, to do so, the court needs to find that: (1) the parties have agreed to keep their right to appeal; (2) the tribunal's decision is patently wrong on a point of law; (3) the point of law is limited to English law; and (4) the matters at stake are of general public importance.[81] Evidence from practice suggests that English courts do not grant an appeal in the majority of cases.[82] In the United States, some courts have devised a non-statutory ground to vacate or set aside an arbitral award based on "manifest disregard of the law". However, this doctrine has been rarely applied[83] because of the high threshold of the proof required (a party needs to demonstrate that an arbitrator deliberately disregarded the law). Also, it has been rejected and disapplied in some states.[84]

5.4 Arbitration is Supplementary, not Alternative, to Courts

The classic arbitrator's dilemma concerns the longstanding debate on the arbitrator's role and the arbitration's nature.[85] There are two distinct formulations to this conceptual problem. Is arbitration an alternative/substitute or a supplement to courts' justice?[86] To put it differently, is arbitration contractual or jurisdictional?[87] Consequently, is an arbitrator a service provider i.e. an agent who is hired by the parties to resolve their dispute based on their rules, or is an arbitrator a quasi-judge who is

[78] Moss [cited] above fn 21.
[79] Gaillard and Savage [cited] above fn 20; McConnaughay [cited] above fn 55; Moss [cited] above fn 21.
[80] Moss [cited] above fn 21; Kurkela and Turunen [cited] above fn 16.
[81] Moses [cited] above fn 13; Andrews [cited] above fn 70.
[82] Andrews [cited] above fn 70.
[83] Kaufmann-Kohler [cited] above fn 17.
[84] Moses [cited] above fn 13.
[85] Rau [cited] above fn 11; Barraclough and Waincymer [cited] above fn 52.
[86] Kirgis, P F, "Contractarian Model of Arbitration and its Implications for Judicial Review of Arbitral Awards", [2006] *Oregon Law Review* 85(1), 1.
[87] Barraclough and Waincymer [cited] above fn 52.

responsible for the right application of the law regardless of the wishes of the parties?[88]

This is the most fundamental problem in arbitration theory and practice that has not been resolved in theory and not settled in practice. It is problematic in practice because it leads to different views on the parties' rights and obligations, and the extent of arbitrators' power and authority.[89]

There is a wide range of opinions that support either model,[90] but the main view seems to support a hybrid model that includes elements of both models: contractual and jurisdictional.[91] The dilemma, however, remains as to where to draw the dividing line. So, if the nature of arbitration is represented by a continuum, with the contractual view and the jurisdictional view at the two ends of the spectrum, then there is a wide margin for individual choice of where to draw the line that represents the hybrid model.[92]

This theoretical division or conceptual tension underpinning arbitration explains most of the controversial views arbitrators hold in relation to their decision-making approach as this research finds.

It follows that the closer an arbitrator is to the contractual view, the more he or she is respectful of the party autonomy. In turn, the arbitrator would have a greater tendency to apply the law as the parties see it and plead it.

Arbitrators, who are closer to the other end of the spectrum, maintain that the arbitral mission entails a duty to apply the law in the same manner as a national judge would.

This duty, they believe, is derived from the very concept of arbitration as supplementary to court justice and not a substitution or a replacement to substantive justice as administered by courts. As such, by selecting arbitration, there is a basic assumption that the parties have not given up their legal rights. Rather, they wish their legal rights to be determined but in a neutral setting. If the parties do not wish their dispute to be resolved according to the law and their contract, then they should seek mediation or other forms of alternative dispute resolution (ADR) techniques whereby a dispute resolver is not bound by the law. Likewise, there is a considerable scholarly opinion that arbitration is a procedural but not substantive alternative to court litigation.[93] The parties opt for arbitration for procedural reasons (e.g. enforceability of arbitral awards,

[88] Kirgis [cited] above fn 86.
[89] Barraclough and Waincymer [cited] above fn 52.
[90] E.g. Kirgis [cited] above fn 86; Rau [cited] above fn 11.
[91] Barraclough and Waincymer [cited] above fn 52.
[92] Barraclough and Waincymer [cited] above fn 52.
[93] Karton [cited] above fn 13; Ridgway, D A, "International arbitration: the next growth industry", [1999] *Dispute Resolution Journal* 54(1), 50.

the neutrality of the forum, flexibility of procedure etc.) but not for substantive reasons.[94]

5.5 Parties' Expectations

The literature contains a number of claims or anecdotes concerning parties' expectations that have been allowed to pass with no empirical evidence. For instance, some authors opine that commercial parties expect a commercial decision and that is the reason for choosing arbitration in lieu of court litigation. In this sense, a decision based on a black-letter analysis of the law would be contrary to their commercial expectations.[95] There is another suggestion that the parties in international commerce pay little attention to the law while closing the deal. They negotiate the terms of the contract and leave the choice of law to the end. Sometimes, they insert a choice of law clause without a careful analysis of its impact on their contractual allocation of risks or agree on a third law when they are not familiar with its content simply because of its neutrality. Sometimes, they even do not agree on the law to govern their contract or forget it and end up with no choice of law. This indicates that the parties expect their contract terms to be enforced no matter what legal rules may be applied by arbitrators.[96]

However, the available evidence discredits this claim and suggests otherwise. Parties prefer arbitration to national litigation because of the advantages of neutrality and enforceability,[97] and the parties' expectations are seemingly to have their disputes determined according to the law. The parties' expectations, as inferred from the choice-of-law they make in their arbitration clauses,[98] is that they wish a decision based on a specific and

[94] Drahozal, C R and Ware, S J, "Why do businesses use (or not use) arbitration clauses", [2010] *Ohio State Journal on Dispute Resolution* 25, 433; Naimark, R W and Keer, S E, "What do parties really want from international commercial arbitration?", [2002] *Dispute Resolution Journal* 57(4), 78; Bühring-Uhle, C, *Arbitration and mediation in international business* (Kluwer Law International (1996)).

[95] Vogenauer, S, Sources of Law and Legal Method in Comparative Law in Reimann, M and Zimmerman, R (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press (2006)); Hermann, A H, *Judges, Law and Businessmen* (Kluwer (1983)); Ossman, G, *Construction arbitration consistency and reliability: An empirical study*, M.Sc., Pepperdine University School of Law (2003); Ridgway, D A, "International arbitration: the next growth industry", [1999] *Dispute Resolution Journal* 54(1), 50; McConnaughay [cited] above fn 55.

[96] Moss [cited] above fn 21; Cuniberti [cited above] fn 49.

[97] Lagerberg, G and Mistelis, L, *International Arbitration: Corporate Attitudes and Practices*. Queen Mary University of London and School of International Arbitration (2006); Nazzini, R, *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (Informa Law from Routledge (2018)); Friedland, P and Mistelis, L, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, Queen Mary University of London and School of International Arbitration (2015); Bühring-Uhle, C, "A Survey on Arbitration and Settlement in International Business Disputes – Advantages of Arbitration", in Drahozal, C and Naimark, R (eds) *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International (2005)).

[98] Drahozal, C R, "Contracting out of National Law: An Empirical Look at the New Law Merchant", [2005] *Notre Dame Law Review* 80(2), 523; Bond, S R, "How to Draft an Arbitration Clause", in Drahozal, C R and Naimark, R W (eds) *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International (2005)).

predictable national law. They do not desire an "extra-legal" resolution to their disputes.[99] Neither do they want their legal rights and obligations to be decided by the courts of the other party's state of nationality.[100]

Arbitrators interviewed in this study as well as scholars[101] opine that arbitrators' duty to apply the law also draws from commercial parties' appreciation of the certainty of their rights and obligations, predictability of the outcome of their dispute and the stability in commercial dealings in the long run. Predictability and stability go hand in hand with the finality of arbitration which is one of the most attractive aspects of international arbitration. Otherwise, if arbitrators entertain wide discretion to decide as they prefer, people will lose confidence in the arbitration process. Therefore, to protect arbitration as an international private justice system that provides disputants with decisions which are final and binding with limited grounds for appeal, arbitrators need to assure predictability and this can only be achieved by applying the law.

Further, if the parties truly expect a commercial decision then they would be expected to structure their dispute resolution process to produce such an outcome. For instance, they could appoint commercial people as arbitrators. Although in principle all arbitrators have the same duty to apply the law, some participants noted that, as a practical matter, arbitrators' different backgrounds may lead to somewhat different results. People from the industry (e.g. engineers, project managers) will generally have more difficulty applying the law and more tendency to apply commercial norms. In light of this, some participants noted that there is an implicit understanding between the disputants and the arbitrators they select with respect to the decision they expect. In this respect, if the parties choose arbitrators with legal backgrounds, then this indicates that they expect a legal decision. If, on the other hand, the parties choose arbitrators from the construction industry, then this implies that they expect a decision that is more attentive to commercial practice. In addition to appointing commercial people as arbitrators, the parties could direct the tribunal to decide based on non-legal criteria (e.g. trade usage, *lex mercatoria*, *ex aequo et bono*, etc.).

This cannot be further from the truth. Often, the parties appoint legal professionals (lawyers, barristers, law professors, judges etc.) to arbitrate their disputes[102] and select a national law to govern their

[99] Bond [cited] above fn 98.

[100] Dezalay, Y and Garth, B G, *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order* (University of Chicago Press (1998)); Bond [cited] above fn 98.

[101] Mayer [cited] above fn 63; Karton [cited] above fn 28; Karton, J, "A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards", [2012] *Arbitration International* 28(3), 447–486; Kaufmann-Kohler, G, "Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture", [2007] *Arbitration International* 23(3), 357–378.

[102] Cuniberti [cited above] fn 67; Karton [cited] above fn 32; Franck, S, "The Role of International Arbitrators", [2005] *ILSA Journal of International & Comparative Law* 12, 499.

disputes.[103] The arbitrators interviewed in this study asserted that the choice of law clause is one of the most important contractual decisions. The parties are presumed to be knowledgeable and aware of the implications of their choices, and they should draft their contract in a way that is consistent with its governing law in order to avoid undesirable results. Moreover, the available empirical evidence suggests that the parties make their decision to initiate arbitration based on their assessment of the strength of their legal position.[104]

Therefore, the way the parties structure their arbitration decision-making process indicates that it is their intention and expectation to receive a decision according to the law.[105] As such, the argument that the parties' expectations are not to have their dispute determined according to the law fails to be convincing.

5.6 Informal Control: ICC and Scholarly Scrutiny

Some arbitrators mentioned that they are mindful of the ICC Court of Arbitration's scrutiny of arbitral awards rendered under its auspices. This review process serves as a reminder that they need to follow the law. According to the interviewed arbitrators, the scrutiny of arbitral awards is one of the particularities of ICC arbitration that makes it different from other institutional arbitrations.

In ICC arbitration, an arbitration tribunal submits its draft award to the secretary. Then, the court, through one of its weekly sub-committees or monthly plenary sessions, reviews it and either approves it or asks the tribunal to revise its award. In the latter case, the court might recommend a change or require a change. Although the court's feedback mainly concerns the form of the award, it also touches upon matters of substance. Article 33 (Scrutiny of the Award by the court) of the ICC 2012 Rules of Arbitration suggests that a court may recommend the tribunal to revise certain findings or conclusions that are seemingly flawed or inconsistent. As some interviewed arbitrators pointed out, the court will normally not require tribunals to change their decisions on the substance, however, it remains a professional embarrassment for some arbitrators to receive such remarks. It is even more embarrassing if their arbitral awards get publicised and receive scholarly criticism.

[103] Karton [cited] above fn 32; Drahozal [cited] above fn 98; Bond [cited] above fn 98; Berger, K, Dubberstein, H, Lehmann, S and Petzold, V, "The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration - Background, Procedure and Selected Results" in Drahozal, C R and Naimark, R W (eds) *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International (2005)).

[104] Lagerberg, G and Mistelis, L, *Corporate choices in International Arbitration: Industry perspectives.* Queen Mary University of London and School of International Arbitration (2013).

[105] Park, W W, "Arbitration in autumn", [2011] *Journal of International Dispute Settlement,* 2(2), 287–315.

This form of social control of arbitrators' application of the law as provided by the court and scholarly scrutiny is paramount in international arbitration as a justice system lacking formal control of its substantive outcomes.

5.7 It is the Parties' Choice

In the interaction between law and parties' expectations, some scholars[106] believe that in many cases there is a misalignment between the stipulations of the governing law of the contract and the expectations of the parties. Nonetheless, the arbitrators interviewed in this research maintain that they would apply the law even if it turns out to be contrary to the parties' expectations. Throughout the interviews, the arbitrators maintain that it is not their job to re-write the parties' contract or ignore the stipulations of the law they chose to govern their contract. Their arbitral mission does not give them the jurisdiction to decide on a basis different from that which the parties agreed to. Rather, they have to respect the parties' agreement and enforce their contract including the choice of law clause as an objective statement of their intent.

In addition, according to the arbitrators, construction parties are usually not small players and are assumed to have had legal advice before entering into a contract. As such, the parties should be able to look after themselves and perhaps undergo an internal review to find who was accountable for agreeing on certain terms during contract negotiation or for failing to administer and manage the contract during contract performance.

5.8 Concern for Reputation and Appointments

Some arbitrators stated that they are keen to apply the law and adhere to the parties' contract for the sake of their own reputation. This indicates the arbitrators' perception that it is the parties' expectation to have their contract terms enforced according to the governing law. As such, they believe a fulfilment of the parties' expectations in addition to their compliance with their duty to apply the law enhances their reputation. Further, they believe that this decision-making behaviour safeguards their awards from the risk of challenge which could otherwise cause them reputational damage and negatively affect the demand on their services.

This concurs with the opinion of some scholars that arbitral decision-making behaviour is shaped by market competition and arbitrators' incentive to receive appointments. One key factor to win this competition

[106] Mandziuk, S N, "Book Review: Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation, by Catherine Mitchell", [2014] *Osgoode Hall Law Journal* 52(2), 660–669.

is to win the parties' confidence that if appointed, the arbitrator will apply the terms of the parties' contract and comply with the stipulations of the law they chose to govern their contract.[107]

5.9 A Pledge to Professionalism

Some arbitrators suggested that a duty to apply the law comes from a pledge to professionalism in the conduct of arbitration.

Even if the award does not get publicised or commented on, some arbitrators still believe that they have a professional duty to apply the law, otherwise they would be negligent i.e. in breach of a professional duty. However, this should not be construed narrowly as a breach of legal duty as arbitrators are immune from liability and claims based on professional negligence.[108]

Some scholars argue that arbitrators' terms of appointment oblige them to comply with the parties' arbitration agreement, including the criteria to be applied in determining their dispute.[109] Again, this should not be construed in a strict sense because arbitrators are immune from legal action. Therefore, even if arbitrators do not adhere to the criteria the parties elect to govern their dispute, they will not be in a breach of contract that gives rise to legal recourse.[110]

As such, the arbitrators' duty to apply the law should be construed broadly to mean a moral duty and a commitment to professionalism of arbitration. In this sense, an arbitrator interviewed in this research said that in some cases he was applying a national law that was different from the law of the seat and from the laws of the conceivable enforcement jurisdictions. Despite the lack of supervisory power on his decision, he remained keen to properly apply the law due to his commitment to what he called "intellectual honesty" and 'professionalism' in the performance of his job.

6. CONCLUSION

This paper finds that international construction arbitrators concur that they have a duty to apply the law, and they do so unless the parties have agreed otherwise. The application of the law involves applying the rules in the governing law which govern the interpretation of the meaning of a

[107] Karton [cited] above fn 13; Drahozal [cited] above fn 98; Weidemaier [cited] above fn 15.
[108] Salahuddin, A, "Should arbitrators be immune from liability?", [2017] *Arbitration International,* 33(4), 571–581.
[109] Onyema, E, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge (2010)).
[110] Salahuddin [cited] above fn 108.

contract, filling the gaps in a contract and constructing the legal effect and the validity of a contract.

This paper finds that the majority of arbitrators follow the rules of interpretation laid down in the substantive law. Nonetheless, there are dissenting opinions on the extent to which contract interpretation should be governed by the governing law. This is to be further explored in a forthcoming article.

This article suggests that matters involving mandatory rules of the governing law seem to be highly controversial. The core of the controversy boils down to the very concept of arbitration and accordingly the role an arbitrator is presumed to fulfil. The tension is between party autonomy and competing principles concerning the arbitrators' duty to apply the law, the arbitrators' duty to render an enforceable award, and the arbitrators' own conceptualisation of their role as substantially similar to a judicial role in, among other things, the right application of the law. This paper demonstrates that arbitrators strike the balance between these competing concepts differently. Accordingly, the finding that arbitrators follow and apply the governing law does not necessarily mean they apply it in a manner that is identical to national judges. This is attributed to procedural as well as conceptual differences. Nonetheless, the prevailing arbitral opinion supports the orthodox approach in giving higher precedence to mandatory legal provisions over contractual provisions.

This paper unpacks the reasons behind the dominance of the legal model in international construction arbitration decision-making. The legal model fulfils the parties' aspirations for predictability of their disputes' outcomes and hence stability in the commercial and business dealings. It respects the parties' choice of law which is an outcome of their negotiations and part of their risk allocation. Also, the legal model meets the arbitrators' desire to discharge their duties to apply the law and to render enforceable awards which they conceive to be beneficial to their career in arbitration. The legal model also complies with most arbitration rules and arbitration laws requiring arbitrators to apply the law or the rules of law chosen by the parties.

On a more abstract level, the evolution of this legal model appears to be the result of the interaction between a number of forces in the field: (1) the disputants; (2) the arbitrators; (3) arbitration institutions and national legislators setting out rules to guide arbitrators on how to decide; and (4) national courts setting and/or implementing rules relating to the level of scrutiny and control over arbitrators' decisions.

Appendix: Semi-structured Interview Template

This is a template to be used for each interview. It is only a template; not all of these questions will necessarily be asked, nor will they be phrased

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the same way or be asked in the same order in every interview. Further questions may emerge during the conduct of the interviews.

General Questions

1. Tell me about yourself: your main professional education and experience and particularly that related to construction arbitration?
2. What are the main types of disputes you encounter in construction arbitration?

Adjudicative/arbitration philosophy

How do you see your role as an arbitrator? Do you see your role in deciding the merits of construction disputes as roughly the same or different from the role or practice of national courts?

Construction arbitration decision-making

1. How do construction arbitrators decide on construction disputes? Based on what? What are the factors that influence or shape their decisions?
2. How does the applicable/substantive/governing law influence the outcome of the arbitral award? Do you apply the law in a strict/formalist way or in a liberal way that seeks a commercially reasonable outcome?
3. What is your approach in the interpretation of contract, i.e. objective versus subjective interpretation?
4. While making decisions, do you have any hierarchy in mind between the applicable law, contract, and customs/norms?
5. Do you apply the contract strictly? What about time-bar clauses/notice provisions, liquidated damages, limitation/exclusion liability clauses?
6. What is the most difficult part in the decision-making?
7. Do you think there will be a difference between engineer/contractor/lawyer arbitrators in decision-making (facts, laws, damages)? Is there a difference in their approach? How does your professional background assist you in viewing the evidence/facts and in making decisions on liabilities? Does the arbitrator background (engineer vs. contractor vs. lawyer) influence his award according to his perception of fairness?