Choice of Law and Forum in International Commercial Arbitrations
By Thomas G. Heintzman, O.C.Q.C. and Moya Graham

Introduction

The selection by the parties of the place in which their international commercial arbitration is to take place will have a fundamental impact on the determination of those rights. Equally fundamental is the parties’ selection of the law, both substantive and procedural, which will apply to the determination of those rights. This paper examines both of those choices, the forum and the law applicable to the arbitration.

In Ontario, the context in which the choice of forum and choice of law is made for international commercial arbitration has now been established by statute. The International Commercial Arbitration Act (“ICAA”) adopts in Ontario a Model Law on international commercial arbitration adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) on June 21, 1985 (“Model Law”). However, the Ontario ICAA makes a number of important changes to the Model Law, particularly in relation to the choice of law for the arbitration.

The principles of choice for forum and choice of law are also well known in the Anglo-Canadian law relating to conflict of laws. Those principles have been developed over centuries by Courts to address international disputes. Accordingly, arbitrators have a whole body of case law to assist them in determining issues relating to the forum in which the arbitration is to be conducted, and the laws applicable to the arbitration.

Besides the ICAA and the Model Law and the common law principles of conflict of laws, a third source of rules for international commercial arbitrations is the agreement between the parties. It is the policy of both the Courts and the legislature in Ontario that, except for limited public policy exceptions, the parties should be held to their arbitration agreement and they should be required to resolve their disputes within the principles which they have adopted.

Accordingly, the challenge with respect to the choice of law and choice of forum for international commercial arbitrations is to resolve the tension between these three sources of law: the statute/Model Law; the common law; and the parties’ agreement. These three sources will not always be consistent one with the other, and may not obviously lead to the same conclusion. As a result of this tension, which source of rules should predominate? And how do Courts and

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2 International Commercial Arbitration Act, R.S.O. 1990, c.I.9. In federal legislation see the Commercial Arbitration Act, R.S.C. 1985, c.17 which adopts the Commercial Arbitration Code based on the Model Law. That code applies in relation to matters where at least one of the parties to the arbitration is Her Majesty in Right of Canada, a department or corporation or a Crown corporation, or in relation to maritime or admiralty affairs; s.5(1) of the Commercial Arbitration Act.
arbitrators resolve the tension so as to avoid a conflict between these sources of rules? This is the challenge which this paper seeks to address.

Choice of Forum

The significance of the forum for the arbitration

The place of the arbitration is the legal location of the proceeding. That place determines the legal setting, and the legislative and judicial framework, for the arbitration.

The legal place of the arbitration need not be the physical location where the parties and the tribunal meet to conduct all or portions of the proceeding. Indeed, the arbitration proceedings may be held at any place that is appropriate, whether for consultation among members, hearing of witnesses, for the evidence of experts or the inspection of property or document.3

The importance of the place of the arbitration is underlined by Article 1(2) of the Model Law which states that the Law applies only if the place of arbitration is in the territory of the state. For Ontario, s. 1(6) of the ICAA provides that the “state” means Ontario. Only if the place of the arbitration is in Ontario does the ICAA and Model Law apply, except with respect to Articles 8, 9, 35 and 36.4

Although the word “place” is used in the Model Law and the Ontario ICAA, it has a more formal sense and for this reason the word “forum” is often used by commentators or Courts, and is used interchangeably with the word “place” in this paper. In the U.K. Arbitration Act, 1996, the word “seat” is used.5

There is somewhat of a “catch 22” in relation to the place of the arbitration. While the Ontario ICAA incorporating the Model Law only apply to an international commercial arbitration which takes place in Ontario6, the arbitral tribunal has, failing agreement between the parties, the right to determine the place of the arbitration. Accordingly, even though the arbitral tribunal may be formed pursuant to an order of the Ontario Court appointing one or more arbitrators, the arbitrators themselves could then decide that the place of the arbitration shall be in another jurisdiction which may eliminate the effect of the ICAA and the continuing authority of the Ontario Courts to grant remedies with respect to the arbitration.

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3 Model Law, Article 20(2)
4 The latter Articles deal with the Court’s power to stay an action in breach of an arbitral submission, to grant interim measures of protection and to recognize and enforce arbitral awards from other countries. Under the Federal Commercial Arbitration Act, the code referred to in that Act applies only if the place for arbitration is in Canada.
5 U.K. Arbitration Act, 1996, c.23, s.3
6 Article 1(2) of the Model Law
No express choice of forum

The parties to a commercial agreement may agree on arbitration to resolve their disputes, and also agree on the place where the arbitration is to be held. If they do not agree on that place in their commercial agreement, then the parties can agree on that place once a dispute arises. In the event that the parties do not so agree in either the commercial agreement or when the dispute arises, then the Model Law grants the arbitral tribunal the power to determine the place of the arbitration “having regard to the circumstances of the case, including the convenience of the parties.”

While the arbitral tribunal may, thus, determine the place for the arbitration, the first step leading up to that process may be an application to a Court for the appointment of one or more of the arbitrators. This application may be independent one, or it may occur in response to a Court action brought by the other party.

If a party to an arbitration agreement requests referral to arbitration, then in Ontario and pursuant to the ICAA, the Ontario Court must refer the parties to arbitration unless the Court finds that the arbitration agreement is “null and void, inoperative or incapable of being performed.” Other than that exception, the Court does not have the discretion to refuse to refer the parties to arbitration; “the wording of Article 8 is mandatory.” When the Court refers a dispute to arbitration, related Court proceedings are stayed.

Even if the power to determine the place of the arbitration may, in some sense, be said to go to the arbitrator’s jurisdiction, the arbitrators have the power to determine that question in the first instances. The authority of the Courts to intervene is strictly limited to those circumstances contemplated in the governing legislation. If the matter arguably falls within the arbitration agreement, then a Court should not determine jurisdictional matters finally, but should refer them to the arbitration tribunal for the initial decision. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the Court reach any final determination in respect of such matters on an application to stay. On matters of jurisdiction,

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7 Model Law, Article 20(1).
8 Model Law, Article 11. There is no appeal from such an order: Article 11(5).
10 In cases where the party requests referral to arbitration in response to an action in Court, the requesting party must request referral no later than the first submission on the substance of the dispute in the Court action, as required by Model Law, Article 8(1).
11 Model Law, Article 8(1)
13 ICCA, s.8.
15 Informica Inc. v. CGI Information systems and Management Consultants Inc. 2009 ONCA 642 (CanLII) at para. 14
Canadian Courts have taken a deferential approach to decisions by arbitrators and will treat them with “reasonableness, deference and respect.”

If the parties have not agreed on the place where the arbitration is to take place, it will be advantageous to a party to appoint, or seek the appointment by the Court of, an arbitrator or arbitrators that work or reside in the forum preferred by that party. Since the arbitrators may reasonably conclude that they have been selected because they come from the jurisdiction considered most appropriate for the determination of the dispute, the selection of the arbitrators themselves may substantially influence the arbitrators’ selection, in turn, of the place of the arbitration. Since the choice of the place of the arbitration may affect procedural and substantive rights, as discussed below, the beginning of the process, namely, the place where a party goes to Court to require the appointment of an arbitrator or arbitrators, may be a crucial first step in the ultimate selection of the forum.

As has already been said, there is an inherent tension between the Court appointment of arbitrators under the Model Law, and the arbitrators’ selection of the place of the arbitration. Thus, in terms of Ontario, the ICAA and the Model Law only apply if the place of the arbitration is Ontario, yet the arbitrators once appointed can select any place that they find to be appropriate. How this tension will play out, and whether arbitrators appointed by an Ontario Court can validly select another place for the arbitration, is as yet uncertain.

Apart from the “circumstances of the case” and the “convenience of the parties”, there are no express principle in the Model Law which state how the arbitral tribunal must determine the proper place for the arbitration. However, the arbitrators are likely to look to four sources for guidance in selecting the proper place.

First, many arbitrators have a legal background and in any event will be guided by the fact that the tribunal’s decisions regarding jurisdiction are reviewable by the Court. In these circumstances, a tribunal will have regard to the legal test applied by a Court when determining the tribunal’s own jurisdiction.

In Canada, the Courts apply two legal tools to determine jurisdiction. The first tool is the rule of ‘real and substantial connection’. This rule requires the Court to consider a set of factors and determine whether there is a real and substantial connection between the subject matter in dispute and the jurisdiction of the Court. In the absence of such a connection, the Court cannot assume jurisdiction. The second legal tool is the discretionary test of forum non-conveniens which asks the Court to consider whether there is a more convenient and appropriate forum for the pursuit of the dispute.

Arbitral tribunals are not required to apply these principles but they help us understand what arbitrators will likely consider when determining the place in which the arbitration should be conducted. Arbitral tribunals will consider whether there is a real connection between the

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17 Ace Bermuda Insurnace Ltd. v. Allianz Company of Canada, 2005 ABQA 975 at 53
18 Muscutt v. Courcelles, 60 O.R. (3d) 20
dispute and the proposed forum and whether there is another, more appropriate forum for the arbitration.20

The first source to which arbitrators will likely look to determine the proper place for the arbitration is the agreement itself from which the arbitration arises. Parties who have agreed to submit disputes to arbitration have imposed contractual obligations on themselves. Although they may not have agreed to the place for the arbitration, the other elements of their agreement may indicate the appropriate place.

The third source to which arbitrators will likely look to determine the proper forum for the arbitration is the rules of procedure, if any, which the parties chose for the arbitration. If the parties did chose the rules of procedure of a particular jurisdiction, then that jurisdiction is also likely the appropriate forum for the arbitration.21 For instance, if the parties to an arbitration agreement agree to have the Rules of Civil Procedure of Ontario apply to the arbitration, then that indicates that Ontario is a convenient and appropriate forum.22

A fourth source to which the arbitrators may look to determine the proper place for the arbitration is the place of the express choice of substantive law, if any, that the parties have selected to determine their dispute. Once again, the parties’ choice of law is not determinative of the place of the arbitration, but it does provide a strong indication of the intentions of the parties.23

If the parties do not agree to a place for the arbitration but agree to submit their dispute to an arbitral institutional, then the rules of the institution may determine the forum. For instance, if the parties agree to submit to arbitration at the British Columbia International Commercial Arbitration Centre in Vancouver, then the BCICAC International Commercial Arbitration Rules apply. Those Rules provide that the place of the arbitration is to be in Vancouver, British Columbia in the absence of an agreement by the parties or a decision by the tribunal to the contrary.24 If the parties select the London Court of International Commercial Arbitration (the “LCIA”), then the LCIA institutional rules will be determinative. The LCIA rules provide that in the absence of agreement to the contrary, arbitrations with the LCIA will be seated in London unless and until the LCIA Court determines that another seat is more appropriate.25

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20 The arbitral tribunal may also have to go through another exercise which a Court examines in relation to forum, namely, whether a dispute falls within the agreement in the first place: Matrix Integrated Solutions Ltd. v. Radiant Hospitality Systems Ltd. (2009), O.A.C. 222; 2003 CanLII 34234 (Ont. C.A.).

21 C v. D, [2007] EWHC 1541 (Comm) at para 31

22 As noted above, under Article 20(2) of the Model Code, the arbitral tribunal may meet at any place it considers appropriate to discharge its functions, notwithstanding the place of the arbitration. The forum of the arbitration as it is discussed here, addresses the legal place of the arbitration. Notwithstanding the legal place of the arbitration, Article 20(2) of the Model Law provides that the arbitral tribunal may meet at any place it considers appropriate to hear witnesses or inspect evidence.

23 Chris Sawyer v. Atari Interactive Inc., [2005] EWHC 2351 (Ch)


25 LCIA Arbitration Rules, Article 16.1
Express Choice of Forum

According to Model Law, “[t]he parties are free to agree on the place of arbitration.”26 However, if the commercial agreement provides for a particular place for the arbitration, when the dispute actually arises one of the parties may submit that the arbitration should be undertaken in another place by reason of convenience or other factors relating to the actual dispute. Having contracted for one forum, it is unlikely that a party could be successful in arguing that the arbitration should occur in another place. In these circumstances, the reneging party will likely be confined to arguing that the arbitration agreement itself should not be enforced by Courts in relation to the dispute because the arbitration agreement is “null and void, inoperative or incapable of being performed” under Article 8(1) of Model Law.

In *Dalimpex Ltd. v. Janicki*,27 the Defendant moved for a stay of proceedings under Article 8(1) of Model Law and referral to arbitration in Poland. The Plaintiff argued that the arbitration agreement was unenforceable because the chosen arbitral institution ceased to exist. The Ontario Court of Appeal referred the parties to arbitration in Poland, and held that the jurisdiction of the successor institution in Poland was a matter to be decided by the arbitrators in the first instance.

The party may also argue, as the Defendant did in *Moran v. Carbone*, that the parties to the dispute are not party to the arbitration agreement. In that case, Justice Farley confirmed that in cases where it is arguable that the parties are party to the arbitration agreement, that matter shall be referred to the arbitration tribunal.28

The impact of the forum

The selection of a forum for arbitration is a significant decision for two reasons. First, the selection of a forum may be used as evidence of the parties’ intentions in cases where the parties disagree about what laws govern their agreement. Second, the legal setting of the arbitration may have an impact on the proceedings themselves.

(a) Procedural Law Impact

The parties’ choice of forum for the arbitration may be used to infer an intention to have the arbitral laws of the forum apply to the arbitral proceedings. This impact of the choice of forum will be particularly important in cases where the parties have not chosen the substantive laws of any jurisdiction to apply to their dispute, or have chosen the substantive laws of a jurisdiction different from the place of the arbitration. The choice of a particular forum for the arbitration may signal the parties’ intention that the arbitral laws of that forum should apply.29 If the parties agreed to submit their dispute to an arbitral institution then the rules of that institution

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26 Model Law, Article 20(1)
27 *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (2d) 737 (C.A.)
29 Walker & Castel, *Canadian Conflict of Laws*, sixth ed. at 15.3.b
may apply to determine the procedures and the forum of the arbitration and the laws that govern the substance of the agreement.30

(b) Substantive Law Impact

The parties’ choice of forum for the arbitration may also inform the determination of the substantive law, sometimes called the “proper law”, that governs the contract. If the parties to the arbitration agreement do not agree on the laws that govern the substance of the contract, but they have an arbitration agreement which selects a forum for the arbitration, Canadian Courts will normally take the substantive law of the forum as indicative of the proper law of the contract.31

According to s. 6 of the ICAA, the arbitral tribunal shall apply the rules of law that it considers appropriate in the circumstances. Section 6 of the ICAA stipulates that this requirement applies “[d]espite Article 28(2) of the Model Law”. That latter Article stipulates that the arbitral tribunal shall “apply the law determined by the conflicts of law rules which it considers applicable”. Accordingly, the Ontario statute requires that the arbitral tribunal directly use the rules of law which it considers most applicable, not the conflicts rules contained in those rules of law, to determine the substantive law. This Ontario rule, therefore, causes the arbitral tribunal to directly select the most applicable laws, rather than being bounced from there to another set of laws by the first laws’ principles of conflict of laws.32 However, in deciding directly what rules of law are most applicable in the circumstances, the arbitral tribunal may well have regard to conflict of laws principles.33

(c) Impact on the legal setting for the arbitration

The choice of a forum for arbitration is not simply a choice of where to conduct the arbitration. It is a choice about which Courts will have supervisory jurisdiction over the arbitration.34 The scope of a Court’s power to supervise an arbitration depends on the domestic legislation of the forum of the arbitration.35

The importance of understanding the law regarding arbitration in a forum is illustrated by comparing the scope of judicial review available in Canada with that available in the United

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31 Kent Trade and Finance Inc. and others v. JP-Morgan Chase Bank and Another, 2008 FCA 399 at 31
32 Section 6 of the ICAA may have been intended to avoid the application of principle of conflict of laws known as Renvoi: Castel & Walker, Canadian Conflict of Laws, 6th ed., Chapters 5 and 31.2. There is no provision in the Federal Commercial Arbitration Act, similar to s.6 of the ICAA requiring that the arbitral tribunal directly applies to the laws which it considers applicable. Accordingly, Article 28(2) of the Model Law (or the Code as it is referred to in that federal statute) applies, requiring the arbitral tribunal to apply the law determined by the conflict of laws rules which it considers applicable.
35 Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs and Government of Pakistan, [2010] 1 All ER 592
Kingdom. The Canadian common law is based largely on the English common law and yet the
difference between the treatments of arbitration in two forums is not insignificant.

In Ontario, parties may only seek judicial review of an arbitral tribunal’s decision, and
may not appeal the arbitrator’s decision. Thus, Article 34 of the Model Law states that recourse
to a Court against an arbitral award may be only by way of an application to set aside that award
as provided in that Article. No right of appeal is granted.36

In the United Kingdom, however, the rules of laws applicable to international commercial
arbitrations are incorporated within the Arbitration Act 1996, which Act also applies to domestic
arbitrations.37 Under that Act, appeals on questions of law are permitted. In Shell Egypt West
Manzala GcbH et al v. Dana Gas Egypt Limited,38 the Court granted the applicant permission to
appeal on the merits from an award in an international commercial arbitration. The award was
granted pursuant to an agreement to arbitrate under UNCITRAL rules. Awards made under
UNCITRAL rules are “final and binding” according to Article 32(2) of the rules. The Court held
that, under the U.K. Arbitration Act 1996 and the common law in the United Kingdom, the
phrase “final and binding” is insufficient to preclude appeals based on errors of law. A more
explicit intention to exclude appeals is required. For instance, under Article 28.6 of ICC rules
parties are “deemed to have waived their right to any form of recourse.” The Court held that the
wording of the ICC provision would have been sufficient to exclude the right to appeal points of
law.

The Court’s decision in Shell Egypt West Manzala illustrates the importance of
understanding the law of the place chosen for the arbitration. The arbitral tribunal derives its’
power from the contractual agreement between the parties but the forum for the arbitration
provides the legislative framework for the arbitration.39 When drafting an arbitration agreement,
the parties should carefully consider the laws applicable to interpreting and enforcing the
agreement, the rights to review the decisions of the arbitral tribunal and the statutory and
contractual interpretation by those Courts in each jurisdiction which might potentially be the
forum for the arbitration.

Some powers are outside the authority of the arbitral tribunal and require application to
the Courts. Thus, Article 27 of the Model Law permits arbitral tribunals to request the assistance
of the Ontario Superior Court of Justice in compelling evidence. The Ontario Court may execute
the request “within its competence and according to its rules of taking evidence”.

36 This position is to be distinguished from domestic arbitrations which in Ontario are subject to appeal on matters of
law and, if the parties so provide in the arbitration agreement, on matters of fact and law: Arbitration Act 1991,
S.O., 1991, c. 17, s. 45.
2097. The appeal was ultimately dismissed: Shell Egypt West Manzala Gcb H & Shell Egypt West Qantara
39 Lesotho highlights Development Authority v. Impregilo SpA and others, [2005] UKHL 43
Arbitral tribunals in Ontario do not have the power to compel evidence from witnesses in other jurisdictions. In *Corporation Transnacional*,40 one of the parties attempted to have the arbitral award set aside on the ground that the party’s witnesses could not provide evidence to the tribunal. The Court found that “the inability to produce one’s witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration and is not a basis for setting aside an award.”41

There are certain legislative provisions which cannot be avoided, even by expressly contracting out of them. For instance, if parties choose Ontario as the forum for arbitration and their dispute is non-arbitrable under the laws of Ontario, the Court may refuse to enforce the agreement of the parties and may refuse to appoint arbitrators.42 Legislatures are free to confer exclusive jurisdiction over certain matters to the Courts. The choice of a forum for arbitration in another jurisdiction cannot “oust the jurisdiction” conferred by a legislature.43

In Ontario, the *ICAA* and the Model Law do not expressly state which provision the parties cannot contract out of. Rather, those provisions which the parties can contract out of contain words such as “unless the parties otherwise agree”.44 The remaining provisions are stated in mandatory form and the implication is that they are mandatory and the parties cannot agree otherwise. Generally speaking, the result is that the parties are entitled to contract out of the procedure relating to and the conduct of the arbitration, but may not contract out of the public law environment in which the arbitration is conducted, including such matters as the appointment of arbitrators by the Courts and recourse to the Courts for an enforcement by the Courts of the arbitral award. Article 4 of the Model Law confirms that there are provisions of the law from which the parties may derogate, but requires that a party must state a timely objection to such derogation, failing which that party is deemed to have waived the right to object.

In the United Kingdom, the arbitration legislation contains a list of provisions of the Arbitration Act which cannot be contracted out of by the parties.45 By and large, those provisions reflect the same sort of mandatory provisions inferentially stated in the Model Law and incorporated into Ontario law.

Accordingly, parties considering a particular place for an arbitration agreement should be familiar with the arbitral laws in that place and have regard to whether any provisions of the arbitration agreement are unenforceable in that jurisdiction. If the mandatory provisions in a jurisdiction are not satisfactory, the parties may want to consider a different forum for the arbitration. Mandatory provisions are an example of the impact that a forum can have on the rights of the parties to an arbitration agreement and they underscore the importance of understanding the law of the forum chosen for arbitration.

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40 *Corporation Transnacional de Inversiones, S.A. de C.V. v. STET International S.p.A.*, 1999 Canlii 14819 (Ont. S.C.) at 50. (“*Corporation Transnacional*”)

41 Ibid., at 51.

42 Model Law, Article 1(5)


44 See Articles 4(1); 10(1), (2) and (3); 13(1); 17; 19(1); 20(1); 22(1); 24(1); 25, 26, 33(3).

45 Supra note 22, schedule 1.
The forum of the arbitration is also important when it comes to the enforceability of the arbitral award. Most trading countries (one hundred and forty-four countries in total) are now signatories to the New York Convention\textsuperscript{46} which sets out the rules for enforceability of arbitral awards in all signatory countries. The place of the arbitration is the jurisdiction in which the arbitral award is made.\textsuperscript{47} Thus, the place of the arbitration is the only jurisdiction in which the Courts may annul or cancel the award.\textsuperscript{48}

**Choice of Law**

Parties to an international commercial contract may include in that contract a clause stating which system of laws will govern the agreement and disputes under it. The parties may also agree on such a choice of law after the dispute actually arises. In either event, the Model Law requires the arbitral tribunal to decide the dispute in accordance with the laws or rules selected by the parties.\textsuperscript{49}

*No express choice of law*

If the parties have agreed to arbitrate their dispute, but did not, in a commercial agreement or at the time that the dispute arose, agree on the law to apply to the agreement and the dispute, then that law is determined by the arbitral tribunal.\textsuperscript{50}

As already noted, s. 6 of the *ICAA* requires the arbitral tribunal to apply the rules of law that it considers appropriate in the circumstances. Section 6 states that this requirement is to apply “[d]espite Article 28(2) of the Model Law”. Interestingly, s. 6 of the *ICAA* does not require the arbitral tribunal to apply Ontario conflict of laws rules, nor does the Model Law require the arbitral tribunal to apply conflict of laws rules of the forum of arbitration, when determining the proper law of the agreement. Leading author on conflict of laws, Janet Walker has indicated that the conflict of laws analysis is relevant to the arbitral tribunal’s determination of the proper law to govern the agreement.\textsuperscript{51} However, arguably s. 6 of the Ontario *ICAA* may contradict that approach.

In selecting and applying the substantive law, the Model Law requires that the arbitral tribunal shall do so “in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction”.\textsuperscript{52} In making this direction, the Model Law refers to no other facts and, as already noted, the application of the forum’s conflict of laws rules is expressly countermanded by the *ICAA*. Accordingly, the extent to which an arbitral tribunal governed by Ontario law may refer to Canadian conflict of laws principles is somewhat in doubt.

\textsuperscript{46} The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958)


\textsuperscript{48} *Ibid.*, at p.287

\textsuperscript{49} Articles 19(1) and 28(1) of the Model Law

\textsuperscript{50} Section 6 of the *ICAA* and Article 28(2) of the Model Law

\textsuperscript{51} Walker & Castel, *Canadian Conflict of Laws*, sixth ed. at ●

\textsuperscript{52} Article 28(4) of the Model Law
Nevertheless, in making the selection as to which rules of law are “appropriate”, an arbitral tribunal governed by Ontario law will likely consider Canadian case law setting forth Canadian conflict of laws principles. Courts in Canada have considered a number of factors which give rise to an inference of an applicable law:

- Venue chosen for the arbitration
- Agreement by the parties as to jurisdiction
- Legal terminology of the agreement
- Form of the documents
- Currency of payments
- Language
- Preceding transactions
- Nature and location of the subject matter of the agreement
- Residence or headquarters of the parties

Accordingly, assuming that the arbitration takes place in Ontario and is governed by the ICAA, then absent some extraordinary facts dictating the application of other methods of selecting the “appropriate” law to govern the agreement and the dispute, the arbitral tribunal will likely have reference to these factors traditionally referred to by Canadian Courts.

In choosing the “appropriate” law, the venue chosen for the arbitration is an important factor, but it will not be decisive. If all factors point to the laws of a jurisdiction other than the forum of the arbitration, then the forum of the arbitration will not dictate the applicable law. Conversely, if no other factors indicate that another jurisdiction has a closer or more substantial connection, then the forum of arbitration will be determinative.

The conflict of laws concept of the inferred choice of law attempts to determine what law the parties intended to have govern their agreement. An inferred choice of law is determined by looking at factors listed above. These factors help link the agreement to a particular jurisdiction. Factors such as terminology, currency and the form of documents may also be used to indicate the legal setting of the agreement. However, the direction in the Model Law to take into account the terms of the contract and trade usages give those sources of inferred choice greater, and arguably over-riding, importance.

These factors are only relevant to the extent that they are contemporaneous with the agreement itself. Generally speaking, a choice of law cannot be inferred from actions or events that occur after the formation of the agreement. The agreement has a governing law applicable

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54 The Conflict of Laws, Dicey & Morris, eleventh ed., at 1183
55 Kent Trade and Finance Inc. And others v. JP-Morgan Chase Bank and Another, 2008 FCA 399
to it from the beginning, and if that choice can be inferred, then Canadian conflict of laws rules requires the arbitral tribunal to apply that law to the disputes under the agreement.  

In some circumstances, the factors will indicate that more than one system of laws is potentially applicable to the agreement. It may be that one or more terms of the agreement would be invalid under one of those potentially applicable systems of law. Under these circumstances, there is a presumption that the applicable law is the one under which the terms of the agreement are valid. This presumption is rebuttable if the other factors overwhelmingly indicate that an inference should be drawn that the parties actually chose the other system of laws. In *Etler v. Kertesz*, the court held that although the agreement was invalid under Austrian law, the laws of Austria applied to the agreement because the contract was executed in Austria and was to be substantially performed there.

Where there is neither an express nor inferred choice of law, Canadian conflict of laws rules provide that the law with the closest and most real connection to the agreement shall apply. The factors to be considered in determining the law with the closest and most real connection are:

- The place of contracting
- The place of performance of the contract
- The place of residence or headquarters of the parties
- The nature of the subject of the agreement

This real connection test replaced the old maxim that, in the absence of agreement to the contrary, the law of the place of contracting will govern the contract. Under the real connection test, any of the factors above may suggest a close connection. The place of contracting is no longer decisive. The test is flexible and allows for fact-specific case-by-case analysis.

Under the real connection test, if the place of the contracting and the place of performance are the same, in all likelihood the laws of that place will have the closest and most real connection to the agreement. However, the test allows the decision-maker to consider all the circumstances.

Like the inferred choice of law analysis, the real connection test is also aimed at discovering the intentions of the parties at the time of agreement. The decision-maker must

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58 [1960] O.R. 672 at 14


determine what laws the parties, at the time they made the agreement, intended to have govern the agreement. That decision will be made by examining the agreement itself, the trade practices surrounding it and all the circumstances of the formation of the agreement.

In a similar fashion, if the parties have not selected procedural rules, then the arbitral tribunal may, subject to the provisions of the Model Law, conduct the arbitration in the manner that it considers appropriate, and a tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.63

Express Choice of Law

In Ontario, parties to an international arbitration agreement have the right to chose what rules of law will govern their agreement. Arbitral tribunals must decide disputes in accordance with the rules of law that the parties have chosen to apply to the substance of their dispute.64 The legislation does not give the arbitral tribunal the power to overrule the parties’ choice of law.

Canadian Courts have consistently stated that choice of law clauses should be given effect by the Courts in all but the most unusual circumstances. However, in the case of proceedings in the Courts themselves (and not before arbitral tribunals), Courts have refused to give effect to choice of law clauses where the choice was made to evade the laws that are otherwise most closely connected to the agreement65 and where the application of the chosen law would be contrary to public policy.66

The Court’s power to overrule the parties’ choice is not exercised lightly. Even in cases where the action would not be recognized under the chosen law, the Courts have erred on the side of giving effect to the parties’ choice, even in the case of actions in the Courts themselves. Thus, in Dime Group International Inc v. Soyuz-Victan USA, the District Court of Illinois held that a choice of law (or choice of forum) clause is not unenforceable on the grounds that another jurisdiction would provide more favourable laws.67 The Courts have consistently promoted freedom of choice and held that the “where the parties to a contract expressly stipulate that an agreement shall be governed by a particular law, that law will generally be the proper law of the contract.”68

Unlike the Courts, arbitral tribunals do not have the power to overrule the choice of law of parties to an international commercial agreement under Ontario law. The Model Law requires arbitral tribunals to give effect to the parties’ choice of substantive law.69 If the parties include a choice of law clause in their agreement and they submit a dispute to arbitration, the arbitral

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63 Article 19 of the Model Law
64 Model Law, Article 28(1)
67 LLC, 2008 WL 450825 at 4
69 Article 28(1) of the Model Law
tribunal will give effect to their choice and there need not necessarily be any connection at all between the contract and the law chosen to govern its substance. 70

If the law chosen by the parties to govern their dispute gives rise to an immoral result, or a result that is illegal in Ontario, then that dilemma may be dealt with at two stages of the arbitral proceeding. First, one of the parties might proceed to Court under Article 8 of the Model Law for determination as to whether the agreement is null and void, inoperative or incapable of being performed by virtue of that situation. Second, the Court may set aside the award under Article 34(b) on the grounds that the subject matter of the dispute is not capable of settlement by arbitration under Ontario and Canadian law, or is in conflict with the public policy of Ontario and Canadian law.

As previously discussed, the parties may agree to the procedural rules applicable to the dispute. 71 Often, the parties will adopt a particular arbitral regime, such as the ICC or LCIA or arbitral bodies in Vancouver or Montreal. If they do so, then the procedural rules of those regimes apply. The extent to which those rules amount to “procedure” rather than “substance” may be in dispute. Thus, the Ontario Court of Appeal has recently held that, in respect of a domestic arbitration, the rules relating to security for costs are procedural rules which, once adopted by the parties, are enforceable and an arbitral decision implementing or enforcing those rules is not reviewable by the Court. 72

The binding effect of choice of forum and law

As we have seen, Articles 19, 20 and 28 of Model Law all require an arbitral tribunal to give effect to the choices made by the parties. Accordingly, the arbitral tribunal is given the power to determine the forum and law only where the parties have not agreed. 73

The Courts interpret Model Law as conferring a great deal of freedom on the parties to make binding choices of forum, law and procedure. When parties agree to settle disputes through arbitration, it is the judicial and legislative policy of Ontario to “hold parties to their bargain.” 74 The Supreme Court of Canada has also emphasized the parties’ freedom of choice: “the parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate. They can choose cyberspace and establish their own rules.” 75

The parties’ choice of forum and law is only binding, of course, if that choice is permitted to be made by the ICAA and the Model Law and if that choice is enforced by the arbitral tribunal

70 The Conflict of Laws, Dicey & Morris, eleventh ed., at 1174
71 Article 19 of the Model Law
72 Informica Inc. v. CGI Information Systems and Management Consultants Inc., 2009 ONCA 642 (CanLII)
73 ICAA, s.6 and Model Law, Articles 20(1) and 28(2). The arbitral tribunal has the power to decide its own jurisdiction which often involves interpretation of the arbitration agreement to determine its scope and application. This power is conferred by Article 16 of Model Law. It does not permit the arbitral tribunal to replace the parties’ choice of forum, law or procedure with its own. These decisions are subject to judicial review.
74 Moran v. Carbone, 2005 Canlii 2932 (On. S.C.) at 10
75 Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801 at 52 (emphasis added)
and the Courts. As we have seen, the parties cannot agree to change or eliminate certain core public policies relating to arbitration.\(^{76}\) However, none of those exceptions expressly refer to the choice of forum and law. Accordingly, arbitral decisions must enforce that choice by the parties, and arbitral decisions about those matters cannot be overruled by the Courts, except to the extent that they involve jurisdictional issues. If they do and those issues arise by the time of the pleading stage in the arbitration, then those issues must be raised no later than the submission of the statement of defence in the arbitration and the court may rule upon the matter, but without further appeal.\(^{77}\) Similarly, if any subsequent decisions of the arbitral tribunal relating to choice of forum or law result in an alleged jurisdictional error in the final award, then recourse against the award may, unless it was required to be raised earlier, be a ground of recourse against the award in a Court proceeding pursuant to Article 34(2) of the Model Law.

**Conclusion**

From this discussion, we can now return to the questions raised at the beginning of this paper and address how the three sources of law can be utilized to select the choice of forum and law for an international commercial arbitration. We can see that a three step process is involved.

First, the choice of forum or law is almost always a matter upon which the parties can agree. Subject to their choice involving some immoral, illegal or jurisdictional issue, the parties’ choices will govern.

The second ranking rules are provided by the *ICAA* and the Model Law. If the parties have not agreed on those matters, the Model Law provides rules for the arbitral tribunal to use in selecting the forum and law. In the case of the choice of law, the *ICAA* mandates a more direct selection of the choice of law than contemplated in the Model Law.

The third rank of legal principles is found in the Canadian case law relating to conflict of laws. This case law cannot overrule the parties’ choices, nor can it overrule the *ICAA* and the Model Law. However, the case law will assist the arbitral tribunal and the Courts to interpret and apply the parties’ agreement or to assist the arbitrators and the Courts in interpreting and applying the *ICAA* and the Model Law if the parties have not made that selection.

While case law occupies a more supportive role, it will play a crucial, and the most dynamic, role in the development of legal principles for the selection of the forum and applicable law for the arbitration. In this process, arbitral and court decisions will not just explore the proper meaning of arbitral agreements and the Model Law. Over time, those decisions will develop the inter-relation between the parties’ agreement and the Model Law and show how all three sources of law can, in a coherent fashion, promote arbitration as a viable mechanism to resolve disputes arising from international commercial agreements.

\(^{76}\) Model Law, Articles 5 and 6 and notes 43-45 above.

\(^{77}\) Model Law, Article 16