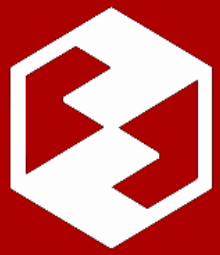

INTEGRITES

INTERNATIONAL LAW FIRM

2015 Kyiv Arbitration Days

Party Autonomy and Choice of Law

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ROADMAP

I. Choice of Law. International arbitration v. National courts.

II. Party autonomy in light of choice of law.

I. Choice of Law

International arbitration v. National courts

Starting point:

If the contract contains a clear choice of law clause, the tribunal will respect that choice

Reasons:

- **International arbitral tribunals have no inherent *lex fori***. They therefore have no inbuilt predisposition toward any particular national law and no nationally-generated choice of law regime;
- **Arbitral tribunals begin the choice of law process** not from the point of view of any national system of law, but **from the expectations of the parties**.

Two general limitations:

I. **Choices *in fraudem legis*** – made only to circumvent the applicability of an undesired law, will not necessarily be enforced;

II. **Applying other national laws that claim extraterritorial effect.**

What if the parties did not choose the applicable law?

In such scenario, the arbitral tribunal has two options:

I. **To select the choice of law rule it considers most appropriate, and then apply that rule to determine the governing law.**

I. ***Voie directe*** (“direct route”) **– designating an applicable law directly.**

Permitted in, *inter alia:*

- ICSID Rules Art. 21(1);
- LCIA Rules, art. 22(3);
- ICDR Rules, art. 31(1);
- UNCITRAL Rules, art. 35(1).

Advantages of *voie directe*:

1. Avoids the complex and uncertain choice of law process;
2. When exercised, will not render the award unenforceable in national courts;
3. Choice of law under *voie directe* frequently yields the same law, that application of a country's choice of law rules would provide;
4. Even when the parties have not agreed on an applicable law, *voie directe* might be used in a manner to give voice to party autonomy – in this sense, *voie directe* is more likely than application of choice of law rules to accord with the parties' presumed intentions.

Example of sound *voie directe* applicatiom:

ICC Award No. 4145, YCA 1987

Problem: the contract did not specify the governing law. The law of Switzerland and of another country were the only laws connected to the contract. The tribunal directly applied Swiss law, on the ground that

…

14. “[…]the law of country X, might partially or totally affect the validity of the Agreement.

15. "It is then reasonable to assume that from two possible laws, the parties would choose the law which would uphold the validity of the Agreement.

16. "It is also a general and widely recognized principle that from two legal solutions, the judge will choose the one which favours the validity of an agreement (*favor negotii*).

17. "In these circumstances, the arbitrators definitely decided to choose Swiss Law as the applicable law”.

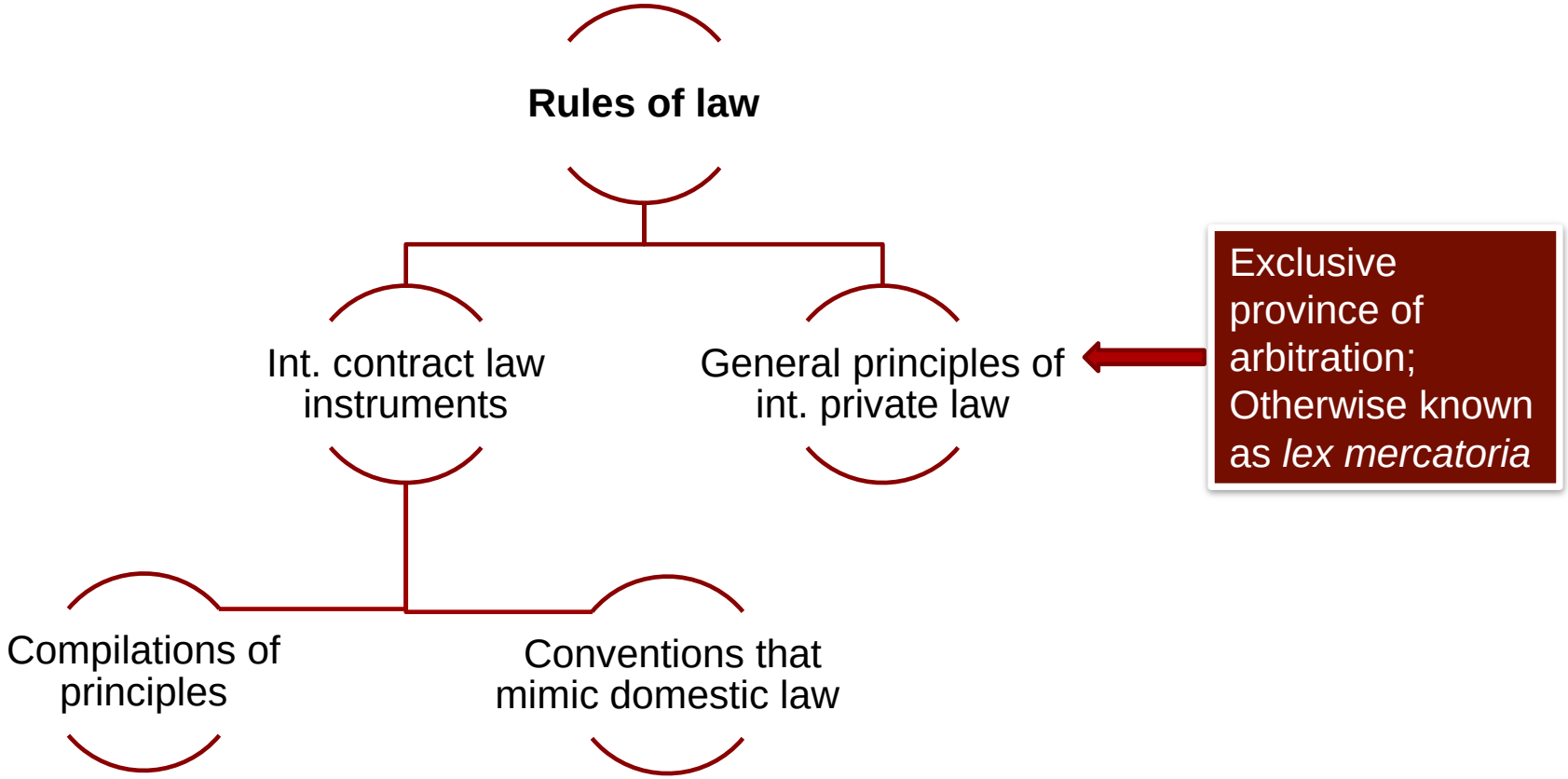
Choice of law – right to chose ‘rules of law’ as well

The difference between ‘laws’ and ‘rules of law:

Law	• laws applicable in a state • statute, case law, treaty, etc.
Rules of law	• are any statements of principle that do not have the force of law in any state • cannot be applied in any national court

- The parties have a right to expressly choose to have their contract governed by general principles
- Arbitral tribunals’ are right to apply them in the absence of a choice by the parties

What are the rules of law that parties might choose?



Legislation which explicitly allows application of rules of law:

Swiss Private International Law Statute, Article 187(1):

> "Arbitral tribunals may apply the rules of law with which the case has the closest connection"

French Code of Civil Procedure, Article 1496:

> "The arbitrator determines the dispute according to rules of law that the parties have chosen; in default of such a choice, in accordance with rules he deems appropriate"

Situations in which choice of rules of law might backfire:

The New York Convention permits courts to refuse to recognize or enforce arbitral awards that are contrary to the public policy

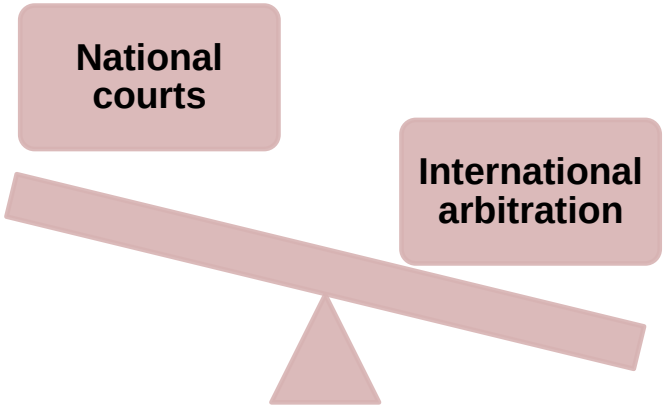
National arbitration laws permit courts in the country to set aside the arbitration award on public policy grounds

State adopts the position that application of non-national rules of law are against its public policy

All enforcement applications based on rules of law fail

Sub conclusions:

- Parties enjoy bigger choice of law freedom in international arbitration than in national litigation;
- Choice of law and choice of rules of law clauses are generally enforced by arbitral tribunals;
- A successful invocator of rules of law before an arbitral tribunal might face problems in enforcing such award before a domestic court.



Freedom in choice of law

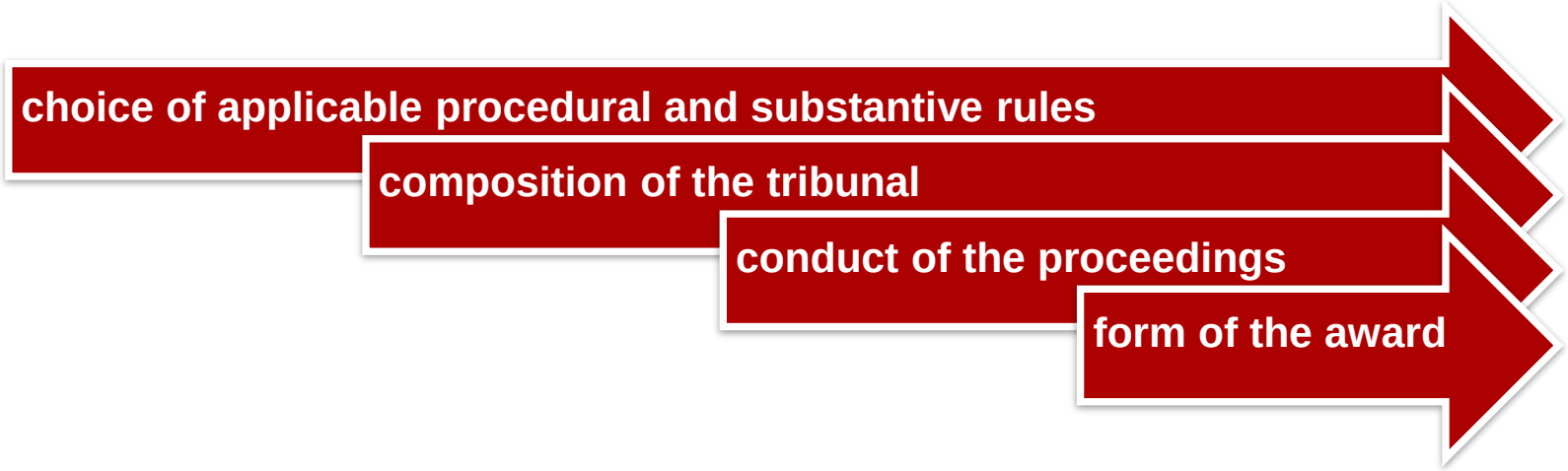
II. Party autonomy in light of choice of law

Party autonomy is the “foundation stone” of arbitration generally, and of international arbitration in particular.

- Redfern and Hunter

Party autonomy is a legal principle that extends beyond the jurisdiction of the tribunal and pervades every stage of arbitration.

The parties are free to define:



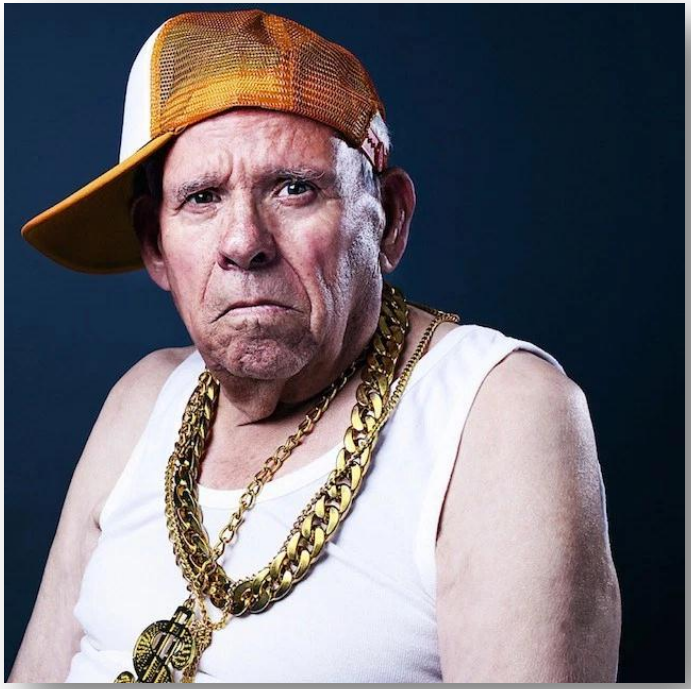
How does the difference between a national litigation and arbitration breed the broad scope in choice of law?

I. Relationship between arbitrators and parties:

- Arbitrators are more likely than judges to see matters from the point of view of the parties and to be more attuned to the interests of the parties, including in the choice of law, than to the interests of the legal system and the society as a whole;
- As the international arbitration community is small and “clubby”, and, at its heart, arbitration is a service industry, with the arbitrators providing to their clients the service of resolving a dispute, the idea that the arbitrator is bound to respect the parties’ will in exercising his or her role and, more generally, in discharging his or her duties, has prevailed for a long time;
- Experienced advocates tend to appoint arbitrators who have a reputation for strict impartiality when assessing the facts and legal issues in a given dispute;
- This influences a careful and well-learned approach into evaluation of the choice of law by arbitrators, as was already demonstrated in the ICC Case 4145.

However, as Dezalay & Garth put it,

'… to be "really independent," an arbitrator must be older than seventy-five and so not dependent on further arbitration business.'



II. Arbitration – Justice in the Service of Business

- International arbitration is characterized by an orientation toward the interests of international commerce;
- Most of the world's international arbitral institutions (and nearly all of those located in civil law jurisdictions) are attached to chambers of commerce;
- Arbitrators see party autonomy as the core desire of international commercial actors with respect to the resolution of disputes and choice of law.

III. Choice of Law and Neutrality

- The most unbiased forum – an arbitration does not take place in the home court of either party;
- No party is “playing away from home”:
  - neither party is more familiar with the procedures than the other;
  - neither is put at a linguistic disadvantage;
  - neither takes the risk that the judge will be a prejudicial.
- The overall domain of neutrality determines how arbitrators evaluate the governing law – to avoid situations where a party is disadvantaged by having to work with unfamiliar foreign substantive law in the same way that it is disadvantaged by having to work with unfamiliar foreign procedures, the arbitrators may prefer rules of substantive law that are neutral;
- Substantive neutrality often calls for the application of a law that has no direct relationship with the parties.

Overall conclusions:

- Arbitrators are more likely to maintain a higher level of respect to party autonomy in choice of law than judges of domestic courts;
- In international arbitration situations in which tribunals worry that choice of law agreements ought not to be upheld, are unlikely, as opposed to national courts that approach this issue from a completely different viewpoint;
- Arbitration is favoring party autonomy in a manner not shared by national court litigation;
- A blanket deference to party autonomy creates greater certainty and predictability in the resolution of disputes;
- Arbitral experience shows that little harm would result if states were to permit parties to choose non-state rules of law to govern their contracts.

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Thank You for attention!