II. ASSESSING THE PLACE OF THE CLOSEST CONNECTION TEST IN INTERNATIONAL COMMERCIAL ARBITRATION

5.03 Chapter 2 compared ten individual conflicts rules potentially applicable in international commercial arbitration. The closest connection test features among these conflicts rules already applied in arbitration. It is sometimes applied by arbitrators pursuant to their existing, broad, discretions. The closest connection test is a theme running throughout the literature on arbitral conflicts of laws. It is the test invariably applied through the restricted *voie indirecte*. It is even considered to constitute part of the procedural *lex mercatoria*, reflected in Art XIV.2(b)-(d) *Trans-Lex Principles*, though Art XIII.4.1(b) *Trans-Lex Principles* does adopt the pure *voie indirecte* with specific reference to arbitration.

5.04 The closest connection test is, however, only one rule among many that may be applied pursuant to the current regulatory regime's prevailing (and broad) discretions. Identifying the optimal arbitral conflicts rule requires a rigorous evaluation of the available rules' merits, rather than a quantitative estimation of their current application.

II. RETHINKING THE CONFLICT OF LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION

7.05 Like Born's analysis, this book takes substantive certainty as its touchstone. However, it has an important point of departure. Born's ideal conflicts methodology includes the presumptive application of the seat's conflicts rules, in order to secure predictability in the absence of an appropriate international conflicts rule. This book seeks to secure that same substantive certainty by instead proposing the optimal international conflicts rule which Born identifies as currently lacking. To that end, in contrast to the broad arbitral discretions prevailing under the current regulatory regime, this book proposes...
a (modified) Art 4 Rome Convention rule for arbitral conflicts of laws. As set out in Chapter 6, that rule (marking up the original Art 4 Rome Convention text for the purposes of clarity and explanation) reads as follows:

Article 4: Applicable Law in the Absence of Choice

(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the rules of law of the country with which the case is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with other rules of law another country may by way of exception be governed by those rules of law the law of that other country.

(2) Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the case contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party’s trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated ...

(5) Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraph [...] 2 [...] shall be disregarded if it appears from the circumstances as a whole that the case contract is clearly more closely connected with another country.

7.06 The world’s move towards the pure voie directe is understandable, in a sense, given the ‘dismal swamp’ which represents the current state of arbitral conflicts of laws, and the distinct lack of uniformity across jurisdictions. Without a more certain rule, applied consistently across jurisdictions, the pure voie directe might very well be thought better than the alternative - resorting to the existing mass of different rules potentially applicable in international commercial arbitration, and otherwise reflected in (domestic) private international law systems. How then can this book’s recommendation be implemented, in a way that displaces the current regulatory regime, but which also overcomes the problems which have led to the current regulatory regime’s existence?

[...]


12 ibid, 2659-61.


Referring Principles:

XIV.2 - Law applicable to international contracts