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# House Rules: Why Implementing Express Rules Governing Conflicts of Laws Absent Parties Explicit Choice will Strengthen International Arbitration Tribunals

SAIKRISHNA SRIKANTH\*<sup>©</sup>

## INTRODUCTION

In 1865, England became the first nation to accept private parties' right to decide the proper law of their contract, thereby greenlighting party autonomy as a foundational principle in choice of law jurisprudence.<sup>1</sup> As choice of law jurisprudence evolved from litigating issues in courts to parties utilizing their autonomy to have an arbitration house manage their agreement, commercial arbitration has boomed.<sup>2</sup> By choosing arbitration, parties are free to select various procedural and substantive rules that they believe will best regulate any dispute that may arise from their agreement.<sup>3</sup> Furthermore, private parties retain the

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1. See Karen Denise Untiedt, *International Contracts under the Conflict of Laws Rules of Great Britain and Japan*, 7 LOY. L.A. INT'L & COMP. L.J. 193, 198 (1984) (explaining that England was the first country to allow parties to choose the governing law of their contract and thereby recognizing party autonomy); see also Ole Lando, *The Substantive Rules in the Conflict of Laws: Comparative Comments from the Law of Contracts*, 11 TEX. INT'L L. J. 505, 523 (1976) ("The distinction between private law and public law rules has been a basic one in civil law where many authors and courts still maintain that the normal conflict of law rules only refer to substantive rules of private law.").

2. See Stavros Brekoulakis, *International Arbitration Scholarship and the Concept of Arbitration Law*, 36 FORDHAM INT'L L.J. 745, 766 (2013) ("In the area of commercial arbitration, for example, it is now accepted that tribunals have authority to determine not only commercial claims pertaining to the formation, interpretation, and performance of a commercial contract, but also statutory claims that may have crucial social implications or involve public policy.").

3. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961) ("The simplest [setting for arbitration] is when two persons in a contract delineating a business relationship agree to settle any disputes that may arise under the contract by resort to arbitration before named arbitrators or persons to be

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freedom to determine the location of their arbitration, irrespective of whether the parties themselves are physically present in these settings.<sup>4</sup> Such flexibility in rules bolstered parties' desire for arbitration and emboldened the formation of arbitration houses in major commercial centers across the globe.<sup>5</sup>

The establishment and subsequent growth of major international arbitration houses is directly tied to the rules that govern each house.<sup>6</sup> Since different houses offer different rules, parties are free to decide which house's rules are best suited to govern the parties' transaction.<sup>7</sup> When the parties clearly define, and agree to, the law applicable to the merits of their arrangement, arbitrators will still "have to address [issues] that cannot be dealt with by simply applying the law chosen."<sup>8</sup> Additionally, when the parties do not make an explicit choice on the applicable rules, a house's rules will typically provide some, but not complete, clarity in guiding arbitrators to reach the correct decision for each proceeding.<sup>9</sup> Given that each arbitral tribunal has its own rules, the resolution of a conflict of laws dispute, absent parties' choice under one house, can differ from the determination of another house.

This article proposes one solution to resolve the different results that emerge when parties do not make their choice of law explicit: arbitration houses should have express rules governing conflicts of laws. Since arbitration houses compete with each other to attract business, a single house adopting express rules to govern choice of law in the absence of the parties' explicit choice could change the landscape of arbitration selection. A house that adopts express choice of law rules absent the parties' clear instruction could draw more business than its competitors because it provides a crystallized standard for addressing conflicts. Moreover,

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named at the time of the dispute. In this, which can be called individuated arbitration, the making of all arrangements, including the procedures for arbitration, rests entirely with the parties concerned.”).

4. See Steve Nelson & Michael Robbins, *Guide to International Arbitration*, DORSEY & WHITNEY LLP 1 (Feb. 2016), <https://www.dorsey.com/-/media/files/asia-pacific/dorseyasiaguidetointernationalarbitration.pdf?la=en> (“The arbitral process itself is governed by the law of the place chosen as the situs or seat of arbitration, which need not be the law governing the contract in dispute, and by arbitral rules chosen by the parties.”).

5. See Eric Bergsten, *Americanization of International Arbitration*, 18 PACE INT’L L. REV. 289, 292 (2006) (“International commercial arbitration developed primarily on the continent of Europe, with France, Germany and Switzerland participating in a significant number of cross-border arbitrations.”).

6. See Nelson & Robbins, *supra* note 4, at 3 (“For example, a choice of Singapore as the seat would mean that the Singapore International Arbitration Act 1994 will serve as the applicable procedural law governing the arbitration, including provision for any limited involvement of the Singapore courts that may become necessary to ensure effective operation of the arbitral process.”).

7. See *id.* (“When choosing a seat, the parties must consider what ramifications will follow.”).

8. Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, NYU LAW AND ECONOMICS RESEARCH PAPER No. 10–40 1, 2 (2010).

9. See *id.* (“When the parties have not chosen the law applicable to the merits, relevant arbitration laws and/or the arbitral rules will usually provide some direction to the arbitrators.”).

because international arbitration houses are a-national,<sup>10</sup> these houses have greater flexibility than state or federal governments in crafting these express rules. Given that arbitration is a chaotic field where results vary based on numerous factors, ranging from terms of the agreement to selection of a governing house, the implementation of express rules to govern choice of law absent the parties' directive would bring further legitimacy to arbitration houses.

To reach this conclusion, this article proceeds in the following manner. Part I maps the history of international commercial arbitration in the Twentieth Century and the formation of competing arbitration houses. Specifically, this part looks to four major houses of arbitration: The International Chamber of Commerce in Paris, the London Court of International Arbitration, the Singapore International Arbitration Centre, and the American Arbitration Association. These houses have been selected because parties have either historically or recently favored these forums for international commercial arbitration. Part II briefly outlines various rules of these major arbitration houses that govern choice of law and examines the language of those houses that offer a rule for parties who do not make their choice of law explicit. By identifying the conflicts rules of each house, this part illuminates the gaps that exist when parties do not make their choice of law explicit.

Part III fleshes out the value of having express rules governing conflicts of laws absent parties' explicit choice. Sub-part A addresses previous scholarship in this space. Sub-part B examines the proposal to have arbitration houses adopt these express rules. First, two cases are scrutinized to demonstrate how arbitration houses rule when parties do not make their choice of law explicit. Next, the discussion proceeds to the normative support for adopting express rules absent parties' choice, emphasizing that it will (1) increase competition between the arbitration houses by incentivizing other houses to adopt similar express rules, (2) establish a novel concept, the default house rule, which does not interfere with parties' ability to contract, and (3) ensure that gaps that arise from parties not expressing a choice of law regarding arbitration will be filled in a way that strengthens private dispute resolution without undermining public policy.

#### I. A HISTORY OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE FORMATION OF FOUR MAJOR HOUSES

International commercial arbitration arose in the early Twentieth Century despite the absence of two nations that play a significant role in shaping global trade: The United States and England.<sup>11</sup> Although England established an international commercial arbitration house in 1892, the London Court of International Arbitration

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10. See Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629 (1989) ("The basic characteristic of a-national arbitration is that it does not owe its existence, validity, or effectiveness to a particular national law.").

11. See Bergsten, *supra* note 5, at 291.

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("LCIA")<sup>12</sup>, English law governed the substantive and procedural aspects of these international commercial disputes.<sup>13</sup> The United States and England's absence in the realm of arbitration prompted questions of "whether there was anything that could be called international commercial arbitration in the post-World War II period."<sup>14</sup> Nonetheless, a significant number of arbitrations occurred in Europe in the immediate post-World War II period, with parties often selecting to arbitrate their disputes at the International Chamber of Commerce ("ICC") in Paris.<sup>15</sup>

### A. *The International Chamber of Commerce*

Established in 1919 in Paris, France, the ICC's founders aimed to "create an organization that would represent business everywhere."<sup>16</sup> In 1923, four years after its inception, the ICC created the International Court of Arbitration and designated it to serve as the principal forum for arbitrating international commercial disputes.<sup>17</sup> For several years after its establishment, parties that submitted disputes to the ICC for arbitration limited their claims to matters such as the "supply of industrial plant and public works, sales contracts, agency distribution contracts, license agreements, the formation and winding-up of companies, share transactions, and maritime disputes."<sup>18</sup> These claims made up the bulk of the roughly fifty cases per year that the ICC arbitrated, a sizeable number for its time.<sup>19</sup> Over time, the ICC Court of Arbitration's case load grew exponentially.<sup>20</sup> Today, the ICC Court of Arbitration manages the largest caseload of any arbitration house in the world that is involved in international commercial arbitration.<sup>21</sup> Moreover, American parties

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12. THE INTERNATIONAL ARBITRATION REVIEW 192 (James H. Carter ed., 4th. ed. 2013).

13. See Bergsten, *supra* note 5, at 291 ("Therefore, there was English arbitration of international commercial disputes, not English participation in international commercial arbitration.") (emphasis omitted).

14. *Id.*

15. *Id.* at 292.

16. See *History*, INTERNATIONAL CHAMBER OF COMMERCE, <https://iccwbo.org/about-us/who-we-are/history/> (last visited Apr. 5, 2019).

17. See *id.* (explaining the ICC founded the International Court of Arbitration in 1923).

18. Leonard N. Bannicke, *International Chamber of Commerce Court of Arbitration*, 23 ALTA L. REV. 51, 51 (1985).

19. Bergsten, *supra* note 5, at 292.

20. L. CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (Oceana Publications & ICC Publishing 1990) (explaining that by 1990, the International Court of Arbitration "received 300 new requests per year, with a total of some 7,000 cases in its 67 years of existence."); see also Dawn Chardonnel, *ICC Announces 2017 Figures Confirming Global Reach and Leading Position for Complex, High-Value Disputes*, INTERNATIONAL CHAMBER OF COMMERCE (last visited Apr. 5, 2019) <https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/> (stating that "[a]ccording to the latest figures, a total of 810 new cases were filed in 2017" and "[t]he Court has administered 23,000 cases since its creation in 1923.").

21. See Chardonnel, *supra* note 20; see also Craig, *supra* note 20, at 374.

are increasingly seeking out the ICC to handle their disputes through international commercial arbitration.<sup>22</sup>

*B. The London Court of International Arbitration*

While the ICC continued to prosper in the post-World War II era, it took time for America and England to warm to international commercial arbitration. As mentioned in Part A, the LCIA formed in 1892. However, English attitudes towards international commercial arbitration remained sour, largely because “arbitral proceedings were perceived essentially as ancillary fact-finding procedures.”<sup>23</sup> Moreover, the English believed that “arbitrators merely attempted to ‘play judge’ and could not render cogent adjudicatory determinations.”<sup>24</sup> Nevertheless, as England grew to dominate world trade during the nineteenth century and international commercial parties increasingly looked to the London Court of International Arbitration to settle their disputes, Parliament passed the Arbitration Act of 1950 to govern international commercial arbitration.<sup>25</sup> Parliament then revised the Arbitration Act in 1979<sup>26</sup> to enable “exclusion agreements”<sup>27</sup> that, in effect, provide for arguably the greatest party autonomy amongst the international arbitration houses.<sup>28</sup> As a result of this change, the LCIA is “no longer considered an exclusively English organization,”<sup>29</sup> and remains one of the world’s leading international institutions for international commercial arbitrations.

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22. See Bergsten, *supra* note 5, at 300 (noting that as of 2005, “about one-fourth of the cases heard before the ICC involve an American party.”).

23. Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 Me. L. Rev. 263, 267 (1988).

24. *Id.*

25. See Richard J. Graving, *The International Commercial Arbitration Institutions: How Good A Job Are They Doing?*, 4 AM. U. J. INT’L L. & POL’Y 319, 342–43 (1989); see also Arbitration Act 1950, 14 Geo. 6 c. 27, §§ 31-43 (Eng.), [http://www.legislation.gov.uk/ukpga/1950/27/pdfs/ukpga\\_19500027\\_en.pdf](http://www.legislation.gov.uk/ukpga/1950/27/pdfs/ukpga_19500027_en.pdf) (last visited Feb. 21, 2020) (providing the governing rules for international commercial arbitration).

26. Arbitration Act 1979 (Commencement) Order 1979, c. 16 (Eng.), [http://www.legislation.gov.uk/uksi/1979/750/pdfs/uksi\\_19790750\\_en.pdf](http://www.legislation.gov.uk/uksi/1979/750/pdfs/uksi_19790750_en.pdf).

27. Graving, *supra* note 25, at 346 (exclusion agreements mean that “now parties to international contracts may, unless they are all “domestic,” adopt a clause to contract out of any appeal at any time, before or after a dispute arises.”); see also Arbitration Act 1979, Eliz. c.42, § 3(1) (Eng.), [http://www.legislation.gov.uk/ukpga/1979/42/pdfs/ukpga\\_19790042\\_en.pdf](http://www.legislation.gov.uk/ukpga/1979/42/pdfs/ukpga_19790042_en.pdf) (detailing the statutory requirements for exclusion agreements).

28. Graving, *supra* note 25, at 346; see also Michael Kerr, *The Arbitration Act 1979*, 43 Mod. L. Rev., 45 (1980) (“[t]he Act permits the parties to contract out of any appeal by means of “exclusion agreements,” with the result that arbitral tribunals are then wholly unfettered in their decisions except in relation to allegations of “misconduct,” which remain unaffected by the Act.”).

29. See Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 Loy. L. A. L. Rev. 1337, 1355 (2007) (explaining that by 2007, “more than 70 percent of the cases filed with the LCIA involve non-U.K. parties.”); see also *Facts and Figures – 2017 Casework Report*, LONDON CT. OF INT’L ARB. 1, 3 (last visited Apr. 8, 2019),

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### C. *The American Arbitration Association*

Similar to England, the United States resisted adopting international commercial arbitration as a viable alternative to litigation.<sup>30</sup> Although the United States created its flagship arbitration house in 1926,<sup>31</sup> the American Arbitration Association (“AAA”), the United States did not fully embrace arbitration until 1970,<sup>32</sup> when the United States ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).<sup>33</sup> Before ratifying the New York Convention, America disfavored arbitration, treating the practice as trespassing on the realm of the courts.<sup>34</sup> America only began to trek towards embracing international commercial arbitration when approached by international petroleum companies seeking to resolve their complex concession clause issues with recently decolonized nations.<sup>35</sup> American law firms, while not well-versed in arbitration, had sizable rosters of attorneys, many of whom navigated similar issues to the ones facing these oil companies.<sup>36</sup> In assisting these companies, the reality of the burgeoning international commercial trade scene and a desire to arbitrate instead of litigate became too overwhelming to ignore.

By 1970, when the United States ratified the New York Convention, a key fixture in international arbitration that “applies to the recognition and enforcement of

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file:///Users/kellycallahan/Downloads/LCIA%20Facts%20and%20Figures%20-%202017%20Casework%20Report.pdf (As of 2017, “The vast majority of parties (over 80%) came from outside the United Kingdom, with an increasingly significant number from the United States.”).

30. Bergsten, *supra* note 5, at 293 (This resistance is explained, at least in part, because “international commercial arbitration developed essentially as an adaptation of the civil law rules of procedure, and not those of the common law known in the United States and England.”).

31. *The American Arbitration Association: A Long History of Working with Government*, AM. ARB. ASS’N, [https://www.adr.org/sites/default/files/document\\_repository/AAA%20Government%20Services.pdf](https://www.adr.org/sites/default/files/document_repository/AAA%20Government%20Services.pdf) (last visited Feb. 21, 2020).

32. Carbonneau, *supra* note 23, at 263.

33. See *Status of Treaties*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en) (last visited Mar. 06, 2020) (showing what countries have ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, including the United States); see also *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/english> (last visited Mar. 06, 2020) (specifically listing the articles of the Convention ratifying the arbitral awards); see also Carbonneau, *supra* note 23, at 272 (“The New York Convention ... is the universal charter of international commercial arbitration. Its ratification is a measure of a nation’s acceptance of international commercial arbitration.”).

34. Carbonneau, *supra* note 23, at 266; see also Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1, 8 (2010) (“Arbitration was popularly touted as a more efficient, less costly, and more final method for resolving disputes; there was little or no discovery, motion practice, judicial review, or other trappings of litigation.”).

35. Bergsten, *supra* note 5, at 293.

36. *Id.* at 294.

foreign arbitral awards and the referral by a court to arbitration,<sup>37</sup> America had become more accepting of international commercial arbitration.<sup>38</sup> After ratifying the New York Convention, the AAA shrewdly alerted parties that they could now include arbitration clauses in their international contracts and ensure that the arbitral awards would not be upended by an American court.<sup>39</sup> The AAA's suggestion paid off because within twenty years, the United States Supreme Court adopted a policy "favoring international trade and commerce," and subsequently steered lower federal courts "toward an unequivocal endorsement of arbitration for the resolution of private international commercial disputes."<sup>40</sup>

In 1996, the AAA established the International Centre for Dispute Resolution ("ICDR") to strengthen its international presence in commercial arbitration.<sup>41</sup> While concern existed for the AAA's ability to attract completely international parties to the ICDR in its first ten years,<sup>42</sup> there has been an uptick in international parties filing cases with the ICDR in the last few years.<sup>43</sup> American commercial parties currently believe that arbitration is the "preferred method of settlement in international disputes."<sup>44</sup>

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37. *The New York Convention*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/> (last visited Apr. 3, 2019).

38. See Bergsten, *supra* note 5, at 295 ("In the 1970s, the United States increased trade with the Soviet Union and other state-trading countries. The American party was usually a private corporation that required an acceptable, predetermined dispute settlement mechanism. Although disputes over international trade contracts arose in only a small percent of the contracts, it was important for the parties to know how they would be settled.").

39. *Id.*; see also Mentschikoff, *supra* note 3, at 856 (From its foundation, the American Arbitration Association "held itself out as an expert in matters that went to the enforceability of an award and set up its rules and regulations with the primary aim of rendering awards that would not be set aside by the courts.").

40. Carbonneau, *supra* note 23, at 264.

41. See *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARB. ASS'N, <https://www.adr.org/about> (last visited Apr. 6, 2019) ("The AAA's and ICDR's administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation.").

42. Stromberg, *supra* note 29, at 1354–55 ("while the AAA recently eclipsed the ICC with respect to the amount of international arbitration filings, most of its cases involve an American party.") (citing Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 41–42 ("According to the leading authority in international arbitration, AAA's number of truly international cases (cases where both parties are non-U.S.) is 'modest' and cannot compete with the ICC numbers.")).

43. See AM. ARB. ASS'N, 2017 ANNUAL REPORT AND FINANCIAL STATEMENTS 20 (2017) ("There were 1,026 cases filed with the ICDR in 2017, with total claims of \$6.33 billion and counterclaims of \$648 million").

44. See Bergsten, *supra* note 5, at 300 n.35 (citing Christopher R. Drahozol, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79 (2000) ("International commercial arbitration is the accepted way of resolving international business disputes... [o]ne estimate is that ninety percent of all international contracts contain arbitration clauses.")).



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### D. Singapore International Arbitration Centre

While the first three arbitration houses represent longstanding forums where international commercial arbitration has thrived, new players have emerged on the scene.<sup>45</sup> In 1991, Singapore entered the international commercial arbitration space by establishing the Singapore International Arbitration Centre (“SIAC”).<sup>46</sup> Commercial parties attribute SIAC’s popularity for international arbitration in part to “an efficient and impartial judiciary respectful of the principles of arbitration.”<sup>47</sup> The ICC endorsed this view by noting in 2016 that Singapore represented the most popular seat in Asia for ICC arbitration.<sup>48</sup> By 2018, Singapore had become the third most popular international commercial arbitration seat in the world.<sup>49</sup> Currently, “eighty percent of SIAC’s caseload is international in nature, while forty-two percent of the new cases filed in 2016 did not involve Singaporean parties.”<sup>50</sup>

## II. CHOOSING THE APPLICABLE LAW – A GLANCE AT THE CHOICE OF LAW OFFERINGS IN THE FOUR ARBITRAL INSTITUTIONS

The popularity of the four aforementioned arbitration houses stems as much from their commitment to enforcing arbitral awards as their flexibility in allowing parties in international commercial arbitration to choose the law applicable to their arrangement. This section examines the extent to which each forum offers parties alternatives in the arbitration process.

### A. The ICC

The ICC’s Arbitration Rules, last updated on March 1, 2017, “regulate the management of cases” submitted to the ICC’s International Court of Arbitration.<sup>51</sup> For the ICC, parties should refer to four specific articles under the Arbitral Proceedings heading, namely: Article 18 – Place of the Arbitration (Article 18(1) states that “[t]he place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.” Article 18(2) states that “[t]he arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it

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45. See generally CHINA INT’L ECON. TRADE ARB. COMM’N H.K. ARB. CTR., [http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen\\_US%5Cindex&userLocale=en\\_US](http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen_US%5Cindex&userLocale=en_US) (last visited Feb. 22, 2020); H.K. INT’L ARB. CTR., <https://www.hkiac.org/> (last visited Feb. 22, 2020); CHARTERED INST. OF ARB., <https://www.ciarb.org/> (last visited Feb. 22, 2020).

46. See *Why SIAC*, SING. INT’L ARB. CTR., <http://www.siac.org.sg/2014-11-03-13-33-43/why-siac>.

47. See THE INTERNATIONAL ARBITRATION REVIEW 419 (James H. Carter ed., 9th ed. 2018).

48. See Christopher K. Tahbaz & Justin R. Rassi, *The Development of Arbitral Institutions in Asia*, 13 U. PA. ASIAN L. REV. 102, 104 (2018) (citing 2016 ICC Dispute Resolution Statistics, 2017 ICC DISP. RES. BULL. at 111).

49. THE INTERNATIONAL ARBITRATION REVIEW, *supra* note 47, at 419 (citing WHITE & CASE LLP ET AL., 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION (2018)).

50. See *Why SIAC*, *supra* note 46.

51. International Chamber of Commerce [ICC], *Arbitration Rules* (Mar. 1, 2017).

considers appropriate, unless otherwise agreed by the parties.”),<sup>52</sup> Article 19 – Rules Governing the Proceeding (“The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.”),<sup>53</sup> Article 20 – Language of the Arbitration (“In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.”),<sup>54</sup> and Article 21 – Applicable Rules of Law (Article 21(1) states that “[t]he 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.”; Article 21(3) states “[t]he arbitral tribunal shall assume the powers of an *amiabile compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.”).<sup>55</sup>

The ICC states that these rules “ensure transparency, efficiency and fairness in the dispute resolution process while allowing parties to exercise their choice over many aspects of the procedure.”<sup>56</sup> Fundamentally, the ICC designed the rules so that they “balance party autonomy with professional supervision of proceedings.”<sup>57</sup>

#### B. The LCIA

While the London Court of International Arbitration has touted the autonomy it provides to commercial parties, the rules governing the LCIA do not offer as much choice for parties as suggested. The LCIA Arbitration Rules are current as of October 1, 2014.<sup>58</sup> In that most recent update, the mention of party choice appears in two articles of the LCIA Arbitration Rules: Article 16 – Seat(s) of Arbitration and Place(s) of Hearing (Article 16.2 states that “[t]he parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal.”; Article 16.2 further states “[i]n default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another

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52. See *id.* at art. 18(1)–18(2).

53. See *id.* at art. 19.

54. See *id.* at art. 20.

55. See *id.* at art. 21(1).

56. International Chamber of Commerce [ICC], *Arbitration Rules - Mediation Rules*, 2 (2017).

57. Graving, *supra* note 25, at 332.

58. See London Court of International Arbitration [LCIA], *LCIA Arbitration Rules* (Oct. 1, 2014).

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arbitral seat is more appropriate.”),<sup>59</sup> and Article 22 – Additional Powers of the Arbitral Tribunal (“The Arbitral Tribunal shall decide the parties’ dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.”).<sup>60</sup> Moreover, Article 16.1 and 16.2 raised concerns regarding party choice.

While the 1998 Rules instructed the LCIA Court to make a final determination on the location of the arbitral seat absent the parties’ choice (which often defaulted to London), the 2014 Rules bequeathed that power to the arbitral tribunal instead.<sup>61</sup> Specifically, while the 2014 update indicates that parties retain some measure of choice to select the seat “even after the arbitral tribunal has been constituted,” the notion that party autonomy exists in this regard is upended by the tribunal’s ability “to fix a different seat than the parties have agreed, to the extent such agreement takes place after constitution of the tribunal.”<sup>62</sup>

### C. *The AAA*

As referenced in Part I, the major bulk of the AAA’s international commercial arbitration occurs under the International Court of Dispute Resolution (“ICDR”). Two articles discuss the ramifications for parties when they do not come to an agreement or make their choice explicit: Article 17 – Place of Arbitration (“If the parties do not agree on the place of arbitration by a date established by the Administrator, the Administrator may initially determine the place of arbitration, subject to the power of the arbitral tribunal to determine finally the place of arbitration within 45 days after its constitution.”),<sup>63</sup> and Article 18 – Language of Arbitration (“If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise.”).<sup>64</sup> Additionally, Article 31 – Applicable Laws and Remedies (“The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be

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59. *See id.* at art. 16.1–16.2.

60. *See id.* at art. 22.3.

61. *See* Ferdinando Emanuele & Milo Molfa, *The Application of the 2014 LCIA Rules to Arbitral Proceedings Seated in Italy*, 8 EUROPEAN, MIDDLE EASTERN, & AFRICAN ARB. REV. 77, 78 (2015).

62. *Id.* at 78–79.

63. *See* Int’l Ctr. for Disp. Resol. [ICDR], *International Dispute Resolution Procedures*, art. 17(1) (June 1, 2014).

64. *See id.* at art. 18

appropriate.”),<sup>65</sup> enables the tribunal to apply the substantive law on behalf of the parties if they do not agree on the law beforehand.

*D. The SIAC*

Similar to its counterparts, the Singapore International Arbitration Center details what it will do when parties make an explicit choice on both the language and location of the arbitration. These rules are current as of August 1, 2016. The SIAC elucidates these specificities in Rule 21 – Seat of the Arbitration (“The parties may agree on the seat of the arbitration. Failing such an agreement, the seat of the arbitration shall be determined by the Tribunal, having regard to all the circumstances of the case.”),<sup>66</sup> and Rule 22 – Language of the Arbitration (“Unless otherwise agreed by the parties, the Tribunal shall determine the language to be used in the arbitration.”).<sup>67</sup>

The above rules show that even the best arbitration houses have rules governing parties when they do not make an explicit choice. However, the existing framework is inadequate to address the conflict of laws/choice-of-law issues that may arise when parties fail to make their choice. To improve the current rules and to rekindle the belief that arbitration places power squarely in the hands of the parties, a further step must be taken to bridge the gap when parties do not make their choice clear and choice-of-law issues are implicated. A viable solution involves establishing express rules governing conflicts of law when parties do not make a definitive choice.

**III. IMPLEMENTING EXPRESS RULES GOVERNING CONFLICTS OF LAW ABSENT THE PARTIES’ CHOICE**

*A. How Scholarship Has Tackled the Conflicts Question in Absence of the Parties Explicit Choice*

The determination by arbitral tribunals of what the applicable law should be when parties do not make a choice is not a new phenomenon. Under the most recent version of the United Nations Commission on International Trade Law (“UNCITRAL”), the UNCITRAL Model law “directs the arbitral tribunal to use a conflict of laws analysis to determine the applicable law,” which may include a “duty to apply the conflict of laws rules that it deems applicable or appropriate.”<sup>68</sup>

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65. See *id.* at art. 31.

66. See Sing. Int’l Arb. Ctr. [SIAC], *SIAC Rules*, Rule 21.1 (Aug. 1, 2016).

67. See *id.* Rule 22.1.

68. Silberman & Ferrari, *supra* note 8, at 4 n.37 (quoting United Nations Commission on International Trade Law [UNCITRAL], *UNCITRAL Model Law on International Commercial Arbitration*, Art. 28(2) (1985) (“Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”)).

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Contrastingly, the New York Convention does not offer any guidance as to the law applicable absent parties' choice.<sup>69</sup> The LCIA Rules are in concert with the English Arbitration Act of 1996, as both adhere to the idea that when the parties do not make their choice of applicable law clear, the tribunal applies the conflict of laws rules it deems appropriate.<sup>70</sup>

The options that arbitral tribunals have in streamlining how they want to apply the conflicts of laws rules is noted by the variety of choices arbitral tribunals can make. One scholar has suggested that arbitrators should, absent an arbitration clause, apply the conflict of laws system of the courts of the country that would retain jurisdiction over the matter.<sup>71</sup> Another approach involves looking to the rules of the arbitral seat regarding conflicts of laws.<sup>72</sup> Section 6 of the International Commercial Arbitration Act ("ICAA") and Article 28(2) of the Model Law bolster the former point by stating "[i]f 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."<sup>73</sup> A suggestion also exists for utilizing the conflicts of laws system of the nation where the arbitral award will be enforced.<sup>74</sup> A completely different proposal involves applying the conflict of laws system of the country most closely connected with the dispute.<sup>75</sup>

The most recent scholarship contends that "it is fair to say to parties that they cannot rely too heavily on a particular law being applied when they choose arbitration and do not make an explicit choice about applicable law."<sup>76</sup> However, in that same breath, this scholarship argues that "parties should be able to have some control with respect to the choice of law process and to ensure that arbitrators do what the parties want them to do."<sup>77</sup> To overcome this challenge, parties must

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69. *Id.* at 5.

70. See PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 334 (3rd ed. 2010);

see also United Nations Commission on International Trade Law [UNCITRAL], *UNCITRAL Model Law on International Commercial Arbitration*, Art. 28(2) (1985).

71. See Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflicts of Laws Problem?*, 16 INT'L LAW. 613, 615 (1982).

72. See F.A. Mann, *Lex Facit Arbitrum*, 2 ARB. INT'L 157, 167 (1967); see also Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48, 53 (1991) ("Under the conflict of laws perspective, the question arises whether and to what extent the place of arbitration may, in major arbitration jurisdictions, be considered a relevant connecting point with respect to international commercial arbitrations.").

73. See Section 6 of the ICAA; see also UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration*, art. 28(2) (1985).

74. Silberman & Ferrari, *supra* note 8, at 15.

75. *Id.*

76. *Id.* at 32.

77. *Id.*

make express choice of law clauses matter so that in circumstances where arbitrators fail to honor the parties' choice by instead applying commercial law or other legal principles, the action is considered beyond the scope of the arbitrator's authority.<sup>78</sup> In effect, the absence of party choice in international commercial arbitration is better served by emphasizing the importance of making an express choice.

But what if a better answer existed to ensure that the lack of explicit choice by the parties did not manifest in confused arbitrators who inconsistently applied conflicts of law analysis? Perhaps an answer that would seek to bring uniformity to the growing issue of how best to retain party autonomy in selecting the applicable law without the arbitral institutions imposing the selection on parties and undercutting their autonomy. The solution I offer is that arbitration houses should adopt express rules governing conflicts of law when parties do not make an explicit choice on the applicable law.

*B. Why Express Rules Governing Conflicts of Law Absent Explicit Choice by the Parties Strengthens International Commercial Arbitration*

The primary reason arbitration houses should implement express rules to govern conflicts of law absent explicit choice by the parties is stability. The unpredictability of arbitration results is largely due to the absence of definite statements on choice of law.<sup>79</sup> In this chaos, the rules that arbitration houses adopt to govern conflicts of laws must be consistent and predictable to ensure uniformity.<sup>80</sup> Achieving consistency is critical because courts assess the decisions of arbitration houses and subsequently establish a body of caselaw that they can refer to for future decisions.<sup>81</sup> However, given the absence of rules governing conflicts of law when parties do not make an explicit choice, arbitration houses can render decisions that clarify the standard for determining the governing law in one instance, and then subsequently modify the standard in the next instance. Two cases below will illuminate this problem.

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78. *Id.* at 32.

79. See Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage*, 12 NW. J. INT'L L. & BUS. 163, 177 (1991) ("Without the benefit of clear, definite statements of the law, arbitrators essentially apply such choices of law by determining *de novo* what the rules require for each separate dispute. The results of arbitration thus become unpredictable, eradicating the outcome-determinative and the dispute reducing qualities of choice of law.").

80. See S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 21 (2012).

81. *Id.* (quoting Interim Award in ICC Case No. 4131, IX Y.B. Com. Arb. 131, 135 (1984)) ("[t]he decisions of these tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.").

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### 1. Case Law

#### a. *SulAmérica SA v. Enesa Engenharia SA*

In *SulAmérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* (“*SulAmérica*”),<sup>82</sup> the Court of Appeal of England and Wales examined an arbitration agreement regarding an insurance policy.<sup>83</sup> Under the policy, the insurers refused to cover damages and consequential losses greater than 1 billion Reais resulting from revolts that temporarily stopped construction of the Jirau hydropower plant.<sup>84</sup> Prior to arbitration, the parties made an express choice of law that Brazilian law would “govern the contract.”<sup>85</sup> Additionally, the parties agreed to an exclusive jurisdiction clause to be controlled by the Brazilian courts.<sup>86</sup> However, the parties also placed a multi-layered dispute resolution clause in the policy that established London as the seat of arbitration and mediation.<sup>87</sup>

Before the English Court of Appeal decision, the insurers filed suit against the insured in the 9th Civil Court of the Capital of Sao Paulo.<sup>88</sup> The insurers argued that since they crafted the policy as an adhesion contract, the efficacy of the arbitration agreement remained suspect.<sup>89</sup> Additionally, under Article 4 of the Brazilian Arbitration Act, the parties did not expressly consent on the arbitration house.<sup>90</sup> A Brazilian Civil Court judge dismissed the anti-arbitration request made by the insureds,<sup>91</sup> but a week later, another civil court judge upheld the anti-arbitration request.<sup>92</sup> On appeal, the Court of Appeals of the State Sao Paulo upheld the anti-arbitration request.<sup>93</sup> The Court of Appeals rested its reasoning on the ineffectiveness of the arbitration agreement under Brazilian law, pursuant to adhesion contract rules.<sup>94</sup>

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82. *Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA (Civ) 638, [2013] WLR 102 (Eng.).

83. *Id.* at ¶ 1.

84. *Id.* at ¶ 2.

85. *Id.* at ¶ 3.

86. *Id.*

87. *Id.*

88. TJSP AI No. 0304979-49.2011.26.0000, Relator Paulo Alcides, 19.4.2012, DIÁRIO OFICIAL DOS ESTADOS SÃO PAULO [D.O.E.S.P.], 19.4.2012 (Braz.).

89. *Id.*

90. *Id.*

91. *Id.* (“On December 12, 2011, in an *ex parte* decision, the first instance Brazilian judge dismissed the interim anti-arbitration request made by the insureds.”).

92. *Id.* (“On December 19, 2011, a second decision by the Brazilian judge reviewed the insureds’ request and granted an anti-arbitration injunction against the insurers.”).

93. TJSP AI No. 0304979-49.2011.26.0000, Relator Paulo Alcides, 19.4.2012, DIÁRIO OFICIAL DOS ESTADOS SÃO PAULO [D.O.E.S.P.], 19.4.2012 (Braz.).

94. *Id.*

However, in England, the Court of Appeal came to a different result. The Court of Appeal fashioned a three-part test to determine the relevant law: (1) the express choice of the parties, (2) the implied choice of the parties in the absence of an express choice, and (3) where the parties had not made any choice, the proper law would be the law which the arbitration agreement has its closest or most real connection with.<sup>95</sup> Since the parties did not adopt an express choice of law provision to govern the arbitration agreement, the Court of Appeal examined the implied choice of the parties and the closest/most real connection prong, inquiries which the Court admitted “will often merge into one another.”<sup>96</sup> The Court of Appeal started their analysis at this point because the parties likely intended for the entirety of this relationship to be governed by the same system of laws, unless indications to the contrary appeared.<sup>97</sup>

While the Court of Appeal noted that the parties chose Brazilian law to govern the policy, that the exclusive jurisdiction clause would be controlled by Brazilian law, and that the contract itself had a close commercial connection to Brazil, the Court found the parties’ implied choice to be English law and that English law had the closest connection for the arbitration agreement.<sup>98</sup> The enforceability of the arbitration agreement under Brazilian law depended on Enesa’s consent, which would “undermine the agreement.”<sup>99</sup> Moreover, the Court of Appeal stated that the substantive law governing the insurance policy did not bear a relationship to that of dispute resolution, while the exclusive jurisdiction clause maintained a closer connection to the arbitration agreement.<sup>100</sup> By choosing London as their seat of arbitration, the Court said that the parties accepted that “the law of the country relating to the conduct and supervision of arbitrations will apply to the proceedings.”<sup>101</sup>

The Court of Appeal held that “it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law.”<sup>102</sup>

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95. Joanne Greenaway, *SulAmerica v. Enesa Engenharia: Herbert Smith comment*, THOMPSON REUTERS: U.K. PRAC. L. (May 31, 2012).

96. *Id.*

97. *Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA (Civ) 638, [11], [2013] 1 WLR 102 (Eng.).

98. Greenaway, *supra* note 95, at 1.

99. *Id.*

100. *Id.* (“Following the approach taken in *ACE Ltd v CMS Energy Corporation* [2009] 1 LRIR 414, the court did not allow the exclusive jurisdiction clause to encroach on the validity of the parties’ choice to arbitrate although it left little in practice to court jurisdiction (which was limited to declaring a dispute arbitrable, compelling arbitration, declaring the validity of the award, or deciding on the merits if the parties dispense with arbitration).”).

101. *Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA (Civ) 638, [29], [2013] 1 WLR 102 (Eng.).

102. *Id.* at ¶ 11.



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Furthermore, the Court of Appeal specified that while “it is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it,” if the parties have not done so, “the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.”<sup>103</sup>

The three part-inquiry implemented by the Court of Appeal in *SulAmérica* became the leading authority on determining the law governing an arbitration agreement. Before *SulAmérica*, English cases had been split in determining whether arbitration agreements should be governed by the substantive law of the contract or by the seat chosen by the parties.<sup>104</sup> After the case, parties gained clarity on which law English courts would apply to arbitration agreement when the choice of law is not explicit.<sup>105</sup> Although courts in other countries evaluating arbitration agreements absent the parties’ express choice of law looked to *SulAmérica* for guidance, application of the three-part test could still yield unpredictable results.<sup>106</sup> Therefore, parties involved in international arbitration are better served when they expressly include a governing law clause in the arbitration agreement.<sup>107</sup>

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103. *Id.*

104. *See* *Abuja International Hotels Ltd. v. Meridien SAS* [2012] EWHC (Comm) 87, [20, 21], [2012] 1 Lloyd’s Rep. 461 (Hamblen J) (Eng.) (finding that English law applied to the arbitration of a management agreement governed by Nigerian law because under the closest connection test, the law under which the arbitration had its closest connection was England, given that the parties agreed that England was the arbitral seat); *see also* *C v. D* [2007] EWCA (Civ) 1282, [13], (Eng.) (administering the closest connection test [meaning, closest connection to the arbitral seat] to a London arbitration clause in a contract that the parties expressly instructed New York law to govern).

105. *See* *Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings* [2012] EWHC (Comm) 3702 [23], [2013] 1 Lloyd’s Rep. 235 (Smith J) (Eng.) (finding that the terms of the arbitration agreement, which excluded parts of the Indian Arbitration and Conciliation Act of 1996, demonstrated a mutual intention of the parties to choose the law of India as the law of the arbitration agreement); *see also* *Habas Sinai ve Tibbi Gazler Istihsal Endustrisi as v. VSC Steel Company Ltd.* [2013] EWHC (Comm) 4071 [101] (Eng.) (explaining that *SulAmérica* advised that deciding on an arbitral seat carries significant weight, particularly absent a clear expression of substantive law in the main contract; however, if substantive law is expressed in the main contract, it is a strong signal regarding parties’ intention as to the correct law governing the arbitration agreement, perhaps even to the point that agreed-upon choices about the proper arbitral seat are insufficient to supersede an express choice of substantive governing law).

106. *See* Harry Ormsby, *Governing Law of the Arbitration Agreement: Importance of SulAmérica Case Reaffirmed Where Choice of Seat was Agreed Without Actual Authority*, KLUWER ARBITRATION BLOG (Jan. 29, 2014), <http://arbitrationblog.kluwerarbitration.com/2014/01/29/governing-law-of-the-arbitration-agreement-importance-of-sulamerica-case-reaffirmed-where-choice-of-seat-was-agreed-without-actual-authority/> (“It will depend on whether there is an express choice of law of the matrix contract; whether there is a choice of seat in the arbitration agreement (and whether this is different to the express choice of law of the matrix contract), and whether there are any other “sufficient factors” which may displace an attempt to imply a choice of law on the basis of the chosen seat and lead to application of the third stage (the “closest connection” test).”).

107. *Id.*

*b. Firstlink Investment Corp. Ltd v. GT Payment Pte Ltd. and others*

In *Firstlink Investment Corp. Ltd v. GT Payment Pte Ltd. and others*,<sup>108</sup> the question before the Singapore High Court centered on how to determine which law governs an international arbitration agreement as impliedly chosen by the parties in the absence of express choice.<sup>109</sup> The contention between the three defendants and the plaintiff revolved around a perceived violation of an online user agreement.<sup>110</sup> The plaintiff argued that the money deposited to an online account constituted a loan to the defendants.<sup>111</sup> When plaintiff sued, one defendant applied for a stay and referenced the arbitration agreement the parties signed, stating that claims were to be adjudicated by the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”).<sup>112</sup> The plaintiff asserted that the arbitration agreement was unenforceable as “it does not make sense” for an agreement to be governed by the “laws” of an international arbitral institute such as the SCC.<sup>113</sup> The defendant countered that the parties chose the substantive law to “govern the main contract and not the arbitration agreement.”<sup>114</sup>

The Singapore High Court referenced *SulAmérica* and implemented the three-part test to determine the applicable law absent the parties’ explicit choice.<sup>115</sup> The Court noted that each part of the test must be examined separately to ensure that any choice made by the parties is respected.<sup>116</sup> The Court also stated that the methodology employed in *SulAmérica* mirrored the test used by the Singapore Court of Appeal to determine the substantive law governing commercial contracts.<sup>117</sup>

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108. FirstLink Investments Corp. Ltd. v GT Payment Pte Ltd. and others [2014] SGHCR 12.

109. *Id.* at ¶ 1.

110. *Id.* at ¶ 3.

111. *Id.*

112. *Id.* at ¶ 10.

113. FirstLink Invs. Corp. v. GT Payment Pte., [2014] SGHCR 12 ¶ 10 (Sing.).

114. *Id.*

115. *Id.* at ¶ 11.

116. *Id.* See also Greenaway, *supra* note 95, at 2 (“This tracks the development of the principle of separability, whereby the arbitration agreement is legally distinct from the contract of which it forms a part.”); U.N. Comm’n on Int’l Trade Law, UNCITRAL Model Law of Int’l Arbitration, U.N. Doc. A/40/17 (July 7, 2006).

117. FirstLink Invs. Corp. v. GT Payment Pte., [2014] SGHCR 12 ¶ 16 (Sing.) (citing *Pacific Recreation Pte. Ltd. V. S.Y. Technology, Inc.*, [2008] 2 SLR(R) 491 ¶ 36 (“There are three stages in determining the governing law of a contract. The first stage is to examine the contract itself to determine whether it states expressly what the governing law should be. In the absence of an express provision one moves to the second stage which is to see whether the intention of the parties as to the governing law can be inferred from the circumstances. If this cannot be done, the third stage is to determine with which system of law the contract has its most close and real connection.”)) (citing *JIO Minerals FZC v. Mineral Enterprises Ltd.*, [2011] 1 SLR 391 ¶ 79 (“It is well established that a three-stage approach is applied to determine the governing law of a contract ... At the first stage, the court considers if the contract expressly states its governing law (“the Express Law”). If the contract is silent, the court proceeds to the second stage and considers whether it can infer the governing law from the

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Ultimately though, the Singapore High Court noted that part two of the *SulAmérica* test needs refining because the English Court of Appeal “created a rebuttable presumption that the express substantive law of the contract would be taken as the parties’ implied choice of the proper law governing the arbitration agreement.”<sup>118</sup> To avoid that presumption, the Singapore High Court instead stated that “it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise.”<sup>119</sup> Thus, the natural inference that parties want the same system of laws to govern two separate relationships cannot exist.<sup>120</sup>

Instead of adopting the natural inference that the English Court of Appeal posits in *SulAmérica*, the Singapore High Court stressed that when parties seek to resolve their disagreements through dispute resolution, the parties should opt for neutrality principles.<sup>121</sup> The High Court further observed that the most important of neutrality principles is allowing the law of the arbitral seat to recognize and enforce the arbitration agreement.<sup>122</sup> By selecting a neutral seat, the parties would have “implicitly selected the *lex arbitri* of the seat to govern matters including the supervisory court’s powers to determine a jurisdictional dispute in relation to the validity of an arbitration agreement.”<sup>123</sup> Furthermore, because the parties’ choice of a neutral seat incorporates a selection of the arbitral seat to preside over procedural aspects of the arbitration (i.e. the determination of a jurisdictional dispute by a supervisory court with respect to the enforceability of an arbitration agreement), it is logical that parties intended the same system of law to govern the validity of the arbitration agreement in order to ensure consistency between the law and procedure of determining the legitimacy of the arbitration agreement.<sup>124</sup>

In *Firstlink*, the Singapore High Court makes a compelling case for the arbitral seat to govern the validity of the arbitration agreement in the absence of express choice by the parties.<sup>125</sup> The Singapore High Court’s decision puts a premium on

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intentions of the parties (“the Implied Law”). If the court is unable to infer the parties’ intentions, it moves to the third stage and determines the law which has the closest and most real connection with the contract (“the Objective Law”).”.

118. *Id.*

119. *Id.* at ¶ 13.

120. *Id.*

121. *Id.*

122. See *Singapore High Court Finds that Parties are Presumed to have Chosen the Law of the Seat as the Proper Law of the Arbitration Agreement*, CLIFFORD CHANCE at 2 (June 2014), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2014/06/singapore-high-court-finds-that-parties-are-presumed-to-have-chosen-the-law-of-the-seat-as-the-proper-law-of-the-arbitra.pdf>.

123. *FirstLink Invs. Corp. v. GT Payment Pte.*, [2014] SGHCR 12 ¶ 15 (Sing.).

124. *Id.*

125. See *supra* note 122, at 3.

ensuring neutrality and integrity for the arbitration process.<sup>126</sup> By applying the law of the arbitral seat instead of the substantive law of the underlying contract, the Singapore High Court sends a clear message that the law of the seat is more aligned with the commercial intention of the parties.<sup>127</sup>

Both *SulAmérica* and *Firstlink* lay out a framework for what rules govern an arbitration agreement when parties do not make their choice of law explicit. However, while the rule set forth in *SulAmérica* can be referred to as a leading authority, the rule established in *Firstlink* reveals that even the leading authority can be altered within a short period of time based on the nature of the case.<sup>128</sup> Given that arbitration houses adopt different rules to govern the agreement when the parties do not make an explicit choice of law, houses should adopt a system where the rules governing conflicts does not change on a case-by-case basis. Such a move would establish a consistent framework that parties can refer to when crafting their arbitration agreements. Moreover, it would facilitate more business for an arbitration house that implements this system, increasing jurisdictional competition.

## 2. *Jurisdictional Competition: Establishing House Rules Absent Party Choice to Increase Caseload*

International arbitration houses specialize in attracting clients to conduct business in their house instead of another's.<sup>129</sup> Increased competition between arbitration houses can stem from a change as simple, but important, as introducing specialized commercial courts that “bring international dispute resolution ‘business’ back to the domestic courts.”<sup>130</sup> The race to secure arbitration cases exploded over the course of the last few decades.<sup>131</sup> The reason for this boom is that jurisdictions realized that having laws that provide parties with greater autonomy to arbitrate

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126. *Id.*

127. *Id.*

128. Greenaway, *supra* note 95, at 2 (“[A]lthough we now have clearer guidance as to the law which English courts will apply to the arbitration agreement where it is not stipulated, there is still room for uncertainty and much will depend on the circumstances of the case.”). See also *FirstLink Invs. Corp. v. GT Payment Pte.*, [2014] SGHCR 12 ¶ 16 (Sing.) (“Nevertheless, I must caution that the determination of the implied proper law ultimately remains a question of construction; each case will have to turn on its own facts.”).

129. See Christopher R. Drahozal, *Diversity and Uniformity in International Arbitration Law*, 31 EMORY INT’L L. REV. 393, 411 (2017) (“Competition among jurisdictions for arbitration business provides the incentive for this sort of [legal] innovation in international arbitration law.”).

130. See Alison Chamberlain, *Destination Arbitration: Competition in the Market for Justice*, THOMPSON REUTERS: PRAC. L. ARB. BLOG (Mar. 21, 2019), <http://arbitrationblog.practicallaw.com/destination-arbitration-competition-in-the-market-for-justice/>.

131. See ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 92 (2009) (“The caseload of the American Arbitration Association, which is now chosen in more than 10 percent of international contracts utilizing arbitration, more than tripled from 1993 to 2003.”).

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their private agreements would indubitably receive more commerce.<sup>132</sup> Moreover, jurisdictions began to understand that the entity that fashioned a rule governing a financial transaction, be it a state, a foreign nation, or a private organization, mattered less as long as private, consenting parties had greater autonomy “to make welfare-enhancing transactions.”<sup>133</sup>

In the same way that private parties being able to “opt out of mandatory domestic laws through offshore incorporation mirrors ‘legal regime shopping,’”<sup>134</sup> parties should have the ability to regime shop for arbitration houses that clearly elucidate rules governing an arbitration agreement when the parties do not make their choice of law explicit.<sup>135</sup> Take the example of the three-part inquiry established by the Court of Appeal in *SulAmérica*. If parties do not make an explicit choice about the law to govern their London arbitration clause, *SulAmérica* states that the test goes to implied choice/closest connection. However, *SulAmérica* also says that individual cases must be evaluated on a case by case basis. So, the question remains, is the implied choice/closest connection test reserved only for cases where the facts are similar to *SulAmérica*? This unpredictability is reason enough for parties to ask that arbitration houses adopt express rules governing choice of law when the parties do not make a choice.

International commercial arbitration is trending towards homogeneity as competition increases between longtime arbitration strongholds and regional arbitral seats.<sup>136</sup> The gap between these houses is shrinking when it comes to cost, delay, sophistication, reliability, consistency, and efficacy.<sup>137</sup> If homogeneity is inevitable, then adopting express rules on conflicts of laws absent party choice will be one way to continue to bolster jurisdictional competition.

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132. *Id.* at 86–87 (“Since the mid-1980s, arbitration has emerged as an important dispute resolution tool for international commerce. . . . Contracting parties have significant freedom to choose between one or more court systems and arbitration. If the parties agree to resolve their disputes with binding arbitration, nations with significant international trade and investment activity commonly will enforce the arbitration clause and the subsequent arbitration award.”).

133. See William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 42 (2019).

134. *Id.* at 43.

135. See Erin A. O’Hara & Peter B. Rutledge, *Arbitration, The Law Market, and The Law of Lawyering*, 38 INT’L REV. L. & ECON. 87, 90 (2014) (If, as a practical matter, several jurisdictions, both within the United States and abroad, have deliberately liberalized their home legal regimes, including their lawyer licensing rules, in order to market themselves as more “arbitration friendly,” then surely the same concept could apply to arbitration houses liberalizing their rules to adopt a new system that makes explicit the rules governing arbitration agreements absent express choice by the parties.).

136. See Kimberly Chen Nobles, *Emerging Issues and Trends in International Arbitration*, 43 CAL. W. INT’L L.J. 77, 107 (2012).

137. *Id.* at 108.

3. *The House Default Rule: Safeguarding Privately Created Rights by Solidifying Arbitral Rules Governing Conflicts of Law Absent Party Choice*

While increasing competition between arbitral tribunals undoubtedly challenges houses to adopt express rules governing conflicts of laws absent party choice, parties may be concerned if the house is best suited to determine default rules<sup>138</sup> when the parties either intentionally or unintentionally fail to make it clear in their agreement. Since “arbitration is a creature of contract,”<sup>139</sup> the “disputes go to arbitration only with the consent of all parties to the dispute.”<sup>140</sup> Moreover, in international commercial arbitration, a fundamental principle regarding conflicts of law that has emerged is the arbitrators duty to respect the rights of the parties to identify the applicable law governing their agreement.<sup>141</sup> Therefore, critics of the proposal set forth here may say that unless significant public policy considerations exist,<sup>142</sup> arbitration houses should not interfere on the parties’ right to choose which law governs their agreement, even if that choice includes not making a call on a potential conflicts of law issue.

Although party autonomy reigns supreme in arbitration, the reason parties choose a specific arbitral house is that they believe that tribunal can best preside over their agreement.<sup>143</sup> In making that decision, parties are aware of the rules that each arbitration house has implemented. Because default rules can be opted out of by the parties through their contract, parties might resist allowing arbitrators to impose a house default rule onto them. However, if arbitration houses adopt express rules to govern conflicts of law absent party choice, the house is simply

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138. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 706 (1999) (“Default rules are those government-created rights and duties that are privatizable, rules that govern unless the parties contract out of them.”).

139. See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (“arbitration is a matter of contract”); *Sgouros v. Transunion Corp.*, 817 F.3d 1029, 1033 (7th Cir. 2016) (“As the Supreme Court repeatedly has emphasized, arbitration is a creature of contract.”); *First Liberty Inv. Group v. Nicholsberg*, 145 F.3d 647, 649 (3rd Cir. 1998) (“Arbitration is a creature of contract.”).

140. Ware, *supra* note 138, at 708–09.

141. See Cindy G. Buys, *The Arbitrators’ Duty to Respect the Parties’ Choice of Law in Commercial Arbitration*, 79 ST. JOHN’S L. REV. 59, 59 (2005) (“The right of the parties to themselves identify the law to apply and the obligation on arbitrators to respect that choice is the one overwhelming and truly international conflict of laws rule which [sic] has developed in international commercial arbitration.” (quoting JULIAN D.M. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 582 (1978))).

142. *Id.* at 70 (“Arbitrators do, however, have a duty to render an award that is enforceable. If the arbitrators render an award that is contrary to the public policy of the forum or of the place of enforcement, the award may be unenforceable, leaving the prevailing party without an adequate remedy.”).

143. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2856 (2015) (“Negotiating parties could design their own idiosyncratic procedures, select their decision makers, and stipulate remedies to suit their preferences. Arbitrators in turn derived their power from and owed their loyalties to the parties’ intent, rather than governing law.”).

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alerting parties that by choosing a particular tribunal, parties can still contract around all the other default rules of the contract except the house default rule that governs conflicts of law when party choice is not made clear.

While the new house default rule may be seen as too burdensome and an overplay by arbitration houses against the strong history of allowing parties to decide what they want to contract around, the truth is that “in theory, the law governing arbitration should supply the default provisions necessary to fill any gaps.”<sup>144</sup> In adopting this express rule, arbitration houses would effectively communicate to parties that if they do not make their choice of law clear to govern conflicts, the house has established a rule to remedy the issue. Similar to how “courts may need to require parties to announce at the outset of arbitration whether they are asserting any claims arising under mandatory law,”<sup>145</sup> so that it would “alert other parties to the risk of a motion to vacate for failure to apply the law and to the need for a record of the arbitration proceedings,”<sup>146</sup> the arbitration house would simply alert parties to the fact that by choosing this seat, an embedded house rule controls in the absence of party choice with respect to conflicts of law. In this sense, the arbitration house is forewarning parties that the tribunal already has a rule on the books to govern conflicts of law irrespective of whether the parties opted for or against determining how best to govern a conflicts issue.

There may be fear that imposition of a rule absent party choice judicializes<sup>147</sup> the arbitral forum, allowing the house to serve as the final legal body that reviews the agreement to determine if the parties made an express choice of law determination on conflicts. I disagree. The addition of the default house rule does not trump freedom of contract and does not interfere on party choice.<sup>148</sup> Here, however, the new rule is a default rule, and it is not designed to eliminate the default rules already agreed to by the parties to govern their contract. Instead, this rule permits freedom of contract to continue and only arises when parties have not made choice of law clear to govern conflicts of law for the arbitration. Additionally, the default rules that the parties set forth to govern their contract are not being subjected to

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144. See Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WM. & MARY BUS L. REV. 225, 249 (2011).

145. Ware, *supra* note 138, at 740.

146. *Id.*

147. See Wesley A. Sturges, *Arbitration – What Is It?*, 35 N.Y.U. L. REV. 1031, 1045 (1960) (“Sometimes arbitration is cited as being a ‘quasi-judicial tribunal’ and arbitrators as being ‘judges’ of the parties’ choosing, ‘judicial officers’ or officers exercising ‘judicial functions.’”).

148. Ware, *supra* note 138, at 739 (“The essence of a mandatory rule is that it trumps freedom of contract.”). Here, however, the new rule is a default rule, and it is not designed to eliminate the default rules already agreed to by the parties to govern their contract. Instead, this rule permits freedom of contract to continue and only arises when parties have not made choice of law clear to govern conflicts of law for the arbitration.

arbitral review.<sup>149</sup> In this instance, judicial review and arbitral review are interchangeable, in that the arbitration house is not functioning as a courthouse. Lastly, the arbitral tribunal is not applying mandatory public law to override the parties' contract because they did not choose how to govern conflicts of law issues.<sup>150</sup> Instead, the default house rule exists only to explain how the arbitration house proceeds if this situation arises. Whether the arbitration house opts for the seat of arbitration<sup>151</sup> to be the controlling standard or looks to see if the parties added an exclusive jurisdiction clause,<sup>152</sup> a house default rule will not inhibit the parties' freedom to contract in any way while simultaneously providing a clarifying standard that arbitration houses will follow.

#### 4. *Strengthening Dispute Resolution: The House Default Rule Fills the Gap*

As with any newly proposed rule, an overarching consideration must be whether the rule improves upon the current situation when parties do not make an express choice governing conflicts of law. History informs us that if the parties did not intend to make an express choice governing conflicts of law, then either one or both parties may have had a reason not to.<sup>153</sup> This type of default is referred to as a penalty default.<sup>154</sup> However, to repel this maneuver, two scholars suggested that "courts should choose defaults that are different from what the parties would have wanted."<sup>155</sup>

If courts can be called upon to counter the will of a more knowledgeable party seeking to hide information from the other, then this check can be extended to arbitration houses. Unlike courts, which would evaluate the merits of hiding the

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149. *Id.* ("Unless the agreement calls for it, arbitration claims arising under default rules should not be subject to judicial review for errors of law.").

150. *See generally* Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration*, 10 INT'L TAX & BUS. LAW. 59, 59 (1992) (explaining that "an arbitrator who decides to apply the mandatory rules of public law faces three problems: 1) party perception that mandatory rules of public law are an unnecessary interference with formation and performance of international contracts; 2) conflicts between the underlying public policy and the contracting parties' will; and 3) enforceability of the arbitration award.").

151. *See* ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* § 3–42 (4th ed. 2004) (discussing how in international commercial arbitration, gaps are filled by reference to the presiding arbitration law—normally that of the place of arbitration.).

152. *See* England and Whales Court of Appeal (Civil Division) Decisions, *supra* note 86 and Greenaway, *supra* note 100 (referencing the exclusive jurisdiction clause in *SulAmérica* and how it did not affect the parties' desire to arbitrate in a particular seat).

153. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 100 (1989) ("The knowledgeable party may not wish to reveal her information in negotiations if the information would give a bargaining advantage to the other side.").

154. *Id.* at 91 ("Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.").

155. *Id.* at 103.



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information on legal grounds, arbitration houses, as a-national bodies of law, can simply craft a default house rule that prevents this issue from occurring in the first place. In the case of a party that does not want its reasons known for failing to make an express choice of law determination on conflicts, the arbitration house can make a policy determination and say that “in some instances, a particular party may need to acquire certain types of information before contracting, so that forcing disclosure would have minimal disincentive effects.”<sup>156</sup> In adopting the house default rule, arbitration houses could “deter[] inefficient gaps at the least social cost,”<sup>157</sup> preserving party autonomy to contract with each other without subjugating both parties and the house itself to confusion in terms of which rule to apply when parties do not make a clear choice on laws governing conflicts.

Although the prevailing thought in arbitration is that party autonomy is sacrosanct, for arbitration houses to avoid unpredictability, filling in the gaps in rules is critical. Much like “courts need to establish ... rules for deciding when a contract is incomplete,”<sup>158</sup> arbitration houses should be determined to plug holes in their own rules. Doing so will create “‘safeharbors’ [sic] of contractual language”<sup>159</sup> that alert parties, both knowledgeable and lacking, to the simplicity and directness of arbitrating in a particular seat. This gap filling process will undoubtedly strengthen arbitration while simultaneously ensuring that the house respects party choice to contract out of anything besides the house default rule.

### CONCLUSION

Arbitration houses do not have rules when parties do not make an express choice on conflict of laws. The lack of rules adds to the chaotic nature and unpredictability of arbitral results. By compelling arbitration houses to adopt a house default rule on conflicts of laws absent party choice, arbitration houses can flesh out a uniform rule, increase competition amongst the other arbitration houses, protect party autonomy, and bring stability to the arbitration rules governing conflicts of laws.

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156. *Id.* at 107.

157. *Id.* at 98.

158. *Id.* at 119.

159. *Id.* at 123.