SUBMISSION TO THE PUBLIC CONSULTATION ON PROPOSED AMENDMENTS TO THE 2013 HKIAC ADMINISTERED ARBITRATION RULES

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I INTRODUCTION

'Flexibility is certainly one of the reasons for which parties choose arbitration, but "flexibility" means procedural flexibility relating to how the arbitration is run, and surely not flexibility or arbitrariness in substantive outcomes. Parties do not choose arbitration because of its flexibility in the determination of which party wins.'[1]

International commercial arbitration is renowned for its flexible procedure. But what if arbitrators could resolve disputes by simply asking themselves, 'who should win?' Would this be a fair way to resolve international commercial disputes? And would this be consistent with the commercial imperatives of parties who choose international commercial arbitration as a tool for managing their business risk?

My submission to the HKIAC's public consultation on proposed amendments to the HKIAC Rules 2013 asks these very questions. It addresses an existing feature of the HKIAC Rules 2013, proposed to be carried over into the amended rules – its approach to conflicts of laws.

[1] Simon Greenberg, 'The Law Applicable to the Merits in International Arbitration' (2004) 8 *Vindobona Journal of International Commercial Law and Arbitration* 315, 335.

The HKIAC opened this public consultation on 29 August 2017, and in doing so, identified three key principles of the existing HKIAC Rules 2013 – their 'light touch' approach, their innovative contributions to arbitral practice, and their market-leading status.[2] The recommendations contained in my submission – based on research underpinning my 2017 Oxford University Press text, *Conflict of Laws and Arbitral Discretion*[3] – are consistent with these key principles.

Given the importance of certainty in the conflict of laws to outcomes in arbitration, and to the interests of arbitrating parties, my submission recommends that the proposed Art. 36(1) HKIAC Rules be amended as follows:

> The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. ~~Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.~~ Failing such designation by the parties, the arbitral tribunal shall apply the rules of law with which the case is most closely connected. It shall be presumed that the case is most closely connected with the country where the party who is to effect characteristic performance of the contract had its habitual residence, at the time of contracting. This presumption shall be disregarded if it appears from the circumstances as a whole that the case is clearly more closely connected with another country.

The conflict of laws is a notoriously difficult and technical area of State court procedure;[4] and has a similar reputation in arbitration.[5] It must also be acknowledged that the perspective I bring to this issue is principally academic. Nevertheless, my submission's proposal is important, having very real and very practical consequences for arbitrating parties. As Marc Blessing explained in 1997, in a passage as relevant now as it has ever been:

> These questions may sound academic and may seem to be of interest for professors only, but as a practitioner I can say that they are not. They are questions of crucial practical significance because, depending on their answer, they may sometimes directly determine the outcome of a case. And because this is so, these questions need to be examined and handled very carefully.[6]

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[2] Hong Kong International Arbitration Centre, *Public Consultation Process on Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules* (29 August 2017) Revision of the 2013 Administered Arbitration Rules <http://www.hkiac.org/news/revision-2013-administered-arbitration-rules>.

[3] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion – The Closest Connection Test* (Oxford University Press, 2017).

[4] William Prosser, 'Interstate Publication' (1952 – 1953) 51 *Michigan Law Review* 959, 971.

[5] Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2617.

[6] Marc Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14(2) *Journal of International Arbitration* 39, 49.

II KEY TERMS AND DEFINITIONS

Before addressing the proposed HKIAC Rules, and the specifics of my submission, it is useful to clarify the meanings of some key terms.

The literature, and the case law, often treat the phrases choice of law and conflict of laws as interchangeable.[7] Nevertheless, it is important to appreciate that the governing substantive law can be identified by one of two distinct means[8] in international commercial arbitration – party choice of law, or arbitrators' own identification of the governing law. Different processes attach to each – this is a necessary consequence of the two means being fundamentally different in their nature.

My submission treats the term choice of law as referring to *party* choice of the governing substantive law, and uses the term conflict of laws to describe *arbitrators* identifying the law to be applied. My submission is specifically concerned with the conflict of laws, as just defined. It therefore addresses the last sentence of the proposed Art. 36(1) HKIAC Rules.

While choice of law is the norm in international commercial arbitration,[9] and while many cases in arbitration will ultimately turn on their facts,[10] conflicts of laws processes still have significant importance for commercial parties – as addressed in Parts V and VI below.

[7] See, eg, Simon Greenberg, 'The Law Applicable to the Merits in International Arbitration' (2004) 8 *Vindobona Journal of International Commercial Law and Arbitration* 315, 315; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 565 [71].

[8] In some cases, both – Benjamin Hayward, *Conflict of Laws and Arbitral Discretion – The Closest Connection Test* (Oxford University Press, 2017) 16 – 18 [1.29] – [1.35].

[9] For collected ICC choice of law statistics spanning 1990 to 2015 – see Benjamin Hayward, *Conflict of Laws and Arbitral Discretion – The Closest Connection Test* (Oxford University Press, 2017) 19 – 25 [1.37] – [1.46]. The HKIAC's case statistics reports for 2009 to 2016 do not disclose the incidence of choice of law clauses in HKIAC arbitration – Hong Kong International Arbitration Centre, *Statistics* (2017) At a Glance <http://www.hkiac.org/about-us/statistics>.

[10] Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2617; Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 375 – 376 [6.75].

III THE CONFLICT OF LAWS POSITION TAKEN UNDER THE PROPOSED AMENDED HKIAC ADMINISTERED ARBITRATION RULES

Application of the governing law in arbitration is a matter going to the substance of the dispute; though identifying a particular law as governing in the first place is a procedural issue.[11] As such, most (but not all)[12] institutional arbitration rules address identification of the governing substantive law. In the proposed HKIAC Rules, it is Art. 36(1) HKIAC Rules which sets out the relevant procedure. According to that provision:

> The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

The final sentence of this provision embodies a conflict of laws procedure known as the *voie directe*. Literally translating to 'the direct path',[13] a *voie directe* procedure allows arbitrators to directly apply any law determined appropriate.[14] Conflict of laws rules may be used by arbitrators as a matter of discretion, though their use is not required.[15] In this sense, *voie directe* provisions – such as the proposed Art. 36(1) HKIAC Rules – embody the 'widest possible discretion',[16] and 'could hardly be more liberal'.[17]

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[11] Jeffrey Waincymer, 'International Arbitration and the Duty to Know the Law' (2011) 28 *Journal of International Arbitration* 201, 207.

[12] Of the institutional arbitration rules surveyed in my book, several examples were identified. The *CIETAC Rules 1989*, *DIA Rules 1990*, *JCAA Rules 1997*, *JCAA Rules 1992*, and the *SCC Rules 1988* contained no provisions addressing private international law – that is, no provisions addressing choice of law or the conflict of laws. The *CIETAC Rules 2005*, *CIETAC Rules 2000*, *CIETAC Rules 1998*, *CIETAC Rules 1995*, *CIETAC Rules 1994*, *Czech Rules 2015*, *Czech Rules 2012*, *Franco-Arab Rules 2005*, *KLRCA Fast Track Rules 2010*, *SIAC Rules 2007*, *SIAC Rules 1997*, and the *SIAC Rules 1991* contained provisions addressing the law's application, but did not set out conflict of laws methodologies.

[13] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion – The Closest Connection Test* (Oxford University Press, 2017) 65 [2.35].

[14] Linda Silberman and Franco Ferrari, 'Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Sellier European Law Publishers, 2011) 257, 265.

[15] Marc Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14(2) *Journal of International Arbitration* 39, 55; *ICC Case No. 11754 / 2003* (2010) 21 *ICC Bulletin Supplement* 20, 24 [29].

[16] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) 866 [1538].

[17] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) 867 [1540].

IV THE CONFLICT OF LAWS POSITIONS TAKEN UNDER CURRENT AND PAST VERSIONS OF THE HKIAC RULES, AND UNDER THE UNCITRAL RULES

As identified in Part I of my submission, the proposed Art. 36(1) HKIAC Rules carries forward the conflict of laws methodology currently found in Art. 35(1) HKIAC Rules 2013. Aside from the proposed provision's postponed number, it is a verbatim reproduction of the existing Art. 35(1) HKIAC Rules 2013:

> The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

Like the proposed Art. 36(1) HKIAC Rules, Art. 35(1) HKIAC Rules 2013 embodies a *voie directe* methodology, conferring the broadest discretion possible upon tribunals in identifying the governing law.

Before 2013, however, a very different approach was taken, under Art. 31(1) HKIAC Rules 2008. Instead of conferring a broad discretion upon arbitrators to directly choose a governing law, Art. 31(1) HKIAC Rules 2008 required arbitrators to apply a specific conflict of laws rule – the closest connection test:

> The arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.

Under the closest connection test, arbitrators identify and weigh factors connecting a case to the various jurisdictions and laws at issue, and apply the most closely connected law.[18] In this way, arbitrators are said to apply a law that is consistent with the parties' reasonable expectations.[19]

The UNCITRAL Rules 2010[20] adopt a *voie directe* methodology, like Art. 35(1) HKIAC Rules 2013. According to Art. 35(1) UNCITRAL Rules 2010:

> The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

[18] Peter Burckhardt and Philipp Groz, 'The Law Governing the Merits of the Dispute and Awards *ex Aequo et Bono*' in Elliott Geisinger, Nathalie Voser and Angelina Petti (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer, 2nd ed, 2013) 153, 166 – 167.

[19] Peter Burckhardt and Philipp Groz, 'The Law Governing the Merits of the Dispute and Awards *ex Aequo et Bono*' in Elliott Geisinger, Nathalie Voser and Angelina Petti (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer, 2nd ed, 2013) 153, 168.

[20] Noting that no relevant amendments were made in 2013, as a result of the promulgation of the UNCITRAL Rules 2013, through the introduction of Art. 1(4) UNCITRAL Rules 2013.

There is one key difference between this provision, and Art. 35(1) HKIAC Rules 2013, concerning conflicts of laws. The latter permits arbitrators to apply 'rules of law', while Art. 35(1) UNCITRAL Rules 2010 only authorises arbitrators to apply 'law' when resolving conflicts of laws. The phrase 'rules of law', as opposed to 'law', is wider – it is well-understood as a 'coded reference' allowing arbitrators to apply non-national systems of rules, as well as State law.[21]

Art. 35(1) UNCITRAL Rules 2010 departed from the position originally taken under the UNCITRAL Rules 1976.[22] Under Art. 33(1) UNCITRAL Rules 1976, arbitrators were required to apply a conflict of laws rule, but had free choice over the rule that was to be applied. When moving away from this position in 2010, UNCITRAL also considered the closest connection test as a possible option, though ultimately decided against that methodology.[23] Art. 33(1) UNCITRAL Rules 1976 provided:

> The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Although conferring significant discretion, this discretion is not as wide as that embodied in the *voie directe*. As Born explains, there is free choice as to the conflict of laws rule used, though some conflict of laws rule must still be applied.[24] In addition, as under Art. 35(1) UNCITRAL Rules 2010, arbitrators were limited to applying law – precluding the arbitrators' application of non-national systems of rules.

V CERTAINTY IN THE CONFLICT OF LAWS – IMPORTANCE TO THE OUTCOME IN ARBITRATION

My submission's proposal regarding Art. 36(1) HKIAC Rules would replace its 'widest possible discretion'[25] with the closest connection test. As a specific conflict of laws rule, this formulation would implicate a significantly more certain methodology (and relatively more certain results) than the proposed *voie directe* approach. This is particularly so given its use of the characteristic performance presumption – as seen, for example, in Art. 4(2) Rome Convention.

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[21] Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 216 [3.189].

[22] Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013) 395 [35.3].

[23] It was felt that adopting the closest connection test risked implying that contracts could be governed by only one law – Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013) 396 – 397 [35.4] – [35.5].

[24] With respect to Art. 28(2) Model Law 2006, embodying the same conflict of laws procedure – Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2633 – 2634.

[25] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) 866 [1538].

Certainty in the conflict of laws is important, because outcomes in arbitration can differ depending on the law applied. This phenomenon should not be overstated; the Redfern and Hunter text estimates that 'perhaps' 60% to 70% of arbitrations turn on their facts.[26] Nevertheless, in the right case, conflicts decisions can 'so dramatically change the legal situation facing a party that it has lost the case before the arbitration is properly underway'.[27]

Why should it be that an arbitration's outcome can be affected by the exercise of an unconstrained, and effectively unreviewable, discretion? In an extreme case, this would be tantamount to arbitrators simply asking themselves, 'who should win?' There are scores of legal issues that may be decided differently, depending on the law applied. A paradigm example is prescription; Binder cites statutes of limitations as an example of rules 'chang[ing] considerably from one law to another'.[28]

Statutes of limitation were at issue in *ICC Case No. 7375 / 1996*,[29] an excellent illustration of the stakes involved where uncertainty exists as to the governing law. A dispute had arisen in relation to a contract between the Government of Iran (the claimant) and the Westinghouse Electric Corporation (the respondent). Westinghouse argued that the statute of limitations had expired. Westinghouse argued that Maryland law governed the issue, implicating a four year limitation period.[30] On the other hand, the Government of Iran argued that Iranian law was governing, and that no relevant limitation period existed under that law.[31] If Iran's argument were to succeed, its claim would proceed to a full hearing on the merits – while if Westinghouse's argument was accepted, the claim would fail before it was even able to be heard.

Though illustrating the importance of conflicts decisions to substantive outcomes in arbitration, this case also illustrates the difficulties of discretion in the conflict of laws. The majority award, applying a choice of law analysis, found that general principles of law governed the prescription issue.[32] However, the majority also undertook an *excursus* into conflicts of laws, and found that (had it adopted a conflict of laws approach) the law of Maryland would have applied.[33] The dissenting arbitrator's conflict of laws analysis would have led to the application of Iranian law.[34]

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[26] Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 375 – 376 [6.75].
[27] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd ed, 2010) 336 [6-011].
[28] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd ed, 2010) 336 [6-011].
[29] *ICC Case No. 7375 / 1996* (1996) 11(12) *Mealey's International Arbitration Report* A-1.
[30] *ICC Case No. 7375 / 1996* (1996) 11(12) *Mealey's International Arbitration Report* A-1, A-29 [218].
[31] *ICC Case No. 7375 / 1996* (1996) 11(12) *Mealey's International Arbitration Report* A-1, A-29 [218].
[32] *ICC Case No. 7375 / 1996* (1996) 11(12) *Mealey's International Arbitration Report* A-1, A-37 – A-38 [289] – [290].
[33] *ICC Case No. 7375 / 1996* (1996) 11(12) *Mealey's International Arbitration Report* A-1, A-32 – A-35 [242] – [272].
[34] *ICC Case No. 7375 / 1996* (1996) 11(12) *Mealey's International Arbitration Report* A-1, A-66 – A-67 [85] – [87] & A-69 [95].

A further illustration of the importance of conflicts of laws to outcomes in arbitration is given by the *Second Interim Award* in *ICC Case No. 4145 / 1984*.[35] The parties had included a choice of law clause in their contract, though it was not definitive – it provided that '[t]he validity and construction of this Agreement shall be governed by the laws of the Canton of Geneva, Switzerland or [Middle Eastern] country X, or both'.[36] The selection between Swiss law and the law of Middle Eastern country X was material – country X's law might have invalidated the contract for alleged corruption, while Swiss law would not do so.[37]

Like *ICC Case No. 7375 / 1996*, this case also demonstrates the difficulty of highly discretionary approaches to conflicts of laws. The Tribunal ultimately applied Swiss law, adopting the validation principle as a conflict of laws rule.[38] On the other hand, the closest connection test (on the defendant's argument) would have led to the laws of country X.[39]

My submission's proposal would make the conflict of laws process more certain in HKIAC arbitration, by establishing a specific conflict of laws rule for arbitrators to apply. This is appropriate, given that outcomes stand to be affected by the exercise of conflicts discretions – as are currently embodied in the proposed Art. 36(1) HKIAC Rules.

VI CERTAINTY IN THE CONFLICT OF LAWS – IMPORTANCE TO THE PARTIES IN ARBITRATION

Parties to international commercial arbitrations have an obvious interest in the outcomes of their disputes. However, certainty in the conflict of laws is also important to arbitrating parties in other ways – relating to their motivations for choosing arbitration.

Parties are said to prefer arbitration as an international dispute resolution mechanism for a variety of reasons. For example, the Redfern and Hunter text identifies neutrality and enforcement as 'two reasons of prime importance';[40] with flexibility, confidentiality, the powers of arbitrators, and continuity of the arbitral role being 'additional reasons'.[41] Studies conducted by the School of International Arbitration at Queen Mary University of London have identified (on an empirical basis) factors motivating parties to arbitrate. These studies also identify procedural flexibility as amongst the key attractions of arbitration.[42]

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[35] *Second Interim Award* in *ICC Case No. 4145 / 1984* (1987) XII YBCA 100.
[36] *First Interim Award* in *ICC Case No. 4145 / 1983* (1987) XII YBCA 99, 99 [1].
[37] *Second Interim Award* in *ICC Case No. 4145 / 1984* (1987) XII YBCA 100, 100 [10].
[38] *Second Interim Award* in *ICC Case No. 4145 / 1984* (1987) XII YBCA 100, 101 [15] – [17].
[39] *First Interim Award* in *ICC Case No. 4145 / 1983* (1987) XII YBCA 99, 99 [5].
[40] Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 28 [1.97].
[41] Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 30 [1.103]. See generally 30 – 31 [1.104] – [1.107].
[42] School of International Arbitration, *Pre-Empting and Resolving Technology, Media and Telecoms Disputes – International Dispute Resolution Survey* (2016) 26 <http://www.arbitration.qmul.ac.uk/docs/189659.pdf>; School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015) 6 <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>; School of International Arbitration, *Corporate Choices in International Arbitration: Industry Perspectives* (2013) 8 <http://www.arbitration.qmul.ac.uk/docs/123282.pdf>; School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2006* (2006) 6 – 7 <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>.

Arbitration's procedural flexibility is a point of sharp contrast against litigation in State courts, involving 'fixed procedural rules'.[43] However, the procedural flexibility of international commercial arbitration must be differentiated from flexibility regarding the substance of the parties' dispute – their (business) reason for coming to arbitration. As Born suggests, parties might actually choose arbitration as a dispute resolution mechanism precisely because they want 'enhanced certainty' over their substantive legal rights – a 'stable substantive legal regime'.[44] This does not necessarily conflict with party desires for flexible frameworks of procedure.

As explained in Part III, identifying the governing substantive law is a procedural function. However, since the eventual application of that law goes to the substance, it might fairly be said that the entire issue implicates 'grey areas at the margin'.[45] The conflict of laws is an area where some tension exists between party interests in flexible procedure, and in stable substantive legal rights.

A more certain process for resolving arbitral conflicts of laws will – to a small degree – impair arbitration's procedural flexibility. The (small) extent to which this impacts upon the HKIAC's 'light touch' approach to arbitration[46] justifies careful scrutiny of my submission. However, the benefits to parties of more certain substantive legal rights outweigh any detriment arising from this small reduction in the flexibility of arbitral procedure. The conflict of laws represents only one fraction of arbitral procedure as a whole. But in addition to conflicts of laws questions affecting legal outcomes in arbitration (addressed in Part V), they also impact upon how parties perform their contractual obligations in the first place, their decision-making around settlement, and their ability to present and argue their cases in arbitration.[47] All three of these matters would be improved for parties, should conflicts of laws processes be more certain in HKIAC arbitration.

As explained by Greenberg, in the quotation opening my submission, arbitration's flexibility advantage refers to 'procedural flexibility relating to how the arbitration is run, and surely not flexibility or arbitrariness in substantive outcomes'.[48] By proposing a closest connection test for conflicts of laws in HKIAC arbitration, my submission seeks to re-calibrate arbitration's flexibility to address this concern.

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[43] Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 30 [1.104].
[44] Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2616.
[45] Jeffrey Waincymer, 'International Arbitration and the Duty to Know the Law' (2011) 28 *Journal of International Arbitration* 201, 207.
[46] Hong Kong International Arbitration Centre, *Public Consultation Process on Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules* (29 August 2017) Revision of the 2013 Administered Arbitration Rules <http://www.hkiac.org/news/revision-2013-administered-arbitration-rules>.
[47] See generally Benjamin Hayward, *Conflict of Laws and Arbitral Discretion – The Closest Connection Test* (Oxford University Press, 2017) 25 – 42 [1.47] – [1.85].
[48] Simon Greenberg, 'The Law Applicable to the Merits in International Arbitration' (2004) 8 *Vindobona Journal of International Commercial Law and Arbitration* 315, 335.

VII PROPOSAL AND CONCLUSION

'Given the current confusion regarding the choice of the applicable law in international arbitration it is useful to consider the future direction of choice-of-law analysis … [I]t is important to recognize that the choice-of-law analyses of existing authorities have produced uncertainty and unpredictability, which is inconsistent with the objectives of the international arbitral process, and that a measure of rethinking is necessary.'[49]

The *voie directe* methodology reflected in the proposed Art. 36(1) HKIAC Rules, and in the existing Art. 35(1) HKIAC Rules 2013, is the prevailing approach to conflicts of laws in international commercial arbitration.[50] This does not necessarily mean that it should be preferred. Popularity may 'militate for, rather than against … replacement' where an existing legal structure is '*both* dominant *and* "bad", or at least not good enough'.[51]

My submission has argued that the closest connection test is a preferable conflicts methodology to embody in the proposed Art. 36(1) HKIAC Rules. By narrowing arbitrators' discretions in identifying the governing law, the closest connection test increases certainty in the conflict of laws. This certainty is important to outcomes in arbitration, as well as to the parties themselves.

On this basis, the wording of the proposed Art. 36(1) HKIAC Rules should be amended as follows:

> The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. ~~Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.~~ Failing such designation by the parties, the arbitral tribunal shall apply the rules of law with which the case is most closely connected. It shall be presumed that the case is most closely connected with the country where the party who is to effect characteristic performance of the contract had its habitual residence, at the time of contracting. This presumption shall be disregarded if it appears from the circumstances as a whole that the case is clearly more closely connected with another country.

In my submission's opening remarks, three key principles of the HKIAC Rules 2013 were referred to – their 'light touch' approach, their innovative contributions to arbitral practice, and their market-leading status.[52] My submission is consistent with maintaining these principles. The closest connection test is innovative. Its adoption would break from existing orthodoxy, in favour of a position similar to the one previously taken under Art. 31(1) HKIAC Rules 2008. In this sense, its adoption would reflect the kind of 'rethinking' in the conflict of laws advocated by Born.[53]

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[49] Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2656.
[50] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion – The Closest Connection Test* (Oxford University Press, 2017) 58 – 73 [2.22] – [2.52].
[51] Symeon Symeonides, 'A New Conflicts Restatement: Why Not?' (2009) 5 *Journal of Private International Law* 383, 397 (emphasis in original).
[52] Hong Kong International Arbitration Centre, *Public Consultation Process on Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules* (29 August 2017) Revision of the 2013 Administered Arbitration Rules <http://www.hkiac.org/news/revision-2013-administered-arbitration-rules>.
[53] Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2656.

Furthermore, my submission is consistent with the HKIAC's rules being recognised as light touch, and market-leading. Switzerland – a jurisdiction renowned for its light touch approach to arbitration, and its market-leading status – adopts the closest connection test in both Art. 187(1) Swiss Private International Law Act 1987, and in Art. 33(1) Swiss Rules 2012. No damage has been done to Switzerland's reputation as a 'strong seat[…]'[54] by these provisions' embodiment of this conflict of laws methodology.

The HKIAC's consultation paper notes that the Rules Revision Committee 'does not contemplate a wholesale revision' of the HKIAC Rules 2013.[55] My submission's recommendation represents a small, but important, change – one that stands to benefit the parties to HKIAC arbitrations, and in doing so, stands to benefit the HKIAC itself.

[54] Loukas Mistelis, 'Arbitral Seats – Choices and Competition' in Stefan Kröll et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution – Liber Amicorum Eric Bergsten* (Kluwer, 2011) 363, 379.

[55] Hong Kong International Arbitration Centre, *Public Consultation Process on Proposed Amendments to the 2013 HKIAC Administered Arbitration Rules* (29 August 2017) Revision of the 2013 Administered Arbitration Rules <http://www.hkiac.org/news/revision-2013-administered-arbitration-rules>.