SUBMISSION TO THE *ACICA RULES* REVISION CONSULTATION 2020

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I INTRODUCTION

'Parties often choose international arbitration to resolve their disputes because they desire enhanced certainty and predictability concerning their legal rights.'[1]

The Australian Centre for International Commercial Arbitration ('ACICA') is currently undertaking a public consultation process regarding amendments to its arbitration rules (the '*ACICA Rules*').[2] The *ACICA Rules* Committee[3] has released the *ACICA Rules 2020 Consultation Draft* (current as at 6 April 2020),[4] incorporating proposed changes to the existing *ACICA Rules 2016*, for public comment.[5] This Submission has been prepared for the purpose of this consultation process.

A range of cutting-edge subject-matters reflected in the currently-proposed changes to the *ACICA Rules 2016* will inevitably be analysed in other contributions to this consultation. Amongst other things, the *ACICA Rules 2020 Consultation Draft* (as it currently stands):

[1] Gary Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 2616.
[2] Australian Centre for International Commercial Arbitration, '*ACICA Rules* Revision Consultation 2020', *Arbitration* <https://acica.org.au/acica-rules-revision-consultation/>.
[3] Australian Centre for International Commercial Arbitration, '*ACICA Rules* Committee', *ACICA* <https://acica.org.au/acica-rules-committee/>.
[4] Australian Centre for International Commercial Arbitration, '*ACICA Rules 2020 Consultation Draft* (current as at 6 April 2020)' <https://acica.org.au/wp-content/uploads/2020/07/ACICA-Arbitration-Rules-Consultation-Draft.pdf>.
[5] Australian Centre for International Commercial Arbitration, '*ACICA Rules* Revision Consultation 2020' (n 2).

- aspirationally[6] clarifies that ACICA 'is the only body authorised to administer arbitrations under the *ACICA Arbitration Rules*';[7]
- confirms that ACICA will be the administering organisation where the *ACICA Rules* are used, or where ACICA arbitration is chosen;[8]
- makes provision regarding party communications to the Tribunal, and the role of the Secretariat;[9]
- provides for the Secretariat's role in confirming Arbitrators nominated by the parties;[10]
- significantly amends the existing consolidation rules;[11]
- amends the existing joinder rules;[12]
- provides for single arbitrations dealing with multiple contracts;[13]
- specifically integrates ADR mechanisms within the arbitral process;[14]
- provides for the early dismissal of claims;[15]
- adapts the *ACICA Rules'* confidentiality provisions to accommodate third party funding arrangements;[16]
- sets out a time period for the rendering of final awards;[17]
- addresses (in detail) costs of the arbitration;[18] and
- addresses third party funding.[19]

Rather than comment on these matters, this Submission addresses how the *ACICA Rules 2020 Consultation Draft* regulates identification of the substantive law governing the merits of the dispute. For the sake of clarity, it is noted that this Submission does not address other applicable law issues that may arise in international commercial arbitration,[20] including identification of the substantive law governing the parties' arbitration agreement.

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[6] Australian Centre for International Commercial Arbitration, 'ACICA Webinar: Launch of *ACICA Rules* Revision Consultation' (Webinar Recording, 5 August 2020) <https://www.youtube.com/watch?v=G1qRU3fIBls&feature=emb_logo> 00:11:31.

[7] Art. 1.2 *ACICA Rules 2020 Consultation Draft*.

[8] Art. 2.1 *ACICA Rules 2020 Consultation Draft*.

[9] Art. 5 *ACICA Rules 2020 Consultation Draft*.

[10] Arts. 12.1, 13.1, 14 *ACICA Rules 2020 Consultation Draft*.

[11] Art. 16 *ACICA Rules 2020 Consultation Draft*.

[12] Art. 17 *ACICA Rules 2020 Consultation Draft*.

[13] Art. 18 *ACICA Rules 2020 Consultation Draft*.

[14] Arts. 24.3, 24.4, 54–5 *ACICA Rules 2020 Consultation Draft*.

[15] Art. 24.7 *ACICA Rules 2020 Consultation Draft*.

[16] Art. 25.2(f) *ACICA Rules 2020 Consultation Draft*.

[17] Art. 38.3 *ACICA Rules 2020 Consultation Draft*.

[18] Arts. 47–50 *ACICA Rules 2020 Consultation Draft*.

[19] Art. 53 *ACICA Rules 2020 Consultation Draft*.

[20] Benjamin Hayward, 'Paying Attention to Choice of Law in International Commercial Arbitration – or – Why the Conflict of Laws Always Matters' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 151, 151–2.

II IDENTIFICATION OF THE APPLICABLE SUBSTANTIVE LAW UNDER THE *ACICA RULES 2020 CONSULTATION DRAFT*

'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.'[21]

This Submission's focus on the governing substantive law is adopted for very good reason. The *ACICA Rules* Committee has expressed that in some respects it 'didn't have our work cut out for us', as the *ACICA Rules 2016* constitute a 'tried and tested product'.[22] The *ACICA Rules 2020 Consultation Draft* does not propose any changes to the *ACICA Rules 2016's* applicable law provision. Nevertheless, applicable law issues warrant serious consideration by the *ACICA Rules* Committee as a result of their significant practical implications.

Parties fail to choose the governing substantive law in a significant number of cases. 12% of International Chamber of Commerce ('ICC') cases in 2019 did not involve an express party choice of law in their relevant contract/s.[23] This figure is broadly consistent with historic ICC choice of law data,[24] and there is good reason to believe that this ICC data is representative of international commercial arbitration practice in general.[25] Whether or not parties choose the governing substantive law, its identification is practically very important because arbitration is a process conducted in accordance with law.[26] The governing law's identification stands to affect the determination of party rights and obligations, performance of the parties' contract, the parties' ability to present and argue their cases, and their settlement negotiations.[27]

Art. 42 *ACICA Rules 2020 Consultation Draft*, unchanged as compared to the existing Art. 39 *ACICA Rules 2016*, addresses the applicable law. This provision is currently cast in the following terms:

> **Art. 42: Applicable Law, *Amiable Compositeur***
>
> 42.1 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 rules of law which it considers applicable.
>
> 42.2 The Arbitral Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have, in writing, expressly authorised the Arbitral Tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
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> 42.3 In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

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[21] Marc Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14(2) *Journal of International Arbitration* 39, 49.
[22] Australian Centre for International Commercial Arbitration, 'ACICA Webinar' (n 6) 00:06:09.
[23] International Chamber of Commerce, *ICC Dispute Resolution 2019 Statistics* (ICC, 2020) 15.
[24] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, 2017) 21–4 [1.42]–[1.44].
[25] Ibid 20–1 [1.40]–[1.41].
[26] Born (n 1) 2657.
[27] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 24–42 [1.47]–[1.85].

This Submission's recommendations specifically address Art. 42.1 *ACICA Rules 2020 Consultation Draft*. As demonstrated in Part III, there are two separate respects in which this provision is capable of being improved.

III ANALYSIS: ART. 42.1 *ACICA RULES 2020 CONSULTATION DRAFT* IS BOTH TOO WIDE AND TOO NARROW

'Thus, the Restatement's large numerical following turns out to militate for, rather than against, its replacement because the Restatement is both *dominant* and *"bad", or at least not good enough.'*[28]

Art. 42.1 *ACICA Rules 2020 Consultation Draft* is broadly consistent with current international practice.[29] This does not, however, mean that it embodies an optimal solution for identifying the governing substantive law. The popularity of its approach actually militates for, rather than against, its revision as it embodies two separate defects. First, the discretion that Art. 42.1 *ACICA Rules 2020 Consultation Draft* confers upon Arbitrators is too wide. Secondly, that provision also fails to expressly recognise the overlap between party choice of law and Arbitrators' own determination of the governing law.

A *Art. 42.1 ACICA Rules 2020 Consultation Draft is Too Wide: The Extent of its Discretion*

Art. 42.1 *ACICA Rules 2020 Consultation Draft* is too wide in the sense that it confers an undesirably wide discretion upon Arbitrators to identify the governing substantive law where the parties themselves have not done so.

Art. 42.1 *ACICA Rules 2020 Consultation Draft* reflects international practice, regarding this discretion, because it embodies the *voie directe*: 'the direct path' for Arbitrators' identification of the governing law.[30] Arbitrators have complete discretion when identifying the governing substantive law, including the ability to make a direct choice.[31] They are not required to use conflicts of laws rules, and if they do, they can use those rules in any way.[32] This approach can 'hardly be more liberal'.[33]

This provision might (at first glance) appear consistent with the light touch approach traditionally associated with ACICA arbitration. However, despite this traditional 'light touch' reputation, 'there has been a graduation accretion of … supervision of arbitrations' under the *ACICA Rules*.[34] According to the *ACICA Rules* Committee, the 'ethos' of the current revisions 'is continuing with the light touch, but gradually reflecting the store of knowledge that we've gained by administering arbitrations since 2006'.[35] A more constrained procedural framework for Arbitrators' identification of the governing substantive law is consistent with this ethos.

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[28] Symeon Symeonides, 'A New Conflicts Restatement: Why Not?' (2009) 5(3) *Journal of Private International Law* 383, 397.
[29] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 65–9 [2.35]–[2.40], 71–2 [2.49], 73 [2.51].
[30] Ibid 65 [2.35].
[31] Ibid.
[32] Ibid 65 [2.35], 102–4 [3.14]–[3.18].
[33] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer, 1999) 867 [1540].
[34] Australian Centre for International Commercial Arbitration, 'ACICA Webinar' (n 6) 00:03:31.
[35] Ibid 00:04:59.

The width of the discretion conferred upon Arbitrators via the *voie directe* makes that approach fundamentally flawed. A discretion allowing Arbitrators to apply any law, unguided by any criteria, encompassing the ability to voluntarily apply any conflicts rule (or not), is inconsistent with the 'enhanced certainty and predictability' sought by parties choosing to arbitrate.[36] That this is so is demonstrated by the following extreme, but still realistic, scenario: what if Arbitrators decided to simply apply 'the law that the members of the tribunal happen to know best'[37] when identifying the governing substantive law?

This is permitted by the *voie directe*,[38] but would be 'objectively inappropriate', and 'there is no effective means of redress' for such an exercise of arbitral discretion.[39] It is inappropriate for Arbitrators to identify the governing law in this way because 'it runs contrary to party expectations and intentions'.[40] There is no effective means of redress because the exercise of a Tribunal's conflicts discretion does not fall within any of the Art. 34 *Model Law 2006* annulment or Art. V *New York Convention* enforcement objection grounds.[41] Though Art. 34(2)(a)(iv) *Model Law 2006* and Art. V(1)(d) *New York Convention* encompass procedural defects, it is 'precisely' the parties' agreed-upon procedure 'which confers the broad discretion that has been exercised'.[42] It is hard to conceptualise the exercise of a *voie directe* conflicts discretion as erroneous in any event, as discretions (by their nature) implicate the exercise of judgment and liberty of choice.[43] Annulment and enforcement provisions treat exercises of conflicts discretions in the same way as the application of substantive law: no review on the merits is allowed.[44] This general principle against merits review is recognised internationally,[45] and is very firmly reflected in Australian law.[46]

In my doctoral research, I described this problem as a 'theoretical critique' of the *voie directe*.[47] Nevertheless, since conducting that research, evidence of this problem arising in actual arbitral practice has emerged. In *SCC Case Code 38/1993*,[48] published for the first time in 2017, a Stockholm Chamber of Commerce Tribunal elected to apply Swedish private international law and (via its closest connection test) determined that Chinese law applied.[49] However, the Arbitrators went on to explain:

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[36] Born (n 1) 2616.
[37] Giuditta Cordero-Moss, 'International Arbitration and the Quest for the Applicable Law' (2008) 8(3) *Global Jurist Advances* 2:1–42, 42.
[38] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 129 [3.84].
[39] Ibid 128 [3.82].
[40] Ibid 129 [3.84].
[41] Ibid 130–3 [3.86]–[3.89].
[42] Ibid 132 [3.89].
[43] Franz Schwarz and Christian Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer, 2009) 621 [24-046].
[44] Born (n 1) 2619–20, 2776.
[45] Ibid 3707–10.
[46] See, eg, *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, 439 [133]; *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792, 796 [12], 799 [27]; *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, 789 [8], 790 [17].
[47] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 128 [3.81].
[48] *SCC Case Code 38/1993* in Linn Bergman (ed), *Casebook on Choice of Law in Arbitration* (Landa, 2017) 31.
[49] Ibid 32–3.

> Another question is which principles that should be applied to the interpretation of the Agreement where Chinese statutory law is silent and where there is no information available to the arbitrators whether or to what extent there exists any generally accepted principles of construction in Chinese law. The Arbitrators will in such situations apply such principles of construction which they believe are reasonable, taking into account the principles and rules of the jurisdictions *with which they are acquainted*.[50]

As this award was rendered in 1993, these proceedings were likely conducted under the *SCC Rules 1988*, which contain no applicable law provision. In this context, the Tribunal effectively exercised its discretion to apply 'the law that the members of the tribunal happen to know best'.[51]

The exceptionally wide *voie directe* discretion can also be critiqued from an alternative perspective: equity arbitration. Recent scholarship has sought to reinvigorate equity proceedings in response to the over-judicialisation of international commercial arbitration.[52] Nevertheless, according to current international standards, arbitration as *amiable compositeur* or as *ex aequo et bono* is only permitted if specifically chosen by the parties.[53] This standard is reflected in Art. 42.2 *ACICA Rules 2020 Consultation Draft*. However, the practical effect of Art. 42.1 *ACICA Rules 2020 Consultation Draft's* discretion is to confer equity-like powers upon Arbitrators in all cases where the parties have not chosen the governing law. The following cautionary remarks of Greenberg reflect this concern:

> 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. The trend towards excessive flexibility is contrary to the trend away from giving arbitrators the right to decide as *amiable compositor* [sic] (based on fairness, not law). Normally, in order to decide in this way the parties must expressly authorise the arbitrator to do so. But when considering the discretion given to arbitrators to choose the substantive law – or the conflict of laws rules to lead to a certain law – the outcome on the merits is as influenced by the arbitrator's sense of fairness as though she/he were acting as *amiable compositor* [sic]. The law exists to limit the arbitrator's liberty of decision. Without a fixed procedure for determining the law, those limits are reduced.[54]

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[50] Ibid 33 (emphasis in original, but added by the original to the source award).

[51] Cordero-Moss (n 37) 42.

[52] See generally Nobumichi Teramura, *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration* (Kluwer, 2020); Nobumichi Teramura, '*Ex Aequo et Bono* and Arbitration Theories: An Arbitrator's Subjective Perspective of Fairness as the Final "Gap-Filler"' (2020) 38(2) *ASA Bulletin* 350; Nobumichi Teramura, 'The Strengths and Weaknesses of Arguments Pertaining to *Ex Aequo et Bono*' (2019) 15(2) *Asian International Arbitration Journal* 63; Nobumichi Teramura, '*Ex Aequo et Bono*: An Overlooked and Undervalued Opportunity for International Commercial Arbitration', *Kluwer Arbitration Blog* (Blog Post, 18 November 2018) <http://arbitrationblog.kluwerarbitration.com/2018/11/18/ex-aequo-et-bono-an-overlooked-and-undervalued-opportunity-for-international-commercial-arbitration/>.

[53] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 6 [1.09].

[54] Simon Greenberg, 'The Law Applicable to the Merits in International Arbitration' (2004) 8(2) *Vindobona Journal of International Commercial Law and Arbitration* 315, 335.

Thus, the *voie directe's* 'short-cut' may be 'one simplification too many', allowing a Tribunal to effectively use equity power 'for the conflicts issue'.[55] In this sense, the *voie directe's* discretion is 'scarcely consistent' with resolving disputes via application of the law,[56] notwithstanding its popularity in current arbitral practice.

Requiring Arbitrators to use a fixed conflicts rule – specifically, the closest connection test – is a comparatively superior approach. The closest connection test is sometimes voluntarily applied by Arbitrators in any event, and is a theme running throughout the literature on arbitral conflicts of laws.[57] It also constitutes part of the procedural *lex mercatoria*.[58] But most importantly, the closest connection test relates a Tribunal's conflicts analysis to the parties' case, and thereby 'seeks to ascertain the law that reasonable persons in the parties' positions would have identified'.[59] The closest connection test is thus consistent with party expectations.[60]

Nevertheless, and despite constituting a specific conflict of laws rule, the closest connection test is not devoid of all discretion. It is still capable of adaptation to the needs of any particular case. Given that Arbitrators must seek the law having the closest connection to the case, discretion remains in both selecting and weighing the relevant connecting factors.[61] Furthermore, applying the closest connection test does not foreclose the ability of Arbitrators to apply different laws to different parts of a contract, or the *lex mercatoria*, in rare cases where this might be appropriate. This is confirmed by Swiss law, and in relation to the *lex mercatoria's* application, simply requires that the relevant conflicts rule seeks the closest connection with rules of law (as opposed to just law).[62]

It is true that a minority of jurisdictions' arbitral laws (and institutions' rules) adopt the closest connection test.[63] This does not, however, diminish the test's importance.[64] The closest connection test is adopted in both Art. 187(1) *Swiss Private International Law Act*, and in Art. 33(1) *Swiss Rules 2012*. Switzerland is one of the world's most important arbitral seats,[65] and its more restrictive conflicts approach has not in any way damaged that standing.

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[55] Johan Erauw and Maud Piers, 'The Law Applicable to the Substantive Rights in Arbitration Under European Regulations and Draft Regulations' in CEPANI (ed), *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI, October 15, 2004* (Bruylant, 2005) 174, 181.

[56] A.J.E. Jaffey, 'Arbitration of International Commercial Contracts: The Law to be Applied by the Arbitrators' in David Perrott and Istvan Pogany (eds), *Current Issues in International Business Law* (Avebury, 1988) 129, 133.

[57] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 188 [5.03].

[58] Ibid 188–9 [5.03]. See, eg, Arts. XIV.2(b)–(d) *Trans-Lex Principles*; cf Art. XIII.4.1(b) *Trans-Lex Principles*.

[59] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 212 [5.55].

[60] 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.

[61] Ibid 167.

[62] Ibid.

[63] Hayward, *Conflict of Laws and Arbitral Discretion* (n 24) 63–5 [2.30]–[2.34].

[64] Ibid 72 [2.50].

[65] See, eg, International Chamber of Commerce (n 23) 14, 28; School of International Arbitration, '2018 International Arbitration Survey: The Evolution of International Arbitration', *Research* (Research Report, 2018) 9–11 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF>.

Recent amendments to Chapter 12 of the *Swiss Private International Law Act* (expected to come into force in 2021) will not affect Art. 187(1) *Swiss Private International Law Act's* closest connection test.[66] These revisions seek to 'regulate only "as much as necessary" and "as little as possible" in order to preserve party autonomy'.[67] They also seek to retain 'the concision and flexibility that has made Switzerland's international arbitration law so successful'.[68] The fact that the closest connection test is being retained by Switzerland, against this context, should give comfort to the *ACICA Rules* Committee that the test is compatible with ACICA's own light touch reputation.

Reflecting on the risks and trade-offs involved in choosing arbitration as a dispute resolution mechanism, the *Redfern and Hunter* text explains:

> Few jurisdictions permit any form of appeal on the law or facts from an arbitral award. If the tribunal has jurisdiction, the correct procedures are followed, and the correct formalities are observed, the award – good, bad, or indifferent – is final and binding on the parties.[69]

Parties already take risks as to the misapplication of substantive law when choosing to arbitrate: '[i]n arbitration, the law is what the arbitrator says it is'.[70] Exposing them to *further* risk, regarding identification of the governing law in the first place, is unnecessary. The closest connection test is an existing solution, is reflected in existing arbitral practice, and is seen as acceptable to one of the world's leading arbitral seats. It is superior to the *voie directe*, embodied in Art. 42.1 *ACICA Rules 2020 Consultation Draft*. On the basis of this Section's analysis, it is recommended that the *ACICA Rules* Committee replace the *voie directe* methodology with this closest connection test. A recast Art. 42.1 *ACICA Rules 2020 Consultation Draft*, reflecting this recommendation, is contained in Part IV.

B *Art. 42.1 ACICA Rules 2020 Consultation Draft is Too Narrow: Its Failure to Expressly Recognise Overlapping Party Choice and Arbitrator Determinations of the Law*

Whilst Art. 42.1 *ACICA Rules 2020 Consultation Draft* is too wide in the sense described in Section A, it also too narrow: it fails to expressly recognise the potential for overlap between party choices of law, and Arbitrators' determination of the governing law.

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[66] Sebastiano Nessi, 'New Law Maintains Switzerland at the Forefront of International Arbitration', *Kluwer Arbitration Blog* (Blog Post, 22 August 2020) <http://arbitrationblog.kluwerarbitration.com/2020/08/22/new-law-maintains-switzerland-at-the-forefront-of-international-arbitration/>; Jonatan Baier and Corina Moschen, 'Switzerland Updates its International Arbitration Law', *MME Magazine* (Blog Post, July 2020) <https://www.mme.ch/en/magazine/magazine-detail/url_magazine/switzerland_updates_its_international_arbitration_law/>; Valentina Hirsiger-Meier and Lukas Innerebner, 'Reform of Swiss International Arbitration Law Approved by the Parliament', *Baker McKenzie Global Arbitration News* (Blog Post, 10 June 2020) <https://globalarbitrationnews.com/reform-of-swiss-international-arbitration-law-approved-by-the-parliament/>.

[67] Nessi (n 66).

[68] Baier and Moschen (n 66).

[69] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 591 [10.64].

[70] Thomas Schultz and Robert Kovacs, 'The Law is What the Arbitrator Had for Breakfast: How Income, Reputation, Justice, and Reprimand Act as Determinants of Arbitrator Behaviour' in Julio César Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (Oxford University Press, 2016) 239, 239 [23.01].

Art. 42.1 *ACICA Rules 2020 Consultation Draft* takes a binary approach to delineating party choice of law and the Arbitral Tribunal's own determination of that issue. According to its current drafting, these two categories of case are treated as *either/or*: reflected in the words '[f]ailing such designation by the parties …' This assumption is consistent with much of the literature addressing the governing substantive law in international commercial arbitration.[71] Nevertheless, it is not *necessarily* the case that the presence of a (purported) choice of law clause negates the need for an Arbitral Tribunal's own conflicts analysis.[72] There are, in fact, nine scenarios where a Tribunal might still be called upon to determine the applicable substantive law (for one, several, or all legal issues in dispute) notwithstanding the existence of a choice of law clause in the parties' contract. These are:

- where the parties' choice does not deal with all legal issues in dispute;
- where the parties' choice is only a negative choice of law;
- where disputes arise concerning legal issues that are not within the scope of the parties' own choice of law rights;
- where the parties' apparent choice of law is actually a choice of private international law;
- where the parties' apparent choice of law is actually an incorporation of contractual terms by reference;
- where there is a battle of the forms, and the parties' standard terms include conflicting choice of law clauses;
- where statutory provisions require conflicts analyses, irrespective of any choice of law that the parties themselves may have made;
- where there is an apparent choice of law clause, but it is ineffective for being unclear, invalid, or indecisive; and
- where mandatory law applies irrespective of the parties' chosen law.[73]

This observation is not 'an exercise in technicality for technicality's sake'.[74] Recognising that party choice of law and a Tribunal's own identification of the governing law may co-exist is a matter of practical significance. Parties are rightly encouraged to include choice of law clauses in their contracts,[75] but should also understand that 'absolute certainty is not guaranteed': they (and their advisers) should be alert to both the 'inherent limits' of choice of law clauses, as well as 'the implications of their drafting'.[76] The first bullet point on the list of nine scenarios set out above is a very practical example: a choice of law will be incomplete where restrictive language is used to describe the legal issues that it covers. An Arbitral Tribunal will need to apply its own conflicts analysis to determine the law governing issues beyond the clause's scope. This law may be the same as the chosen law, as in *ICC Case No. 9517/1998* (Dubai law chosen for the contract's 'construction and effect', with the Arbitrators finding that Dubai law also governed the other issues in dispute);[77] but it may differ, as in *ICC Case No. 9479/1999* (New York law chosen for 'any dispute relating to the validity of this Agreement and Stipulation', with the Arbitrators applying usages and international public policy to other legal issues).[78]

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[71] Hayward, 'Paying Attention to Choice of Law' (n 20) 153–4.
[72] Ibid 153.
[73] Ibid 154–5.
[74] Ibid 174.
[75] Jan Paulsson, Nigel Rawding and Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts* (Kluwer, 3rd ed, 2010) 18–19.
[76] Hayward, 'Paying Attention to Choice of Law' (n 20) 174.
[77] *ICC Case No. 9517/1998* (2002) 13(2) *ICC Bull* 87, 88.
[78] *ICC Case No. 9479/1999* (2001) 12(2) *ICC Bull* 67, 68–9.

As compared to Art. 42.1 *ACICA Rules 2020 Consultation Draft*, a different approach is taken by the new Art. 22.3 *LCIA Rules 2020*, which come into force on 1 October 2020. Replicating the approach taken in the existing Art. 22.3 *LCIA Rules 2014*, that provision explains that a Tribunal must determine the governing substantive law '[i]f and to the extent that the Arbitral Tribunal decides that the parties have made no such choice'. By referring to the 'extent' of party choice, Art. 22.3 *LCIA Rules 2020* expressly recognises the potential overlap between party choice of law and a Tribunal's own identification of the governing substantive law. It thereby reflects an important reality of arbitral practice, evidenced widely in arbitral case law.[79] It also constitutes a useful reminder to parties and their advisers that these two categories of case are not mutually exclusive.

Once again, though Art. 42.1 *ACICA Rules 2020 Consultation Draft* reflects current international practice, its drafting remains sub-optimal. On the basis of this Section's analysis, it is recommended that the *ACICA Rules* Committee expressly recognise the potential for overlap between party choice of law, and an Arbitral Tribunal's determination of the governing law. A recast Art. 42.1 *ACICA Rules 2020 Consultation Draft*, reflecting this recommendation, is contained in Part IV.

Before moving on to Part IV's recommendations and conclusions, it must also be noted that the overlap issue addressed in this Section reinforces the importance of the recommendation made in Section A. The fact that party choice of law does not necessarily negate the need for an Arbitral Tribunal's own conflicts analysis compounds the problems relating to Art. 42.1 *ACICA Rules 2020 Consultation Draft's voie directe* discretion: cases involving party choice of law can still trigger that undesirably wide discretion.

IV RECOMMENDATIONS 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.'[80]

This Submission has identified two separate respects in which Art. 42.1 *ACICA Rules 2020 Consultation Draft* is capable of being improved. The current version of Art. 42.1 *ACICA Rules 2020 Consultation Draft* can be improved, in both respects, by amendment: benefiting from the 'measure of rethinking'[81] advocated by Born.

On the basis of Part III's analysis, this Submission recommends that Art. 42.1 *ACICA Rules 2020 Consultation Draft* be recast in the following terms:

> 42.1 The Arbitral Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. If and to the extent the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the rules of law with which the case is most closely connected.

[79] Hayward, 'Paying Attention to Choice of Law' (n 20) 155–73.
[80] Born (n 1) 2656.
[81] Ibid.

The following paragraph, reproducing this recast provision, includes marked-up changes indicating the necessary amendments:

> 42.1 The Arbitral Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. If and to the extent the Arbitral Tribunal decides that the parties have made no such choice, ~~Failing such designation by the parties,~~ the Arbitral Tribunal shall apply the rules of law with which the case is most closely connected. ~~which it considers applicable.~~

Given this Submission's scope, no comment is made in relation to Arts. 42.2–3 *ACICA Rules 2020 Consultation Draft*.

The *ACICA Rules* Committee's 'ethos' during the current revision program has been 'continuing with the light touch, but gradually reflecting the store of knowledge that we've gained by administering arbitrations since 2006'.[82] This Submission's recommendations are consistent with this objective. Amending Art. 42.1 *ACICA Rules 2020 Consultation Draft* in line with this Submission's recommendations will allow ACICA to innovate (regarding the governing law in international commercial arbitration) in a manner that does not interfere with the conduct of arbitrations, or the parties' own autonomy. Such innovation would be useful to Arbitrators and lawyers: what might be described as a 'scholar's heaven' regarding the current state of applicable law issues in international commercial arbitration 'is practitioner's hell'.[83] Most importantly, however, this Submission's recommendations will benefit commercial parties: the ultimate users of ACICA arbitration.

[82] Australian Centre for International Commercial Arbitration, 'ACICA Webinar' (n 6) 00:04:59.

[83] Cf Pascal Hachem, 'The *CISG* and Statute of Limitations' in Ingeborg Schwenzer (ed), *35 Years CISG and Beyond* (Eleven International Publishing, 2016) 151, 151.