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Rules and Standards in Private International Law

By

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Reprinted from
(2007) 73 *Arbitration* 441–445

Sweet & Maxwell Limited
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(*Law Publishers*)

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Review Articles

Rules and Standards in Private International Law¹

by WILLIAM W. PARK

When a treatise becomes a classic, both revision and review present special challenges. The rigour of the task increases when the relevant subject matter spans topics as disparate as domicile, *forum non conveniens*, marriage, arbitration, realty, estates, torts, insolvency, insurance, foreign currency and mental incapacity. Sir Lawrence Collins and his colleagues have succeeded in giving us an even better edition of what older generations called “Dicey & Morris”.² The work remains the gold standard in texts on conflict of laws.

The discipline called “private international law” in continental scholarship, and “conflict of laws” within traditions derived from English common law, includes a cluster of questions generally related to three interrelated categories: jurisdiction, judgments and applicable law. The editors of *Dicey, Morris & Collins* arrange these subjects into seven major sections: preliminary matters (e.g. *renvoi* and domicile); procedure (including proof of foreign law); jurisdiction and judgments; family law; property; corporations; and obligations (contracts, torts and restitution). The book begins with a superb table of cases and ends with a fine index. The two initial chapters, which address the nature of the subject and the characterisation process, could well constitute stand-alone essays.

Inherited from previous editions, the emphasis on “black letter rules” gives the current edition a familiar configuration. Two hundred and forty-two hydra-headed statements attempt to capture the content of English law as applied in civil litigation with a foreign element. Matters addressed by these rules include disputes over foreign property, contracts performed outside England, and torts committed abroad. Extensive comments and notes describe specific wrinkles on the underlying principles, furnish illustrative fact patterns, and give vital references to cases and scholarly works.

This rules-based approach inherent in any such *précis* has both costs and benefits. Apparently, even Dicey himself may have had second thoughts on this matter, having confided to a friend a few years after the first edition that his “faith in digests had declined.”³

On the positive side, simplified rules can serve as good starting points for analysis, supplying intellectual hooks on which to hang complicated concepts. In its very nature, law relies on the type of generalities that enhance equal treatment for those situated in roughly similar situations. To impart learning would be an almost impossible task without some recourse to general statements, particularly in a field as vast as private international law. Efforts at a “rule-free” approach have usually met with the same bad results as the misguided efforts to teach children mathematics without asking them to learn multiplication tables. Little practical help can be found in abstract statements urging that “the law with

¹ Review of Sir Lawrence Collins (General Editor), *Dicey, Morris and Collins, The Conflict of Laws*, 14th edn, (London: Sweet & Maxwell, 2006), 785 pages, £349, ISBN 9780421883604 and 0421661402.

² The five learned editors are Adrian Briggs (Oxford University), Jonathan Harris (University of Birmingham); J.D. McClean (University of Sheffield); Campbell McLachlan (Victoria University, Wellington) and C.F.J. Morse (King’s College, London). The work also received input from a dazzling array of multilingual legal talent that includes eminent scholars and practitioners throughout the world.

³ Biographical note by J.H.C. Morris, reprinted at p.xix of the 14th edition.

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the greater interest shall apply.”⁴ Nor is one ever quite sure what to make of perspectives that tout “choice-influencing considerations”⁵ or the “inherent morality that should be part of the relationship between the parties”.⁶ As Holmes J. observed a century ago, “General propositions do not decide concrete cases.”⁷

Rules have a down side, however. They can prove either under-inclusive or over-inclusive (and sometimes both), saying too little or too much. Language relies on words placed in sequence, while reality builds on events that often defy such logical order. The occasional chaos of truth inheres no less in private international law than elsewhere. The thoughtful reader will take the rules as signposts rather than cook-book recipes, knowing that the difficulty lies not in rules per se, but in their potential for either confusion or mischief. Moreover, the commentary in *Dicey, Morris & Collins* helps to dispel any misconception that questions can be solved by the rules alone. The editors manoeuvre skilfully around the woodenness of rules to provide appropriate shades of grey in supporting illustrations.

Treatises are not just for cognoscenti and connoisseurs. On some occasions, the less initiated readers of *Dicey, Morris & Collins* may have difficulties finding straightforward principles that address common problems that inhere within international transactions. For example, business lawyers often seek guidance on the law applicable to piercing the corporate veil in a multinational context. Surprisingly, however, no easily identifiable rules address that matter, at least not in a form likely to help someone lacking prior experience in the area. In contrast to scholarship on the Continent⁸ and in North America,⁹ the work seems to omit any relatively concise reference to the *lex societatis* as it might affect disregard of corporate personality.¹⁰ Such gaps should not be surprising. It would be impossible for any treatise to

⁴ For a case purporting to apply such abstractions, see *Offshore Rental v Continental Oil Co.*, 22 Cal. 3d 157 (Sup. Ct Ca., 1978), addressing the right of a California employer to recover for injury that one of its officers suffered in Louisiana. Deciding that Louisiana law governed (thus no cause of action), the court purported to apply a “comparative impairment analysis” whose criteria included the “maximum attainment of underlying purpose by all governmental entities” as identified through a “focal point of concern of the contending lawmaking groups” and the “comparative pertinence” of those concerns when probed through the history of each laws. The same conclusion, of course, would result from looking to the law of the place of injury.

⁵ On Robert Lefflar’s choice-influencing considerations (including “the better rule of law”), see Robert Lefflar, “Choice Influencing Considerations in Conflicts Law” (1966) 41 N.Y.U. L. Rev. 267; cf. Peter Hay, “Reflections on Conflict-of-Laws Methodology” (1981) 32 Hastings L.J. 1644; Alfred Hill, “Judicial Function in Choice-of-Law” (1985) 85 Colum. L. Rev. 1585; Maurice Rosenberg, “Comment on *Reich v Purcell*” (1968) 15 U.C.L.A. L. Rev. 641.

⁶ See Joseph Singer, “Real Conflicts”, (1989) 69 B.U. L. Rev 1, 37.

⁷ Dissenting in *Lochner v New York*, 198 U.S. 45 (1905), where the majority struck down a New York state law prohibiting bakery employees from working more than 60 hours per week.

⁸ Yvon Loussouarn and Jean-Denis Bredin, *Droit du Commerce International* (1969), §301; Bernard Audit, *Droit International Privé*, 4th edn (2006), §§1127–1128; Jean-Michel Jacquet, Philippe Delebecque and Sabine Corneloup, *Droit du Commerce International* (2007), §332; In Switzerland, this principle has been codified in the *Loi Fédérale de Droit International Privé/Bundesgesetz über das Internationale Privatrecht (LDIP/IPRG)*, Arts 154 and 155.

⁹ The *Restatement (2nd) Conflict of Laws* at s.307 provides:

“The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder’s liability to the corporation for assessments or contributions and to its creditors for corporate debts.”

See also Castel and Walker, *Canadian Conflict of Laws*, 6th edn (Janet Walker, 2005), s.30.1.

¹⁰ Relevant pieces of several rules do combine to present some answers. For example, r.160 states that “The domicile of a corporation is in the country under whose law it is incorporated.” After r.161 (concerning creation or dissolution of foreign corporations) we find a statement that

articulate all propositions in a fashion that satisfies every reader. In many instances, lacunae probably arise simply because the reader does not know where to look.

Subscribers to this journal can be expected to take particular interest in ch.16, titled “Arbitration and Foreign Awards”. Given that most universities now offer international arbitration as a stand-alone subject, it is heartening that the editors of *Dicey, Morris & Collins* address the subject as an integrated part of conflict of laws, linked to jurisdiction and judgments. Private international law is about civil litigation. When litigants agree to arbitrate, they waive the right to bring the merits of a dispute before national courts, which in turn must decide whether to respect the arbitration clause and/or any resulting award.

The principal statement for international arbitration (r.57) constitutes a clear improvement over the analogous provision of the prior edition. The former rule had asserted that the “validity, effect and interpretation” of an arbitration agreement are governed by its applicable law. In the old rule, the chief problem lurked in the capacious nature of the word “effect”. In considering impact, an agreement’s applicable law is neither the beginning nor the end of the story. Other legal systems shape the contours of an agreement’s effect throughout the arbitral process. The law of a party’s residence comes into play when a motion is made to compel arbitration or stay litigation.¹¹ The juridical regime at the arbitral seat applies in the context of an application to vacate the award.¹² And the legal system at the place of award recognition will be invoked during the end game, when enforcement must be sought against the loser’s assets.¹³

The new Rule contains greater nuance. In its first subdivision, the applicable law is said to govern the “material validity, scope and interpretation” of an arbitration agreement, omitting the previous reference to the agreement’s effect. The Rule then continues to state that the applicable law will be expressly or impliedly chosen by the parties. Absent a choice, one looks to the law most closely associated with the arbitration agreement, generally that of the arbitral seat. A second limb of the Rule addresses arbitral proceedings, which are said to be governed “in general” by the law of the seat of arbitration. A third leg makes reference to the substance of the dispute (the “merits” of the controversy) as governed by the law chosen by the parties, in some cases supplemented by considerations determined by the arbitral tribunal.¹⁴

Even the more subtle articulation of arbitration’s choice-of-law framework does not always lend itself to easy application in many international business problems where the scope of

“Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed.” r.162 states that “all matters concerning the constitution of a corporation are governed by the law of the place of incorporation”. Finally, references to Art.22 of the Bruxelles Regulation (Council Reg. 44/2001) indicate that courts at the corporate seat determine the validity of a company’s constitution.

¹¹ See *Mitsubishi Motors v Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), involving challenge to an arbitration clause in the United States by the American respondent.

¹² *South Pacific Properties v Egypt & EGOH*, Cour de cassation, January 6, 1987, 1987 Rev. Arb. 469, vacating an award that extended the arbitration clause to the Egyptian state as well as a government-owned tourism instrumentality.

¹³ *Parsons & Whittemore v Société Générale de l’Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir., 1974), which addressed recognition of a non-American award against assets in the United States.

¹⁴ It is not entirely clear, at least to this reviewer, how the law of the place of award recognition fits into the scheme of r.57. For example, challenges to the validity of arbitration agreements and the resulting award might be mounted with respect to remedies such as punitive damages or the impact of those agreements on consumers. See, e.g. Case C-168/05 *Mostaza Claro v Centro Móvil*, October 26, 2006, ECJ, reported in 25 *Swiss (ASA) Bulletin* 1/2007 (commentary by Bernd Graf and Arthur Appleton), in which a Spanish court (backed by the European Court of Justice) struck down as an “unfair contract term” an arbitration clause in a mobile phone contract.




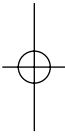
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an agreement to arbitrate has been put at issue. One scenario that springs readily to mind relates to an application that an arbitral tribunal take jurisdiction over a company that never signed a contract containing an arbitration clause.

For example, a company in Paris might contend that an American corporation should be bound by a contract, subject to French law, signed only by the corporation's Delaware subsidiary. The French company might invoke (rightly or wrongly) a theory of implied consent, under which an agreement to arbitrate would be found in the parent's negotiation of the subsidiary's obligations and performance of related contracts. In other words, the parent arguably agreed to arbitrate by virtue of its pattern of behavior.

In such instances, one may ask how the r.57 factors assist in determining the scope of the arbitration clause. Rather than traditional veil piercing (based on fraud or undercapitalisation), the French company has urged the tribunal to find an implicit agreement to arbitrate based on a course of conduct.

Conceptual and practical problems arise if arbitrators take the contract-designated law as the starting point for analysis of the gateway question of who agreed to arbitrate. To do so would seem a circular exercise in presuming one's own conclusion. If the parent never consented, it cannot be subject to the contract or its applicable law. Likewise, the law of the arbitral seat would be equally foreign to an entity that remained a stranger to the transaction.¹⁵ Nor could arbitrators necessarily begin with the law of the place of performance (even if most closely connected with the agreement), since that too would involve the circularity of presuming that one company had in fact accepted to be bound by the other's obligations. The parent might contend that it performed work under a separate agreement, with its own forum selection clause. Had that distinct contract been brought to the attention of the signatory early in the negotiations, the fact would tend to negate any implied consent.



If a party contests that it agreed to be bound, the arbitrator confronts a dilemma not unlike that of the proverbial chicken and egg. Standards must be fixed by which to evaluate the controverted consent. As creatures of contract, arbitrators would normally seek these standards in the parties' mutual bargain, express or implied. However, the existence of that bargain remains the precise matter in controversy. Thus it becomes highly problematic to refer to law-selecting indicia such as party choice, arbitral situs, or country of closest connection. Each of these factors presumes an assent to arbitrate which one side denies.

Unlike judges (who take a starting point from the norms of their own forum), arbitrators faced with cross-border transactions will rarely find any single country to serve as the obvious source for their authority. The generating spark for arbitral jurisdiction lies in a private decision to waive recourse to otherwise competent courts. Legitimate arbitral power can be exercised only with respect to entities and individuals who have renounced dispute resolution in national courts. When the identification of these persons constitutes the question that must be decided, arbitrators (at least arbitrators not tainted with bias) cannot start with an applicable law that derives solely from one side's version of the very facts in dispute.

Consequently, in determining whose story to believe about the identity of those parties, arbitrators often seek guidance in so-called "transnational norms" articulated by scholars and in published awards. These norms constitute an emerging corpus of principles that address circumstances under which an arbitration clause might be extended to a non-signatory, perhaps on the basis of participation in contract formation or confusion from inter-related

¹⁵ In this context, one notes the treatment of *Peterson Farms v C&M Farming Ltd* [2004] EWHC 121. In fn.49 of s.7-012, *Dicey, Morris and Collins* suggests that "[t]he identities of the parties to an arbitration agreement is a matter of substance." With respect to the law applicable to joinder of non-signatories, it is not entirely clear what this might mean. Often cited as a case about extending the arbitration clause, *Peterson Farms* on closer examination might better be understood as a decision denying indirect damages. In connection with a purchase of diseased poultry, the arbitral tribunal awarded compensation to one company for birds owned by a corporate affiliate.

agreements.¹⁶ Such transnational norms command wider application than “trade usages” derived from a specific profession,¹⁷ and remain distinct from general principles of law.¹⁸ The commentary in *Dicey, Morris & Collins* acknowledges (s.16-053) that transnational norms exist, but seems to limit their authoritative application to cases involving party choice. The editors note that the Arbitration Act 1996 s.46 permits the parties to choose “a non-national set of legal principles . . . or more broadly, general principles of commercial law or the *lex mercatoria*.”

In practice, the past few decades have also seen arbitrators apply transnational norms even when not explicitly told to do so by the parties. In appropriate circumstances, these norms justify themselves as the best calculus for determining the reasonable expectations of litigants from diverse legal cultures. They apply not because any authority says they must, but *faute de mieux*, for want of any better way to promote fair dispute resolution in a global community where not all commercial actors accept the parochial standards of any single national law.

These minor observations have been presented merely as an *apéritif* to future scholarly dialogue. The editors of *Dicey, Morris & Collins* have given us a work of scholarly magnificence that will be treasured by practitioners and academics alike.

¹⁶ Many commentaries on the subject begin with a discussion of the “group of companies” doctrine as expressed in *ICC Award No.4131 of 1982 (Dow Chemical)*. See *Receuil des Sentences Arbitrales de la CCI: 1974-1985*, Volume I, 1974-85 (Sigvard Jarvin and Yves Derains, 1990), at p.146; 110 J. Dr. Int’l 899; upheld by the Paris *Cour d’Appel*, October 21, 1983, 1984 Rev. Arb. 98. See also ICC Awards in Cases Nos. 1434, 3879, 4131, 5721, 5730, 6519, 7604, 7610, 8910, 11160 and 11405. See generally, Jean-François Poudret and Sébastien Besson, *Droit Comparé de l’Arbitrage International* (2002), at p.227; Charles Jarrosson, “Conventions d’Arbitrage et Groupes de Sociétés” in *The Arbitration Agreement: its Multifold Critical Aspects* 209 (ASA Bull., Special Series No.8; Basel Symposium of June 17, 1994). See generally, Bernard Hanotiau, *Complex Arbitrations* (2005).

¹⁷ In Germany, the *Bundesgerichtshof* has held that an arbitration clause may be implied through trade usage. The buyer of several thousand sheepskins cancelled the contract and sued for return of payments made. The seller requested arbitration based on a standard form “International Hide & Skin Contract No. 2” which had apparently been mentioned in a letter. The BGH found that a commercial practice might (at least in theory) give rise to a duty to arbitrate, and remanded the case for determination of whether the alleged practice in fact existed. BGHZ, Urt. V, December 3, 1993, III ZR 30/91; commentary by Klaus-Peter Berger (1993) *Deutsche Zeitschrift für Wirtschaftsrecht* 465.

¹⁸ Emmanuel Gaillard, “La Distinction des Principes Généraux du Droit et des Usages du Commerce International”, in *Etudes Offertes à Pierre Bellet* (1991). See generally W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (2000), ch.35, at pp.633–639; Yves Derains and Eric Schwartz, *Guide to New ICC Rules of Arbitration*, 2nd edn (2005), at pp.242–244; Michael Mustill, “The New *Lex Mercatoria*” (1988) 4 Arb. Int’l 86; Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1999), at pp.102–112; Filip De Ly, *International Business Law and Lex Mercatoria* (1992), at pp.134–151.