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Private International Law and International Commercial Arbitration – A Dialogue about the Usefulness and Awareness of the Former for the Latter

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Introductory Note

This contribution is different in many ways. It is not in the format of a traditional book chapter but it replicates the keynote debate between Giuditta Cordero Moss (GCM) and Diego Fernández Arroyo (DFA) that took place at one of the conferences in Edinburgh in the context of the PILIM project. This chapter explores the role played by private international law in international commercial arbitration. It highlights the relevance of private international law's thinking for the practice of international commercial arbitration and discusses the advantages and disadvantages of conflict rules in arbitration proceedings where the parties have made a choice of law, examining also the limitations of choice of law clauses. The debate was chaired by Verónica Ruiz Abou-Nigm (VRA), principal investigator of the PILIM project.

The Debate

GCM: We have seen the role of private international law highlighted from different perspectives. I expected coming to a seminar on private international law to see and hear a consistent support for the idea that private international law is important for arbitration, but I have heard a little bit of both points of view. This is good because I will speak about how important private international law is, and if everyone agreed it would be quite boring. Diego has generously agreed to play the role of devil's advocate in this debate, that is, to challenge the usefulness of private international law in the context of international commercial arbitration. We thought that we might start with some general brief comments and then approach some specific issues including jurisdiction, procedure, law applicable to the substance, and challenge and enforcement of the arbitral award.

DFA: I must confess my sceptical views on the usefulness of private international law in arbitration, at least if we take 'private international law' in its classical conception.

I have several observations underlying my scepticism to share with you. In my own experience as an arbitrator I have never seen my colleagues very worried about private international law in general. Actually, some months ago, a colleague mentioned to me that he brought up the question in a case in which he is involved as the presiding arbitrator. Considering his character of private international law scholar, he tried to expose an issue relating to the applicable law to the merits from the traditional perspective of private international law, underlying how important this perspective was. His co-arbitrators were astonished: ‘What? What are you talking about?’ After a short discussion, they decided to submit the question to the parties, who answered immediately that the law of country A was applicable and that they could not see any problem there. I suspect that the same reaction would arise in any single opportunity a similar question is raised.

That said, let’s go to my observations, from a very general point of view. The first one is particularly addressed to people here who are not familiar with private international law or who are not private international law specialists. Private international law scholars (also known as conflict scholars in England and North America) are convinced that private international law is the centre of the universe, at least of the legal universe. According to a private international law scholar, colleagues from other fields deal with legal science and technique; conflict scholars deal with an art. Actually, they feel like artists. They are much more sophisticated than ordinary lawyers. They solve disputes that lack a common legal framework. That is to say, disputes involving several legal orders. Solving disputes whose elements are all related to a single legal order can be relatively straightforward in terms of technique. Even a student in the first semester of law school can attempt to provide an answer to a legal problem if all the elements involved therein are related by a single legal order. Conversely, solving a dispute involving many legal orders is an art only reserved to a few specialists. That is what conflict scholars tend to think about themselves. Needless to say, generally speaking, the other legal scholars and practitioners do not share this impression.

The second observation concerns methodology. As you know, the most renowned conflict scholar ever, Friedrich Carl von Savigny, coined a methodology which has proven to be successful. I said successful, which does not always mean useful. In other words, many legislators and courts followed and still follow that methodology even if its flaws seem more numerous than the solutions it offers, particularly in some fields. The idea of private international law that has been shared by many conflict scholars until now is based on a notion of a world divided into national states and national legal orders. Given that there are many legal relationships that are linked to more than one legal order, it would be necessary to rely on a mechanism to select one single law to govern each legal relationship. The key notions of this classical assumption of private international law are domestic law, national law and the use of an indirect mechanism, a mechanism of localisation, to deal with international legal relationships. That is to say, we would need a sort of particular methodology to adjudicate a particular legal outcome to legal relationships related to several legal orders.

This kind of mechanical tool to select one legal order to be applied to relationships that are related to several legal orders is enforced in many systems and still attracts lawmakers all over the world, even in the most recently enacted acts on private international law.

Thirdly, when arbitration started its evolution toward a modern disputes settlement mechanism – I am talking about the idea of the immediate post-World War II period, in the 50s and 60s – classical private international law was still influential. So modern international arbitration was born under a conflicts pattern, that is, under the classical private international law pattern described above. You can see that in the 1958 New York Convention, in the 1961 Geneva Convention and even in more recent private international law domestic Acts. The main example is the Swiss Private International Law Act adopted in 1987, which includes a chapter on arbitration, from a very classical private international law approach. The reason is perhaps that this law was made when international arbitration was not so important in Switzerland. In Latin America, this approach from a private international law perspective in arbitration no longer exists, but we have the example of the 1975 Panama Convention and the Mercosur Agreements in international arbitration made in 1988. The latter is in force but it remains practically (and fortunately) unapplied, maybe because of the approach used in the drafting of those agreements.

Lastly, international arbitration today is not what it used to be in 1958 when the New York Convention was made. Today, it is rather transnational in nature. There are common terms, common practices, the same leading arbitrators, and the most significant institutions compete to develop the most attractive legal offer for transnational business. In this framework, that panorama of classical private international law is not necessarily adapted to the field of arbitration. If we took private international law in another sense, from a more modern perspective (I mean including soft law rules and substantial considerations), perhaps it could be interesting to deal with certain situations. Yet, private international law based on the selection of a national law according to the location of some connecting factors is practically irrelevant for arbitration, or at least it should be. Rules on arbitration are mainly substantive rules. Within the context of arbitral proceedings, that is to say, proceedings conducted by arbitral tribunals, the use of classical private international law is exceptional. Private international law may have a role only at the limits of the arbitral proceedings, or outside of them. I mean when parties go to the courts before, during or after arbitral proceedings requesting judicial support for arbitration proceedings, but not for the proceedings as conducted by arbitral tribunals themselves. Courts, in their assistance of arbitration, may have recourse to private international law tools, but even in court proceedings related to arbitration, private international law is becoming rare, for two main reasons: modern arbitration law is mostly substantive law, and its notions are transnational rather than international. Whenever the question about the applicable law arises, the best answer in arbitration is almost always a transnational substantive rule.

GCM: I noted four main points that I would like to comment upon, firstly, regarding how often private international law is relevant in practice. On this point we had nice exchanges with colleagues showing how this usually is a question of awareness. You may have a disputed contract and, if you don't know that private international law exists, you may think that the contract doesn't have any problems of private international law. But as soon as you know it exists, you become aware of all the problems. Yet, you could still 'live happily' without an awareness of those private international law problems. So, it's not that in most arbitration cases you would need to take recourse to private international law, but there is a good number of situations in which the outcome depends on whether you apply one law or another. And you have cases where one party is really gaining from the application of one law and the other party is really gaining from the non-application of that law, and that is the situation where private international law rules become really practical and relevant. This is actually an assumption I wanted to lay out underpinning the observations that I am going to make during this debate. There are situations in which this is not relevant, such as when the parties agree to apply the same law (choice of law clause), or where the possible applicable laws provide for the same substantive regulations. However, except for these kinds of situations, private international law conflict rules should provide the answer. Not in an artistic way, but in a positive way.

I had never thought of it like this, but I must say I like the idea of being an artist. Rather than as an artist, I consider the private international lawyer as a good technician. The private international law lawyer is dealing with meta law, a regulation on which regulations are going to decide the substance. I would consider it more as meta law than as an art. The point is to contribute to foreseeability in the dispute or the potential dispute. I drafted contracts for many years, and I wanted to know which law would be applicable so that I could draft the contractual clauses accommodating that. In order to do that, I need a set of rules to tell me which law is going to be applicable to that contract in the event of a dispute. Actually, a more creative and artistic approach is required, in my mind, in situations where there is no private international law. Because when there isn't private international law you don't really know the criteria according to which the applicable law will be chosen. That becomes sort of an art, not necessarily in a positive way. Here I would quote the Danish professor Ole Lando, whom everybody of course knows, wonderful academic and person, who started as a private international law lawyer and gradually turned to think that private international law was not important after all, and that transnational law gives all the solutions. In one of his many publications he said: 'Why do we have to worry about private international law in arbitration? You know arbitrators are not normal lawyers; they are more like social engineers.'¹ You just leave the matters in the hands of the arbitrators. You don't have to give the arbitrators any parameters,

¹ Lando, O. (1985) 'The Lex Mercatoria in International Commercial Arbitration', *International and Comparative Law Quarterly*, vol. 34, no. 4, 747–68, at 752.

criteria, any rules because they are social engineers; they are creating the rules and the frameworks while they are making the decision. Described like that, the idea of arbitrators as social engineers may be very appealing, but I can't help being reminded of Franz Kafka's wonderful 'The Trial'. This poor guy was accused of something and he didn't know what he was accused of nor did he know the applicable rules. Try to defend yourself and plead your case before a social engineer without knowing which rules he's going to create. That is more like art than private international law. I am not saying private international law is perfect, but it is better than the alternative, which is a sort of full discretion. The alternative assumes that you have to go to an arbitrator and plead your case before you find out under which law that case should have been pled. These are my preliminary comments on the artistic side of the question.

Thirdly, I will comment on the idea that private international law is based on relatively outdated concepts of domestic law and national states, whereas the very nature of international arbitration and international disputes is that they are based on international transactions and relationships. It is true that international disputes are based on international relationships, but as long as the awards have to be enforced by national courts, it is still necessary to relate them to the old-fashioned understanding of the law and to produce an award that can be recognised and enforced by a court that is still thinking in terms of domestic legislation. We have the New York Convention, which refers to national laws and national courts in several contexts that are quite important, that I think we are coming back to when we discuss different topics later during this debate. Invalidity of an award is regulated by national law and certainly depends on the criteria of national law, and enforceability depends on the criteria of the New York Convention, which refers to national law in some contexts. Not taking into consideration this structure of domestic legal systems may be tempting and less anachronistic than sticking to the domestic systems, but it does not fit with the regulation on invalidity and enforceability. If you abandon the traditional approach, you may have a less anachronistic award, but it might be one which is not valid or enforceable. Lastly, on these lines, being 'transnational' does not necessarily remove the need to interpret a contract or a transnational system or the need to apply rules that belong to domestic legal systems. There are several illustrations that can be made of this point, which I will leave for the later discussion on specific topics.

DFA: Let's talk about the four topics mentioned by Verónica. The first one is jurisdiction. Jurisdiction in arbitration is based on the will of the parties. I think we can share this point of view without any problem. Giuditta agrees with me. Arbitral tribunals have the competence-competence principle. So, they decide on the basis of the arbitration agreement and the generally recognised arbitration principles. National laws in this context are not relevant; therefore, classic private international law is not relevant. That is generally applicable to commercial arbitration, but if you think particularly of institutional arbitration, whenever the parties cannot solve a specific problem, it is the institution that is in charge of solving such problem on the basis of the material rules and practices of the institution. National jurisdiction is not relevant

because parties have chosen arbitration as a dispute settlement mechanism in order to avoid national courts. Comparative law shows a trend towards the exceptional character of national courts' intervention in arbitral proceedings. According to this trend, national courts can only intervene in a very limited number of issues during arbitral proceedings. Some legal systems are quite tough with judges who violate this restriction. For example, the Peruvian arbitration act expressly states that judges are liable whenever they interfere with arbitration outside the few specific situations provided by Peruvian arbitration law. In my opinion private international law is not relevant for transnational issues for concrete reasons. Firstly, except for exceptional circumstances, arbitration agreements block state jurisdictions. All modern arbitration laws recognise this. Secondly, it is not clear what would be the applicable sources of private international law, since arbitral tribunals do not have a forum. If you say that a conflict rule shall apply but the arbitral tribunal can select the one it finds most appropriate (as was the common assumption in the past), we would end up in a useless, artificial intermediation. Thirdly, even if domestic rules were necessary within arbitral proceedings, arbitrators are in general free to apply them or not. Ultimately, when a domestic court intervenes in arbitration it might apply substantive rules and principles to solve jurisdictional issues. Even with regard to internationality, the answer to the question about when a specific arbitration is international is treated from a substantive perspective in some national systems. For example, Article 1504 of the French Code of Civil Procedure establishes that arbitration proceedings are international when trade interests are at stake. That is to say, the old-fashioned rule that arbitration is international if one of the parties has a different nationality from the other, or the headquarters of the company or the legal administration of the parties are in different countries . . . that does not exist any more for the French legal system. I mention France, but also other modern codifications in arbitration law assume – at least partially – a substantive point of view to deal with international arbitration. That shows the different perspectives and approaches to arbitration.

GCM: I agree with everything that you said, which can be summarised by saying that there is a widespread arbitration-friendly attitude in regulations. So, you have international conventions as well as national domestic laws providing that the agreement to arbitrate prevails and if parties have agreed to arbitrate then courts cannot in principle exercise jurisdiction. So, there is an arbitration-friendly framework. The arbitral tribunal has the competence to decide on its own competence; indeed the competence-competence principle is very well established in arbitration. This, however, does not mean that courts do not have any jurisdiction or anything to say on this matter. Because even if the tribunal has competence-competence, it is the court that ultimately decides on the validity or the enforcement of an arbitral award. And, as I was mentioning earlier, the courts do apply national law when they decide on the invalidity of an award, and in several respects they also apply national law in connection with the enforcement of the award. The most important examples are the form of the arbitration agreement, which is regulated uniformly in Article 2 of the

New York Convention, but, as we know, today there are many domestic legislations that have a more favourable regulation when it comes to the form of the arbitration agreement; for example in Norway and Sweden, the arbitration agreement may be oral, it does not have to be in writing, whereas it has to be in writing under the New York Convention.

You have the possibility to apply the more favourable law according to the New York Convention, but the question is which law is applicable to the form of arbitration agreements. This is a private international law question, and this question is solved in this case by the New York Convention itself, which has a rule in Article 5 that states that unless the parties have agreed otherwise, the award cannot be enforced if the arbitration agreement was invalid under the law that the parties agreed to, or if the parties have not agreed, then under the law of the place of arbitration. That is a private international law rule in the New York Convention that is very useful in the framework of international arbitration.

DFA: I have already said that the New York Convention was under the influence of classical private international law. Furthermore, the ground you mention and all grounds of Article V, paragraph 1 only apply if one of the parties invokes it. That is to say that the rule is not as mechanical as traditional conflict rules. Furthermore, coming to the enforcement of arbitral agreements, nothing prevents the use of a substantive presumption of validity, as it is the case in France.

GCM: The French approach is very special. But in the remaining 191 countries, the approach is that of the New York Convention. Another example is about legal capacity. The rule again in Article 5 of the New York Convention says that an arbitral award cannot be enforced if it turns out that one of the parties to the arbitration agreement was under some form of incapacity under that party's own law. That is private international law – the capacity is governed by the law of each of the parties to the arbitration agreement. And that is of course a conflict rule that is not perfect, because it does not say which law is 'each party's law', which means private international law becomes relevant to find out which law each party is subject to, when it comes to its own capacity. There are many other examples of situations where the validity and the enforceability of an award is subject to the local laws when the courts examine the arbitral award, in connection with the arbitrability, in connection with the scope of the arbitral agreement, with the substantive validity of the arbitral agreement, and then of course with public policy. I won't talk about these, but since I started talking about legal capacity, I started by saying that legal capacity has a special conflict rule in Article 5 of the New York Convention, which is not perfect and assumes application of another conflict rule.

I would like to go back to what Diego said and what was said earlier today as well – that arbitration has no forum, and therefore there is no private international law which an arbitrator could look at. That is something I am not very convinced of, because arbitration has a forum in many different contexts. The law of the place of

arbitration is relevant, for example, when it comes to the validity of the arbitration agreement, the default mechanism for appointing the arbitrators, the default mechanism for challenging the arbitrators, the procedure of the arbitration proceeding, which powers the tribunal has, for example, when it comes to interim measures, which possibilities the court has to give assistance for the arbitral tribunal, for example in producing evidence, and then, of course, the challenge of the arbitral award and then the public policy and the arbitrability rules. All these aspects are regulated by the *lex loci arbitri*, the law of the place of arbitration. So, in my mind, arbitration does have a forum, as all these examples show. And then I wonder why should the forum not also be relevant when it comes to private international law rules? I know that recent modern legislation is trying to sever the link between arbitration and private international law of the place of arbitration – there are many different approaches. I am not sure that this is a good development, because, since the law of the place of arbitration is so important in all these aspects that I have mentioned, I don't really see why it should not also be employed when it comes to private international law. The gist of what I am saying here is that, yes, arbitration and jurisdiction of arbitrators are based on the will of the parties, and yes, the relevant laws and international conventions give plenty of room to the arbitration agreement and to the parties, but there are very important aspects where the validity and enforceability of an arbitration award depend on the arbitral tribunal having applied the right law – the right law is determined either by special conflicts rules provided for in the New York Convention or in other arbitration instruments, for example, or in some other system of private international law. I think it should be the legal system of the place of arbitration, but there are different solutions in different systems. And this is something that is useful not only for the validity and enforceability of the award, but also for the parties' ability to predict which law is going to be applied, whether they have the legal capacity or not and so on.

DFA: Before going into issues of procedure, I would like to rebut two of Giuditta's arguments. First, Giuditta said that ultimately it is a court that decides about the jurisdiction of the arbitral tribunal. That is not totally true. The court has the right to express the last word; that is the rationale of the competence-competence principle, which is based on the priority given to the arbitral tribunal in order to avoid bad practices in arbitration. Remarkably, in the overwhelming majority of cases, the court's last word is not pronounced. In other words, in the vast majority of cases the decision of the arbitral tribunal on its own jurisdiction is final and binding – there are no challenges, there is nothing for the court to decide. I do not have statistics, but my impression is that in most cases, the decision of the arbitral tribunal on its own jurisdiction is the last word. So private international law is maybe relevant, but marginally relevant. The other comment is that almost every time you mentioned for all those examples the application of the so-called *lex loci arbitri* by the courts, the law of the forum, you called it forum, or *lex loci arbitri*, or the law of the seat. That means, courts normally apply their own arbitration law. For that, no private international law is necessary.

Private international law is not necessary when the only real option is the application of the *lex fori*. I imagined that private international law was more sophisticated than that. Just to say that the law of the seat is applicable – we don't need all the complex apparatus of private international law. Courts already did that before the existence of private international law, in the Dutch statutes. We had already the application of the *lex fori* before Savigny, Mancini and everyone after that.

GCM: Just a very brief reply: in some situations, private international law will point to the law of the court; in some other situations it does not – for example, in relation to the legal capacity of the parties to enter into the arbitration agreement.

DFA: In almost all the examples you gave, the application was the law of the forum, the *lex loci arbitri*.

GCM: Not when it comes to legal capacity and not when we are talking about enforcement. Now you are assuming that you are in a challenge situation, but if you are trying to enforce the award in a different country then . . .

DFA: But that is in our last point [below].

GCM: But you are taking me there! OK, we'll leave the reply to the last point.

DFA: Let's discuss procedure. I will be brief now. Procedure is governed by the parties' agreement and parties normally choose arbitration rules of an institution or the UNCITRAL arbitration rules for ad hoc arbitration. In addition to that, arbitrators have international sources, such as the IBA rules on taking of evidence, and generally recognised principles (equality of the parties, due process, etc). Recourse to national law is not necessary and is not advantageous in general in arbitral proceedings. So private international law is not that necessary either in this point. The arbitral tribunal – by means of the so-called procedural order number one – settles what the parties have not previously agreed upon. That is the practice of arbitration. If the parties have not agreed upon some procedural aspect, the arbitral tribunal solves this by applying the rules it has established or relying on inherent powers. Whenever procedural issues are exceptionally brought before domestic courts, courts do not necessarily use private international law criteria to decide; they systematically apply their own law without considering any connecting factor and we can say that they apply the *lex fori* in general, which is an option within private international law discourse, I know, but it is rather a denial of private international law. The principle of territorialism is not even pre-modern private international law.

GCM: That is a difficult one. I do not really have so much to say about procedure because I think that, on purpose, most modern arbitration laws do not have an extremely detailed regulation on the procedure and the regulation that they have

is usually a default regulation unless there are, of course, the important principles like *audi alteram partem* (you know, both parties have to present their case), and due process and several other well-recognised principles. But otherwise most of the procedural rules can be derogated from the contract of the parties and they are integrated by the arbitration rules if the parties have chosen institutional arbitration. And all this flexibility is on purpose because the parties should be able to regulate their proceeding as they see fit. So, I have not seen a lot of private international law issues arising in the context of procedure; probably the most relevant areas would be the interface between the courts' power and the arbitral tribunals' powers when it comes to preliminary or preventive measures, or the production of evidence. There was an interesting discussion in the UNCITRAL working group on arbitration in the last session when we were talking about the notes on the organisation of the arbitral proceedings: someone talked about the possibility that the parties would choose a procedural law different from the law of the place of arbitration, which is a possibility that anybody reasonable speaks badly about. But there is this possibility under French law, as far I know, and what was interesting was that the whole room was for once in complete agreement that there is no such possibility. And the French delegate was there, and I went during the break after and asked him, 'Don't you have in French law the possibility to choose a different law?' and he answered, 'Yes, indeed, but it is not so important'. So, it seems that the territoriality principle in the context of procedure is actually living a quite unchallenged and happy life.

DFA: We are talking about procedural issues arising before a domestic court. For an arbitral tribunal the problem is not a real problem because all arbitrators will be using substantive rules agreed by the parties or decided by the arbitral tribunal. Article 1509 of the French Code of Civil Procedure, it is true, allows parties to choose another procedural law, that is to say another arbitration law. That was included coupled with the intervention of the French *juge d'appui*, the judge acting in support of arbitration, just to permit another supplementary intervention of French courts in arbitrations whose seat is outside of France. And that is because in France the perception is that French arbitration law is so worthy that everyone deserves to be governed by French arbitration law.

GCM: That is very kind of them.

DFA: Yes, it would be like a gift for people of other countries.

Moving to the applicable law, I think we have heard many interesting thoughts today and several approaches to this issue, as indeed the very rich contributions to this volume, so we should not have so much to add. Nevertheless, there is, I think, an evolution in the matter of the applicable law in international arbitration, in particular regarding the merits. I am talking about the evolution from the *voie indirecte* to the *voie directe* in national acts on arbitration, in arbitration rules, and – most importantly – in lawmakers' mentality. There is also an evolution from the use of the term 'law'

to the use of the term ‘rules of law’ and there is a common assumption that trade usages and the terms of the contract must be considered in any event. So, the space for classical private international law seems to be reduced. I cannot say it has been totally eliminated but it is significantly reduced. Talking specifically about the law applicable to the merits, concerning the arbitration agreement, back to the first issue, some legal systems have already evolved towards a substantive approach governed by the validity principle, that is autonomous of all legal systems and only subject to international public policy. And that is the French system I mentioned before. In 1993, there was a famous case in the French Supreme Court for private law matters, the *cour de cassation*, the *Dalico*² case; this case dealt with a contract between a Danish company and a Libyan municipality that refused to arbitrate because the mandatory provisions of Libyan law imposed formalities to the arbitration agreement that had not been fulfilled in the case. The *cour de cassation* considered that the arbitration agreement was valid, and that the fact that some formal requirements were missing did not affect its validity because an arbitration agreement must be addressed without reference to any national law. This is, I think, a manifestation of an evolution of the concept, even if I can accept that in some particular cases the law applicable to the arbitration agreement is still important and that in other legal systems, traditional conflict rules are still enforced. But this is not the idea, for example, in the new version of the UNCITRAL Model Law. As you probably recall, the Model Law was revamped in 2006 and one of the modifications was about the form of the arbitration agreement. There are now two options, and one of the options is no form at all for arbitration agreements. Maybe in the future, it will become a trend. And if no formal requirements are established for the arbitration agreement in international arbitration obviously we do not need a conflict rule to say which law governs the formal requirements.

GCM: I leave the form of the arbitration agreements because I spoke already about that; actually, I would like to add just one comment, that is, if there is uncertainty whether it is French law or Austrian law, which I think is a little bit more formal when it comes to the requirements, then private international law becomes very important because you have to decide whether the agreement was subject to one or the other. So, the fact that some national laws are becoming very liberal when it comes to the form of the arbitration agreement only enhances the need for choosing between the laws, rather than making that need less relevant. But I have some comments regarding the laws applicable to the substance of the case. You were mentioning the *voie directe* – there is a trend towards the possibility for the arbitral tribunal to directly identify the law applicable without going through the mechanism of the choice of laws, so without necessarily applying whatever connection criteria would be applicable. As I

² See *Municipalité de Khoms El Mergeb v. Société Dalico*, 20 December 1993, Case No. 91-16828.

said earlier, speaking about the social engineers and Kafka, I don't think that trend is necessarily helping because it does not really contribute to foreseeability when you don't know in advance on the basis of which criteria the law is going to be chosen.

DFA: That is in the case where parties have not chosen . . .

GCM: I know.

DFA: So, parties have the possibility . . .

GCM: They may not have chosen the law, for example, because the one informed party knew that under the applicable private international law the contract would be subject to a certain law, and that is the law that party wants, so there was no need to bring the matter up with the other party. Or the parties, without speculating on that, might have assumed on the basis of private international law that the contract would be subject to a certain law and therefore there was no need to regulate the choice of law. In any case, even if the parties have forgotten or were not aware when they drafted the contract, when a dispute arises and the parties start evaluating which possibilities they have, that is the time when they need to find out which law is applicable, because that is when they need to work out if it is worthwhile to go to arbitration, or if they should rather aim to settle the matter outside any adjudication procedure. For making that kind of assessment the parties should have the possibility to take recourse to some criteria, some objective criteria, to allow them to ascertain the law that is applicable. And if they have to wait for the social engineer to decide which law is applicable, it means that they have already started the arbitration, so they have already gone through all the costs that are connected with that. And then the arbitrator says, 'Oh sorry, it was the law according to which you are time-barred, so you don't have a claim'. So that's a little bit too late to identify the governing law. That was the point I wanted to make earlier in relation to foreseeability.

There are two further points that I would like to make on the question of the governing law and how private international law is useful in this context. One is relating to the choice of law made by the parties in the contract. According to classical private international law, the parties are allowed to choose the law that applies to the contractual aspects of their relationship. This a conflict rule known as party autonomy. If they have a complicated contract, like a shareholder's agreement that has also some company law aspects, or a transaction where there is some pledge or some mortgage or some other property law aspects, or a contract with intellectual property aspects, those are areas (legal categories) where party autonomy does not apply. Those are fields, issues, that are outside the scope of the choice made by the parties, notwithstanding that the parties have written in the contract 'this contract is to be governed by Swedish law'. The choice of law made by the parties does not necessarily have effects on every aspect of the business transaction. Limitations apply to competition law, labour law, property law, *inter alia*.

DFA: It depends on the legal system. Moreover, if you say that in a contract on intellectual property no party autonomy is admitted, that would not be true.

GCM: Well, of course. If you are licensing your property you can choose the law. Whether you have a patent that is valid or not, that is something different.

DFA: But that is not a contractual issue.

GCM: But that is exactly my point. You may have a contract that is complex. And you may have a contract that has implications of company law, of property law, of intellectual property law in the sense of patents, for example the validity of the patent. Of course, we all know that the law chosen applies only to the contractual aspects, but if the contract is complex and has also implications for several other non-contractual legal issues, what law shall govern those issues? The parties might believe that their choice of law applies also to those aspects, and that is where private international law comes in and tells you that ‘sorry, your choice applies to the contract, and not also to whether you had the capacity to enter into the contract or not’, for example. That is a very typical example where the parties get very surprised and say, ‘What? I have chosen Swedish law, why do they say that under Ukrainian law my contract is not valid because the other (Ukrainian) party didn’t have the legal capacity? I didn’t choose Ukrainian law, I chose Swedish law’. And that’s where an awareness of private international law is useful, because it permits the parties to determine in advance the scope of the choice of law they are making. This is something that becomes relevant again when we talk later about enforcement.

And then the other point that you made about parties choosing more and more rules of law and not necessarily only laws, meaning that there are more and more transnational sources that make the choice of domestic legal systems redundant. It is true to a large extent, of course. But there are situations where even those instruments of transnational law need to be interpreted and they need to be supplemented. They don’t cover everything and what do you interpret with, and how do you supplement them? With the applicable law. So, this is another example, another situation where the modern trends do not render private international law redundant. They might reduce its scope, but they don’t make it redundant.

DFA: Only marginal, not redundant. Let’s go to the last point, enforcement.

GCM: Yes.

DFA: I will make only three very short points. The first one is that the vast majority of awards are enforced all over the world without any necessity for court intervention. That is a matter of fact. The second point: whenever a party applies for enforcement before a domestic court, the award is enforced in most cases. That is to say that we have a reduced number of cases where we go to court in order to enforce, to ask for

the enforcement of an award. And there are an even more reduced number of cases in which there is a real problem, in which – maybe – private international law issues will arise. And the third point deals with the grounds for the refusal of enforcement or the challenge of an award, which are quite standardised due to the strong impact of the New York Convention. And I already mentioned that the New York Convention is at the beginning of the modern era of arbitration and because of this, it should change in the future. And even within the context of the application of the New York Convention as it is, if you look at Article V, paragraph 2, that is to say the problem of public policy and arbitrability, again, not real private international law is there, but a sort of control of domestic compatibility, court members do not need particular private international law skills to do that, to say ‘this decision is against our public policy’. They should know their public policy principles. And finally, we have Article V, paragraph 1, and there some small space for private international law considerations appears, due in particular to paragraph 1a, which deals with the situation already mentioned of the law applicable to the arbitration agreement. And, once in a blue moon, we have a problem about capacity. In such a case you need to say, ‘Ukrainian law says . . .’. That is indeed very rare; it would be one case out of thousands of cases. That is the reality of the practical use, I mean of the usefulness of private international law in arbitration.

GCM: It is, luckily, true that the great majority of arbitral awards are enforced voluntarily, without having to go to court. And of those that need assistance by the courts, there are not necessarily always private international law aspects. However, this does not mean that you should not regulate those aspects. So, I do not think I should spend more time on that. And I will not spend time reading again the list of all the subjects in the first sentence of Article V, where private international law is relevant, because it is the same as I mentioned at the beginning in connection with challenge. There is one further point that I would like to make very quickly. I mentioned when we talked about the law applicable to the substance of the dispute that private international law is useful because it gives you an understanding of the scope of party autonomy. And it gives the arbitral tribunal the tools to understand how far the choice of the parties goes, and what the criteria are for choosing the law in the other aspects (company law and labour law, *inter alia*) where party autonomy does not reach. Why do I mention it again in connection with the enforcement of the arbitral award? Let’s think, for example, that the parties have a contract that has competition law relevance in Europe. They do not want to be subject to European competition law. They chose Russian law instead. They go to arbitration and they instruct the arbitrator specifically to apply Russian law according to the choice made by the parties. We all know that the arbitral tribunal has to follow the will of the parties. So, if the arbitral tribunal says, ‘I cannot apply Russian law to the competition law aspects, I have to apply European law, otherwise the contract is not enforceable in Europe’, then the arbitral tribunal runs the risk of exceeding its power. And excess of power is reason for not enforcing the award. So, the arbitral tribunal has actually

to follow the will of the parties, the instructions given by the parties, to apply Russian law. On the other hand, if the arbitral tribunal disregards the relevant provisions on European competition law, we know that the Court of Justice of the European Union said that European competition law is public policy and therefore the arbitral award runs the risk of not being enforceable in Europe. So, what should be done in this situation? Does the arbitral tribunal have to decide between non-enforceability because of excess of power on one hand, or non-enforceability because of conflict with public policy on the other hand? That is a very bad position to be in. That is where private international law comes to the rescue, because that is where an awareness of private international law allows the parties to understand that ‘yes, arbitrators have to follow the will of the parties, but the parties did not have the power to choose a different competition law from European law in this scenario’. Party autonomy only gives the parties the power to choose the law for contractual matters. So the law that was chosen by the parties had effects within the contract law aspects and not beyond. The arbitrators are to apply Russian law within the contract law aspects. When it comes to competition law, party autonomy does not cover competition law. So private international law gives the tools for the arbitral tribunal to understand and to explain to the parties what is the scope of party autonomy and avoid the risk of providing reasons for the award as if they had exceeded their power.

VRA: Thank you very much to our excellent world-renowned debaters! It was a very engaging debate. There is plenty of food for thought on both sides, I have to admit. Thank you very much indeed.