

***CONFLICT OF LAWS AND ARBITRAL DISCRETION: THE
CLOSEST CONNECTION TEST BY BENJAMIN HAYWARD
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Dr. Benjamin Hayward's book is a treasure for anyone engaged in the field of international arbitration or conflict of laws (also known as "private international law"). With the advances of international commercial transactions and the popularity of arbitration tribunals, the question of the applicable law to govern the adjudicative process is most pressing today. The majority of contemporary international contracts includes a clause that expressly states the identity of the applicable law. However, one may inquire about the significant number of cases where the applicable law is not stated. Which law shall govern those cases? Puzzlingly, and despite the imminent significance of this question, the answer is still pending. From this perspective, Hayward's book fills in an important gap in the literature.

It is a truly comprehensive, well-written and internally balanced work. It provides both a careful analysis of the legal doctrine and establishes an appealing normative argument as to the future of the field. The author knows how to tell a coherent story to the potential reader and makes the story interesting and engaging. The argument progresses slowly and in a thorough way. It is evident that Hayward cares about his audience.

This book review consists of two parts. Firstly, it provides a brief overview of the book's structure and the main aspects of Hayward's argument. Secondly, it makes some observations on the point of the importance of the book and its contribution to the literature.

I BOOK STRUCTURE AND THE MAIN ASPECTS OF THE ARGUMENT

The book consists of seven closely related chapters. Chapter 1 provides a much-needed introduction to the subject and sets the groundwork for further exposition of the argument. While outlining the growing significance of party autonomy in the area of international commercial arbitration (pp. 11-16), this chapter sets the scene for the main focus of the book: the cases where the parties have not specified the identity of the applied law. Furthermore, the introductory chapter sets the conceptual framework for the entire work and discusses the underlying values of the field of international commercial arbitration: the values of predictability, parties' reasonable expectations and market harmonization (pp.41-43).

Chapter 2 provides a descriptive overview of provisions governing the question of the applicable law in international commercial arbitration. It demonstrates the vast discrepancy between the various rules and calls for their harmonization (p. 96). Within this overview, Hayward demonstrates the apparent popularity of the so-called “closest connection” principle amongst the various regulatory frameworks (pp.84-85). According to this principle, the arbitrary tribunal shall apply the law of that place which has the “closest connection” to the parties and their interaction. Take for example a contract between two English residents, signed in Italy that deals with the delivery of goods in England. According to the “closest connection” principle, this contract, shall be governed by English law. The author’s focus on this principle is not incidental. Indeed, as we will see in Chapters 6-7, this principle plays a key role in Hayward’s vision of the applicable rules to international commercial arbitration.

Chapters 3-4 explains why arbitrators require guidance in the first place. It develops an attack against the contemporary popular view that grants the arbitrators broad discretion to identify the applicable law (p.98). It shows that, as a matter of legal theory, the practical aspects of commercial activity and the underlying rationales of the field, granting the arbitrators a broad discretion is untenable (pp. 134-144). What should come instead, explains Hayward, is a predictable set of *a-priori* legal rules that would provide arbitrators with a comprehensive framework for tackling the identity of applicable law (151, 158-169). This framework does not need to be rigid and a fair amount of flexibility and adjudicators’ discretion should be incorporated. In other words, guidance is required, alongside discretion. An account that empowers the arbitrators with unlimited discretion must be unequivocally rejected.

Finally, Chapters 5-7 reveal the proposed solution to the question of the applicable law in international commercial arbitration. Following chapters 3-4, these chapters mark the precise way of how the adjudication process can coherently incorporate strict rules with flexible, discretion-based rules (p.184-186). Specifically, the author suggests making a reference to a related to international commercial arbitration field of law- conflict of laws. By referring rule of the so-called “specific performance” that is central within the European community,¹ Hayward favours incorporating this rule as a guiding principle for international commercial arbitration. For example, the characteristic performance of a contract of loan, would be the place where the contract is to be performed- the place of the loan payment.²

¹ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 (EU) art. 4 (2).

² Report on the Rome Convention by Professors Mario Giuliano & Paul Lagarde Report (OJ 1980 No C282/1), at 20-21.

Within Hayward's framework, the popular "closest connection" principle plays a central role. While the "characteristic performance" rule provides a guiding principle and serves as a primary rule, the "closest connection" principle plays a secondary role and crystalizes the discretionary aspects of the adjudication process. Thus, for example, when the place of the characteristic performance of a contract may be arbitrary to the particular parties' interaction, the "closest connection" principle may enter the picture and point to application of a different law.

II THE IMPORTANCE OF THE BOOK AND ITS CONTRIBUTION TO THE LITERATURE

In this book review, I would like to focus on the following two aspects of the book: (1) the fact that the argument develops through a constant reference to the field and literature of conflict of laws; and (2) the fact that the book positively reflects on the "closest connection" principle and suggests its integration as an inherent component of the decision-making process of international commercial arbitration. The following paragraphs discuss each one of these aspects, in turn.

A *Partnering international arbitration and conflict of laws*

Consider, first, the many references to the insights and literature on conflict of laws. In many ways this reference is innovative. The traditional vision of the conflict of laws viewed this discipline as fundamentally grounded on the organizing principle of states' relationships and states' sovereignty. These principles have played a key role in determining the question of the applicable law to govern the parties' rights and duties. Take the traditional contract conflict of laws rule of the place of contract formation. For a sovereignty-based account of choice-of-law, this rule represents a state's inherent interest to be involved in the act (i.e. contract formation) which took place within its territorial borders. As one of the classical choice-of-law thinkers put it, the place of contract formation rule "...gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreements done in his own territory".³

The historical state-based foundational basis of conflict of laws explains the traditional hostility of conflict of laws scholarship to incorporate the principles of international arbitration and to rely on its decisions. And vice versa: the insights of conflict of laws have been traditionally ignored by international arbitration. In contrast to the field of conflict of laws which had been heavily affiliated with the state-based activity and grounded on the state-based organizing principle,

³ Joseph Beale, (1909) 'What Law Governs the Validity of a Contract' (1909) 23 Harv. L. Rev. 73 at 271.

international arbitration has been considered as a private matter, separate from state-based activity. This, indeed, explains the traditional somewhat sharp disjunction between the fields of international arbitration and conflict of laws.

Yet, times have changed. Nowadays, conflict of laws scholarship has moved away from the state-based underlying underpinnings and rationale. It has warmly embraced such “private” underlying principles as the party autonomy principle and parties’ reasonable expectations.⁴ Hayward’s book precisely follows this trajectory: by explicitly relying on the insights and literature from the realm of conflict of laws, he links the two areas of law on their deepest level.

In fact, international commercial arbitration and conflict of laws can be excellent candidates for a potential partnership. The decline of the traditional sovereignty-based principles in conflict of laws suggests that it can be matched with international arbitration. There is no conceptual or practical reason to separate the two. This partnership would suggest that the two disciplines can learn from each other’s mistakes, hesitations and the volumes of adjudicative decisions. Hayward’s work is an illuminative example of this common learning exercise.

B *Supporting the “closest connection” principle*

The other significant contribution made in Hayward’s work relates to his positive treatment of the “closest connection” principle (pp. 2, 43 n.359, 84-85, 188, n.3, 212-213). This position should not be taken for granted. Much ink has been spilled in the literature to mock this principle as inherently problematic and as granting adjudicators with almost unlimited discretion. Serious concerns have been expressed as to the very ability of the principle to operate on a daily basis in the adjudicative reality.⁵

However, Hayward’s position is different. His support of the closest connection principle seems to be based on the following interrelated arguments. First, as a matter of legal practice, this principle seems to be popular within the various regulatory frameworks and adjudicative practice. From this perspective, the critics have failed to acknowledge and honour the actual practice of the adjudicative tribunals. One can argue that any conceptual account cannot bluntly disregard the practice. Practice feeds theory. There must be something about the “closest connection” principle that has made it so popular in the adjudicative tribunals.

⁴ Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2019); Sagi Peari, *The Foundation of Choice of Law: Choice & Equality* (Oxford University Press, 2018); Friedrich Juenger, *Choice of Law and Multistate Justice* (Martinus Nijhoff, 1993); Gerhard Kegel, ‘The Crisis on Conflict of Laws’ (1964) 112 *Rec. des Cours* 95.

⁵ Albert A. Ehrenzweig, ‘A Counter-Revolution in Conflicts of Laws’ (1966) 80 *Harv. L. Rev.* 377 at 381; Laura E. Little, ‘Hair-splitting and Complexity in Conflict of Laws: The Paradox of Formalism’ (2004) 37 *U.C. Davis L. Rev.* 925 at 958.

Secondly, Hayward shows that the critics of the principle have failed to acknowledge another central point: it does not frequently operate as a stand-alone principle. Rather, it serves and shall serve (as Hayward argues) as a complimentary principle of the adjudicative process. This secondary role of the “closest connection” principle challenges the criticism that has targeted its inherent unpredictability. Unfortunately, very little has been discussed in the conflict of laws and international arbitration literature about the positive aspects the “closest connection” principle.⁶ From this perspective, Hayward’s work is a most welcoming development.

In summary, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test*, is an excellent, much-needed, well-written, well-argued book. It provides an illuminating outline of the existing practice of international commercial arbitration and offers a comprehensive argument on how to improve it. The broad community of international arbitration and conflict of laws practitioners and scholars around the world should be thankful Dr. Hayward for that.

⁶ Hayward’s mentions in his book that the foundational father of conflict of laws – Friedrich Carl von Savigny, has not been supportive of the closest connection principle (pp. 45-46, 256). However, one can challenge that view, see Sagi Peari, ‘Savigny’s Theory of Choice-of-law as a Principle of Voluntary Submission’ (2014) 64 (1) *University of Toronto Law Journal* 106.