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International Commercial Arbitration

5.5 Law Governing the Merits of the Dispute



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NOTE

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WHAT YOU WILL LEARN

In the great majority of cases in which an international arbitration takes place, the arbitrator (or arbitrators) finds himself faced with a legal situation of an international nature. Even if the international character of the arbitration and that of the legal relationship on the merits often go together, the two questions need to be distinguished from each other.

The attention of the arbitrator will be unavoidably drawn to the question each time that the parties expressly request him to decide the question of the applicable law. For this reason, the parties can demand that the arbitrators decide this question by means of a partial award rendered at the outset of the procedure.

However, even when not faced with such a demand, the arbitrator must take a position on this point. The law applicable to the merits of the dispute will affect the approach of the arbitral tribunal to a significant degree. This must be carefully distinguished from the rules of law applicable to the procedure. In this way, Article 19 of the UNCITRAL Model Law on International Commercial Arbitration deals with the determination of procedural rules. A different provision, Article 28 of the same Model Law, is devoted to the law governing the merits of the dispute.

The determination of the rules of law applicable to the merits of the dispute can be very simple to resolve in some cases, but a very complex matter in others. Arbitrators must, therefore, have an excellent knowledge and understanding of the principles which will enable them to perform as well as possible this sometimes delicate aspect of their task.

That is why the present chapter begins with a short explanation of the way in which the legal rules to be applied by the arbitrator are determined. That will be the subject of Part 1. Part 2 considers the basic rule, which is that of party autonomy. The arbitrator is required, whenever the issue arises, to give effect to the will of the parties concerning the applicable law.

Part 3 will consider the situation of the arbitrator deciding on the law applicable to the merits of the dispute where he cannot rely on any indications from the parties as to their intentions. In such circumstances, it is important to determine the principles that will guide the arbitrator in his choice of the applicable rules of law.

Part 4 is devoted to the specific role that may be played in all these situations by the provisions of the contract and trade usages.

Finally, Part 5 deals with the question of the application by the arbitrator of international public policy and mandatory rules of law, which must be applied even if the rules of law applicable to the merits of the dispute are determined on the basis of other considerations.

1. THE PRINCIPLES TO BE APPLIED BY THE ARBITRATOR IN THE DETERMINATION OF THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE

1.1 Lex Arbitri

Notwithstanding the many theories concerning the role of the arbitrator, which will not be reviewed in this paper, there is widespread consensus on one point: the international commercial arbitrator does not do justice in the name of any State. As a result, and unlike a national judge, the arbitrator does not have a *lex fori*, and therefore is not bound to apply any national system of conflict of laws rules.

Consequently, and to provide an example, the establishment of the seat of an arbitral tribunal in Switzerland or in France does not mean that the arbitrator will be required to apply the conflicts of law rules in force in Switzerland or in France. However, even though arbitrators do not have a *lex fori*, they are subject to a *lex arbitri*.

So, an arbitrator sitting in Switzerland or in France will be required to apply the legal rules governing international arbitration in force in that country. In contrast to national conflicts of law rules mentioned above, which apply to national judges, the rules of international commercial arbitration, the *lex arbitri*, apply to international commercial arbitrators. It is therefore in the applicable arbitration law that the arbitrator will seek the rules to be applied to the determination of the law applicable to the merits of the dispute.

1.2 Lex Arbitri and Institutional Arbitration

One must also take into account the fact that in numerous cases, the parties decide to entrust the resolution of their dispute to an arbitration institution whose rules they have agreed to follow. In such cases, the arbitration rules of the institution must be applied by the arbitrators as reflecting the parties' intentions.

Consider as an example the case of a dispute between a Swiss party resident in Switzerland and a Spanish party resident in Spain, the parties having expressed their agreement to ICC arbitration, by means of an arbitration clause in their contract, with Geneva as the seat of arbitration. This arbitration would be governed by the Swiss law on international arbitration (Article 176 of the Swiss P.I.L Act of 18 December 1987), which functions as the *lex arbitri*. It would give full effect to the ICC Rules of Arbitration chosen by the parties in this example.

All arbitration rules used in international trade are designed to give effect to the wishes of the parties.

However, since the arbitration rules are only applicable by virtue of their selection by the parties, the latter – by making such a choice – are exercising the power to choose the applicable law within the constraints provided for by the institution's rules. This power, though, is itself derived from the *lex arbitri*. The UNCITRAL Arbitration Rules are of particular importance in this regard.

**Article 33(1),
UNCITRAL Arbitration
Rules**

“The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute...”

In the end, arbitrators must remember that they are required to refer to the *lex arbitri* – which defines the framework within which they have to work – in order to come up with the solutions that are provided for them on the question of the applicable law. The formulation of the legal rules on the applicable law must not be allowed to mislead us: even though they appear to be addressed principally to the parties, they are in fact aimed at the arbitrators.

Since in general the provisions of the *lex arbitri* are suppletive, the parties, or in the end the arbitrators, can amend or derogate from them. So, when parties have decided to have recourse to international arbitration, the provisions of the arbitration rules of the institution they have chosen will become applicable from the point of view of the *lex arbitri*. The *lex arbitri* does not usually take away from the parties the option of organising their arbitration as they wish.

1.3 The Lex Arbitri and the Rules for Determining the law Applicable to the Merits of the Dispute

The *lex arbitri* therefore includes, in one form or another, the principal of autonomy, which allows the parties to choose the applicable law.

However, the *lex arbitri* (or the arbitration rules chosen by the parties to which

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