



Transnational civil litigation and International commercial arbitration

*The law applicable to the merits in international
arbitration*

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LAWS APPLICABLE IN INTERNATIONAL ARBITRATION

- There are several different laws that are applicable to an international arbitration:
 - ✓ The law **applicable** to the **arbitral process** as such (*Lex arbitri-Curial law*)
 - ✓ The law **applicable** to the **arbitration agreement**
 - ✓ The law **governing** the parties' **capacity to arbitrate**
 - ✓ The law **applicable** to the **merits** of the dispute
 - ✓ The law of the **place** of the **enforcement** of the arbitral **award**

IN INTERNATIONAL ARBITRATION, IT IS POSSIBLE THAT EACH OF THESE LAWS IS OF A DIFFERENT STATE

MERITS OF THE DISPUTE

- Term commonly used to refer to the **substance** of a legal dispute
 - The **merits** of a legal dispute refer to the determination of the legal rights and obligation of the parties stemming from their legal relationship (contractual or non-contractual)
- When the **merits** of a case are decided, the **substantive** subject matter of the dispute has been decided, as opposed to **procedural** issues
 - for instance, a **procedural** issue (and not the merits of the case) is decided when arbitrators decline **jurisdiction** for being the arbitration agreement null and void

DETERMINING THE LAW APPLICABLE TO THE MERITS

General features

- Business transactions referred to international arbitration are usually not confined to a single country
- As a dispute arising from an international business transaction touches **more than one legal order**, in principle any of them might be intended to govern the legal relationship
- When such coexistence of several legal orders touched by the same legal relationships occurs, it can be said that a **conflict of laws** issue has arisen

DETERMINING THE LAW APPLICABLE TO THE MERITS

General features

- In the event of conflict of laws issues relating to merits of a contractual dispute, there's the need to identify which is the legal order that governs the issue that must be decided
 - If the dispute refers to a sale contract, for instance, it may be relevant to determine
 - ✓ how long is it and when the statute of limitation begins to run,
 - ✓ which is the time limit for notifying the seller of defects,
 - ✓ when the goods must be considered delivered
- Identifying the law applicable to the merits means basically selecting the single legal provision applicable for resolving and deciding issues as those listed above

DETERMINING THE LAW APPLICABLE TO THE MERITS

General features

- **Private international law (PIL)** is the set of rules that is part of any domestic legal system which is intended to regulate contractual transactions or other juridical occurrences that have connections to more than one jurisdiction
 - **PIL** must not be confused with public international law, which regulates relations between states and other sovereign entities

PRIVATE INTERNATIONAL LAW

Connecting Factors

- **PIL rules** consist of two elements:
 - the part that identify the legal occurrence that it intends to regulate (contract, tort, succession, legal capacity of natural persons, etc.), and
 - the part that provides for the **connecting factor** which shall be used for the purposes of linking the legal occurrence with foreign elements to the national legal system competent to regulate it

PRIVATE INTERNATIONAL LAW

Connecting Factors

- **PIL rules** may be national and supranational as well. Within the European Union, Regulation No. 593/2008 on the law applicable to contractual obligations (“**Rome I**”) overrides the national PIL rules of EU member States establishing uniform rules for determining the law applicable, in the event of a conflict of laws
- Under **Rome I** regulation **connecting factors** are:
- **Choice of the parties** to the contract (“*A contract shall be governed by the law chosen by the parties*”)
- Absent a choice, the location of the party required to effect the **characteristic performance** of the contract
- **Closest connection** with the contract

HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

- Are arbitrators bound to apply PIL rules which are in force in the State of the seat of arbitration ?
 - According to some scholars, international **arbitral tribunals have no forum**, international arbitrators are not organs of a particular State, therefore they are in principle not bound by PIL rules in force in the State of the seat. But if the *lex arbitri* provides that arbitrators shall decide according to the rules of law, why they should disregard national PIL rules ?
- In international arbitration the law applicable to the merits of the case is usually determined according to **other provisions than the statutory conflict of laws rules in force in the State of the seat**
 - Many national laws on arbitration contain **autonomous provisions** in respect of determining the law applicable to the merits of the dispute, which differ from those intended for the courts
 - It should therefore be pointed out that an arbitral tribunal is not bound by the **statutory PIL rules** of the **seat** of arbitration as it is this law that commands it to apply different and special provisions to resolve the conflict of laws. **Failing these special provisions, the rules of law that arbitrators are called upon to apply must include the ordinary PIL rules of the seat**

HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

Uncitral Model Law

ARTICLE 28 (RULES APPLICABLE TO SUBSTANCE OF DISPUTE)

- (1) *The arbitral tribunal shall decide the dispute in accordance with such **rules of law as are chosen by the parties** as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*
- (2) *Failing any designation by the parties, the arbitral tribunal shall apply **the law determined by the conflict of laws rules which it considers applicable.***

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ART. 46 (1)(3) UK ARBITRATION ACT 1996

1. *The arbitral tribunal shall decide the dispute (a) in accordance with **the law chosen by the parties** as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. 2 [...]*
3. *If or to the extent that there is no such choice or agreement, **the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable***

HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

Lex arbitri

Article 1051 German code of civil procedure

- (1) *The arbitral tribunal shall decide the dispute in accordance with such **rules of law** as are **chosen by the parties** as applicable to the substance of the dispute. [...]*
- (2) *Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is **most closely connected**.*

Art. 187 Swiss Federal Act on Private International Law (PILA)

1. *The arbitral tribunal shall decide the dispute according to the rules of law **chosen by the parties** or, in the absence of such a choice, according to **the rules of law with which the case has the closest connection**.*

HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

Lex arbitri

Article 34 (2) Spanish Arbitration Act

*Subject to the previous paragraph, where the arbitration is international, the arbitrators shall decide the dispute in accordance with such **rules of law as are chosen by the parties**. [...] Failing any designation by the parties, the arbitrators shall apply **the law that they consider appropriate***

Article 1511 French code of civil procedure

*The arbitral tribunal shall decide the dispute in accordance with the **rules of law chosen by the parties** or, where no such choice has been made, in accordance **with the rules of law it considers appropriate**. In either case, the arbitral tribunal shall take trade usages into account*

HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

Lex arbitri

Art. 822 Italian code of civil procedure

*When the arbitrators are called upon to decide according to the rules of law, **the parties may**, in the arbitration agreement or by written instrument prior to the commencement of the arbitration proceedings, **designate** the rules or foreign law as **the law applicable to the substance of the dispute**. Failing any indication by the parties, **the arbitrators shall apply** the rules or **the law identified under the criteria of conflict deemed applicable***

HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

Lex arbitri

ARTICLE 3 MILAN CHAMBER OF ARBITRATION (CAM) ARBITRATION RULES

1. (...)
2. *The Arbitral Tribunal shall decide in accordance with the **rules chosen by the parties.***
3. *In the absence of any agreement pursuant to Para. 2, **the Arbitral Tribunal shall apply the rules it determines to be appropriate,** taking into account the nature of the relationship, the qualities of the parties and any other relevant circumstance.*
4. (...)

ARTICLE 21 ICC ARBITRATION RULES

1. ***The parties shall be free to agree** upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, **the arbitral tribunal shall apply the rules of law which it determines to be appropriate.***
- 2 (...)

HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

Non-State Law

- The merits of a dispute submitted to arbitration may be governed not only by some national body of law (e.g., the Italian Civil Code) but also by **a non-state, non-national set of provisions**
 - Are parties free to select as applicable “law” instruments that do not form part of any state’s law ?
 - Are arbitrators, failing any agreement of the parties, entitled to apply such instruments rather than binding state law or binding international conventions?
- **UNIDROIT Principles of International Commercial Contracts** are a restatement of the general principles of contract law and comprehensively cover issues of interpretation, performance of contractual obligations, contract formation, conducting of negotiations, and remedies
- **Convention on International Sale of Goods** (Vienna Convention, CISG) is intended to regulate formation and performance of international sale of goods contract