



# Transnational civil litigation and International commercial arbitration

*Arbitral Awards*

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15<sup>TH</sup> NOVEMBER 2023

## ARBITRAL AWARDS

### General Features

- Arbitral Tribunal decides the dispute referred to arbitration by an order which is called and referred to as **arbitral award**
  - An arbitral award may decide the merits of a dispute by:
    - ✓ simply declaring the legal rights and obligation of the parties;
    - ✓ ordering one of the parties to pay a sum of money to the other party;
    - ✓ ordering one of the parties to perform an act or to refrain from performing an act
- During the arbitral proceedings, arbitrators may be asked to decide **procedural** issues
  - If the procedural issues are simply administrative (scheduling of a hearing, time limits for submitting statements of claim and statements of defence), they will be decided in the form of a **procedural order**
  - If the procedural issues can determine the end of the procedure (e.g., **jurisdiction**), they might be decided in the form of an **award** - **UNCITRAL Model Law, Article 16(3)**

# ARBITRAL AWARDS

## Time Limits

- Some arbitration laws dictate that Arbitral Tribunal must render the **award within a specified time limit, under pain of nullity** (art. 820 Italian code of civil procedure, Art. 37 Spanish Arbitration Act; Uncitral Model Law and UK Arbitration Act 1996 contain no provision to this extent)
  - In the first place, it's up to the parties to determine the term for the issuance of the award
    - parties may decide on this issue
      - ✓ by providing for the term in question in their arbitration agreement, or
      - ✓ by making reference to the arbitration rules of an arbitral institution (art. 31 ICC Rules; art. 36 CAM Rules)
- Failing any agreement of the parties, national arbitration laws provide for the term within which arbitrators must render their awards
- Terms for the issuance of the arbitral award may be extended, after arbitral process started
  - By **agreement** of the parties (usually after a specific request by arbitrators)
  - by **operation of law** (for instance, where evidence must be taken)

## ARBITRAL AWARDS

### Deliberation

- Most national arbitration laws prescribe that awards shall be made by **a majority of the arbitrators**
  - **Art. 29 Uncitral Model Law:** “In arbitral proceedings with more than one arbitrator, any **decision** of the arbitral tribunal shall be made, unless is otherwise agreed by the parties, by **a majority of all its members**. However, **questions of procedure** may be decided by **a presiding arbitrator**, if so authorized by the parties or all members of the arbitral tribunal”
  - **Art. 823, para. 1, Italian Code of civil procedure:** “The award shall be made by **majority vote with the participation of all the arbitrators**”
  - **Art. 35 Spanish Arbitration Act 2003:** “In arbitral proceedings with more than one arbitrator, all decisions will be made by **majority**, unless otherwise agreed by the parties. **If no majority is reached, the decision will be made by the president.** Unless otherwise decided by the parties or the arbitrators, **questions of administration or procedure or that expedite the proceedings may be decided by the president**”
  - **Art. 1480, para. 1, French Code of Civil Procedure:** “The arbitral award shall be made by **majority** decision. It shall be signed by all the arbitrators”.

## ARBITRAL AWARDS

### Formal Requirements

- Awards must be rendered in **writing** and, in principle, all arbitrators are required to **sign** the award
  - Where the minority arbitrator does not want to sign, most national arbitration laws provide that award may be signed by the majority and the arbitral award must expressly state that one arbitrator refused to sign it.
    - **Art. 1480, 2 e para., French Code of Civil Procedure:** *“The arbitral award [...] shall be signed by all the arbitrators. If a **minority** among them **refuses to sign**, the award shall so state and shall have the same effect as if it had been signed by all the arbitrators”*
    - **Art. 823, para. 2, n. 7), Italian Code of civil procedure:** *The signature of a majority of the arbitrators shall suffice, provided that mention is made that it was deliberated with the participation of all the arbitrators and that the other arbitrators were either unwilling or unable to sign”*
    - **Art. 52(3) UK Arbitration Act:** *“The award shall be in writing signed by all the arbitrators or all those assenting to the award”*

## ARBITRAL AWARDS

### Formal Requirements

- Usually, national arbitration laws and arbitration rules provide that arbitral awards shall contain
  - The **date** in which it has been rendered by the signing of the arbitrators
    - ✓ The date of the award is when it begins to have effects
  - The **place** where it has been rendered
    - ✓ the place where the award has been made coincides with the **seat of the arbitration**, irrespective of where arbitrators deliberated it and signed it (**article 53 UK Arbitration Act; art. 816 Italian Code of Civil procedure**)
  - The **reasons** on which the decision is based, even in summary
    - ✓ (it suffices that parties can understand on which grounds arbitrators relied for deciding issues at dispute)
    - ✓ Parties may agree on having no reasons (**art. 31 Uncitral Model Law; art. 52, para 4, UK Arbitration Act**)

## ARBITRAL AWARDS

### Set-aside proceedings

- Arbitral awards are subject to appeal for limited reasons
  - Appeal against arbitral awards (set-aside proceedings) must be brought before national state courts
    - As matter of principle, recourse against arbitral award is allowed only in the event of serious procedural irregularities
    - Errors of law by arbitrators are not in principle a ground for challenging arbitral award

## ARBITRAL AWARDS

### Effects on the merits of the dispute

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- An award which finally resolves the merits of the dispute produces *res judicata effect*.
  - It prevents litigants from starting fresh proceedings over the same matter resolved by arbitrators
- If the arbitral awards ordered a party to pay a certain amount of money or to perform an act, the award would be in principle **enforceable** against the losing party if it does not voluntarily comply with such order
- In principle, both effects take place in the state where the award has been rendered, in accordance with the rules set out in the national legislation of that state
  - For example, in Italy an arbitral award has res judicata effects since the last signature of the arbitrators, while it becomes enforceable when it has been so declared by the national court after a formal control

## ARBITRAL AWARDS

### (Domestic) effects on the merits of the dispute

- An award which finally resolves the merits of the dispute
  - produces **res judicata effect**, preventing litigants from starting fresh proceedings over the same matter resolved by arbitrators
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- In principle, both effects take place in the state where the award has been rendered, in accordance with the rules set out in the national legislation of that state
  - For example, in Italy an arbitral award has res judicata effects since the last signature of the arbitrators, while it becomes enforceable when it has been so declared by the national court after a formal control
    - Therefore, if the losing party starts new proceedings in the state of the seat over the same matter the other party may raise a res judicata objection
    - If the losing party has assets in the state of the seat, the other may start enforcement procedures in that state

# ARBITRAL AWARDS

## Recognition and enforcement abroad

- What happens if a litigant starts a fresh proceedings **before the court of the state other than the one where the award has been rendered** over the same matter resolved in arbitration ?
  - The other party needs to rely on the ***res judicata* effects** of the award rendered above for preventing the losing party in arbitration to relitigate the same issues, therefore that party needs to have the **award recognized in that other state**
- What if the losing party does not voluntarily comply with the order contained in the award and its assets are located in state other than the one where the award was made ?
  - The winning party needs to have the **award declared enforceable** in that other state

## ARBITRAL AWARDS

### Recognition and enforcement abroad

### The New York Convention 1958

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- **New York Convention 1958** is an international treaty currently in force in 170 Contracting States
- It deals with **recognition** and **enforcement** of **foreign arbitral awards** and dictates, in its **article III**, that  
*“each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”.*
- One of the essential aims of the **New York Convention 1958** is to establish a uniform set of conditions for the recognition and enforcement of foreign arbitral awards

## ARBITRAL AWARDS

### Recognition and enforcement abroad

### The New York Convention 1958

- **Article V** of New York Convention sets out the grounds upon which recognition and enforcement of a foreign arbitral award may be refused and it contains two sections:
  - **Article V(1)** sets out the grounds upon which **recognition and enforcement may be refused at the request of the party resisting enforcement**.
  - **Article V(2)** sets out additional grounds upon which the enforcing **court may refuse recognition and enforcement of its own motion**
- At the stage of resisting enforcement or recognition of foreign arbitral awards, **no review of the merits of the award is allowed** as errors of law or of fact by the arbitral tribunal is not included in the list of grounds for refusal exhaustively enumerated in Article V
- **Burden of proof:** the party resisting the recognition and enforcement bears the burden of proving one of the grounds for refusal of enforcement in Article V

## ARBITRAL AWARDS

### Recognition and enforcement abroad

### The New York Convention 1958

- Pursuant to **Article V(a)**, recognition and enforcement of a foreign arbitral award may be refused if  
*The **parties** to the agreement referred to in article II **were**, under the law applicable to them, **under some incapacity**, or the **said agreement is not valid** under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*
- The court of the enforcement uses the law of the domicile of a natural person and the law of the place of incorporation of a legal person for determining the capacity of the parties (which includes, among others, mental incompetence, physical incapacity, lack of authority to act in the name of a corporate entity)
- As regard the **invalidity** of the arbitration agreement, that ground for refusal includes the **non-existence of any arbitration agreement**.
  - A party may rely on this ground asserting that it was not a party to the arbitration agreement
  - The provision lays down a **conflict rule** for determining the law applicable to the arbitration agreement.

## ARBITRAL AWARDS

### Recognition and enforcement abroad

### The New York Convention 1958

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- Pursuant to **Article V(b)**, recognition and enforcement of a foreign arbitral award may be refused if

*The party against whom the award is invoked was not given **proper notice** of the appointment of the arbitrator or of the arbitration proceedings or was otherwise **unable to present his case***

- The ground in question concerns **serious procedural irregularities** and it is aimed at ensuring that the parties to the arbitration have had a reasonable opportunity to participate in the arbitral proceedings and to state their case (**due process/adversarial principle**)

## ARBITRAL AWARDS

### Recognition and enforcement abroad

### The New York Convention 1958

- Pursuant to **Article V(c)**, recognition and enforcement of a foreign arbitral award may be refused if

*The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced*

- This provision covers awards **ultra petita** (i.e., where the arbitrators disposed of claims not demanded by the parties in the arbitral proceedings) as well as awards that disposes of matters that do not fall within the scope of the relevant arbitration agreement

## ARBITRAL AWARDS

### Recognition and enforcement abroad

### The New York Convention 1958

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- Pursuant to **Article V(d)**, recognition and enforcement of a foreign arbitral award may be refused if

*The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*

- This ground for refusal includes cases where the arbitrator who should have been appointed by one party was in fact selected by an appointing authority on behalf of that party on the wrong assumption that that party has failed, due to its fault, to act promptly in appointing the arbitrator

## ARBITRAL AWARDS

### Recognition and enforcement abroad

### The New York Convention 1958

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- Pursuant to **Article V(e)**, recognition and enforcement of a foreign arbitral award may be refused if

*The award has **not yet become binding** on the parties, or **has been set aside** or suspended by a competent authority of the country in which, or under the law of which, that award was made*

- Notwithstanding that an award has been set aside in the country in which, or under the law of which, the award was made, a court in another country may still grant recognition and enforcement. France is the best-known example of a jurisdiction that has declared an award enforceable notwithstanding the fact that it had been set aside in the country of origin

# DETERMINING THE LAW APPLICABLE TO THE MERITS

## General features

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- 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

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- 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

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- **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

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- **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

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- **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

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- 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

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#### 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.***

## HOW ARBITRATORS DETERMINE THE LAW APPLICABLE TO THE MERITS

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- (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***

#### 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*

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#### 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*

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#### 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*

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### 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*

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- 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