

# Applicable Law

International Commercial Arbitration and International Sales Law

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# A checklist

- Is the AA evidenced in writing? (Article II(2))
- Does the AA exist and is it substantively valid?
- Is there a dispute?
- Does the dispute arise out of a defined legal relationship, whether contractual or not? (Article II(1))
- Did the parties intend to have this particular dispute settled by arbitration?
- Is the AA binding on the parties to the dispute?
- Is this dispute arbitrable?

# Case

Companies A and B, incorporated in countries M and E, have entered into a sales contract with a clause which provided that

*all disputes arising under the contract shall be solved by arbitration by a tribunal which shall be seated in country D.*

When the dispute arose, company A brought a claim before the courts of M, alleging that the contract was signed by the deputy CEO, who had no authority to sign agreements on behalf of A, thereby challenging the validity of the AA and the tribunal's jurisdiction.

\*M, E and D are UNCITRAL ML countries and parties to the NYC.

# List of applicable laws:

- lex arbitri
- law applicable to the arbitration agreement
- governing the substance of the dispute (the merits)
- law(s) governing recognition and enforcement of the award
- other laws

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# Seat

## **Geneva Protocol:**

law of the country in whose territory the arbitration takes place

## **NYC:**

‘the law of the country where the arbitration took place’ and, synonymously, to ‘the law of the country where the award is made’

## **ML:**

The provisions of this Law, except [articles on enforcing the AA, interim measures recognition and enforcement], apply only if the place of arbitration is in the territory of this State

# Seat

can be selected by:

- the parties
- the AT

*UNCITRAL AR: Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.*

- the national courts

The positions of different countries in regard to arbitration differ!



# Seat vs. Delocalisation

## two points of control:

- lex arbitri and
- law of the country where recognition and enforcement is sought

## only one point of control:

- law of the country where recognition and enforcement is sought

Delocalisation is possible to the extent that it is permitted by the *lex arbitri* itself

-Belgium (no set aside)

-when a court recognized an award that was set aside

# Lex arbitri: functions

- gives an established legal framework, fills the gaps in the arbitral process
- controls actions of the AT (minimum procedural requirements)
- gives the orders of the AT the force of law to reach beyond the parties' will
- confers nationality on award to benefit from any international treaties
- mandatory provisions are to be obeyed
- sometimes draws a line between international and domestic arbitration

# Lex arbitri: scope of application

## Internal matters:

- the definition and form of AA;
- the form and validity of the award;
- treatment of the parties;
- freedom to choose the rules of procedure;
- hearings;
- statements of claim and defence;
- default proceedings;
- the powers of the arbitrators;

## External matters:

- arbitrability;
- the constitution and grounds for challenge of the arbitral tribunal;
- competence competence;
- court assistance;
- interim measures of protection;
- the finality of the award.

# Lex arbitri

## might be different from:

- law that governs the substantive matters
- law of physical location of the AT

BUT: an obligation to obey the mandatory rules of the location

- (very rare) the procedural law

## is the same as:

- law of the country where the award was made
- procedural law in arbitration

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# Law applicable to AA

- Choice of law by the parties  
direct or indirect
- No choice (usually)  
in search for the closest connection:
  1. (if it is an AC) The law of the main contract (Germany)
  2. (if the seat of already known) The law of the seat of arbitration (lex arbitri)  
(UK, Sweden, Belgium)
  3. The parties' common intention (France)
  4. Combinative approach (Switzerland)

# Laws applicable to AA: European Convention

## Art. VI(2):

*In taking a decision concerning the existence or the validity of an AA, courts of Contracting States shall examine the validity of such agreement ...*

*(a) under the law to which the parties have **subjected** their AA;*

*(b) failing any indication thereon, under the law of the country in which the **award is to be made**;*

*(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, **under the competent law by virtue of the rules of conflict of the court seized of the dispute.***

# Laws applicable to AA: TransLex-Principles

## No. XIV.1 - Law applicable to international arbitration agreements

*(a) The **substantive validity** of an international AA is to be determined according to the law chosen by the parties of said agreement, or failing any indication thereof, according to the law in force at the place (seat) of the arbitration.*

*(b) The **formal validity** of an international AA is to be determined according to the formal validity rules of the arbitration law of the country in whose territory the arbitration has its seat.*

Court Decisions: C v D, [2007] EWCA Civ 1282, Hudson v Conagra Poultry Company, 484 F.3d 496, SULAMERICA CIA NACIONAL DE SEGUROS S.A. v. ENESA ENGENHARIA S.A. [2012] EWCA Civ 638



# French and Swiss approaches

- French: Cour de cassation *Dalico*

*the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.*

- Swiss: Art. 178(2) of the Swiss Federal Statute of PIL

*As regards its substance, the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law.*

# Law of the main contract vs. lex arbitri

**Art. V(2)(a) NYC, art. 34(2)(a)(i):**

*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 //*

*under the law of this State//*

**BUT:**

- solution only in the context of setting aside, recognition and enforcement
- no solution for the cases where the parties had not subjected the AA to a particular law

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# Law applicable in arbitration

- Choice of law by the parties  
express or implied  
“a choice of forum is a choice of law” is not a safe assumption
- Choice of law by arbitrators: options:
  1. conflict-of-laws rules of the seat (=courts)
  2. conflict-of-laws rules that AT considers applicable (European Convention, UNCITRAL AR, LCIA Rules)
  3. direct choice with no reference to conflict rules (France, Canada, India, Kenya, the Netherlands)

# Applicable substantive law

## UNCITRAL ML Art. 28

1. choice of the parties
2. law determined by the conflict of laws rules which AT considers applicable
3. ex aequo et bono or as amiable compositeur only if the parties have expressly authorized
4. in accordance with the contract and taking into account the trade usages

## German law §1051 ZPO

1. choice of the parties
2. the closest connection to the subject matter
3. in equitable discretion only if the parties have expressly authorized
4. in accordance with the contract and taking into account any commonly accepted trade usages

# Law applicable in arbitration

## What to choose?

1. national law;
2. public international law (including the general principles of law);
3. concurrent laws (combined laws);
4. non-national law
  - a) lex mercatoria (UNIDROIT Principles on International Commercial Contracts or PICC);
  - b) codified terms (INCOTERMS);
  - c) trade usages;
5. equity and good conscience.

# Non-national law in arbitration

- Rules vs. laws
- **ILA Recommendation on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration:**

The fact that an international arbitrator has based an award on transnational rules rather than on the law of a particular State should not itself affect the validity or enforceability of the award:

(i) where the parties have agreed that the arbitrator may apply transnational rules; or

(ii) where the parties have remained silent concerning the applicable law.