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THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

Abstract: *The article delves into the complexities of determining the applicable law in international arbitration agreements. It discusses the growing role of arbitration in international trade and highlights the challenges of identifying governing laws, especially when parties have not specified them. The article also explores common law and civil law approaches to this issue and mentions Uzbekistan's recent legislative efforts to become an arbitration-friendly jurisdiction. The text is particularly relevant for legal professionals and scholars interested in international arbitration and its evolving legal frameworks.*

Key words: *International Arbitration, Applicable Law, Arbitration Agreements, Common Law, Civil Law, International Trade, Jurisdiction, Legislative Initiatives, Governing Laws.*

Аннотация: *Статья детально анализирует сложности, связанные с определением применимого закона в контексте международных арбитражных соглашений. Она акцентирует внимание на растущей значимости арбитража в международной коммерции и освещает вопросы идентификации применимых законов. Автором рассмотрены подходы как общего, так и гражданского права к данной проблематике, а также упомянуты недавние законодательные инициативы Узбекистана в направлении создания арбитражно-дружественной юрисдикции. Статья представляет особый интерес для юридических специалистов и исследователей, занимающихся международным арбитражем и его текущими правовыми рамками.*

Ключевые слова: *Международный арбитраж, применимый закон, арбитражные соглашения, общее право, гражданское право, международная торговля, юрисдикция, законодательные инициативы, регулирующие законы.*

Arbitration as a dispute resolution mechanism is becoming popular in light of the recent expansion of economic, trade, and investment relationships among legal entities and the states. It is very notable that the more popular arbitration becomes, the more intrinsic the problem appears. Arbitration is the preferred dispute resolution mechanism of international business. Even though prevalence rates of around 90%, which are derived from the limited empirical data on corporate preferences, are likely to be limited to large corporations and certain business circles, arbitration also plays an important role in the field of international trade.

Arbitration sets up a peculiar framework of applicable laws governing various parts of arbitration. Unlike court proceedings, arbitration is always a matter of consent between the parties and even purports the derogation of established laws and rules should the parties agree on the matter. Arbitration goes beyond existing legal standards, and state-controlled legal vacuums, and establishes its own set of laws, which applies to a particular case. Therefore, the issue of applicable laws is complicated indeed, as the parties come from various legal systems, they may choose another set of rules separately for procedural and substantive parts of the contract, and consider the application of soft law instrument. Very often, parties fail to indicate the law applicable to their arbitration agreement and, therefore, the Arbitral Tribunal should identify the law applicable to the arbitration agreement. The international practice of determining the law governing the arbitration agreement contemplates two approaches, in particular common law and civil law approaches. The first is potentially founded on the precedents (similar case laws) and the second on an implied provision of the choice-of-law rule contained in Art. V (1) (a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In order to identify which approaches currently exist with respect to determining the law applicable to the arbitration agreement, a number of scholars have surveyed how courts in over 80 jurisdictions address the most prevalent situation in international commercial contracts: the parties have chosen the law applicable to their main contract and have selected a seat of the arbitration, but have not expressly provided for the law governing the arbitration agreement.

Many scholars, arbitrators, and practitioners emphasize the existing dilemma between applying the law of the contract containing the arbitration agreement and the law of the seat. Surprisingly, this alternative appeared to be not exclusive: the other potential options in validation principle and a national approach.

While the four approaches will thus often lead to different conclusions, there appears to be some consensus about the rough design of the conflict of laws rule governing arbitration agreements in the majority of jurisdictions. This work will, therefore, dive into the possible options of determining the applicable law to the arbitration agreement and, further by analysis conclude, the best option.

On 16 February 2021, Uzbekistan adopted the Law “On International Commercial Arbitration”, which follows the UNCITRAL Model Law. The Law also introduces novelties related to the immunity of arbitrators, experts, arbitration institutions, and their employees; prohibition from reviewing the award on the merits; representation by foreign organizations and citizens; and confidentiality of arbitration proceedings. The Law was drafted with the assistance of Asian Development Bank (ADB) experts [1] and aims to integrate Uzbekistan into the global arbitration map. More activities are considered in this context, including the capacity building of judges and local legal practitioners. The new Law follows the UNCITRAL Model Law, with some additions, provisions, and structure

required by national legislation [2]. It marks a step towards the development of international commercial arbitration in Uzbekistan, towards making the country an arbitration-friendly jurisdiction.

It is important to choose a neutral law to ensure the imperiality resolution of the dispute. The law of the seat unlike the law of the arbitration agreement that governs the existence, effectiveness, and validity of the arbitration agreement, regulates the arbitral procedure along with the applicable arbitration Rules.

The issue of identifying the law governing an arbitration agreement is of crucial importance. The rationale behind this is not only purely academic relevance but also practical considerations together with ethical implications. The point is that there are various situations in practice where it is necessary to construe the meaning and effect of the arbitration agreement and where the choice of the governing law of the arbitration agreement can be determinative. For example:

a. It is quite often necessary to determine the scope, interpretation, and effect of the arbitration agreement. This issue can arise *inter alia* where the arbitration agreement is invoked as a bar to court proceedings, where a challenge is made to the arbitral tribunal's jurisdiction, where a challenge is made to the arbitral award, or where enforcement proceedings are contested.

b. Sometimes questions arise concerning the identity of the parties to the arbitration agreement, and (depending on the specific circumstances) this is also an issue that can be determined by the governing law of the arbitration agreement.

c. The choice of governing law is also particularly important if the arbitration agreement would be invalid under one law but not another.

d. One unusual situation, which nevertheless features rather often in some of the cases in this area, is where the parties have chosen two different forms of dispute resolution – e.g., arbitration in Sweden and litigation in England – and where it is necessary to determine the meaning and effect of the parties' choice in the particular circumstances of the case at hand.

e. The governing law of the arbitration agreement can also be of importance in circumstances where the governing law includes an implied term – for example, an implied term of confidentiality.

Obviously, the above-mentioned problems may be avoided by a mere designation of the law governing the arbitration agreement. Although not entirely, the arbitration is trying to uniform arbitration procedures globally, the distinction could be within the different jurisdictions and adopted approaches of the countries. Therefore, it is important when determining the law of the seat to be aware of the existing public policy in the designated country. Despite the variety of approaches, fortunately, the content of the determination test of law governing the arbitration agreement is still being preserved, i.e., an established three-stage inquiry, the only complex dilemma is the choice between applying the law of the main contract or the law of the seat.

It should be admitted that the differences are present, the question is how they can be harmonized to achieve more international uniformity though notable exceptions remain, the majority of jurisdictions today provide for similar conflict of laws rules to determine the law governing the arbitration agreement: in the absence of an express or implied choice of law by the parties, an objective connecting factor is decisive. It is at the micro level – when assessing whether there has been an implied choice of law, and which law is most closely connected to the arbitration agreement – where results nevertheless, continue to diverge.

The author suggests that a more uniform approach can be achieved by *dispensing with presumptions and hypotheticals and focusing on objective circumstances instead (emphasis added)*. If the parties have not included an express choice of law regarding the arbitration agreement, second-guessing the parties' hypothetical intent with regard to their implied choice of law is often a vain exercise. Rather, courts and arbitral tribunals should accept that the parties simply have not dealt with the question of the applicable law to their arbitration agreement and, therefore, should apply an objective connecting factor. This objective connecting factor should be the law of the seat-either directly because Article V(1)(a) of the New York Convention applies or indirectly as the system of national default rule law that is most closely connected to the arbitration agreement.

Should there be a necessity to provide expressly for the default application of the law applicable to the arbitration agreement in the Law? On the one hand, the answer is no, since this would contradict the consensual nature of arbitration as well as would prevent the tribunal from signifying the initial intent of the parties. Therefore, the law may only impliedly suggest a potentially applicable law. On the other hand, yes. Considering the worldwide statistics and a default provision of the majority of Model Law jurisdiction including Uzbekistan, establishing a strict application of the law of the seat to the arbitration agreement would be convincing, but still would be in conflict with general principles of arbitration.

In any case, it has to be said that, from the parties' point of view, attempts should be made to avoid the more difficult issues that can arise in these situations. Parties should always include a governing law clause in their contract, and although it is unusual to do so, potential difficulties could easily be avoided if the governing law clause makes clear that it also relates to the arbitration agreement itself. In such circumstances, under both the common law approach and the civil law approach, the party's choice of law would generally be upheld.

References:

1. https://www.adb.org/projects/53296-001/main#project-overview

2. National legislation requires including articles relating to the aim of the Law (Art. 1), related legislation (Art. 2), bringing legislation into conformity with the Law (Art. 55) and entry into force of the Law (Art. 56)