

THE LAW APPLICABLE TO THE SUBSTANCE OF ARBITRAL DISPUTES: ARBITRATORS' CHOICE IN ABSENCE OF PARTIES' CHOICE

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ABSTRACT

*Diverse approaches arise when the parties to international commercial arbitration do not choose any law for the substance of their disputes. The arbitral tribunal may apply either “the law which it determines to be appropriate” (UNCITRAL Arbitration Rules Article 35.1) or “the law determined by the conflict of laws rules which it considers applicable” (UNCITRAL Model Law on International Commercial Arbitration Article 28(2)). The former represents a “direct” approach of choosing a jurisdiction’s substantive law without applying any choice of law rules, whereas the latter exemplifies an “indirect” approach of applying some choice of law rules in order to choose a substantive law. Both approaches make arbitrators’ choice of law unpredictable. Further complexity arises from the dichotomy between “law” and “rules of law”, the latter of which extends the choice of law to non-national laws such as the *lex mercatoria* and general principles of international law.*

Possibilities of UNCITRAL Arbitration Rules’ direct approach include the substantive law of either the arbitral seat or the place with the closest connection. The Model Law’s indirect approach entails more options for choosing conflicts rules. The less common

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choices include the place of enforcement, the place whose courts would have jurisdiction but for the arbitration agreement, and the place of contractual performance. Using the arbitral seat's conflicts rules is more common for reasons of simplicity, predictability and neutrality, albeit incompatible with the delocalisation theory. The cumulative approach involves applying the conflicts rules of all jurisdictions connected to the dispute, and even non-national conflicts rules. Such complex application of both the conflicts rules and substantive laws of all relevant nations may enhance the enforceability of the resulting arbitral award.

In light of the findings from the comparative survey of 115 legislative and institutional arbitration rules, this article makes recommendations on arbitrators' determination of the applicable substantive law(s) of a dispute in the absence of parties' agreement on such law(s).

KEYWORDS: *choice of law in arbitration, governing law, applicable law, substantive law, law applicable to substance of dispute, conflict of laws rules, private international law*