

**IMPORTANCE OF THE LAW APPLICABLE TO THE
ARBITRATION AGREEMENT IN INTERNATIONAL
COMMERCIAL ARBITRATION**

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ABSTRACT

This article analyzes the law applicable to the arbitration agreement in international commercial arbitration and some of the issues that could arise when the parties do not choose any particular law to govern their arbitration agreement. Parties frequently determine the substantive law that will govern the merit of the dispute and the rules applicable to the arbitration procedure. However, parties generally remain silent about the law that will govern the arbitration agreement itself, which could lead to unexpected or undesired effects before, during, and after arbitration, most of which could be avoided by simply selecting the law applicable to the arbitration agreement.

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I. Introduction

Arbitration has traditionally been considered as an institution of contractual origin. Although authors differ as to whether the legal nature of arbitration is contractual or jurisdictional, varying depending on many factors, the truth is that beyond any theoretical discussion, an arbitration cannot exist without an arbitration agreement between the parties of any dispute. Therefore, the arbitration agreement is the basis for any arbitral proceeding.

In addition, it is usually said that arbitration is primarily about autonomy of the parties. Therefore, it is not surprising that autonomy of the parties is categorized as the most important and powerful of all arbitration principles, a sort of principle “mother” from which all other specific arbitration principles derive.²

The autonomy of the parties and their freedom to choose the law for several purposes is more common in international arbitration than in domestic arbitration, since in the latter it will be necessary to comply with local rules in each country, which may contemplate certain restrictions.

Indeed, in international commercial arbitration, the parties, using their autonomy and freedom, may choose the type of arbitration (i.e., institutional or *ad hoc*), how

² See José Carlos Fernández Rozas, Sixto A. Sánchez Lorenzo & Gonzalo Stampa, *Principios Generales del Arbitraje*, 25 (Tirant lo Blanch, 2018).

arbitrators will be appointed, the language and seat of arbitration, and the law applicable to several issues related to the dispute and arbitration, including the law applicable to the arbitration agreement itself. Instead, just to give an example related to domestic arbitration, in most Latin American countries disputes arising from petroleum contracts are necessarily subjected to domestic laws (*e.g.*, Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, and Venezuela); there are restrictions on the type of arbitration available; and in some cases the disputes cannot be submitted to arbitration and must be resolved in national courts (*e.g.*, Venezuela and Bolivia).³

This short note will focus only on the law applicable to the arbitration agreement (not the law applicable to the contract or the arbitration procedure), which is generally less often considered by most authors and available literature. The note will then conclude with why it is important that the parties expressly choose the law that will govern the arbitration agreement itself.

II. The Arbitration Agreement is not an Accessory to the Underlying Contract

Although the arbitration agreement is usually contained in a contract between the parties, and is also called an “arbitration clause,”⁴ it is not an accessory to the

³ Enrique A. Jaramillo-Vargas and Marlon M. Meza-Salas, *Petroleum Contracts, Applicable Laws and Lex Petrolea in Latin America – Chapter 9*, International Arbitration in Latin America: Energy and Natural Resources Disputes (Kluwer Law International, anticipated 2021).

⁴ See Art. 7(1) of the UNCITRAL Model Law on International Commercial Arbitration: “...An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.” See United Nations Commission on International Trade

main contract. Therefore, if the main contract is null and void, the arbitration agreement is not necessarily null and void; even if the underlying contract is tainted, vitiated, or terminated, it does not affect the jurisdiction of the arbitral tribunal based on the arbitration agreement inserted in that contract that maintains (in principle) its validity and provides a safe ground for the issue of an award.

Indeed, an arbitration clause and the underlying contract are generally considered separable contracts under a widely accepted legal theory known as the separability doctrine. The autonomy or separability of the arbitration agreement emerged historically to prevent obstacles to arbitration in the event that a party could argue that the main contract was null and void.

The principle of separability of the arbitration agreement has been accepted in case law and recognized by statutes in many countries. It has been widely recognized in several institutional arbitration rules, most modern arbitration laws, and by court decisions in several countries, even where the applicable laws do not provide for the principle. The separability doctrine has been considered as one of the true transnational rules of international commercial arbitration.

For instance, the Model Law of the United Nations Commission on International Trade Law on International Commercial Arbitration (“UNCITRAL Model Law”), states in its Article 16(1) that:

“...an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A

decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”⁵

In similar sense, the Arbitration Rules of the International Chamber of Commerce (ICC) establishes in its Article 6.9 that:

“Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties’ respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.”⁶

III. The Parties’ Choice of Law

Due to the separability doctrine, different laws can be applied to the main contract and the agreement to arbitrate. Parties usually choose the law governing the substantive aspects of the dispute, also called the law applicable to the merits, to the arbitration clause or

⁵ United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 8 (United Nations, 2008).

⁶ International Chamber of Commerce, Rules of Arbitration of the International Chamber of Commerce 8 (ICC, 2017).

underlying contract. In most—but not all—jurisdictions, the parties are free to choose the substantive law governing the dispute, irrespective of nexus to jurisdiction.

Parties usually also determine the rules and law applicable to the arbitration procedure, that is, the procedural framework to conduct the arbitration. This may include rules of arbitral institutions that will administer the dispute (*e.g.*, International Chamber of Commerce (“ICC”), London Court of International Arbitration (“LCIA”), International Center for Dispute Resolution (“ICDR”), etc.), or a set of rules determined by parties in case of *ad hoc* arbitration (creating rules themselves, or choosing a set of preexisting rules, such as the UNCITRAL Arbitration Rules). In addition, the law governing the arbitral proceeding—usually the law of the seat of arbitration or *lex arbitri*—allows national courts to play some supervisory function and solve some issues, such as:

- (i) When the parties, in the absence of an emergency arbitrator, are seeking interim relief or protection measures in support of the arbitration proceeding, without losing the right to arbitrate;
- (ii) When one party starts proceeding on the merit of the dispute in a court and the other party argues the lack of jurisdiction of the court on the basis of a valid arbitration clause; and
- (iii) When one party applies to a national court for the appointment of an arbitrator and the other party has failed or refused to participate in the establishment of the arbitration tribunal.

Although parties usually choose the substantive law governing the dispute and the law applicable to the arbitration procedure, parties rarely choose a law that

specifically governs the arbitration agreement itself. The subject of the law applicable to the arbitration agreement is important in cases of international commercial arbitration because in domestic arbitration the agreement will be governed by the local law of each country.

IV. Law Applicable to the Arbitration Agreement

It is worthwhile to mention that the law applicable to the arbitration agreement regulates the formation, modification, validity, interpretation, scope, termination and enforcement of the arbitration agreement. If the parties do not choose the law governing the agreement itself, it could be determined by different forms or approaches. This could create uncertainty for the parties at a later stage when one of them plans to submit any dispute to arbitration, and/or during and after arbitration.

Indeed, up to nine different approaches about the law applicable to the arbitration agreement have been identified in arbitration practice when the arbitration clause does not specify it.⁷ The most common is the law of the seat of arbitration or *lex arbitri*, as established in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e., the New York Convention). This regulates the existence and validity of an arbitral award in the enforcement stage, stating that the recognition and enforcement of the award may be refused if the arbitration agreement is not valid under the law “*where the award was made*”,⁸ if the parties did not make an express

⁷ See JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 107-108 (2003).

⁸ See Art. V.1.a of the New York Convention.

or implied choice. Similarly, the UNCITRAL Model Law on International Commercial Arbitration states that in an action to set aside an arbitral award on grounds of invalidity of the arbitration agreement, if no choice by the parties can be determined, the court should apply their own law (the law of the seat of arbitration) to determine the agreement's validity.⁹

Although the *lex arbitri* is considered the default rule, depending on the approach used in absence of parties' choice, the law applicable to the arbitration agreement could instead be the law of the contract, or the law governing the arbitration procedure.¹⁰

The English approach prefers—if there is not an express or implied choice of law—the law with which the arbitration agreement has the closest and most real connection. In recent years, the approach adopted by English law when no express choice exists has been to consider an implied choice of law under the presumption that the arbitration agreement was governed by the law of the main contract. However, in a recent case the UK Supreme Court has provided some clarifications on the applicable test to determine the law implied by the parties to govern their arbitration agreement. The case held that in the absence of an express or implied choice of law, the law of the seat—*lex arbitri*—will generally be most closely

⁹ See UNCITRAL Model Law, Art. 34(2)(a)(i).

¹⁰ Although the place of arbitration usually determines the procedural law applicable to the arbitration, parties may select a procedural law other than the *lex arbitri*. See Roque Caivano, *International Commercial Arbitration: The Arbitration Agreement – Module 5.2*, Dispute Settlement 50 (UNCTAD, 2005).

connected to the arbitration agreement and will therefore apply.¹¹

Per the French approach however, the validity of the arbitration clause depends only on the intention of the parties, without it being necessary to make reference to a national law. French courts hold that international arbitration agreements are “autonomous” from any national legal system and are instead directly subject to general principles of international law.¹² Additionally, it is possible to find differing approaches in other legal systems, depending on whether they consider the arbitration agreement as a procedural or substantive category¹³

In summary, there are a multiplicity of approaches, yet no consensus on the legal system that can be applied to the arbitration agreements. As a result, and as one well-

¹¹ The referred case is *Enka Insaat Ve Sanayi AS v OOO “Insurance Company Chubb” & Ors* [2020] UKSC 38; regarding the presumptions on the implied choices of law to govern the arbitration agreement and the exceptions upheld by the U.K. Supreme Court, see the following comprehensive reports: Mihaela Maravela, *Enka v Chubb Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement*, Kluwer Arbitration Blog (October 11, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/10/11/enka-v-chubb-revisited-the-choice-of-governing-law-of-the-contract-and-the-law-of-the-arbitration-agreement>; Dipen Sabharwal QC *et al*, *U.K. Supreme Court provides welcome clarity on how to determine the governing law of an arbitration agreement*, White & Case (October 14, 2020), <https://www.whitecase.com/publications/alert/uk-supreme-court-provides-welcome-clarity-how-determine-governing-law>.

¹² See GARY B. BORN, *Choice of Law Governing International Arbitration Agreements – Chapter 4*, INTERNATIONAL COMMERCIAL ARBITRATION 472, 481 (Kluwer Law International, 2nd. ed. 2014).

¹³ See Alexander J. Belohlávek, *The law applicable to the arbitration agreement and the arbitrability of a dispute*, in YEARBOOK OF INTERNATIONAL ARBITRATION 27, 32-33 (Marianne Roth & Michael Giestlinger eds., 2013).

known commentator has pointed out, international arbitration agreements are often subject to an unfortunate uncertainty.¹⁴

V. Unexpected or Undesired Effects When the Parties do not Choose the Law Governing the Arbitration Agreement

The different methods related to the selection of the law applicable to the arbitration agreement, and results obtained as per each approach, could lead parties to face undesired or unexpected effects. When signing the underlying contract, they could have been convinced that the law applicable to the arbitration clause was the same as that governing the contract. However, as we have seen, the law of the main contract is not the dominant approach, rather it is that of the seat of arbitration—*lex arbitri*—and it is possible that the parties were not intending for the latter to regulate the validity and scope of their arbitration agreement.

The above scenario occurs more frequently than one might think, especially because the arbitration clause in a contract is not usually given the same importance as the rest of the contractual stipulations. It is usually negotiated at the last minute (that is why it is called the midnight clause), and usually a "standard" and not very detailed arbitration clause is used. It can sometimes even end up being a pathological clause.

In fact, the requirements related to the legal capacity of the parties or other formal requirements for the existence and validity of the arbitration agreement vary

¹⁴ See Gary B. Born, *The law governing International Arbitration Agreement: An International Perspective*, 26 SING. ACAD. OF L. J. 814, 820-821 (2014).

from one legal system to another. Therefore, an agreement could end up being invalid based on a law that the parties did not take into account or did not have in mind during the negotiations. The execution of international arbitration agreements could require the involvement of juridical persons, the contracting parties' representatives, and natural persons. Additionally, beyond the law or choice-of-law determined by the parties within the arbitration agreement, the personal law of a party usually prevails in determining the capacity to sign agreements in private international disputes. This solution is even included in the New York Convention, which when referring to the invalidity of the arbitration agreement as a ground for preventing the recognition and enforcement of an award, and more specifically when referring to the incapacity of the signatory parties of the arbitration agreement, expressly refers to the law applicable to the parties. In addition, although there is a general consensus on the application of a party's personal law to issues of capacity, there are disagreements about what constitutes a party's personal law, which differ from one jurisdiction to another. For example, in civil law jurisdictions the capacity of natural persons is usually governed by the law of their nationality, while in common law jurisdictions it is generally governed by the law of their domicile (principal place of business). Similarly, in civil law jurisdictions the capacity of juridical persons is generally governed by the law of the seat of the entity, while in common law jurisdictions the law of the place of incorporation is ordinarily applicable.¹⁵ To add more complexity to the matter, juridical persons are not only private entities. There may also be public entities signing arbitration agreements to resolve their disputes.

¹⁵ See Born, *supra* note 14, at 627-630.

The arbitrability of the subject matter of the dispute could also be affected, since some national laws may not recognize the parties' reference to arbitration and may determine that some disputes are not arbitrable and must be resolved in court (*e.g.*, disputes involving family matters, taxes, criminal law and bankruptcy issues, antitrust, patents and copyright, bribery and corruption, etc.).

The doubts and questions on the existence, validity, or scope of the arbitration agreement may arise in different stages. For instance, they could arise initially, when one of the parties requests a court to recognize the arbitration agreement at an early stage of the arbitration (*e.g.*, by requesting the court to decline its jurisdiction or to appoint an arbitrator). It could be raised in relation to the constitution of the arbitral tribunal, if the parties want, among other things, to change the method to appoint the panel or to select the third arbitrator (which implies a modification of the arbitration agreement or the rules selected by the parties). It could be raised during the arbitration procedure and may affect, for example, whether a non-signatory can be a party to an arbitration. The issue could also arise at the end of the arbitration as a ground to annul the award, or in the enforcement stage, when it is raised as a defense to challenge recognition or enforcement of the arbitral award. Finally, an issue could even arise if the parties, instead of resorting to an arbitration proceeding, decide to terminate the arbitration agreement, drawing the validity of the termination agreement itself into question.

VI. Need to Mitigate the Risk of Adverse Effects

Parties may find it surprising that a State court or an arbitral tribunal deciding their case may end up applying different laws to the contract and the arbitration agreement. In order to reduce uncertainty, the parties should use

clauses stating in express and unequivocal terms the law governing the arbitration agreement. The most convenient is to use a mandatory language rather than a permissive or ambiguous language. Mandatory language can ensure that there is no doubt that the will of the parties is to choose a law to govern the arbitration agreement, and that that law is not confused with the law that governs the merit of the dispute or the law applicable to the procedure (*e.g.*, “*For the avoidance of doubt, this clause shall be governed by the law of...* ”).

By using mandatory and unequivocal language, the parties could anticipate many issues (and significant real-world consequences) in connection with the formation, modification, validity, interpretation, scope, termination, and enforcement of the arbitration agreement. Alternatively, failing to determine in advance the law applicable to the arbitration clause could allow uncertainty to exist before, during, and after arbitration.

