

Choice of law

- The law which governs the contract and parties' obligations under it.
- The arbitrators will, under most of the jurisdictions, apply the law chosen by the parties
 - However, the mandatory rules might in some instances override the choice of law
- If the law was not chosen by the parties, the arbitrators will have to do so

Choice of law II.

- Most usual choice is the national law of some state
- Possible problem: Under some legal systems, the conflict of law rules are not excluded in the case of the choice of law.
- The chosen law might, as a result, stipulate that different legal system shall be applied => parties should address this issue

Neutral applicable law

- The parties might choose the law that has no connection whatsoever to their contractual relationship
- Most countries will recognize choice of a neutral law
- However, the United States require relationship between the applicable law and the contract

Dépeçage

- The parties might decide that different parts of their contract will be governed by different laws
- It can cause difficulties because of inconsistencies between the laws
- If there is no choice of law by the parties, the arbitral tribunal might decide to apply different laws to different parts of the contract
- Secondly, similar situation might arise when the mandatory rules of some state have to be applied

The *tronc commun* doctrine

- When the parties are from different jurisdictions, the approach should be to ascertain which parts of their national laws are similar and apply those common parts in the dispute
- Most of the courts would uphold such a choice of law, but would not apply this doctrine by themselves
- This approach requires an extensive legal research of the applicable laws

Stabilization clauses

- The law is a continuously developing system and its changes might influence the contractual relationships between the parties
- The parties might avoid this risk by implementing a so-called stabilization clause
- The stabilization clause stipulates that the law which was valid as of a selected date will be used and the its latter changes shall be disregarded
- If a state is a party, it might agree not to change its own laws.

Mandatory rules

- The set of rules that have to be applied even though the parties have chosen a different law
- The goal of the mandatory rules is to protect the proper functions of country's political system, economy, society

Contract Sans Loi I.

- The contract does not have to be governed by a national law, but other set of rules
- Lex Contractus
 - The principle that the contracts should be performed is raised to the level of the law
 - This principle has not been fully endorsed yet
 - It might be impossible to draft a contract fully isolated from the national and international law
 - The New York convention requires a defined legal relationship. Lex Contractus: there is no defined legal relationship

Contract Sans Loi II.

- Equity principles
 - The tribunal shall decide the case on the basis of what is fair and reasonable
 - The tribunal might apply no law at all, or to use the equity to mitigate some effects of applicable law. The second approach is more frequent.

Lex Mercatoria

- The law of merchants
- Its origin is not precisely determined
- The set of rules and principles followed by the merchants in the international trade
- Some claim that it is a-national, because it is not derived from the national legal system
- There are some lists of principles of lex mercatoria, but they are not definite and its principles are very vague
- Some experts claim that lex mercatoria can fulfil the function of a proper law

Lex Mercatoria II.

- There is ongoing codification of Lex Mercatoria, which undermines the criticism of its uncertainty

Many courts will uphold a choice of Lex Mercatoria nowadays

- Most arbitration legislation permit a choice of Lex Mercatoria

Lex Mercatoria III. - Rules

- Central transnational database – over 70 principles of LM
- UNIDROIT – Principles of international commercial contracts
- INCOTERMS – Contractual terms + definitions of words used in IC contracts
- International rules for the interpretation of Trade Terms (by ICC)

Public international law

- Used to resolve disputes among states and individuals
- Consists of: international conventions, I. Custom, general principles, judicial decisions, jurisprudence..

Conflict of Laws

- The arbitral tribunal has to determine which law was chosen by the parties
 - They can do so expressly or tacitly
 - If they choose the principles of equity, the applicable law should be determined by the tribunal because of the mandatory principles
 - Similarly, if the Lex Mercatoria is chosen, the law that will fill its gaps should be chosen

Conflict of Laws II.

- If the parties have not chosen a law, the arbitral tribunal can:
 - Apply the conflict of laws rule
 - Directly select the applicable law
- However, the tribunal has to determine on which law it should base its decision between the conflict of laws rule and direct selection of applicable law. There are several way of doing that:

Conflict of Laws II.

- Law of the place which would have had a jurisdiction but for the arbitration clause
- Law of the seat of the arbitration
- Laws of all countries which have a connection with a dispute
- The application of no law
- The application of the law derived from the international treaties