Conflict of Laws in International Arbitration

von
Franco Ferrari, Stefan Kröll

1. Auflage

Conflict of Laws in International Arbitration – Ferrari / Kröll
schnell und portofrei erhältlich bei beck-shop.de DIE FACHBUCHHANDLUNG

Sellier. European Law Publishers München 2010

Verlag C.H. Beck im Internet:
www.beck.de
ISBN 978 3 86653 170 3
Conflicts of law in international arbitration – an overview  

Filip De Ly*


I. Introduction

Any overview of conflict of laws in international commercial arbitration is a delicate exercise in view of the breadth and complexity of the topic but also as it overlaps with the contributions of others in this book. The approach of this report will, thus, be synthetic and also focus on some recent developments regarding the interface between private international law and international commercial arbitration.

The difficulties and complexities of the topic of private international law in international commercial arbitration (encompassing not only issues of applicable law but also of international jurisdiction and recognition and enforcement of judgments and arbitral awards) stem from the fact that arbitrators in international commercial cases are not only facing a conflict of laws question (which law applies) but also a conflict of conflicts of law question (which system of private international law applies). This is not an issue for domestic courts that apply their own system of conflict of laws; international commercial arbitrators sitting for instance in London, Paris, New York or Singapore, however, first will have to address the question as to whether they automatically can apply English, French, New York of Singaporean conflict of laws rules (as a domestic court at any such seat would do) or whether they may resort to conflict of laws rules different from those applying before domestic courts at their seat.

This issue is further complicated by the fact that there is a potential interface between international commercial arbitration which does not live in a legal vacuum but may need support from domestic courts (for instance

* Prof. Dr. Filip De Ly, Erasmus School of Law, Rotterdam.
in the taking of evidence) or may be subject to some form of limited review, primarily in setting aside proceedings at the seat of the arbitration and in enforcement proceedings at any place where an arbitral award is to be recognized or enforced. In those circumstances, domestic courts may apply conflict rules different than those applied by the arbitrators as the systems they apply may differ.

II. Scope of the Problem

From a theoretical perspective, any conflict of laws problem might arise in international commercial cases. However, in practice, not all conceivable conflict issues arise with any meaningful frequency and some notorious conflict of laws theories such as renvoi, conflit mobile, adaptation, substitution or transitory problems related to a change of a conflict, procedural or substantive rule hardly arise in international commercial arbitration. On the other hand, the applicable conflicts system remains relevant for a vast range of issues many of which will be discussed in other contributions in this book. These issues relate to the following aspects of the arbitral process:

- the arbitration agreement (validity, scope, extension to non-signatories, termination, formal requirements, evidential aspects, state immunity, lis pendens regarding parallel court of arbitration proceedings\(^1\))
- subjective and objective arbitrability as it is understood outside the United States (i.e., the question whether a party (for instance a State) can become a party to an arbitration agreement or whether certain disputes (for instance corporate, anti-trust, insolvency or intellectual property disputes) can be submitted to arbitration
- the arbitration procedure (access to justice, service of process, standards of fair trial, evidence, independence and impartiality of arbitrators, joinder, intervention and consolidation, confidentiality of the arbitral proceedings, arbitral interim measures, requirements for an arbitral award)
- the merits of the dispute including the application of mandatory rules and uniform law rules

recognition of prior or intervening court judgments and arbitral awards which may raise res judicata and related issues\(^2\)
in relation to the issues above, questions as to conflict of laws methodology may arise such as:
- characterization\(^3\)
- application by an arbitral tribunal on its own motion of a conflict rule
- ascertaining the contents of the applicable law (\textit{iura novit curia})\(^4\)
- public policy or \textit{fraude à la loi} as bars to the application of the governing law.

In all these circumstances, an international commercial arbitration tribunal will have to determine whether it can apply the conflict of laws rules of its seat or whether the conflict issue may be solved by relying on some conflict rule different from that prevailing at the seat.

III. Competing Paradigms as to the Applicable Conflict Systems

Until the mid-1950s, a traditional paradigm governed the question as to which private international law system arbitrators had to apply in interna-


\(^3\) A recent example is the \textit{Vivendi} case where the Swiss Federal Supreme Court struggled with the question as to the proper characterization of Art. 142 of the Polish Insolvency Act and whether that provision implied that an arbitration clause has been terminated by operation of law (case 4A_428/2008, decision of March 31, 2009, available at www.bger.ch).

tional cases under which arbitrators had to apply the private international law system of the state in which they were sitting. Thus, the law of the place of arbitration (law of the seat) controlled the question as to which system of private international law to apply. This traditional paradigm was still formulated in the resolutions of the Institut de Droit International of 1952 which accepted in this respect the report and recommendations of Sauser-Hall.

The traditional paradigm was challenged by Berthold Goldman in his remarkable and still unique 1963 Hague lectures in which he developed an autonomous system of conflict rules for international commercial arbitration. Based on theoretical assumptions (arbitrators have no lex fori and are unlike domestic courts) and practical considerations (the place of arbitration is often chosen for reasons of neutrality and there is, apart from the arbitral seat, no connection between the seat and the subject matter of the dispute), Goldman developed autonomous conflict principles to be applied instead of the conflict of laws of the seat. This autonomous method was developed by Goldman and others and led to methods such as the cumulative application of competing conflict rules, the cumulative application of competing substantive rules (bypassing any conflict rule), the better law approach and the application of general principles of law. The autonomous conflict methodology quickly turned also in the development of a theory of substantive transnational law (lex mercatoria) under which arbitrators could apply and develop self-regulatory rules based on contracts, standard conditions, trade usages, customs and general principles of law. Although different definitions of any such lex mercatoria exist, the most far reaching goes as to accept that it constitutes a legal system autonomous from domestic legal systems which can be chosen by parties by virtue of a choice of law provision of their contract and can be applied by arbitrators under an autonomous conflict of laws system.

The challenge of the traditional paradigm by the proponents of an autonomous theory gradually made a big impact on national legislation and case law, uniform law and arbitration rules and led to some compromises between the competing paradigms. The liberalization of international ar-

5 Sauser-Hall, L'arbitrage en droit international privé, 44(1) Annuaire de l'Institut de droit international (1952), 469-613.
8 On these aspects, see De Ly, supra n. 7, 207-291. The literature on the lex mercatoria is abundant; for a most recent publication with further references, see Berger, The creeping codification of the new lex mercatoria (2010), 422 pp.
bitration law by case law in France as of the 1960s and by statute as of the English Arbitration Act of 1979, the French reforms of 1980-81 and the adoption by many countries of the UNCITRAL Model Law, to a certain extent achieved the autonomy of the arbitral process, primarily in relation to:

- The arbitration agreement where uniform rules have been developed combined with the endorsement of the Kompetenz-Kompetenz principle according to which arbitrators may decide on a jurisdictional challenge (with or without parallel court proceedings).

- The arbitration proceedings where uniform principles of party autonomy and, absent agreement, arbitrator autonomy have been accepted.

- The law applicable to the merits where uniform principles of party autonomy and, absent agreement, arbitrator autonomy have been accepted. In this respect, party autonomy is by and large construed liberally so that the parties may choose any rule of law (and, thus, not limited to domestic law) and arbitrators either can determine the law applicable to the merits on the basis of any conflict of laws principle they consider appropriate (thus, disregarding the conflict rules of the seat) (indirect approach) or may directly apply any substantive rule they deem appropriate (thus, disregarding any conflict rule) (direct approach).

However, notwithstanding these compromises and clarifications, many other issues remain unsettled. For any such issues, parties will have to brief arbitral tribunals and arbitrators will have to decide based on the applicable arbitration rules and the arbitration law of the seat. Also, arbitrators may take account of the law of possible places of enforcement in order to avoid that the outcome of the arbitral process might be jeopardized at the time of enforcement.

On the other hand, the autonomy given to parties and arbitrators under the autonomous paradigm has been criticized for leading to uncertainties and lack of predictability. To a certain extent, this criticism has been met by the international codification of contract law, notably by the UNIDROIT Principles on International Commercial Contracts which are frequently applied in international commercial arbitration.

9 On the UNIDROIT Principles (ed. 1994, second ed. 2004) and case law thereto, see www.unidroit.org. See also Bonell, An international restatement of contract law, The UNIDROIT Principles of International Commercial Contracts, 3rd ed. (2005), 691 pp. A third edition of the UNIDROIT Principles is being prepared and should be published end 2010 or early 2011. Other codifications such as the Principles of European Contract Law have not attained the same level of (worldwide) dissemination and are much less referred to in international arbitral awards.