Applicable Laws

Int. commercial Arbitration Involves Interaction of Many Laws:

1. Law Governing the capacity of the Parties
2. Law Governing the arbitration agreement
3. Law Governing the arbitration
4. Law Governing the main contract
5. Procedural law of Arbitration
6. Law Governing the conduct of arbitration proceedings (Internal procedure)
7. Law Governing the recognition and enforcement of award

Capacity: Personal laws of the parties

Law Governing the arbitration agreement: Parties autonomy: But if not selected by the parties then there are 4 approaches:

A) *Law governing the main contract-*

"There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be *implied* as an agreement of the parties as to the law applicable to the arbitration clause."

"The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality."

This is based on the view that generally law governing the main contract and the arbitration agreement are the same. But discards the established principal of separability. The NYC also recognizes seaparability.

B) Law of the seat: Another approach is to subject the Arbitration Agreement to the Law of the seat. Thus according to

London Court of International Arbitration (LCIA) Rules, which provide at Article 16(4) that: The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.

In *Sulamérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors*, (2012) the English Court of Appeal held that English law was the governing law of an arbitration agreement, even though it appeared in a contract that was governed by Brazilian law.

In the *Bulbank* case, the Bulgarian Foreign Trade Bank (Bulbank) concluded a contract with an Austrian bank. The main contract containing the arbitration clause expressed a choice of Austrian law. A dispute arose between the two parties and arbitral proceedings were initiated in Stockholm. Bulbank challenged the award in the Swedish courts on the basis that the arbitration agreement was void for breach of an allegedly implied term of confidentiality. The Supreme Court of Sweden held that the arbitration agreement was valid under the law of the seat of arbitration, Swedish law, stating that:

…no particular provision concerning the applicable law for the arbitration agreement itself was indicated [by the parties]. In such circumstances the issue of the validity of the arbitration clause should be determined in accordance with the law of the state in which the arbitration proceedings have taken place, that is to say, Swedish law.

The Supreme Court thus ignored the parties' choice of Austrian law to govern the underlying contract, considering that the arbitration clause ought to be treated as a separate agreement subject to a separate law.

(*Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc.*, Case No. T1881–99, Swedish Supreme Court, 27 October 2000, (2001) XXVI YBCA 291. It should be noted that the Swedish Arbitration Act 1999 provides, in s. 48, that where an arbitration agreement has an international connection and the parties have not agreed upon a choice of law, the arbitration agreement is governed by the law of the seat of the arbitration.)

(C) Parties Common Intention: The French Approach- The French Court have said that:

By virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.

However if parties want to subject their arbitration agreement to some national law they are free to do that

(D) Combining several approaches—a Swiss model

The final approach in determining the law or rules applicable to an arbitration agreement is to combine several approaches, as is the case in Switzerland. Section 178(2) of the Swiss Federal Statute of Private International Law (Swiss PIL) provides:

As regards its substance, the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law.

This formulation allows Swiss courts maximum opportunity to uphold the validity of the arbitration agreement.

Law Governing the Arbitration – Lex Arbitri: Arbitration does not happen in a legal Vacuum. there has to be a law governing arbitration; Which is described a lex arbitri;

Lex arbitri is "a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (eg Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (eg filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (eg removing an arbitrator for misconduct)."

Approcahes with respect to the Lex arbtri- Seat theory- Seat is a legal term of art and means that the law of the seat will govern the arbitration *Union of India v. McDonnell Douglas Corp* [1993] 2 Lloyd's Rep. 48

Delocalised approcah and Transnational arbitral legal order.

Procedural Law External and Internal:

Union of India v. McDonnell Douglas Corp [1993] 2 Lloyd's Rep. 48 where the contract provided that the arbitration should be conducted in accordance with the procedures provided in the Indian Arbitration Act 1940 and that the seat of arbitration proceedings should be in London. The issue was whether the law governing the arbitration proceedings was English or Indian law. The court was of the view that by specifying London as the seat of arbitration, it was reasonable to assume from that choice that they attached some importance to the relevant laws of England, Saville J stated:

"It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities, as Lord Justice Kerr observed in the *Amazonica* decision….

[I]t seems to me that by their agreement, the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law."

Law Governing the main Contract: The law governing the main contract is also called Substantive Law Governing Law or Applicable Law;

Parties’ autonomy: e.g. Section 28 of the Indian Arbitration Act:

What Choices are available- National Law- Most often- Sate Party – Freezing clauses and Economic Equilibrium clauses.

Public International Law-

Transnational Law (Lex mercatoria, UNIDRIOT-CIF, FOB, Sharia Law –

Concurrent laws-

Equity and Good Conscience, - what is equity- it’s a device to mitigate the harshness of general law when applied to a particular condition. Arbitrator can put aside the strict legal rules and decide according to principles of fairness.

If Parties Do not choose- The responsibility is of the tribunal – How do they choose-