

Applicable Law and the Arbitrator's Role in International Commercial Arbitration



Chouchou achour

University of setif 2, Algeria, achour-ch.zam@hotmail.com

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Abstract:

International traders often opt for international commercial arbitration because of its numerous advantages. One key benefit is the parties' ability to select the law governing the dispute. This may be the national law of a specific country, a set of international legal norms, or what is commonly referred to as international commercial law. The arbitrator plays a crucial role in interpreting the chosen law, assessing its relevance to the nature of the dispute, and determining which provisions are applicable. In the absence of a clear choice by the parties, the arbitrator may apply rules derived from either domestic or international legal systems, based on what is most appropriate for the case at hand.

Keywords: Choice of domestic or international law; role of arbitrator.

* Corresponding author: Chouchou achour , achour-ch.zam@hotmail.com

Introduction:

It is widely recognized that international commercial arbitration specializes in resolving disputes related to international commercial transactions. These disputes may arise between natural persons or between natural and legal persons of different nationalities. The conflict may concern the transaction itself, its execution, or the terms of an international commercial contract. In all such cases, specific arbitration procedures must be followed to reach a binding and final resolution. (Mechagi 2008 p 17)

Consequently, countries have sought to establish alternative mechanisms at the international level to resolve potential future disputes. One such solution is the empowerment of international arbitration bodies to handle these conflicts. As a result, international arbitration has come to occupy a prominent position in the context of international commercial contracts. This prominence is largely due to the unique advantages it offers, especially considering that international transactions often involve rules and practices unfamiliar to domestic legal systems. Such complexity makes recourse to international commercial arbitration not only beneficial but, in many cases, essential. (Ozyan, 2011 p 35)

This raises the following central question: What is the nature of the law chosen in disputes arising from international commercial contracts, and what role does the arbitrator play in applying that law?

To address this question, the research is divided into two main sections. The first part explores the contracting parties' autonomy in selecting the law applicable to disputes arising from international trade agreements. The second part examines the role of the arbitrator in light of this choice, considering the provisions of both international arbitration agreements and domestic legislation. This study adopts a descriptive approach, aiming to elucidate the parties' role in determining the governing law within the framework of international commercial arbitration by analyzing relevant legal texts and arbitral decisions. Additionally, it sheds light on the arbitrator's function in applying the chosen law and the extent of the authority granted to them in resolving disputes between the parties.

1: Party Autonomy in Choosing the Governing Law of the Dispute

The parties involved in international commercial arbitration have the right to choose the law governing the substance of the dispute. The law applicable to such arbitration refers to the body of substantive legal rules that govern the dispute from the conclusion of the arbitration agreement to the issuance and enforcement of the arbitral award. These rules may originate from national legal systems or be derived from international legal norms, irrespective of their source.

1.1: Choice of National Law

Parties are generally free to choose the law that will govern their dispute, a principle affirmed by both domestic legislation and international arbitration

conventions. This choice may be either explicit or implied, and in cases of ambiguity, the arbitrator plays a key role in interpreting the parties' intent.

A: Explicit Choice of Applicable Law

Following the principle of party autonomy, parties to an international commercial contract may explicitly designate the law or legal rules to be applied by the arbitrator. The arbitrator is obliged to honor this choice and apply the selected law, regardless of its origin. The chosen legal framework may be the national law of one of the parties or that of a third country. When national law is chosen, the arbitrator is generally expected to apply its substantive provisions, rather than its conflict-of-law rules, unless the parties have expressly agreed otherwise.

Moreover, the parties may opt for a more flexible approach by selecting specific legal rules drawn from multiple legal systems or a combination of national and international sources. In some instances, the parties may also choose to apply international trade customs, practices, or even model contracts as the governing framework for the dispute. (Ben Saïd. 2012 p 316)

To enshrine the parties' freedom in choosing the applicable law, both domestic laws and international agreements, including Algerian law under Article 1050 of the Code of Civil and Administrative Procedure, have recognized and protected this autonomy. The parties may select the law governing the dispute, whether it is the national law of one of the parties, the law of the country where the arbitration is seated, the law of the country where enforcement may take place, or even a law that bears no direct relation to the dispute—provided that the law chosen is permitted under the relevant legal framework.

International agreements further reinforce this principle of party autonomy. For example, Article 7 of the European Convention on International Commercial Arbitration (1961) and Article 21 of the ICC Arbitration Rules both affirm the parties' complete freedom to determine the law that the arbitrator must apply to the dispute. This is grounded in the principle of the sovereignty of the parties' will, granting them full discretion to select the legal framework that will govern their arbitration". (Abu Zaid, 1977 p 15)

To clarify the issue of selecting the law most relevant to the contract, it is helpful to revisit the traditional concept of arbitration. In this framework, the arbitrator resolves the dispute by applying the legal rules of national law, whether from the country of arbitration, the country where the arbitral award is to be enforced, or another jurisdiction, depending on the rules of attribution. Arbitration practices have consistently followed this approach in numerous rulings, such as the decision in the Serbian and Brazilian Loans case, which stated: "Every contract that is not between states as subjects of public international law finds its basis in national law." In this context, private international law—or the theory of conflict of laws—addresses the task of determining the applicable law. (Leben, 1980 p 417)

B: Implicit Choice of Applicable Law

In the absence of an explicit choice of applicable law, the arbitrator must determine the parties' implied intention by considering general indications. These may include factors such as the place where the contract was concluded, the place of performance—often a key reference point—or more specific factors such as the residence of the contracting parties, the language of the contract, the subject matter of the contract, or the place of arbitration. These elements serve as indicators that help the arbitrator infer which legal system the parties would likely have chosen had they explicitly done so. (Abu Zaid, 1980 p 21)

However, it is important to note that when the parties to an international trade contract do not explicitly choose the applicable law, the choice may be either implicit or nonexistent. In cases of an implicit choice, the applicable law is inferred through a set of criteria, including an objective analysis of the subject matter of the dispute, the circumstances and context surrounding the contract, and specific evidence such as the nationality or domicile of one of the parties. Other relevant factors may include the interpretation of certain concepts or terms used in the contract, or the place where the contract was concluded or performed.

It is also crucial to recognize that when the arbitrator is tasked with determining the applicable law in the absence of an explicit choice by the parties, they are not bound to any one legal system. The arbitrator has the authority to apply rules from different legal systems if they find a relevant connection to the dispute at hand. (Hamad Al-Hajjaya 2011 p 676)

Article 21 of the 2010 ICC Arbitration Rules stipulates that the arbitral tribunal shall decide following the law chosen by the parties. In the absence of such a choice, the tribunal is empowered to decide under the law it deems appropriate. However, the determination of appropriateness is not made arbitrarily; rather, the tribunal must base its decision on specific criteria. These include a thorough consideration of the circumstances and conditions of the contract, along with other relevant factors that guide the arbitrator in identifying the most applicable legal framework. (<https://www.icc.se>)

1.2: Choosing Legal Rules that Do Not Belong to National Law

The freedom granted to the parties to choose the applicable law extends beyond national law, allowing them to select appropriate rules to govern their legal relationship. In this regard, the parties may opt for rules from the international legal system, such as international trade law, the principles of international law, or other relevant legal frameworks.

A: Selection of International Commercial Law Rules

With the evolution of global trade and arbitration practices, there has been a growing trend towards the application of international legal rules. This

trend is reflected in various international agreements that explicitly stipulate the application of international rules to disputes arising in international arbitration. However, opinions and legal theories on this matter diverge. Some scholars argue that the mere choice of international arbitration inherently signals the application of international rules, while others contend that the application of such rules requires an explicit agreement between the parties.

International rules are often regarded as an independent legal system that encompasses general principles shared with public international law. As a result, some have proposed referring to it as "international contract law," a body of law that includes the general principles and rules governing international trade, as well as texts found in both domestic and international laws, international arbitration rulings, and the practices of international trade. (MAHIOU 1989 p 53)

As previously discussed, parties choose international commercial arbitration to resolve disputes, viewing it as an alternative to national courts due to the numerous advantages it offers. One of the most significant benefits is the ability of the parties to select rules that do not belong to any national legal system, specifically opting for the rules of international commercial law. (BOSTANJI 2005 p 1072). These rules are distinguished by their independence and autonomy, as they do not derive from any single national system but form part of a specialized framework. (Hamad Al-Hajaya 2011 p 667).

International commercial law is increasingly seen as a system in its own right, one that continuously evolves to regulate the relationships between those engaged in international trade. Many legal scholars have advocated for the application of international commercial law, particularly in instances where no mandatory national rules apply. Under this framework, the parties may exclude national legal provisions and instead apply the specific rules of international trade to govern their contract. (Bostanji 2005 p 1072)

The parties' selection of international commercial arbitration signals their intention to move away from domestic law and instead apply international commercial law. This body of law draws its provisions from international customs and traditions, international agreements, general principles of law, rules of justice and fairness, and precedents set by arbitration rulings. (Hamad Al-Hajaya 2011 p 653)

International trade contracts are governed by specific rules, including the application of both national law and international trade customs. Traditional private international law or the conflict-of-laws approach is generally unsuitable for regulating and governing international trade relations.(Abu Zaid 1980 p 10)

Thus, in international trade contracts, the parties may opt for the rules of international commercial law, either through an explicit reference or, more commonly, indirectly by selecting international trade practices to govern the contract. This approach is reflected in Article 21 of the ICC Arbitration Rules. In

some cases, these rules are invoked through the parties' choice of general principles of law. In exceptional circumstances, the arbitral tribunal may also apply these rules. (Kadri, 1997 p 54)

In examining arbitration applications, we find that many arbitral tribunals have followed this approach, considering the rules that govern international trade contracts through an indirect interpretation. This often occurs by referencing conditions within the contract as an implicit indication of the parties' intention to apply such rules. However, some legal scholars argue that these rules lack provisions on aspects like capacity, defects of consent, and other foundational elements, meaning they do not constitute a fully integrated legal system. As a result, they are often applied in conjunction with national law, rather than independently. (Ranouil, 1998 p 46)

B: Selection of General Principles of Law and International Law

Jurisprudence has varied in its approach to the basis of general principles of law. Some scholars view these principles as shared legal rules agreed upon by the parties, while others argue that they are a synthesis of rules common to several domestic legal systems. Both views have been critiqued for potentially leading to the application of domestic legal systems. (Wali, 2024 p 117)

As a result, some jurists maintain that these principles do not derive their authority from national legal systems but from the collective belief of the international community, comprising traders, professionals, and businessmen, in their necessity and significance for regulating international relationships. This explains the subjective nature of applying these principles as arbitral tribunals see fit. A segment of jurisprudence has sought to systematize these principles, drawing from a variety of legal sources and arbitration rulings to provide clearer guidelines for those involved in international trade. (Nader, 2000 p 296)

In addition to general principles of law, parties may choose to apply the general principles of international law, particularly in contracts between developing countries and foreign companies. These principles may be applied either independently or as a supplement to domestic law. However, a key issue in arbitration proceedings is that arbitrators may use these principles to exclude the application of national law. A notable example of this occurred in a case involving Libya and a group of foreign companies concerning oil exploitation contracts. However, the principles of international law often do not encompass all the elements necessary to govern a contract, and as such, they are typically insufficient to be applied independently of national law. Consequently, they are applied in conjunction with national law, supplementing the rules outlined in domestic legislation. (Hamad Al-Hajjaya 2011 p 669)

2: Applicable Law and the Role of the Arbitration Court

International commercial arbitration is viewed as a form of contractual justice, deriving its authority from the agreement between the parties. This is rooted in the principle of the sovereignty of the will, which plays a crucial role in international trade contracts. In these contracts, the rigidity of national legal systems gives way to the autonomy and freedom of the parties to select the law or legal rules that will govern their contractual relationship. The arbitrator is tasked with applying these rules in the event of a dispute. Despite this autonomy, the arbitrator retains the authority to assess whether the chosen law is appropriate for the dispute, and may intervene to modify the choice to align with the nature of the dispute.

2.1 : Public Order Rules and Their Impact on the Applicable Law

It is well established that the parties in international trade contracts are free to choose the applicable law. However, if a law is chosen, the arbitrator must ensure that the parties’ selection complies with public order rules, whether national or international. Failure to do so renders their choice invalid. The issue of public order is one of the most significant challenges in international commercial arbitration, as an arbitration award may be unenforceable in the country of enforcement if it conflicts with the public order of that country. National judges have the right to annul an arbitration award if it violates their country’s public order. This is particularly relevant when arbitrators apply national law, as they may rely on national concepts of public order to avoid a situation where the award conflicts with domestic legal principles. (Boudaoud, 2023 p 284).

A: The Chosen Law and Internal Public Order

It is important to note that internal public order refers to the set of mandatory rules within national law that cannot be violated. These rules are designed to serve public interests, whether political, social, or economic, and are foundational to the societal system, taking precedence over individual interests. (Othman, 2002 p 69).

As a result, parties cannot select a law that excludes these mandatory public order rules. They cannot even invoke the principle of party autonomy to agree to terms that contravene these essential provisions. The application of public order by the arbitrator may lead to the exclusion of the chosen law if it conflicts with these rules. (Nader 2000 p 498)

The concept of public order is clearly defined in private international law as rules of mandatory application, which everyone must respect. These rules cannot conflict with another legal system. Various international agreements emphasize the importance of adhering to these mandatory rules. For example, Article 7 of the Rome Convention of 1980 on contractual obligations asserts that the provisions of the convention must not undermine the laws of the court’s jurisdiction. (Ozyan, 2011 p 35)

It can be concluded that the parties must respect and comply with the mandatory rules of the chosen law. They cannot select international commercial law rules that contradict national law. This principle is reinforced by Article 21 of the ICC Arbitration Rules and Article 28 of the UNCITRAL Arbitration Rules. International arbitration has consistently recognized the supremacy of the general provisions of the chosen law over contractual terms. A notable example is a case before the Special Arbitration Committee in 1993, where the arbitrator invalidated a clause regarding non-reviewability of the price, after referencing the provisions of Algerian law, which considers the theory of unpredictability a mandatory rule. (Racine, 1999 p 244)

B: Selected Law and International Public Order

International public order refers to the fundamental principles upheld by countries that are committed to law and legality, such as respect for human rights and the principles that ensure stability in international trade transactions. These principles are crucial for maintaining order and fairness in international relations. (Othman 2002 p 69)

In addition to international public order, the concept of the international legal system has emerged, often referred to as "transit public order" by some scholars. This term refers to a system directly issued by a collective of states and traders, encompassing rules that accommodate various legal systems. Others describe it as a set of universally accepted rules endorsed by the majority of civilized nations, serving as a common legal foundation across countries. (RACINE 1999 p 67)

Accordingly, the parties must consider international public order when choosing the applicable law to avoid invalidating the chosen law, as transnational public order may prohibit actions that are legitimate under the selected legal system. This has been confirmed in many arbitration cases, often indirectly, especially in cases before the International Chamber of Commerce. (Jean-Baptiste RACINE p 363) This issue becomes particularly relevant when the parties select transnational law to govern the contract, as the arbitrator must adhere to this system. Failure to do so may result in the arbitrator's actions being invalidated, as international public order is seen as essential to the nature of international arbitration, where no single national legal system governs the proceedings. (Bardan 2004 p 572)

2.2: The Nature of the Contractual Relationship and its Impact on the Applicable Law

The arbitrator applies the law chosen by the contracting parties, regardless of the law selected. However, in all cases, the arbitrator retains the

critical role of seeking justice and applying the most suitable legal rules to the dispute. As such, he may exclude the chosen law or even apply legal rules he deems appropriate, especially in the absence of a clear choice.

A: The Arbitrator's Assessment of the Elements of the Contractual Relationship

International arbitration is regarded as the most prominent method for resolving disputes at the international level. This affords it the authority to apply the law chosen by the parties or even to infer the applicable law from the circumstances and conditions surrounding the contract. This means that the arbitrator applies national law when the parties have explicitly expressed their will to do so, or when the circumstances and conditions of the contract point toward a specific legal system, even in the absence of an explicit choice. Arbitration has confirmed this in many cases. For example, in Case No. 1526, decided by the International Chamber of Commerce Arbitration Court in Paris, the arbitrator ruled that the governing law for the concession contract between the state and a Belgian company, in the absence of an explicit choice, would be the national law of the contracting state. This was based on the place of implementation, which was presumed to be the applicable law. (Al-Haddad 2001 p 485)

In addition to considering the circumstances and conditions of the contract, the arbitrator may apply certain rules of international commercial law, even in the absence of an explicit choice by the parties. Various systems, including those governing international arbitration and national laws related to arbitration, allow for the use of international trade practices and customs, even when the parties have not explicitly chosen these rules. Some arbitration decisions have excluded the chosen law and instead applied these international rules. (POMMIER 1992 p 18)

The arbitrator's application of international rules does not necessarily mean the exclusion of domestic laws. In some cases, the arbitrator is required to refer to the national law of the parties, particularly for issues such as nationality and capacity, which are mandatory. The will of the parties does not influence the application of these rules. The arbitrator must also apply national law when the parties select cross-border laws, especially regarding rules of necessary application, as these rules take precedence. This is because international commercial law does not cover certain aspects, such as capacity or the regulation of companies, among other examples. (Ranouil 1998 p 47)

It is clear, then, that the arbitrator is not solely bound to apply the law chosen by the parties but also monitors the effectiveness of that choice. As a result, the arbitrator may apply international rules and exclude the chosen law if it contradicts international standards or if the international rules are directly applicable, such as in the case of international trade terms, or to fill a gap in national law. Consequently, international rules play a complementary role in filling

or modifying gaps, especially when mandatory international rules conflict with domestic laws.

However, it is important to note that the arbitrator is not obligated to apply the chosen law unless the parties provide proof of its content and relevance to the dispute. Since the chosen law may be foreign to the arbitrator and they may not be sufficiently familiar with it, the arbitrator will resort to international rules as a precaution if the parties fail to substantiate the chosen law. (Nader 2000 p 386).

Therefore, despite the parties' choice of law, the arbitrator may decide that this law does not govern all aspects of the contract. The arbitrator may determine that certain matters, such as those concerning the capacity of the parties, fall outside the scope of the chosen law and should instead be governed by the personal law of the parties. Additionally, the arbitrator may reject the parties' choice of law if it is deemed unsuitable for resolving the issue at hand, if the mandatory provisions of the chosen law cannot be excluded, or if a decision contrary to public order would be required. (FOUCHARD, 2000 p 395)

B: The Arbitrator's Application of the Applicable Rules by Referring to the Elements of the Contractual Relationship

As established in private international law jurisprudence, the law that applies to a contract must be related to that contract. This principle was emphasized internationally in the Maritime Consignments Case of 1950, where the French Court of Cassation accepted the idea that every contract must be connected to the law of a state, thereby rejecting the notion of a contract existing without a governing law. Consequently, when the parties fail to specify a choice of law, the arbitrator must determine the law most relevant to the dispute or refer to conflict of law rules to identify this law. The arbitrator typically identifies the law most pertinent to the contract by considering the place where the most significant part of the contractual obligations was performed. In cases where this "place of performance" criterion is not applicable, the arbitrator may refer to the circumstances and conditions of the contract, which may suggest the application of a specific country's law to the contract. (Al-Hajaya 2011 p 676)

Under Algerian law, Article 1050 of the Code of Civil and Administrative Procedure mandates that the arbitration court apply the rules of the law chosen by the parties. In the absence of such a choice, the arbitration court is required to apply the appropriate rules of law and customs. This provision indicates that, if the parties are silent about their choice of law, the arbitrator may apply relevant legal rules, customs, and traditions. These customs can serve as supplementary rules where the law does not provide guidance. However, if the chosen law contradicts these customs, the arbitrator must prioritize the chosen law's provisions.

In the field of international trade, several customs have developed over time, known as *lex mercatoria*, which are widely accepted in international

commercial transactions. Among these customs are principles such as force majeure, economic rebalancing in international contracts, and certain principles established by arbitration tribunals, including those relevant to international maritime trade. These customs, along with general principles of international trade, may be applied by the arbitrator when no specific provision exists in the chosen law.

Thus, the arbitrator may apply the law of the country where the arbitration takes place, the law of the country where the relevant facts occurred, or any other legal system applicable in a different country. However, the arbitrator is bound by the requirement to choose the law that is most relevant to the dispute, rather than applying any law arbitrarily. The law governing the dispute could be the law of the place where the contract was concluded, the law of the country where the contract is performed, the law of the place of arbitration, the law of the nationality of the parties, or even the law governing the language of the contract. (Ben Said 2012 p 320)

In conclusion, the parties are free to choose the law applicable to their contract, and the arbitrator has the authority to resolve the dispute based on the chosen legal rules. However, if the arbitration court finds that the chosen law is inappropriate to govern the relationship, or if it conflicts with public order, the arbitrator may apply the legal rules they deem appropriate. International agreements and arbitration systems recognize the possibility of the arbitrator resorting to international trade customs and practices, even if the parties have not explicitly chosen these rules. Furthermore, certain arbitration decisions have excluded the chosen law in favor of applying these international rules. (POMMIER 1992 p 18).

conclusion:

The parties involved in international commercial contracts enjoy the freedom to select the law that the arbitrator will apply to their contract. This principle is enshrined in domestic legislation, including Algerian law, as well as in international agreements. Parties can opt for the national law of one of the parties, the law of the place where the contract was concluded, the law of the place where the obligations arising from the contract are to be performed, or even a law that has no direct connection to the contract. Additionally, they may choose rules from the international legal system, such as international trade customs and practices, general principles of law, or even specific rules from international law, especially in contracts involving a state or one of its affiliated agencies. However, for the choice of law to be valid and for the award to be enforceable, it must comply with public order rules, particularly those of the country where the arbitration award will be enforced.

Based on our research, the following conclusions can be drawn:

1. **Freedom of Choice:** Parties have the freedom to choose the law that governs their dispute. They can select any law that governs the relationship, whether domestic or international, or even choose a combination of rules from different legal systems.
2. **International Trade Customs:** Contracting parties to international trade contracts can opt for international trade customs and practices as the governing rules. This principle is recognized both in domestic laws and international agreements.
3. **Arbitration Court Powers:** The arbitration court possesses powers that are not available to national courts, including the ability to apply international trade customs and practices, even in the absence of an explicit agreement between the parties.
4. **Arbitrator’s Discretion:** The arbitrator has the authority to apply international trade customs without needing to investigate their existence, even if the parties have not agreed to apply them. This approach differs from that of national courts, which generally require proof of the existence and application of customs.
5. **Monitoring the Chosen Law:** The arbitrator is not strictly bound by the parties' choice of law. Instead, the arbitrator is responsible for ensuring that the chosen law is appropriate for resolving the dispute. If the chosen law is found to be unsuitable, the arbitrator may exclude it and apply the rules deemed appropriate to the case.

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