

Introduction to International Commercial Arbitration

Prof. Giorgio F. COLOMBO



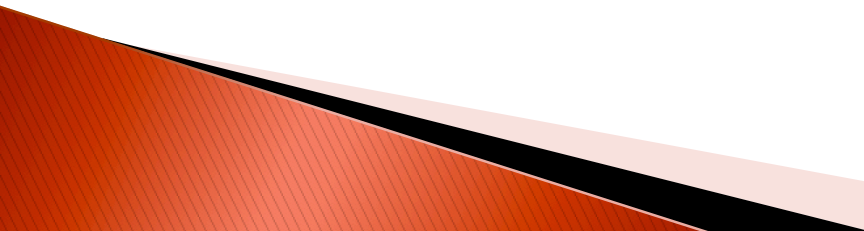
Applicable Laws

Lesson n.5

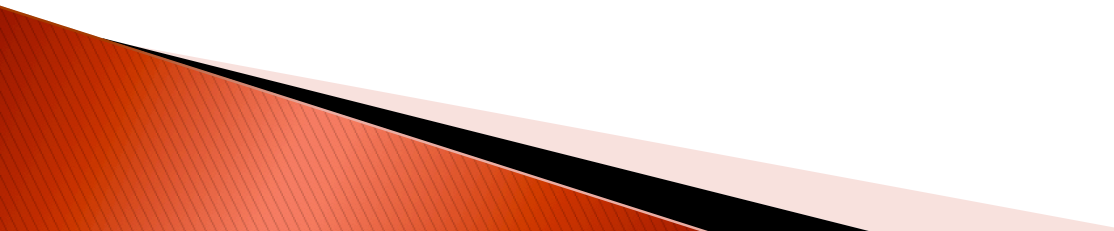
Law applicable to...

- ▶ When speaking about applicable law, we must consider at least three issues:
 - The law applicable to the the agreement to arbitrate
 - The law applicable to the proceedings (*i.e.* the *lex arbitri*)
 - The law applicable to the merits of the dispute
 - Other laws?
 - Enforcement

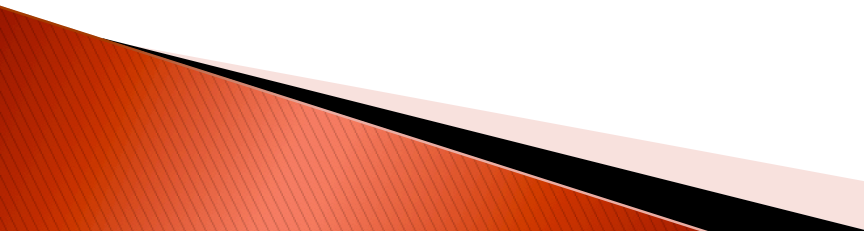
The law applicable to the agreement to arbitrate

- ▶ Normally the same law that applies to the merits of the dispute, if the parties made a choice about that
 - ▶ Failing any choice by the parties, usually the law of the seat of arbitration applies
 - ▶ Favor to uphold the validity of the arbitration agreement (France – French Law, Switzerland – Law applicable to the agreement, to the merits or Swiss Law)
- 

Law applicable to the proceedings

- ▶ Usually the law applicable to the proceedings is different to the law applicable to the merits, as parties choose a «neutral» venue to dispute
 - ▶ The prevailing theory is that the law of the «seat» will apply to the proceedings
 - ▶ Some States provide a different set of norms for national and international arbitration
- 

Law applicable to the proceedings

- ▶ There might be unintended consequences in choosing the seat (*e.g.* the Dutch arbitration law gives arbitrators the power to joinder two or more arbitration proceedings)
 - ▶ There might be a conflict between the law applicable to the proceedings and the law applicable to the merits (*e.g.* arbitrability, consumer arbitration)
- 

Law applicable to the proceedings

- ▶ There might be some mandatory State rules applying to (for example):
 - freedom to agree on procedural rules
 - interim measures
 - court assistance
 - appointment and removal/challenge of arbitrators
 - powers of the arbitrators
 - award (form, requirements, award upon consent)

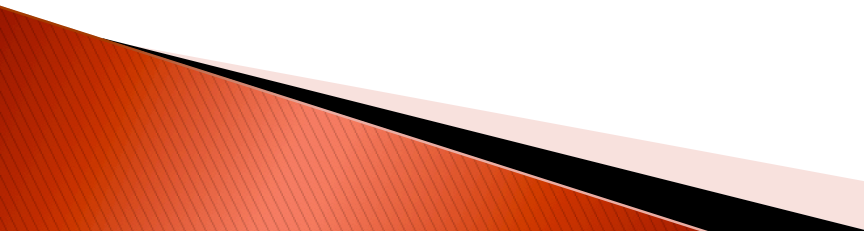
Law applicable to the proceedings

- ▶ Of course nothing prevent parties to select a different system of law, but this would not prevent mandatory provisions of the *lex arbitri* to be applied
- ▶ Why? Life is already complicated enough

Law applicable to the merits

- ▶ Basic rule: autonomy of the parties (contract)
 - Limits:
 - *Bona fide*
 - Public policy
- ▶ What do we mean by «Law»?
 - National Law(s)
 - Non-National Law(s) or set of rules
 - Equity and good conscience

National Law

- ▶ This is the normal choice
 - ▶ Balancement when one party to the contract is a State (stabilisation clause)
 - ▶ Mandatory rules (cannot be derogated from by way of contract)
 - ▶ National laws outside the national law (*e.g.* International Conventions): importance of studying the system
- 

Non-National Laws / Rules

- ▶ *Lex Mercatoria*
 - What is that?
 - Is it possible to assess its limits?
 - EU approach to it
- ▶ UNIDROIT Principles
 - Codified *Lex Mercatoria*?
 - Often used in case of conflicts
- ▶ Shari'ah
 - We will discuss about it in detail

Equity/good conscience

- ▶ Does it mean that the Award is not an award?
- ▶ Does it mean that the Arbitral Tribunal is free to completely ignore the law?

What happens if no choice is made?

- ▶ The Arbitral Tribunal is entitled to decide which law applies (unless there is something to the contrary in the *lex arbitri*)
 - Implicit or tacit choice?