Arbitration and conflicts of laws

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In international arbitration and court proceedings relating to international arbitration, questions of conflicts of laws may arise. As codified conflict of laws rules are often lacking, it is not always evident which law should be applied.

For example, written conflict of laws rules with regard to arbitrability are a rarity, an exception being Articles 33 and 49 of the Swedish Arbitration Act. Also with regard to the law applicable to the substantive validity of the arbitration agreement, many jurisdictions do not provide for a codified conflict of laws rule. If a written conflict of laws rule is lacking, it is often not evident which law should be applied to determine whether the arbitration agreement is substantively valid and which law is to be applied can be highly debated. Noteworthy in this context is the recent decision of the UK Supreme Court in the matter of *Enka Insaat Ve Sanayi AS* v. *OOO Insurance Company Chubb* [2020] UKSC 38. In its decision, the UK Supreme Court ruled that where the parties have not expressly specified the governing law of the arbitration agreement, the law chosen by the parties to govern their contract will generally apply to an arbitration agreement which forms part of that contract, or in case the parties have not chosen a governing law for their contract, the governing law of the arbitration agreement will generally be the law of the seat of arbitration, as that is generally the law with the closest connection to the arbitration agreement. Where the validity of the arbitration agreement under English law is tested in accordance with one law only, under the *in favor validitatis* principle laid down in Article 10:166 of the Dutch Civil Code and Article 178(2) of the Swiss Federal Statute on Private International Law, parties may, simply put, invoke the most favourable of (i) the law chosen by the parties to govern the arbitration agreement, (ii) the (contract) law of the seat of the arbitration or (iii) the law applicable to the merits (of the dispute). The arbitration agreement is valid if it is valid under one of the laws that may be invoked.

When it comes to the merits of the dispute, national conflict of laws rules are not necessarily applicable to arbitration. Article 1054(2) of the Dutch Code of Civil Procedure, for example, provides that, failing a designation of the applicable law by the parties, the arbitral tribunal shall decide in accordance with the rules of law it considers appropriate. With this provision, the method of the *voie directe* – also known in, for example, Belgium and France – was introduced in the Netherlands. Pursuant to this provision the arbitral tribunal is not obliged to apply any conflict of laws rule. Article 28(1) of the UNCITRAL Model Law, on the other hand, sets forth the *voie indirecte* method and provides that failing a choice of law by the parties the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Similar rules are recognised in, for example, England & Wales and Denmark. Other arbitration acts, such as the German and Swiss Arbitration Acts, provide that the merits of

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the dispute, in the absence of a choice of law by the parties, is governed by the law or rules of law with which the case has the closest connection. At the same time, the substantive dispute may usually also be assessed on the basis of non-state rules to the exclusion of national laws, although in some jurisdictions only if the parties have so agreed, whilst in other jurisdictions also absent such an agreement.

As a consequence of the various unclarities with respect to applicable laws and arbitration, there is ample reason to further investigate the interaction between arbitration and private international law. This special issue of *NIPR* is devoted to exactly this interaction (and the resulting intricacies).

The first contribution, by Alexander Bělohlávek, introduces the reader to a pivotal issue in international arbitration: the law applicable to the dispute on the merits. Rejecting the notion that the Rome I Regulation should be considered exclusively applicable to civil litigation, Bělohlávek submits that there is no reason why the Rome I Regulation cannot also be used in arbitral proceedings to determine the applicable law.

In the second contribution Zlatan Meškić and Almir Gagula discuss the application of the *lex mercatoria* in arbitration. They first identify rules that may represent the *lex mercatoria*. Subsequently, Meškić and Gagula provide an in-depth analysis on the gap-filling role of *lex mercatoria* in international arbitration and discuss how arbitrators can use the *lex mercatoria* in many ways.

The third contribution, by Ibrahim Shehata, focuses on the issue of overriding mandatory rules in international commercial arbitration. Offering perspectives from the Swiss and French jurisdictions, Shehata proposes that jurisdictions adopt the Swiss approach, under which the setting aside court is to assess whether the arbitral tribunal has taken overriding mandatory rules into consideration, rather than testing the correct application of the overriding mandatory rule at issue.

Next, in the fourth contribution, Pauline Ernste focuses on the law applicable to (the taking of) evidence in international commercial arbitration. She compares Article 1039(1) of the Dutch Code of Civil Procedure with, among others, Article 10:13 of the Dutch Civil Code and highlights the differences between both rules. After comparing these provisions, Ernste elaborates on the rules on evidence that are applicable in arbitration.

It would be fair to mark the issue of *res iudicata* as one of the most challenging subjects in (international) arbitration. In the fifth contribution, Marek Zilinsky tackles the subject head on. He discusses the law applicable to *res iudicata*. Offering an in-depth analysis from a Dutch law perspective, Zilinsky submits that the question of *res iudicata* must be answered in accordance with the law applicable at the place where the award has been issued (i.e. the seat of arbitration).

Equally challenging is the doctrine of *ius curia novit*, which is the topic of Niek Peters' contribution. In this sixth contribution, Peters investigates in what instances a Dutch-seated arbitral tribunal is to apply Dutch conflict of laws rules and to add to the legal grounds *ex officio*. While it is often assumed that arbitrators are not obliged to apply conflict of laws rules or to add to the legal grounds *ex officio*, Peters shows that this is not necessarily true.

The seventh and last contribution, by Bas van Zelst, investigates and challenges existing notions of private international law aspects concerning the liability of arbitrators. Starting from a succinct comparative analysis of how the role of the arbitrator is viewed and which standards

apply to arbitrator liability in various jurisdictions, Van Zelst assesses the applicability and application of the Rome I Regulation to the liability of arbitrators.

The aforementioned contributions make clear that, as codified conflict of laws rules in relation to arbitration are often lacking, legal uncertainty remains. Although flexibility is considered to be one of the advantages of arbitration, such flexibility should not be at the expense of legal certainty and predictability. Therefore, the aforementioned (and other) conflict of laws issues should be addressed – either in terms of legislation or in a more practical context – in order to further enhance the appeal of arbitration and we look forward to revisiting the topics discussed in five or maybe ten years' time.

Finally, a brief word of thanks. We are indebted to *NIPR*'s editorial board for allowing us to edit this special issue and are grateful for their suggestions and support.