Seat of arbitration, procedural law (lex arbitri) and substantive law

JUS5852 - International Commercial Arbitration – Class 3
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By the end of this class you should be able to answer:

- What is the seat of arbitration? How is it distinguished from a location of the hearings? Why is it important? What should you consider when picking a seat and how should you draft an arbitration clause?
- What is “lex arbitri” and what does it regulate? How does it differ from local rules of civil procedure? Should you pick a law different from the law of the seat to govern the procedure?
- Which law governs the merits of the dispute? If the parties have not selected the governing law, who gets to rule on it and how? Is this decision subject to judicial review, and to which extent?
- When selecting the governing law, what should you keep in mind? What are the most significant limits to party autonomy?
Reading materials

• This lesson corresponds to chapters 6 and 13 of the book (pgs. 105-119; 233-261)
Arbitral seat

• Not the same thing as the location where the hearings are conducted – it is the “domicile” of the arbitration, and as such, it is a legal construct, rather than a geographical location

• Draft agreements accordingly!

• **Activity 1**: Discuss and explain why an arbitration clause which provides “… the seat of arbitration will be Stockholm, Sweden” is to be preferred over the one stating “…the hearings will take place in..”
Arbitral seat

• Determines national legislation applicable to arbitration (procedural law, lex arbitri)
  – Internal procedures of the arbitration
  – External relationship with courts
• Determines the law applicable to the arbitration agreements in the absence of choice (NYC, UNCITRAL Model Law)
• Is a “place where an award is made” for the purposes of NYC

• Other considerations: might influence nationality/background of the arbitrators, location of the hearings, cost, etc.
Impact of procedural law (lex arbitri)

• Internal procedures in arbitration
  – Generally very few mandatory norms; requirement to treat the parties equally and allow them to present their case

• External relationship with courts
  – Annulment of an award (“validity challenge”)
    • Different laws give different grounds for challenging an award
    • Awards that are successfully set aside at the seat may be refused enforcement
  – Qualification, selection and removal of arbitrators
  – Interlocutory disputes
  – Provisional measures and evidence-taking
  – Etc.

• Note that it is only national arbitration legislation that constitutes lex arbitri, not the local civil procedure rules.

• Selection of foreign procedural law, though sometimes possible, is ill-advised.
Selection of the arbitral seat

• By the agreement of the parties
• By the arbitral institution
• By the national courts

• Considerations when selecting:
  – Party to the NYC Convention
  – Grounds for annulling an award
  – Arbitration-friendly national legal regime
  – Effect on selection of arbitrators
  – Effect on procedural and substantive laws
  – Cost, convenience and other practical considerations
Substantive law applicable to merits of the dispute

• Two situations:
  – Parties have not chosen the substantive law
  – Parties have chosen the substantive law

• Absent the choice-of-law agreement, arbitral tribunal has broad power to rule on the applicable substantive law
  – This power is given to the tribunals by many national laws (see e.g. UNCITRAL Model Law 28(1) and 28(2)), as well as institutional rules

• Which conflict rules apply? Different approaches in national laws
  – Mandatory application of general conflict rules of arbitral seat
  – Mandatory application of specialized conflict rules of arbitral seat
  – “Applicable” or “appropriate” conflict rules, as selected by tribunal
  – Direct application of substantive law by tribunal
  – Mandatory law rules

• What if there is a conflict between selected institutional rules and national law? E.g. “appropriate” conflict rules vs. direct application?
• How do we distinguish between matters of substance and procedure?
Choice-of-law agreements

• Presumptively valid under international conventions and many national laws
• Public policy limitations
• Overriding mandatory rules

• Considerations when selecting substantive law
  – Is it wise to select your own national law just because you are familiar with it?
  – Developed, stable, predictable law?
  – Split, floating, overlapping, non-national laws?

• What is the effect of the choice-of-law clause?
• Judicial review of arbitrators’ choice-of-law decisions?
Activity 2

- Companies A and B have entered into a cross-border sales agreement, which provided that all disputes shall be resolved by arbitration seated in London, England, under UNCITRAL Arbitration Rules, as well as that the merits of the case shall be governed by the CISG (Convention on International Sale of Goods).
- What happens if:
  - Arbitral tribunal finds that CISG does not regulate certain aspects of the dispute, and, applying the “appropriate law” standard, rules on those issues by applying the English law?
  - Arbitral tribunal skips the “appropriate law” determination and applies English law directly?
  - Arbitral tribunal rules ex aequo et bono after it finds that CISG does not regulate the said aspects of the dispute?