

Opinion

DETERMINATION OF THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE IN INTERNATIONAL ARBITRATION.

In international arbitration, where the parties have identified the law applicable to the merits of the dispute, the arbitral tribunal is required to apply the designated law. In the absence of such an agreement, the tribunal may resort to conflict of laws rules or directly determine the applicable substantive law.

The parties' determination of the law applicable to the merits of the dispute in advance, at the contractual stage, and the direct designation of the substantive law without reference to conflict of laws rules can help avoid stalemates in the dispute resolution process arising from the parties' failure to reach an agreement on this issue. It also prevents the application of legal rules that were not contemplated by the parties, thereby ensuring that proceedings remain fair and aligned with the commercial agreement of the parties. In making this choice, the parties should carefully consider the practical dimensions of their relationship, including their respective positions within the commercial arrangement and the jurisdiction in which the underlying transaction is conducted. Such foresight contributes to a more efficient and coherent dispute resolution outcome.

This choice typically refers to the law of a specific country. Parties may make this designation in one of the following ways: within the arbitration clause embedded in the substantive contract, separately within the main contract, or through a stand-alone "choice of law agreement". Party autonomy in selecting applicable law also extends to "anational rules" (non-national rules) which may be treated as binding rules of law distinct from national legislation.

Such choice of law can be express or implied:

- (a) Express choice means the substantive rules of the selected law apply directly. Unless agreed otherwise, conflict-of-laws principles under that law are excluded.
- (b) Implied choice must be inferred from the parties' intentions, based on a review of the contract's terms and the parties' overall conduct. Indications of an implied choice may include: use of language or legal terminology tied to a specific jurisdiction, contractual features (e.g., place of delivery or nationality of a party) pointing toward a particular country, parties referring to the same national law when asserting claims.

A recurring debate concerns whether the choice of the arbitral seat or procedure suggests an implied choice of substantive law. The predominant view is that it does not: the seat is selected for its procedural framework, not for its substantive legal rules. Therefore, the choice of arbitral seat should not be interpreted as a choice of substantive law.

Finally, once the parties have made a valid choice of applicable law, the arbitral tribunal is bound by it. Arbitrators are not permitted to disregard or override the parties' chosen law based on perceived inadequacy, unfairness, or irrelevance to the dispute.