Chapter 22
Applicable Law to International Commercial Arbitration in Panama (Digital Aspects)

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Abstract International arbitration proceedings give rise to a variety of choice-of-law issues, particularly when you add the increasing implementation of digital technologies. The success of the economic collaboration between the counterparties of various jurisdictions depends on the choice-of-law by the parties in dispute. This article focuses on how to properly choose the applicable law in arbitrations for international commercial disputes in the Republic of Panama, adding the particularities of the increasing use of digital technologies. The author explores the nuances and specificities when parties have expressly chosen an applicable law to the dispute and the legal reasoning and theories behind properly selecting the law applicable when the choice-of-law by the parties is absent, considering different approaches such as conflict-of-law rules, the closest connection test, the cumulative method, international conventions, and transnational principles of laws.

22.1 Introduction

International commercial arbitration as a special mechanism of solving commercial disputes at the international level has peculiar characteristic features [1, p. 91], one of these characteristics is that parties have the capacity and availability to choose the laws and/or rules that shall be applied to solve a current or future dispute. The economic growth of a country demonstrates remarkable changing in legal behavior on enumerated country's private parties' activities as well [2, p. 166]. The introduction of new methods of using means of production, the improvement of technology leads to the active development of the economy. The increasing degree of complexity and even the sophistication of financial markets and commercial have led to the need to apply more sophisticated dispute resolution methods that may come up in all types of disputes including cross-border banking and financial transactions. The above-mentioned modernization of commercial disputes resolution entails many problems

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of legal nature [3, p. 754]. Additionally, digital technologies are currently affecting the settlement of dispute by arbitration, not only when it comes to consent to arbitrate the actual arbitration proceedings but also the selection of the legislation to the merits or substantial aspects. Furthermore, arbitrators may encounter circumstances when the parties did not agree or did not expressly select the legislation, or set of rules to be applicable. In this situation, it is of utmost importance to correctly determine the applicable norms to the dispute. In this regard, it is the arbitrators' responsibility to properly decide on the applicable law and the legal grounds of this determination such as transnational principles of law, the closest connection test, international conventions, the national arbitration act, and the arbitration rules from the corresponding arbitration institution.

The party autonomy principle intrinsically affects and has enormous and different impacts on the legislations and rules to be used in an arbitration. This principle affects the law governing the substance or mertis of the dispute, the procedural law governing the arbitration, the law applicable to the arbitration clause, and also the further recognition and enforcement of the arbitral award. The present article is devoted to properly choosing the mechanisms to rightfully determine the material law applicable to the merits of the case, particularly for international commercial disputes in the Republic of Panama.

Correctly determining the law governing the substance part of the dispute is significantly important, since this is the legal act or rules governing the agreement that is the basis for the controversy. Consequently, this substantive law shall determine the legal rights and obligations of the parties involved, including the types and calculation of damages, the limitation of defenses, and the substantive remedies available to the parties.

22.2 Methodology

The present article applies a comparative method analysis of different legal frameworks, arbitration legislations, conflict-of-law rules, arbitration rules, judicial decisions, and arbitral awards from several jurisdictions which in turn allows us to understand the approach accepted in the Republic of Panama.

This research by utilizing a formal-legal methodology observes from a legal point of view, the nature of the governing law applicable related to the legal disputes of international commercial disputes solved by arbitration in the Republic of Panama. Particularly, when the parties have chosen such set of rules or in contrast when there is an absence of choice by the parties. Additionally, this article uses the normative legal method to study the legal norms and regulation in the Republic of Panama of the material law that ought to be applied to the merits or substance part of international arbitrations, including national legal acts, international private law code, and internal arbitration center regulations.

The research's purpose consists of identifying the correct approach to pick the governing law of the merits in arbitrations of international commercial cases in

Panama. This purpose is achieved by analyzing the different approaches applied by arbitrators worldwide, by examining standards used in national arbitration laws and arbitration rules of well-renown institutions, and by studying the reasoning in case law when arbitrators have determined the material law of a specific case.

22.3 Results

22.3.1 Expressed Choice by the Parties—Digital Aspects

Panama's national arbitration legislation recognizes the party autonomy principle to freely indicate the legislation, acts, and arbitration rules applicable to a future or current dispute. Panama's law for national and international commercial arbitration (Law No. 131 of 2013) expressly stipulates under article 56 "the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the merits of the dispute." In doing so, arbitrators shall consider "any indication of the law or legal system of a particular state shall be understood to refer, unless otherwise stated, to the substantive law of that state and not to its conflict of laws rules."

Indeed, Panama's legislation follows the approach of most jurisdiction considering that "any designation" of the law or legal system of a given State shall be construed as "directly referring to the substantive law of that State and not to its conflict of law regulation." However, this designation may be affected by digital aspects. Parties can consent the use of a material law by digital means. This may include, the use of electronic communication or data messages, as long as the information contained therein is accessible for consultation afterwards.

Article 5 of the law 131 of 2013 specifies the meaning of "electronic communication" and "data message." This regulation defines electronic communication as "any communication that the parties make by means of data messages"; and data message as "information generated, sent, received or archived by electronic, magnetic, optical or similar means, such as electronic data exchange, e-mail, Telegram, telex or fax, among others."

Digital aspects are also present when it comes to communications and notifications to the parties [4]. Art. 8 of the National Arbitration law states that notifications or communications made by telex, fax, or other means of electronic, telematics, or other similar types of telecommunication, which allow the sending and receipt of writings and documents stating their sending and receipt and which have been designated by the interested party, shall be valid.

22.3.2 Determination of the Applicable Material Law in Absence of Choice by the Parties

In circumstances where the parties to a dispute have not agreed about the substantive law governing the merits of dispute, the task of properly selecting the regulations governing the main contract, genesis of the dispute, is typically an obligation of the arbitral tribunal. Consequently, arbitrator may refer to national and international elements. In doing so, different arbitral tribunals may have different approaches to solve this issue. Some might refer to international private law, conflict norms of the legal place or seat of the arbitration, others may consider different criteria such as the cumulative method, the closest connection test, non-national legal systems, and international conventions; while others may select the conflict rules which they considered to be appropriate. Additionally, arbitrators must consider exceptions to the application of conflict rules, e.g., directly applicable laws, overriding mandatory rules, and/or public order policies [5].

Panamas' national legal system provides the arbitral tribunal, the authority and power to select the legislation that governs the substance or merits of the dispute, stating under article 56 of the law 131 of 2013 that if the parties do not indicate the applicable law, the arbitral tribunal shall apply the applicable legal norms to the dispute.

22.3.3 Conflict-of-Law Norms of the Seat of the Arbitration

An approach that was frequently used by arbitral tribunals in the past was to select the conflict-of-law norms of place or arbitral seat to indirectly determine the law applicable to the legal dispute. This point of view required arbitrators to refer to the choice-of-law norms concerning the seat or place of the arbitration to resolve the dispute.

Supporters of this theory considered that parties, whether individuals or legal entities, who have chosen a place for arbitration have consequently agreed that this law should be implicitly applicable to both procedural and substantive matters. Little reference was done to which conflict of norms dictated this, or were to be applied by the arbitral tribunal. Rather, the parties' selection of the seat was deemed to be an indirect choice of the seat's substantive law [6, p. 300].

This perspective, however, has been abandoned by most national laws and arbitration rules. It is regarded as an antiquated criterion and there is currently a minimum number of arbitrators that follow this approach.

22.3.4 Cumulative Method of Choice-of-Law Norms

The cumulative method is an approach that is frequently utilized by international arbitral tribunals. This method consists of simultaneously considering all of the choice-of-law norms of all legal systems with which the dispute in question is connected. If all of these diverse choice-of-law norms point to the same substantive law, the arbitrators apply this law regarding the merits of the case. The idea behind this method consists of demonstrating a "false conflict" to show that all analyses would lead to the same applicable law [7, p. 921]. Arbitral Tribunals normally make special efforts to show that the substantive solution found for the dispute is either one pointed out by the international private law legal systems of the national jurisdictions reasonably connected with the dispute (false "conflit de systems") or by a generally accepted conflict-of-laws rule.. On a practical level, the cumulative approach also provides some insulation against a challenge for failure to apply the proper conflict-of-laws or substantive rules [8, p. 191].

Arbitrators sometimes apply the conflicts rules of each of the states with a connection to the dispute. As a practical matter, this "cumulative" approach virtually always concludes that all potentially relevant conflicts rules select the same law. Alternatively, some awards apply a variation of this analysis that considers the application of all potentially applicable national (or other) substantive laws [6, p. 301].

This methodology has been criticized by some scholars as Yves Derains, when stating that "the method known as cumulative application of system of conflict laws of states involved in a dispute has no sense unless the approach results in convergence" [9, p. 529].

22.3.5 Closest Connection Test

Some national arbitration laws and arbitration rules demand that the arbitrators need to apply the legislation of the state which has the "closest connection" to the parties' dispute. Indeed, some arbitration legislation prescribes a "closest connection" standard for tribunals seated on national territory; where such legislation is applicable, tribunals typically have applied the closest connection standard. Indeed, even where no such statutory rule applies, some awards have applied a "closest connection" choice-of-law rule. This approach draws support, in regards to the choice-of-law analysis applicable to contracts in the international legal sphere, from the connected points of view of the Rome I Regulation on the Law Applicable to Contractual Obligations and its predecessor, Rome Convention, both adopting a "closest connection" standard, and the Restatement (Second) Conflict of Laws adopting a "most significant relationship" standard [6, p. 301].

This approach has been accepted by German Code of Civil Procedure ("the arbitral tribunal is to apply the laws of that State to which the subject matter of the proceeding has the closest ties"); Swiss Arbitration Law ("the arbitral tribunal shall decide… in

the absence of a choice-of-law, by applying the rules of law with which the dispute has the closest connection"); and Italian Civil Procedure Code ("… if the parties are silent, the law with which the relationship has its closest connection shall apply").

Even when the tribunal that is deciding the arbitration case is not required to use the closest connection standard, some tribunals have considered that this test is a transnational principle of private international law and have gone on to apply it as the most appropriate conflicts rule to determine the substantive law. This method appeals to the notion that the law will be tailor-made for the particular contractual circumstance. However, in this modern and digital era, there can be too many relevant factors connected to the dispute [7, p. 921].

The criteria to understand which law has the "closest connection" can be quite complicated. Arbitrators may consider different factors: the place where the contract was concluded by the parites (lex loci contractus), the law of the place of performance of the contract (lex loci solutionis), the place of business or habitual residence of the parties, and the jurisdiction for future enforcement. Nevertheless, this approach might lead to ambiguity in international arbitrations and uncertainty for the parties, especially taking into account electronic commerce and the fact that more than one legislation may be applicable to one case.

Panama's national arbitration law does not expressly accept the closest connection test as a standard to determine the substantive law to a dispute. Nonetheless, this standard is recognized under Article 160 of the International Private Law Code, stating that "in case of silence of the contracting parties as to the applicable law, it refers to the determination made by the judge of the forum of the specific State with which the contract in question has the closest proximity or closeness based on its objective and subjective elements."

22.3.6 Choice-of-Law Norms that the Arbitral Tribunal Considers to Be "Appropriate"

As seen from above, this approach is currently being accepted by leading international organizations and arbitration centers around the world. This mechanism gives arbitrators the power and faculty to select the legislation to be applicable to the merits of the dispute based on what they considered to be more "appropriate."

Under this standard, arbitrators may have the freedom to select the most appropriate conflict-of-law norms that will ultimately determine the substantive law to solve the dispute. This freedom, however, should not be understood to permit unfettered discretion. On the contrary, the arbitrators remain obligated to select the conflicts rules that are "appropriate" in light of the procedural law to the arbitration and the arbitration agreement; this is a selection with right answers and wrong answers, and not a purely discretionary matter. For example, an arbitrator cannot select the conflicts rules of his home jurisdiction, if it has no connection to the dispute, merely because it is familiar [6, p. 300].

From the reading of Art. 56 (2) of the law 131 of 2013, it is clear Panama's national arbitration law also accepts this standard when stating: "If the parties do not indicate the applicable law, the arbitral tribunal shall apply the rules of law it deems **appropriate**." However, if we further analyze this article one may observe that it departs the Model Law considering that the article does not expressly stipulate a reference to conflict-of-law norms to determine the applicable law.

22.3.7 Direct Application of Substantive Law

Another standard recognized by arbitration laws when determining the material law applicable to the arbitration is to "directly" chose the substantive law. This standard allows arbitrators to directly apply the material law that shall be applicable to the substance of the legal dispute. In doing so, arbitrators may not necessarily refer to conflict-of-law norms, but they will have the possibility to directly select the substantive law.

After examining Panama's national arbitration law, it is clear that Panamanian legislation primordially follows this standard stating under Art. 56 (2) that "If the parties do not indicate the applicable law, **the arbitral tribunal shall apply the rules of law** it deems appropriate." In this regard, this provision does not expressly stipulate that arbitrators shall apply the "conflict-of-law rules" they deem appropriate, rather it only refers to the use of "rules of law" ("normas jurídicas"). Therefore, it is arguable, whether arbitrators shall mandatorily refer to conflict-of-law norms to figure out the applicable law or whether they may directly choose the substantive law to solve a concrete case. As mentioned previously, this constitutes a departure from the original wording of the UNCITRAL Model Law (Art. 28). In the author's view, this deviation is clearly intentional. This is precisely to not restrain arbitrators to a choice-of-law system and to grant arbitrators not only power to directly choose the material legislation applicable to the substance of the arbitration case but also to open the possibility for arbitrators to select non-national rules to govern the dispute.

This approach has been accepted by leading arbitration institutions such as the International Chamber of Commerce (ICC). Under article 21(1) 2017, the ICC Rules [10] provide that "[t]he parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."

Recognition and acceptance of such approach shall ultimately depend on the legal provisions of the national arbitration regulation applicable to international commercial arbitrations. Jurisdictions such as France, Switzerland, the Netherlands, India, and Canada are in favor of the point of view that arbitrators are able to select on their own the rules they consider to be appropriate to solve the dispute. Article 1511 of the French Code of Civil Procedure authorizes arbitrators an international arbitration to "directly" apply the substantive law that they consider appropriate. Indian Arbitration and Conciliation Act, Art. 28(1)(b)(iii) ("apply the rules of law it considers to be

appropriate given the circumstances surrounding the dispute") and Netherlands Code of Civil Procedure, Art. 1054(2) ("in accordance with the rules of law it considers appropriate"). Nonetheless, other influential jurisdictions such as England, Germany, and Japan have declined to accept this approach when determining the law applicable to the material issues between the parties.

22.3.8 Transnational Principles of Law (Application of Non-national Legal Systems)

Another method that international arbitrators may use to solve the issue of applicable law to the substance or merits of the arbitration dispute is applying transnational principles of law, which constitute non-national legal systems, not attached to a particular state or choice-of-law system. Such non-national legal systems may include reference to lex mercatoria, the UNIDROIT Principles of International Commercial contract (the UNIDROIT Principles), the Principles of European Contract law ("PECL"), or the "TransLex-Principles.

Whatever the case is, either choice-of-law or direct application of a substantive law; arbitrators must observe the stipulations of the agreement, and follow commercial usages. When it comes to international arbitrations in Panama, specifically, arbitrators must follow the UNIDROIT Principles as indicated in Art. 56 of the law 131 of 31 December 2013, stating that "… In all cases, the arbitral tribunal shall decide in accordance with the provisions of the contract and shall take into account the commercial uses applicable to the matter. International arbitrations shall also take into account the Principles on International Commercial Contracts of the International Institute for the Unification of Private Law (UNIDROIT)."

Moreover, Art. 79 of the Code of Private International law of Panama complements this norm by stating that "Parties may use the principles of international commercial contracts regulated by the International Institute for the Unification of Private Law, known as **UNIDROIT, as a supplementary rule** to the applicable law or as mean of interpretation by the judge or **arbitrator**, in the contracts or relations of international trade law."

22.3.9 International Approach

An alternative approach that arbitral tribunal have recognized to escape the peculiarities of national laws is to consider "international conflict of law norms." This method considers conflict-of-law norms that are not necessarily connected to any national conflict rules.

The reasoning behind this method was explained in ICC Case No. 7071 [10] in the following way: "… much to be said in favour of adopting generally accepted principles of international conflict of laws. The fact that the dispute arises out of dealings between one government and an instrumentality of another government gives them a unique international flavour. Hence, the parties could reasonably have contemplated that arbitrators would apply generally accepted international conflicts-of-law rules in arriving at the applicable law by which their dispute would be resolved. In the circumstances of the present arbitration, which is truly international in character, the Arbitral Tribunal is of the opinion that it should adopt generally accepted international conflict of laws rules."

Nonetheless, our current global scenario cannot offer yet a single set of organized international conflict-of-law rules that might be applicable universally and particularly to international arbitration cases. Arbitrators may refer to international conventions applicable to an arbitration case (e.g., the United Nations convention on Contracts for the International Sale of goods) or regional systems (e.g., Rome and Brussels regulations). The reality is that different legal systems regulate conflict-of-law rules differently and the same issue may vary from jurisdiction to jurisdiction.

22.4 Conclusion

Different approaches exist when determining the substantive law ought to be applicable to the merits of a case. Even when parties have expressly chosen the law governing their legal relation, the issue may turn more complex, when parties have decided to do so by the use of technological or digital means. Furthermore, when parties do not expressly choose a governing law that is to be applicable to the commercial dispute, it is the arbitral tribunal's responsibility to correctly determine such law. To do so, arbitrators may follow guidelines and standards established recognized and accepted by the national arbitration legislation and the arbitration rules of arbitration centers or institutions.

These methods include the use of conflict-of-law norms of the seat of the arbitration, the cumulative method of choice-of-law norms, the closest connection test, the application of choice-of-law provisions that the arbitral tribunal considers "appropriate," the direct application of material laws, and the application of non-national or transnational [11].

Out of all of these methods, Panamanian legislation follows a combination of approaches. If the parties involved in the arbitration process did not indicate the applicable law, the arbitral tribunal that is deciding the case shall apply the rules of law it deems appropriate. In this sense, one may suggest that the Republic of Panama accepts the "appropriate" method, however, there is a distinct peculiarity. When arbitrators choose the law they deem to be appropriate, it is not mandatory to refer to or consider conflict-of-law rules, rather they are able to choose the rules of law. This allows arbitrators to directly apply the law to be applicable to the merits of

the dispute (including substantive law and non-national laws). After examining the Panamanian legislation, one must have reached the conclusion that the Republic of Panama primordially follows the direct application of rules of laws, without being restricted to the application of conflict-of-law norms.

In all cases, the arbitrators shall decide in accordance with the provisions of the contract and shall take into account the commercial uses applicable to the matter. When it comes to international arbitrations specifically, arbitrators must follow the UNIDROIT Principles, as stated in the national arbitration law and in the private international code of Panama.

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