Title:
XIII.4.1 - Rules applicable to merits; decision ex aequo et bono

Content:
No. XIII.4.1 - Rules applicable to merits; decision ex aequo et bono

(a) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(b) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(c) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(d) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Commentary:
1 Subsection (a) provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. This conflict rule reflects the principle of party autonomy as the hallmark of international contract law. Due to the paramount importance of this Principle, the award may be set aside if the tribunal ignores the parties' choice of law. The text refers to 'rules of law' (Rechtsvorschriften, règles du droit) instead of 'law'. This terminology indicates that the parties' choice is not limited to domestic law. They may also choose transnational law ('lex mercatoria', 'general principles of law'). Transnational contract law is 'codified' in these Principles or in the UNIDROIT Principles of International Commercial Contracts. Their Preamble provides that '[t]hey may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like'.

2 In the absence of an express or implied choice of law by the parties, Subsection (b), like Art. 28 (2) UNCITRAL Model Law, provides that the arbitrators may determine the applicable substantive law by reference to the conflict-of-laws rules, which they consider applicable. In contrast to this 'indirect' ('voie indirecte') approach to the determination of the applicable substantive law, the French and Dutch arbitration laws adopt the "direct" ('voie directe') approach and provide that the tribunal may decide the dispute according to the law which it considers appropriate. This allows the arbitrators to adopt a more flexible approach in the determination of the applicable law, being it because all possible conflict of laws systems lead to the application of the same law, or simply because the arbitrators consider a certain legal system particularly appropriate for a 'fair and reasonable' solution of the dispute before them, without having recourse to conflict of laws rules.

3 In international arbitral practice, the difference between the various approaches to be applied in the absence of a choice of law by the parties is rarely felt. Irrespective of whether the conflict rule contained in the lex arbitri favors the direct or indirect approach, arbitrators will resort to generally accepted conflict-of-laws rules, the closest connection or 'centre of gravity'-test being the most prominent among them.