Content:

No. XIV.1 - Law applicable to international arbitration agreements

(a) The substantive validity of an international arbitration agreement is to be determined according to the law chosen by the parties of said agreement, or failing any indication thereof, according to the law in force at the place (seat) of the arbitration.

(b) The formal validity of an international arbitration agreement is to be determined according to the formal validity rules of the arbitration law of the country in whose territory the arbitration has its seat.

Commentary:

1 The validity of the arbitration agreement is primarily governed by the law chosen by the parties. Typically, international business contracts do not contain specific choice of law clauses for the arbitration agreement contained in such contracts. The general choice of law clause contained in the contract and specifying the proper law of the contract does not necessarily extend to the arbitration agreement which is a separate contract.

2 Absent a choice of law by the parties, the law of the seat of the arbitration plays a dominant role in determining the law applicable to the arbitration agreement. It governs the following issues, three of which relate to the validity of the arbitration agreement:

1. The substantive validity of the arbitration agreement absent a choice of law;
2. The formal validity of the arbitration agreement if it is to be determined by the tribunal;
3. The objective arbitrability of the subject matter of the dispute;
4. The arbitral procedure.

3 This significance of the law of the seat has an important harmonizing effect on the determination of the law applicable to the validity of the arbitration agreement. It serves to avoid frictions and contradictions that might arise if different laws apply to these issues. Decisional harmony created by the seat is important because the arbitration agreement constitutes the very basis of the tribunal's jurisdiction. This requires hard, fast, workable and generally accepted conflict rules in order to avoid further complications if the jurisdiction of the tribunal is contested by one side. This is also in line with the notion of party autonomy as one of the principal maxims of international commercial arbitration. The seat is typically chosen by the parties or by the tribunal or by the arbitral institution on their behalf. The choice of the seat thus becomes a direct or indirect choice of law by the parties with respect to the issues listed above.

4 If the issue at stake relates to the personal status of a party or to the protection of the other party, the significance of the seat is overridden by other connecting factors which are better able to do justice to these policy considerations. This applies to:

- The parties’ capacity to arbitrate (“subjective arbitrability”), which is governed by the law of the country where the party has its residence, domicile or seat, and

- The issue of whether a party was duly represented when concluding the arbitration agreement, which is governed by the law of the state where the agent has concluded the arbitration agreement

5 Thus, there are only three different connecting factors, the seat reigning most prominently among them, with respect to the determination of the law governing all aspects of the validity of international arbitration agreements for six (see marginal No. 2 and 4) different legal issues.