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**INTERNATIONAL COMMERCIAL ARBITRATION:**

**TO THE ISSUES OF APPLICABLE LAW**

Among the several issues that international arbitration poses, that of the «applicable law» plays a very important role [1, p. 613].

The problem of applicable law can be viewed in the two main aspects: the first one – is the procedural rules, which will be used during
the process of solving the disputes; the second one – is the substantive law, which will be applied to resolve disputes on the merit.

As to the procedural law, this aspect can be divided into two parts considering the form of arbitration – institutional and ad hoc. Institutional arbitrations directly state the procedural rules in their Arbitration Rules, for example, the Arbitration Rules and the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce and Arbitration Rules of The London Court of International Arbitration. Ad hoc arbitrations are created occasionally by the arbitration agreement or arbitration clause, whether on the bases of model law, international law, international trade or business customs or on the preferences of the parties.

As a choice of law in the procedural part seems not to rise many questions, the choice of substantive law does.

Generally, parties usually foresee the applicable law in their arbitration clause or arbitration agreement. This fact is confirmed by the basic principle in international commercial arbitration – party autonomy. According to the article 19(1) of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), «the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings» [5].

Therefore, arbitration tribunal hears the case relating to the norms, which parties voluntarily agreed to be applicable to the consideration of the current dispute.

Usually, such applicable law is a national law of a particular state. However, such applicable law can be «law of justice» or «according to the right and good» (ex aequo et bono); international law; international trade law (lex mercatoria); law of international trade and business customs (INCOTERMS) [6, p. 552-556].

Both article 28 of UNCITRAL Model Law and article 28 of the law of Ukraine «On International Commercial Arbitration» foresee such variety of types of applicable law.

«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 as directly referring to the substantive law of that State and not to its conflict of laws rules.

Each mentioning of the particular law of a state has to be considered as a reference to a substantive law of that state but no to the collision norms of that state» [5, 7].
However, parties did not choose the applicable law in many cases. In this instance, if the parties did not choose the applicable law, the arbitral tribunal will decide what law to be applied based on the collision norms which tribunal considers itself. All the decisions of the international commercial arbitration are based on the provisions of the agreement and on the international trade and business customs. The choice of the collision norm, which will define the applicable law, depends on the place of the arbitration.

European Convention on International Commercial Arbitration (1961) sets up a specific rule, in which the international commercial arbitration applies the rules of the seat of arbitration (the presumption – who chooses the arbitration, chooses the applicable law) [3].

Nevertheless, in modern conditions, within the conditions of wide international cooperation the conflict principle of «who chooses the court, chooses the law» (qui elegit juridice elegit jus) becomes more and more limited.

Finally, the theoretical problem of the appliance of law becomes actual in practice. As a result, the attention should be paid to the following classification [2, p. 200-221]:

I. Parties to arbitration may try to agree on a particular law as being applicable in a dispute. The parties usually agree to choose a law, which is neutral or well developed to govern their agreement [4]. An arbitrator has to apply the law chosen by the parties. However, this does not mean that the parties can choose any law they want. The parties are free to choose the «proper law» governing their dispute.

II. The parties’ failure to choose a law governing their dispute present the arbitrators with a myriad of choices.

1. The parties’ intention is not clearly expressed but can be derived from the agreement.

2. The parties fail to designate the law and no inferred choice can be detected from the terms of the agreement.

III. The applicable law can be chosen by the arbitrators when the parties fail to indicate expressly or implicitly the law, which will govern the substantive of the agreement.

1. Seat Theory. An arbitrator is bound by the principle of conflict-of-laws to apply the law where the arbitral tribunal is seated to consider the substantive law governing the arbitration agreement (lex loci arbitri).

2. The conflict-of-law rules of the court, which has original jurisdiction. The substantive law is applying the conflict-of-law system
of the court, which would have jurisdiction if there were no arbitration agreement.

3. The arbitrators or the parties rules of conflict-of-law. Arbitrators should apply those conflict-of-law rules of which the arbitrators have the best knowledge. This assumes that the arbitrators are connected to the legal system, and can recognize the conflict-of-law rules of his personal law.

4. The cumulative of conflict of law system concerned with the dispute. The necessity to choose the best law suitable for the case among the large number of alternatives.

List of the sources used: