The Hague Academy of International Law Centre for studies and research 2020 programme “Applicable law issues in international arbitration”

Prof. Jean-Marc Thouvenin, Secretary-General of The Hague Academy of International Law, kindly informs us about the Academy’s Centre for studies and research 2020 programme – highly recommended!

The Centre for studies and research of The Hague Academy of International Law welcomes applications for its 2020 programme on “Applicable law issues in international arbitration”.

International arbitration has long been the most successful method for settling all kind of international commercial disputes, and still is – notwithstanding the surrounding criticism – the leading method for settling disputes between foreign investors and the host state. One of the characteristics of international arbitration is that it to a large extent relies on an international or transnational legal framework. The effects of arbitration agreements and of arbitral awards, as well as the role of the courts regarding arbitration agreements and awards, are regulated in international conventions such as the New York or the ICSID Conventions. Furthermore, although there is room for specificities of national law, commercial arbitration acts are largely harmonised especially through the impact of the UNCITRAL Model Law. Similarly, even if arbitral institutions try to distinguish one from each other by providing for some

specific tools, the essential content of arbitration rules does not vary. It can be said, consequently, that the transnational framework of arbitration is intended to create to the extent possible an autonomous system of dispute resolution, which can be applied in a uniform way irrespective of the country in which the proceedings take place or the award is sought enforced. The procedural autonomy of arbitration may also have an impact on how arbitral tribunals relate to the substance of the dispute.

As arbitral awards are final and binding, and domestic courts and ICSID annulment committees do not have the power to review them in the merits, arbitral tribunals enjoy a considerable flexibility in selecting and applying the rules of law applicable to the dispute, even though they are constrained to respect the will of the parties. Legal literature has strongly emphasized that this flexibility creates an expectation of delocalization: both from the procedural and from the substantive point of view, arbitration is described as a method for settling disputes that strives for uniformity on a transnational level and should not be subject to national laws. The autonomy and flexibility of arbitration, however, are not absolute. The international instruments that regulate arbitration either make, in some contexts, reference to national law or call for the application of (general or concrete) international law. Also, they do not cover all aspects of arbitration, thus leaving room for national regulation. Additionally, the restricted role that courts and ICSID ad hoc committees have in arbitration does not completely exclude that national law may have an impact. While court and committee control is not a review in the merits, application of the parameters for validity or enforceability of an award, even where these parameters are harmonised, may depend on national regulation.

Importantly, the definition of what disputes are arbitrable is left to national law. While the scope of arbitrability has

been significantly expanded starting from the last two decades of the last century, there are signs now that it may be restricting. The scope of arbitrability may be looked upon as a measure of the trust that the legal system has in arbitration. From another perspective, it may represent the way in which States approach the settlement of international commercial disputes: intending to keep an exclusive power by means of the exclusion of private deciders, or adopting the role of controllers of the regularity of arbitration. As far as investment arbitration is specifically concerned, it is well known that States' attitudes are diverse and may change from time to time. In both cases, States' policy choices may have an impact on applicable law issues.

All the foregoing considerations, succinctly exposed, are the frame for the present topic. On such a basis, it is possible to develop two lists of issues to be individually addressed. The first list deals with the fundamental aspects of the topic. Among the issues included therein, some refer to all types of arbitration, while others are rather specific to either commercial or investment arbitration. The second list responds to the fact that the applicable law is not necessarily unitary. Indeed, according to the principle of severability, a different law may apply to the procedural aspects and to the substantive aspects of the dispute, and within these two categories there are further possibilities for severing the applicable law. Thus, one can wonder to which issues is it appropriate to apply international sources of law, to which issues is it appropriate to apply soft sources of law, to which is it appropriate to apply national sources of law, and to which issues is it appropriate to apply (or to create) transnational standards. Or a combination of these sources? On which basis may this selection be made, and what are its effects on the autonomy of arbitration, on the expectations of the parties and on the credibility and legitimacy of arbitration as an out-of-court judicial system that enjoys enforceability?

The general and specific above-mentioned questions may be discussed for each of the following issues:

I. General issues

1. Available rules of law regarding substantive issues – The strength of soft sources
2. Available rules of law regarding procedural issues – The scope and applicability of the lex arbitri
3. Selection of the applicable law by the parties (???)
4. How do arbitrators ascertain the rules of law applicable to the merits?
5. Overriding mandatory rules of a law not chosen by the parties
6. How do arbitrators interpret international contracts?
7. How do arbitrators interpret international treaties?
8. Effects of precedents in arbitration
9. Iura novit arbiter
10. Control by domestic courts of the law applied to the merits
11. Control by means of procedural public policy
12. Misapplication of the law as manifest excess of powers of the tribunal under ICSID Convention

II. Specific cases of determination of the applicable law

1. Validity of the arbitration agreement and effects on non-signatories
2. Assignment of contract containing an arbitration clause
3. Qualification of the arbitrators
4. Production and admissibility of evidence
5. Legal privilege
6. Emergency arbitrator: procedural and substantive issues
7. Interim measures
8. Legal capacity to sign the disputed contract
9. Interests on the awarded amounts
10. Arbitrability
11. Res iudicata

12. Liability of arbitrators

The co-directors of the 2020 Centre (Prof. Giuditta Cordero-Moss (University of Oslo) & Prof. Diego Fernández Arroyo (Sciences Po, Paris)) invite applications from researchers including students in the final phase of their doctoral studies, holders of advanced degrees in law, political science, or other related disciplines, early-stage professors and legal practitioners. Applicants should identify the specific topic on which they intend to write. Participants will be selected during the spring of 2020, and will convene at The Hague from August 17 to September 4, 2020, to finalize their papers. The best articles will be included in a book to be published in the fall of 2021.

Further information is available here.