

# ILA Offers Guidance on Determining the Contents of Applicable Law

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A report by the International Law Association's (ILA) Committee on International Commercial Arbitration, presented at the ILA's 2008 Biennial Conference in Rio de Janeiro this past August, contains 15 recommendations to assist arbitrators in determining the contents of the applicable law in international commercial arbitration cases.

The report focuses on two challenges facing international arbitrators: (1) identifying the common or civil laws and rules applicable to the dispute at hand (the conflicts-of-law question); and (2) determining the contents of those laws once they have been identified.

The report concludes that, with rare exceptions, there are no general arbitration rules or laws specifying how arbitrators should go about determining the contents of the applicable law. Since parties will rarely write into their arbitration agreement the procedure that should guide arbitrators when they do this, the committee reviewed international arbitration procedures to determine whether any guidance resides there for arbitrators to follow. However, this review did not reveal anything resembling a uniform practice in how arbitrators determine the contents of the applicable law in international commercial arbitration.

Although the committee found no specific laws or rules on this issue, it concluded that general principles intrinsic to commercial international arbitration are relevant and provide "some outer parameters for the exercise of an arbitrator's discretion." These principles include due process, deciding the dispute within the mandate of the agreement, approaching the dispute with an open mind, and considering public policy in determining the approach toward the contents of the applicable laws.

The committee recommends that international arbitrators take "a balanced approach" to making this determination and that they rely on the parties to state the legal issues, identify disputed issues, and present the law. However, it also concludes that arbitrators may inquire about the applicable law and, in an appropriate case (considering cost, time and relevance), conduct their own research, as long as the parties are given an opportunity to be heard.

Beyond these conclusions, in order to reduce uncertainty and increase uniformity, the committee developed 15 recommendations for arbitrators and parties to an international commercial arbitration to follow when determining the contents of the applicable law. These recommendations fall into five categories: general considerations, acquiring information, interaction with parties, making use of information about the law's content, and special circumstances. ■

## Summary of ILA Recommendations on Applicable Law Content

1. If a question arises regarding the content of a potentially applicable law or rule, the arbitrators should identify those laws and rules and ascertain their contents as needed to determine the dispute.

2. In ascertaining the contents of rules and laws, the arbitrators should consider due process, public policy, fairness to the parties, the deliverance of an award within the submission to arbitration, and bias avoidance.

3. If the contents of an applicable law might significantly alter the case outcome, the arbitrators should raise that with the parties and establish procedures to ascertain the contents of law.

4. Arbitrators should not assume that court rules pertaining to the contents of law are applicable in arbitration, and should not rely on unexpressed presumptions as to the contents of the applicable law.

5. The parties remain the primary information source for the contents of the applicable law.

6. Arbitrators should not introduce legal issues the parties have not raised.

7. Arbitrators are not restricted to the parties' submissions on the contents of the applicable law. They may question the parties over legal issues and submissions, review sources not invoked by the parties, and rely on their own knowledge.

8. The parties should have the opportunity to be heard on legal issues relevant to the disposition of the case. Decisions should not be rendered that could reasonably be expected to surprise the parties

(or a party), and decisions should not be based on legal issues not raised by or with the parties.

9. Arbitrators may consider statutes, treatises, case law, and other reliable sources in determining the contents of a potentially applicable rule or law.

10. If the sources relied upon were not provided by the parties, the sources should be brought to the parties' attention, and comments invited, unless the sources corroborate or reinforce sources already addressed by the parties.

11. If further information is required regarding the contents of the applicable law during deliberations, the arbitrators may reopen the hearing for further submissions from the parties.

12. Arbitrators should give due regard to information about the application of rules in the jurisdiction from which the rules emanate.

13. Should a dispute implicate public policy rules or other rules from which the parties cannot derogate, the arbitrators may take measures to determine the applicability and contents of such rules, including independent research or raising new issues with the parties.

14. Arbitrators may take account of the nature of the proceedings and may take a more active role than might otherwise be the case in questioning legal submissions.

15. If the arbitrators cannot ascertain the contents of the applicable law, they may apply whatever laws or rules they see fit on a reasoned basis, after giving the parties notice and a chance to be heard.

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