Determining the law governing obligations in arbitration and the applicability of the Rome I Regulation

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Abstract

Factors specific to arbitration, and particularly the fact that the place of arbitration is often chosen as a neutral venue with no links to the domicile of the parties or to the subject of the dispute, also influence the procedures followed to determine the substantive law governing obligations. Even so, it is essential to employ a method for determining this law that is transparent, that excludes arbitrariness on the part of arbitrators, and that allows the parties to rely on a certain degree of predictability. Considering the growing importance of the seat of arbitration, which has seen the relevance of the theory of the anationality of arbitration decline in most cases, it is always necessary to assess the importance of the lex fori arbitri *in determining the applicable substantive law. Unless the application of EU legislation, and hence also the Rome I Regulation, on the law applicable to obligations stems, as a matter of necessity, from the mandatory* lex fori arbitri *(which tends to be the exception), the application of the Rome I Regulation must always be kept to a minimum. There is therefore no reason why the Rome I Regulation cannot also be used in arbitral proceedings to determine the applicable law. Arguments such as the fact that this is a regulation applicable exclusively to civil litigation must be rejected.*

1. Introduction

The method and rules for determining the substantive law governing a contractual obligation that is the subject of international arbitration have always been a matter of broad debate among scholars. Increasing attention is paid to the arbitrators' relationship to EU law. In this context, the question is whether arbitrators are required to consider Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the Rome I Regulation).

Few issues stoke such divergent opinions and approaches by arbitrators in their decision-making practices. In certain cases, this may even be coloured by the arbitrators' negative views of EU law in general. However, the opposite approach, where the need to apply the Rome I Regulation is automatically presumed solely because of the priority and direct effects of EU

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Regulation. The aim of this article is to shed light on the problematic nature of this view. Rules resulting in the mandatory application of EU law in Member States in arbitration conducted in such a state are exceptional.[52] The absolute majority of rules under the *lex arbitri* leave arbitrators the freedom to consider the applicability of those conflict-of-laws rules that may come into play. In the vast majority of states, arbitrators have ample opportunity to consider whether or not a dispute has a connection with the EU.

On the issue of countries in which the law insists, even in arbitration, on the application of the conflict-of-laws rules in force in the seat of arbitration, there is no – and cannot be any – violation of the rights of the parties. The extensive autonomy that arbitration gives to the parties is, or at least should be, balanced by the parties' increased responsibility to protect their rights and legitimate interests. The parties have the opportunity to familiarise themselves with the conflict-of-laws rules in the seat of arbitration under consideration, and to weigh whether the benefits that are provided to them by the *lex arbitri* and that led to the choice of this seat of arbitration sufficiently balance the fact that the substantive law governing the particular obligation will be determined according to conflict-of-laws rules that the parties had not anticipated when they assumed their contractual obligations. There is nothing to prevent the parties from ascertaining what the outcome of applying the conflict-of-laws rules under the *lex fori* would be. On the contrary, such acquaintance with the consequences of an arbitration agreement must be regarded as the minimum that can reasonably be expected of the parties. If the parties do not proceed with this level of care, they can hardly subsequently claim that there has been interference with their rights and legitimate expectations. It is therefore largely up to the parties whether to decide on the application of conflict-of-laws rules that they are unfamiliar with. Finally, if the parties consider the application of such conflict-of-laws rules to be unacceptable, they can always prevent them from being applied by directly choosing the applicable substantive law.

If the situation described were to constitute an infringement of the parties' rights, it would have to apply *vice versa*, too, and we would have to conclude that entities from different EU Member States legitimately expect the Rome I Regulation to be applied as the governing conflict-of-laws rules.

6. Conclusion

The application of the Rome I Regulation should be carefully considered in each individual case, taking into account both the individual circumstances of the dispute and, in particular, compliance with the requirements of the *lex fori arbitri* for determining the applicable substantive law. Unless such legislation expressly provides for the obligation to apply the Rome I Regulation in arbitration, the arbitrators are not obliged to proceed in accordance with the Rome I Regulation and it is not binding.[53] However, since the rules under the *lex arbitri* entrusting the determination of the applicable law exclusively to arbitrators cannot be taken to mean that they have an element of arbitrariness, the possible application of the Rome I Regulation should also be taken into account in disputes in which there is an EU link. Arbitrators often do this

52 See, for instance, Section 119 of Czech Act No. 91/2012 on private international law.

53 See, for instance, D. Babić, 'Rome I Regulation: binding authority for arbitral tribunals in the European Union?', *Journal of Private International Law* (13/1) 2017, pp. 71-90.

in practice.[54] Conversely, it should be noted that there is no obstacle that expressly prevents arbitrators from applying the Rome I Regulation.

54 See, for instance: SCC Case 158/2011, reported in: *Yearbook of Commercial Arbitration* 2013, p. 253 et seq., marg. 60, or ICC Case 10274, reported in *Yearbook of Commercial Arbitration* 2014, p. 128 et seq., marg. 32, as well as in many earlier cases reported with reference to the Rome Convention. Many decisions also referred to the Rome Convention earlier on, like for instance: ICC award 4996, reported in *JDI (Clunet)* 1986, No. 113, p. 1131; ICC Final Award 6360, reported in *ICC Bulletin* (24/1) 1990; ICC Final Award 6379, reported in *Yearbook of Commercial Arbitration* (17) 1992, p. 212; ICC Partial Award 7177, reported in *ICC Bulletin* (7/1) 1996, p. 89; ICC Award 7205, reported in *JDI (Clunet)* 1994, No. 122, p. 1031; ICC Partial Award 7319, reported in *Yearbook of Commercial Arbitration* (24) 1999, p. 141; ICC Third Partial Award 7472, reported in Grigera Naón 2001, p. 240 (*supra* n. 14) (applying the Rome Convention on the ground that it 'forms the common law for the rules of conflicts of law') etc.