

“Choice in the Absence of Direct Choice: The Law Applicable to the Merits in Investment Disputes”



ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

“EURO-ARAB INVESTOR-STATE DISPUTE SETTLEMENT: RECENT DEVELOPMENTS AND FUTURE PERSPECTIVES”

**Arab League (10-11 October 2012)
Cairo - EGYPT**

Dr. Mohamed S. Abdel Wahab

Founding Partner, Head of International Arbitration Group, Zulficar & Partners Law Firm

Assistant Professor, Faculty of Law – Cairo University

Vice-Chairman, Chartered Institute of Arbitrators (Cairo Branch)

Choice of Law by Reference to Arbitration Rules



- The distinction between “Treaty Claims” and “Contract Claims” for choice of law purposes.
- UNCITRAL Art. 35(1): “[...] the arbitral tribunal shall apply the law which *it determines to be appropriate*” [Discretion/Subjectivism]
- SCC Art. 22(1): “the Arbitral Tribunal shall apply the law or rules of law which *it considers most appropriate*” [Broad Discretion?]
- ICC Art. 21(1): “[...] In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate” [Discretion/Subjectivism]
- CRICCA Art 35 (1): “the arbitral tribunal shall apply the law which has the closest connection to the dispute”. [Objectivism?]

ICSID Criterion and Conflicting Approaches



- ICSID 42(1): “[...] the Tribunal shall apply the ***law of the Contracting State Party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable***”
- National (Municipal) Law & International Law: **An Inherent Tension?**
- **Inclusive Approach** [*International Law as part of National Law: Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, 28 January 2002, where no express choice of law agreed or included in the BIT. The tribunal inferred that the parties agreed to apply primarily the UK/Egypt BIT, save for matters not covered by the BIT, which were subject to Egyptian law and international law as inferred from the parties’ pleadings*]

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ICSID Criterion and Conflicting Approaches



- **Distributive Application/Renvoi.** (*Dispute Depeçage?*)
- **Complementary/Combined Application.** [*SPP v. Egypt Case No. ARB/84/3, Award, 20 May 1992*]
- **Optional & Exclusive Application.** [*In Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Award 25 February 1988, where no agreement on the applicable law, yet the tribunal applied only the Senegalese law without reference to international law and it awarded compensation for the investor based only on Senegalese law.] Compare with Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia ICSID Case No. ARB/99/2, Award, 25 June 2001, where it was decided to apply Estonian law and exclude international law rules (other than United States/Estonia BIT provisions) in reference to the fact that the outcome would not differ and neither party contended the application of international law.*

ICSID Criterion and Conflicting Approaches



- **Corrective/Overriding Application.** [*Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, and SPP v. Egypt*, where the tribunal was silent on the choice of law, but stated:

*“when municipal law **contains a lacunae**, or international law is **violated** by the exclusive application of municipal law, the Tribunal is bound in accordance with Article (42) to apply directly the relevant **principles** and **rules** of international law”]*

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ICSID Criterion and Conflicting Approaches



- Under Article 42(1) of the ICSID, The **Wena decision** demonstrates that the ICSD case law has evolved from the exclusive corrective and supplementary role of international law to recognizing a broader role for international law and its equal application along with the host state law. The *Wena* decision ***conferred on the tribunal the discretion and the freedom as to the applicability of international law and domestic law and how the relationship between both is to be organized.***
- In *Azurix Corp v. The Argentina Republic ICSID Case No. ARB/01/12, Award, 14 July 2006*, the tribunal stated that it is clear from the second sentence of Article 42(1) that **both legal orders** [international law and host state law] have a role to play, which role will depend on the **nature of the dispute** and may vary depending on **which element of the dispute** is considered.

ICSID Criterion and Conflicting Approaches



- Impact of Article 42(1) second sentence:
- **Avoidance Approach** [*ADC v. the Republic of Hungary ICSID Case No. ARB/03/16, Award 27 September 2006*: **implied choice** to apply the BIT and international law inferred from the parties consent to arbitration under the BIT. Hungarian law limited to the amount of compensation as expressly stipulated in Article 4(3) of the BIT]
- **Subjective Arbitral Discretion and Disregarding National Law**: A Quasi Legislative Role?

Concluding Remarks



- Choice of Law remains problematic and indeed pertinent.
- Careful consideration of **treaty** vs. **contract** claims and impact on applicable law issues.
- ***The risks of Arbitral Quasi Legislative Role (Uncertainty, unpredictability, conflicting decisions, diminished transparency)***
- Investments are **not insulated or immune** from National/Municipal Law.
- International law **rarely addresses, in sufficient details, substantive issues** pertaining to investors rights and State's liabilities, contractual conditions and obligations, so national/municipal law has a considerable role to play.

Concluding Remarks



- The evolution of ICSID case law on Article 42(1) and the diverse approaches to its application.
- Potential impact on nullity proceedings if the tribunal **manifestly exceeded its powers** with respect to applicable law issues. [In *M.C.I v. Republic of Ecuador ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009*, the *ad hoc* Committee decided that *Ad hoc* Committee decisions however recognize that a tribunal's failure to apply the governing law may constitute a manifest excess of powers pursuant to Article 52(1)(b).
- ***lura novit curia***: Surprising the Parties?

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Thank You

maw@zulficarpartners.com

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