

Arbitrators and the Application of Law and Legal Principles

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What arbitrators can and cannot do rests upon the mandate given to them by the parties as evidenced by the arbitration agreement. The mandate may be restricted to solution of the dispute referred to them without any specific instructions. Generally, the parties wish to give the arbitrators the right to reach their conclusion as they deem fit.¹ But it is expected that they do so within the ambit of the chosen law, if any, or otherwise with the application of choice of law principles and such legal principles as are appropriate considering the type of contract and dispute.²

As arbitration is a “one-shot procedure” without the possibility to appeal, it is often preferred to litigation before courts of law. An arbitration award may exceptionally be challenged. According to § 34 of the Swedish Arbitration Act, the award may i.a. be challenged if an arbitrator is found not to be impartial or not meeting the requirements stipulated in the arbitration agreement and if the arbitrators lack jurisdiction or have not given the award within the stipulated time limit or else exceeded their mandate. The award may also be challenged if the arbitrators have committed a procedural irregularity which probably have had an effect on the award (§ 34.6 : “i handläggningen har förekommit något fel som sannolikt har inverkat på utgången”).³

The litigants expect that the arbitrators render their award on such basis as could be reasonably foreseeable and conforming with the applicable law and generally accepted principles. Thus, the arbitrators are not entitled to decide the matter “*ex aequo et bono* as amiable compositeurs” unless the parties have

1 See for some critical remarks Caldwell, P.S., *Do Arbitration Rules Give Tribunals Too Much Freedom to Conduct International Arbitration As They Think Fit?*, in Hobér, K., Magnusson, A. and Öhrström, M., eds., *Between East and West: Essays in Honour of Ulf Franke*, Jurisnet, Huntington, New York 2010, pp. 77-90 and Heuman, L., *Skiljemannarätt*, Norstedts Juridik, Stockholm 1999, p. 493-495.

2 See Ramberg, J., *The Creativity of Arbitrators in the Context of the Unidroit Principles of International Commercial Contracts*, in *Uniform Law Review* 1998-2/3, p.652.

3 In the 2015 proposal for a revised Arbitration Act it is suggested to limit the possibility of challenge on this ground by requiring an *obvious* effect on the award.

given them such a mandate.⁴ In some cases, the parties wish to ensure that the arbitrators are well aware of the relevant commercial practice or such matters which require special expertise. If so, the arbitration agreement will require that the arbitrators belong to a category of persons with the expertise needed for a full understanding of the relevant facts and a correct application of the law. In an arbitration between a credit insurance company in bankruptcy and re-insurers, the arbitration clause provided that the arbitrators should be “senior officials of an insurance company” and that the arbitrators should not apply the law (Swedish law) “strictly”. I was appointed by the credit insurance company, as I served since 12 years in the Board of Directors of a transport insurance company in Bermuda. I was challenged as Webster’s dictionary did not give the answer how to interpret “official.” The parties finally agreed that I could serve as arbitrator together with co-arbitrators without any position in an insurance company.⁵

In international arbitration, the parties usually wish to avoid being disadvantaged by the choice of a seat of arbitration in the country where the other party has its place of business or by the choice of the law of such country. Indeed, the very reason for the choice of arbitration may be to avoid an imbalance between the parties by giving one party the benefit of a forum in its own place of business⁶ and of the application of the law at such place. As most disputes are settled amicably, such a benefit would most probably be reflected in a settlement to the disadvantage of the party faced with additional costs for obtaining legal opinions of the foreign law and assuming an additional risk of losing the case. Thus, the parties usually choose a seat in another country than where a party has its place of business. This explains why arbitration institutes, such as the ICC Court of Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) frequently are chosen by litigants from other countries. The success of the SCC Institute is to a great extent due to an agreement 1977 between the American Arbitration Association and the USSR Chamber of Commerce and Industry to refer disputes to the SCC Institute, which subsequently became known as the preferred Institute in East-West arbitration.⁷

If the arbitration agreement provides for the application of national law, the arbitrators have to apply it. If they apply some other law, or a nonconforming general principle, their award may be challenged on the ground that they have exceeded their mandate. However, they are not considered to have done so, if they do apply the chosen law but incorrectly. It may be difficult to pinpoint the borderline between the choice of something other than the chosen law and

4 *See* Heuman, L., *op.cit.*, p. 495.

5 The arbitrators decided that the credit insurance company on some occasions had failed to give re-insurers correct information and applied *ex analogia* the pro rata-principle of § 45, second paragraph, of the 1927 Swedish Insurance Act.

6 The Hague Convention on Choice of Court Agreements, which entered into force 1 October 2015, may change the advantage of arbitration in this respect.

7 *See* Gernandt, J., *Ulf Franke- Thirty-five Years and Afterwards*, in *op.cit.* note 1, p.169-174.

incorrect application of that law. In particular, it may be difficult to decide whether the arbitrators may apply general principles following from *lex mercatoria*.⁸ On one occasion, when Lord Mustill had presented a paper on this subject, I asked him if I could apply *lex mercatoria* as an arbitrator. His answer was telling: “Of course you can, if you do not tell anyone”. The Swedish Arbitration Act does not require the arbitrators to give reasons for their award but it is generally considered that they should.⁹ In any event they do not have to give a full account of their reasoning. However, a scrutiny of the award would normally clarify if they have based their award on other principles than following from the chosen law. So, Lord Mustill’s advice was meant as a joke and should not be taken seriously.

In most cases, the chosen law would explicitly acknowledge the use of norms, other than following from statutory law. It may suffice to mention § 1, second paragraph, of the Swedish Contracts Act, § 3 of the Sale of Goods Act and Article 9.2 of the CISG.¹⁰ However, it seems difficult to assume that the parties have impliedly agreed to use general principles of law, such as the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL) on the basis that, as set forth in Article 9.2 of the CISG, “the parties knew or ought to have known” the principles as they are “in international trade... widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”. However, as mentioned in PECL Article 1:101 (4) the principles may be used to provide “a solution to the issue raised where the system or rules of law applicable do not do so”. Both PECL and UPICC suggest that the principles may be used “when the parties have not chosen any law to govern their contract” (UPICC Preamble) and “have not chosen any system or rules of law to govern their contract” (PECL Article 1:101 (3) (b)). In my view, arbitrators should be careful to follow the suggestion. CISG, in Article 7(2), provides: “Questions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”. If the arbitrators wrongfully believe that the CISG is based on such a principle and therefore fail to apply “the rules of private international law”, there is no basis for a challenge of the award, since they have simply

8 See for a definition of *lex mercatoria* Lando, O., *Principles of European Contract Law*, Liber memorialis Francois Laurent, Ghent 1989, p.562 and for the application Ramberg, J., *Lex mercatoria rediviva*, Lex ferenda, Skrifter utg. av Juridiska fakulteten vid Stockholms universitet nr. 50, 1996, pp. 181-193, *The Law and Practice of International Commercial Contracts in the 2000s*, Sc.St.L. Vol. 39 (2000), pp. 431-437 and Nerep, J., *Lex Mercatoria and Amiable Composition in International Arbitration-Brief Notes*, Festskrift Ramberg, Norstedts Juridik, Stockholm 1996, p. 387-401.

9 See Heuman, L., *op.cit.*, p. 509-511.

10 See for further examples Ramberg, J. & Ramberg, C., *Allmän avtalsrätt*, Wolters Kluwer, Stockholm 2016, p.28.

applied Article 9 (2) of the CISG incorrectly.¹¹ But it is questionable whether they can bypass choice of law principles merely because of the existence of UPICC and PECL, although admittedly such principles may be more appropriate for parties engaged in international commercial contracts. It may well be better to choose generally recognised international principles than the law of the country where a party has its place of business. The fact that the parties have not chosen a national law is in most cases explained by their failure to agree, both having objected to the choice of the law of the country of the other party. In other words, there is a common negative a choice of law. Why should not such a choice be respected? If a negative choice is respected, international private law would fail to give an appropriate answer when there are no connecting factors to any other law than the laws excluded. Nevertheless, as I have suggested, the arbitrators should be careful to apply UPICC or PECL instead of choosing the law following from the applicable choice of law principles. In case of the aforementioned negative choice, the law of the seat of arbitration may be preferable.

In institutional arbitration the Rules may provide that the Arbitral Tribunal "...shall decide the merits of the dispute on the basis of the law (s) or rules of law agreed upon by the parties. In the absence of such agreement, the arbitral tribunal shall apply the law or rules of law which considers to be most appropriate" (Article 22(1) of the 2010 SCC Rules). This may provide a solution when the parties have not agreed on the applicable law and the law chosen in accordance with international private law does not provide an acceptable solution. As an example could be mentioned the difficulty to find an appropriate interest rate when the CISG applies. As Article 78 does not set forth any interest rate, an applicable law would normally have to be chosen to fill the gap. Case law shows a considerable variety in choosing the applicable interest rate. The CISG Advisory Council, in Opinion 14 (www.cisgac.com), suggests that the law in the creditor's place of business should be chosen. Although this will be appropriate in most cases, the chosen law may lead to over- or undercompensation of the creditor. In the latter case, he may be compensated by damages according to CISG Article 74 or Articles 75 – 76. However, overcompensation of the creditor to the detriment of the debtor may be difficult to solve.¹² This may happen when the law of the creditor's place of business provides for an interest rate without distinguishing between different currencies of payment. I have been involved as arbitrator in a case where Swedish law was chosen and, as a consequence, the arbitrators had to apply the interest rate according to the Swedish Interest Act (at that time the discount rate +8%) on an amount to be paid in a currency where the market rate was considerably less than the Swedish discount rate. It was argued that we should avoid applying the rate according to the Swedish Interest Act by applying section 36 of the Contracts Act on unreasonable contract terms. Needless to

11 See Ramberg, J., *Skiljedom eller dom? Om effektivitet och rättsäkerhet i dömande verksamhet*, JT 1997-98 p. 628.

12 See Ramberg, J., *CISG and the default interest rate in arbitration*, 35 years cisg and beyond. I. Schwenzer, ed., Eleven International Publishing, The Hague 2016, p. 179-181.

say, we found it impossible to do so. The parties had chosen Swedish law and we could not avoid applying it. However, if no such choice had been made we would have looked for a more appropriate rule and we would have found it in UPICC Article 7.4.9 (2) which provides: “The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment”.

The Swedish Arbitration Act, in 1 §, second paragraph, stipulates that the arbitrators may not supplement the contract unless the parties have permitted them to do so. In my view, this provision is unfortunate, as supplementation of contracts frequently falls within the ambit of contract interpretation.¹³ Although it may well be appropriate to discourage the arbitrators from writing a new contract for the parties, the present wording of § 1, second paragraph, may induce the losing party to challenge the award. Such challenges are usually unsuccessful, as the court normally finds that the arbitrators have not added anything to the contract but merely engaged in such gap-filling as is frequently required for contract interpretation (see e.g. UPICC Article 4.8 , “Supplying an omitted term”).¹⁴ The Law Faculty of the Stockholm University has, in its comments to the 2015 proposal for a revised Arbitration Act, suggested a deletion of § 1, second paragraph. Whether this suggestion will be followed remains to be seen.

13 See Ramberg, J., *Autonomy of Contract and Non-Mandatory Law*, Sc.St.L. Vol. 37 (1993) p. 147 and *The Arbitration Agreement*, Stockholm Arbitration Report 1991:1 of the Arbitration Institute of the Stockholm Chamber of Commerce, p. 23.

14 See on gap-filling methodology in contract interpretation Ramberg, J. & Ramberg, C., *op.cit.*, p. 160-188.

