

Investment Protection and Government Contracts - Risks *Choice of National Law*

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Issue

“In any major international agreement, the parties should strive to select one body of national law as the applicable substantive law and set it out plainly in a separate clause in the agreement. This is an important element of certainty in the resolution of legal disputes that may arise. Yet, it is often extremely difficult – if not impossible – for the host State to agree to designate the investor’s home State law or for the investor to designate the host State’s law. Other options (none of them free from difficulty) are to agree on the national law of a third State or on rules or principles of international law of various permutations.”

Reed, Pålsson et. al . “Guide to ICSIC Arbitration” (Kluwer, 2010)

Article 42 of the ICSID Convention

- Defers to any agreement on choice of law made by the parties. In the absence of such an agreement, it provides for the application of the host State's law and international law:

Article 42 (1)

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, 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.

- *“Despite its apparent simplicity, Article 42(1) probably has generated more debate than any other provision of the ICSID Convention.”*

Reed, Pålsson et al.

Further Issue

- The relationship between national and international law as applicable to the merits
- Difficult balance in practice?

“The practice of tribunals on the issues of applicable law varies considerably. [---]The applicable law in investment disputes has turned out to be a dangerous area. It takes great nautical skill to keep the proper balance between the Scylla and Charybdis of the two legal systems.”

Schreuer ‘Investment Arbitration: A Voyage of Discovery’ (2005)

- Issue of potential challenge/annulment
 - > Distinction between non application of the applicable law and mistaken application of such law

Basic Reality

- Hybrid system: domestic and international legal order integrated into one process - or - *sui generis*: neither public international or private transactional
- Competing interests:
 - Investor seeks a neutral system of law and enhanced legal protection
 - Host State wants to retain as much control as possible
- Agreements/contracts show considerable variety:
 - Some simply refer to the host State's domestic law
 - The choice of the law of the investor's home country or of the law of a third state rare (exceptions, loan/licensing agreements)
 - Some include the domestic law of the host state as well as international law

Basic Premise

- A straightforward reference to the domestic law of a host State
- The arbitrators should primarily apply national law to the dispute:
 - > Party autonomy : Respected by the national arbitration law of the tribunal's juridical seat, as well as in arbitration rules to which the parties may refer; and for many investment tribunals because article 42(1) of the ICSID Convention

National Law - Benefits?

- The advantage of predictability for both parties?
 - In principle be a known and existing system, capable of reasonably accurate interpretation
- Not isolated legal rules, a complete legal system
- “Party autonomy”
- Close connection to the host State’s legal system

National Law - Risks

- For whom? Context?
- General/specific risks
- Connection to choice of forum?
- Does it rule out a role for international law?
- Are the claims treaty claims or contract claims?

Other Treaties

- Chapter 11, section B of the NAFTA, refers only to international law including the NAFTA itself:

Article 1131 - Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.

- Similarly, the Energy Charter Treaty:

Article 26

Settlement of Disputes between an Investor and a Contractual Party [...]

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

Thank you!

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