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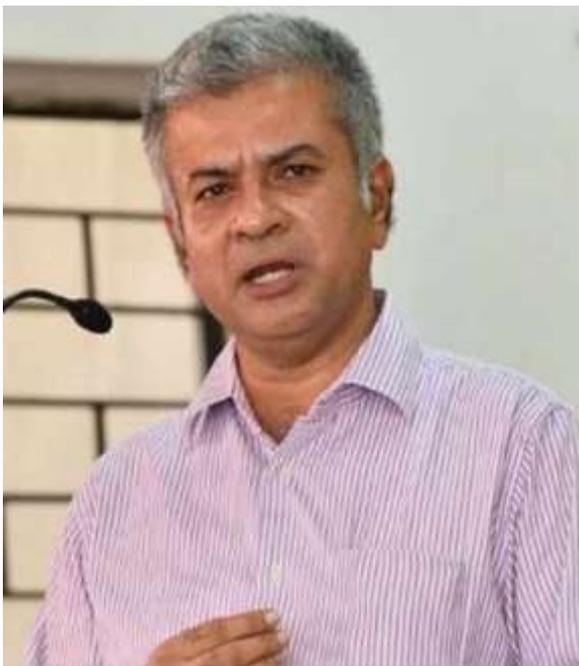
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ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

**"DETERMINING GOVERNING LAW IN
INTERNATIONAL COMMERCIAL ARBITRATION: A
CASE STUDY OF UNDEFINED GOVERNING LAW IN
CROSS-BORDER CONTRACTS"**

AUTHORED BY: - ADARSHA SARDA

ABSTRACT:

Controlling law is crucial when coming to the application, implementation, and settlement of international contract disputes in arbitration agreements. Lack of governing legislation results in either party being in confusion, dragging out procedures, and problem of enforcement of rules. In this paper, the author focuses on without governing law cross-border agreements and the difficulties that arise in cases of dispute resolution, as well as the extent to which arbitral tribunals have to determine the proper governances' law. Should legal grounds not exist in this regard, the arbitrators may proceed by applying principles of general international commercial legislation or in accordance with the law of the place where arbitration takes place, which may not be in the best interest of the parties. Specificity of such standards may be used in a way that has adverse effects on fairness and certainty in arbitration. Using anonymised sample case scenarios and a doctrinal method of analysing principles of law in this study, it is explored how potentially different laws may yield extremely dissimilar meanings and outcomes. The study therefore finds that to avoid these pitfalls and to get international contract arbitration to be as efficient as the parties intended it should be, the governing law in those contracts must be as certain as possible.

KEYWORDS: The governing law, Article for international contracts, The Arbitration body, Uncertainty, Analysis between the two legal systems

INTRODUCTION:

Any time there are two parties from different countries, it is important to determine the law applicable to the parties' contract. The governing law mandates the applicability of rules covering the process of interpretation, and enforcement, as well as the method of resolving the contract dispute. In our case, there isn't a clause in the building contract between Company X

from Germany and Company Y from South Korea that sets the controlling law. This has resulted to a controversy since each company wanted the national law of their country of origin to apply. Such circumstances clearly demonstrate how various cross-border enterprise commitments are unsteady and sophisticated where the appropriate rule of law to be used is not defined.

The primary question then becomes: This paper aims to answer the following research question: What are the consequences of international arbitration that does not have a governing law? When this happens, each of the parties to the contract may apply his or her nation's law to the terms of the contract hence resulting to vast differences that could complicate the solution to the contract dispute. Arbitration tribunals, which are usually expected to address such issues, do so by identifying the governing law according to the nature of the contract to the relationship between the parties as well as the standard practice in the sector. Nevertheless, this discretion creates uncertainty as to the final decision the tribunal would make over their client and over the respondent, thus the issues of predictability and fairness can be raised.

Introducing this choice in international contracts is the focus of this research, particularly with reference to the question of governing law to minimise such problems during international business transactions. A specified governing law is advantageous for contractual interpretation, for the interest of both parties and for easing the burden on the arbitral tribunal that would have otherwise been involved in deciding the governing law. Through considering the function of the governing law and the effects of its lack, this work intends to recognize the main lessons for the cross-border contracts, emphasizing that an accurate definition of the governing law clause is the governing law clause that defines the principles of a proper and rational dispute resolution in the framework of the international arbitration.

LITERATURE REVIEW:

SR.N O	NATURE OF LITERATURE	NAME OF LITERATURE	COVERED/ REVIEW	RESEARCH GAP	INTENDED RESEARCH
1.	Journal Article	Neither express nor implied: rethinking governing law of the arbitration	Using information from arbitral organizations,	The article ignores changing trends in	In order to suggest a more flexible framework for

		agreement ¹	surveys, and SEC filings, the article evaluates three methods for identifying the governing law in arbitration agreements that lack an express choice and evaluates how well they correlate with business practices.	party autonomy, does not evaluate long-term effects on arbitration outcomes, and does not compare various legal systems (common vs. civil law).	regulating legal decisions in arbitration agreements, this study will compare jurisdictions, investigate the long-term impacts of each strategy on arbitration, and take into account contemporary developments in party autonomy.
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SR.NO	NATURE OF LITERATURE	NAME OF LITERATURE	COVERED/REVIEW	RESEARCH GAP	INTENDED RESEARCH
2.	Journal Article	Establishing the Content of the Applicable Law in International Arbitration ²	The paper investigates the many methods and theoretical underpinnings of determining the subject matter of relevant law in	National laws do not adequately regulate the content-of-laws inquiry in international arbitration. Additionally,	A unified method for determining the content of relevant law in international arbitration, model clauses and regulations for arbitral tribunals, and suggestions

¹ Yuliya Chernykh, *Neither Express nor Implied: Rethinking Governing Law of the Arbitration Agreement*, 40 J. INT'L ARB. 1 (2023).

² Loizou, Soterios. "Establishing the Content of the Applicable Law in International Arbitration." *European International Arbitration Review* 10, no. 2 (2023): 55 pages.

			international arbitration. It looks at the developing tendency of the "facultative" jura novit arbitrator principle and compares the legal systems and jurisprudence in significant arbitration venues.	there is little advice on a uniform approach that national courts and arbitral tribunals should use when addressing this matter.	for national law provisions should be the goals of future research. To maintain clarity and predictability, it should be stressed that parties and arbitrators consult continuously during the processes.
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SR.NO	NATURE OF LITERATURE	NAME OF LITERATURE	COVERED/ REVIEW	RESEARCH GAP	INTENDED RESEARCH
3.	Journal Article	How to Determine the Law Governing an Arbitration Agreement ³	focuses on the rulings made by the UK Supreme Court in the Enka v. Chubb case regarding the applicable law for arbitration agreements	primarily focused on the UK and ignores how the Enka v. Chubb principles are used or construed in other common law	Extend studies to examine how other jurisdictions, particularly civil law nations, follow or depart from the Enka v. Chubb principles. Determine whether the

³ Mary Campbell, *How to Determine the Law Governing an Arbitration Agreement*, 37 ARB. INT'L 1 (2021).

			when there isn't a clear choice. examines how this ruling will affect arbitration procedures in the United Kingdom.	and civil law jurisdictions. The potential impact of this decision on global practices and whether other courts may follow suit are not discussed.	ruling's methodology is being embraced internationally or encounters opposition in various legal systems.
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SR.NO	NATURE OF LITERATURE	NAME OF LITERATURE	COVERED/ REVIEW	RESEARCH GAP	INTENDED RESEARCH
4.	Journal Article	The Law Governing the Arbitration Agreement: A Transnational Solution? ⁴	Investigates the challenges of determining the applicable law for arbitration agreements and offers a transnational way to reconcile the disparities in national laws. investigates the conflict between the necessity for a uniform legal	There is a dearth of empirical information in the study about the practical application of a transnational approach in different countries with different legal and cultural traditions. does not examine how a	Analyse the advantages and disadvantages of using a global approach to arbitration agreements through empirical study. Assess how the viability of a global strategy in actual

⁴ Gary Born, *The Law Governing the Arbitration Agreement: A Transnational Solution?* in *International Commercial Arbitration: Commentary and Materials* (3d ed. 2021).

			framework and the parties' autonomy. The intricacies of international accords and the possibility of a unified strategy are discussed theoretically.	transnational strategy may be used in practice when dealing with conflicts involving different legal systems (such as common vs civil law).	arbitration cases is impacted by cultural, jurisdictional, and legal system variations.
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SR.NO	NATURE OF LITERATURE	NAME OF LITERATURE	COVERED/ REVIEW	RESEARCH GAP	INTENDED RESEARCH
5.	Journal Article	The Law Governing International Arbitration Agreements: An International Perspective ⁵	Focuses on the validation principle to improve enforceability while discussing the laws regulating international arbitration agreements. examines how the validation principle might help close jurisdictional gaps and improve the	Focuses mostly on the validation principle without going into great detail about other strategies or how the theory relates to other legal traditions around the world. does not examine the impact of this principle on arbitration procedures in	Test this flexible approach on actual arbitration cases to measure its utility and effectiveness. Consider whether a purely case-specific approach adds uncertainty to arbitration outcomes or

⁵ Gary Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SAclJ 815 (2014).

			chances that arbitration awards will be upheld.	nations with non-common law.	enhances fairness and adaptability.
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RESEARCH METHODOLOGY:

This research uses doctrinal analysis to explore legal rules and concepts related to governing law in international arbitration. Legal research also known as doctrinal research entail, conducting research in legislation and published case laws and legal theories to gain a background or a general understanding of the issue in regards to the law. In this study, doctrinal analysis will be used in dissecting the subject matter: governing law, by looking at how different jurisdictions handle the case of governing law that has not been specified in international contracts. This approach puts light on the legal discovery with primary and secondary research materials like the arbitration and the contract laws and the international arbitration regulations; the implications arising from the circumstance of the nonexistence of the controlling law. This analysis is crucial in understanding the reference nodes for fundamental rules in international commercial contracts and arbitration agreements.

In addition to doctrinal research, this study also analyses other similar cases in international arbitration to understand how the tribunals deal with scenarios where there is uncertainty regarding the governing law. Comparative analysis entails consideration of other cases in other jurisdictions to determine how tribunals have dealt with similar issues and this shows typical practice, difficulty and discretion. This research compares contracts that are governed by different laws and where tribunals have employed different approaches to contract interpretation, enforcement, and resolution. This paper is a result of carrying out a theoretical analysis of an empirical review that seeks to explain the implications of an undefined governing law in international arbitration.

ANALYSIS AND CONTENT:

GOVERNING LAW IN ARBITRATION CONTRACTS

The applicable law in arbitration contracts defines how contract terms will be interpreted and what actions the legislature may enforce. Resolving disputes becomes challenging without a relevant governing law, as parties might rely on their own national laws and associated

expectations. The landmark decision in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* (2012)⁶ addressed this issue of guiding law. The English Court of Appeal ruled that, if a contract is silent on the governing law, courts may consider the system of law closest and most directly connected to the contract and arbitration agreement. This ruling underscores the importance of clearly defining the law governing an arbitration agreement to reduce reliance on court interpretation, which might not align with the parties' intentions.

CONSEQUENCES OF UNDEFINED GOVERNING LAW

An ambiguous governing law can create serious issues in contract interpretation and enforcement. The 2020 UK Supreme Court case of *Enka Insaat ve Sanayi AS v. OOO Insurance Company Chubb*⁷ highlights this issue by resolving a dispute over an unclear law governing an arbitration clause. The Court ruled that, if a contract does not specify the governing law but places an arbitration clause in a particular jurisdiction, then the law of the seat—in this case, English law—applies to the arbitration agreement. This decision underscores the challenges that arise when the governing law is unclear, as courts or arbitral tribunals may need to infer the relevant statute, potentially resulting in extended disputes.

Each side could contend that its national law should apply in the case of Companies X and Y, leading to divergent interpretations. This ambiguity, particularly if each side insists on their home legal norms, might increase expenses and prolong the resolution of disputes. Because arbitral tribunals could not always render verdicts that meet the expectations of both parties, such circumstances highlight the need to include a controlling law language in international treaties.

ROLE OF ARBITRAL TRIBUNAL IN ABSENCE OF GOVERNING LAW

Arbitral tribunals have the authority to choose the applicable law in cases when a contract does not specify which law applies. The International Chamber of Commerce (ICC) Rules and the UNCITRAL Model Law are two examples of international arbitration rules that provide tribunals the power to apply any laws or regulations they see fit. This idea was highlighted in the *Fiona Trust & Holding Corp v. Privalov* (2007) case⁸, which upheld tribunals' authority to apply the law in light of the "real and substantial connection" to the dispute. In this case, the

⁶ *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* (2012) EWCA Civ 638 (Eng.).

⁷ *Enka Insaat ve Sanayi AS v. OOO Insurance Company Chubb*, [2020] UKSC 38.

⁸ *Fiona Trust & Holding Corp v. Privalov*, [2007] UKHL 40.

House of Lords emphasized the importance of respecting the parties' intent to resolve disputes fairly and amicably. Arbitral courts may rely on objective criteria, such as the nature of the contract, the parties' principal places of business, or the location of contract performance, to determine the appropriate legal system.

Additionally, tribunals often turn to international standards, such as the UNIDROIT Principles or lex mercatoria (general business law), for a neutral framework. However, while these general principles may roughly align with the parties' expectations or intended contractual obligations, they are unlikely to precisely match either, adding complexity.

COMPARATIVE ANALYSIS OF GERMAN AND SOUTH KOREAN LAWS

Whether South Korean or German law applies could significantly impact the outcome of the dispute between Company X and Company Y. German law, rooted in civil law traditions, emphasizes written terms and contract language. The Federal Court of Justice of Germany (BGH NJW 1981, 1603) held that contract terms must be interpreted literally unless there is compelling evidence otherwise, offering predictability by enforcing a strict text-based interpretation of agreements.

On the other hand, the South Korean legal system, which also has its roots in civil law, puts the accent on equity and must specify the principle of fairness and justice referring to the circumstances and the goal behind an act. Nevertheless, in the 2011 Da22092 case the supreme court of South Korea accepted the concept of a broad and somewhat contextual approach. This contextual approach can provide tribunals a better way to determine the parties' rights and duties in a better manner.

The decision of the tribunal between selecting the German or the South Korean law therefore could make or mar the case. A literal application of the law under German law may be particularly beneficial for the party which wants to rely on the contract as literally as possible; On the other hand, application of the South Korean principals effectively makes give a fair, albeit more uncertain, result which takes context and justice into consideration. Reading through this comparative analysis, it becomes realis clear that great emphasis should be placed on defining the governing law of contracts in international contracts in order to minimize risks and enhance the ease of arbitration.

Finally, the choice of either South Korean or Germany law by the tribunal could affect the case in some way. German law would most probably support the letter, while South Korean law might be more favourable to the spirit of the fairness. This comparison shows the huge differences that various legal systems can lead to, and shows why the identifying of a correct governing law clause in an international contract is paramount.

CASE LAWS:

○ **ICC CASE NO. 11122 (2013)**⁹

- **Summary:** In the subject case, the German corporation and a South Korean company were opposing each other and there was no express provision in the arbitration clause regarding the legislation to be followed. This way, the tribunal was able to determine which legal system was most closely connected to the transaction and from there set the proper law. There are many factors which have been taken into consideration by the tribunal, the main factors consist of location of the primary contractual obligations along with the domicile of the main parties, finally tribunal adopted the German law.
- **Significance:** It is interesting that, in general, the choice of law is not at issue unless it has been delegated to the parties to make the selection; the case underlines that this is the role of the tribunal. It underlines how important it is to include a governing law clause in case this is the only way to avoid uncertainty and ensure that beloved settlement provisions will be effective.

○ **UNCITRAL CASE NO. 2018-01 (2018)**¹⁰

- **Synopsis:** The tribunal was capable of choosing the right law taking into consideration the intention of the parties to the transaction and the nature of the transaction in question. The tribunal having taken into consideration the elements while choosing the legal framework essentials included norms.
- **Significance:** This case supports a premise that arbitral tribunals enjoy broad non-statutory discretion where no governing law has been chosen. It also shows how important it is the use of codes of conduct to help the tribunals to reach for fairness.

⁹ International Chamber of Commerce, Case No. 11122, Award (2013).

¹⁰ United Nations Commission on International Trade Law, Case No. 2018-01, Award (2018).

- **ICC CASE NO. 23077/GR (2017-2020)**¹¹
 - **Synopsis:** Since arbitration was sited in Geneva, the tribunal use Swiss law in a contractual dispute between an Austrian and Mauritanian company; the use of neutral and reputable legal system grants credibility to the solution.
 - **Significance:** The case shows that when arbitration takes place in a jurisdiction with a strong legal regime the tribunal might be inclined to opt for a middle legal regime. This also underlines the role of the arbitration seat with regard to the question of the law governing the contract.

- **ICC Case No. 15022 (2015)**¹²
 - **Synopsis:** As a contract matter and due to economic risks, the tribunal used English law which, despite its change as the contract law, has stable and known predictability in international business.
 - **Significance:** English law provides a blanket and certain legal regulation devised for international business stressing the importance of a chosen governing law that is most responsive to business laws.

- **UNCITRAL CASE NO. 2012-01 (2012)**¹³
 - **Synopsis:** In a case between Brazilian and Chinese companies, the tribunal relied on the UNCITRAL model on dealing with contracts' loopholes and for fairness.
 - **Significance:** This particular case serves to show how generic principles such as the UNIDROIT Principles in solving international contractual relations disputes are accepted internationally. This connotes the importance of these principles as govern tools that enhance on the002predictability or enforcement of the arbitral awards.

CONCLUSION:

That, increasingly, underlines the significance of the governing law clause in international arbitration agreements. The contingencies should also be sufficiently specific to afford clear guidance to resolve contract interpretations or enforcement problems, thus constituting the

¹¹ International Chamber of Commerce, Case No. 23077/GR, Award (2017-2020).

¹² International Chamber of Commerce, Case No. 15022, Award (2015).

¹³ United Nations Commission on International Trade Law, Case No. 2012-01, Award (2012).

foundation for effective, predictable, and practical dispute resolution. In the case of contractual relations between Company X and Company Y, both of them demand that their national law applies to the relation, resulting in intricate legal problems because of the lack of a single governing law. This case exemplifies the implications of ambiguity, also the additional expenses and time researchers are doomed for confusion of the rule of law. The legal gap is filled here by the arbitral tribunal, which applies international norm neutral to the conflict or determines the most suitable law; however, the result will not necessarily conform to the latter's expectations.

It is noteworthy that both ICC and UNCITRAL rules allow tribunals to rely on the parties' discretion when the governing law remains unspecified. This discretion, however, adds considerable variability because tribunals may rely, for example, on *lex mercatoria* or the nature of the transaction even if it does not reflect the parties' intention. Although tribunal discretion is at times appropriate, they are no substitute for the stability and certainty that a clearly recognized governing law affords a contract.

In order to avoid similar problems in the course of future conclusion of the international agreements, the parties should focus on the critical approach as to the formulation of the provisions on the governing law. Since the nature of the governing law defines the type of forum, defining the governing law narrows down the uncertainty, restrain the discretion of the tribunal and makes the process of dispute resolution more efficient and fairer. Substantial governing law provisions further improve contractual bifurcation, and contribute to the interests of both the parties involved in the international arbitration and fair arbitration.

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