

RESOLUTION No. 6/2008

INTERNATIONAL COMMERCIAL ARBITRATION

The 73rd Conference of the International Law Association held in Rio de Janeiro, Brazil, 17-21 August 2008:

HAVING CONSIDERED the Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration by the Committee on International Commercial Arbitration;

RECOGNISING the need for guidance and the development of best practices for parties, counsel and arbitrators in relation to ascertaining the contents of the applicable law in international commercial arbitration;

ADOPTS the Recommendations annexed to this Resolution;

COMMENDS the Recommendations to arbitral tribunals, with a view to facilitating uniformity and consistency in ascertaining the contents of the applicable law in international commercial arbitration;

REQUESTS the Committee and others to encourage the application of the Recommendations within the arbitral community; and

RECOMMENDS that the Executive Council renews the mandate of the Committee for a period of four years to study and report on the topic of confidentiality in international commercial arbitration.

Annex

**INTERNATIONAL LAW ASSOCIATION RECOMMENDATIONS ON
ASCERTAINING THE CONTENTS OF THE APPLICABLE LAW IN
INTERNATIONAL COMMERCIAL ARBITRATION**

General considerations

1. At any time in the proceedings that a question requiring the application of a rule of law (including a question of jurisdiction, procedure, merits or conflicts of laws) arises, arbitrators should identify the potentially applicable laws and rules and ascertain their contents insofar as it is necessary to do so to decide the dispute.
2. In ascertaining the contents of applicable law and rules, arbitrators should respect due process and public policy, proceed in a manner that is fair to the parties, deliver an award within the submission to arbitration and avoid bias or appearance of bias.

Acquiring information

3. When it appears to the arbitrators that the contents of applicable law might significantly affect the outcome of the case, arbitrators should promptly raise that topic with the parties and establish appropriate procedures as to how the contents of the law will be ascertained (in submissions with materials attached, through experts, witnesses or otherwise).
4. Arbitrators attempting to ascertain the contents of applicable law should bear in mind that the rules governing the ascertainment of the contents of law by national courts are not necessarily suitable for arbitration, given the fundamental differences between international arbitration and litigation before national courts. In particular, arbitrators should not rely on unexpressed presumptions as to the contents of the applicable law, including any presumption that it is the same as the law best known to the tribunal or to any of its members, or even that is the same as the law of the seat of the arbitration.

Interaction with parties

5. Arbitrators should primarily receive information about the contents of the applicable law from the parties.

6. In general, and subject to Recommendation 13, arbitrators should not introduce legal issues – propositions of law that may bear on the outcome of the dispute – that the parties have not raised.
7. Arbitrators are not confined to the parties’ submissions about the contents of applicable law. Subject to Recommendation 8, arbitrators may question the parties about legal issues the parties have raised and about their submissions and evidence on the contents of the applicable law, may review sources not invoked by the parties relating to those legal issues and may, in a transparent manner rely, on their own knowledge as to the applicable law as it relates to those legal issues.
8. Before reaching their conclusions and rendering a decision or an award, arbitrators should give parties a reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties, or any of them, or that are based on legal issues not raised by or with the parties.

Making use of information about law’s content

9. In ascertaining the contents of a potentially applicable law or rule, arbitrators may consider and give appropriate weight to any reliable source, including statutes, case law, submissions of the parties’ advocates, opinions and cross-examination of experts, scholarly writings and the like.
10. If arbitrators intend to rely on sources not invoked by the parties, they should bring those sources to the attention of the parties and invite their comments, at least if those sources go meaningfully beyond the sources the parties have already invoked and might significantly affect the outcome of the case. Arbitrators may rely on such additional sources without further notice to the parties if those sources merely corroborate or reinforce other sources already addressed by the parties.
11. If in the course of deliberations arbitrators consider that further information about the contents of applicable law is necessary to the disposition of the case, they should consider reopening the proceedings to enable the parties to make further submissions on the open legal issues, but only to the extent necessary to address the open legal issues and taking into account considerations of relevance, time and cost.
12. In applying the rules of the applicable law, arbitrators should give due regard to available information about the application of the rules in the jurisdiction from which the rules emanate.

Special circumstances

13. In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award.
14. In applying the foregoing Recommendations, arbitrators may take account of the nature of the proceedings, in particular regarding default and expedited interim relief proceedings, and may take a more active role than might otherwise be the case in questioning legal submissions.
15. If after diligent effort consistent with these Recommendations the contents of the applicable law cannot be ascertained, arbitrators may apply whatever law or rules they consider appropriate on a reasoned basis, after giving the parties notice and a reasonable opportunity to be heard.

Rio de Janeiro, 21 August 2008