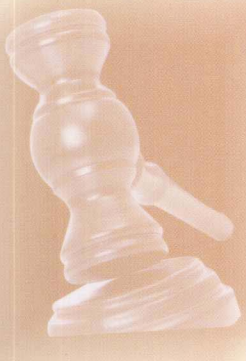
现代国际商事仲裁法律适用问题研究



XIANDAI GUOJI SHANGSHI ZHONGCAI FALÜ SHIYONG WENTI YANJIU

寇丽 著

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现代国际商事仲裁法律适用问题研究

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内容提要

本书以国际商事仲裁的法律适用为研究主题，以分析国际商事仲裁的法律适用的基本理论为基础，从国际商事仲裁协议的法律适用、国际商事仲裁程序问题的法律适用和国际商事仲裁实体问题的法律适用三个方面展开详尽论述。在此基础上，结合各国及相关国际组织的仲裁立法和仲裁适用法律实践以及我国现行的仲裁立法和仲裁实践，对我国在国际商事仲裁法律适用领域的相关问题进行剖析，并对我国仲裁法的修改以及未来的国际商事仲裁实践提出切实可行的建议。

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序

寇丽博士是我在中国政法大学指导的第一届博士，回想寇丽攻读博士学位阶段，从拟定研究计划到开题、开始写作直至顺利通过博士论文答辩，期间虽辛苦种种，却是攀爬学术之峰的必然付出，现在回头，依然如昨日。现在寇丽的博士论文即将出版，我亦高兴见证她在国际私法领域的学术研究取得的长足进步，特为她的著作出版作序。

寇丽博士长期在中国政法大学从事教学科研工作，在《政法论坛》担任国际法学等专业编辑十余年，同时担任国际法学院硕士生导师，主攻国际私法和国际商事仲裁等领域，开设国际私法、国际民事诉讼和商事仲裁、国际民商事案例评析等课程，一直活跃在理论研究领域。实务领域她一直兼任几家仲裁机构的仲裁员，积累了一定的仲裁实践的经验。这些都使得她的论文在理论和实际相结合方面有着独到的优势，也期望她在今后的学术生涯中继续探索，不断创新，使自己的研究与实践需求同步。

国际商事仲裁的法律适用问题，从法律内涵来看，主要包括仲裁协议的法律适用、仲裁程序的法律适用和仲裁实体问题的法律适用三个方面。它不仅与仲裁协议本身效力及各方当事人之实体权利义务密切相关，还关乎整个国际商事仲裁程序顺利进行的理论乃至实践基础。基于诉讼与仲裁的不同，国际商事仲裁的法律适用与传统意义的契约冲突法在价值取向和具体原则方法上都存在很大区别。现代国际商事仲裁最基本的价值取向应是公平、效率和便利的平衡，法律适用作为国际商事仲裁解决争议的前提，如果制度构架合理，表述清晰简洁，则可对国际商事仲裁的发展发挥因势利导之功效。

国际商事仲裁的法律适用是一个极为复杂的理论和实践问题：其中，仲裁协议的法律适用问题由于包含了仲裁协议本身效力、当事人行为能力、争议事项可仲裁性等，成为适用程序法和实体法的效力基础；而相对独立于一国司法体系的仲裁程序法律适用，更多体现在仲裁程序的自治性和形式性，结合当事人的意思自治，共同构筑起一座直达实体公正彼岸之桥梁。实践中，诸多当事人因对一国仲裁机构“程序正义”之信任而约定仲裁地点；而国际商事仲裁中，实体法法律适用的明确性、可预见性则是国际商事仲裁各方在交易活动中

获得预期法律保护的实质保障，其公正性正是国际商事仲裁应追求的终极目标。

作者以国际商事仲裁的历史发展为端，以国际商事仲裁协议、仲裁程序和实体法适用为体，通过穿针引线的方式将国际商事仲裁的理论与实践现状、国际与国内研究成果娓娓道来，最后对我国国际商事仲裁法律适用进行了体系化分析并提出合理化建议，既有实践的需要，又澄清了该领域的相关理论问题。

该书论证严谨，角度全面，既体现出寇丽博士治学的钻研精神和深厚功底，也透露出作者对国际商事仲裁法律适用领域的独到造诣。因此，我祝愿寇丽博士以本书的出版作为新的起点，在今后的工作、生活中取得新的成绩。

赵相林

于中国政法大学

2013 年 3 月

此为试读，需要完整PDF请访问：www.ertongbook.com

中文摘要

本书以国际商事仲裁的法律适用为研究主题，以分析国际商事仲裁的法律适用的基本理论为基础，从国际商事仲裁协议的法律适用、国际商事仲裁程序问题的法律适用和国际商事仲裁实体问题的法律适用三个方面展开详尽论述。在此基础上，结合各国及相关国际组织的仲裁立法和仲裁适用法律实践以及我国现行的仲裁立法和仲裁实践，对我国在国际商事仲裁法律适用领域的相关问题进行剖析，并对我国仲裁法的修改以及未来的国际商事仲裁实践提出切实可行的建议。

全书除绪论外，共五章。

第一章为概述，主要介绍国际商事仲裁及其法律适用的一般理论。国际商事仲裁是指在国际商事活动中，当事人依据事先或事后达成的仲裁协议，自愿将他们之间产生的或可能产生的具有国际因素的商事争议交给常设仲裁机构或临时仲裁庭进行审理和裁决的一种争议解决制度。它早在14世纪的欧洲就出现了，但真正的发展和完善是在19世纪末20世纪初，并已日益发展成为现代国际经济交往的重要工具。19世纪末以来，国际商事仲裁出现统一化趋势，1958年《纽约公约》和1985年《联合国国际贸易法委员会国际商事仲裁示范法》是这种统一化趋势在不同发展阶段的典型代表。国际商事仲裁的法律适用，是指在国际商事仲裁中，适用何种法律来判定国际商事仲裁协议的有效性、国际商事仲裁的程序规则和仲裁当事人的实体权利义务。它直接关系到仲裁协议的效力、仲裁程序所遵守的规则、仲裁当事人的实体权利义务、仲裁裁决的法律效力及其承认和执行。其突出特点在于仲裁当事人具有更大的自主性来行使意思自治，可以选择仲裁协议所适用的法律、仲裁程序法、仲裁实体法，而不必拘泥于仲裁地法律的限制。它通常涉及仲裁协议的法律适用、仲裁程序的法律适用、仲裁实体法的适用三个方面的问题。各国关于国际商事仲裁的法律适用的立法模式主要有三种：在仲裁法中明确规定法律适用规则；在国际私法中专门规定仲裁的法律适用规则；在民事诉讼法中规定仲裁的法律适用规则。经济全球化的发展、网络时代的到来、仲裁第三人的理论和实践，使得

国际商事仲裁中的仲裁协议、仲裁程序等基本制度都面临巨大的挑战。国际商事仲裁的统一化趋势将使国际商事仲裁的法律适用以统一实体规范为主，但是冲突规范仍将在一个漫长的时间内继续发挥其特有的调整效用。基于当事人自治而建立起来的国际商事仲裁制度及其实践的发展更加奠定了意思自治原则在法律适用领域的重要地位。

第二章为国际商事仲裁协议的法律适用。国际商事仲裁协议的法律适用是一个极为复杂的理论和实践问题。确定国际商事仲裁协议的存在或有效性问题时，除了依据国际私法的一般原则和理论外，也不能忽视国际商事仲裁纷繁复杂的实践。一般认为，国际商事仲裁协议的有效性是由五个方面的因素决定的：仲裁协议的形式必须合法；争议各方的意思表示一致；仲裁协议的当事人必须是合格主体；仲裁协议的内容必须合法；仲裁协议双方当事人提交仲裁的意思表示真实自愿。不同因素的法律适用规则并不完全相同。原则上，首先应适用当事人意思自治原则，但实践中仲裁当事人的意思自治权往往行使得不够充分。若当事人未选择仲裁协议的准据法，则适用仲裁地法，但仲裁地法并不能解决上述所有因素的法律适用问题。当事人的行为能力应适用其属人法和协议缔结地法；可仲裁事项除按一般原则确定其准据法外，还需考虑当事人住所地、财产所在地等裁决可能被申请承认和执行地的法律。需要注意的是，为了促进国际商事交往，保障国际商事仲裁的顺利进行，国际上对仲裁协议的法律规制呈现宽松化的趋向，除了以公共政策的理由对其进行控制外，在其他方面均逐步放宽了限制。只要当事人有进行仲裁的意愿，各国仲裁立法都尽量保障其实现，而不轻易判定仲裁协议无效。在仲裁协议内容不完备时，各国法律都允许当事人进行补正，而不当做无效的仲裁协议来处理。从国际商事仲裁条约和各国仲裁立法对仲裁协议的法律适用规则少有直接明文规定的事实也可看出，世界各国对仲裁协议的存在或有效性并不特别苛求。充分尊重当事人以仲裁方式解决争议的意愿，比以严格的法律规则审查仲裁协议的存在或有效性更为重要和具有意义。

第三章为国际商事仲裁程序问题的法律适用。国际商事仲裁中程序法的适用，是指仲裁庭如何确定仲裁所适用的程序法。适用于国际商事仲裁程序事项的法律既包括仲裁程序法（或称仲裁法），也包括仲裁规则，二者既有区别，又有密切联系。在某些情况下，仲裁程序并不绝对从属于一国的司法制度，仲裁所依据的程序法不仅仅是仲裁地法。仲裁程序法所属法律体系可独立于仲裁实体法所属法律体系。国际商事仲裁程序法的确定规则有：第一，当事人选择

仲裁程序法；第二，当事人未选择时，由仲裁庭选择仲裁程序法或者程序规则。仲裁庭据以选择仲裁程序法或者仲裁程序规则的方法主要包括：推定当事人未明示的默示选择，适用仲裁地法，适用外国程序法，适用仲裁机构的程序规则。20 世纪 60 年代以来，随着仲裁国际化进程的加快，在国际商事仲裁的理论和实践中涌现出一种否定“所在地理论”，力图使国际商事仲裁程序完全摆脱仲裁地法的控制和支配的发展趋向，即“非内国仲裁”。其目的旨在尽可能摆脱仲裁地法院的干预，最大限度地尊重当事人选择适用仲裁程序法和仲裁规则的自治权。实践中，仲裁程序非国内化已成为一种不可忽视的趋势；但在理论上，学者们对此的观点褒贬不一。笔者认为，随着仲裁国际化要求的提高和电子商务的发展，“非内国仲裁”理论将得到广泛的关注，尤其在网上仲裁领域将备受重视。

第四章为国际商事仲裁实体问题的法律适用。由于国际商事仲裁具有高度的自治性，并且没有固定适用的冲突法规则体系来约束，因此，与国际民事诉讼相比，在争议实体法的选择上，国际商事仲裁要灵活、特殊和复杂得多。从国际商事仲裁的实践和各国国内立法以及国际条约的规定来看，国际商事仲裁中实体法的确定主要有两种方法：第一，当事人通过协议选择仲裁实体法。第二，当事人未选择仲裁实体法时，由仲裁员选择仲裁实体法。仲裁员或者依冲突规则确定仲裁实体法，或者根据案件情况直接确定仲裁实体法。与法官不同，仲裁员在运用冲突规则方法确定仲裁实体法时，可以在多种冲突规则之间进行选择。这些冲突规则包括仲裁地国冲突规则、仲裁员本国的冲突规则、裁决执行地国的冲突规则、最密切联系国家的冲突规则等。除依据上述规则确定实体法外，在国际商事仲裁中还可能涉及一些特殊原则和规则的适用，包括国际法规则、契约条款和国际商事惯例、公允及善良原则、强行法。在国际商事仲裁中，国际法规则可能在两种情况下得以适用：当事人协议约定适用国际法规则，或当事人未就实体法作出选择时，由仲裁庭依据冲突规则确定或直接决定适用国际法。无论当事人是否选择了仲裁准据法，也无论当事人选择了何种准据法，仲裁庭在裁决案件时均不应不考虑契约条款和国际商事惯例。尽管世界各国对公允及善良原则的态度不尽一致，国际商事仲裁机构对其的态度也有差异，但仲裁庭经当事人同意，可以依据它所认为的公平标准对案件作出有约束力的仲裁裁决，这已经被许多国际公约和国际常设仲裁机构的仲裁规则所确认。作为国内法体系的组成部分，强行法必然也会给国际商事仲裁的实体法律的适用带来若干影响。

第五章为中国国际商事仲裁的法律适用问题。本章首先分别对中国国际商事仲裁协议的法律适用、国际商事仲裁程序问题的法律适用以及国际商事仲裁实体问题的法律适用的立法及实践进行评析。其次分析中国仲裁制度目前存在的不足，主要表现在：忽视关于国际商事仲裁的法律适用方面的立法；与涉外仲裁的国际性要求还有差距；仲裁协议形式要件的要求过于严格；缺乏关于临时仲裁的规定。在此基础上，对完善我国《仲裁法》提出若干建议，包括：完善关于国际商事仲裁的法律适用方面的立法；对于仲裁协议效力的形式要件作宽松的认定；规定并承认临时仲裁的效力。

Abstract

Centering on applicable law of international commercial arbitration, basing on analysis of the general theories of applicable law in international commercial arbitration, the dissertation analyzes the applicable law of arbitration agreement, the applicable law of procedural issues in international commercial arbitration and applicable law of substantive issues in international commercial arbitration. On those bases, according to the legislations of arbitration of other countries and related international organizations, and China's current legislation and arbitrational practice, the dissertation discusses related problems in the field of applicable law in international commercial arbitration in China, and puts forward practical suggestions for amendment of Chinese arbitration law and Chinese future practice of international commercial arbitration.

The dissertation consists of five chapters besides introduction.

Chapter one makes an introduction of the general theories of international commercial arbitration and its applicable law. International commercial arbitration is a system, by which parties of international commercial activity voluntarily submit their contractual or non – contractual commercial dispute to ad hoc or permanent arbitral tribunal according to arbitration agreement, and the tribunal makes binding arbitration awards. It came into being in Europe in the thirteenth and fourteenth centuries, developed and improved at the end of the nineteenth century and the beginning of the twentieth century, now it has become an important tool for international economic communication. International commercial arbitration took on a trend of unification since the end of the nineteenth century. New York Convention of 1958 and UNCITRAL Model Law on International Commercial Arbitration of 1985 are typical representations of different stages of this trend. The application of laws to international commercial arbitration refers to the choice of laws in international abitration to determine the effect of international commercial arbitration agreement, the application of the procedural rules of international commercial arbitration and the substantive rights

and obligations of the parties in the course of international commercial arbitration. It has direct effects on the validity of the arbitration agreement, on the procedural rules and the determination of the substantive rights and obligations of the parties, and on the legal effect of arbitration award and its recognition and enforcement. Its main characteristic lies in that parties of arbitration has more autonomy in choosing the applicable law of arbitration agreement, procedural law and substantive law of arbitration, and the applicable law is not confined to the law of the place of arbitration. It usually involves three issues: the applicable law of arbitration agreement, the application of the procedural rules, and application of arbitrational substantive law. There are three legislative modes of applicable law in international commercial arbitration, that is: making special provisions in arbitration law, making special provisions in private international law, and making provisions in civil procedure law. The development of economic globalization, coming of era of network, and theory and practice of third party in arbitration make basic system of international commercial arbitration face enormous challenges. The tendency of unification in international commercial arbitration makes applicable law in international commercial arbitration mainly base on uniform substantive law, but rules of conflict will still play its special role for a long time. System of international commercial arbitration established on the basis of the principle of the autonomy of parties and development of its practice enhanced the important role of this principle in the field of applicable law.

Chapter two explores the application of laws to international commercial arbitration agreement. The application of laws to international commercial arbitration agreement is a very complicated theoretical and practical issue. Besides the general principles and theories of Private International Law, practices of international commercial arbitration should not be ignored in judging the existence and the validity of international commercial arbitration agreement. Generally speaking, the validity of international commercial arbitration agreement is decided by the following four elements: formal validity, capacity of the parties, trueness and consensus of parties' intention, arbitrability of dispute. Different element needs different rules of applicable law. In principle, the principle of party autonomy should be applied firstly. The parties usually do not fully exercise their autonomy in practice, therefore, law of place of arbitration should be applied when parties have no indication for applicable law. On the other hand, the law of place of arbitration can not solve all applicable law problems of the above – mentioned elements. For capacity of parties, lex personalis should be

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applied. For arbitrability dispute, general principles should be applied; furthermore, law of parties' domicile, law of place of property, and law of those countries where awards may be recognized and enforced should also be taken into account. To be mentioned, in order to promote international commercial communication and to secure smooth operation of international commercial arbitration, international community loosened in legal regulation of arbitration agreement. Except for reason of public policy, restrictions in other aspects have been gradually loosened. The legislation of each country does not easily make arbitration agreement invalid as long as the parties have the intention of arbitration, whereas allowing the parties to complement when the contents of the arbitration agreement is imperfect. From the facts that rules of the applicable law of arbitration agreement are not stipulated directly in conventions on international commercial arbitration and the arbitrational legislation of each country, we can conclude that each country has no strict requirements on the existence and the validity of arbitration agreement. Fully respecting of the parties' intention of settling dispute by way of arbitration is more important and has more significance than reviewing the existence and the validity of arbitration in accordance with strict legal rules.

Chapter three analyzes the application of procedural rules in international commercial arbitration. Application of procedural law in international commercial arbitration refers to how arbitration tribunal decides procedural law applied in arbitration. Law applied to procedural matters in international commercial arbitration includes not only arbitrational procedural law, but rules of arbitration, which are two different but closely related conceptions. In some cases, arbitration procedure is not absolutely subordinated to a country's judicial system, and procedural law of arbitration is not only law of place of arbitration. Legal system of procedural law of arbitration can be independent of legal system of substantive law of arbitration. The rules by which procedural law of international commercial arbitration is judged include: firstly, choice of parties; secondly, choice of arbitration tribunal in absence of parties' choice. The rules according to which arbitration tribunal chooses arbitrational procedural law or rules of arbitration procedure are as following: implied choice of parties, application of Lex Arbitri, application of procedural law of foreign countries, application of procedural rules of arbitration institutions. With the development of internationalization of arbitration from 1960s, a developmental trend emerged in theory and practice of international commercial arbitration, which denies theory of localization, making procedure of international commercial arbitration not subject to control and domination of

law of place of arbitration, that is so – called theory of denationalized arbitration. The purpose of this theory is getting away from interference of court of place of arbitration, respecting parties' autonomy of choosing procedural law and rules of arbitration as fully as possible. Although denationalisation of arbitrational procedure has become a tendency that should not be ignored in practice, scholars have different opinions on it in theory. The author holds that, with improvement of requirement of internationalization of arbitration and development of e – commerce, theory of denationalized arbitration will be given more attention, especially in field of network arbitration.

Chapter four discusses the application of the substantive laws in international commercial arbitration. Compared with international civil litigation, international commercial arbitration is more flexible and complex in choosing substantive law because international commercial arbitration has high autonomy, and not bound by fixed system of rules of conflict. Seen from international commercial arbitration practice and provisions of national legislations and international conventions, there are two ways in determining the substantive law in international commercial arbitration: firstly, parties choose by arbitration agreement; secondly, arbitrator chooses either according to rules of conflict or to situation of each case if there are no indication of parties. Different from judge, arbitrator may choose among many kinds of rules of conflict when they choose substantive law by way of rules of conflict. These rules of conflict include: rules of conflict of place of arbitration, native rules of conflict of arbitrators, rules of conflict of those countries where awards may be enforced, and rules of conflict of closed connection country, etc. International commercial arbitration may also involve application of some particular principles and rules, such as international rules, contractual provisions and international commercial usages, mandatory law. Rules of international law may be applied in two cases: either according to parties' agreement or to tribunal's decision. Arbitration tribunals should take account of provisions of contract and international commercial usages when they make a adjudication, whether parties have chosen applicable law or not, and whatever applicable law parties have chosen. Although attitudes of each country towards principle of ex aequo et bono are not consistent, and attitudes of international commercial arbitration institutions are different, this principle according to which arbitration tribunal makes binding awards if parties so decide has been confirmed by many international conventions and international arbitration institutions. As a part of national legal system, mandatory law will inevitably brings about certain effects on application of substantive law in

international commercial arbitration.

Chapter five makes an exploration of the applicable law of Chinese international commercial arbitration. The author firstly discusses the legislation and practice of applicable law of international commercial arbitration agreement, procedural problems and substantive problems in international commercial arbitration in China separately. Secondly, analyses some defects of Chinese arbitration system, such as ignoring the legislation about the applicable law of intenational arbitration, failure to meet international requirement of foreign arbitration, strict requirements for form of arbitration agreement, absence of system of ad hoc arbitration. On the basis of analysis, the author puts forward some suggestions for improvement of Chinese arbitration law, which include perfecting the legislation about the applicable law of intenational arbitration, making less strict provisions on requirement of form of arbitration agreement, making stipulation for ad hoc arbitration and recognizing its effect.

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