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DETERMINATION OF SUBSTANTIVE LAW IN ARBITRATION

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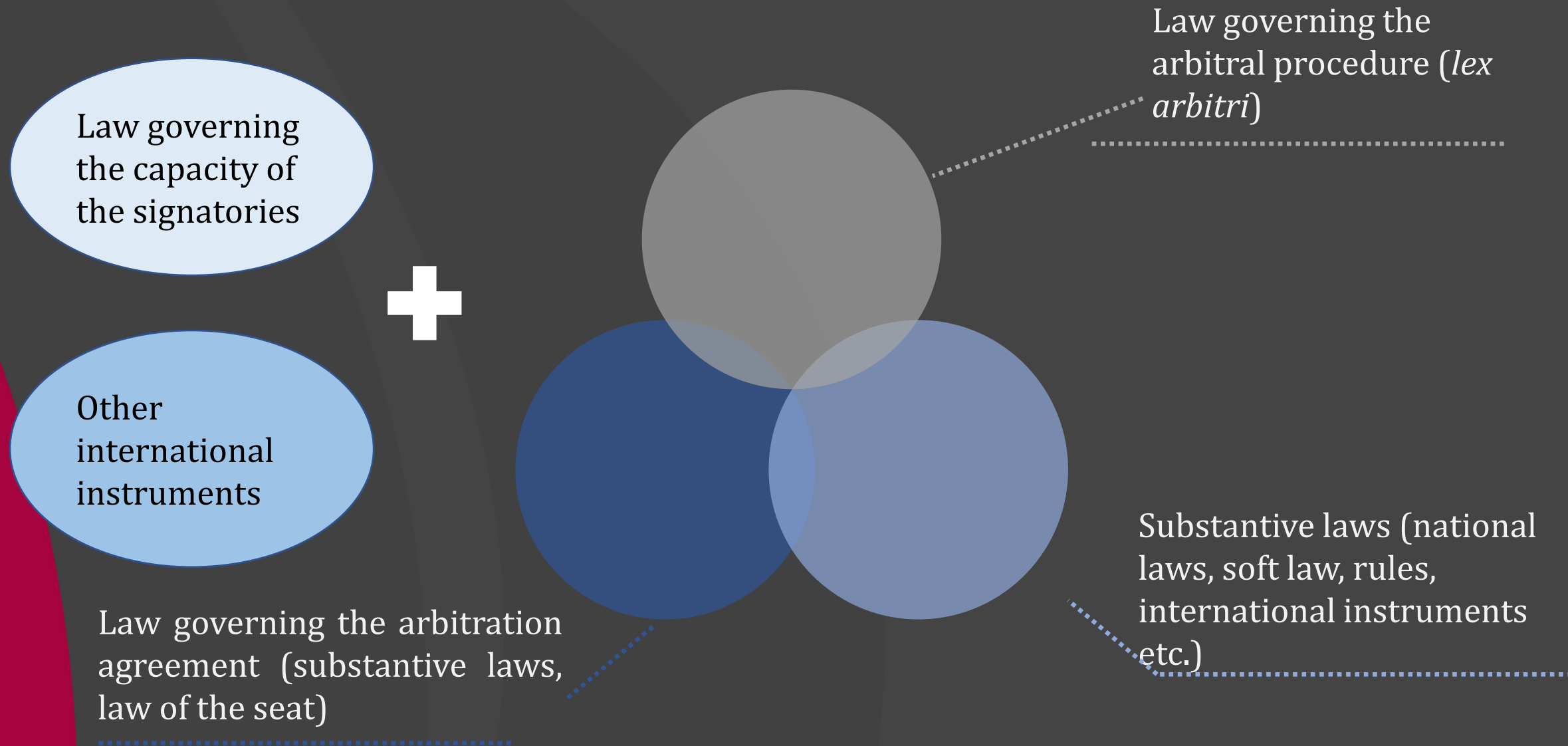


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1. APPLICABLE LAWS IN ARBITRATION





2. DETERMINATION OF SUBSTANTIVE LAW IN ARBITRATION

Provision	Categorization	Jurisdiction
“the law determined by the conflict of laws rules which [arbitral tribunal] considers applicable”	Indirect approach: UNCITRAL Model Law Article 28(2) European Convention Article VII(1)	Hong Kong, Singapore, Malaysia, U.K, etc
“the law which [arbitral tribunal] determines to be appropriate”	Direct choice of law: UNCITRAL Arbitration Rules Article 35(1)	Vietnam, Cambodia, Indonesia, Austria, etc
“the law which is mostly connected to the dispute”	Direct choice of law with the closest connection	China, Germany, Korea, Taiwan, etc
“the rules of law [arbitral tribunal] considers to be appropriate”	Direct choice of rules of law	Finland, France, Italy, Netherlands, etc



3. PRACTICAL APPROACH

- Factors can be applied for determination:
 - Habitual residence or place of business of the party
 - places of performance.
- *Amiable compositeur* or *ex aequo et bono* = make decision based on principles of fairness and equity
- *Jura novit curia* = “the judge knows the law”



Decision No. 11/HTPT dated 14/1/2005 of the Supreme People's Court

- Dispute arising from a sale of good contracts between a Korean company and a Vietnamese company
- No choice of substantive law
- The Court found that:

It is unreasonable to apply Korean Law since the contract was concluded and performed in Vietnam, Further, under Article 15.3 of the Contract, the parties chose the Vietnam International Arbitration Center to resolve the dispute. There is no choice of the law governing the contract. Hence, it is reasonable to apply the Vietnamese law to consider the disputes arising from the contract



4. RECOMMENDATIONS

For parties:

- Parties should expressly agree on the substantive law
- No choice of law, parties should consult the experienced lawyers on which would be the most appropriate law/ which would give more advantages.

The arbitral tribunal:

- Should provide reasonings for their decisions on substantive laws
- Should consult parties if they want to apply any legal grounds which have not been invoked by the parties;



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