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CHOICE OF SUBSTANTIVE AND PROCEDURAL LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract. In most cases international disputes related to trade and commerce are resolved by international commercial arbitration. The parties of international commercial transactions favor globally recognized and efficient method of settling their commercial disputes, rather than traditional national court litigation. International arbitration is one of the ways of alternative dispute resolution system however the use of international arbitration is becoming increasingly popular over time..

Keywords: arbitration; choice of law; international commerce.

It is convenient for a party of a dispute if the court proceedings will be in his own country. That party can use his own lawyers who are familiar with the company's legal affairs and national court proceedings. At the same time another party maybe remained in unfavored situation where this party have to face challenges with unfamiliar court proceedings, possible expenses of staying in a foreign country and presumable language difference. In such situations, the arbitration serves as an instrument that ensures balance between parties. The leading arbitration institutions offer their facilities worldwide.

The one of the advantages of international arbitration is its convenience to enforce final arbitral awards compared to foreign court judgments. Many states have bilateral or multilateral agreements between each other, however it is difficult to enforcement foreign court judgment if there no agreement between states. Which means the state where enforcement of a judgment is sought, do not have any obligation to enforce the foreign court judgment if there is no agreement on enforcement between states. Reversely, if the parties solve their dispute through international arbitration, in

that case the parties can easily enforce final arbitral award as by 2020 more than 156 countries around the world are member states of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[1]

Moreover, the arbitration gives freedom to the parties to choose applicable substantive and procedural law. Therefore, it is convenient for the parties to carefully scrutinize all aspects of a case and decide on applicable law. Many authors stated that another benefit of the arbitration is its expedited consideration of cases rather than lingered court litigation and arbitrators' high expertise of specific commercial matters.

The most parties opt for the arbitration, because the parties have the right to appoint an arbitrator whom they prefer due to arbitrator's high qualification, independence and impartiality. Confidentiality is the next advantage of the arbitration. Besides final and binding awards of an arbitral, tribunal triggers actors of international commerce to resolve their conflict in question through arbitration.

In the light of above mentioned benefits the parties of international commerce incline toward arbitration rather than litigation. Choice of law in international commercial arbitration is one the main fundamental questions that is subject to heated debate among experts and researchers worldwide. Moreover, recent incident of Brexit also prompts international scholars to review and research the choice of law issues of international contracts.

To understand the very nature of international commercial arbitration, one should not forget that it is a consensual mutual agreement between parties, thus they have the right to define flexible framework for their arbitration agreement.[2] No matter whether it is institutional or ad hoc arbitral tribunal, it forms according to the mutual consent of the parties a dispute. The scope of authority of the arbitral tribunal defined pursuant to arbitration agreement between parties.[3]

A contract between the parties supervises the rights and obligations of the parties. Thus, arbitrators must not look beyond arbitration agreement to adjudicate consequence of a case. Notwithstanding, there is existing legal framework that maintains legitimacy and interpretation of the international commercial contracts, legal

[1] 'Contacting States » New York Convention' <http://www.newyorkconvention.org/countries> accessed 24 June 2020.
[2] Alan Redfern and Martin Hunter, 'Law and Practice of International Commercial Arbitration, Fourth Edition' (2004).
[3] 'Giuditta Cordero Moss, International Commercial Arbitration. Party Autonomy and Mandatory Rules' (2003) 68 Nordic Journal of International Law 375.

rights and obligations of the parties, procedural conduct and liability for non-performance of the obligation.[4]

The legal framework of international arbitration proceeding is multilateral. Which means due to multifaceted nature of legal framework of arbitral proceeding's, one system of law regulates a particular feature of the proceedings while other systems of law govern another aspect of the proceedings.[5]

In international commercial arbitration, there is unavoidable question of choice of law complexity. There are four types of various matters than arise in the course of choice of law in international arbitration: (i) applicable substantive law of a case; (ii) procedural law applicable to a case; (iii) applicable law that governs international arbitration agreement; (iv) conflict of laws.[6]

The applicable substantive law of a case will be decided by the parties while drafting an arbitration agreement. The parties should consider mandatory national laws, public policy and other related issues prior to selecting applicable law. However, there are cases where the parties could not agree on particular applicable law and this failure of the parties leads to the determination of the applicable law by the arbitral tribunal.

The procedural law applicable to arbitration cited as *lex arbitri* or curial law. The applicable law to the arbitral proceedings usually is determined by the seat of arbitration. This law regulates the procedural conduct of a case *i.e.*, presentation of evidences, procedural deadlines, cost distribution, appointment of arbitrators and so on.

The law of the arbitration agreement within underlying contract can be determined separately. According the separability principle, the arbitration agreement can be concluded as a stand-alone arbitration agreement or an arbitration clause within the main contract.[7] In most cases the law applicable to the arbitration agreement can be the law of the seat of arbitration, law of the main contract or general principles of contract law.

Finally yet importantly, the conflict of law rules might be determined by arbitral tribunal that applies to each category of applicable law we have discussed. Therefore,

[4] Redfern and Hunter (n 2).
[5] ibid.
[6] 'Choice of Law in International Commercial Arbitration • IAR' <https://www.international-arbitration-attorney.com/choice-of-law-international-arbitration/> accessed 24 June 2020.
[7] Gary B Born, *International Arbitration: Law and Practice*, vol 35 (Kluwer Law International 2012).

the choice of law complexity in international commercial arbitration is not duck soup and requires rigorous endeavor to solve this conundrum.

Without determining applicable law of a specific matters of a dispute, the arbitral tribunal cannot pursue conduct of arbitration proceedings. Determination of applicable substantive and procedural law, and the law governing the agreement itself is inevitable question. It should be a paramount clarion for parties and arbitral tribunal. It is vital to the parties of a case to some extend to be acquainted with the applicable laws in order to mastermind concomitant risks related to a contract and avoid possible mishaps.

No matter what is the nature of the international commercial transaction, there is pivotal issue that should be defines primarily: which law regulates the contract.[8] Usually the parties rely on their familiarity with a particular law while determining applicable law.

It is of primary importance not only clarify to what the parties have agreed but also expressly determine the law applicable to the parties' contractual dealings.[9] The parties of international arbitration agreement have the right to freely designate what law will apply to the substance and procedure of their dispute. The choice of law is very critical issue that figures out presumable risks associated with the contract. By the same token, the parties of international commerce embrace arbitration, not court litigation, mainly because of privilege in selecting applicable law.[10] In this context the principle of party autonomy plays significant role. The most jurisdictions acknowledge the principle of party autonomy which grants the party of arbitration agreement explicitly select applicable law.[11]

According to the modern viewpoint the parties of international commercial transaction have the right to opt for any substantive and procedural law even that law does not have close link to their dispute.[12] The parties of international law can choose

[8] Gustavo Moser, 'Rethinking Choice of Law and International Arbitration in Cross-Border Commercial Contracts' (2018) <http://conflictoflaws.net/2019/rethinking-choice-of-law-and-international-arbitration-in-cross-border-commercial-contracts/> accessed 25 June 2020.
[9] Redfern and Hunter (n 2).
[10] Albert Jan van den Berg, 'Planning Efficient Arbitration Proceedings' (1996) <https://lrus.wolterskluwer.com/store/product/planning-efficient-proceedings-the-law-applicable-in-international-arbitration-x-vienna-1994/> accessed 25 June 2020.
[11] Okezie Chukwumerije, 'Choice of Law in International Commercial Arbitration' (1994) <https://openlibrary.org/works/OL3961197W/Choice_of_law_in_international_commercial_arbitration> accessed 25 June 2020.
[12] Berg (n 10).

national law, *lex mercatoria*, trade usage, transnational law, general principles of international law and so on.[13]

In the majority of the cases the parties of international arbitration agreement prefer to include arbitration clause within the underlying contract rather than drafting sole arbitration agreement.[14] Pursuant to the Rome Convention the applicable law ought to be explicitly determined or illustrated according to the provision of a contract or situation of a dispute.[15] Therefore implicit choice law clause is be determined only if there is undisputed choice is made by the parties.[16]

If the parties fail explicitly or impliedly define which law applies to their dispute, in that case the arbitral tribunal should avoid to apply a national law of the one party. Contrary, the arbitral tribunal should apply so-called *tronc commun* doctrine which means arbitrators should apply common aspects of national laws of both parties that is close to the parties' intentions.[17]

If the parties have not decided which law applies to their dispute, the arbitral tribunal can use so-called subjective approach and try to interpret the silence of the parties on choice of law issues or the tribunal can opt for objective approach and exert conflict of law rules of private international law.[18] The subjective approach is rarely used by arbitral tribunal, however objective approach widely used by arbitrators as a "magic tool" in determining applicable law.[19]

In order to better comprehend the rationality level while deciding the choice of law applicable to a case, we address to Daniel Kanheman's research and it also helps to estimate the effect of Brexit on choice of law issue thereafter. Daniel Kahneman is a psychologist and won Nobel prize in Economic Sciences in 2002. He explained difference between two approaches in decision-making process:[20]

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[13] Redfern and Hunter (n 2).
[14] Marc Blessing, 'Regulations in Arbitration Rules on Choice of Law', vol 7 (1996).
[15] 'Rome Convention on the Law Applicable to Contractual Obligations' (1980) Article 3(1) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41998A0126%2802%29> accessed 25 June 2020.
[16] Redfern and Hunter (n 2).
[17] Blessing (n 14).
[18] ibid.
[19] ibid.
[20] 'Thinking, Fast and Slow — By Daniel Kahneman — Book Review - The New York Times' <https://www.nytimes.com/2011/11/27/books/review/thinking-fast-and-slow-by-daniel-kahneman-book-review.html> accessed 25 June 2020.

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