DETERMINING THE LAW GOVERNING THE NATURE OF A CASE IN INTERNATIONAL ARBITRATION

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Abstract
Foreign investment plays a key role in economic development. Indeed, it is this type of investment that provides the necessary economic factors, namely investment and technical knowledge, for economic growth. Advent of new means of global communication and advances made in a wide range of science fields has led to enormous and more complicated international transactions. The resulting disputes and complication are obviously beyond the scope of local courts which deal with local lawsuits. In fact, many international commercial disputes referred to local courts led to lengthy and expensive court hearings and has caused a number of problems for the parties involved. Furthermore, international arbitration was established and was later improved to an extent that in most international business contracts, both parties agree that should any dispute arise in connection with their contract, they will resolve it through international commercial arbitration. Therefore, determining the law governing international commercial arbitration is of paramount importance. This paper aims to analyze various theories on determining the law that governs arbitral vote.

Key Words: Arbitrator, International Arbitration, Dispute Resolution, Conflict Between Qualifications And Laws

Problem statement
Determining law governing the nature of a case is an important issue in international or transnational commercial arbitration. This issue is basically associated with private international law which has a particular structure in international arbitration and is inconsistent with generally accepted rules in international law. In International arbitration courts and local courts alike, determining the law governing the nature of a case is instrumental. Whichever court commercial dispute cases are referred to, they need to determine law governing the nature of dispute. In other words, they have to establish which law, rules and regulations should be applied to substantive issues of dispute. Local courts, however, refer to state law of their respective countries and determine the governing law using rules and regulations of dispute resolution stated there. In international dispute resolution courts, establishing the law that governs the nature creates further complication and has special significance since arbiters are independent of any country and they apply “rules other than local court law”.

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Overview and Concepts
Section 1: Literal meaning of the word “Davar” meaning “arbiter”
In the explanation given for the word “Davar” in Qyas-al-Loqat which is Persian dictionary, we read that this word was originally “Dadvar” which mean the protector or owner of justice and later the second “d” was contracted (Yousefzade, 2002). Another well-known Persian dictionary, Dehkhoda states that the word “Davar” is derived from “Daroo” which is contracted form of “Darood”, following the same rule that applied to word such as “Namvar” (famous) and “Soaqanvar” (orator). General definitions provide for arbitration include: executing God’s judgment on the Judgment day, preaching, judgment, governance, rectification, resolving dispute between two parties.
Arbiter in some of dictionaries is defined as the person who is trusted by both parties outside the boundaries of court, chosen as the third person or people to resolve dispute (Dehkhoda, 1993).
However, pursuant to paragraph A of Article 1 of the Law of International Commercial Arbitration Act 1376 “arbitration is defined as settling dispute between the parties by natural or artificial person or people resolved out of court by a natural or legal person or persons chosen by mutual consent or appointed ”. In Block Dictionary of legal terms, arbitration is referring dispute to an impartial party chosen by the parties involved and prior to hearing session, they agree to accept arbiter’s decision and act accordingly (Bordbar, 2005).
Section 2: International arbitration
International arbitration is applied along with domestic and foreign arbitration1. International arbitration should not be confused with general international law which addresses issues pertaining to state governments and has its own specific rules. International arbitration in this analysis refers to international commercial arbitration for international transactions in either private or public sectors.
With rapid increase in the number of international business people and the range of their abilities, foreign investment and transfer of technology during last few decades, disputes and conflicts arose which required an organization or entity independent of jurisdiction of countries to settle them. In fact, these business people and international corporations needed international arbitration to work based on internationally accepts rules and regulations (Bordbar, 2005, 34-35).
There is no determining criterion to identify when international commercial arbitration is required. In legal system of one country, if the subject of dispute involves a foreign factor, it may entail to international arbitration. International arbitration can also applied when the parties involved in dispute are foreigners with respect to the country where the dispute is addressed, when arbitration is assigned to an international organization2 or when arbitration has to follow rules which have international aspects3. With the exception of the last case mentioned above which is inherently an international case, others can only be considered for international arbitration when they are within the framework of international relations or at least pertain to transactions that could fall into international business category and may not be commercial. A solution is provided for such case in civil law of France. Pursuant to article 1472, arbitration can only be considered international when profit of international business is involved. If such

1. If the subject of dispute referred to arbitration is solely related to government of a country, domestic arbitration is applied, and arbitral decision made will be used for other countries.
2. Such as The International Centre for Settlement of Investment Disputes (ICSID)
3. For instance, arbitration based on rules and regulations of UNCITRAL
arbitration done in a country other than France leads to adjudication, it is considered an international arbitration rather than foreign, hence is not a subject to rules stated in Article 1473 which pertains to foreign arbitration. These rules are also applied to arbitral decisions made in France which are issued with respect international transactions. When a relationship is established based on international law, it certainly accounts for international arbitration. However, the opposite is not necessarily true. The determining factor for a case is that it should be related to international business profit (Eskini, 861347; Movahed 2005). Pursuant to paragraph B of Article 1 of law on international commercial arbitration in Iran, arbitration can be considered international if one of the parties was not a citizen of Iran when the arbitration agreement. Therefore, in Iranian law, a personal criterion was considered by legislators. According to paragraph three of Article 1 UNCITRAL model law, arbitration is international when:

a) At the time of signing the arbitration agreement, parties carry their business transactions in different countries

b) One of the following locations is not included in the list of places that parties carry their business activities.

c) Parties clearly agree that main subject of arbitration agreement includes more than one country, thus it is clear that international commercial arbitration is very limited and such limitations question the objectivity in facilitating arbitration with regard to international arbitration. Unlike domestic mechanisms of dispute resolution which have a clear procedure and rules, international arbitration and claims require a correct understanding of legal systems of several countries, foundation of different authorities, different procedures and regulations related to reasons to prove a case (foundations and reality), law governing the case, proving foreign law and finally executing the decision made. Due to the transnational aspect inherent in international arbitration, jurisdiction inevitably arises in international arbitration.

Section 3: Determining the governing law
- "Arbiter" makes decisions based on legal rules that the parties have chosen as the nature of the case. In whatever way the law or legal system of a country is determined, it will be considered as referring to the substantive law of that country. Conflict rules will not be subject to this order, unless the parties agree in a different way.

2. If parties do not determine the governing law, arbiter will resolve dispute using a legal system which is deemed suitable for conflict resolution.

3. Should parties clearly authorize in the agreement, arbiter is allowed to resolve dispute based on justice and helped them reach a compromise.

4. Arbiter must invariable make decisions based on the terms of the agreement and business practices related to the case.

Part one – Rules on how to determine the law governing the nature of the case
Determining the law governing the nature of a case is an important issue in international or transnational commercial arbitration. Basically this issue is related to private international law which takes a different structure in international arbitration. Determining the law should be applied in international commercial arbitration which deal with international dispute is of prime important. International arbitration court or domestic court must determine which law will be applied to the nature of the case. Judges in domestic courts, however, should refer to the law of
their country on conflict resolution to settle dispute. In international dispute resolution courts, arbiters are independent of any country and they apply “laws without local court laws” (Safa’ee, 1996).

Nowadays, it is accepted that to establish the law for dispute resolution will of the parties to be the basis of making decision on such cases. In other words, parties can choose the governing law and arbiters have to obliged to applied it which is also an accepted practice in commercial papers (Almasi, 2004).

Determining the governing law based on the free will of the parties has become so popular that Ole Lando considers it as one of the generally accepted rules among developed nations. An analysis of important legal systems in France, England, The United States, Canada and several other countries confirms this. Direct confirmation of parties in international arbitrations documents is not applicable. Rules related to organizational and ad hoc arbitration also accepted this issue. Several laws confirming this issue include Article 76 of European Convention on international commercial arbitration of 1961 (also known as 1961 Geneva Convention), article 38 of rules of economic arbitration commission of the United Nation in Asia and Far East of 1966 and Article 17 of the UNCITRAL Arbitration Rules of the International Chamber of Commerce (Jonaydi, 189: 1997).

According to 1961 Convention mentioned above, parties are allowed to choose the law that arbiters use for their case. This peremptory norm is also repeated in the law concerning international arbitration. The new civil procedure of France also obligates arbiters resolve dispute applying the law chosen by the parties and not to assess its legitimacy and should simply apply it to the case. It should be noted that even if the parties determine the governing law, the conflict of laws has to be considered since some of issues referred to arbiter need to be dealt with through private international laws.

Part 2: General theories on determining the governing law

When parties are silent, four major systems are used to determine the governing law:

1. The theory of law system: determining the law based on the laws of conflict of the country, arbitration:

According to this theory, arbiter must refer to private international law and rules about conflict of laws and determine the nature of the case using conflict resolution rules of the country where the hearing session is held. In this theory, arbitration process is similar to judicial processes in domestic courts and law of arbitration is similar to law of judicial processes. Law of arbitration, in this theory, is considered the same as law in the country where the hearing session is held. For instance, if arbitration law of the country renders the law of the country where the agreement is signed binding, (similar to Article 968 of Iranian civil law), arbiter is obliged to apply the law and if law considers the rules and regulations of the country where the contract is executed the governing law, then arbiter must apply it. This simple theory was criticized heavily there is no organic, legal relationship between the case and the country where the arbitration session takes place and arbitration court is not a part of judicial system of the country. Although international arbitration organizations did not issue any statement approve this theory, it was accepted by the institute of international law in 1952. This theory is not applicable since the location of arbitration session is not clearly determined and if the location is stated there may be several locations where hearing sessions will be held. Therefore, it is not clear which location is considered as the source of reference for the parties (Safa’ee, 141: 1996).
Discussion 2: theory of dispute resolution and determining the location of legal relationship
According to this theory, which is applied in some international issues, arbiter chooses a location for the legal relationship based on the nature of each case and conflict of laws. In other words, if legal relationship has an adequate or more connection with a country, this country will be legal relationship and its conflict of laws is applicable. When dispute is related to contract, the country with more connection to the contract will be determined as the reference and international private law of the country will be determined as the governing law of the case.

Section 1: The theory of applying international laws
Another system recommended by international law scholars is that when parties do not specify any governing laws, arbiter must apply the principles of laws about international contracts without referring to specific rules of conflict of laws in any country. Therefore, the contract will no longer be connected to a specific country, but will be addressed by international law. This theory gained some international acceptance but was heavily criticized. The two main criticisms about this theory are as follows: First, lack of clear criterion for internationalizing a contract and, second, uncertainty about the location of laws of international contract. The reason for this is that private parties that have state contracts must assume right and responsibility in international law but typically governments and state organizations are considered one side of dispute.

Section 2: the system of arbiter freedom and independence
According to this theory, if parties are silent, arbiter is allowed to specify the conflict rule and use it to determine the applicable law. Arbiter in this system does not have to abide by conflict law of any country. He can even establish his own conflict rule if he does not find the existing conflict laws appropriate. Article 7 of afore-mentioned 1961 convention stated this theory: When governing law is not specified by parties, arbiters refer to conflict law that they find suitable for each case. Paragraph A of Article 17 on arbitration rules of international chamber of commerce states that parties can agree on a legal system as the reference for arbitration, otherwise arbiter(s) will choose the legal system they consider appropriate. Article 1477 of new French civil procedure also stated the same course of action. In practical terms, many arbiters, especially in western countries, do not consider domestic conflict of laws as an important part of the process. This is contrary to socialist countries where international arbitration is determined by domestic laws in these countries. In these countries, if governing law is not determined by the parties, arbiters are obliged to refer to apply the law of the location of hearing session.

The main problem with this theory is that when arbiters are allowed to choose applicable rules using any legal system they deem appropriate, then how are they different from arbiters who resolve disputes based on justice and general legal considerations? (Safa’ee, 141: 1996). Some laws such as UNCITRAL model law, including paragraph 3 of Article 28 and paragraph 3 or Article 17 of international chamber of commerce arbitration do not allow arbiters to make their decisions based on general legal consideration and justice in general terms unless they are were authorized to do so. This theory neutralized the efficacy of these laws to some extent. It should be noted that arbiters are restricted with respect to apply governing laws and one these restrictions is that they are not allowed to resolve the problem through general considerations unless parties authorize arbiters or arbitral tribunals to do so.

Discussion 3: analysis of Iranian law with respect to law governing the nature of arbitration
Paragraph A of Article 27 of Iranian law on international commercial arbitration emphasizes on autonomy of the parties and solves one of the problems; agreement of parties on governing law
of one country will be referred to the financial laws of the country rather than conflict of laws rules. Paragraph 3 of Article 27 of Iranian law does not force parties to specify national and domestic law of a certain country. Arbitration based on justice general considerations reflects the free will of the parties in determining the governing law. In confirmation of the fact that our legal system allows parties to choose transnational laws to their agreement and not domestic law we can refer first line of paragraph A of Article 27. This paragraph is concerned with rules of the legal system chosen and not necessarily the specified law itself. Some questions need to be addressed about paragraph 2 of Article 27:

1. Question: Based on Iranian legal system, if parties are silent in specifying the governing law, is arbiter allowed to apply substantive laws directly or does it have to be done through rules of conflict of laws?
   Answer: Arbiter must apply the rules of conflict of laws.

2. If parties are silent in specifying the governing law, can arbiter resolve dispute based on justice and general considerations?
   Answer: Pursuant to paragraph 3 of Article 27, the answer is negative.

3. In the same case as above, does Iran’s legal system allow transnational business rules to govern the case?
   Answer: Paragraph 2 of the same article does not allow that. In fact, paragraph 2 states that when parties are silent, arbiter should decide based on law and has not implied to rules. Therefore, arbiter must apply the domestic law of a particular country. Furthermore, paragraph 2 states that applied law should be considered appropriate based on rules of conflict resolution. Rules of conflict resolution never refer to transnational rules but they refer to a domestic legal system.

Therefore, Article 27 of law on international business arbitration of Iran is similar to that of conservative approach. Article 27 on determination of law governing a case is similar to new theories when parties are not silent since it allows arbitration based on compromise, but when parties are silent, as mentioned in paragraph 2 of Article 27 it states a somewhat conservative rule.

Conclusion
Based on the discussions above, it can be concluded that parties’ will is the determining factor. Thus, when determining the governing law, free will is the most important principle and if parties specify the law governing their dispute, arbiter or arbitral tribunal should apply it and typically is not allowed to compromise. Will of the parties is not only a principle of conflict of laws for determination of governing law; it is also a binding substantive law. This means that if the contents of a contract are also subject to certain rules which can directly be applied, these rules have to be observed as well. This principle is also reflected and confirmed by conventions and texts related to judicial processes and doctrine of international disputes. Despite the above principle about governing law chosen by the parties, some of the decisions made in Iran – United States Claims Tribunal based on Article 5 of the statement for resolution are against this principle and can be criticized. This issue was stipulated in Article 27 of international commercial arbitration law of Iran. According to this article, arbiter must decide based on the law chosen by parties on the nature of dispute. Regardless of the way law or legal system of a
country is specified, it will be used as a reference to substantive law of that country. When parties do not decide on the law governing the nature of a case, arbiter is authorized to adopt an appropriate conflict of laws. This authorization is stated in a new report on international arbitration and a related theory which is widely accepted now. This means the arbiter can adopt conflict of laws rule that deems appropriate, through which he can choose domestic law for dispute resolution (Article 7 of 1961 Geneva Convention, paragraph 3 of Article 13 of international business arbitration of chamber of commerce, paragraph 2 of Article 27 on international business rules and first part of Article 5 of the statement of Iran – United States Claims Tribunal).

5. Article 5 of the statement on dispute resolution states that court must make decision based on respect to all the rules and apply all the rules on determining the governing law (Rules of conflict of laws), principles of commercial rules and international laws when deems applicable. It must take into account all the related commercial customs, contents of contract and altered conditions and situations (Safa’ee, 147:2005).

Reference