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Practice and Theory of Application of Law In Arbitration: Problems and Solutions

Umidjon Nematov
student of the Tashkent state university of law
Email - nematovumidjon497@gmail.com

Abstract

In this article, applicable law in international arbitration, the theoretical opinions of some scientists about it, the similarities and differences of these theories, the possibilities of the parties to choose applicable law, its application in practice, the problems of online arbitrations and sports arbitrations, as well as, the problems that arise in the application and choice of law and the solutions found based on the relevant international laws and arbitration practice are analyzed.

Keywords- applicable law, delegalization, lex fori, lex arbitri, arbitrability, sport arbitration, online arbitration, choice of law

INTRODUCTION

Theory and practice of application of law

Arbitration tribunals developed from many years and now their importance is increasing because of commercial relationship among countries. But there is some practice and underlying theories for application of law in arbitration process and law governing arbitrability. Sometimes, these situations cause some problems in arbitration process for finding solutions for dispute between parties. However, some solutions for those were found by scientists and now are being used.

Theories about arbitration process and application of law explain arbitrators and disputants what they choose applicable law and place of arbitration. I start with delocalization, by becoming more independent of national legal systems, arbitration is acquiring some new qualities – it is getting delocalized, meaning that it is floating on the surface of legal systems of different countries, not attaching itself to any, and serving primarily the interests of international trade.[1]

Delocalization allows parties to become more independent of the local and national legal systems, by disregarding the procedural legal protections offered by national laws. The concept of delocalization stemmed from the autonomist theory, primarily meaning that the international commercial arbitration process is not attached to any jurisdiction.[2] By this theory, independence of arbitration is provided. As a result of this, arbitration tribunal can conduct litigation process without

[1] Knežević, G. – Međunarodna trgovačka arbitraža, Belgrade, 1999, pp. 62-64.
[2] Dejan Janicijevic, 'Delocalization in International Commercial Arbitration' (2005) 3(1) Law and Politics, p - 63.

interruption of national and local courts. But these types of courts should supply international arbitrations with legal protection during the process.

Delocalization has its foundations in party economy where both the parties are allowed to decide what procedural laws will guide the arbitration. Delocalization is also the need of the hour as new forms of arbitration such as e-arbitration are coming to the fore. It is very important for parties to decide the procedural law guiding the arbitration process. At the root of arbitration is privacy and freedom of choice. Local and national courts should not be allowed to intervene, except for the purpose of giving effect to the arbitral award.[3] Both parties can choose what procedural law is applicable during the process and they do this freely and privately.

It is referred to as stateless, floating, or a-national arbitration. It is based on a theory that international arbitration should not be fettered by the local law of the place where the arbitration occurs. Parties frequently choose a seat of arbitration in a country where neither party's business interests are located. In addition, the seat may be chosen simply because it is convenient to both parties.[4]

In some theories and scientists' research, it is provided that delocalized arbitration is detached from the procedural rules of the place of arbitration, the procedural rules of any specific national law, the substantive law of the place of arbitration, the national substantive law of any specific jurisdiction.

The detachment depends on written contractual terms, rules of agreed arbitration, general principles of commercial obligations applicable to transactions, and applicable procedural and substantive approaches common to legal systems to which the transaction is connected.[5] It imposes a duty on arbitral tribunal referring to the law to be applied, which can be both national and non-national.[6] If disputants agree on certain (delocalized) substantive law to be applied, the failure of arbitral tribunal to render an award based on such delocalized law is illegal action.

The most significant feature of delocalization is the detachment from the procedural rules of arbitration. The second most important feature is the detachment from substantive law of the place of arbitration, and lastly detachment from national substantive and procedural law of any specific jurisdiction.[7] So we can say that delocalized arbitration rely on the agreement between both parties and contractual terms written by them.

Delocalization critics believe that international commercial arbitration will be placed in vacuum if there is no procedural law applied to it.[8] According to this, in the international arbitration local and national laws, as well as, laws of the seat of arbitration have to be allowed to be applicable.

The counterargument to delocalization is that every arbitration takes place in a specific territory, and must conform to the laws – at a minimum to the mandatory laws – of that territory. Moreover, there may be times when the assistance of the court is needed during the arbitral process, for example, to appoint arbitrators, for emergency relief, for preserving evidence, or for enforcing

[3] Ceil, C. (2018). Theory of Delocalization in International Commercial Arbitration. Available at SSRN 3521053.
[4] Moses.
[5] Boyd, S. – "Arbitrator not to he Bound by Law" Clauses, 6 Arb. Int'l (1990), p. 122;
[6] Law and Politics Vol. 3, No1, 2005, pp. 63 - 71
[7] Ceil, C. (2018). Theory of Delocalization in International Commercial Arbitration. Available at SSRN 3521053.
[8] Andrew Tweeddale and Keren Tweeddale, Arbitration of Commercial Disputes International and English Law and Practice (Oxford: Oxford University Press, 2007).

arbitral orders.[9] It follows that national courts have an important role for some activities of arbitration tribunals, which can be seen in the above-mentioned types of assistance. So we can say that court involvement in arbitration statutes comes in many forms during the process and some duties and necessary works are rarely dealt with. For example, orders for protecting and taking evidence, or otherwise protecting the integrity of the arbitration are very helpful. This type of intervention is generally unobjectionable and appropriate in circumstances where the tribunal cannot (rather than has refused to) take the measures sought, and the intervention has the agreement of the tribunal.[10]

Traditionally, court assistance in arbitration referred to the support courts provided to arbitrators in the process of taking evidence, notably with the respect to witness who fail to voluntarily appear before the arbitral tribunal.[11] By doing this, national and local courts help the arbitral tribunal and arbitration process to proof some elements, as well as, this make arbitration process faster.

There is some contrasts between national courts and international tribunal's process. Firstly, arbitral tribunal must be constituted for the specific dispute before they can exercise any judicial function[12]. Secondly, there is no arbitrator "on duty" at all times in the same way judges are and to whom a party in the need of urgent relief can turn. [13]

According to UNCITRAL MODEL LAW and NEW YORK CONVENTION, local and national courts help arbitration to enforce and recognize award based on arbitration decision without any intervention and restriction.

Based on the information mentioned above, arbitration law is binding and applicable for disputants. This applicable law aid arbitral tribunal and parties whole arbitration process and to make a decision for determining arbitral award. Besides, sometimes this law chosen by parties is applicable and enforceable for national and local courts. According to different theories and rules, parties choose the applicable law for their dispute and it helps them to determine the number of arbitrators, place of arbitration, procedural actions, as well as, recognition and enforcement arbitral award by national courts.

Moreover, in this developed epoch, importance of online arbitration is becoming increased and arbitration practice prefer to this form of process because of having many qualities for parties and other participants. Increasingly, as more business is conducted electronically, there is more interest in also conducting arbitrations electronically. With online dispute resolution (ODR), it is indeed difficult to say where the "seat" of the arbitration is found.[14] In this form of arbitration process hearings might be conducted "by electronic communication tools such as video link, telephone, online email or computer communication, but this form of process depends on parties and arbitral tribunal. In most cases, if the arbitration process is conducted in this form, Hong Kong Special Administrative Region is determined as the seat of arbitration.

[9] Moses
[10] Lew, J. D. (2009). Does National Court Involvement Undermine the International Arbitration Processes?. American University International Law Review, 24(3), 3.
[11] Schaefer, J. K. (2015). Court Assistance in Arbitration-Some Observations on the Critical Stand-by Function of the Courts. Pepp. L. Rev., 43, 521.
[12] CF.2 LARRY E. Edmission, Domke On Commercial Arbitration., 24-1, 24-4 (3d ed. 2015).
[13] Schaefer, J. K. (2015). Court Assistance in Arbitration-Some Observations on the Critical Stand-by Function of the Courts. Pepp. L. Rev., 43, 521.
[14] Moses

In addition to this form of arbitration, sport arbitration has a key role in the world. To address arbitral problems related to sport, parties mat choose the Code of Sports-related Arbitration providing Lausanne, Switzerland as a seat of arbitration, even though hearing might be taken place elsewhere. At the Olympic games, for example, the hearings are held at the site of the games, but the "seat" is nonetheless Lausanne.[15] In both sports arbitrations and in some online arbitrations, the seat of the arbitration is a fiction, at least as a place where the hearings occur.[16] For both types of arbitration, law chosen by parties become applicable. If they do not choose the law, the law of the seat of the arbitration remains an important source of the law governing an arbitration for them.

But tribunal sometimes has difficulties because of different approaches to arbitrability, that is, they face some questions must decide whether to apply the law of the seat, the law chosen by the parties, the law of the enforcing jurisdiction, or another law. Most tribunals in this instance will apply the law of the place of arbitration.[17]

If parties cannot agree to choose the national law of one of them, and they do not want to choose general principles of law, another option is to choose a national law of a neutral country, that is, a country with no particular relationship to any party. In most jurisdictions, the strong concept of party autonomy will permit parties to choose an unrelated national law.[18]

Problems and solutions related to applicable law in practice

Above, we mentioned the theoretical and practical cases of delegalization. In this part of the article, we will deal with the difficulties in applying degilization in practice and how to find a solution to them. The concern is that the local peculiarities of a law and a court system, which might impede the effectiveness of the arbitration proceedings, should not be imposed on an international arbitration just because the proceedings happen to be located in the jurisdiction. A matter of particular concern is that the local court might find a way to vacate the arbitral award under its local law when a party moves to set aside the award, possibly rendering the process a waste of the parties' time and resources.[19] It follows that if local courts interrupt with the arbitration process and try to vacate the award it has decided, it will reduce its effectiveness and lead to a waste of time and necessary resources. So local and national courts have not to disrupt their arbitral activity and help to enforce arbitral awards.

When an arbitrator has to decide which law to apply for the solution of the dispute, he may find a contractual clause providing an express choice of law: "The validity, construction and performance of this contract shall be governed by and interpreted in accordance with the law of. . . " or similar provisions. [20] There are two choices of application of law those are national and non – national ones.

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[15] Gabrielle Kaufmann-Kohler, Arbitration and the Games or The First Experience of the Olympic Division of the Court of Arbitration for Sport, 12–2 Mealey's Int'l Arbitration Report (Feb. 1997).
[16] Moses
[17] Moses
[18] Mo Zhang, Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law, 20 Emory Int'l L. Rev. 511 (2006).
[19] Moses
[20] Croff, C. (1982). The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws

If parties choose application of national law, there are some problems, which arbitrators have to deal with. First, it might be argued that all private international law systems accept without limitation the doctrine of party autonomy. Second, it can be maintained that even though there are some differences among countries in recognizing the parties' freedom to choose the applicable law, those differences are not relevant because parties to international contracts do not push their choice beyond a standard common to all private international law systems. As will be demonstrated, both assumptions are incorrect and therefore the above-mentioned issue is worthy of discussion.[21]

Parties are entitled to agree what is to be the proper law of their contract.[22] Civil codes of many countries recognize as well the choice of law by the parties except from the few countries that have not explicitly provided for party autonomy in their Codes. If I take as an example the Civil Code of Uzbekistan, it is provided that the contract is governed by the law of the country chosen by agreement of the parties, unless otherwise provided by law.[23] I opine that giving a power to choose their applicable law is true because both parties have equal right to find good solution for their problems which serves to their interest.

Since a casual observer would conclude that in fact all private international law systems accept the principle of party autonomy, some authors drew the conclusion that an arbitrator must apply the law chosen by the parties without checking if any conflict of laws rule limits that freedom. But not all countries permit unlimited freedom to the parties to determine the law applicable to their contractual relation. But, the English private international law rule does recognize the party autonomy principle with certain qualifications. [24] Therefore, some countries allow freedom for parties to choose the law applicable to their case and some countries do not recognize this freedom. As a result, the parties face problems in choosing the law to be applied in resolving this issue in arbitration. In addition to this, unnecessary complications in the choice of law and the seat of arbitration can greatly increase the time and cost of the arbitration process. So arbitration courts and some national private law have to give a right for disputants to recognize their freedom by choosing their applicable law. To avoiding some unnecessary complication, arbitrations should use digital tools and platforms which create opportunities for significant efficiencies and cost savings.

Moreover, another area to focus on is ensuring that every aspect of international arbitration has a client mindset. This means that the parties – essentially our clients – are driving the service requirements.[25] To find solution for this problem, arbitrators have to identify their clients' wish in each case, improve ability to find good solution and respond to their needs. This way might give disputants more control over the way in which the settling of their dispute unfolds.

Most States also want to exercise a supervisory function to ensure that the private system of dispute resolution in their territory is not being used to defraud, and is not tainted by corruption. When a party moves to set aside an award, the State where the arbitration takes place can exercise this

Problem?. The International Lawyer, 613-645.

[21] Croff, C. (1982). The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?. The International Lawyer, 613-645.

[22] Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [19701 A.C. 583, 603 per Lord Reid.

[23] Civil code of Uzbekistan

[24] Croff, C. (1982). The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?. The International Lawyer, 613-645.

[25] https://www.law.com/international-edition/2023/02/13/6-ways-to-overcome-the-challenges-facing-international-arbitration/;

supervisory function.[26] As mentioned above, another situation that interfere with a fair conclusion of the arbitration process is the presence of corruption, where one of the parties may pay a bribe to settle the case in his favor. As a result, the principles of impartiality and fairness of arbitration activities are violated.

Corruption is inherently difficult to prove and the inability of arbitral tribunals to compel the production of evidence compounds this problem. A number of tribunals have simply avoided the difficult task of ruling on corruption allegations through jurisdictional manoeuvres.[27]

In addition, in practice, there is also the problem of the validity of the arbitration agreement, which is valid if it complies with any law, otherwise it is invalid. Validity problems the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties, or the law governing the object of the dispute, and, in particular, the law applicable to the principal contract, or with Swiss law[28]. Thus, when an arbitration takes place in Switzerland, if the arbitration agreement is valid under either the law chosen to govern it, or the substantive law governing the contract, or the law of the forum, it would be found valid by a court or tribunal.

In this modern period, online arbitration is one of the most used types. We may see some problems in this type. Regarding jurisdiction problems, it should be emphasized that jurisdiction of a court refers to the power of a national court concerning cross – border commercial disputes, which allows a national court to exercise its jurisdiction over the parties, either individuals or companies.[29]

In e – commerce transaction, particularly in B2B transactions, the issue of jurisdiction may amount to serious problems, which accordingly may lead to "multiple jurisdictions" and to forum shopping problems due to the fact that a contract is concluded online.[30] But this issue can be decided based on different possibilities. As such, a court that may have jurisdiction in the case of e – commerce transaction is a court that is at the place where the business resides, or otherwise, a court that is found at the place where a companies server is located or where a company is registered.[31]

At the earliest stage, Sauser-Hall at the 1957 Meeting of the Institute of International Law suggested a preliminary solution to the issue. Even though he maintained that arbitration has a mixed nature, its source being contractual but its effect jurisdictional, he emphasized that parties do not have unlimited freedom on the choice of the applicable law but must submit to the conflict of laws system of the lex fori. A decade later Mann stated the same orientation. On the assumption that "every arbitration is necessarily subject to the law of a given state," he expressed the view that nobody has been able to "point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law." From this premise he then analyzes the specific issue at hand.

[26] Moses
[27] Rose, C. (2014). Questioning the role of international arbitration in the fight against corruption. Journal of international arbitration, 31(2).
[28] Swiss Private International Law Act provides in art. 177(1)
[29] Amro, I. A. S. (2019). Online arbitration in theory and in practice: a comparative study of cross-border commercial transactions in common law and civil law countries. Cambridge Scholars Publishing;
[30] Stelios, Kousoulis., "Regulating Electronic Commerce", Revue Hellenique de Droit International, Volume 55, 2002, at p. 359.
[31] Amro, I. A. S. (2019). Online arbitration in theory and in practice: a comparative study of cross-border commercial transactions in common law and civil law countries. Cambridge Scholars Publishing.

Even the party autonomy principle as well as arbitration as a whole, must rely on and derive its existence from a national law system. Every right, power or duty of a person has its root in the law of a nation. In arbitration this national law system is the lex fori itself: the law of the country of the arbitral tribunal. A clause in an international contract providing that "the contract is governed by the law chosen by the parties," is acceptable only if there is a rule of conflict of laws that gives to the parties this freedom.

Mann takes a strict position: he does not recognize the choice of the applicable law by the parties as such. The arbitrator must analyze the party autonomy theory under the conflict of laws rule of the lex fori and he can also disregard the choice of the parties if they did not select the national law with which the contract has its closest connection.[32]

If the parties have not chosen a seat, that choice will generally be made by the institution in an institutional arbitration. The London Court of International Arbitration (LCIA) rules provide that absent party agreement, the seat will be London, unless the Court decides otherwise after hearing from the parties. [33] The International Centre for Dispute Resolution (ICDR) rules state that the administrator decides, but can be overruled by the arbitral tribunal within 60 days after it is constituted.[34]

Although an arbitrator's award usually cannot be reversed for a mistake of law, it can be challenged if it is against the public policy of a jurisdiction, or if the arbitrator has acted in a way that exceeds her powers.[35] It follows that if the arbitrator's decision is against the state's interest, this decision can be challenged.

[32] Croff, C. (1982). The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?. The International Lawyer, 613-645.
[33] LCIA Rules of Arbitration, art. 16.1.
[34] ICDR Rules, art. 13(1).
[35] Moses