ROLE OF DIFFERENT TYPES OF ARBITRATION IN DETERMINATION OF APPLICABLE LAW

Dr. Mohammed Reza Mojtehedi*

Abstract

In the present article types of arbitration (national, domestic and international) will be examined regarding the determination of applicable law. Whereas having a trend in arbitration voluntarily a decisive point, so it shall be considered in determination of applicable law and in cases that there is silence in this regard any way, and/or the parties have made no choice on applicable law, different methods such as Conflict of Laws Rules of *venue*, Autonomy of Arbitrator and place which legal relationship takes place method and also the method of International Law have been provided. In this field Doctrine and law of some countries also will be analyzed and finally conclusion will be made.

Key Words: *Applicable Law, Arbitration, Foreign, International, Transnation.*

* Associate professor, Faculty of Law and Social Sciences, University of Tabriz, Tabriz, Iran.

Introduction

Determination of applicable law is of vital role in arbitral proceedings and the importance, especially, in transnational arbitrations becomes much evident. Arbitration inevitably shall be divided into domestic foreign and international for determination of applicable law. In international commercial arbitration, because it must be defined that according to which rule the case should be settled, determination of applicable law is of much importance. The reason is that, principally, in international commercial arbitration arbitrator/arbitrators are of no *venue rule* and have no dependence to an especial country consequently. It means that the case is unlike the situation in domestic courts that the judge frequently refers its country's laws and by virtue of its conflict of law rules determines the applicable law. It must be noted that in international commercial arbitrations determination of applicable law has some kind of impact on arbitration agreement, procedure and even on the applicable law on parties' capacity and consequently is of great importance for scientific examination that in the present work the types of arbitration about the applicable law on the nature of the case will be considered solely. So, at first step domestic, foreign and international arbitrations will be analyzed and then the doctrine and legal opinion about the case will be considered. After assessment and analyses of the related regulations and conventions, finally the conclusion part of the work that purports the achievements of the article will be done.

1) Domestic Arbitration

If all existing elements in arbitration such as subject of dispute, parties' nationalities, arbitrators and also the applicable law solely have connection with one country, the arbitration is a domestic or national arbitration. So, if the origin of dispute between two Iranian be in Iran and resolution of disputed administered by an Iranian subject and by application of Iranian law rules in Iran, the arbitration will be an Iranian i.e. a domestic arbitration. The chronological evolution and process of arbitration in Iran is as follows:

a) Civil Procedure Law

The domestic arbitration that is also called as national and local arbitration basically refers to 1939 that Chapter Eight of Civil Procedure Law was enacted. In this Chapter arbitration regulations were passed and then some changes were applied and this time it is legislated under the title of "Arbitration" in Chapter Seven of Civil Procedure of Common and Revolutionary Courts in Civil Cases Act 2000. These provisions are mostly concerned with civil disputes and

they do not consider social and economic changes and also Institutional Commercial Arbitration, as it is required to. In fact this Chapter is rarely referred and applied.

b) Amending parts of Judicature Laws Act

In this Act different topics and cases are considered but Article 3 requires presence of group of experts and delegates from Chamber of Commerce in business cases proceedings. In proceedings that commercial claims are the case, the aforementioned group of expert should attend as expert and arbitrator necessarily. After Islamic Revolution in Iran took place, the mentioned Act got no chance for application and consequently the economic society of the country achieved nothing from its advantages. Whereas the economic changes resulting from Oil Market Circulation lead to an increase in amount and diversity of commercial cases, we may firmly allege that it was a modern law in the kind that intended to especialise courts and also move commercial cases in a way that to be proceeded by merchants self appointed arbitrators.

c) Islamic Republic of Iran Chamber of Commerce Act

Chamber of Commerce and Industries and Mines Act was passed by Iranian Parliament in 1990. Some amendments made in 1994 thereto. After passing the Act, establishment of an Arbitration Centre was provided and the Centre got jurisdiction over the commercial disputes among member and non-member persons of Iranian Chamber to be settled there. After establishment of the mentioned arbitral panel, the panel proceeds disputes between parties that agreed on proceeding of their case by the panel.

d) Act of Article of Association of Iranian Centre of Arbitration

Arbitration Centre of Iranian Chamber was established subsequent to passing the Act. The Act emphasized that, proceedings of domestic commercial disputes shall be proceeded in accordance with provisions of Arbitration Chapter of Civil Procedure Law and international disputes shall be proceeded according to International Commercial Arbitration Act. Some inventions such as Appointment of Arbitrator, Determination of Applicable Law by parties are considered in this Act.

e) International Commercial Arbitration Act

The law was passed by the Parliament on 29th August 1997 that was one of the modern laws in the United Nations Commission on International Trade Law "UNCITRAL" are the basis for the Act and innovations made in, have covered a lot of existing vacuum in Iranian Legislature.

2) Foreign Arbitration

First it should be understood that how arbitration may take Foreign Arbitration Nature. In fact Iranian Laws have provided nothing about the issue. It must be noted that, although title of International Commercial Arbitration Act consists phrase of "Commerciality" there is no independent definition that indicates the subject of arbitration must be foreign. But in Thoughts, Doctrine and Judicial Precedent Foreign Arbitration criteria could be recognized. According to a traditional definition, if the composing elements of dispute have connection with Law of another country, it will be Foreign Arbitration. So, if all of the composing elements of dispute and consequently the arbitration have connection with other country, it will be Foreign Arbitration. Generally, contract that purports foreign element, is conceptually similar to contract that is of international nature but in legal works, without mentioning reason, they are distinguished from each other. So, if contract has connection with two or more countries, it will be considered as international contract. As a result, disputes arising from contracts, without consideration of competent court and or its arbitral law, the Applicable Law will be determined through Conflict of Law Rules.

Principally, the contract that foreign element will have broad application scope. Whereas defining foreign element is a subjective function, so the contract that is of foreign element from one country view, it may not be so from another country view. The "foreign element" is recognized by two specific criteria. The first criterion that is considered is place and country. Accordingly arbitration that proceeds in foreign country, principally is considered as foreign arbitration. The other criterion is its recognition while arbitration proceeding that shall be applied by virtue of civil procedure. So, awards issued by application of one country civil procedure, is also considered as foreign arbitral award. In this case, place of arbitration does not play decisive role in recognition of an award as foreign one. It must be added that in Newyork Convention 1958 that was prepared on recognition and enforcement of arbitral awards and Iran was acceded to the Convention in 2001, two criteria were provided for recognition of award as foreign one. In accordance with the Convention foreign award is an award that was issued in country different from country that it was requested to be recognized and enforced there or it is going to be so requested. This award shall not be considered as domestic one in the latter country. Consequently, the place that arbitration is proceeding there or even the arbitral award is issued, principally has no effective legal impact in this case. Considering applicable law that may be

applied on merits of dispute, especially, is more efficient and consequently much important and by this means we may resort to conflict of law matter somehow. Then arbitration may take different nationalities according to different laws as a result. The simple definition for foreign arbitration provides that any award that issued in another country territory shall be foreign arbitration award. So, holding arbitration in a place different from its place of enforcement will lead to it be considered as foreign arbitration.

3) International Arbitration

In a traditional concept this type of arbitration was applied for settlement of dispute among countries and principally, as a result it is concerning with public international law issues. Whereas in arbitrations on international commerce that takes frame work of private law issues, this is also used. In order to avoid combination of concepts (distinguish concepts), generally, "international commercial arbitration" expression is used for arbitrations on international commerce which are enforced in private law field. If parties to arbitration are subject of different countries and their main place of business is located in different countries, and the appointed arbitrator is subject of another country and /or arbitration is held outside the party/parties home country, the arbitration will be an international arbitration and as a private law concept is also considered as international commercial arbitration. There are different understandings about international arbitration in legal thoughts and practice. Some consider it alike and synonym with foreign arbitration that consists foreign element and some others believe that arbitration which is outside the borders of national legal system is international arbitration.

In some doctrines the issue is considered from international trade view. The international commercial arbitration consists vast variety of international commercial arbitration that result from commercial international disputes. In a case that an element in a legal relationship provides application of another law necessary in addition to *lex fori* the case will have international personality.

It is a fact that parties will, is the basis for determination of applicable law to the merits of international commercial arbitration. It means that the applicable law to merits, basically, is determined by the parties and arbitrator/arbitrators are obliged to subordination and performance. But if parties have made no especial agreement on the issue and there was silence, the following methods may be applied:

a) Application of Conflict of Law Rules of Arbitration *venue*

In this method general provisions and stipulations of private law and also conflict of law rules of arbitration *venue* are considered and the applicable law will be determined about the issue by application of conflict of law rules of the country. So, if the conflict of law rules of the arbitration *venue* provide that *lex loci contractus* appropriate, the arbitrator/arbitrators shall apply the law. Application of this method despite its convenience has not enough reasonable justification. Because regardless of parties' actual relation that in fact is as basis, and regardless of nature and consequences of arbitration agreement and conditions thereto, invoking to facial and sudden elements solely for determination type of arbitration as domestic or international will have no firm basis. Because arbitration is legal method for settlement of dispute resulted from defined actual relation. In a case that place criterion and also the existing criterion in civil procedure are accepted as applicable law, for application of provisions and consequences of international commercial contract in arbitration we shall o be chose civil procedure of the country of performance or place of arbitration as country of performance, in order to make let domestic arbitration laws be applied by the parties.

b) Autonomy of Arbitrator

Because in this method parties have stipulated no law so arbitrator/arbitrators will choose the appropriate conflict of laws rules for determination of applicable law autonomously. In the present method arbitrator is of autonomy to the extent that he may, in absence of appropriate conflict of laws rules, create an appropriate one, himself. It is probable in such cases non legal expediencies or Equity to be applied by arbitrator/ arbitrators who think open-mindedly in this regard.

c) Placement of Legal Relationship

Arbitrator after examination and authorization the existence of firm or more relationship with one country will define the country as place of legal relationship takes place and consequently he will determine applicable law by conflict of laws rules of the country. What is important in this method is the legal relationship that conflict of laws rules is determined and applied by consideration of its merits. So, parties actual relationship merely is set as a basis and as a result merits and consequences of arbitration agreement or its conditions must be considered as basis for the relationship.

So, if facial and sudden elements are considered in arbitration for determination whether the case is domestic or international, there will be no realistic basis for the case. Whereas nature of actual

relationship determines the nature of arbitration which has close connection thereto, then regardless of arbitration itself, its background and the stage prior to that existing relationship between the parties must be analyzed in order to determine type of arbitration i.e. domestic, foreign or international and the applicable law. In determination of nature and legal description of arbitration, if social and economic features of relationship are also considered as basis, the nature of applicable law and applicable law itself will have no impact on parties' will.

In the present method, certainly the main relationship is solely as basis for determination of the type of arbitration as national or international. Whereas in disputes arising from contracts, the reference and resort is usually made to arbitration institutes, so determination of nature and its type as national or international, will depend on compliance of arbitration elements with type of arbitration.

d) Doctrine

In accepted doctrines it is emphasized that types of contract shall be divided into national, foreign and international any way. So if contract is subject to laws and regulations of another country, the contract will be foreign contract. If the obligations of the mentioned contract are to be fulfilled in different numerous countries, it will be international contract. If it is provided that the obligations of the contract to be performed not in specific foreign country but in different countries, this contract will be international contract. In order to determine that contract is international, it ought to be distinguished from the contracts relating to domestic law, necessarily. If obligations of contract are performed in one country, the contract is related to domestic economy of the country and the contract that its obligations shall be fulfilled in different countries it will be considered as international contract e.g. Export and Import contracts are international contracts, principally. This attitude is also accepted in French Classic Doctrine. So, circulation of obligations which are incorporated in contract, from one country to another, suffices to consider it as international contract. According to the doctrine the scope of application of a contract that gets foreign element or international contracts is limited. By taking into consideration the current understanding from the concept of international contract relating to international commerce, the contracts which have got no foreign element whether in their nature or from geographical prospect, principally may define wide application scope for them.

e) Comparative Law

Regulations of amendment of French Civil Procedure Act which was passed on 12th May 1982 are aimed to support international commerce, has performed its mission completely and has great effect for encouraging international commerce.

The Act in Article 1492 provides that if benefits of international commerce are the case, the arbitration will be international. According to the Article international arbitration composed of two elements. The first is that it is international and the second is its commerciality. If the dispute is about transaction and production, constructive activities, investment and any other services circulating from one country to another, it will be international definitely. It means that services and money transfer among countries will make the nature of relation or legal act to be international. The other issue in the Article is commerciality of the legal act or relation which is subject of arbitration. In fact, the Article international commerce maxim includes any economic activity in international field. It must be noted that such activities do not include import and export solely, but activities related to services, international tenders, industrial investments and financial sections are also included. So, disputes arising from legal activities related to transactions and delivery of goods and services from one country to another will create issues for international arbitration.

Articles 174 to 194 of Swiss Federal Act are relating to the country's Private International Law are focused on international arbitration. The Act came into effect since 18th December 1987. According to Article 176 of the Act defines the scope of application of international arbitration. So, if at least one of the parties to arbitration is not domiciled or resided on Switzerland at the time that arbitration is held, the Act will not be applicable on the case.

In UNCITRAL Arbitration Rules on international arbitration, the maxim of international arbitration is applied instead of foreign arbitration and the note of the Article defines and recognizes concept of international arbitration:

"The arbitration is international in following cases:

a) At the time of arbitration agreement conclusion one of the parties has occupation in another country;

b) One of the following places is located in a country other than the country parties main place of business is:

1) Place of arbitration, if it stipulated or determined by arbitration agreement;

2) The place that substantial part of obligations arising from commercial relationship is performed or the place that dispute issue is most related to;

3) If the parties expressly accepted that arbitration agreement issue is related with more than one country.

An opinion different from UNCITRAL Arbitration Rules believes that the relationship between arbitral award and/or arbitration issue with especial country may not be raised in another international arbitration. It means that the nationality of arbitral award exist no more and consequently there is no necessity for examination of award nationality and in enforcement level retaliation may not be operative element.

f) Application of International Law

According to this opinion if parties to contract do not determine the applicable law, arbitrator/arbitrators will enforce principles of international contract law i.e. no reference will be made to conflict of laws rules or substantive rules of especial country. In fact international contract will be governed by international law.

The main criticize on the method is that public international law rules are related to countries, principally, and may not may extended to private law subject such as corporations and institutes. Application of the method will result that the connection of international contract is cut off with one country and it will be subject to international law i.e. in such cases parties accept that dispute to be settled thorough arbitration and by consideration of conventions and also observance of the relating principles to international law. There is no doubt that if government or organizations and state owned companies are parties to contract, whereas they do not incline to accept the counter party's national law, they will conform their commercial intercourse to international law and it may be justified to some extent. It must be added although the method is of confirmed in some arbitral awards such as Texaco award dated 9th January 1977. But whereas there exists no adequate and precise criterion for recognition of contracts as international contracts, on the one hand, and international contract law takes no firm and stable position, principally, on the other hand, it is criticized.

The fact is that application of such method is of no reasonable justification. It must be noted that in contracts concluded between state and private individuals, dispute resolution to be also governed by international law, in some cases. In Algeria settlement statement dated on 19th January 1981, it was provided that:

"The Tribunal shall observe the law and apply conflict of laws rules, commercial law principles, international law and recognize international commerce principles and decide by consideration of *lex mecatoria*, related regulations and change in situation. As we have seen the applicable law is international law on the case.

Conclusion

One of the reasons for division of arbitration into international, foreign and domestic (national) arbitration is its importance and vital role in determination of applicable law. Whereas applicable law plays decisive role, so it must be determined by applicable law. If the parties determine their own applicable law, arbitrator/arbitrators have to comply with and this originates from will autonomy principle. The principle is accepted in most countries laws, Conventions and thoughts. If applicable law is not determined by the parties, different methods such as arbitrators autonomy in choice of appropriate conflict of laws rules, the place that the legal relationship takes place and international law rules and regulations will be applicable and any of them has advantages and also disadvantages.

References

1- Akıncı Z. 2000. Milletlerarası Ticari Hakem kararları tenfizi.

2- Amir Moazzi, A. 2008. International arbitrations in commercial cases. Dadgostar Publication.

3- Ekşi, A. 1992. Yabancılık unsuru taşıyan Akitler ve bu akitlerin. At Roma konvansiyonuna göre anlamı, 2MHB.

4- Kalantarian, M. 1995. Arbitration. Office of International law in Iran.

5- Khazayi, H. 2012. Lecture notes of international judgments. University of Tehran.

6- Mohammadzadeh Asl, H. 2000. Arbitration in Iran's law. Ghafnous Publication.

7-Naghibi, S.H. 2004. The current status of arbitration in Iran. Publication of arbitration center of Islamic Republic of Iran chamber commercial, industries and mines.

8- Nasiri, M. 1967. Enforcement of foreign judgments votes.

9- Safayi, S.H. 1996. International law and international judgments. Mizan Publication.

10-Seviğ, Reşat V. 1976. Borçlanma ehliyetini yöneten kanun, 13MHAD

11-Şanlı C. 1986. Milletlerarası Ticari tahkimde Esasa uygulanacak Hukuk.