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INTERACTION OF DIFFERENT LAWS AND RULES IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract

One of the main advantages of arbitration is that it can be a ground for dispute resolution which requires interaction of various different laws and rules. Parties can freely decide what laws or rules should govern their dispute settlement mechanism and what procedure to follow in the event of disagreement about their contractual obligations. In order to understand and take the most of international arbitration, main applicable laws and rules should be indentified. However, there are also restrictions to party autonomy principle and the law of the seat of arbitration has a major influence to international arbitration procedure.

Key words

International commercial arbitration; applicable law; different laws; rules; seat of arbitration; interaction; substantive law;

Introduction

One of the main effects of globalization to world trade is the major increase in a number of international contracts. International contracts involve different nationalities, different cultures and different laws. In order to facilitate

international trade more effectively there should also be a clear, simple and internationally recognizable system of dispute resolution. That is where international commercial arbitration is very helpful and useful tool for participants in international trade. One of the main advantages of arbitration in this context is that it can be a ground for dispute resolution which requires interaction of various different laws and rules. Parties can freely decide what laws or rules should govern their dispute settlement mechanism and what procedure to follow in the event of disagreement about their contractual obligations. In order to understand and take the most of international arbitration, main applicable laws and rules should be indentified. An issue of applicable law is of great importance in international arbitration, especially when parties did not make any stipulations to what laws should govern their contract or their dispute resolution.

Interaction of different laws and rules

Practitioners and scholars usually agree on what laws and rules are there in international arbitration. A clear and concise identification of laws which are involved in international commercial arbitration is made by Redfern and Hunter[1]:

I. The law governing the arbitration agreement and performance of that agreement;

II. The law governing the existence and proceedings of the arbitral tribunal – lex arbitri;

III. The law, or the relevant legal rules, governing the substantive issues in dispute – generally described as the

[1] Redfern & Hunter on International Arbitration 5th ed: Student Version, 2009, p. 165;

"applicable law", the "the governing law", "the proper law of the contract", or "the substantive law";

IV. Other applicable rules and non-binding guidelines and recommendations;

V. The law governing recognition and enforcement of the award (which may, in practice, prove to be not one law, but two or more, if recognition and enforcement is sought in more than one country in which the loosing party has, or is thought to have, assets).

All of these laws and rules are of great importance to arbitration. However, the ones that should be identified first in order to proceed to a proper international arbitration are the procedural law, arbitration rules and substantive law. A deeper analysis and relationship among these laws and rules will be made next.

Procedural law

Procedural law or the lex arbitri in theory could be divided into national arbitration laws of a county and other arbitration rules (institutional, like ICC Arbitration rules or ad hoc rules, like UNCITRAL Arbitration rules). However, for the sake of clarity, this paragraph will deal only with the law of the seat of arbitration (lex loci).

In order to identify the procedure and laws which will govern the international arbitration, firstly, the arbitration laws of the seat of arbitration must be taken into consideration. Seat of arbitration can be called the juridical place of arbitration. However, the hearing itself could be organised anywhere which is convenient for the parties. It is of great importance for the parties to choose the proper seat of

arbitration, because, firstly, the mandatory rules of local arbitration law will govern substantial procedural matters in arbitration. Secondly, parties must take into account the national court's approach to arbitration and analyse local international arbitration regulations and see what assistance could be made by national courts to arbitration proceedings (for example: interim measures). Thirdly, is a country a party to the New York Convention for enforcement issues? Fourthly, the place of assets or evidence and local arbitration regulations for taking evidence. Therefore, the mandatory requirements of local arbitration laws can not be avoided and all aforementioned issues should be analysed carefully.

An example of local arbitration law could be the English Arbitration Act 1996 or the Arbitration (Scotland) Act 2010. Both of these acts consist of mandatory rules and requirements which can not be avoided or agreed by the parties to avoid them. For example, if the chosen seat of international arbitration is London, then English Arbitration Act 1996 and it's mandatory requirements would apply and if the seat of international arbitration chosen by the parties in a contract clause of after the dispute arose stipulates Glasgow, then the Arbitration (Scotland) Act 2010 and it's mandatory rules would apply.

An important point to be made here is that parties can choose also other rules which would govern their procedure of international arbitration or make there own rules. However, the mandatory rules of procedural law of the seat of arbitration would prevail in a case collision of local mandatory rules and other rules chosen by the parties. Another example can be made with the Arbitration (Scotland) Act 2010 which consists of mandatory and default rules. Therefore, mandatory rules would always prevail, but the default rules of Arbitration (Scotland)

Act 2010 would take effect only where parties did not agree otherwise.

Furthermore, the UNCITRAL Model Law on International Commercial Arbitration is also relevant in this context. In order to be confident and to ensure that the arbitral award would be enforceable and binding to the parties, they would be advised to check whether the arbitration law of the seat is compatible or at least similar with UNCITRAL Model Law. All modern international arbitration acts are drafted in compliance with UNCITRAL Model Law which represents good practice and proper facilitation of international arbitration.

Arbitration rules

It was mentioned that parties may chose, after the dispute arose or stipulate in their contract, that their dispute would be governed by arbitration rules. It was also mentioned that parties can not avoid mandatory requirements of local arbitrations laws of the seat, however, all other procedure of arbitration can be governed by arbitration rules. Arbitration rules could be divided into institutional arbitration rules, ad hoc arbitration rules and other regulations (soft law). For such rules to take effect in arbitration proceedings it is necessary for the parties to agree and stipulate in their submission to arbitration or in their contract clause that such rules would apply in a case of dispute. Examples of institutional rules are the ICC Arbitration rules or the LCIA Arbitration rules. If parties have chosen the ICC or LCIA Arbitration rules to govern their international arbitration, then substantive issues in their arbitration procedure would be governed by such rules, for example, - appointment of arbitrators or challenge of arbitrators. In ad hoc arbitration, parties can also chose the rules whichever they like, for example, the UNCITRAL Arbitration rules or even make their own rules. However, enforcement

issues should be taken into account while choosing rules, because due process and opportunity for the parties to present their case are the essential keys which must be provided by the rules in order to ensure the enforceability of the award. Soft law can also be chosen by the parties to govern their dispute settlement in arbitration. It must be incorporated by the parties into their arbitration agreement or agreed by the parties to apply or could be applied when tribunal acts as amiable compositeur or aequo et bono. Soft laws refer to those practices, standards, rules, directions or guidelines which have a persuasive effect or represent best practice[2].

Substantive law

Substantive law or, as commonly called, the law of the contract is also an important issue which determines the outcome of international arbitration. The substantive law is the one which determines the rights, duties and contractual obligations of the parties to a contract. An arbitrator will apply the law of the contract after all matters in the dispute are considered and the law of the contract will be the foundation of the arbitral award. However, the substantive law of the contract can not be discussed in the absence of the law of the seat. The relationship between the laws of the seat and the substantive law usually comes in question when certain contractual obligations can be contradicting with the law of the seat of arbitration. For example, rights and duties under the contract can is some countries be in a conflict with money laundering or public policy provisions regulated under the laws of the seat of arbitration. In such a case, the law of the seat would prevail or the award could not be enforceable.

[2] Introduction to International Commercial Arbitration. Dr Emilia Onyema, Chartered Institute of Arbitrators 2008;

It is also important to recognise that the agreement to arbitrate can be governed by different law – the so called separability doctrine. For example, if the contract is void, it would not mean that the agreement to arbitrate would be also not enforceable. Such rule insures the parties that the agreement to arbitrate would not be influenced by the contract itself and that the outcome of contractual obligations would be decided the way the parties intended, while drafting the contract.

In cases where parties explicitly chose the law applicable to the contract, usually there are fewer problems to arbitral tribunal as compared with situations where there is no such stipulation. In such a case, the arbitral tribunal should, after considering all relevant facts and matters in the contract, decide what law should govern the contract. International conventions or conflict of laws rules should be applied. However, in international arbitration, parties can also choose the law applicable to the contract after the dispute arose, for example, under Art. 3 of the Rome convention.

Furthermore, parties to a contract usually choose the national law of one or another country. However, they are not precluded to choose other laws or rules, for example lex mercatoria or the UNIDROIT principles. Notwithstanding that those rules is the expression of the principle of parties' autonomy, the law of the seat should not be forgotten in order to arrive at the enforceable award which would be binding to the parties.

Conclusion

The internationality of the parties and the internationality of the dispute are the main causes of the interaction of different laws and rules in international arbitration. Parties are free to choose the conduct and the procedure to follow in their international arbitration process.

However, there are also restrictions to party autonomy principle and the law of the seat of arbitration has a major influence to international arbitration procedure. Before deciding what rules to follow and where to conduct international arbitration, parties should find the equilibrium between their will to conduct arbitration freely and arrival to enforceable award – the main objective of international arbitration.