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CHOICE OF LAW GOVERNING THE NATURE OF THE CLAIM BY THE ARBITRATORS

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Abstract .Freedom of the parties in this context has great scope, to the extent that their choices do not include the restrictions of autonomy principle, and their autonomy should be respected. On the other hand, in case of parties' silence, the arbitrator decides according to appropriate rules of conflict resolution. Appropriate rules of conflict resolution do not mean that the arbitrator, necessarily, should refer to Iran conflict rules for determining the law governing the nature of the claim, but the intention is that the arbitrator has a choice in selecting appropriate rules of conflict resolution, and this is a prevailing trend in international commercial arbitration. In International Commercial Arbitration, in addition to determining law governing the nature of the claim, the law governing the arbitration agreement, and the law governing the procedure of the arbitration, also rises and in this thesis, questions have been raised that are answered as follows: Methods of determining law governing the nature of the claim are different and varied. Iranian legislator ratified the international commercial arbitration law, according to the methods of determining law governing the nature of the claim, and in order to the commercial and economic development. The method of choice of law by the parties is in fact recognizing the principle of party autonomy and accepting the choice of law by both parties, engaging them in resolving their differences, and by implication, (not necessarily) making fair decisions. The research method in this study is theoretical (descriptive - analysis), which the result of this study is that, Iranian legislator ratified the international commercial arbitration law, with considering the above levels and in order to develop Iranian trade and economic and, in fact, it has the same pace and direction with the development of international trade and economic. In such a situation, it seems that the existence of two heterogeneous and conflicting rules, in Article 968 of the Civil Code and Article 27 of the international commercial arbitration law, the situation is not suitable, and therefore, regardless of the Imperatives theory and practice of selection, which was raised on Article 968 of the Civil Code, reviewing the rule of conflict resolution in Article 968 of the Civil Code and amending it in line with the international commercial arbitration law is an interest, based on modern materials and it seems inevitable.

Keywords: Governing Law, The Nature of the Claim, Arbitration, Commercial, International

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1. INTRODUCTION

Determining law governing the nature of the claim is one of the key issues that are raised in international commercial arbitration, and in other words, in the transnational arbitration. This issue is essentially related to "private international law, which finds a special face in international arbitration, and is not fully compatible with the generally accepted rules of private international law.

This study seeks to examine ways of determining law governing the nature of the claim, which result in the decision about the nature of the dispute as the cause and the ultimate goal of arbitration. In other words, when arbitrators settle the claim, based on the governing system of a national legal system, they use what method or methods, and even, in cases where, on the basis of a transnational law system, the dispute is resolved and what method or methods are used .

Generally, what causes immense importance of the arbitration is the way that the application of settlement has in the area of international commercial claims, and the reason for this importance is private arbitration, choice of arbitrator, non-ceremonial proceedings, more speed and less cost and many other reasons. Choice of law governing the nature of the claim in the arbitration is an important issue in dispute settlement.

In this study, we will seek to answer the following question: what are the ways, in determining the law governing the nature of the claim, internationally?

This article seeks to prove or disprove the hypothesis that the methods of determining the law governing the nature of the claim are varied. The methods include: (1) choice of law by the parties.

The purpose of this article is to develop a culture of going to arbitration in the country and the legal community.

The research method in this study is theoretical (descriptive - analytic) and data collection, in this essay is a field and library.

The most important tool used in this article is to collect data by taking notes.

1.1. Implied term as an evidence of negative option to apply national law

In trade agreements among governments, organizations and state-owned companies, national rule of law offer from one party on their business relations is usually faced with serious opposition of the other party. Arbitrators may interpret their behavior in negative ways, in the absence of an explicit choice of governing law, and consider it as an opposition to apply national law of the parties. Because the absence of an explicit choice implies that they failed to agree that their trade relations depend on the national law of the other side. So, the arbitral tribunal implicitly deduces this silence as a negative option of the governing law. (Amir-Moezzi, 2009, p. 399)

In contracts that the government or the institutions, companies and government agencies, are their parties, it is strongly recommended that, in such cases, the parties in the contract should note that:

None of the national rule of law parties has accepted the other party. In this case, the arbitral tribunal, regardless of the national law of the parties, looks for a neutral law or general principles of law, international trade law and trade conventions.

In the negotiations, when the parties do not reach an agreement in selecting the governing law, they spend the opportunities for discussion on matters and circumstances that there is a possibility of reaching an agreement. Particularly, in contracts that the state or sub-state are their parties, the governing law is not discussed, because of a negative reaction. They consider accepting the national law of the parties incompatible with the sovereignty of the state, and they do not want to depend themselves on the law of the foreign national. (Amir-Moezzi, 2009, p. 400)

Therefore, arbitrators should not determine the governing rule by using international conflict resolution rules, such as regulations of the closest connection, in the 1980 Rome Convention. For the application of this provision, ultimately, ends to determine the national law on the one party that has an obvious conflict with the intention of the parties. In addition, the use of other regulations, such as the center of gravity of the contracts and characteristic performance leads the arbitrator to determine the national law, and the parties have been opposed to its application from the outset.

1.2. The rule of law in the seat of Arbitration

According to this theory, the arbitrator should refer to private international law of a country in the place of arbitration and determine the rule of conflict in the

country, law enforcement in the nature of the claim. In this theory, arbitration is likened to judicial proceedings in the civil courts, and the place of arbitration rule of conflict has been considered as the regulation in the seat of the court. In fact, this theory suggests the same solution that is applied in the judgment of Justice, according to the old principles of private international law. One of the most famous proponents of this theory is Professor Suserhal, Swiss lawyer that has defended it in his report to the Institute of International Law, in 1952. The text that was passed by the resolution of the Institute of International Law, called "Amsterdam resolution" in 1957, apparently, did not leave any place for parties. It can even be said that the recent resolution has exclusively given the determining the law governing the nature of the claim to the rules of conflict of arbitration. (Skini, 1990, p. 158)

This theory has been severely criticized. To refute this theory, it is said that there is no organic legal relationship between the claim and the country where the arbitration forms and the Court of Arbitration is not a part of the judiciary organization of the country, and however, in accepting it, no vote of the International arbitration authorities has been issued. Furthermore, the idea is not easily applicable because the place of arbitration in all contracts is not determined expressly, or maybe the place is certain, but it is not single. In such a case, it is unclear that the legislation of which designated places were considered by the parties. (Safai, 1996, p. 141)

In some of the views of the International Chamber of Commerce, even those that have been issued, before the adoption of the new rules, dated 1975, which give freedom to the arbitrator in determining the appropriate law, it is seen that, metaphoring the arbitrator to the judge and comparing the place of arbitration to the seat of the court, was rejected. In one of these votes, it is:

"Determining rules of law vary from country to country. State judges choose them from their national law, which is the law of the seat of the court, but an arbitration court has not law in the strict sense of the word, especially when, the case is the item has the international nature of the nature of the subject of the claim, the arbitrators' choice and an organization that monitors the arbitration". (Y.Derains, 1972, p.104) (Quoting Janidi, 1997, p. 206)

In another vote of the Chamber of Commerce that Professor Lalive acted as a single arbitrator, states:

"International Arbitrator does not determine the law that would borrow the rules of conflict resolution from it." (Janidi, 1997, p. 206)

Thus, today, the rule of law arbitration based on the nature of the claim is ruled out as a definite rule, and this factor, along with other factors that are involved in selecting the rule of law, can be raised. As a result, we can no longer claim, the assumption of selecting an arbitrator to select the law. Leo says, in this regard: In recent years, the utility of above assumption has been reduced, because the basis that assumption is based on, is illogical and wrong ... Today, this assumption is just one of the connecting factors, which may have the relevance and applicability in special circumstances. (Janidi, 1997, p. 206)

In some new cases of Commerce Chamber that the conflict rules in the seat of the arbitration are imposed on them, typically, the situation is that, due to the lack of a stronger connection factor with another country, so that they are preferable by the country- the arbitrators have come the conclusion that, by selecting the place of arbitration, the parties showed their lack of objection in imposing the rules, as an appropriate law, in particular, if non-local arbitrators have also selected. (Kordestani, 2013, p. 84)

The important thing that can be said in the critique of this view is that the law of the seat of Arbitration theory has been canceled from the beginning, about the major categories of contracts, which means the government contracts.

1.3. Rule of law, government of the contracts

According to this theory, which has been applied in some international opinion, the arbitrator, in each case, determines a place of the legal relationship, according to its nature, and run the regulation of the conflict. To be more precise, if a legal relationship with a particular country has more or enough links, the same country is considered the legal relationship place and the conflict regulation of the country determines the law's entry into force. In case of dispute, arising out of contract, a country where the contract is more closely related to it is determined, and with the use of private international law, law governing the nature will be highlighted. (Ojaghlu, 2008, p. 21)

What support the idea, now are a few things.

1. For the purposes of international documents, rules of arbitration of the International Center for settlement of claims related to the investment are proposed, which accordingly, in lack of agreement between the parties with respect to the substantive law applicable, the law of the State Tribunal is convinced and applied including conflict of laws rules. (Article 42 of the Arbitration Rules of the International Center for settlement of claims related to the investment).

2. Applying new perspective of private international law, which is reflected in some new approved laws, such as the European Convention of 1980, which means applying the closest and most realistic measure of the relationship also typically leads to the rule of law, government contracts. This view is reflected, in the article one, from the Institute of International Law adopted a resolution, in Athens, dated September 1979. In this article, states:

"Contracts concluded between a State and a foreign private person is subject to legal rules that have been selected by the parties and in the absence of choice, it is subject to legal rules that the contract has the closest relationship with it."

The lack of choice of law by the parties, it is said both in the European Convention of 1961 and in the rules UNCITRAL and regulations of the Chamber of Commerce, that arbitrators should run the law determined by the rules of conflict of laws, which are applicable. Applying the rules of conflict of laws means that domestic law, that is most relevant to the contract, shall be governed, not the general legal principles or international law...

In practice, in disputes between governments and foreign companies, the rules of conflict resolution, often, but not always, leads to apply the law of the land involved in the case, and that is controversial because of the close relationship between the origins of a contract dispute with the government. (Janidi, 1997, p. 207)

3. In terms of scientific procedures, Deniz famous case of the Serbian loans is consistent with the terms mentioned above. In this case, the Permanent Court of International Justice commented:

Any contract that agreement between the governments in terms of their post will not be as international rights issues is based on the law of the country. The issue that what is the law is a branch of the rights, which is usually described as private international law or conflict of law theory.

We have seen that, applying the rules of conflict resolution, typically, lead to the rule of law, government contracts.

4. One of the reasons is the status of the ruling government. Some wrote, it cannot be assumed that a ruling government of the contract makes it subject to a legal system other than its own legal system. And others have gone too far in this case and even considered applying a non-local substantive law as well as applying a foreign national law, contrary to their government and believed that:

"As if about applying a foreign national law, he is desecrated, it will be the same by applying a non-local law. Therefore, although the application of a national law in the practice of international arbitration as usual, and dominant, the tendency is in this direction that the national law of the contract will be applied. "The fact is that, because the law of contract may provide entirely the government benefits and, in particular, may be changed unilaterally and removes the stability of the agreement. Now, applying a variety of non-local substantive law is raised, and this method has the relatively wide acceptance. (Janidi, 1997, p. 208)

With all this support for the theory of conflict of laws and relying on the law enforcement of government contracts, in principle, it is in favor of developing countries.

1.4. Freedom of the arbitrator (applying the most appropriate system of conflict of laws)

Under this theory, the arbitrator, in the silence of the parties is free to select the conflict regulation, which considers appropriate, and determines the binding law through it. According to this theory, the arbitrator is not obliged to respect the conflict regulation of a particular country, and even, according to a promise, if he does not consider the conflict rules of countries appropriate, he can make the rule of conflict. (Safai, 1996, p. 141) This is a theory that is referred in Article 7 of the Convention in 1961: "... in the case of not indicating the law governing the contract by the parties, the arbitrators of the law governing the nature of the claim can be determined by referring to the principle of conflict, which identifies appropriate in each case". Paragraph 1 of Article 17 of the arbitration rules of the International Chamber of Commerce, states: "The parties may determine legal rules that the arbitral tribunal shall apply in the nature of the claim, with the agreement. In the absence of such agreement, the tribunal applies the legal norms, which determines

appropriate." Article 1477 of the new Code of Civil Procedure France predicts the same solution. From a practical standpoint, most of the arbitrators have put this way of thinking into effect. In fact, especially in Western countries, the international arbitrators do not recognize respecting the internal systems of the conflict of laws necessary. In contrast to the socialist countries, in which international arbitration depends on the domestic law of these countries and in the case of not determining law governing the nature of the claim, the arbitrator is obliged to enforce the law.

Analysis of the performance of arbitration, with the arbitrator reveals a double line of thought. The arbitrator, at first searches to see that if the conflict relationship is dominated by an international rule of substantive, which could resolve the dispute, or not? This is the first stage of argument, based on the thinking that the rules of customary international business directly, can regulate international trade relations and, in this case, it is preferable to the rights of the interior. Therefore, the arbitrator's effort must be expended to prove the existence of customs and practices and its direct connection with the subject of the dispute. The arbitrator must show which international trade custom is in the dispute that could settle the subject of dispute. This procedure is according to international commercial arbitration law. Article 7 of the European Convention 1961 provides that, in all cases, "the arbitrator will calculate the business customs ... as renege." Also, paragraph 2 of Article 17 of the Rules of Arbitration International Chamber of Commerce, also stipulates: "In all cases of the tribunal, it should consider "the agreement terms" and "the relevant business custom." In paragraph 4 of Article 28 of the law of UNCITRAL also referred to it. (Kalantarian, 1995, pp. 380-381) This is explicitly stated in paragraph 4 of Article 27 of the Law of International Commercial Arbitration. Under this regulation, the arbitrator, in all cases, should make decision according to the terms of the contract, and business practices should consider the matter.

1.5. Systems integration of conflict resolution

In this way, the arbitrator searches the applying of a law conflict system, in all systems of conflict rules that are associated with the claim, so that with their help, he can reach a single system, which implies a specific law. It means the whole systems refer him to a specific national law. Some legal scholars supported this way, especially Mr. Drain, who stated: "The arbitrator checks the rules of conflict of laws in different countries related to the claim that have been released for him, one by one. If the rules of conflict of laws, which the contents are always different, are directed to a national law, the ruler declares that this law is applicable. (Nikbakht, 2009, p. 328)

1.6. Applying the general principles of conflict of laws

According to this theory, if the parties to the contract do not select the law, the arbitrator should run the principles of international law in the contracts, without referring to the conflict rules or substantive rules of a particular country. Thus, the international relationship agreements, with a particular country will be cut and this contract is subject to international law. Despite that, the theory is confirmed by some international votes, but, it has been under strong criticism by legal scholars. This theory is objectionable in two ways.

First, in terms of the fact that there are no criteria and rigorous standard for the internationalization of the contract, and secondly, the existence of "international law of contracts', is doubtful. Because it requires that private entities under contract with the government will be the parties and right and obligation owner, in international law, whereas, usually, only governments and international organizations are considered as the rights and obligations party in this field. (Ojaghlu, 2008, p. 22)

In Verdict No. 4996 Chambers of Commerce, said: "In private comparative international law, place of performance of the contract rule, (that probably, takes the form of residence or ordinary residence law of the party, who is responsible for the implementation of the contract), is supremacy over the signing place law. (Clunet, 1985, p.1133) (Quoting Ojaghlu, 2008, p. 22)

Evve Drain has written on the interpretation of the vote: "Arbitrators, in fact, evaluate various relationship factors, to decide on this issue that which of them should be applied, in accordance with the general principles of private international law." (Janidi, 1997, p. 214)

A similar argument can be seen in another vote of the Chamber of Commerce, and in this vote, it said the general trend in the conflict rules is in the application of domestic law for the ordinary residence of the obligor, who is responsible for the fundamental commitment arising from the contract. This obligor in the sales contract is the seller. (Yearbook, 1990, p.71) (Quoting Ojaghlu, 2008, p. 22)

Sometimes, this method is applied with recklessness and audacity. In one claim, in 1967, stated that: "According to current theory and jurisprudence related to conflict of laws ..., the primacy is with the law of concluding the contract place and in subsidiary, with the applicable place law." (Lando, 1987, P. 332) (Quoting Ojaghlu, 2008, p. 22)

1.7. Direct election of substantive law

In case of not determining the substantive rule of the arbitration by the parties, the task of determining it is assigned to the arbitrator; In fact, paragraph two of Article 27 of the International Commercial Arbitration, adapted from paragraph two of Article 28 of the Model Law UNCITRAL Arbitration, ruled "in the absence of determining the applicable law by the parties, the arbitrator deals with the nature of the dispute, legally that recognizes appropriate in accordance with the rules of conflict".

The main characteristic of international arbitrator's positions, which should determine the applicable Rights on the nature of the claim, indeed, is his freedom and diagnosis, in determining the applicable law. The arbitrator responds the legitimate expectation of the partie with the use of this freedom. (Drain, 1988, p. 173)

The paragraph was discussed in the conference related to examine the UNCITRAL Arbitration Model Law. A group was opposed to the content of this paragraph, due to the reason that it limited the authority of judges, contrary to the new trends in arbitration. (Broches, 1990, p.130) (Quoting Ojaghlu, 2008, p. 22) Among experts in Western countries, mainly the prevailing opinion is that the arbitrator should not be limited to the conflict rules, like courts, which the court use, but the arbitrator should be given more power (Lando, 1987, p.138) (Quoting Ojaghlu, 2008, p. 22). Some even believe that the arbitrator is not obliged to respect a specific state regulation conflict and even Fushar says that if the arbitrator does not fit the rules of conflict of laws of the country, he can make a regulation of the conflict himself. (Safai, 1996, pp. 27-28)

This belief was introduced at the United Nations Conference on International Trade Law. The representatives of the United States of America, Argentina, France, Canada, Sweden and Australia stated that, in determining the applicable law by the parties, the conflict rules should not be mentioned and the arbitrator, in accordance with the new trend, in practice, of International Commercial Arbitration should be free from the conflict rules. (Broches, 1990, p.130) (Quoting Jafarian, 1995, p. 134)

The result of the arbitrator's freedom, in determining the applicable law in the nature of the case, is that anyway, it has exempted him from running the principle of "the Court". In this sense, the situation of the arbitrator is different with the court judge, in cases where he is faced with the issue of conflict of laws, fundamentally. (Jafarian, 1995, p. 135)

According to the international arbitrator, removing the rule of law court, at least, has two important results:

The first result is that the concept of competent law will be meaningless for the arbitrator, because there are no rules that the arbitrator would be required to implement it. Of course, implementing the law of the parties is considered an exception, because the result of the implementation of a special regulation is international arbitration (ie, the principle of freedom of parties to choose the law) and not a result of the involvement and enforcement of the court law.

The second result is particularly explained by Professor "Goldman", and there is no foreign law in international arbitration to the meaning that is not a member of the investigating authority legal system of the claim. All the rules have the same value, according to the arbitrator, and none of them has a privileged condition and status. This is applicable in the proof of concept stage and the provisions of law. In addition, it is limiting as a factor and repulsive in public order, and it has major effects in the case and in fact, it liberates the arbitrator from the national law of the parties. Basically, international arbitrator is not obliged to observe the purely national context. (Drain, 1988, p. 178)

It was also reported that: "The arbitrator cannot act based on some of the determined rules of conflict resolution, and consider himself obliged to select the law, based on the principles that can rely on less. It should be noted that, the arbitrator must not obey the rules of conflict of a country, rather than conflict rules of another country." (Sammartano, 1990, p. 258) (Quoting Jafarian, 1995, p. 134)

Obviously, foreigners that deal with the rights of Iran, if they feel that the rules of international commercial arbitrations of Iran, clearly support and advocate Iranians, they would prefer to refer their differences with the Iranians to the non-Iranian authorities for arbitration. Therefore, it is necessary to set the regulatory context of international

commercial arbitration to provide the ensuring of all parties to the dispute, including foreigners. Therefore, it is suggested to remove the term "conflict rules recognize appropriately" in paragraph two of Article 27 of the International Commercial Arbitration Act, and replace the phrase "conflict rules that recognize appropriately, will be determined."

2. CONCLUSION

The cause of disputes and litigation in commercial contracts is whatever; the benefit of both sides exists in it to conclude it in the right, secure and expertise way. Cost-benefit logic in business firms also requires that, commercial disputes will be resolved as soon as possible and also, methods of resolving commercial disputes should be implemented tailored to the needs of the commercial.

Arbitration methods are considered the best and the most professional and fastest way to resolve commercial disputes that causes the claims are not involved in the complexity of the rules of procedure of the courts.

Promoting arbitration and support it is one of the indicators of the strength and integrity of the legal system in each country, and even is a sign of progress and prosperity and trade, and in turn, it is considered in the row of preconditions for entering a safe and effective partnership, in the global economy. Hence, the development and support of arbitration appears necessary, because the development of a legal system, in the arbitration is considered a significant achievement. Methods of determining law governing the nature of the claim are varying. These methods include: (1) choice of law, by the parties (2) choice of law by the arbitrator

The first method arises from the nature of the arbitration, in which the independence and freedom of the will of the parties is the principal and decisive. To recognize the autonomy principle and accept the right choice for parties is engaging them in resolving their differences, and by implication, (not necessarily) make more fair decisions.

The second method includes different types, including: rule of the government party of the contract- seat of the arbitration rule- arbitrator's freedom in applying the most appropriate rules conflict system-integration systems of resolving the conflict- applying the general principles of conflict resolution- direct election of substantive law- applying transnational business rights, including the general legal principles or international law convention, or public international law.

Nevertheless, it seems that the conflict rules with national laws, for international trade are not talented or enough rules. In addition, the rules of international law or international conflict cannot be verified as well. Diversity and the wide variety of rules on conflict of laws cause instability and fragmentation of the law applicable to the nature of the claim.

Instability, due to conflict of laws, which unpleasantly, affected the International Commercial Arbitration, can be improved by updating the rules of nature, both nationally and internationally, and move towards integration. To achieve this goal, we must admit that arbitrators can apply the laws of nature in certain circumstances, which is proper.

Regardless of the rules of conflict of laws, one of the most prominent features of international commercial arbitrations, at present, is tendency to non-nationalization of arbitration, of substance that now, the growing trend of exercising transnational business rights, to the nature of the claims in international trade, mentioned in the arbitration references is the clearest reflection of this trend. In conventions and some international arbitration documents, and arbitration regulations of international institutions, and some national laws, clearly, the possibility to apply various elements of transnational commerce is accepted, that such an approach, even regardless of the criticisms, somehow, is more accurate and more convenient than the other methods described above.

On applying the principle of equity, and the village chief patronizingly, which is the most suitable and logical methods, it should be noted, if it is considered that the arbitrator's vote will be just, fair and reasonable, it should appear fair, just and reasonable in the context in which, it is applied, not based on personal notions of fairness and justice. Arbitration, based on equity, contrary to popular belief, necessarily, is not a decision outside the framework of legal rules, but it is completing and correcting legal rules, based on fairness and justice.

However, Iranian legislator considers the above matters, and adopts International Commercial Arbitration law in the development of Iran commercial and economic that in fact, it has a same path and pace with the development of trade and international economics. In such circumstances, it seems that two heterogeneous and conflicting rules in Article 968 of the Civil Code, and Article 27 of

the Law on International Commercial Arbitration is not a good situation, so, regardless of imperatives and selective theories that were raised concerning Article 968 of the Civil Code, reviewing in the conflict resolution rule mentioned in Article 968 of the Civil Code and its amendment, in line with the law on international commercial arbitration seems an interest, based on modern materials and inevitable necessity.

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