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METHODS OF DETERMINING THE LAW GOVERNING NATURE OF THE CLAIM IN INTERNATIONAL COMMERCIAL ARBITRATION BY THE PARTIES

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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.

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 short, it should be noted that in international commercial arbitration, the will of the parties is the reference and basis of work and this is why, the utmost respect will be done for the principle of autonomy in determining law governing the nature of the claim, however, when the law governing the nature of the claim is not specified by the parties, then the disagreement happens and arbitrators should determine what the law and based on what criteria, governing the nature of the claim. So at this point the importance and necessity of ways of determining law governing the nature of the claim will be characterized, because as long as the law governing the nature of the claim will not be determined, arbitrators and arbitration institution do not achieve the mission and their main goal, which is to resolve the existing dispute.

Despite the author's effort, no research was found in databases, which examined methods of determining the law governing the nature of the claims in international commercial arbitration, with an emphasis on arbitration jurisprudence. However, so far, few studies have been done in the field of international commercial arbitration, which can be noted, as follows:

1. Nahid Parsa, to determine the law governing the nature of the claim in the international commercial arbitration, the Ministry of Science, Research and Technology - Mazandaran University - Faculty of Law and Political Science in 2014 (Masters). The researcher examined that, in general, the arbitrator or arbitrators are obliged to settle the disputes between the parties, according to the law of their care. However, sometimes the arbitrators should ignore choosing the parties. Such as those cases that the limitations of the autonomy principle make the parties' selection ineffective. Selecting the law governing the nature of the claim, can have a significant impact in solving disputes through international commercial arbitration, because with its selecting, the parties find the ability to forecast the result of their contractual disputes, previously.

2. Hamed Zare Salahi, determine the law governing various aspects of the arbitration contract, the Ministry of Science, Research and Technology - non-governmental, non-profit institution of higher education Allama Mohades - Faculty of Economics and Administrative Sciences, 2013 (MS), the research examined the content that, in international business transactions, the possibility of legal proceedings is not excluded and at the time of the original contract, with the stipulation or after the contract with the agreement on arbitration, the parties to the contract may decide to settle possible disputes. In this regard, unavoidable problems happen about the law of what country in relation to the event of a dispute over various aspects of the arbitration agreement. Now, these two basic questions should be answered that whether the parties are able to determine the applicable law? In the silence of the parties, based on what law, arbitrators should resolve any disagreements? Arbitration in principle subjects to the parties' choice and the parties may choose the law governing the various aspects of the arbitration agreement, but it is clear that freedom of the parties cannot be without limitations and it has exceptions.

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. (2) The choice of law by the arbitrators.

The purpose of this article is to develop a culture of going to arbitration in the country and the legal community and the use of important references opinions of organizational arbitration in the areas of domestic and international.

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.

2. CHOICE OF LAW BY THE PARTIES

2.1. Explicit Selection, Based On the Principle of Autonomy

Systems of national law and treaties and international documents that have accepted the principle of autonomy, they obviously specified how to choose the law, and there is no doubt that they agree on the choice of law by the parties must be clear and unequivocal. Different expressions have been used in the systems and various legal documents to provide the explicit choice, such as, "The parties may agree to apply another law[1]" or "parties may select a law for governing their mutual relationship[2]" or "law governing the obligations is arising from contract law that parties to the contract depend themselves explicitly or by implication[3]", or "choice of law by the parties should be explicit[4]". Expressions resolution is more used in international conventions about the choice of law by the parties should be explicit. For example, Convention 1955 of the Hague said: "determined [governing law] must be stipulated in a clause explicitly [in the contract][5]" or Convention 1985 of the Hague, stipulates that "agreement of the parties regarding the selection [choice of law the ruling] should be explicit[6]" or Convention of Rome in 1980, states: "selection should be stipulated [explicit][7]" or Convention of Mexico in 1994, between the American states, "the agreement of the parties about the choice should be clear[8]." Rules of Arbitration, International Chamber of Commerce[9] and the UNCITRAL Arbitration Rules have accepted the choice of law by the parties, in general and do not have affirmed that the choice must be explicit[10]. However, as previously stated, there is no doubt that in these documents, the selection can be explicit, since the first method of selection tool, and awaring others is expressing and asserting it, by the choice owner.

The parties may select a contract, clearly, about the law of the country, with a simple condition. This condition is known the same as the clause law of choice. For example, the parties in the contract provide a condition, saying: "This contract is under the rule of law country X" Or, for example "the interpretation of the contract will be done according to the law of country X[11]." Explicit choice of law is possible, (although it probably will cause problems) to be done as noted, as if it is stated in the contract, the law of demandant's normal habitual residence or the main place of one of the parties' profession will prevail the contract.

When an explicit clause, choice of law, is written in the contract, this paragraph should be unambiguous as far as possible, and all aspects of the contract, and dispute or all of the issues, which is realized within, should be specified. In some contracts, the parties insert provisions of international law, as a condition or clauses in the contract[12]. This action should not be considered as an explicit choice of law. For example, in a sales contract, the parties agree that the responsibility of the seller against the buyer will be determined in accordance with the provisions of the Civil Code of Iran. Here, it does not mean that Iranian law is the law governing the contract, but the meaning is inserting provisions of the Civil Code of Iran, as a stipulation in a contract that, for example, its governing law is French law. This approach, in fact, is a shorter and easier way to insert provisions of civil law in the contract, instead of writing word

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[1] Such as, the Article 59 of the law conflict of laws in Kuwait:
...; touq low another of application the to agree parties contracting the ... unless quot;

[2] Such as, the Article 9 of the Private International Law Act 1963 in Czechoslovakia:
...; touq mutuels partimoniaux rapports leurs regir a droit le pour opter peuvent contractants Les quot;

[3] Like the Article 968 of Iran Civil Code: "... unless, Parties are foreign citizens and select it as [the obligations arising from the contract] explicitly or by implication, subject to another law."

[4] Such as, the paragraph 2 of Article 116 of the Swiss Private International Law Act:
quot; ... express be must choice The quot

[5] The 1955 Hague Convention Article 2 reads:
; Touq clause express an in contained be must designation Such quot;

[6] Article 7 paragraph 1 of the 1985 Hague Convention reads:
...; touq express be must choise this on agreenent, parties The quot;

[7] The Article (1) 3 1980 Convention Rome so: ...; touq expressed be must choice The quot;

[8] Article 7 Convention 1994 included Mexico, Inter-American is as follows:
quot; ... express be must selection this on agreement parties The quot;

[9] ICC

[10] Paragraph 3 of Article 13 of the International Chamber of Commerce arbitration rules, states that "the parties will be free to determine the rule that should be applied by the arbitrator to the nature of the claim."
the of merit the to arbitrator the by applied be to law the determine to free be shall parties The quot; .quot; ... dispute

[11] As a whole, it is said that the contract will be interpreted by the law of the country X, with that said; this contract does not matter under the protection of country X.
Dicey & Morris, The Laws of Conflict,, ed 10. (Stevens & Sons, Limited, 1980, p.758) (quoting Nikbakht, 1377, p. 188).

[12] Incorporation

for word of the articles. Inserting provisions of a law on contract that the law governing it is not determined by parties, may be a justification for the parties intended the law to be the same governing law in their contract (the implicit choice of law), but essentially it is not.

Inserting a rule, in the contract has features that are different from the law governing the contract. For example, the insertion of the law in the contract affects only as a condition of contract, and its interpretation, based on consensus and the will of the parties and, in particular, by a judge, would act such as the interpretation of other provisions of the contract, and not like commentary in the contract will be included, and as a condition of contract, from any direction, including the validity will be subject to the contract, while, maybe the choice of law clause is interpreted as an independent clause of the contract, and lack of validity or invalidity of the contract claim does not have an effect on it, and even addresses the validity of the contract according to the law that is mentioned in the paragraph above[1]. More importantly, the fact that, with the insertion of foreign law in the contract, the law will remain as a part of the contract, although, later, it will be modified or abolished, that is, changes in the law do not affect on what is listed in the contracts, or at the time the contract. While, with the choice of law, it is assumed that the parties intended to admit, that the law governs their relations, in the form it existed at the time of the visit (at the time of the hearing), namely If the law is changed, the new form will rule the relationship between the parties (Nikbakht, 1998, p. 188).

Paragraph 1 of Article 3 of Regulation Rome recognizes the autonomy principle. According to the above paragraph: "The contract is subject to the law that the parties have chosen" Article cited by both parties has considered a right and full freedom, to determine the law governing contractual obligations.

Based on this principle, the parties are free and autonomous in determining the choice of law governing their obligations. In line with the principle expressed above, the parties to the contract often dedicate a paragraph of the contract to determine the law. The choice of law by the parties can be the national law of one of them and national law of a neutral country (Amir Moeizi, 2012, p. 109). None of the criteria to determine the law governing the contract has the ability to resist against the consensual law. Because, the agreement law is not the only option, among other options, but it is only a correct criterion and the only referral option (Shariat Bagheri, 2012, p. 101).

2.2. Implied Choice

Conflict rules determine the rules of the court or treaties and international documents related to conflict rules that whether the implied choice of the parties about the applicable law or governing law will be accepted or not and if yes, the same rules will define the implicit selection or determine the way to realize them. Today, in many conflicts of laws systems (domestic and international), implied choice of law governing the same explicit choice is recognized. That is clearly and specifically, they consider the implied choice and the implicit, and they provide that, if the implied choice does not exist in the contract, but the circumstances and terms and conditions of the contract indicate a legal choice in the contract, the law will be accepted as the implied choice of the parties and will be assumed governing the contract. For example, paragraph 2 of Article 116 of the Swiss Private International Law Act, passed in 1987, stipulates that "the choice of law must be explicit, or should be determined clearly from the terms of the contract or the circumstances." Or Article 9 of the Law on Private International Law in 1963 Czechoslovakia, states "the parties to the contract may, even implicitly, choose the law governing the contract, if given the circumstances, there will be no doubt in declaring issue." Similarly, Article 59 of the law conflict of laws in Kuwait provides that: "If the circumstances indicate that what the law is, it will be considered the same law governing the contract." Or Article 35 of Law on Private International Law in 1978 Austria says: "If the circumstances show that the parties considered certain rules, as the determining law, it would equal an implied choice".

Legal systems that have accepted the implied choice, in practice, consider the case that there is a genuine election of the parties in the contract, but the choice has not been specified with words and the language, and the legal choice clause is not evident in the contract. In other words, the terms of the contract or the circumstances in which the contract is signed indicate that the parties considered the issue of which law should be governed on their contracts, and even

[1] For example, paragraph 1 of Article 8 Convention 1980 Rome on the law applicable to contractual obligations stipulates: "The existence and validity of the contract, or any term of the contract will be determined by applying the law that if the contract or clause was valid, it will be prevail under Convention."

decided together about the decision, but they did not include it so clearly, in the contract. For example, according to legal rules or legal entities of a specified country in the contract should be considered as the designated choice of the law of that country. Therefore, if there will be a statement, in the contract, such as: "Although the supervening cause, in Iran civil law has been predicted ..." this is a clear indication that the parties' thought was focused on the governing law, and they have decided that Iranian law (at least in certain subject supervening cause) prevails.

There are many cases that an agreement on jurisdiction of a country courts, or putting the judge in the country has been considered as the implied choice of the parties to the ruling of the law of that country (the seat of the Court or Arbitration), or the use of a standard form of contract (contract on a standard form) which is known and the form is under the governance of a certain legal system, even without explicit expression of the law (governing law) in the form, the parties, implicitly, have chosen the legal system, to govern the contract. For example, according to the courts of England, the choice of insurance policy form in England marine insurance Lloyds, for insurance contracts by non English insurance and insurers and unconnected with the UK, indicates that the insurance contract, on the form is under the law of England. Or if the contract is without the explicit law and will be followed or in connection with contracts which were in the course of exchanges between the parties and they had the explicit choice of law, the former situation can guide the court so that the new contract must be ruled by law that the parties have chosen in their previous contracts[1].

3. EXAMINE THE AUTONOMY PRINCIPLE IN ARTICLE 968 OF THE CIVIL CODE AND ARTICLE 27 OF THE ARBITRATION ACT

3.1. Examine Theories on Article 968 of The Civil Code

The civil law of Iran, as the fundamental law and fundamental rights in Iran, has an important rule to solve the conflict about the law governing the contracts. Article 968 of the Civil Code, provides:

"Obligations arising from contracts depend on the place of the contract, unless, the parties are foreigners and place it, explicitly or by implication, subject to other law."

However, the term "contracts" in this article is general, according to the other provisions; this Article does not include all contracts. Civil law, for example, in accordance with Article 7 of foreign nationals residing in Iran, provided that their country has a treaty with Iran, with respect to matters of personal status, is subject to their respective Governments. (Parvin, 1999, p. 274) Another exception for the "contracts" in Article 968 of the Civil Code is immovable, transfers, located in Iran because Article 8 of the Civil Code decreed that "the real property that foreign nationals in Iran select them as their property according to the conventions, will be subject to the laws of Iran in every respect.

Of course, in the case of immovable property in the territory outside the rules of the location of the property and contractual relationships between the parties, there is a possibility of implementing the law on commitments. It might seem that the provisions of Article 968 of the Civil Code are in conflict with Article 966 of the same law, because Article 966 of the Civil Code stated that "the seizure of property and other rights to movable or immovable objects will be subject to the law of the land that objects are really there.

At first glance, it seems that the "contracts" mentioned in Article 968 does not include the contracts related to trading movable objects, such as the sale of goods, and the contracts, in accordance with Article 966 are only subject to the law of the location of the property, but according to the rule of "Combine whatever possible first of the proposition" (Jafari Langroodi, 1984, p. 778), it seems that conflict does not exist between Articles 968 and 966 of the Civil Code, because according to the fact that the objective base of movable and immovable property of the country is the location of property and the contractual rights, in violation of regulations in the country where the property is, do not have the ability to identify and execute, and in any contractual agreement related to movable and immovable property must respect the regulations of the country where the property. Country location of the property may have rules, in cases, like the possession of aliens, withdrawal or non-withdrawal of funds from

[1] Reporters of Convention 1980 Rome on the law applicable to contractual obligations, while describing the state of previous transactions between parties, for example the implicit choice of law, argues that the lack of clarification on the law governing the contract seriously should not be in the circumstances that indicate a change of politics (previous) between the parties.

the country and some issues related to the possession and ownership that there is no escape from them, but outside of regulation in the Country of the property (that usually, these orders and prohibitions are not numerous and widespread, especially in the case of movable property), on many issues of contractual law, such as how to fulfill the obligations, terms of contract and effects of obligations, in general , Article 968 of the Civil Code has the ability to run.

Article 968 of the Civil Code is about the law governing the effects of obligations and it has not usability about the rules governing the basic conditions of the contract. It seems that, in this case, there is no rule of conflict resolution and inevitably, in accordance with the general principles of law, we must refer to the original. The principle of conflict of laws, the implementation of substantive law, is lex fori. (Pierre ghiho, 1992, p.63) (Quoting Nikbakht, 2005, p. 50) In this sense, civil law on the basic terms of the contract has the important article of 190, where it is noted:

"For the validity of each transaction, the following conditions are essential:

1) The intention of the parties and their consent; 2) The qualified parties; 3) A given subject, which is traded; 4) The legitimacy of the transaction

Due to the lack of rule of conflict resolution, in case law on the fundamental terms of the contract, Article 190 of the Civil Code exists in international agreements. Among the conditions mentioned in Article 190, required to implement paragraph 2, in the case of "qualified parties", according to Article 962, it is referring to the respective foreign law. However, Article 962 of the Civil Code notes the interpretation, "everyone" monitors the natural persons, but with the unity criterion, it can be extended to a legal person.

The oldest linking agent chosen for determining the applicable law of international agreements that was suggested by Italian school (school of commentators on Roman law), in the middle Ages, is "lex loci contractus", which was quickly accepted by many legal systems. Until the Middle Ages, for the contract is valid and enforceable, it must be signed in certain way and the freedom of the will were not in creating and the effects of the contract. From the 12th century onwards, gradually, the effect of will on the contract was raised and accepted. (Khomami Zadeh, 2006, p. 210)

Curtis, who is the last representatives of the Italian school, first refers to the authority of the parties, in determining the applicable law implicitly. (Mozhang, 2006, p.516) Later, Domolon, founder of the French school, in the sixteenth century, completed his opinion and stated that the parties are entitled to rule a law other than the law of the place of conclusion of the contract, on its contractual obligations. The contract is due to the ability and willingness of dealers, and they will have the right to choose any legislation that wish freely. (Nasiri, 2004, p. 79)

Today, the general acceptance of the principle of autonomy is, to the extent that, some consider it as a part of the general principle of law. Institute of International Law, in 1991, in an approved letter of sovereignty or independence of the will of the parties to international agreements, mentioned the "autonomy", as one of the "basic principles of private international law". (Nikbakht, 2005, p. 50)

3.2. Autonomy Principle

Article 27 will allow the parties to have a legally binding choice, to rule on their differences. This choice is not only possible to be the choice of a country law, (which has nothing to do with the contract), but also the parties can choose "the rules of legal", more than one legal system, or decide to settle their differences, according to the International Covenant, or a uniform law, which is not still in force, or willing that parts of the laws in different countries rule on their hearing, or the law of different countries rules on different aspects of their contractual relationship. Such a wide discretion of the parties of the contract is used based on the term "rules of law" in this article, which has been chosen instead of the word "law" of one country, in the UNCITRAL Arbitration Rules 1976. (Nikbakht, 2005, p. 138)

In this article, there is no mentioning that, if the choice of the parties should merely be an explicit or implicit choice would be accepted. But, it seems that the choice of legal rules (law), by the parties, can be explicit or implied. That is, if the arbitrator will be absolutely sure about the terms of the contract or the circumstances of the case that the parties have chosen law governing the dispute (implied choice), they apply it without entering the Lack of choice debate. It should be noted that the vast freedom is only for parties. In the absence of legal rules chosen by them, the arbitral tribunal would be limited to the determination of law. First, it should refer the conflict rules, and second, it applies the "law" and

"no rules of law," that the conflict rules will define. (Nikbakht, 2005, p. 139)

3.3. The Prohibition Referred

It is stipulated in paragraph 1 of Article 27 that any law or legal system of a country that is determined means the rules of substantive [financial] of the country and it does not include its conflict rules. This means that if, supposedly, the parties have chosen the law of a particular country, as the law governing the claim, or in the absence of their choice, the arbitral tribunal applies proper rules of conflict resolution, which impose the law of a particular country, it will apply the substantive provisions of the country, and do not refer to the conflict rules of the country and thus, when the rules are not referred, the delegation will not be raised. (Nikbakht, 2005, p. 139)

4. 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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