Choice of Law in International Commercial Arbitration

AUTHOR: BHAVIKA RATHI

1. ESTABLISHING THE THOERY OF CONFLICTS IN INTERNATIONAL COMMERCIAL ARBITRATION

Conflict of law provisions of a country's legal system, commonly termed as private international law, gets invoked and applied anytime it encounters a legal issue which contains a foreign component[1]. Primarily, the focus is on 3 issues: jurisdictional issue, choosing the appropriate law to be made applicable, recognizing and enforcing foreign awards and decrees. International commercial arbitration is certainly the most probable forum on which multiple sorts of foreign elements can be found. Correspondingly, it is extremely challenging to review and evaluate the conflict of laws which invariably occur in international commercial arbitration[2].

Nevertheless, the orthodox notion and approach towards conflict of laws in the domain of international trade has led to a dearth of consistent standard of rules and its unpredictable nature as a result of the complicated foreign components[3]. The orthodox theory of conflict is criticised on the grounds that such rules are not sufficient for addressing the moral and ethical necessities of international commercial arbitration[4]. But so far, this critique is only directed at the selection of the appropriate contractual law. Nonetheless, the contemporary conflicts of laws rules that are found in the international commercial arbitration jurisprudence[5] (which still remain vulnerable towards the universal uniformity critique) have put forth efforts to offer consistent alternatives in addressing the current problems.

Frederick Alexander Mann outlined that even when a particular private legal framework law might indeed allow the parties to choose public international law as the governing law for their agreement, the arbitration proceedings between governments and private individuals are essentially premised on private international law and not public international law[6].

A vast majority of research on the subject of conflict of laws and international commercial arbitration focuses on choosing the law regulating the core issues of the disputes, wherein an arbitrator can resort to conflict of laws rules[7]. Keeping in consideration the propensity to circumvent the conflict of laws rules and to implement the Lex Mercatoria which is the cross border system of law, the scholarly works that are currently available places an emphasis upon the aspects that Court should take into account when the Court is asked to choose the law governing the dispute in case the law to be made applicable has not been decided or chosen by the parties to the dispute. There are, nevertheless, few competent interpretations of this relationship, particularly in the context of the international commercial arbitration procedure and the arbitration agreement[8]. Lex Loci (the law of the country where the contract was entered into by the parties) or Lex Situs (the law of the country where the arbitration proceedings are conducted) have not, conventionally, been the primary rules to regulate the arbitration, at least not in the Western world, rather Lex Fori (law of the forum) is the rule which used to regulate the arbitration agreements and proceedings[9].

The present era reveals a significant shift in this scenario. The conventional conflict of laws principles have been significantly transformed as a result of the growing complexities of the international commercial arbitration[10]. From the perspective of conflict of laws, whether an arbitration is procedural or substantial is the fundamental issue which has emerged in this

1 Sir L. Collins, Dicey, Morris & Collins on the Conflict of Laws (14th edn, Sweet & Maxwell 2006).
2 See William Prosser 51 Mich. L. Rev. (10th edn, Interstate publication 1953) 959, 971.
3 Markus Petsche, International Commercial Arbitration and Transformation of Conflict of Laws.
4 ibid
5 L. Collins (n 1).
6 Frederick Alexander Mann, Lex Facit Arbitrum (1986) 2 Arb. International 241 - 260
7 M. Petsche (n 3).
8 Ernest Lorenzen, Commercial Arbitration: International, Interstate Aspects (1934) 43 Yale LJ 716
9 ibid
10 L. Collins (n 1).

context[11]. All the procedural issues of arbitration will be determined by the Lex Fori if they are to be considered as such. And yet this does not mark the end of how conflict of laws is used in international commercial arbitration. It may be argued that the arbitration process itself has some corrective benefit. So, an imperative issue is: Should the process of choosing appropriate laws be characterised by its corrective component? The answer for the same is No, as will be discussed in the chapters that follow.

2. LEGAL ISSUES IN CHOICE OF LAW

International commercial arbitration creates the potential of different legal issues affecting the conflict since it is derived from the principle of party autonomy, notably embodied in the choice made by the parties with regards to the applicable law. Even if the choice of law in international commercial arbitration might be problematic, a significant advantage is its potential to circumvent the complexity that invariably emerges in an international conflict. International commercial arbitration is considered a "forensic minefield" which is a framework of intricate legal systems that may be subject to various laws that can be made applicable[12].

From the perspective of the procedure of choice of law in international commercial arbitration, there are 3 different choice of law concerns that might come up:

- Substantive law regulating the arbitration agreement and its performance.
- Procedural law regulating the arbitration proceedings (Lex Arbitri)[13].
- Substantive law regulating the underlying contract entered into by the parties the legal issues of the dispute.

There is a possibility that these 3 concerns are governed by 3 distinct law and the legal issues occur when any of the 3 laws are different. From the standpoint of conflict of laws, the characterization procedure (whether it relates to substantive or procedural) is essential for deciding on the appropriate law to be made applicable in a dispute as it is the first step in the procedure of choosing the applicable law, wherein the legal classification of a problem is determined in for learning more about the applicable law which will govern the dispute. Yet, the jurisprudence surrounding international commercial arbitration has simply disregarded such an essential component of the procedure of arbitration.

Additionally, it is essential to bear in mind that no law governing international commercial arbitration (not even the UNCITRAL Model Law) contains provisions for the conflict of laws rules to handle the complex decisions of which law is to be made applicable to the aforementioned three components of international commercial arbitration. Arbitrators dealing with international issues seldom identify a single jurisdiction as the source from which they obtain their competence, as opposed to the domestic courts where the initial course of action is the conflict of laws rules of their Lex Fori. Nevertheless, this reasoning does not really imply that international commercial arbitration and private international law could be separated from each other.

For example, international commercial arbitration is described as a crucial component of conflict of laws in an influential work[14] on private international law[15]. A list of principles for choosing the laws that are to be applied to the aforementioned three components of an international arbitration are provided in Rule 57 of this publication[16].

The jurisprudential aspect of international commercial arbitration has cautiously entered into this subject, despite the fact that the conflict of laws principles pertaining to characterisation are crucial for choosing the law that is to be made applicable in the dispute[17]. Nonetheless, the tools and strategies employed in choice of law issues have substantial usefulness in resolving legal questions concerning the appropriate law that can be applied in an international commercial arbitration.

2.1 SUBSTANTIVE LAW REGULATING ARBITRATION AGREEMENT

A provision or section in a contract requiring the referral of any future legal disputes emerging out of

11 David Stern, The Conflict of Laws in Commercial Arbitration (1952) 17 L. & Contemp. Probs. 567 - 579

12 A. Redfern & M. Hunter, Law and Practice of International Commercial Arbitration (edn, Sweet & Maxwell 2004).

13 The law of the place where the arbitration is seated

14 L. Collins (n 1)

15 See L. Collins (n 1) Ch. 16

16 See L. Collins (n 1) 715

17 Harisankar, International Commercial Arbitration in Asia and Choice of Law Determination (2013) 30(6) J. of Int'l Arbtn 621

this contract to commercial arbitration, or a separate contract requiring the referral of any current legal disputes to arbitration, are both examples of mutually acceptable processes that arbitration generally needs. All countries recognise an arbitration agreement as a separate contract in both scenarios, and the illegality of the underlying contract does not directly impact the legality of the arbitration agreement[18]. From the perspective of the private international law, which law should be the law governing the legality of the agreement is the concern that emerges. In this case, an accurate characterization is necessary to determine if the issue is procedural or substantial.

Like all other contracts, an arbitration agreement gives its parties various substantial privileges. The applicable law which will govern the arbitration agreement can be chosen in accordance with the intent of its signatories, or in any of the following ways:

- by the law of the place where the arbitration agreement was entered into by the parties, or
- by the law of the place where the arbitration proceedings are supposed to take place, or
- by the law of the place of which the parties share the nationality, or
- by any other law[19].

When a legal dispute arises out of a conflict, the parties to the contract are at liberty of choosing the applicable law. This implies that they have the freedom to choose the law that will govern their contract, either explicitly or implicitly, even in the context of an arbitration agreement as the parties to the contract enjoy autonomy[20].

The "nearest and most substantially genuine connection standard" will be applied to determine the law that will govern the arbitration agreement in the case of no explicit or implicit choice of law specified by the signatories to the agreement.

During this stage, there are two different legal stances can be deduced regarding the type of law that will be applicable to the arbitration agreement.

First stance is that it may be assumed that the arbitration agreement will invariably be regulated by the same law[21] regardless of the place where the arbitration is seated, provided an explicit choice of law to govern the entire contract has been mentioned in the agreement.

In the case of Sonatrach Petroleum Corp. v. Ferrell International Ltd.[22], the Court followed a similar strategy. If there is an explicit choice of law provided in the underlying contract but not in the arbitration agreement, then the arbitration agreement will typically be bound by the choice of law that was explicitly made for governing the main underlying contract[23].

In the case of Sulamerica Cia Nacional De Seguros SA & Others v. Enesa Engenharia SA & Others[24], the Court reiterated the previously stated opinion and held that an unambiguous choice of law regulating the underlying contract serves as a clear indication of the intention of the signatories with regards to the arbitration agreement[25].

Gary Born stated that the Courts of England employed the nearest and most substantially genuine connection standard in case of a conflict of law while concluding that the law governing the underlying contract can end up being the law which governs the arbitration agreement[26].

In the case of National Thermal Power Corp. v. Singer[27], the Supreme Court of India ruled that although the arbitration agreement is a subsidiary or supplementary contract to the primary underlying contract, it is still an element of that underlying contract as the parties have made an explicit choice of the law that will govern their agreement. So, the law that will govern the arbitration agreement is the law that the signatories to the contract have explicitly chosen in the underlying contract. Various other Indian courts[28] have adopted a similar legal stance

18 UNCITRAL Model Law on International Commercial Arbitration (1985) 24 ILM 1302, art 16
19 Harisankar (n 17) 630
20 See L. Collins (n 1) Rule 57(1)
21 Union of India v. Mc Donnell Douglas Corp. [1993] 2 Lloyd's Rep 48
22 [2002] 1 All ER 627
23 ibid
24 [2012] EWCA Civ 638
25 Gary Born, The Law Governing International Arbitration Agreements: An International Perspective (2008) 26 SAc. LJ 815, 828
26 ibid
27 [1992] 3 SCC 51
28 Sumitomo v. ONGC Ltd. [1998] 1 SCC 305; Eitzen Bulk A.S. v. Ashapura Minechem Ltd. AIR [2011] Guj 13; Aastha Broadcasting Network Ltd. v. Thaicom Public Co. Ltd. MANU/DE/4410/2011

while deciding the case.

The basis for the second legal stance is the idea that an arbitration agreement should be regulated by a law which is not same as the governing law of the underlying contract. This is because arbitration agreements are distinct from and not dependent on the underlying contract.

According to this standpoint, Courts of England have determined that regardless of the law that governs the underlying contract, the law of the place where the arbitration is seated has the strongest link to the arbitration agreement[29].

The rational assessment of an arbitration agreement will further contribute to an interpretation that its intention is to arbitrate conflicts; such a duty has its nearest relationship with the law of the place where the arbitration proceedings are supposed to take place i.e., the place where the arbitration is seated. The nearest connection standard, which has been taken from the scope of private international law, has been employed for accomplishing a distinct outcome in case of lack of an explicit or implicit choice of law that will govern and regulate the arbitration agreement. The Court came to the conclusion that the arbitration agreement is most closely related to the law that is applicable at the place where the arbitration has been seated.

2.2 PROCEDURAL LAW REGULATING ARBITRATION PROCEEDINGS

It is not possible to have a "floating" proceeding, therefore each arbitral proceeding should be governed by the laws of the nation in which it is taking place[30]. There is absolutely no disagreement about the fact that the arbitration procedure falls under the domain of procedural matter when it comes to classification. This opinion is backed on the premise that several nations' civil procedural codes encompass the law governing the arbitration proceedings. The Lex Fori, or law of the forum, governs all matters related to procedure under conventional private international law. The existence of an opposing viewpoint should be taken into consideration as it claims that the international arbitration proceedings lack Lex Fori due to the absence of any connection to the place where the arbitration proceedings are taking place in the manner that domestic court proceedings are linked to their forum. It is more readily known as the Lex Arbitri in the context of arbitration.

Rulings of many Courts in Asia have highlighted the significance of the place where the arbitration is seated as the pivotal aspect for determining Lex Arbitri. International commercial arbitrations are governed by the laws of the country that has been chosen by the parties for any dispute that might arise out of the contract and are classified as procedural situations. All conflict resolving processes, according to F.A. Mann, are governed by the laws of the country; as a result, no such process could be termed as "floating" process in the ambit of international law[31]. Consequently, all procedural matters are governed by Lex Arbitri. The Lex Arbitri, or the law of the sea of arbitration, is the law of the place where the arbitration is seated, contrary to an entirely different perspective that delocalizes or disconnects international commercial arbitration from the law of place where arbitration is seated and where the courts are seated[32] (principle of territory and jurisdictional theory).

The seat of the arbitration will remain unaffected from a shift in the arbitration's geographical position[33]. According to rulings of Courts in India[34], 'Arbitral Situs' is a legal notion that goes beyond a physical geographic place. It is paramount to differentiate between the place where the arbitration proceedings are supposed to take place (also referred to as venue), such as the venue where certain proceedings of the arbitration can sometimes be held, and the seat that ties the arbitration to a judicial framework of a nation.

In the case of PT Garuda Indonesia v. Bergein Air[35], the Singapore Court of Appeal emphasised up on the crucial distinction between the place recognized as the lawful seat of arbitration and the convenient location for arbitration proceedings or sessions. According to the Court, the fact that the parties might have already chosen another place of convenience for conducting its hearings will not have

29 Abuja Int'l Hotels Ltd. v. Meridien SAS [2012] EWHC 87
30 Frederick Alexander Mann (n 6)
31 UNCITRAL Model Law (n 18).
32 Harisankar (n 17) 632
33 (n 21)
34 Dozco India P. Ltd. v. Doosan Infracore Co. Ltd. [2011] 6 SCC 179; Videocon Industries v. Union of India [2011] 6 SCC 161
35 [2002] SGCA 12

any relevance if they have already decided the venue of the arbitration. More crucially, the court determined that since Indonesia was chosen as the seat for the arbitration, Indonesian law will govern the arbitration proceedings. For many years, legal system of India had an unstructured outlook on the choice of the Lex Arbitri and its function in international arbitration.

In the landmark case of Bharat Aluminium v. Kaiser Aluminium[36], the Supreme Court of India emphasised up on the difference between the venue of the arbitration and the place where the arbitration proceedings are supposed to take place and reaffirmed the importance of arbitral situs. Court clarified this issue and declared that the Lex Arbitri is primarily determined by the arbitration's seat.

However, a person can counter that the discussion on delocalizing and disconnecting international commercial arbitration has rendered the seat of arbitration irrelevant, at least theoretically. Yet, it is abundantly obvious from the aforementioned case law that Asian nations see the "Arbitral Situs" (otherwise known as the Lex Loci Arbitri and its function in the overseeing ambit of the courts) as the sole connecting factor for the determination of the Lex Arbitri.

2.3) SUBSTANTIVE LAW REGULATING UNDERLYING CONTRACT

Deciding the law that will govern the conflict, or more specifically, the contract's substantive law, is crucial in the domain of conflicts of laws, particularly from the perspective of an arbitration tribunal. For the purpose of determining the relevant substantive law to the conflict, international arbitration tribunals can additionally be approached. The procedure of determining the relevant law of the underlying contract is given in Article 28 of the UNCITRAL Model Law[37], in contrast with the aforementioned two aspects of international commercial arbitration pertaining to the arbitration agreement and the arbitration proceedings. As per Article 28, parties are free to decide on the law that will govern their dispute, and the arbitrator is obligated to uphold that decision[38].

The arbitration tribunal should resolve the conflict in conformity with the laws that have been decided by the parties, which must solely reflect the substantive law of that country and not include its rules for conflicts of laws[39]. Broadly speaking, parties are not confined by the choice of law they make, and thus this flexibility includes choosing the law to be made applicable even after a conflict has arisen. However, there are a couple of deviations, for example, Article 7 of Chinese Arbitration Law; Section 28(1)(a) of the Arbitration and Conciliation Act, 1996, which specifies that regardless of the preferences of the parties, Indian law will apply in domestic arbitration cases.

In case there is no explicit or implicit choice of law provided by the parties, the arbitration tribunal has to choose the "appropriate law to govern the contract," which will be pertinent to the fundamental of the conflict. The arbitration tribunal will apply the law that has been decided by relevant conflict of laws rules in such case. The arbitration tribunal can indeed rule the case ex aequo et bono with the consent of the parties. The trading and commerce customs relevant to the deal must also be taken into account by the tribunal.

For contracts that has a foreign element present, party autonomy encompasses the determination of the law that will govern the contract. The one and only restriction that applies to the choice of substantive law is that it must be suitable, bonafide, and lawful[40]. Although there is not a great deal of cases to define the terms "bonafide" and "lawful," comments have been made implying that Countries can impose a connection criterion for the preferred law[41].

In contrast to UNCITRAL Model Law, Indian Arbitration Law prescribed a straightforward method for choosing the substantive law[42]. According to Section 28(1)(b), the arbitration tribunal must comply with rules of law that it deems suitable in case of lack explicit or implicit choice of law by the parties; keeping in consideration the fact that it is being

36 [2012] 9 SCC 552
37 UNCITRAL Model Law (n 18) art 28
38 UNCITRAL Model Law (n 18) art 8
39 See ICC Rules, art 17(1); London Court of International Arbitration Rules ('LCIA Rules'), art 22.3
40 Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] AC 277 (PC).
41 Gokhan Aytar, Party Autonomy, Choice of Law and Wrap Contracts (Thesis, University of Oslo 2012)
42 Doug Jones, Choosing Law or Rules of Law to Govern Substantive Rights of Parties (2014) 26 SAc.LJ, 914

referred to "rules of law" and not "conflict of laws" rules. Even though this strategy can be intended to reduce potential complications in the usage of conflict of laws principles, there is still room for doubt since it gives the arbitration tribunal no point of reference for selecting the proper law because there is no Lex Fori in international commercial arbitration.

Moreover, Section 28(2) states that the arbitration tribunal can declare "ex aequo et bono" only with the parties' explicit consent. In majority of arbitration legislation in Asia, Article 28(2) of the UNCITRAL Model Law is followed because it permits the arbitration tribunal to follow the conflict of laws rule it considers suitable.

The AC (Amendment) Act, 2015 revised Section 28(3) to state that the arbitration tribunal must consider and examine the conditions and customs of the trade and commerce that can be applied to the deal while passing an award.

Several countries in Asia have permitted the arbitration tribunal to choose the applicable law in case of lack of parties' preference using a range of techniques. For example, Chinese Arbitration Law mandates that Chinese conflict of laws principles be applied by the arbitration tribunal that has been seated in China. Parallel to this, the Malaysian Arbitration Act stipulates that, in the case of lack of choice by the parties, the arbitration tribunal is supposed to apply the law as decided by the Malaysia's conflict of laws provisions[43]. The Arbitration Law of Japan[44] offers the most efficient illustration of a straightforward strategy.

The nearest relationship standard, which is used to decide which law should govern contracts, seems to be directly applied in this situation. It states that if there is no arbitration agreement, then the arbitration tribunal will utilise the substantive law of the country to which the legal conflict is firmly associated, giving rise to the arbitration proceedings. The nearest relationship standard[45] to ascertain the appropriate law of the underlying contract seems to be directly employed in this situation, which is in accordance with the conventional conflict of laws rules.

Other countries, however, follow the "no approach" stance. For instance, Indonesian Arbitration Law does not offer any option for the arbitration tribunal to choose the appropriate law in case the parties fail to provide their choice of law[46]. Corresponding to this, the Sri Lankan Arbitration Act[47] stipulates that the arbitration tribunal's competence to decide the substantive law, by applying of the proper conflict of laws rules, will be available "exclusively to the extent consented to by the parties." So, when the arbitration tribunal employs the conflict of laws rules to ascertain the substantive law, in this context, the law is silent regarding any potential substitute accessible to the parties.

CHAPTER 3 – DETERMINING APPLICABLE LAW IN CHOICE OF LAW

Foreign merchants have made it big using international commercial arbitration in past few years as a substitute to domestic courts for the conflict resolution process. International commercial arbitration has discovered a reasonable solution to the demands of international parties to contracts entered between them, especially the necessity for impartiality and competence, that no alternative mechanism for the resolution of conflicts has previously supplied. The "applicable law" question is just one of the many problems that international arbitration is faced with.

What makes it important to consider "the applicable law" in an international commercial arbitration? While determining which law will apply to a conflict emerging from a contract, each domestic court will determine based on its own country's laws. On the contrary, international commercial arbitration, which was created as a substitute to domestic courts, receives its power out of a contract entered into by two private entities rather than from a state. Whether an arbitrator should use conflict of law principles for determining the applicable law? Which conflict of laws framework would be appropriate to follow, if the response is yes? Or whether he must resolve the conflict using the Lex Mercatoria? There has never been a formal source of arbitration awards, thus there hasn't been a consistent body of legal precedent to provide a resolution to the earlier queries.

43 See Malaysian Arbitration Act 2005, s 30(4).
44 See Japanese Arbitration Law (Law No138 of 2003) art 36(2).
45 Amin Rashid Shipping Corp. v. Kuwait Insurance Co. [1983] 3 WLR 241
46 Indonesian Arbitration Law (Law No 30 of 1999) art 56(2)
47 See Sri Lankan Arbitration Act (Act No 11 of 1995) s 24(3)

This chapter will determine how experts tackle the dispute by an evaluation of all of the possible scenarios that may arise when an arbitrator has to decide which law will apply in a particular arbitration conflict.

3.1) WHEN THE PARTIES HAVE DECIDED THE APPLICABLE LAW

The following legal provision or a similar clause can be found whenever an arbitrator is supposed to choose which law should be made applicable for resolving a conflict[48] :

> *"The legality and execution of this contract will be regulated pursuant to and in conformity with the laws of..."*

The contractual parties can stipulate that a law of a certain country or a particular combination of international laws will apply (Ex Aequo Et Bono, Lex Mercatoria). It is indeed necessary to weigh the 2 alternatives independently. Despite it being customary in international business to determine the law to be made applicable, parties occasionally fail to insert a provision regarding the same in their contractual agreement. The parties often find it difficult to reach a consensus regarding this type of crucial matter and instead choose to hold off until a disagreement has already developed. This responsibility is entrusted upon the arbitrator in such situation.

A) IF THE PARTIES DECIDE TO APPLY A NATIONAL LAW

In such case, the arbitrator has to choose whether to apply a private international law rules to evaluate the parties' independence in deciding on the appropriate law or whether to acknowledge such party autonomy directly without using private international law rules.

Both common law countries and civil law countries extensively acknowledge the concept of party autonomy[49]. Without first determining whether any rule of private international law restricts such autonomy, an arbitrator is supposed to follow the law that the parties agreed upon. Yet, all nations do not let parties to select the law that should govern their contract with complete discretion. While being widely acknowledged, the notion of party autonomy is bound to a few restrictions that vary throughout the various conflict of laws frameworks.

In this part of the chapter, the different ways that jurists have addressed this issue would be examined, including whether an arbitrator must recognise the parties' preference of the governing law without restriction or if the arbitrator must focus on ensuring that the chosen law complies with the country's private international law.

The party autonomy concept and arbitration in its entirety have to depend heavily on and draw their validity from a country's legal framework because all rights, privileges, or obligations that an individual possesses are rooted in domestic law.

The country's legal framework serves as Lex Fori or the law of place where the arbitration tribunal is seated. A provision in a contract stating that "the contract will be regulated by the law determined by the parties" in a contract entered into by the parties of two different countries is only lawful if there is a private international law rule which accords the parties this discretion. F.A. Mann believes that the parties choose the appropriate law in conjunction with the Lex Fori, not independently of each other[50]. In accordance with private international law of the Lex Fori, the arbitrator should assess each party's competence to choose the law. If the parties didn't choose the law that the contract is most closely connected to, then the arbitrator can also overlook their choice of law.

Lalive explores 2 different alternatives in his work[51]. He explores at the distinctive character of international contracts on the one side. In some situations, parties prefer an impartial law, such as law of England, that has evolved a specialised framework of standards. Through this process, parties are able to come to an understanding that, if either party's domestic law would have been enforced, they most likely would not have been able to reach to this consensus. These components deem the parties' decision "reasonable," which means that the contract is sufficiently connected to the relevant legal framework to recognise that option.

48 UNCITRAL Model Law on International Commercial Arbitration art 28(1)

49 See eg, Greece, Civil Code (1940) art 25; Italy, Disp. Prel. (1942) art 25; Japan, Int. Priv. Law art 7

50 Frederick Alexander Mann (n 6).

51 Lalive, Le Droit Applicable Aufond Du Litige En Matibre D'arbitrage, [1977] 17 Rassegna Dell'arbitraro 1

Nonetheless, he adds that the parties should utilise their freedom to decide which to be made applicable within reasonable limits. The arbitrator may overlook the law which the parties chose if that law has rendered the contract unenforceable.

As a result, Lalive adopts a moderate approach. He remains of the opinion that the party autonomy as a concept must be monitored by private international law, but he goes about doing so in an easier and more proficient manner than F.A. Mann, while considering the unique features of international contracts.

Further, arbitration awards can be referred to in order to acquire a more thorough understanding of the issue[52].

For the initial type of arbitral award to be taken into consideration, the arbitrator appears to acknowledge the party autonomy concept in general without taking into account the limitations placed by conflict of laws rules.

A conflict about a licensing agreement emerged in a transaction involving Switzerland and French firms[53]. On being confronted with the issue of the governing law, the arbitrators made the following ruling: The judgement, in the essence of the conflict, should be delivered in consonance with Swiss law, that the parties have decided to apply by virtue of licensing agreement they have negotiated.

The second type of arbitration awards examines situations in which arbitrators implemented the law that the parties had determined to be made applicable due to it being consistent with the conflict of laws rules.

In an arbitration award where Lalive was on the arbitration panel, in a conflict involving firms of Germany and Pakistani, the arbitrator decided to submit the governing law that was chosen by the parties to private international law rules. However, in the present instance, the arbitrator was exempted from the huge responsibility of choosing appropriate law out of the private international laws of multiple countries that are associated with the conflict, because every one of them resulted in an identical outcome.

There have been no known instances when an arbitrator rejected the parties' explicit preference of a law. However, one aspect needs to be taken into account i.e., despite the fact that the party autonomy concept has not been recognized by any private international law rule, it will still be unsuitable for the arbitrator to choose not to comply with the law that was chosen by the parties to the dispute.

The options stated hereinafter are typically available with an arbitrator: the law of the place where the arbitration is seated, the domestic law of the arbitrator, the respective domestic laws of the parties, the law of the country where the parties entered into the contract, the law of the country where the contract was performed, and the appropriate law of the contract. Since the outcome of an arbitrator's decision is unknown in addition to the chance that the parties may not be pleased with the decision, this broad range of choices leads to confusion and poses challenges.

B) IF THE PARTIES DECIDE TO APPLY A NON-NATIONAL LAW

Parties can also choose a non-national law rather than the laws of one country. International law, international practices or usages[54], and multinational law are all terms used to describe non-national laws. Despite so many classifications, it is likely the same phenomena persist: a system of laws created by the society of traders to control global commerce. The issue boils down to if an arbitrator must adhere to the decision of the parties to the contract or not. Lex Mercatoria is an undeveloped system; thus it fails to encompass every aspect that can be the subject of a conflict. Hence, an arbitrator has to resort to national laws to bridge the shortcomings and disparities of Lex Mercatoria.

3.2) WHEN THE PARTIES DO NOT DECIDE THE APPLICABLE LAW

When the parties to the contract choose the appropriate law, despite the fact that the contract is valid, they find themselves in a challenging circumstance. Since the parties belong to different

52 The extract for the following arbitration awards were reported in: See Lew, Applicable Law in International Commercial Arbitration: A Study in Decided Arbitration Awards (New York 1978)

53 ICC award No. 1103, Doc. No. 410/774, September 28, 1960

54 UNCITRAL Model Law on International Commercial Arbitration art 28(4); European Convention on International Commercial Arbitration art VII

nations, they remain unfamiliar with and generally fail to trust the domestic laws of each other's country. What makes it problematic for the arbitrator to choose the appropriate legislation in an international commercial arbitration?

A) Applying the private international law of that nation that might have been applicable if there would have been no provision in the contract for referring to arbitration in case of any conflict.

If the parties entering into the contract have not agreed to insert a provision for referring the dispute to arbitration, then the issue was likely to be decided by the laws of the nation whose private international law would have been applied. This nation can reassert its dominion over arbitration in this manner since the provision of referring to arbitration effectively stripped it of its jurisdictional competence.

Two reasons were cited as the fundamental criticisms of this doctrine. According to Anzilloti's perspective[55], an arbitrator has always had the challenging responsibility to decide that the Court of which country would have had jurisdiction assuming that the parties had never really agreed to arbitrate. In addition, this approach is looping which makes it unacceptable.

To determine whether a nation would have been entitled to jurisdiction, an arbitrator needs to decide on a private international law rule; consequently, the question of the appropriate conflict of laws system resurfaces[56].

B) Applying the private international law of that country where the arbitration tribunal is supposed to be seated.

According to this concept, the parties' freedom to choose of the place where the arbitration is to be seated and, in turn, the relevant private international law, is honored. The power of a provision referring the dispute to arbitration should emerge from a provision of a domestic law of the country national law provision, like every other provision of an agreement between 2 entities.

C) Applying the Private International Law rules.

This theory has three patterns. This has frequently been recommended that the arbitrator's recommendation on private international law must be applied. The first query is: Which standard—the country of which arbitrator is a national, resident or has the domicile—should be applied? An arbitrator seems to have the greatest understanding of his or her own domestic laws, according to the reasoning in support of this concept. It is relatively simple to challenge that, because the parties to the contract belong to distinct nations, the arbitrator's decision to comply with the laws of one party would not satisfy the other party. The final scenario is an endeavor to use the conflict of laws system of a country to enforcing the arbitral award.

D) Collectively applying the private international law of the countries that are associated to the conflict

Rather than using the private international law of one country instead of other as discussed in the preceding paragraph, in this theory, an arbitrator analyzes the private international laws of all the countries that are associated to the conflict.[57] Through this study, it is possible to infer the fact that the private international law of every country would result in the same outcome, namely the choice of same country's domestic law to govern the contract.

E) Applying the substantive domestic laws of a country without making a reference to the private international law of that country.

This situation is considered to be a "genuine conflict of laws" issue since the substantive laws of the conflicting countries laws might be inconsistent with each other, resulting in varying conflict resolutions. A domestic court might typically resort to its conflict of laws rule in such a situation. If the intent of the contracting parties regarding the law that is applicable on the contract has not been stated explicitly and is unable to be determined from the context, then the contract is regulated by the law of that country to which that deal has the nearest and most substantially genuine connection[58].

CHAPTER 4 – CONCLUSION

Proliferation of global business has led to increasing predominance of international commercial

55 See Anzilloti, Rivista Di Diritto Internazionale [1906] 467
56 Videocon Industries v. Union of India [2011] 6 SCC 161
57 C v. D [2007] EWHC 1541 (Comm)
58 Swiss P.I.L. Act art 187

CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

arbitration. Since the conflicts between parties are unavoidable, international commercial arbitration is a significant component of every commercial transaction. Among the most challenging aspects of international commercial arbitration is the challenge of determining the law to be made applicable in a dispute. Choosing of applicable law is almost entirely up to people who enter in contract with arbitration clause.

Conflict of law issues, which invariably occur in an international dispute, are somehow avoided by international commercial arbitration, but the Choice of law becomes problematic. This paper provides an in-depth overview of legal issues that arise from disagreements over applicable law.

International commercial arbitration happens to be the most plausible forum with the presence of numerous foreign elements, so naturally, conflict of laws interpretation of the same is highly demanding. In light of conflict theory, the first section of this paper outlines the fundamental linkages between private international law and international commercial arbitration.

Choice of Law explores various root causes of choice of law conflicts and provides answers to these issues. There are three distinct situations in which choice of law issues could occur in cross border arbitral proceedings. In second section of paper, an attempt is made to analyse this issue, placing a focus on different approaches adopted by some of the more important arbitral legal systems in Asia.

Conflict of law emerges forthwith when parties belong to different nations following different laws, and it becomes necessary to decide which legal system is going to govern their case. Third section of the study will examine the various circumstances that can arise when an arbitrator has to decide the substantive law that will apply in a particular arbitration conflict.

Author's first objective is to discuss the factors that should be assessed while choosing the substantive law governing contract. Author's second objective is to discuss the rules an arbitrator should comply when deciding the laws that apply to a contract where the parties have not clearly stated their preferred law in the agreement.

BHAVIKA RATHI
4th Year, BBA.LLB (Hons.)
School of Law, Bennett University, Noida