International Arbitration and Conflict of Law Rules

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1-Introduction:

The term "international arbitration" is used to mark the difference between arbitrations which are purely national or domestic and between those which in some way transcend national boundaries and so are international.

Domestic arbitration concerns disputes where the obligations are founded in domestic law alone. It is likely that the agreement in respect of the initial contractual agreement was concluded within the territory of the state.

There is no unified interpretation of the term "international arbitration". The New York Convention defines "Foreign awards" as awards which are made in the territory of the state other than the state in which recognition and enforcement is sought, but adds to this definition awards which are " not considered as domestic awards" by the enforcement state.(1)

Lebanese arbitration law applies criteria which analyses the nature of the dispute. Article 809 provides that arbitration is international if it involves interests of international trade. The Lebanese Court of appeal has stated that arbitration is international if there is a cross boarder trade.(2)

The English Arbitration Act 1996 has no distinction between domestic and international arbitration, except when it comes to enforcement of a foreign or international award under one of the relevant international treaties.(3)

It is clear from the above, that a unified definition as to what is considered "international arbitration" does not exist. Each state has its own criteria and social policy which underlies its legislative powers.

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(1) Article 1 New York Convention.

(2) Lebanese Arbitration Magazine number 36 /2005.

(3) It is interesting to note that there was provision in the English Act 1996 for a distinction to be made for some purposes between "domestic" and "non domestic or international ". However, these provisions in sections 85-87 of the Act were not brought into effect. One major reason for this was that it was considered that to draw a distinction between British methods and nationals of other countries in the EU would be a breach of community law: see Saville "The Arbitration Act 1996 and its effect on international arbitration in England. Arbitration vol 63, No2, May 97, 104 at 112.

The appeal to arbitration in international settings is enhanced by the perception that it is almost best for a party from one country not to take a dispute with a business partner from another country into the latter's national court system. The fear is that each country's courts exhibit their own cultural and legal biases, so that a foreign party who submits to such a system risks falling victim of a "home court advantage". Both parties as an alternative are normally prepared to agree to a form of international arbitration, in a neutral country. This could take the form of choosing one independent arbitrator, or having an independent foreign seat or location, or seeking rules for arbitration independent of the state, or by both parties appointing their own arbitrators, and leave the third to be appointed by the chosen arbitral institution, or having a mixture of solutions composed of some of the above.

1-1 A complex Interaction of Laws:

Merely to agree to refer disputes to a form of international arbitration is insufficient. There remain a number of questions which must be resolved before an effective dispute resolution procedure is put in place.

International commercial arbitration, unlike its domestic counterpart, will usually involve more than one system of law or of legal rules. Five different systems of law have been identified, which in practice may have a bearing on an international commercial arbitration.

These are:

- The law governing the parties' capacity to enter into an arbitration agreement.
- The law governing the arbitration agreement.
- The law governing the existence of the proceedings of, the arbitral tribunal. This has been referred to as the "crucial law" or to use a technical phrase, the"lex arbitri".
- The law, or the relevant legal rules governing the substantive issues in dispute, variously described as "the applicable law", "the governing law", "the proper law of the contract", or "the substantive law".
- The law governing the recognition and enforcement of the award, (which may in practice, prove to be not one law, but two or more, if recognition and enforcement is sought in more than one country in which the loosing party has, or is thought to have, assets).

1-2 The Law Governing the Parties' Capacity to Enter into an Arbitration Agreement:

Parties to a contract must have the legal capacity to enter into that contract; otherwise it may be invalid, or unenforceable. For example, certain agreements

lacking capacity are voidable by minors and the insane under English law. The position is no different if the contract in question happens to be an arbitration agreement.

The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. Accordingly, the parties to such agreements include individuals, as well as partnerships, corporations, states and state agencies.

The rules governing the capacity to contract can be found in the standard textbooks of the law of contract. They vary from state to state. Thus in the context of an arbitration agreement it is generally necessary to have regard to more than one system of law. In practice, the issue of capacity rarely arises in international commercial arbitration, since most international contracts are carried out between experienced commercial people. Nevertheless, lack of capacity is a ground for objection to an arbitration agreement or arbitration award. The most common example concerns the corporate capacity of an organisation to engage in activities beyond its articles of memorandum and association, or agreements preceding the formation of the company, or after its liquidation.

The provisions of The New York Convention (or the Model Law where applicable) may be brought into operation either at the beginning or at the end of the arbitral process. At the beginning the requesting party asks the competent court to stop the arbitration, on the basis that the arbitration agreement is void, inoperative or incapable of being performed.(4) At the end of the arbitral process, the requesting party asks the competent authority to refuse recognition and enforcement of the award, on the basis that one of the parties to the arbitration agreement is “under some incapacity" under the applicable law.(5)

In the UK, the term incapacity encompasses minors, mental patient, drunkards, and corporations. Taking minors as an example, it was established in the case of "Ryder V Wombwell"(6) that minors are not bound by their contracts unless it was for their own benefit. The Lebanese law follows the ethos of the English law regarding matters of capacity in articles 215-216 Code of Obligations and Contracts(7)

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(4) New York Convention Article II.3 Model Law article 8(11).

(5) Semble 2 Article VI (a) and article 36(1)(a).

(6) [1868]L.R.4EX 32 at38.

(7) The Same effect is given in Lebanese Law to minors under articles 215of the Code of Obligations which provides"any person who has attained the age of full 18 years is capable of committing himself if he has not been declared incapable by a text of law".

And under article 216"Deeds concluded by a person totally deprived of discernment are non-existing (infants, the mentally insane).

Deeds concluded by a person incapable but gifted with discernment are simply liable to nullity (minor who have arrived at years of discretion), nullity may not be proposed by the person who has dealt with the incapable but solely by the incapable himself, by his agent or by his heirs. →

1-3 The Law of Arbitration Agreement:

A submission agreement should preferably contain a choice of law clause or clauses, to govern both the matters in dispute and the submission agreement itself. In this way, the parties and the arbitral tribunal will know what system of law or rules they should take into account if any question arises as to the validity, interpretation of the agreement, as well as the matters in dispute. If no express choice of law is made, the tribunal must select the applicable law of the agreement on the basis of the principles discussed below in 1-5(4-5-6).

Where an arbitration clause is written into a contract, the parties usually do not accompany it by an express stipulation as to the law which governs that clause. For example, the standard ICC clause, which is set out in twelve languages including Arabic-Chinese-Japanese and Russian, does not refer to any specific reference to the arbitration clause itself.

In the first instance, it seems that an arbitration clause which forms part of a contract should be subject to the same law, unless the parties agree otherwise. In fact this is not an unreasonable assumption, particularly where there is an express, choice of law in the contract. Nevertheless, because the arbitration clause in a contract constitutes a separate and independent agreement, the possibility that it is governed by a separate law may need to be considered.

Article V.1 (a) New York Convention stipulates that the agreement under which the award is made must be valid under the law to which the parties have subjected it or, failing an indication thereon, under the law of the country where the award was made, which will be the seat of arbitration.(8) In considering article V.1 (a) above, Dr.Lew has stated that "there is a strong line of authority in case law for the application of the law of the seat of arbitration, which complies with article V.1. (a) of the New York Convention"(9).

In any event, the law of the seat of arbitration may have its own mandatory rules as to what the arbitration agreement may and may not provide, and such rules will have to be taken into account whether by the tribunal or the court(10).

→ When the contract concluded by a minor gifted with discernment was submitted to no particular form, nullity of it may not be obtained by him except on a condition that he has sustained tort there from, if a special formality was required, nullity is, by this fact, entailed. No proof of the existence of Trot by the claimant being necessary."

(8) There is similar provision in the Model Law at article 34(2)(a).

(9) op.cit. 21- P: 75.

(10) For example, under section 60 of the Arbitration Act 1996 the parties may not be allowed to agree before the arbitration has started that one party should pay the Whole or part of the costs in any case.

1-4 The Law Governing the Existence of, and the Proceedings of the Arbitral Tribunal i.e.The Crucial Law or the Lex Arbitri.

1-4(1) What is the Lex Arbitri?

This question was posed and answered by an English judge in "Smith Ltd V HS International"(11).

"What then is the law governing the arbitration? It is a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the court of supportive measures to assist an arbitration which has run into difficulty (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the court to it's supervisors jurisdiction over arbitrations (e.g. removing an arbitrator for misconduct)."

In Lebanon, the proceedings of arbitration are governed by articles 778 et seq. of the Civil Procedure Code. The arbitrators should follow the guiding principles of civil suits and regulate the course of the proceedings according to the way of arbitration chosen. These govern representation of the parties in the court, the arbitrator's mission, the production of evidence, the hearings, and the measures to be taken for preliminary investigations.(12)

In the UK, the underlying jurisprudence, which established the Arbitration Act 1996, is to be found in section 1 of the Act. This is that the object of arbitration is to obtain a fair resolution of disputes without unnecessary delay. The case of "Damond Lock V Laing Investments Ltd"(13) establishes that the arbitral tribunal has to permit both parties to be heard on matters of procedure as well as the substantive issues in the arbitration, or it may be considered to be acting impartially.

The arbitral tribunal's power to conduct proceedings is in the first place provided in the arbitration agreement. Where the parties have not agreed such powers the Arbitration Act 1996 implies certain powers from the party's

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(11) [1991] 2 Lloyd's rep-127 at 130- Per Judge Steyn J.

(12) In articles 776 and 789, Lebanese CPR stipulates that the arbitrator has to settle the dispute according to the law, unless the parties have agreed otherwise, and to respect the rules governing civil suits.

In international arbitration, article 811 provides that" The agreement for arbitration may, either directly or by reference to a code of rules of arbitration, settle the procedure to be followed during arbitration. It may also submit the arbitration to some law of procedure which it indicates."

"If the agreement is silent on the matter, the arbitrator shall decide the procedure in the measure required either directly or by reference to a law or to some code of rules of arbitration."

(13) [1992]-60-BLR-112.

agreement. The general powers of the arbitral tribunal on procedural and evidential matters are found in section 34.(14)

1-4(2) The Lex Arbitri- A Procedural Law or Not?

It is sometimes said that the Lex Arbitri is a law of procedure. It is true that the Lex Arbitri may deal with procedural matters such as the constitution of the arbitral tribunal where there is no relevant contractual provision. The problem is what might be considered a procedural matter under one jurisdiction may be perceived as a matter of substance in other jurisdiction. For example, a dispute might arise over a local agency agreement which is not arbitrable under the local law. It is suggested that this is a matter of substance rather than of procedure. That is why using the Latin word" Lex Arbitri" is preferable and more precise.

1-4(3) The Seat Theory:

The concept that the conduct of arbitration is governed by the law of the place in which it is held, called the "seat" or "forum" or "locus arbitri" of the arbitration is well established in both the theory and practice of international arbitration.

In the English Arbitration Act 1996 " the seat of the arbitration means the juridical seat of the arbitration designated by the parties to the arbitration agreement, or by any arbitral or other institution vested by the parties with powers in that regard, or by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties agreement and all the relevant circumstances"(15).

This makes it clear that the seat of the arbitration is not a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated.

Sometimes the parties choose the lex arbitri precisely because they find it attractive, but nevertheless, once the seat is chosen, it brings with it its own law. If that law contains provisions that are mandatory, those provisions must be obeyed(16).

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(14) In addition, the arbitral tribunal has the power to appoint experts, legal advisors or assessors under section 37, to order a claimant to provide security of costs of the arbitration under section 38(3), to give directions in relation to any property which is the subject of the proceedings under section 38(4), to direct that a party or witness may be examined on oath or affirmation under section 38(5), to give directions to any party to preserve any evidence in its custody or control under section 38(6), to make provisional awards under section 39, and to penalise a party for failing to comply with a peremptory order. The arbitral tribunal powers are wide in order for it to be able to deal effectively with most matters which may occur in the proceedings.

(15) Section 3 Arbitration Act 1996.

(16) The mandatory provisions of the Arbitration Act 1996.

1-4(4) Choice of Foreign Procedural Law:

Parties to an arbitration agreement can choose a foreign procedural law different from that of the seat. For example, arbitration may be held in England, but subject to Lebanese procedural law.

It is not easy to explain why the parties might choose this course of action, thus complicating the conduct of arbitration. It is likely to be that the chosen foreign procedural law answers the needs of the respective parties. The parties may consider that the procedural law of a particular state is comprehensive, clearly stated, effective and fair. Sometimes one of the parties does not have any other choice but to accept applying the foreign procedural law. For example, in state and private party's contracts, sometimes the state legislation might stipulate that the state will not be able to enter an arbitration agreement unless the procedural and substantive law are those belonging to it. Therefore, the other party is left with the choice either to loose a beneficent contract through declining to submit to the state's provisions to enter the arbitration agreement, or to sign the contract based on the state's terms.

The arbitral tribunal may need to have regard to two procedural laws, the chosen law (Lebanese) and the mandatory rules of law (e.g. English law). In order to circumvent this potential problem of choosing foreign procedural law, it is submitted that if the parties find a procedural law of a country that is attractive and advantageous to them, it is advisable to locate their arbitration in that country.

Regarding matters of procedure, it is worth noting that in some arbitration laws such as the Lebanon, applying the procedure set out in the code of civil procedure, which is also applicable to civil litigation, is only obligatory in domestic arbitration unless parties agree otherwise.(17)

1-4(5) Procedure and the Role of the Arbitral Institutions:

The multiplicity of the procedural rules and practices governing arbitration proceedings is to some extent modified by the influence of an emerging corps of legally trained professional international arbitrators. More important as an element of international unification are arbitration rules. These Institutional rules serve two purposes, to regulate and fortify the arbitration institution itself, and to clarify, modify, or fill the gaps in national legal systems. Among non-institutional rules, the UNCITRAL Arbitration Rules are by far the most important and have gained wide spread acceptance(18).

Numerous institutions exist, providing administered arbitrations such as the ICC-LCIA; AAA etc…The parties might choose the rules of an institution to

(17) The rule is the same in France. Contrast this with The Arbitration Act 1996, where the lists of procedural steps in article 34(2) apply to domestic and international arbitration.

(18) International and ICC Arbitration-John Uff and Elizabeth Jones- King's College London-1990-P: 44.

See also the list of conventions in chapter two supra.

govern their procedure. For example, Article 11 of the ICC Rules provides that, "The rules governing the proceedings before the arbitrator shall be those resulting from those rules, and where the rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is made to a municipal procedural law.

However, the parties might not choose the juridical seat of their arbitration in a contract which includes reference to institutional rules such as the ICC. In this case, the rules adopted provide that the place of the arbitration shall be fixed by the court unless agreed upon by the parties(19).

It is worth noting that the venue of arbitration is not necessarily the juridical seat. They may well be different. It was held in the "Union of India V Mcdonnel Douglas Corporation" that the seat is the legal, rather than the physical place of arbitration proceedings, which might be conducted anywhere taking into account the circumstances of the case(20).

1-4(6) Advising Clients on the Choice of the Procedure in International Arbitration:

The parties should think hard before declining to take advantage of the opportunity to provide themselves with a set of procedural rules to regulate the conduct of any dispute process. Ad-hoc arbitration agreements tend to address the question, but many dispute resolution clauses in contracts fail to do so. There are a number of viable options.

- To adopt the procedural rules of a municipal legal system, whether that is of the place of arbitration or any other.
- To incorporate a non- municipal set of procedural rules such as the UNCITRAL rules or the Supplementary Rules governing the Presentation and Reception of Evidence in International Commercial Arbitration promulgated by the International Bar Association.
- To construct their own set of rules, either by invoking rules drawn from any of the above systems or by their own design(21).
- To do nothing, in which case matters of procedure will be determined by the arbitrator(22).

(19) Article 14 (1) ICC Rules 1998.

(20) [1993] 2 Lloyd's Rep: 48.

(21) It is difficult to imagine ordinary parties to arbitration who are capable of constructing their own scheme, but this might be different if the parties are experienced commercial entities who use arbitration extensively.

(22) This concept is recognised in almost all new arbitration laws, and provided for in section 43(1) in the English Arbitration Act 1996 and article 811 CPC83. However, the parties may reach an agreement on the procedure to be followed after the arbitration has begun, and this will bind the arbitrator. In practice, the chances of the parties reaching agreement so as to limit the arbitrator's discretion are so small.

1-5 The Substantive or Proper Law of the Contract:

1-5(1) Background:

When questions of procedure have been settled, the arbitrators will normally try to establish the substantive law which governs the rights and obligations of the contractual parties. Accordingly, it is not enough to know what agreement the parties have made. It is also essential to know what law is applicable to that agreement. In purely domestic arbitration, the law will usually be that of the country concerned. However, in international transactions the position is complicated because there are potentially two national systems of law that may qualify as the proper law of the contract, where the contract itself is silent upon the matter.

1-5(2) Conflict Rules and the Search for the Applicable Law in International Arbitration:

1-5(3) The Autonomy of the Parties:

There is a generally accepted principle of law that often directs international commercial arbitrators to the correct choice of law applicable to an international commercial contract. It is the principle of autonomy of the parties, namely the freedom of the parties to choose for themselves the law applicable to their contract. The principal has gained extensive acceptance in national systems of law:

"Despite their differences, Common law, Civil law, and socialist countries have all been equally affected by the movement towards the rule allowing the parties to choose the law to govern their contractual relations. This development has come about independently in every country and without any concerted efforts by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws[23].

Thus, the Rome Convention for example states that "A contract shall be governed by the law chosen by the parties"[24]. The principle of party autonomy is recognised also by institutional and non-institutional rules. For example, the UNICITRAL rules provide that "the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute"[25].

The ICC Rules provide that:" The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute"[26].

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(23) The Law Applicable in International Commercial Arbitration Oceana Publications –DR.Julien Lew-1978-P: 75

(24) Article 31(1) Rome Convention.

(25) Article 33.1 UNCITRAL Arbitration Rules.

(26) Article 17.1 ICC Rules of Arbitration 1998.

1-5(4) Where No Express Choice of Law is Made:

1-5(5) Implied Choice:

If the parties did not express a clear choice of law in their contracts, it may be possible to infer it from the terms of the contract and the surrounding circumstances.

"Where the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.[27]"

The Rome Convention provides that a choice of law must be "Express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case[28].

This makes it clear that an implied choice must only be found where it is reasonably clear that it is the genuine choice of the parties. This process is applied by international commercial arbitrators.[29]

1-5(6) Neither the Contract Contain an Express Choice of Law, Nor an Implied One Could be Identified:

Various systems of law may apply to an international commercial contract, where no express or implied choice of law has been made. The law of the place where the contract was made, also referred to as the "lex locus contractus", or alternatively the law of the place where the obligation is to be performed, which is often referred to as "the lex locus solutionis" .

An arbitral tribunal faced with this problem must first decide what conflict of law rules it will apply, whether it should follow the conflict of law rules of the seat of arbitration, or any other conflict of law rules.

Every developed national system of law contains its own rules for the conflict of laws. The branch of law in every country that leads us to identify the applicable law is known as "Private international law". The questions that arises are "which conflict of law rules the tribunal should apply" and," is it bound by the seat's conflict rules?"

In litigation the application of conflict of law rules by a national court is the manifestation of the national sovereignty of the court. Every national court applies its own substantive law on an issue, except where its private international rules direct it in some other direction.

By contrast, in international commercial arbitration, there is no national jurisdiction or conflict of law rules, and no lex fori. The basis of every arbitration

(27) The Conflict of Law Rules-Dicey and Morris-11 Edition-1987-P: 595.

(28) Article 3(1) Rome convention.

(29) Ibid: 13p: 181.

is the agreement of the parties to arbitrate. In other words, the tribunal in international commercial arbitration is not bound to apply the conflict of law rules of the seat of arbitration. There is no unified practice, to which conflict of law rules apply. However, it is relevant to consider the international practice regarding the choice of conflict rules.

The traditional approach was for the arbitrator to apply the conflict of law rules of the lex fori. As the arbitration was based in a particular country the laws of that country became the lex fori of the arbitration.

Despite the fact that this method of choice of law is widely criticised today and has few advocates, this route is still followed by some arbitrators. For example, ICC case number 5460[30] concerned an Austrian franchisor and a South African franchisee. The arbitration had its seat in London. After considering the case, the tribunal decided that "The place of this arbitration is London, and on any question of choice of law I must therefore apply the relevant rules of private international law of England."

A more flexible method to be followed in determining the applicable national conflict of law rules is to decide where the "centre of gravity" of the contract lies. Such an approach was applied in ICC case number 4650[31] involving American and Saudi parties, where no choice of law was expressed in the agreement.

As we can see from the above, there is no unified practice applicable in international commercial arbitration to determine the applicable conflict of law rules. The arbitrators will have to determine the applicable conflict of law rules. This concept is admitted in the English Arbitration Act 1996 by virtue of section 46(3) and the Lebanese Arbitration Law in articles 811 and 813 of the Civil Procedure Code 1983(applicable only to international arbitration).

1-5(7) Conflict Rules:

To identify the applicable law, the relevant conflict of law rules generally provides criteria to determine the contract to a system of law. The principal criteria is based on "connecting factors" The meaning of connecting factors does not have universal interpretation, and differs from one jurisdiction to another.

In England, the Rome Convention, which has been given the force of law by virtue of the Contract Applicable Law Act 1990, states that "the contract shall be governed by the law of the country with which it is most closely connected"[32].

Legal systems which are mainly influenced by French law tend to determine the connecting factor by looking to the “lex loci contractus”. For example, (Egypt,

(30) ICC case number 5460, award of 1991, ICCA Year Book - Commercial Arbitration xviii (1993) p: 44

(31) ICC case number 4650, award of 1985, ICCA Yearbook - Commercial Arbitration x11 (1987) p111.

(32) Article 4(1) Contracts Applicable Law Act 1990.

Jordan, and Libya), whilst others adhere to the place of performance “lex loci solutionis” such as Lebanon. Others, such as (Saudi Arabia, Bahrain, Quatar and Abu Dhabi, seem to apply the law of the place of arbitration, (lex loci arbitri)[33].

Regarding the application of the Rome Convention in most of the European Community countries, it is submitted that two of the articles are misleading.

Firstly, despite the fact that the Rome Convention expressly excludes arbitration agreements from its scope of application by virtue of article 1-2(D), they do nonetheless apply to the determination of the proper law of the main contract[34].

Secondly, The Rome Convention is intended to be of universal application. It applies regardless of whether the contract has any connection with a contracting state (one of the 15 EC states). In particular, there is no need for either party to the contract to be domiciled in a contracting state. The only thing that matters is that the dispute is tried in a contracting state to the convention[35]. Thus a contractual dispute between a Lebanese resident and a New York resident which is tried before the commercial court in England will be subject to the convention.

It is submitted that the Rome Convention could thus be applicable, even if the tribunal decided to apply the seat conflict rules. However, these rules do not give effect to the Rome Convention. This may happen where the parties come from contracting states to the Convention, in which the criteria followed by the tribunal to determine the substantive law would be that stated in The Rome Convention and not the seat conflict rules.

The accidental outcome is that if two contracting parties from Europe are trying their dispute in Lebanon, the tribunal might ignore it and apply its domestic conflict rules. However, if the dispute is tried in one of the European countries, it cannot be ignored because the Rome Convention has statutory effect among the 15 EC states. Thus, the outcome of the dispute therefore, may hinge on where it is tried.

1-5(8) Divorcing the Substantive Law of Arbitration from the Seat in International Arbitration:

It is common in international arbitration to have an arbitration whose juridical seat is in one country but where the tribunal is required to determine the dispute in accordance with the laws of a different country.

So, for example, an international project might specify that the contract should be governed by English law, but the seat of arbitration should be Lebanon, or vice versa.

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(33) The Law Applicable in International Arbitration-ICCA Congress Series Number 7-Kluwar International-p: 415.

(34) The Guliano and Lagarde Report p: 11 Quoted from Cheshire and North's "Private International Law" P:548-Butterworth 1999.

(35) Article 2 Rome Convention.

There can be many positive reasons for such a decision to divorce the substantive law of the dispute from that of the seat. It might happen that a country has a supportive environment for international arbitration, but the substantive law of that country is not adequately developed, or supportive to the substantive issues of the underlying contract.

Some times a national government may insist on its own law governing the contract, but may be prepared to agree to any arbitration taking place in a neutral seat(36).

There is nothing wrong with having a different governing law from the law of the seat of arbitration. However, this decision can have unforeseen legal and practical considerations.

Some countries and some arbitrators make an assumption that where a tribunal sitting in country X is applying the law of country Z, issues relating to what is the law in country Z become questions of fact and not questions of law.

So, where a tribunal sitting in Australia applies English law, it determines what English law is as a question of fact and not a question of law. This can produce unexpected consequences.

It was held in "The Independent State of Papua New Guinea V Sandline International Inc"(37) that there was no right of appeal on an award because appeals from arbitration awards were restricted to questions of law only and decisions on English law were questions of fact.

The court recognised that because, what English law was, is a question of fact, expert evidence on English law had to be given to the tribunal in order to prove it, unless the parties agreed otherwise.

It should, however, be borne in mind that it is more likely that these sorts of issues will arise in arbitrations held in common law countries. The reason for this is that common law countries, more than civil code countries, tend as a matter of procedure to have rules in their court systems that foreign law must be proved in a court as a matter of fact by way of expert evidence(38).

It is submitted that considering the proper law when different from that of the seat as a matter of fact, is applied more often by arbitrators who are influenced by litigation, and who bring the practices of litigation into the field of international arbitration, thus making international arbitration a time and cost consuming process.

If international arbitration is to be considered as a really viable alternative to litigation, it should be free from those rules which apply in such jurisdictions.

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(36) A substantial number of the Lebanese government infrastructure contracts with private foreign companies are subject to the Lebanese substantive law, but the seat is chosen in one of the European countries.

(37) Queensland Supreme Court-March 1999.

(38) Julian Cohen-Masons-Available on the web site on www.masons.co.uk, date visited 10/1/2002.

As we have seen before, the arbitrator is not bound by the conflict of law rules of the seat, and he or she should also, as a universal application, be able to apply foreign substantive law as a matter of law and not fact. Thus, international arbitration can be truly different from litigation.

Practically speaking, the parties to an international contract, who choose to divorce the proper law from that of the seat, are advised that they should look to the procedure and practices that influence the seat of arbitration, or else they may loose the right of appeal.

1-5(9) Conclusion:

It is evident from the above that international arbitration is much more complex than domestic arbitration, due to the intervention of more than one national system of law.

Under New York Convention, an arbitration agreement is valid if it is judged to be so either by the law chosen by the parties to govern that agreement, or failing any such choice, the law of the place of arbitration.

Parties to an arbitration agreement are advised to choose a law to govern their agreements. This choice should be made in an appropriate clause. If no express choice of law is made, and a question arises as to the law governing the submission agreement, the general principles as to the choice of law will apply, in the absence of any contrary indication; the law of the place of arbitration chosen by the parties will generally be regarded as the applicable law.

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