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Law governing the arbitration agreement

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Abstract:

The paper deals with such a law institution as arbitration agreement, its nature and applicable law to arbitration agreement when the parties have not chosen it expressly.

Keywords:

Arbitration agreement, arbitration clause, arbitration award, applicable law.

Goal:

Analysis of the notion «arbitration agreement», its nature and ways how to determine which law is applicable to arbitration agreement.

Research methods:

Analysis
Synthesis
Classification.

Arbitration agreements appoint arbitration tribunals to decide disputes instead of state courts. An arbitration agreement can be concluded in the form of an independent agreement (arbitration agreement) or in the form of a clause in a contract (arbitration clause). The cause of any arbitration agreement is the arbitral award resulting from the resolution of the dispute by an alternative means of arbitration.

By virtue of its legal nature, an arbitration agreement has a special "legal fate". The arbitration agreement is autonomous from the fate of the main contract, whether the arbitration agreement is concluded in the form of an arbitration clause or a separate agreement. The conclusion, modification, termination or invalidation of the main contract does not affect the arbitration agreement, which remains valid and able of being performed. This is because in order to invalidate a contract, the appropriate authority must do so, and in the case of an arbitration agreement, it is the arbitrators. It is not the parties themselves who recognize their contract as null and void, for example, it is done by the court or arbitration, that is why the arbitration agreement is presumed to be valid and enforceable, because otherwise it would violate the chain of consideration of the dispute on the merits.

Due to the fact that the arbitration agreement is autonomous from the main contract, arbitrators have to determine what law is applicable to arbitration agreement in the absence of an express choice of the parties. The decision must be based on the grounds that the dispute has the closest connection exactly with this law and it will serve the interests of both parties in the best way.

There are several different laws that are applicable to an international arbitration.

· The law of the place of arbitration (lex arbitri);
· The law of the main contract (lex contractus);
· Validation principle.

The law of the place of arbitration (lex arbitri)

Such a solution to the question can be found in the New York UN Convention of 1958 [1]. In Art. V para. 1 lit. a UN Convention contains an important conflict of laws rule which, among other things, regulates the law according to which the validity of an arbitration agreement is assessed. This is determined by the law chosen by the parties, and secondarily by the law of the country in which the arbitration award was made. This refers to the law of the seat of the arbitration.

The same rule can be found in the UNCITRAL Model Law of 2006 in Art. 34, 36 [2], so both conflict-of-law rules refer to the law of the seat.

If one takes German national law into consideration, one does not find an explicit individual conflict rule referring to the law of arbitration agreements. Nevertheless, there is § 1059 para. 2 no. 1 lit. a of the German Code of Civil Procedure (ZPO) [3], which lists the conditions under which an arbitral award can be set aside, and one of the grounds for this is if the arbitration agreement is invalid under the law to which the parties have subjected it or, if the parties have not stipulated this, under German law. In this norm, the legislator does not mention the seat of arbitration, but one can draw a conclusion that Germany is the place of arbitration. Otherwise, it would be illogical that the national law of one country decided that the only the law of another country (for instance only the law of Swiss) is to be applicable so it is one-side test factor. Let's imagine that two companies, the first from Germany and the second from the USA, enter into a sales contract and the arbitration agreement stipulates that the place of arbitration is London and that LCIA will settle the dispute. In this case, LCIA will use its arbitration rules and will decide itself which law is applicable. As Germany and the USA are members of the New York UN Convention, their rules apply to both countries and most likely the arbitral tribunal will apply English law to the arbitration agreement. This means that if the seat of the arbitration is in Germany, the arbitration agreement will be recognized as invalid under Section 1059(2)(1)(a) of the German Code of Civil Procedure (ZPO).

The same rule can be found in Plenary Resolution of the Supreme Court of the Russian Federation №53 of 10.12.2019 [4], where paragraph 27 states that if the parties have not made a choice of law, the arbitration agreement shall be governed by the law of the country in which the arbitral award was made or is to be made under the arbitration agreement.

Substantive law of the main contract (lex contractus)

The second solution to this question is proposed by the English courts, which hold that the main contract and the arbitration agreement should not be seen as different parts of a single contract, so it is reasonable to assume that the parties have agreed on the law of the arbitration agreement if they have chosen the substantive law for the main contract (implicit choice of law) [5]. If the implicit choice cannot be discovered, the courts will examine the law with which the arbitration agreement is most closely connected (usually the law of the seat of the arbitration). It is emphasized that such a system helps to address the interests of the parties to a great extent.

Thanks to this approach, there is no need to specifically search for the applicable law, because it is assumed that the parties have found the "common and convenient" law, so that both the arbitral tribunal and the state court should accept this choice. Such an approach is usually found in England or the USA.

Validation principle

The next principle is the validation principle. If an arbitration agreement is substantively valid under one of the laws potentially applicable to it, its validity will be upheld even if it is not valid under one of the other potentially applicable legal decisions. Such a rule is not often found in legislation, yet there are states that include such a norm in their laws, such as Switzerland. Para. 2 Art. 178 of the Federal Act on Private International Law[6]: The arbitration agreement is otherwise valid if it complies with the law chosen by the parties, the law applicable to the

dispute, in particular the law applicable to the main contract, or Swiss law. One of the main advantages of this principle is that the validity and enforceability of the arbitration agreement are respected in most cases, which is the aim of the parties in any case.

According to Gary Born, applying the law that validates the agreement, rather than the law that invalidates it, is "the best - and only - way to do justice to the true intentions of the parties".

There is not yet a single answer to the question of which law should be applied to the arbitration agreement, as there are several advantages and disadvantages in all the possible solutions. Nevertheless, I believe that it would be best to apply the way that is more responsive to the interests of the parties, and that is an arbitral award resulting from the settlement of a dispute by alternative means, i.e. arbitration.

References

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