



GOVERNING LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACT DISPUTE WITH REFERENCE TO EXPRESS CHOICE OF LAW AND IMPLIED CHOICE OF LAW

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ABSTRACT

International law is a law regulating international actions. It's divided to public and private. The public seeks to coordinate policies of states; the private governs international activities and transactions between the people belonging to different states. Thus, Contract between persons from different states conclude according to the private international law rules. It deals with three main aspects such as jurisdiction, choice of law and Enforcement of Foreign Judgment. This article deals with express choice of law and implied choice of law clauses in the international commercial transactions and indicates where to refer if disputes arise? And what law is applicable to resolute disputes?



KEY WORD: Private International law, Contract, International commercial contract, Jurisdiction, Choice of law, Enforcement of foreign judgment.

INTRODUCTION

The contract could be specified as any agreement which is lawfully enforceable. So, the major elements of a contract are agreement and enforceability according to law, wherein the agreement is an outcome of offer and acceptance. Contract is international when concluded between the parties from different states or country and it is Commercial whenever made by a trader for the purposes of trade. Thus, when a dispute appears the parties of international commercial contract need to refer to the proper law for settlements of the disputes. Here private international law could be helpful. Conflict of laws may arise in such cases where two parties belonging to two different countries entered into a contract, and they are governed by two different systems of laws. The problem arises generally when both the systems of laws are equally competent to deal with the conflict arising between the parties.

CONFLICT OF LAWS

Conflict of laws or Private International Law could be defined as physics of the law because it is concerned with the application of the law in space and time. It is that part of private law of a country which deals with foreign element issues. Commonly, Private International Law is a set of procedural rules that clear which jurisdiction and legal system is allowed to settle disputes. The laws are applicable when a legal dispute has a foreign element such as a contract agreed to by parties from different states. Hence, conflict of laws is a term which generally refers to the disparities among laws, regardless of whether the relevant legal systems are international or inter-state. This aspect of law presents very comprehensive information on how to resolve international cases or domestic matters which include foreign elements.

The conflict of laws branches are:

Jurisdiction:

Jurisdiction means those laws and principles that regulate the circumstances under which a court is entitled to decide an applicable judgment regarding the international or interstate connections involved.

Choice of Law

It is a procedural stage in the proceedings of a case involving the conflict of laws when it is essential to resolve the dissimilarities between the laws of different legal jurisdictions, such as sovereign states, federated states or provinces. It refers to what jurisdiction's law is applicable when there is a dispute in a transaction. Contracts often contain a choice of law clause to designate the proper law in the case of a dispute.

Enforcement of Foreign Judgment:

It defines as a recognition and enforcement in one jurisdiction of judgments rendered in another ("foreign") jurisdiction. Foreign judgments might be recognized based on bilateral or multilateral treaties or understandings, or unilaterally without an express international agreement.

Parties' choice of governing law

In the time of concluding an international commercial contract, two key questions are arising: (1) where to refer if disputes arise? And (2) what law is applicable to resolve disputes? Choice of law clause could be answer these questions. Thus, when dispute occurs, express choice term and implied choice term could be important and helpful for the parties of the contract and any contract must contain this clause.

Express v. implied

The choice is express when the contract contains a provision that specifies the law, by which it is to be governed, in the situation of conflict if arises in future. It will be better for the parties to an international contract to include such a clause in their agreement, to avoid the uncertainty which may otherwise arise in ascertaining the proper law. However, normally, they neglect to do so, or are unable to agree on which law shall be the governing law in case of dispute, if there arises any, in future.

When the contract contains no express choice of proper law then, the proper law is the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. The first part of this Bonython Formula refers to an implied choice by the parties, which is what we are concerned with now. The second part comes into operation when there is no choice by the parties, express or implied. An implied choice of law might be inferred by the court from the terms or form of the contract or the surrounding circumstances. The most important example of an implied choice of a governing law is a choice of forum clause. A clause by which the parties agree that the courts of a particular country shall have jurisdiction, or a clause providing that any dispute arising from the contract shall be decided by arbitration in a particular country. In commercial contracts, arbitration clauses are common and where the contract is an international one, it may stipulate the country in which arbitration is to take place. An arbitration clause or a choice of forum raises a strong presumption that the parties intended the law of the country in question to govern, on the basis that they are most likely to have had in mind that the court or arbitrators would apply their own law.

Remedy for lack of express choice

The law of the country with which the contract is most closely connected. There was a time when the courts were of the opinion that the proper law was always to be accredited to the intention of the parties. And an implied choice was found, in case there was no express choice. Time to time, various presumptions regarding the implied choice had been developed and now basically these have been abandoned. But these days, the previous trend has been changed. Whenever there is no choice either

express or implied, then the proper law is the law of the country with which the contract has its closest and most real connection.

In this regard, the court considers some important elements like:

- The place or places of making the contract
- The place or places of performance of the contract;
- The connection of the parties with the countries;
- The location of any immovable property which is the subject matter of the contract;
- The country where the ship is registered, on which the goods are to be carried;
- The currency in which money due under the contract, has been paid.

CONCLUSION

An express governing law clause in a contract offers the parties certainty. Providing the clause is well drafted and takes into consideration. The parties will know which law will apply.

Express jurisdiction clauses can either provide for exclusive jurisdiction to be granted to a particular country's courts, or non-exclusive jurisdiction. Exclusive jurisdiction is intended to prevent a party from being able to bring proceedings in another jurisdiction other than the one named in the jurisdiction clause. The choice of law for a contract is a significant issue in international contracts. Therefore, any contract you enter into should contain a clearly expressed governing law clause stating explicitly the applicable law that will govern the rights and commitments of the parties to that contract.

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