Toghrul Guluzadeh

Master of Laws in Legal Sciences (LL.M)
(hüquq üzrə magistr dərəcəsi)
International Commecial Lawyer
(Beynəlxalq Kommersiya Hüquqşünası),
E:toghrulguluzade@gmail.com

ROLE OF PRINCIPLE OF PARTY AUTONOMY IN ARBITRATION

Keywords: *arbitration, party autonomy, choice of law, decision making power*
Açar sözlər: *arbitraj, tərəfin seçim azadlığı, hüquq seçimi, qərar vermə səlahiyyəti*
Ключевые слова: *арбитраж, автономия сторон, выбор права, полномочия по принятию решений*

The principle of party autonomy plays a significant role in arbitration. By applying this principal parties agree on the provisions of a contract, rights and obligations of parties, performance form of the contract etc.

It is not always possible to predict the right intention of parties. Therefore, arbitral tribunal, most of the time, refer to the provisions of applicable law chosen by parties. According to this principle, the parties are free to make their own contract and choose an applicable law.

However, in the absent of choice by parties, does arbitral tribunal have a power to decide on an applicable law? If yes, based on what criteria does arbitral tribunal decide? These issues are very crucial in arbitration.

Choice of Law by Parties

All modern arbitration legizlations recognize party autonomy, i.e. parties are free to choose a substantive law or rules applicable to the merits of the dispute to be resolved by arbitration.

Choice of law provides certainty, predictability and uniformity. Parties make express or implied choices that free arbitrators from this difficult task.

Parties usually choose a legal system which is understood as the substantive law of that state and not its conflict of law rules. As also, the Article 28 (1) of UNICETRAL Model Law says:

"Any designation of the law or legal system of a state shall be construed unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

Parties are also allowed to choose general principles of law, lex mecatoria or authorize the tribunal to act as amicable compositeurs or to decide as ex aequo et bono. Parties are free to make "floating clauses" as well which means parties choose two different substantive laws, one applied if the dispute in one jurisdiction and if it is in another, the other substantive law is applied and these clauses are common in bills of lading.

Choice of Law by Arbitrators

When parties have made no choice of law or even if they have done so, arbitrators face with problems in the conflict of laws rules.

In the absence of a choice of law by the parties, the power of arbitral tribunal to apply the rules to the merits of the dispute can be considered as extension of the principle of party autonomy. **[1]** Arbitrator, in the absence of choice of law, tries to link the contractual issues, in other words, the intention of parties with a relevant law or rules.

There are three approaches to the choice of law by arbitrators: **[2]**

1) Directly, applying the law which appears to be most relevant or has the closest connection.
2) Indirectly applying conflict of laws rules
3) Deciding as ex aqueo et bono

By applying conflict of law rules arbitrators may choose a relevant law or rules to apply;

a) Conflict rules of the place of arbitration,
b) Conflict rules most closely connected with the subject matter of the proceedings,
c) Conflict rules the tribunal considers relevant
d) Converging conflict of laws rules and
e) General principles of conflict of laws

According to the conflict rules of the place of arbitration, arbitrators apply the law of the place of arbitration (lex arbitri). Also, worth to mention that there is no requirement to apply the choice of law rules of the place of arbitration and this freedom of conflict of laws system originates from Article VII European Convention and has been adopted in many arbitration laws and rules.

Conflict of law rules are most closely connected with the subject matter of the proceedings ignores the autonomy of the arbitration process and by applying the conflict rules of that state most closely related to the dispute, an arbitrator relinquishes the power to decide on an applicable law.

In converging conflict of law rules arbitral tribunals often adopts this approach to avoid choosing any single system of conflict of law rules. **[3]**

Arbitral tribunal usually does limit its powers to substantive law, but also, can apply general principles of law.

According to direct choice of law by arbitrators, arbitral tribunal applies any substantive law which can be limited to national laws, contractual agreements, and trade usages or can be unlimited which means arbitral tribunal applies any law or rule that considers relevant.

Article 1496 of French Code of Civil Procedure provides that in the absence of an express choice of law, arbitrators:

"Shall resolve the dispute in accordance with the rules of law he or she considers appropriate".

The example for limited direct choice of law: German law in this case is restrictive and controlling. According to Section 1051 (92) of the ZPO (German Code of Civil Procedure):

"Failing any designation by the parties the arbitral tribunal shall apply the law of the state with which the subject matter of the proceedings is most closely connected"

The Limits to the Principle of Party Autonomy

Sometimes, even though parties choose an applicable law, arbitral tribunal does not apply it, WHEN:

1) It is incomplete
2) The choice was unconscionable or unfair and
3) It is surprising in the circumstances of the contractual relationship

There are some situations when arbitral tribunal limits the application of the principle of party autonomy. These situations come out when relevant mandatory laws and the implications of public policy are considered.

Arbitrators must apply the mandatory rules of the law chosen by the parties, subject to compliance with international public policy. **[4]**

International arbitrators usually apply the mandatory rules of the place of arbitration or the place where the contract was to be performed or the law of the place of arbitration.

In the case OTV and Hilmarton the contract was between English and Alger Company but the contract was governed by Swiss law. Algerian law prohibits the use of intermediaries and the mandatory rules of the place of arbitration are applied. However, the Court of Justice of the Canton of Geneva rejected these mandatory rules and held that unlike corruption the use of intermediaries did not offend Swiss law, which was applicable to the merits of the case.

The principle of party autonomy is also subject to the rules of international public policy:

"The fundamental economic, legal, moral, political, religious and social standards of every state or extra –national community. Examples of international public policy include not seeking to bribe or corrupt government officials, arrangement to smuggle goods in to or out of a particular country etc". **[5]**

Contracts which have these activities as their object will often be illegal or unenforceable under the laws of many countries, but to circumvent the application of such laws parties may expressly submit their contract to some other law that would validate the contract or authorize the tribunal to solve a dispute.

Parties' autonomy in the choice of procedural law is defined or protected either by New York Convention 1958 or UNCITRAL Model Law 1985.

Article V(1) (d) of New York Convention recognizes the parties freedom to agree upon the arbitral procedures, including procedures different from the default procedures prescribed by the laws of the seat where the parties have made such an agreement, also, Article V(1) (d) requires that their agreement be followed, notwithstanding contrary procedural rules in the seat.

The UNCITRAL Model Law (Article 19 (1)) is providing in that "subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". In the absence of choice of procedural law, the arbitral tribunal has a discretionary right to choose procedural law.

İstifadə edilmiş ədəbiyyat:

1. J.D.M.Lew ,L.A.Mistelis, S.Kroll , Comparative International Commercial Arbitration, The Hague, London, New York, Kluwer Law International,2003, p.5
2. Black Clawson Int'l Lltd v Papierwerke Waldhof Aschaffenburg AG, (Judgement of the House of Lords), England,[1981] Lloyd's Rep 446
3. ICC case no 3043,1978, South African company v German company ,106 Clunet 1000 (1979)
4. ICC case no 8385 (1995) , 124 Clunet 1061 (1997)
5. J.D.M.Lew ,L.A.Mistelis, S.Kroll , Comparative International Commercial Arbitration, The Hague, London, New York, Kluwer Law International,2003, p.423

Toğrul Quluzadə

ARBİTRAJDA TƏRƏFİN SEÇİM AZADLIĞI PRİNSİPİNİN ROLU

Xülasə

Arbitrajda tərəflərin muxtariyyət prinsipinin əhatə dairəsi genişdir və göründüyü qədər sadə deyil. Bundan əlavə, bu prinsip məhdudiyyətlərə məruz qalır və hüquq seçimi edilmədikdə, arbitraj məhkəməsi müvafiq qanunu seçmək və ya məhkəmənin müvafiq hesab etdiyi qaydaları tətbiq etməklə mübahisəni həll etmək üçün diskresiyon səlahiyyətə malikdir. Bundan əlavə, arbitrlərin "ex aequo et bono" prinsipinə əsaslanaraq qərar vermək səlahiyyəti ayrıca araşdırma tələb edir.

Toghrul Guluzadeh

ROLE OF PRINCIPLE OF PARTY AUTONOMY IN ARBITRATION

Annotation

Having said all this, the scope of principle of party autonomy in arbitration is wide and not so simple as it seems. Moroever, this principle is subject to limitations and in case of non-choice of law, arbitral tribunal takes a discretionary power to choose a relevant law or decide on a dispute by applying rules which the tribunal consideres relevant. Additionally, to note the power of arbitrators to decide as ex aequo et bono has many aspects to be seperately discussed, as its application creates a lot of obstacles.

Тогрул Гулузаде

РОЛЬ ПРИНЦИПА АВТОНОМИИ СТОРОН В АРБИТРАЖЕ

Резюме

Принцип автономии сторон в арбитраже широк и не так прост, как кажется. Кроме того, этот принцип подлежит ограничениям, и при отсутствии юридического выбора арбитражный суд имеет дискреционные полномочия выбирать соответствующее право или разрешать спор, применяя правила, которые суд сочтет целесообразными. Кроме того, право арбитров принимать решения на основе принципа «ex aequo et bono» требует отдельного исследования.