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Theapplicable law to the merits of the dispute before the international arbitrator under Moroccan and comparative law

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Abstract:
As an alternative to dispute settlement, especially in matters of international trade, arbitration is characterized by its flexibility, its speed, its discretion and its efficiency. In this regard, the parties to the disputes as well as the arbitrators enjoy considerable freedom in the choice of the law applicable to the substance of their dispute, in this sense we ask about the principles that govern this operation. Thus, the development of this subject was carried out by a methodology combined between the description, the analysis and the comparative methodology, to conclude that the freedom offered to the parties and to the arbitrators in matters of choice of applicable law on the merits of the dispute are not without limits, moreover, a recommendation for legislative review concerning the legal status of arbitrators in law is called for.

Keywords: International arbitration; applicable law; merits of the dispute; lex mercatoria.

Résumé :

En tant que alternatif de règlement de différends notamment en matière de commerce international, l'arbitrage se caractérise par sa souplesse, sa rapidité, sa discrétion et par son efficacité. A cet égard, les parties aux litiges ainsi que les arbitres jouissent d'une liberté considérable dans le cadre du choix de la loi applicable sur le fond de leur litige, en ce sens on se demande sur les principes qui régissent cette opération. C'est ainsi que l'élaboration de ce sujet a été effectuée par une méthodologie combinée entre le descriptif, l'analyse et la méthodologie comparative , pour conclure que la liberté offertes aux parties et aux arbitres an matière de choix de loi applicable sur le fond du litige n'est pas sans limite, par ailleurs, une recommandation de révision législative concernant le statut juridiques des arbitres en droit s'impose.

Mots clés : Arbitrage international ; loi applicable ; fond du litige ; lex mercatoria.

Introduction

As state justice no longer offers litigants the advantages and guarantees to which they aspire, they have turned to other modes of conflict resolution, in particular arbitration, which is perceived as soft soothing justice is characterized by its simplicity, its search for discretion and its concern for efficiency[1].

More than half a century has passed since then, and it is clear that this premonitory vision has unfortunately proved to be correct, and state courts are no longer able to ensure the settlement of the conflicts submitted to them in conditions and above all within acceptable deadlines.

Indeed, there is no doubt that the judicial procedure has become long and tedious, which is often punctuated by accidents and exceptions "ingeniously" raised by ill-intentioned parties in particular, for the purpose of delaying the inevitable outcome of the trial, the complexity of the procedure offering a favorable ground for delaying maneuvers[2].

It is in this context that international arbitration has developed, which offers an effective solution where public justice cannot meet the needs of businesses.

"Arbitrari" is a word from Latin origin, the concept of international commercial arbitration contains three fundamental concepts: arbitration, commercial[3] and international[4].

Thus, arbitration is sometimes a so-called amicable or peaceful mode, but always jurisdictional of the settlement of a dispute by an authority which derives its power to judge not from a permanent delegation of the State or from an international institution, but from the parties' agreement. It is said to be international because of the international nature of the dispute or of the procedure followed.

And if the arbitration procedure is characterized "generally" by autonomy of will, this same principle leaves the parties and the arbitrators great freedom to choose the law applicable to the merits of the dispute[5].

In addition, recourse to arbitration has been used for centuries. Platoon has already mentioned it from Ancient Greece[6]. It is, however, over the past 50 years that the use of arbitration has really grown. Currently, arbitration has become the usual method of resolving international disputes, particularly in certain industrial sectors (sale of goods, transport, insurance...) where the appeal to arbitrators is particularly appreciated.

In addition, the international arbitrator is faced with an international relationship, generally having links with many national legal systems, above all and for several reasons, each of the parties to the litigation attaches to a legal system which it considers most favorable to settle the dispute. In this sense, the designated international arbitrator is faced with the need to settle a problem of applicable law.

This is why this subject is extremely interesting because of the complexity of the institution of international arbitration. In this regard, it is necessary to consider the very wide variety of the substance of the subject matter of the disputes submitted to the arbitrators, something which poses a diversity of solutions in the matter.

Settling the merits of a dispute within the framework of international arbitration is based on rules adapted to its specific nature, while respecting the will of the parties who have chosen a law or a legal system applicable to the substance of their dispute, it is also incumbent on arbitrators to choose an applicable law when the parties have not themselves determined the law applicable to the merits of the dispute, but ensuring the proper application of these principles is not always a simple task since that is not without limits. In this regard, we wonder on what principles is based the resolution of the merits of the dispute in international arbitration?

This is how the development of this subject will highlight a combined methodology between the description, the analysis and the comparative method.

It therefore seems wise to devote particular attention to the different choices and limits devoted to the parties for the election of the law applicable to the merits of the dispute (Chapter I), as well as the options open to arbitrators (Chapter II).

Chapter I- A multitude of choices open to the parties for the law applicable to the merits of the dispute

Moroccan law like French law recognizes the parties' freedom to determine the law applicable to the substance of the dispute to be decided by the arbitrators.

This is the consecration of the principle of autonomy of the will presented by article 327-44 of Moroccan law relating to international arbitration[7], as well as article 1486 of the French code of civil procedure, following which "arbitrator settles disputes in accordance with the rules of law that the parties have chosen ".

These rights do not imply such a detour much more, it is the whole of the substance of the dispute which will be submitted to the elected choice, and not only the questions relating to the *Lex contractus*[8]: the principle of autonomy therefore applies, in matters of international arbitration, an even greater scope than that of the general theory of conflict of laws in contractual matters.

Thus, the existence of several choices of law applicable to the merits of the dispute open to the parties (Section 1) does not prevent the presence of certain limits (Section 2).

Section 1 - Diversity of options open to the parties

The diversity left to the parties to choose the law applicable to the basis of the dispute in international arbitration is based on their will (sub-section 1), moreover, the reference to a law chosen by the parties to resolve the dispute is multiple (subsection 2).

Subsection- 1 the correlation between the will of the parties and the chosen law

Even in the absence of a form required to refer to a given law, however, it is imperative that the expression of this choice must be certain (A), this same flexibility also extends for the moment of the choice of the law governing the substance of the dispute (B), as well as for the object of the choice (C) and also in the case of the choice opted for a state law.

A-Expression of choice

In Moroccan law as in French law, the choice by the parties of the applicable law may be express or tacit. No particular shape is required. It is sufficient that the parties have made this choice with certainty for it to be binding on the arbitral tribunal. Moroccan law, like French law or Swiss law, does not impose any formal conditions. Nothing would therefore prevent the arbitrators from discovering in the common attitude of the parties an implicit agreement on the applicable law, even if they have not expressly concluded to the application of this law. On the other hand, the agreement of will must be certain. This is a fundamental requirement which presupposes that a choice has been made.

In practice, the parties will always have an interest in specifying as clearly as possible the applicable law in their arbitration agreement, so as to avoid any subsequent difficulty.

Finally, the choice of the applicable law made by the parties is generally understood as the choice of the internal provisions of the law concerned to the exclusion of the conflict of laws rules of the chosen law. The exclusion of referral in contractual matters is classic[9]. In the law of international arbitration, it is this tradition which has prevailed and this, by virtue of article 28, paragraph 1, of the law which of the UNCITRAL which specifies that "any designation of the law of the legal system of a given state is considered, unless expressly stated otherwise, by designating the substantive legal rules of that state stated conflict of laws rules". This does not prevent the arbitrator from investigating whether the choice made by the parties covers the whole of the disputed matter or only the substantive contract of the dispute. In the latter case, the arbitrator could, with or without recourse to conflict rules, determine the law applicable to the other aspects of the dispute[10].

B-Time of choice

The question of the choice of applicable law does not necessarily arise during the preparation of the contract itself, or of the compromise, but can arise later in the course of the procedure, and one could imagine situations posing certain problems in view of the fact that only certain legal systems allow the subsequent choice by the parties of the applicable law. This has never created major difficulties in international arbitration, since this procedure is based on the consent of the parties and the consent can of course be modified by a subsequent agreement.

C-Object of the choice

According to art 327-44, "The arbitration agreement freely determines the rules of law that the arbitral tribunal must apply to the substance of the dispute". the Moroccan legislator as well as the French legislator by using the expression “right” and not the “law” to describe the choice of the parties, wanted to give them the possibility of choosing not only a state law including all the branches that this encompasses, but also rules that the arbitral tribunal considers appropriate "In the absence of a choice by the parties of the applicable rules of law, the arbitral tribunal shall decide the dispute in accordance with those it considers appropriate" or refer to transnational rules such as the lex mercatoria , "In all cases, the arbitral tribunal shall take into account the provisions of the contract between the parties and the relevant customs and uses of commerce".

D- The case of the choice opted for state law

When the parties have agreed on the law applicable to the merits of the dispute, whether in the initial contract or at a later stage, in particular during the establishment of an act of assignment, the arbitrator must simply give effect to their choice.

The choice of state law by the parties remains the most frequent case in practice.

Sub-section 2 - A Plurality of Choice of Laws is open to the parties

The reference to a law chosen by the parties may relate to a law unrelated to the dispute (A), or to a multitude of “carving” laws (B), or to a “frozen” law (C), or even on a law which cancels all or part of their agreement (D). In addition, the contract may spiral out of control under a higher standard (E).

A-Choice of a neutral law

Unlike the old conception where the Private international law of contracts imperatively required for the validity of the choice of law chosen by the parties that they present a close link with the dispute, contemporary international arbitration law has abandoned this concept, since the parties can choose a neutral law, i.e. a law that has nothing to do with the situation in dispute[11].

B-Choice of a multitude of laws (Skinning)

The choice by the parties of several laws does not generally pose any problems. They can even opt for a differentiated choice of laws, each having the objective of applying only to a part of their contract. In fact, it is about a technique known in private international law of the contracts under the term of dismemberment of the contract which happens to be also applicable in the law of international arbitration.

C-Choice of a fixed law

Clauses tending to freeze the content of the applicable law at a given time have given rise to an extremely abundant literature on state contracts.

As the State generally insists on subjecting the contract to its own law, the parties frequently agree on the compromise solution which consists in subjecting the agreement to the law of the State in its content at a given moment, most often to the date of conclusion of the contract. The fact for a State to use its prerogatives of sovereignty to improve its situation as co-contracting party could undoubtedly be sanctioned by the theory of the misuse of power, but the stipulation of a freezing clause of the applicable law remains, for the private party, the surest guarantee that the rights which it holds from the contract cannot be unilaterally affected by the State. These clauses do not prevent the State from legislating but are content to exempt a specific contract from the possible effects of this legislation.[12] –[13]

D-Choice of annulment law

This is generally the result of an ambiguous agreement emanating from the will of the parties which taints their agreement when choosing the applicable law governing the substance of their dispute. Indeed, during the conclusion of the contract, the contractors generally designate a legal system which they trust, although sometimes they ignore its content in order to find solutions for any difficulties that may arise in connection with their agreement. Thus, and in the event that their solution involves the annulment of a provision of the contract (an excessive non-competition clause for example), or even of the entire contract (in the event of injury for example), it is also respect the will of the parties to cancel the provision in question or the contract[14].

E- Absence of law governing the substance of the dispute.

The significance of this lack of choice may vary depending on the factual assumptions. This may be an unintentional omission of the parties. This will be the case when the contract is drawn up by people without legal training and will not be reviewed by a lawyer. This lack of choice can also be the result of a voluntary omission by the parties, either because they do not manage to reach an agreement and decide to assume the risks inherent in this legal vacuum, or because they use this means to show that they did not want to opt for the application of one or the other of their national[15].

In this regard, we note that the parties and in accordance with the principle of autonomy of the will can expressly or tacitly choose a law to govern their contractual obligations; they can also submit their dispute to rules other than state law determined as the case of the choice opted for an national law (lex mercatoria).

This is how it can be accepted that Moroccan law, like French law, recognizes the parties' freedom to determine the law applicable to the merits of the dispute to be decided by the arbitrators. This is the consecration of the principle of autonomy of the will presented by article 327-44 of Moroccan law relating to international arbitration, as well as article 1486 of the French code of civil procedure, following which “l 'arbitrator settles disputes in accordance with the rules of law that the parties have chosen ”.

Moreover, this freedom open to the parties to choose the applicable law on the merits of the dispute in international arbitration is not absolute.

Section 2- Limits of the parties as to the effectiveness of the choice

In the vast majority of cases, arbitrators respect the expressed will of the parties on the law applicable to the dispute and stick to the application of that law. This is how an arbitral tribunal constituted under the aegis of the ICC in a 1971 award in the 1512 case.

In addition, even if the parties have expressly chosen the law applicable to the substance of their dispute, they may find themselves limited for a number of reasons, by the fact that certain provisions cannot be subject to the law of autonomy (subsection 1), or even because this law chosen by the parties normally applicable is overruled by the arbitrators in the name of public order (sub-section 2).

Sub-section 1-Restrictions encountered limiting the law of autonomy

It is clear that the law of autonomy chosen by the parties is fully expressed in its application on the substantive rules applicable on the merits of the dispute in international arbitration.

However, this freedom is not without limit, since there are certain questions which escape this freedom and which are subject to the rules of attachment thus eliminating the law of autonomy.

In this regard, it is wise to cite legal relationships linked to the territory of the State such as real rights relating to fine real estate or even tort and quasi-tort, see also acts relating to the capacity of contractors.

In this sense, he unanimously admitted that legal relations relating to real estate can only be governed by the law where the property in question is located and this, by virtue of art 17 of the DCC[16].

This rule, focused only on the local level, must have a broader scope, and the interpretation of art 17 as meaning that movable or immovable property is governed by the law of the place where it is located. This principle conforms to an almost universally accepted rule.

As for what relates to the act of misdemeanor and quasi-delict, it must be admitted that this act only degenerates a personal right expressed by pecuniary reparation, and the enjoyment of this right is linked to the will of the beneficiary more as its binding to the place where they were born.

Moreover, the question relating to capacity also escapes the law of autonomy, since it is also unanimously accepted that the capacity of persons is governed by their personal laws, the capacity to contract thus, of each party to the contract must be assessed according to his personal law. In addition, the same provisions governing capacity are also applicable on the question of power.

Therefore, capacity will be governed by the national law of the person concerned, while power will be governed by the law of its source.

In addition to the said limits which block the law of autonomy chosen to govern the substance of the dispute in international arbitration, the public order exception may give the arbitrators the right to oust the law chosen by the parties whenever this is deemed to be contrary to international public order.

Sub-section 2 - Objection from the applicable law by public order

It is undoubtedly recognized that arbitrators may set aside the provisions of law operated by the parties when these provisions are contrary to international public order.

It is true that art 1496 of C.P.C.F, as well as art 327-44 of C.P.C.M, (Moroccan code of civil procedure) did not give rise to such an exception to the application of the law chosen by the parties.

However, it necessarily results from the fact that an award contrary to international public order could be annulled on the occasion of an action for annulment in application of arts 1502-5 ° and 1504 of the CPCF as well as in all States which have ratified the New York Convention of June 10, 1958, of which Morocco is a signatory State and consequently these said provisions will obviously be applicable.

Thus, an award contrary to the requirements of international public order could be refused recognition and enforcement.

As a result, the arbitrators will not be blamed for the contradiction of the award to international public order without giving them the opportunity to set aside the provisions of the law operated by the parties which they consider contrary to it.

In addition, and when it is impossible for the arbitrators to identify clues likely to detect an implicit choice of the applicable law chosen by the parties to the dispute that they should opt for a choice made by them.

Chapter II - Consecration of the principle regarding arbitrators

In the absence of a choice of the parties, it will be for the arbitrators themselves to determine the law applicable to the merits of the dispute.

Since arbitration is international in nature, it is likely that a conflict of laws will arise. ”Bringing into play of the interests of international trade” necessary for the qualification of the internationality of arbitration, opens up uncertainty on the determination of the applicable law and even on the need to apply a state law.

Faced with this pitfall, the arbitrators are in an original situation compared to state judges. Not expressing justice in the name of any State (and in particular not that of the seat of the arbitration) they are not bound to apply a rule of

conflict resulting from a law or a determined international convention. It is often claimed that they do not have a *lex fori*.

Not being bound to apply a particular conflict rule, they are not bound to apply a particular law either. Their only obligation is to apply certain rules of law. This is what article 1496 CPCF expresses, as well as article 327-44.CPCM when they declare that in the absence of such a choice (that of the parties), the arbitrator shall settle the dispute in accordance with the rules of law which he considers appropriate[17].

Indeed, the arbitrators' freedom as to the choice of law applicable to the substance of the dispute is manifested by a multitude of options (section 1), but this freedom of choice is not without limits (section 2).

Section 1- A plurality of choices of applicable law is open to arbitrators

In arbitration practice, we can mainly identify four methods used to designate the law applicable to the dispute, which are moreover often used cumulatively by arbitrators, in this regard it is a question of the choice of a state law (sub-section 1), or choice of a law separate from national legal orders (sub-section 2).

Sub-section 1- choice of a state law

In their search for a national law intended to resolve the merits of the dispute in international arbitration, the arbitrators have the choice between applying the seat conflict rule (A), and the conflict rule of the countries interested in dispute (B).

A-Headquarters conflict rule.

The application of the conflict of laws rules of the seat of the arbitral tribunal has long been essential in arbitral practice. In 1957, the Institute of International Law could still write, in its resolution adopted in Amsterdam, that "the connecting rules in force in the State of the seat of the arbitration must be followed to determine the law applicable to the merits of the dispute. The advances in the delocalized conception of international arbitration have made this method lose all binding value, and certainly contributed to its losing its dominant position in the practice of arbitrators. This being the case, arbitrators can still choose to take this route which has undeniable advantages. First, the approach is ultimately neutral since it leads to the application of the conflict rules of the Headquarters State, itself often chosen for its neutrality[18].

B- Conflict rule of the countries interested in the dispute.

One method, accepted by Professor Y. Derains, which is now widely used in arbitration practice, consists in applying, cumulatively, the conflict of laws rules of the countries involved in the dispute. When these various rules all designate the same law, the titles of jurisdiction of the designated law thus appear to be reinforced[19].

However, even if the conflict rules involved do not have the same content, the important thing is that they all refer to the same law. The approach has obvious merits.

Then, the arbitrator who uses such a method could hardly be suspected of being arbitrary in the designation of the applicable law.

Finally, the solution spares the parties' expectations, which cannot be legitimately surprised by the application of a law designated by the conflict rules of countries having serious contact with the disputed situation.

Sub-section 2- Choice of a law separate from national legal orders

In addition to the aforementioned methods for resolving the merits of the dispute, international arbitrators may opt for the choice of conflict rule from international sources (A), or by the direct route method (B).

A- Conflict rule from international sources.

Another method encountered in arbitration practice, which is detached from national legal orders, consists in applying conflict of law rules resulting from international conventions, such as the Rome Convention of 1980 on the law applicable to contractual obligations, or the Convention of The Hague of 1955 on the law applicable to the international sale of tangible movable objects.

When the convention in question is in force in the countries of establishment of the two parties to the dispute, the arbitrators do not hesitate to apply it since it can make it possible to legitimize the jurisdiction of the law designated by them[20].

B- Direct route.

This method is currently very practical in international arbitration, since it consists for the arbitrator in disregarding the rules of conflict of state law and in determining himself and directly the applicable law.

The method can be encouraged by the drafting of many recent arbitration rules which offer an interesting freedom to arbitrators, although some see the direct route as a refusal of arbitrators to apply any conflict of law rule.

In addition, to the methods open to arbitrators in their arbitration practice, and which are based on a multitude of the aforementioned choices, the latter may be content to apply a specific state law having close links with the dispute in question, and like the parties to the proceedings litigation, arbitrators can also choose a neutral law, apply several laws, or freeze the applicable law at a given time. The same is true, and in the context of resolving the dispute, the arbitrators can refer to the *lex mercatoria*, in this sense, it is accepted that the arbitrators can in the silence of the parties apply the *lex mercatoria*, thus, art 6 of the resolution adopted by the institute of international law at the 1989 Saint-Jacques de Compostel session concerning state contracts enshrines this solution by stating that "insofar as the parties have left the question open, the tribunal seeks the necessary rules and principles from the sources indicated in art 4 "(the general principles of public or private international law, the general principles of international arbitration), or a state law[21].

However, as with parties to international arbitration disputes, the freedom of arbitrators is not limitless.

Section 2- Limits against the choice of arbitrators

It is in this sense of a limit duality, one of state origin (subsection 1), the other relating to international public order. (Sub-section 2).

Sub-section 1- Situation of the international arbitrator with regard to mandatory laws.

Each State intends to impose respect in the arbitration of the police force laws of the forum, and sometimes even of certain foreign police laws. The international arbitrator is in a special position vis-à-vis police laws, which distinguishes him from the state judge: since he is not the judge of any state. All the police laws are foreign to it. This does not mean that it should not respect any of them. The arbitrator should ensure compliance with overriding mandatory laws that are legitimately applicable to the dispute, even if the parties designate another law. The future and effectiveness of its award and more generally of international arbitration require it[22].

Sub-section 2- Situations of the international arbitrator with regard to public order.

Under the terms of the development which marked the authorized arbitrator of disputes involving rules of international public order (in other words, overriding laws), state rights have recognized him as the power, but in reality the duty to ensure itself respect for the rules relating to international public order. French case law has clearly ruled in this direction with regard to international public order. The French judge would oppose the recognition and enforcement in France of sentences which effectively and seriously contravene the rules of international public order.

Indeed, the award which violates a rule of international public order infringes an interest considered fundamental by the forum, and for this reason protected by French international public order[23].

Conclusion

Following the analysis of the aforementioned cases, we find that the parties and comply with the principle of autonomy of will can expressly or tacitly choose a law to govern their contractual obligations.

Moreover, even when the parties have not expressed an express choice on the question, the arbitrators and before seeking the applicable law, must seek to detect all the clues likely to reveal the will of the parties in order to detect a implicit choice of applicable law on the merits of the dispute, and this through careful research and an analysis with regard to the behavior of the contracting parties for the purpose of deducing from it in the clauses and the terms of the contract some clues may come to identify a tacit agreement of these on the law applicable to the substance of the dispute.

As for the arbitrator in international arbitration and more precisely in his role relating to the choice of law applicable to the merits of the dispute, he enjoys remarkable legal autonomy and this is expressed by the multitude of choices open to them in order to find the most suitable solution to resolve the dispute.

However, the international arbitrator and in the exercise of such a mission takes into consideration several factors in order for his award to be enforceable, therefore he is bound to respect the police laws as well as the rules of international public order.

Regarded, however, as a task of elites, international arbitration is today a much sought-after alternative in international trade as part of the settlement of disputes that arise between the various players in the matter.

In this sense, the international arbitrator chosen by the parties wishing to resolve their dispute is required to be experienced in this discipline, since the desired result is based on obtaining an arbitration award with the vocation that it will be executed in the end stage, and it is in this sense that several stages must be taken into consideration, whether it concerns procedural rules or the rules governing the substance of the dispute, in particular in the existence of a multitude of choices of the applicable law on the substance of the dispute open to the parties as well as to the arbitral tribunal.

This mission is further complicated by the existence of limits against the law of autonomy of the parties, in particular respect for international public order and police laws either of the forum or foreign as well as the proper application of the various legal rules and regulations uses in practice.

This is how, following the analysis of this subject, it is obviously admitted that the mission of the arbitrator in international arbitration is not at all an easy task. However, in the absence of a legally recognized legal order for the granting of the title of arbitrator in law, it strongly recommended that a legislative revision should be carried out in this direction so that the profession of arbitrator in law would be a part of the solution not a part of the problem.

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