Abstract

Although the impact of the compulsory internal rules on the internal commercial contracts is clearly obvious, it is not so much effective when they are applicable to the international commercial contracts. When the parties to the international commercial contracts agree to apply certain legal rules (i.e. Lex Mercatoria) on their contractual relationships, they free themselves from applying the compulsory rules of the internal commercial contracts. This is true when the dispute is filed before the international commercial arbitration.

But this does not mean that the contract would flee entirely from the authority of the internal compulsory rules when the case is filed before the international commercial arbitration. As usual, the arbitrators apply the compulsory internal rules of the countries which are related to the contract in order to make their judgments applicable in those countries.

This coincidence between applying rules from both systems, i.e. the transnational system and the internal system, shows the capability of applying the subjective theory and the socialist theory for achieving the balance in the contractual relationships, and preserves the interests of the weak party and contributes in achieving the social justice.

Along time ago, there was a need for the presence of an independent legal system to control the contracts concluded between merchants in the international commercial society, or between them and the others. The rules of which had been constructed by the international mercantile society to control the international commercial contracts, differ from those which control the internal commercial contracts. They are being affected by more than one system of legal rules. This would lead to the important topic of conflict of laws or conflict of legal rules applicable to the international commercial contracts.

The first theory of conflict of laws appeared for the first time in the mid centuries, but it was not applicable to the international commercial contracts at that time, since Lex Mercatoria was applied directly on the disputes related to those contracts.

The jurisprudence opposed to the theory of conflict think that the traditional theory of conflict does not fulfill the legitimate expectations of the contracting parties in reference to the applicable law. Whereas, the transnational law, on the contrary, is being expected by the contracting parties and they have the advantage that they are applicable even without the consent of the contracting parties when the dispute is filed before the arbitral tribunal, the internal laws which are

expected to be applied in reference to Savieny's thought, do not consist with the nature of the international commercial contracts which have different technical characteristics from the internal contracts.

The traditional subjective theory supposes that the applicable law is to be chosen subjectively, i.e. the contract must continue to be free from the power of the chosen law, even the compulsory applied rules. This would lead to the conclusion that the provisions of the chosen law are to be considered as contractual conditions, and that the contract to become sufficient, i.e. does not need to be controlled by a law. Such a contract is called the "international free contract" which lives in vacuum. In such a case, the consent of the parties is to supersede the law. So, the contract becomes compulsory applicable due to the consent of the parties and not due to the law.

In contrast, a new approach appeared recently differs from the jurisprudence of the traditional subjective theory. This new theory states that if the contracting parties are given the ability to choose the law applicable to the international commercial contract, and if this law integrates into the contract, this means that we will still in need to a law to control the contract. This law would be the transnational law (Lex Mercatoria).

The third thought in this context states that, the two systems would be applied together. This was adopted by the Egyptian and the Palestinian legislatures in the provisions (39) and (19) of the Egyptian and Palestinian arbitration laws respectively.

The jurisprudence who are for the Lex Mercatoria say that the silence of the parties, in this context, means that their implied consents refer to the application of the Lex Mercatoria, especially if they choose the arbitration to dissolve the case. Moreover, the arbitrator may apply the Lex Mercatoria without the clear consent of the parties if he finds the following: the main factor in the dispute is situated in the international commercial society; or if the Lex Mercatoria system is more suitable to control the dispute; or if applying the Lex Mercatoria would dissolve the dispute effectively. On the other hand, some jurisprudence think that Lex Mercatoria would be applied in priority to the internal law, even though they were chosen by the parties, in certain cases: if the internal law got in conflict with a compulsory rule of the Lex Mercatoria; or if the internal law was insufficient; or if the internal law refers to the Lex Mercatoria to be applied.