Advances in Research

16(4): 1-7, 2018; Article no.AIR.43930
ISSN: 2348-0394, NLM ID: 101666096

Resolution of Conflict of Laws in International Contract Field

Desiree Roffee Ciss[1*]

[1]School of Law, Zhongnan University of Economics and Law, Wuhan City, China.

Author's contribution

The sole author designed, analyzed, interpreted and prepared the manuscript.

Article Information

DOI: 10.9734/AIR/2018/43930
Editor(s):
(1) Dr. Shi-Hai Dong, Professor, Department of Physics, School of Physics and Mathematics National Polytechnic Institute, Unit Professional Adolfo Lopez Mateos, Mexico.
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(3) Anonymous, Near East University, Cyprus.
Complete Peer review History: http://www.sciencedomain.org/review-history/26464

Original Research Article

Received 04 July 2018
Accepted 20 September 2018
Published 30 September 2018

ABSTRACT

As we know, it would be difficult to live in community, to maintain human relations, in other words, to live in a society without talking about the differences that could arise. It is also in the perspective of managing this kind of situations, these relationships between individuals that is not the right. These disputes may exist either between individuals living in the same territory or between individuals of different nationalities it is also the reason why we speak of a conflict of laws object to our development.

Thus, conflicts of law are understood to mean that branch of private international law which, in the event of a dispute, makes it possible to determine the applicable law for deciding the latter. It must be noted that in the event of a dispute it is necessary at least to have an element of foreign nationality. As we know, there are several types of conflict of laws but the subject of our subject is conflict of laws in contract. We will then ask ourselves the question of how to regulate conflicts of laws?

To try to answer this question in order to eradicate or avoid the conflicts of laws we will have to evoke throughout our development in a successive way: definition of the notion of international contract, of the notion of conflict of laws, so conflict of law, conflict of laws rules, but also discuss how to resolve conflict of laws, how to prevent or avoid conflict of laws, and present conflict resolution methods while using French law as an example.

**Corresponding author: E-mail: desivolley@hotmail.fr;*

Keywords: Resolution; conflict; law; international; contract.

1. INTRODUCTION

We cannot talk about conflict of laws in the field of contract without talking about private international law which is the branch of law which studies the settlement of individual rights disputes having at least an extraneous character, that the parties are of nationalities different, reside in different countries, or are bound by commitments made in a country other than their country of residence [1]. In other words, private international law in civil law systems consists of all the principles, usages or conventions which govern the legal relations established between persons regulated by the laws of different States [2]. In this sense, it can be described as an instrument for managing the diversity of rights. This is a situation of conflict of national laws caused by an element of foreignness in the application of private law situations. In the case of relations between States, the applicable law is public international law. Note that the term "state" does not include only sovereign states or countries and may also refer to conflicts of law between different states. For example, since Canada is a federal state in which the provinces have the power to legislate in private law, when there are conflicts of law caused by an element of foreign nationality, we are talking about international law. The term State, therefore, refers to the State that has sovereignty in a particular area, be it the central state or the federated state.

The objective of private international law is, therefore, to determine in which country the dispute is to be judged: this is a conflict of jurisdiction but also which country is the applicable law: it is the conflict of law. are different, the courts of one country may be required to apply the law of another country. French textbooks also often add a section dealing with subjects of law, including the law of nationality and the status of foreigners [3].

It should be noted that private international law also organizes the recognition and application of jurisdictional decisions from another country in the world. The main problems with private international law are: the conflict of jurisdictions, which is subdivided into two distinct issues: international jurisdiction (in which country can the dispute be judged?), and the recognition of foreign decisions and the conflict of laws (what is the legal order - the country - whose law applies). The two questions are quite distinct, the courts of one country may have to apply the law of another country. In order to avoid the conflict of law in contract field we think it's necessary to review the international contract execution and training conditions, to have a notion about the meaning of conflict of law, how to prevent conflict of law, how to solve conflict of laws matter and after that giving in a conclusion my own understanding.

2. STUDY ON METHODS OF TRAINING AND EXECUTION OF THE INTERNATIONAL CONTRACT

As we know, the contract, in general, is defined as a convention by which people oblige themselves to others to give, do or not do something. The international contract is defined in another way because it is different from the latter by the existence of what is called foreign element [4].

Thus, international law deprived it is the law applicable to the contract which governs the formation of the international contract. Following the sudden break-up by one of the parties, when the negotiations were unsuccessful, the qualification is no longer disputed in comparative law. Some systems retain the contractual qualification to the imitation of German law, others the tort of imitation of French law. The obligations arising from a pre-contractual relationship are excluded from the scope of the Regulation on the law applicable to contractual obligations (Article 1-2). It should be made clear that this regulation invites the search for the law that would be applicable to the contract had it been concluded. According to common principles of substantive law, it is possible to appreciate the formation of the international contract beyond the logic of the conflict of laws [5]. Thus, in the wake of the obligation of good faith, which is enshrined both in arbitral jurisprudence and in international conventions, the parties are obliged to conduct themselves in a loyal and cooperative manner. Loyalty while being both a virtue and a civilly sanctioned obligation is even endowed with permanence that is superior to legality. The process of formation and interpretation of the contract may also be organized by contractual stipulations. In order to be well trained, the formation of the international contract must first be considered in relation to the main rules that apply to them: it, therefore, obeys a certain

number of basic rules. It is in this perspective that we will treat its execution.

Thus, acting on the execution of the international contract, it corresponds to the material realization of the multiple operations that are involved in the implementation of the obligations of each of the contractors. In many circumstances, this execution may last for months even for years. It should be noted, however, that regardless of the length of time required to complete the execution of the international contract, it remains a more or less faithful reflection of the will of the contractors, embodied in the clauses of the contract [6]. This execution always requires, on the part of one of the parties, the one who is not a mere "client" receiving the services of the other at least, a know-how, the recourse to techniques and to an art but the execution is also dependent on the ideal model to which it must tend, such as it draws to the reading of contractual stipulations. Similarly, the contract also considers the means to implement while trying to remedy in advance the most likely difficulties likely to arise. Presented from a legal point of view, there is an important part of the contractual technique in the performance of the contract.

It is in an area subject to the normative sovereignty of the States that the material operations rendered necessary by the execution of the contract take place. They agree, as the conflict of contract rule shows, that they have only limited requirements, essentially derived from a law of the contract which may be freely chosen by the parties. However, it is necessary to specify that the interests which the States have the guard or even the interests which are their own are susceptible by the execution of the international contracts to be affected.

Thus, the spatial materialization of the effects of the contract, knowingly neglected by the conflict rule, is put back in the spotlight by the execution of the international contract.

3. NEED TO KNOW HOW TO NEGOTIATE AN INTERNATIONAL CONTRACT

The negotiation of the international contract then brings us back to the contractual process where according to the cultural area of the people involved, according to the branch of activity and according to the balance of power between the companies, the cultural differences are the most pronounced [7]. Similarly, when the bargaining power of a party is too low, we find the figure of the contract of adhesion, concluded this time between two professionals. For example, if the contract is concluded at the price of defects of consent (fraud or moral violence), protection should be sought in common law. It should be noted that the longer and deeper the negotiation, the less likely a judge or arbitrator will characterize a defect of consent, particularly fraud or economic violence. In the context of negotiations that have not succeeded due to the behavior of one of the partners, for example, it is up to the common law to assess whether this behavior deserves a sanction or not. A well-formalized negotiation is therefore based on instruments that must be presented before analyzing the obligations of the partners.

As regards the negotiation phase, it often includes indiscriminately elements relating to the preparation and elements relating to the actual formation of the contract. Even sometimes because of a beginning of execution or even of a more or less complete execution of the contract even if the documents which materialize the agreement of the parts are not written or are incompletely incomplete things get complicated. They can be complicated either because of the existence of several contractual documents that may never see the light of day. Thus, there is a crucial problem which is to determine from what threshold and with what intensity the parties are effectively bound by a binding agreement. Perhaps then a distinction is made between separating the agreements in principle, or the contractual relationship is not yet created, and the agreements to be completed or perfected in respect of which the threshold of the contractual commitment can be considered as reached [8].

In fact, it will be necessary to be concerned about the possible impact on the final contractual document of any preliminary contracts or partial contracts, letters of intent or simple correspondence that may have been circulated between the parties depending on whether they could or could not be regarded as genuine firm offers or unambiguous acceptances of contracting the obligations they set forth.

4. THE OCCURRENCE OF CONFLICT OF LAW IN CONTRACT FIELD

Conflict of laws is the part of private international law that determines which law will be applied in a dispute with at least one foreign element. In other words, there is a conflict of laws whenever a legal situation may be related to several

countries, it is necessary to choose, between the laws of these different states, the one that will be called upon to govern the legal relationship. It will thus be necessary to find the law applicable to the questions of law asked once the French court is seized of the dispute. Conflict of laws rules have been developed on the assumption that the French judge may apply foreign law, and that the various foreign laws with links to the dispute have a theoretical purpose to apply,

After having concluded an international contract, the parties must think that a dispute could arise at any time in the event, for example, of non-compliance with the clauses of the contract from which there is a conflict of laws because it is concluded by two persons of different nationalities or of the same nationality but living in different countries, for example.

On this, the question that provokes our reflection is that of knowing how to deal with the existence of conflict of laws in terms of contract? Thus, once the French judge is seized of the dispute, it will be necessary to find the law applicable to the questions of law asked. Assuming that the French judge can apply a foreign law, and that the various foreign laws with links to the litigation have a theoretical vocation to apply, have been developed conflict of laws rules. In order to answer these questions, we will do practical case studies to make explicit our words.

5. HOW TO CHOOSE THE LAW APPLICABLE TO CONTRACTUAL CONFLICT

All internal disputes arise in the same terms to the judge: A claim and a set of facts invoked in support of this claim. Where at times the plaintiff indicates the text of the law which in his opinion applies to the case, the judge is not bound by that foundation to which he must substitute the ground which appears to him to be applicable.

In the case of international litigation, the judge must first ask his own national law, or in other words the law of the forum, must not be excluded in favor of foreign law. Indeed, if another legal order proves to be competent it can substitute not only another internal rule but also a rule foreign to the internal rule invoked. Any question of law corresponds to an applicable rule, explicit or implicit, and that in any legal order. Thus, it will be for the judge to rule under this foreign rule as he would for a rule of his own national law.

From the point of view of the public international law, it is of little importance that the foreign State from which the rule is derived be recognized by the French Government. The only thing that counts is that this rule is effectively in force over the extent of the foreign territory and that the parties have entered into relations under it. Thus, to answer the question submitted to him but without necessarily offering him the same solution, the judge must, therefore, choose between several rules that could answer completely.

Thus, arises a criterion of choice: domicile of the subjects of right, Nationality, place of situation of the goods, of occurrence of the acts or legal facts.

It is in an international legal relationship involving a matter which has been the subject of international legislative unification, for example in the matter of checks and bills of exchange with the Geneva Conventions of 1930 and 1931, that there is a problem of Determination of the applicable law obviously finds its limit. Between the signatory States of these two conventions, the rules are identical in their content but also common in their form. It suffices for the judge to apply the treaty which devotes them. Here there is no plurality of legislations and therefore no conflict of laws [9].

However, there may be divergent interpretations of the rules of the treaty according to the different supreme jurisdictions of the signatory states even if there is no plurality of laws. Will the common rule be applied according to the interpretation given by the Federal Court of Germany or the French Court of Cassation? It is said in this connection that there are as many Jurisdictional Orders as there are Legal Orders.

Even in these unified matters, however, it is good that the parties take care to specify in detail the rules they would like them to apply, regardless of the court seized.

Finally, while being able to rule on a dispute under a foreign rule, the French judge is not obliged to do so. Some obstacles can sometimes arise against this application of a foreign rule even based on public international law.

An exclusive power to legislate in certain areas, for example in tax matters, is given to States by public international law. Such as they have been instituted to serve the French State, the judges

traditionally show a reluctance to apply foreign rules and justify this refusal by the so-called political character of the foreign law. Judges simply do not want to work together to achieve the goals that foreign states have set themselves. Admittedly, this attitude is sometimes legitimate, but it may seem to be much less so when, having declared itself competent, however, the judge refuses to apply the foreign law. This is a real opposition. This mark of hostility is the sign that one deliberately wants to hinder the policy of a state. It serves the objective of private international law, which is legal certainty.

If we put aside this assumption of refusal to apply a foreign competent law, we must see from now on methods according to which it is possible to fix a criterion which makes it possible to declare such or such a competent law in the presence of a contest or more exactly a conflict.

In international law the principle is that the parties are free to submit their contract to the law of their choice. On this we bring two precisions:

- The choice of applicable law clause will be designated by the rules of conflict of laws that the judge will apply in the event of litigation, except agreement of the parties.
- Some laws limit the freedom of choice. For example, it has been held that the Bulgarian law chosen by the parties for a contract with a Belgian commercial agent may be rejected in favor of Belgian law, which is more favorable to the latter [10].

6. HOW TO SETTLE A CONFLICT OF LAWS IN MATTER OF CONTRACT

In order to resolve conflict of laws two approaches may be considered by States:

The first approach consists in the implementation of rules of material international private law, and the second in the enactment of rules of conflict. The substantive private international law rules are substantive rules that often come in the form of international treaties. They are intended to apply when a situation, with elements of foreignness, can be described as an international situation and falls within the scope of the Treaty. The advantage of a substantive rule of private international law is that it gives a direct solution to the dispute because of its substantial nature. It is no longer necessary to take the detour of a rule of conflict and the solution of the dispute can be obtained in a much easier way. Take the example of a dispute over the international sale of goods that is governed by the Vienna Convention [11]. If a judge has to rule on a sale concluded between a French and a German (whose respective countries have both ratified this convention) falling within the scope of this convention, he will not have to determine which of the French law or German is intended to apply to settle this dispute, but will directly apply the substantive rules of the Vienna Convention, at least within the scope of the material scope of the convention.

On the other hand, the judge will have to determine for all the elements which are not treated by this convention, the law applicable under the rules of conflict of laws.

It should be known that the enactment of material rules of private international law is extremely difficult from the moment when, when this international rule supposes the agreement of several States on often complex elements. This is why in most situations there are no substantive private international law rules and yet the judge has to decide a conflict of laws. Therefore, it is through a rule of conflict of laws that the judge will have to decide the dispute by applying the designated law. These conflict-of-law rules can be traced back to international conventions (example in domestic law or the Rome Convention on contractual obligations). On the other hand, it is not enough to reveal a choice of parties for this law, the fact that one law is better suited than another to govern the operation [12].

On this, the ordinary element of localization in the Rome Convention is as follows:

It is presumed that the contract has the closest links to the country where the party providing the characteristic service has its habitual residence or, in the case of a company, association or legal person, its central administration at the time of conclusion of the contract.

It is therefore up to the judge to determine the center of gravity of the contract if a service is impossible to identify. There are two advantages to this in choosing the place of residence of the person performing the characteristic service: especially if he is the one who drafts the contract, which meets the expectations of the parties. This allows for some standardization of the

operation and makes it easier in terms of management.

These two advantages respond to the desire to see the development of international trade.

The Convention nevertheless makes four exceptions to this principle:

- In the case of contracts relating to an immovable, for which the applicable law is that of the location of the building (except for the building where the principal establishment of the builder is retained).
- With regard to contracts entered into by the consumer for which the applicable law is that of the place of his habitual residence for the protection of the latter. It is a law of the police which imposes that one cannot deprive the consumer of the protection of the imperative provisions of the law of the country in which it has its habitual residence [13]. This requires either that the consumer has been solicited in his country and has performed the acts necessary for the conclusion of the contract, or that the order was received by the professional or his representative in the same country, or that the consumer travelled to the professional's country and placed an order through a cross-border trip organized by the latter.
- With regard to contracts for the carriage of goods for which the law of the carrier applies provided that it coincides with either the place of loading, the place of unloading or that of the principal place of business of the carrier sender.
- Finally, in the case of employment contracts for which the applicable law is that of the place of habitual performance of work, a temporary posting having no effect on the law of the contract. If the work is done in more than one country, the location of the hiring establishment or the location with the closest connection to the contract is considered.

7. NEED TO KNOW HOW TO PREVENT A CONFLICT OF LAWS IN CONTRACT FIELD

When a conflict occurs, the first reflex is to re-read the contract. A well-written international contract can avoid litigation. It is indeed possible to provide for clauses of exit from conflict, renegotiation, mediation, obliging the parties to meet the case before the court. For example, in the event of disagreement over the application of a clause, it would have been appropriate, upstream, to insert a renegotiation clause of the contract in order to find a compromise.

The last elements to be considered in the conclusion of an international contract are the cost and the time. We must question the cost of negotiating the contract (preparation, letter of intent, talks, consulting fees), to compare with that which can cause a preventable litigation.

Taking the time to negotiate can save time later.

In addition, in the context of negotiations, Anglo-Saxons are always assisted by their council (s), with whom they prepare their negotiation. Taking cultural differences is sometimes a difficult exercise, but necessary for a better understanding of one's co-contractor.

8. CONCLUSION

Knowing which law is applicable is one of the main concerns of private international law. It is the question of the conflict of law rule that identifies the applicable law.

The issue of resolving conflict of laws dates back a very long time. This is how, while we have considered, we have considered three methods that we will discuss one by one:

- Having determined that the French court is competent, we simply apply French law. Apart from the determination of the law, the jurisdiction of the court meets other requirements. The question of jurisdiction answers first and foremost a practical question (for example what is the nearest court?
- After the admission of the application of a foreign law in France, before resolving to apply the foreign law, is first determined the scope of the French law.
- Contrary to the first method, the reasoning of the second method is the opposite starting from the legal relation which is in question (example the place of celebration of the marriage) after having admitted that a foreign law can apply in France. It should be noted that this method multiplies the chances of application of the foreign law. One should not forget to mention the importance for the parties to find common ground, that is to say to make an amicable

choice of the applicable law to settle the dispute without any problem.

However, it should probably be made clear that the conflict-of-law rule, as many people think, does not solve a conflict of laws. It is thus an abstract rule, indirect (it does not allow to resolve the substantive question asked, but only to determine the law competent to solve this question of substantive law), and neutral (the substantial solution is not taken in account in the determination of the applicable law).

What then would be the true function of the rule of conflict of laws? To answer this question, we propose two hypotheses:

- That the function of the rule of conflict of laws is to divide the legislative powers between the different sovereignty states likely to be interested in the situation in dispute,
- But the one according to which, the function of the rule of conflict of laws would be to participate directly in the regulation of this one.

As we can see, it would be difficult to resolve a conflict of laws in the context of the agreement because it concerns two different nationalities, for example, two different jurisdictions. In order to try to resolve these conflicts of laws, it would be necessary to review the conditions of formation and execution of international contracts, to require the respect of the clauses of the contract, to have a notion of the law which governs the international contracts as international contractor but would be better able to prevent a conflict of laws in order to avoid any offense that would give rise to a conflict of laws.

COMPETING INTERESTS

Author has declared that no competing interests exist.

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Peer-review history:
The peer review history for this paper can be accessed here:
http://www.sciencedomain.org/review-history/26464