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WHOSE CHOICE OF LAW IN ARBITRATION: APPROACHES OF CIS ON APPLICABLE LAW

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Abstract. This article seeks to address choice of law approaches (*voie directe* and *voie indirecte*) which arises in international commercial arbitration in member states of Commonwealth of Independent States (hereinafter CIS). This paper uses a multistep desktop research methodology to scrutinize the matters of choice of law issues. In CIS countries both – *voie directe* and *voie indirecte* – methods used to define the applicable substantive law of a commercial dispute. The former method includes to give the authority to a tribunal to ascertain the governing law of the substantial part of a dispute while the latter method uses the conflicts of law rules application. This research paper explores the practical use of the two mentioned approaches in CIS countries and examines the establishment of the international commercial arbitration court in Uzbekistan as it is newly initiated institution.

Keywords: arbitration; choice of law, Commonwealth of Independent States, conflict of laws.

ARBITRAJDA HUQUQNI TANLASH: MDH DAVLATLARI QONUNCHILIGIDA HUQUQNI TANLASH YONDASHUVLARI

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Annotatsiya. Ushbu maqola Mustaqil Davlatlar Hamdo'stligiga (*keyingi o'rinlarda MDH deb yuritiladi*) a'zo davlatlar xalqaro tijorat arbitrajlarida yuzaga keladigan huquqni tanlash yondashuvlari (*voie directe* va *voie indirecte*) masalalarini tahlil qilishga bag'ishlangan. Maqolada huquqni tanlash masalasini ko'rib chiqish uchun ko'p bosqichli tadqiqot metodologiyasidan foydalanilgan. MDH mamlakatlarida tijorat nizolarini hal etishda moddiy huquqni aniqlash uchun *voie directe* va *voie indirecte* usullari qo'llaniladi. Birinchi usul sudga nizoni tartibga soluvchi qonunni aniqlash vakolatini bersa, ikkinchi yondashuvda kollizion huquq qoidalari qo'llanilgan. Mazkur tadqiqot ishida qayd etilgan ikki yondashuv usuli MDH davlatlari tajribasi misolida tadqiq etilgan. Shuningdek, O'zbekistonda xalqaro tijorat arbitraj sudi yangi tashkil etilgan institut sifatida o'rganilgan.

Kalit so'zlar: arbitraj, huquqni tanlash, Mustaqil Davlatlar Hamdo'stligi, kollizion huquq.

ВЫБОР ПРАВА В АРБИТРАЖЕ: ПОДХОДЫ СТРАН СНГ ПО ПРИМЕНИМОМУ ПРАВУ

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Аннотация. Данная статья посвящена выбору правовых подходов (*voie directe* и *voie indirecte*), возникающих в международном коммерческом арбитраже государств-участников Содружества Независимых Государств (СНГ). В статье используется методология многоэтапного исследования для решения проблемы выбора закона. В странах СНГ методы *voie directe* и *voie indirecte* используются для определения материального права при разрешении коммерческих споров. Первый метод дает суду право определять право, регулирующее спор, в то время как второй подход применяет нормы коллизионного права. Два упомянутых в исследовании подхода рассматриваются на примере опыта стран СНГ. Международный коммерческий арбитражный суд также рассматриваются в Узбекистане как недавно созданный институт.

Ключевые слова: арбитраж, выбор закона, Содружество Независимых Государств, коллизия законов.

Introduction

Party autonomy constitutes one of the main fundamental principles of international arbitration law which means parties of a dispute are free to agree the substantive law that determines parties' rights and duties. However, parties of an agreement do not always clearly provide the substantive law which governs their agreement. In this regard it is arbitrators' power to decide the applicable law of a dispute under the national procedural legislation or institutional rules.

International arbitration can give a rise to numerous issues relating to the choice of law matters which is very complicated. Resolution of those issues are lies within at least two classification of laws: 1) applicable law to the substance of a dispute; 2) "*lex arbitri*" or applicable procedural law of a dispute. Moreover, there is also third possible category of applicable law which governs international commercial arbitration agreement itself [1].

Choice of law issues of the substance of a dispute determines parties' legal rights and obligations, types of remedies, limitation defenses, burden of proof and so on while the *lex arbitri* regulates procedural part of arbitral proceedings. Parties to an agreement can choose the same substantial and procedural laws or they may choose different laws respectively. Due to these challenges choice of law is very essential in the scene of international arbitration.

In this research issues related to the first-mentioned classification, the substantive law applicable to a dispute, further will be discussed. The main focus is given to the differences between

voie directe and *voie indirecte* approaches within national laws and institutional arbitral rules of the member countries of CIS. According to the procedural rules of a dispute, in the absence of parties' explicit choice of law, either method of selecting substantive law be determined. While *voie directe* equips arbitrators with the full authority to straightly determine the substantive law applicable to a dispute, the *voie indirecte* provides a room for the "rules of law" which is not limited by laws of a certain country.

The principal target of this research is to analyze provisions of *voie directe* and *voie indirecte* approaches within the context of national legislation and institutional laws of Uzbekistan and other CIS countries.

The *voie directe* method ensures arbitrators with the potential to directly apply appropriate law on merits of a case. By applying this method, the arbitral tribunal has right to consider all circumstances of a case. In practice both *voie directe* and *voie indirecte* can lead to the same results. The analysis of this research will bind the application of both approaches in CIS countries.

Accordingly, the research goals include to discuss and analyze: (a) the development of the International Arbitration center in Uzbekistan; (b) overview of choice of law approaches; (c) conditions of national laws and institutional arbitration rules within CIS countries; (d) assessment of choice of law methods.

These regions becoming more arbitration-friendly compared to the past. Therefore, in order to reduce possibility of risks it is highly

recommended to lawyers and investors to be aware of the arbitration climate in CIS region.

Background information

Development of the International Arbitration in CIS states

Commonwealth of Independent States (CIS) is a territorial organization formed on December 8, 1991 by Ukraine, Russia and Belarus after the termination of the Soviet Union. The members of CIS reached 11 after signing Almaty protocol on 21 December 1991 Azerbaijan, Armenia, Kyrgyzstan, Kazakhstan, Uzbekistan, Turkmenistan, Tajikistan and Moldavia joined. Currently nine former Soviet Union republics are member states of CIS, Ukraine and Turkmenistan are associate members, Georgia ceased membership after Georgia-Russia was in 2008. Latvia, Lithuania and Estonia – Baltic states – are members of European Union by rejecting to unite to CIS [2].

CIS countries cooperate in spheres of trade, security, legal partnership and in other important areas. Besides, CIS has its own Economic court which deal with disputes within the context of organization. In post-Soviet space other intergovernmental organizations also formed by CIS members. For instance, Eurasian Economic Union (EAEU) achieved a remarkable integration, Russia, Kazakhstan, Kyrgyzstan, Armenia and Belarus are member states of EAEU. Eight states out of nine members of CIS are members of CIS Free Trade Area (October 18, 2011) [3].

All CIS countries are the member states of 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards except associated member Turkmenistan [4]. All CIS countries have adopted national and international arbitration laws [5].

These countries share the common background by having civil law jurisdiction as all of them were the part of Soviet Union. Specialized commercial arbitration courts have been developed over time and made remarkable progress [6].

Materials and methodology

Multistep desktop research methodology is used to analyze the issues related to *voie directe* and *voie indirecte* approach within the national laws and institutional rules of CIS countries. First, above mentioned two methods investigated within the institutional law of the Uzbekistan. Second, the same provisions scrutinized under

the national arbitral laws and institutional rules of the other CIS countries. Third, the author critically investigated the applicable choice of substantive law provisions. With the purpose of presenting arguments related to the issue, case law is used in this research and overview of vital national laws and arbitration rules of CIS countries is formulated in Appendices 1 and 2.

A. The development of the International Arbitration center in Uzbekistan

In this day and age, in the context of rapidly developing globalization of the economy, development of interstate relations and unification of legislation at the regional and international levels, commercial arbitration, as an alternative non-state judicial form of resolution of commercial disputes is becoming increasingly important, being one of the main elements of market relations, as in nationally and internationally.

Uzbekistan became a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on February 7, 1996 accession came into force on May 7, 1996.

Uzbekistan accessed the International Convention for the Settlement of Investment Disputes (ICSID) on 17 March 1994 which came into effect on August 25, 1995.

For years Uzbekistan did not have its own international commercial arbitration court, therefore on April 5, 2006 Agreement on cooperation in the domain of international commercial arbitration signed between the Chamber of commerce and industry of the Republic of Uzbekistan and Chamber of commerce and industry of the Russian Federation [7].

The experience of ample states indicated the real necessity of establishment and operation of international commercial courts with the path of expansion of the global market. After getting independence, economic ties evolved from one intrastate to international level and there was historical need for Uzbekistan to develop an independent system for the settlement of disputes emerging in the course of trade.

In Uzbekistan the law “On Arbitration” adapted in August 2006. [8] However, it was different from the international arbitration, this arbitration courts have the right to solve economic disputes only in a local level. It should be noted that in many

CIS countries legislation there are two system of solving economic disputes through arbitration, first is arbitration within one country and the second is that we are discussing now – International Commercial Arbitration. For instance, in Russia the law “On Arbitration Courts” [9] determine preconditions of the local economic litigation while the law “On International Commercial Arbitration” [10] defines conditions for resolving disputes of an international nature. The same pattern inherited in Kazakhstan [11] and Ukraine [12].

To implement tasks set in Strategy Action of development in five priority directions of Uzbekistan in 2017-2021, [13] formation of modern and international standards of investment dispute resolution by international arbitration and improvement of investment climate on November 5, 2018, Shavkat Mirziyoyev, the President of the Republic of Uzbekistan signed a Decree “On establishment of the Tashkent International Arbitration Center under the Chamber of Commerce and Industry of the Republic of Uzbekistan” [14] with the status of non-governmental, non-profit organization (hereinafter TIAC).

The main purpose of TIAC is to settle disputes between commercial entities in different countries through international arbitration. It is noted that TIAC can involve both Uzbek nationals and qualified foreign arbitrators to arbitration process.

It was historically important to introduce a mechanism for resolving international disputes through international, non-governmental system of arbitration to ensure the protection of legitimate rights and interests of business entities in Uzbekistan, improve business environment and increase the investment attractiveness of the state.

B. Overview of choice of law approaches

(i) *Voie indirecte* approach

In the absence of parties’ direct explicit choice of applicable law, the arbitral tribunal should decide how to determine the applicable law to a dispute. First the arbitral tribunal examine whether tribunal has the authority to define applicable law or it should comply with conflict of law rules [15]. Various arbitration institutions and national statutes provide particular approaches to determine substantive law applicable but in every circumstance trade usage ought to be considered by the tribunal [16].

In *voie indirecte* method is that where the institutional law or *lex arbitri* provides the arbitral tribunal with the capacity to determine applicable conflict of law rules, according to what appropriate substantive law will be defined. Closest connection test or conflict of law rules of certain jurisdiction will be considered.

(ii) *Voie directe* approach

Voie directe approach gives the tribunal full authority to directly apply particular law to the substance of a dispute. Nonetheless, all circumstances of a dispute, including parties’ intentions and other relevant factors will be considered before selecting certain law.

The *voie directe* approach obtained broader pillar after adoption of this method by International Chamber of Commerce in 1998 [17]. Notwithstanding that immense amount of national law and international arbitral institutions (e.g. London Court of International Arbitration Rules, American Arbitration Association International Arbitration Rules) have adopted *voie directe* method, the arbitrators infrequently apply this approach.

The difference between law and rules of law is the term law mainly constitutes certain national law while rules of law is a broader concept including internationally recognized general principles, *lex mercatoria*, multinational law concepts and notions of laws [18].

Limited and unlimited direct choice of law authorize the arbitral tribunal accurately select “law” or “rules of law”. The UNICITRAL Model law empowers two alternatives to determine the applicable substantive law. The first option considers closest connection test while the latter is applicable law which the arbitral tribunal determines appropriate [19].

The provision of *voie directe* method is not worthwhile when parties of the dispute *de facto* have selected an appropriate law and difficulty is to ascertain the scope of the law. It is essential to scrutinize entire policy of international private law while deciding the scope of the party autonomy. It might be disagreeable using *voie directe* method in a wider sense by allowing arbitrators easily choose the framework of international private law, as it results in high level of unpredictability and ambivalence.

(iii) *Discrepancy*

The *voie indirecte* approach confines the arbitral tribunal's authority to decide proper conflict of law rules which in return applies to decide applicable substantive law on merits of a dispute. This provision was noted in the 1975 International Chamber of Commerce (ICC) Rules Article 13.3 which states arbitrators have discretionary power to address conflict of law rules which is suitable to a case [20].

In practice *voie indirecte* and *voie directe* approaches can contribute to the same outcomes. In *voie directe* factors considered to define a particular substantive law are not specified and in most cases the tribunal opt for conflict of laws which is fundamentally similar to the conflict of law rules itself. In the process of determining appropriate substantive law, arbitrators should consider the public policy and mandatory laws in order to ensure further validity and enforceability of an award [21].

The significant difference between direct and indirect approaches is in the absence of parties' unequivocal choice of law whether the tribunal should apply conflict of law rules or itself freely define conformable substantive law [22].

The tribunal is required to give reasoned statement that makes choice of conflict rules clear by providing parties with high level of certainty. Upholders of *direct* approach avoid addressing conflict of law rules stating factors considered to apply conflict of law rules usually identical to elements of directly choosing applicable law. Besides *voie directe* approach all-embracing of party autonomy, therefore better corresponds with current practice of international arbitration.

The arbitral tribunal's independence of choice of appropriate law in the absence of parties' agreement should not be limited. From a principal frame of mind, *voie indirecte* method "rules-based" by facilitating conviction and impartiality, in contrast *voie directe* approach "interest-based" and "contextual-based" by promoting veracity and objectivity, moreover this approach is better accord of parties' rational assumptions [23].

C. *The conditions of national laws and institutional arbitration rules*

(I) *Institutional arbitration rules*

Some institutional arbitration rules of CIS countries have adopted *voie directe* approach. For instance, TIAC Rules states that in the absence of parties' choice of substantive law applicable to a dispute, arbitrators can determine the law(s) or rules of law which they regard the most appropriate [24].

Astana International Financial Centre International Arbitration Centre Arbitration and Mediation Rules applies *voie directe* approach, pursuant to the Article 18 if the parties have not agreed on applicable law of a dispute, the arbitral tribunal can define the most appropriate law impartially after considering all aspects of a case [25].

Russian Arbitration Association Rules also provides the *voie directe* method, in case when parties fail to designate appropriate substantive law, the tribunal would determine the law it defines applicable [26].

Moreover, Arbitration rules of the International Court of Arbitration of the Kyrgyz Republic referred to the direct approach which states failing any nomination of the applicable law, arbitrators can independently select appropriate substantive rules of law of a dispute [27].

A remarkable contrary to the *voie directe* is the Rules of Arbitration of the Chisinau International Court of Commercial Arbitration of the American Chamber of Commerce in Moldova, pursuant to Article 58 if there is no parties' express agreement on law applicable to the merits of a dispute, the tribunal has right to decide the law according to the relevant conflict of law terms. [28] Besides, the same provisions defined in Rules of the International commercial arbitration court at the Ukrainian Chamber of commerce and industry [29].

(II) *National arbitration laws*

Arbitral tribunals authority to select suitable law is determined by procedural rules and national laws on arbitration, and parties' agreement [30]. It should be noted that national law might be supremely appropriate as it has close connection to a dispute. Besides national law familiarly adjusts with optimum requisites of the international commercial law.

National arbitration statutes have different techniques to select appropriate law. Some of national arbitration statutes yield the tribunal to determine conflicts of law rules, while others stipulate particular choice of law of the national territory according to the seat of arbitration. Most of the national arbitration laws grant *voie indirecte* approach.

Law of the Azerbaijan Republic on International Arbitration provides if parties to a dispute fail to indicate appropriate law, “the arbitration court shall apply the law in accordance with collision norms that it deems applicable.” [31] A similar pattern can be observed in the Law of the Republic of Belarus on International Arbitration Court [32].

Article 43 (2) Tajikistan International Commercial Arbitration Law when there is no parties’ agreement on appropriate substantive law, arbitrators decide the applicable law according to the conflict-of-laws rules pertinent to a case [33].

In addition, Russian Federation Law on International Commercial Arbitration Article 28.2 [34] and Ukraine Law on International Commercial Arbitration Article 28.2 [35] provide indirect method of choosing substantive law by referring to appropriate conflict of laws rules. However, unlike other CIS states Armenia Law on Arbitration Courts and Arbitration Procedure stipulates significantly different module of choice of system which states if there is no mutual agreement of parties on law applicable, in this regard the tribunal has the right to address general legal principles [36].

(III) Conflict of law rules of the seat

Compared to the past conflict of law rules of the seat of arbitration is less favored method of defining substantive law, nowadays. The main purpose of the seat of arbitration is neutrality, therefore conflict of law of the forum is opposite to parties’ intentions. It is very important to eliminate coincidental connection of the law of the seat [37]. Needless to say that the connection between the applicable law and forum of arbitration is contrary to the party autonomy [38].

Armenian Commercial Arbitration Rules provide that in the absence of parties’ direct choice of law applicable to a dispute, tribunal have to apply Armenian substantive law [39].

Choose of law of the forum also applies in International Arbitration Court Rules of the Republic of Belarus when the parties could not reach an agreement on governing law, the substantive law of the given State will be applicable. [40] Furthermore, the Law of the Republic of Kazakhstan “On Arbitration” states that if there is no express choice of law, the applicable substantive law will be determined according to the legislation of Kazakhstan [41]. The same pattern can be seen in Turkmenistan legislation [42].

(IV) Closest-connection test in choice of law

The closest connection test is one of the less common expressions of the choice of law rules which give wider power to arbitrators to select applicable law. Numerous national and international conflict of law rules encompass the notion of closest-connection test, hence sometimes law accompanied by closest connection assessed as a general principle of the international private law [43]. The main privilege of directly applying law with closest connection is that it can yield firm confidence of eventually applicable law or rules of law.

Even the Rome Convention is not relevant to arbitration, it establishes a general principle of law and states that in the absence of parties’ express choice of law, arbitrators ought to consider law with the close connection to a dispute [44]. The closest connection test has been adopted by many national arbitration laws and institutional rules.

In the practice of international arbitration, the closest connection test is often exercised by arbitrators to determine applicable law or rules of law when there is no parties’ explicit choice of law. In most cases application of the law with closest connection might be outcome of the utilization of general principles of the international private law or cumulative approach of the attached mechanism of the international private law [45].

Among CIS countries the practice of choosing the substantive law with the closest connection can be seen only in the Astana International Financial Centre International Arbitration Centre Arbitration and Mediation Rules [46].

D. Assessment of choice of law methods

Table
Contemporary approaches in CIS region [47]

	Legislative rule	Institutional rule	Total
Indirect choice (<i>voie indirecte</i>) of conflict of rules	6/8 (75%)	3/9 (33.3%)	9/17 (52.9%)
Indirect choice (<i>voie indirecte</i>) of seat of arbitration	2/8 (25%)	2/9 (22.2%)	4/17 (23.5%)
Direct choice (<i>voie directe</i>) of law	0/8	1/9 (11.1%)	1/17 (5.8%)
Direct choice (<i>voie directe</i>) of law with close connection	0/8	1/9 (11.1%)	1/17 (5.8%)
Direct choice (<i>voie directe</i>) of rules of law	0/8	2/9 (22.2%)	2/17 (11.7%)

Pursuant to the above presented data, *voie indirecte* is common preference among CIS countries, constituting in total 52.9%, and the national legislative laws provide indirect approach of conflict of law rules. While *voie directe* method with three alternative forms is less favorable, especially regarding to the national law. Nevertheless, two widespread methods of choice of law are *voie indirecte* of conflict rules (52.9%; 75% national rules) and *voie directe* of rules of law (11.7%; 22.2% institutional rules). The indirect approach with conflict of law rules comprise traditional and confined method of choice of law. National laws generally provide more restricted approach and grounded on Article 28.2 UNICITRAL Model law.

The direct approach represents more flexible and actual technique of selecting applicable law and this method presumptively and principally impelled by institutional arbitration rules. Besides this method gives an equal opportunity to both arbitrators and parties to decide applicable substantive law. The above given statistical information proves the diversity of choice of law approaches in the current practice without indicating what is the reason for such variety choices of law. However, the flexibility of the arbitral tribunal's choice of law should not be undermined.

The *voie indirecte* approach sometimes might generate unanticipated outcomes, while *voie*

directe method is more corresponds with parties' intentions. Moreover, the arbitral tribunal should take into consideration choice of law which upholds the validity of the contract. In this regard the *voie directe* approach grants an authority to the tribunal presume that genuine objective of parties was having a valid agreement to arbitrate [48].

The clear difference between two approaches are not distinctly determined. The reasons behind considering *voie directe* approach and factors of the closest connection test for *voie indirecte* method sometimes can be the same. Using either approach or apply one particular national law the arbitral tribunal should consider the general international principles of the contract law to adjunt them [49].

Conclusion

Determination of an appropriate substantive law is a multifarious problem which requires practical, legal and independent utilization of the dispute resolution procedure. The initial issue for arbitrators is either exert conflict analyzes or detour it. If arbitrators opt for considering conflict analysis – *voie indirecte* approach – the tribunal should decide which of the conflict of rules to address: international, jurisdiction, forum or law with closest connection. For the *voie directe* method the arbitrators are required to consider appropriate (a) arbitral forum, (b) law with close connection, (c) more suitable jurisdiction. Despite selection of either approach, the third step for arbitrators is to determine whether to apply law or rules of law (gerenal principles of law).

Pursuant to authors' observations among 17 national statues and institutional arbitration rules of CIS member states, the majority of national laws render the common proclivity towards *voie indirecte* approach. The *voie directe* approach is regarded as less favorable among above mentioned states. However, most of the institutional rules provide direct method of choice of law with three alternative forms (law, rules of law and law with close connection).

Nonetheless arbitrators' decision of choice of law should be cogent and manipulated. Hence, it is subject to confined scope of judicial review. The general principles of the international private law well-suits the parties' intentions forthright rather than conflict of law rules of one particular state.

There are pros of applying *voie indirecte* method, where the tribunal considers conflict of law rules, national legislation, international conventions, arbitral case law and so on. The arbitral tribunal can also concern *voie directe* approach to define applicable substantive law

to a dispute, demonstrating that it might be the same as applying conflict of law rules. There is no unequivocal classification between *voie indirecte* and *voie directe* approaches rather they both normally applied determining the substantive law and entertain the same factors.

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