Conflict of Laws in ADR:

A sting in the tail?

The article highlights the International dispute resolution with a focus on choice of law issues, which are dealt with corporate legal departments as well as International arbitrators, who may well be Chartered Accountants, and the manner in which they may be resolved.

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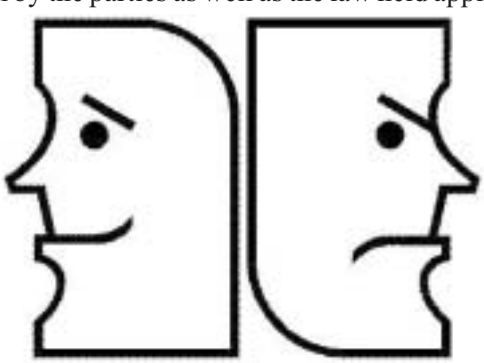
Alternative Dispute Resolution (ADR) has been a parallel system for resolution of disputes for well over a century. The litigants whose disputes are perceived to be either time consuming or complex, or both, generally opt for ADR in preference to the ordinary courts. The two chief processes in the flexible field of ADR are arbitration (or 'binding' arbitration, as it is called in the US) where the award has the effect of a court decree and conciliation (mediation) where the document is binding only with the consent of the parties. Mediation tends to be extremely subjective in nature and depends largely upon the quality of the mediator and the parties' willingness to settle.

Choice of law

'Choice of law' refers both to the law expressly chosen by the parties as well as the law held applicable by the forum hearing the dispute. In cases where the contract between the parties expressly provides for the forum and the applicable law of a country, the problem faced is essentially one of construction of the clause. The use of an unambiguous provision tends to reduce difficulties in respect of the clause.



The greatest difficulty usually lies where no choice of law is expressed in the contract, or where the clause is ambiguous in nature. In these circumstances, it is left to the courts to ascertain the law applicable to the agreement. The courts of every jurisdiction have developed their own 'choice of law' rules for determining the applicable law. One of the more popular destinations for international litigation is London. For example, in a sales contract, it is typical of European courts (pursuant to the Rome Convention) to treat the seller as the 'characteristic performer' of the contract. Accordingly, the law of the seller's place of business is usually held to be the law applicable to the sales contract.

The chief problem with choice of law rules is that, being part of private international law, they operate in default of the parties' wishes. In most international con-

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tracts, both parties are desirous to maintain a certain amount of equity in terms of the law that governs any disputes that they may have. This is more so where, for some reason, the parties have not negotiated a choice of law clause in the contract. A determination of the court, holding that the laws of the seller's place of business govern the contract may come as a rude shock to the buyer who may have taken literally the adage that 'customer is King'!

Courts' approach to choice of law

London and New York are the most frequently used destinations for international litigation, both where the parties have voluntarily accepted the jurisdiction and where they have not. Amongst Asian venues, Singapore and Hong Kong are the most prominent; both closely follow English law, the former having abolished the right to appeal to the Privy Council as late as 1994 and the latter having been a British Colony till 1997. The judicial approach towards choice of law is one of ascertaining, through its rules of private international law, the governing law of the contract. This can prove to be a murky process. It also suffers from the canon of certainty, which demands that the court decide all cases in accordance with precedent and objectively ascertainable standards.

In certain areas involving multiple parties residing in multiple jurisdictions, such as letter of credit transactions, the black and white certainty as to which law is applicable imposed by the courts is welcome. The system of documentary finance demands that the law applicable to the applicant-issuing bank, issuing bank-advising bank, issuing bank-confirming bank, issuing bank-beneficiary and confirming bank-beneficiary contracts be objectively ascertainable. In most other transactions, however, there can be little doubt that the party deprived of the comfort of its own local law will be disconcerted. In fact, a well-advised party may save negotiation costs by deliberately omitting a choice of law provision, secure in the knowledge that the agreement will be governed by his legal system.

A particularly burdensome situation arises where a neutral forum, such as Singapore, concludes that Indian law applies to the contract. In this scenario, the parties will have to satisfy the court what are the provisions of Indian law applicable to the contract as well as the interpretation of those provisions. This can prove to be a costly exercise for lawyers and judges untrained in and unfamiliar with Indian law. Both parties can, therefore, suffer from the uncertainties inherent in a decision based on a foreign law.

There is also the further problem that every judge is a public servant, and as such is bound to give effect to the public policy of the jurisdiction he serves. This can lead to difficulties where the applicable foreign law is in conflict with the public policy of the forum state. The forum may also refuse to give effect to the procedural aspects of the applicable law and follow its own procedure, choosing only to apply the substantive component of the law.

Another interesting problem can arise in what can be called a rebound situation. This is where the parties have expressed a choice of neutral law in the contract; say Japanese law. The Tokyo court may well apply Japanese law *including its rules of private international law,* thereby leading to the absurd conclusion that the law applicable to the contract as per the Japanese choice of law rules is in fact the law of the place of residence of a party. Such an approach would defeat the very purpose of a neutral governing law clause. Although courts in advanced countries have not been known to 'rebound' often in this manner, prudent international contracts tend to specify that New York law notwithstanding its conflict of law rules; shall govern the agreement. It is important not to omit this proviso in boilerplate governing law clauses.

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Arbitrator's dilemma

International arbitrations frequently have situations where the actors are all from different legal systems. One of the authors has been involved in an arbitration where the seller was Indian, the buyer German and the arbitrator Malaysian, with English Law as the applicable law. The chief problem faced by arbitrators in such scenarios is that they are not fully versed with the provisions of legal systems they are untrained in. This is compounded where the arbitrator is not a lawyer himself. It is common for arbitral

tribunals to be composed of non-legal individuals such as Chartered Accountants, architects, engineers and even laymen educated in the school of commercial experience.

One, therefore, finds that International arbitrators run the risk of being terribly muddled where a party raises a choice of law issue or where the parties agree to a neutral law. The courts in New York and London have traditionally taken a liberal approach where an arbitrator gets a point of law wrong. This is based on the premise that arbitration, unlike a court proceeding, need not be bound by precedent in the same manner. Although, the proposed redrafting of the Indian Arbitration and Conciliation Act, 1996 seeks to introduce the right to challenge awards on the grounds that the arbitrator erred in deciding a question of law, it is noteworthy that the proposed Bill does not extend such challenges to international arbitrations.

Arbitrators, pressed for time and resources, take advantage of the flexibility afforded to them by the courts in several ways. Firstly, they tend to dispense with form and procedure, unless some fixed procedure is agreed between the parties (the incorporation of ICC rules, for example). This may have the benefit of simplifying and expediting proceedings.

Secondly, and more significantly, arbitrators are not rigidly bound by the doctrine of precedent and may well depart from the opinions held by the courts of the legal system whose substantive law has been held applicable to the contract. This enables arbitrators to focus on the actual dispute between the parties instead of getting bogged down with conflict of law issues, which may well be a dilatory tactic on the part of a party.

In addition to simplifying the law and procedure applicable to the contract, an arbitrator may also sometimes seek guidance and support from non-national legal standards formulated by International organisations such as UNCITRAL, Unidroit and ICC. These standards are designed with a view to 'harmonize' the two main legal systems of Common Law and Civil Law. The drafters are representative of diverse nations and claim to keep in mind concerns of parties in rich as well as poor countries.

Therefore one finds that an arbitrator holed up in a hotel room in Dubai and faced with a patently ambiguous choice of law such as 'Anglo Saxon principles of jurisprudence' may simply pick up a copy of the Unidroit Principles 2004 and base his decision on that model. He would, therefore, decline to open a hefty book on Private International law for the purposes of ascertaining the applicable national law.

In situations where a Chartered Accountant is made arbitrator, he should attempt to convince the parties that a uniform code such as 'Unidroit Principles' should be agreed upon for the sake of efficacy.

The Unidroit Principles are simple and neutral as to the legal system since they are based on diverse legal systems. They also contain practical approaches for dispute resolution, for example the interest rate in a money claim is calculated at the inter-bank offering rate. The primary base of the Principles is the concept of 'good faith' in international transactions. Good faith as a legal obligation is largely absent from the common law system, which tends to eschew subjective standards. Most merchants, however, would desire good faith to govern their conduct.

The use of Unidroit Principles is particularly helpful for those arbitrators who are inducted for their ability to understand technical issues such as valuations or building plans. Such arbitrators are often pounced upon by seasoned lawyers and faced with numerous applications and technical objections. The Unidroit Principles are simple and fairly straightforward. They enable the arbitrator to focus on the factual matrix and thereby reduce the transaction costs associated with litigation.

Courts are willing to enforce arbitral awards, which have been based upon transnational law such as the Unidroit principles. Such enforcement is based upon recognition of the principle of 'party autonomy'; if the parties intended court procedure to be followed, then they should not have opted for arbitration. On the other hand, the approach of reference to the Unidroit principles as a 'common denominator' between the parties may prove impossible where a court is the forum of dispute resolution as courts are bound to follow the legal system of a state and not a transnational system that is not grounded in treaty.

There are evident dangers to the approach taken by arbitrators in adopting a model law or a transnational

standard and ignoring conflict of law rules entirely. Such an approach would not be expected of a trained arbitrator faced with an unambiguous governing law clause and courts may be reluctant to enforce the award under such circumstances.

On the other hand, practical experience suggests that insistence on a particular national law is usually taken in order to maintain hyper-technical objections and/or delay proceedings. In this respect, the flexibility afforded to arbitrators is useful

Conclusion

The foregoing brief discussion reveals two basic propositions. Firstly, in the drafting or reviewing of any agreement of an international character, care should be taken in ensuring that the governing law and jurisdiction clause is carefully drafted. There should be no ambiguity in the choice of law and, where possible, the forum/venue of dispute resolution should be the same as the country whose law has been chosen.

The chief problem with choice of law rules is that, being part of private international law, they operate in default of the parties' wishes. In most international contracts, both parties are desirous to maintain a certain amount of equity in terms of the law that governs any disputes that they may have.

Secondly, in situations where a Chartered Accountant is made arbitrator, he should attempt to convince the parties that a uniform code such as Unidroit Principles should be agreed upon for the sake of efficacy. He should also refer to the Code for guidance even where there is an express choice of law, so as to ensure that alternate dispute resolution does not sink into the swamp of legal conundrums. This was what the parties intended to avoid when they agreed to arbitration. ■

Campus Interviews: September-October, 2004

The Committee for Members in Industry has successfully organised the Campus Interviews at nine cities in September-October, 2004 for those candidates who have qualified in May, 2004 examination, as per the following schedule:

1.	**Hyderabad**	**13th and 14th September, 2004**
2.	**Ahmedabad**	**15th and 16th September, 2004**
3.	**Jaipur**	**17th and 18th September, 2004**
4.	**Bangalore**	**20th and 21st September, 2004**
5.	**Pune**	**24th & 25th September, 2004**
6.	**Kolkata, Mumbai, Chennai, New Delhi**	**The Campus Interviews were held concurrently at these Centres from 27th September to 7th October, 2004 (excluding Sunday)**

More than 3369 Charetered Accountants who had qualified in May, 2004 Examinations had filled in the application form On-line. The bio-data of these professionals were classified centre- wise and they were given an opportunity to meet 99 interview boards of 49 organisations (including Institute) at nine cities. The candidates bio-data were also provided in computer floppies to the participating companies.

The Table showing the statistical information of campus interview at a glance is given below:

S.No.	Name of the Centre	No.of interview panels	No. of Students Applied	No. of Candidates Selected*
1	Bangalore	11	203	42
2	Hyderabad	7	116	26
3	Pune	2	128	10
4	Jaipur	13**	162	7
5	Ahmedabad	5	172	19
6	Mumbai	20	891	210
7	Chennai	13	285	59
8	Kolkata	10	344	71
9	New Delhi	18	1068	179
	TOTAL	**99**	**3369**	**623**

*Tentative, as information is still trickling in ** 12 companies took interview at New Delhi Centre for Jaipur Candidates