

Conflict of Laws in Internet Transactions: An Iranian Legal Perspective

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Abstract: The purpose of this study is to discuss the relevant issues on conflict of laws in internet transactions from the Iranian legal perspective. The application of the conflict of laws doctrine has led to jurisdictional conundrums over e-commerce contract disputes. Conflict of laws in on-line transactions is still in a state of unsettledness in Iran. The researchers discuss the conflict of laws in Iran from the aspects of conflict of forum and conflict of laws. The Iranian electronic commerce law is examined in the context of the Brussels regulation. The Iranian civil code as a local legislation and the United Nations convention on international electronic communications 1980 which is an international document are also examined in this study.

Key words: E-commerce, conflict of laws, conflict of forum, internet, Iran

INTRODUCTION

Online contracting especially through the use of internet involves international or trans-border transactions and any disputes arising from internet contracting often involves the laws of more than one country (Sheela, 2010). Although, the electronic contract is signed in virtual cyberspace, the subject and object of the legal relationship are real persons or beings. Suppose that factory A supplies goods composed of 3 parts from countries B, C and D as producers. A businessman (E) buys the goods and sells to a consumer (F). The consumer uses the goods in country (G). Finally, he dies in country I's territory (Jafaritarab, 2011). Knowing which country's laws will be applied for the consumer's rights and how the liability of the producers will be adjudicated is important. This is an instance of conflict of laws and the issue of conflict of laws is determined by the authorized law (Almassi, 2011). Due to the characteristics of e-commerce transcending national boundaries, the parties and the subject matter of electronic contracts often belong to different countries. Collier (2001) describes the conflict of laws as follows:

The conflict of laws is concerned with all of the civil and commercial law. It covers the law of obligations, contract and tort and the law of property both immovable and movable whether a question of title arises *inter vivos* or by way of succession. It is concerned also with family law, including marriage and divorce and guardianship and the relations of parent and child. Recognition

or enforcement of a judgment in some civil or commercial matter may be called for whether it was for breach of contract or a tort (derelict) or dealt with the ownership of property or concerned status, such as a decree of divorce or nullity of marriage or a custody or adoption order

In accordance with international law, every country may exercise its own jurisdiction. Furthermore in private international law each country has the national right to exercise jurisdiction to all people, objects and events in the field. Generally, jurisdiction includes territory, nationality, supportive and universal jurisdiction (Zhang, 2008). In other words, the sovereign has exclusive jurisdiction over everybody, everything and every transaction within its territory. Also, the sovereign can refuse to consider any law but its own. This, however is impractical in the current cyber world where the internet enters foreign places to chat see meet do research, arrange, shop, sell in short to conduct so many daily activities, means that the world has shrunk, the global village has more than ever become a reality (North, 1974). Therefore, the issues arising in the Internet arena cannot be viewed merely as a domestic concern because as stated by Friedman in Perritt and Jr (1999), the internet is going to be like a huge vise that takes the globalization system and keeps tightening that system around everyone in ways that will only make the world smaller and smaller and faster and faster with each passing day. Thanks to the internet, we now have a common global postal system, we now have a common global shopping centre, global library and we now have a common global university.

However, the jurisdiction of national conflict, according to Rawson (2002) is inevitable in e-commerce and electronic commerce transactions regularly raise 2 aspects in this context:

- The proper law of the contract and resulting application of national laws to the overall transaction
- The appropriate jurisdiction for determining a dispute, including choice of forum and resulting procedural rules

In other words when litigation is sought with a foreign party present, the court must ask itself 3 principal questions before it can proceed to consider the merits of the case, namely:

- Can and will the court exercise jurisdiction over the subject matter of the dispute and the persons involved in the dispute?
- Which law should be applied by the court to the facts before it is it the law of its own country or the law of another country?
- To what extent should the court take cognizance of foreign judgments and decisions by the courts of a different jurisdiction?

In addition if a consumer purchases goods online and result in a dispute which court is to have the jurisdiction to hear the case and what is the choice of law to be applied? In most instances the consumer is not sure whether the web site he has accessed is within his country or on a different continent. For instance, if an Iranian consumer accesses a Malaysian website and purchases goods is the consumer bound by the jurisdiction and choice of law of Malaysia? Can the decision of the courts of Malaysia be enforced in Iran or vice versa?

The answer to these questions is the function of the body of rules known as conflict of laws. The body of rules under the conflict of laws determines whether a local court can assert jurisdiction which involves a foreign party or when the suit contains a foreign element (Almassi, 2011).

The objective of this study is to provide solutions to the jurisdictional conundrums that arise when consumers contract for the sale of goods via the internet from the Iranian perspective (Bagheri and Hassan, 2012a). The researchers scrutinize whether Iranian private international law and particularly conflict-of-laws principles is comprehensive in dealing with online transactions for the sale of goods and does the conflict of laws in Iran give any significance to consumer protection?

The need to redefine the traditional rules of private international law arises because conflict of laws principles must conform to the modes operandi of internet contracting, namely; e-commerce (Jafaritabar, 2011). The researchers will discuss the conflict of laws in Iran from the aspects of conflict of forum and conflict of laws.

CONFLICT OF FORUM

Generally, the parties to a commercial contract will include a clause specifying the jurisdiction and choice of law and generally, parties to a contract have freedom of choice over the applicable law. To exercise this choice either express words may be used or the intention should be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. The law of contract under the rome convention. Available at: http://skemman.is/stream/get/1946/1616/5166/1/Jon_Stefan_Hjaltalin_loka%C3%BAtg%C3%A1fa.pdf (12/04/2012). The parties will decide which court should adjudicate their dispute and which laws should govern their dispute (Almassi, 2011). This autonomy is given to the contractual parties under the notion of freedom of contract. However, Article 17 of the Brussels regulation on behalf of consumer protection has put some limitations on this principle stating that the provisions of the Brussels regulation may be departed from only by an agreement:

- Which is entered into after the dispute has arisen
- Which allows the consumer to bring proceedings in courts other than those indicated in this study
- Which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same member state and which confers jurisdiction on the courts of that member state, provided that such an agreement is not contrary to the law of that member state

Article 4 of the Iranian ECL recognises the authority of Iranian courts in terms of silence or any ambiguity and states that upon any ambiguity of the chapter one of this law, courts of law shall pass their judgment in conformity with other statutes and within the framework of the parts, terms and conditions contained in this law.

Generally, Iranian courts authorise themselves to try any case that is referred to. This authority is according to the political expediency or interest and national sovereignty, namely; the transient rule (Jafaritabar, 2011). Article 11 of Iranian civil procedure act does not oblige the plaintiff to plead in foreign country courts. It states the case shall be pleaded in the court of the defendant's

residence if not in the court of the temporary place of habitation if does not have temporary habitation in the court where there is his/her immovable property in case none of the previous conditions exist, the plaintiff will plead in the court of his residence. Therefore, Iranian legislation does not intend to make the plaintiff plead the case before the foreign country's court. In terms of sale of dangerous goods cases, Iranian courts are authorised to hear the following cases (Jafaritarab, 2011):

- If the domicile of the producer or seller is in Iran (Article 11 of the Iranian civil procedure act)
- If the place of the claim is in Iran
- When the producer or seller of the goods commit a crime under the Iranian criminal law
- When the dangerous goods are related to public order
- When the place of the dangerous buildings (immovable property) is in Iran
- The jurisdiction of the court where the contract was made:
 - When the contract has been concluded in Iran
 - When the contract has been made by the representative who is dealing in commercial conducts (Article 11 of consumer rights protection act 2009)
 - In cases that the contract is under Iranian law because of its implied or explicit clauses
 - When the claim is because of the breach of contract in Iran jurisdiction

Although Iranian laws, such as civil code and civil procedure code protect the consumer regarding the risk of exposure from enormous legal costs and legal liability, it is better for the Iranian legislator to allow the plaintiff of the goods to plead his case in foreign courts too. Sometimes the laws of the foreign countries, such as Europe or US in terms of defective goods which is based on restricted liability is better than Iranian laws, such as the civil code which is based on the ground of fault to enable the consumer to obtain his rights. In addition, Article 971 of the Iranian civil code refers to the authority of the Iranian court and states, claims and lawsuits follow in cases of authority of the court and of laws of procedure, the laws of the place where they are instituted are authorised. The fact that the same case or claim is already being decided by a foreign court cannot nullify the competency of the Iranian court.

As mentioned earlier, the civil liability of consumer contracts that limit the consumer from proceeding before the courts of foreign countries goes against the principle of consumer protection and freedom of choice of law.

Therefore, Iranian laws allow the consumer to claim in a court where he can better and more easily obtain his rights, such as provided under French laws (Behshid, 1992). Furthermore, Article 45 of the Iranian ECL ascertains that the execution of consumer's rights under this law shall not be limited by other laws that provide less support for the consumer. Also to protect consumers, Article 16 of the Brussels regulation (CE) No. 44/2001 provides that in disputes the consumer is to sue and be sued in the consumer's home country. Brussels regulation (CE) No.44/2001 (council regulation (EC) No 44/2001 of 22 December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters official journal L 012, 16/01/2001 P. 0001-0023, Available at:<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:html> provides the following in regard to the choice of court:

If the parties, one or more of whom is domiciled in a member state have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be:

- In writing or evidenced in writing
- In a form which accords with practices which the parties have established between themselves
- In international trade or commerce in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned

Any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing.

The Iranian ECL in Article 6 and 12 considers electronic and written documents legally the same. It states: When the existence of a written document is deemed legally requisite, data message can be used as a replacement.

Investigations of various jurisdictions illustrate that the authority of the defendants domicile court is a principle in civil procedure (Abdollah, 2002). Meanwhile, the freedom of choice of law for the parties in concluding contracts is another principle that in the event of a dispute, the court will heed what has been agreed in the

contract by the parties. As mentioned earlier, Article 16 of the Brussels' regulation (CE) No. 44/2001 in Article 16 allows consumers to sue and be sued in their home country. It states that:

- A consumer may bring proceedings against the other party to a contract either in the courts of the member state in which that party is domiciled or in the courts for the place where the consumer is domiciled
- Proceedings may be brought against a consumer by the other party to the contract only in the courts of the member state in which the consumer is domiciled
- This article shall not affect the right to bring a counter-claim in the court in which in accordance with this section, the original claim is pending

However, nationality or territorial borders are the basic factors for determining jurisdiction of the courts as inferred from Articles 968 and 971 of the civil code and Article 11 of the civil procedure code. Moreover, electronic commerce is not territorially based and the conflicts between technology and law cannot be ignored. Computer networks render geographic boundaries irrelevant and cyberspace is considered to increase the porosity of the physical boundaries because an internet user may enter a forum without the sovereigns awareness (Zembek, 1996). Therefore, current rules especially the local ones are not comprehensive in dealing with online transactions. The rules regarding conflict of laws must be viewed in the paradigm of a different regime commonly known as the cyberspace. As mentioned in chapter 4 of this thesis, the law is unsettled in deciding where the contract was constituted. Therefore if the contracting parties have not inserted the choice of forum clause the issue of contracting parties to decide on the jurisdiction of the courts on the basis of where the contract took place still remains uncertain.

CONFLICT OF LAWS

The choice of law will be that intended by the contracting parties. In terms of settling conflict of laws 2 methods have been proposed (Almassi, 2011). Proponents of the Dogmatic method consider international private law as a political rather than of a legal nature. According to this method in finding a resolution for conflict of laws, the specific interests of any country must be considered and then only to apply the provisions of those conflicts. In the Jurisdiction (legal) or Eclectic method, there is no previous hypothesis for determining the resolution of conflicts and the legal aspects of any case. Without taking into account the interest of the country, this

method scientifically seeks legal resolution of any conflict. Each one of these methods can be applied in particular situations. The Dogmatic method is suitable for application in determining the issue of nationality while for contract formation and conflict of laws the Jurisdiction method is enforceable.

The issue of conflict of laws and courts occurs when there is a foreign or external element in the contract and as such domestic contracts cannot be governed by foreign laws. Article 968 of the Iranian civil code gives the right to freedom of choice of law only for the foreigners stating that, obligations arising out of contract's are subject to the laws of the place of the performance of the transaction except in cases where the parties to the contract are both foreign nationals and have explicitly or impliedly declared the transaction to be subject to the laws of another country. Recognising the cross border characteristic of the contract is of great significance for the parties. According to the law of autonomy, international contracts, unlike domestic contracts, allow parties to include clauses such as choice of law. As such, as external elements naturally exist in digital networks or the web, it can be said that contracts concluded through the Internet are international (Bakhtiarvand, 2008; Bagheri and Hassan, 2012b).

Moreover, the borderless trait of the internet makes it necessary to recognise all the e-commerce transactions as international contracts, although not all contracts concluded through the web or internet are international contracts. For instance, a contract where an Iranian consumer receives a book purchased online within a few hours cannot be considered international, although it has been concluded through electronic media. But if the person connects to a foreign website, then the contract will be international. According to the European union, the rules of the Rome convention 1980 (1980 Rome convention on the law applicable to contractual obligations (consolidated version), official journal C 027, 26/01/1998 P. 0034-0046. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126%2802%29:EN:HTML:12/05/2012>) shall apply to contractual obligations in any situation involving a choice between the laws of different countries. Furthermore, Article 1 (1) of the United Nations convention on international electronic communications 1980 which Iran has signed, states that this convention applies to contracts of sale of goods between parties whose places of business are in different states. United Nations convention on international sale of goods 1980, available at: <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> (12/05/2012).

However, from Article 968 of the Iranian civil code for dispute resolution and Article 1 (2) of Iranian international commercial arbitrary act 1998, it can be recognised that Iranian legislators tends to choose the nationality criterion in terms of conflict of laws in international contracts. This seems to derive from Article 5 (2) of the Rome convention which states that a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence. The conventions declares this right under the following conditions:

- If in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and he had taken in that country all the steps necessary on his part for the conclusion of the contract
- If the other party or his agent received the consumer's order in that country
- If the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy

Moreover in practical terms, the law of the forum (*lex fori*) governs most of the subject of international private law because it has the capacity to replace the foreign law or is applicable in the absence of the proper law. In deciding on the proper law or choice of law to adjudicate a case, the system of law by which the parties intended the contract to be governed or where their intention is neither expressed nor inferred from the circumstances, the system of law with which the transaction has its closest most real connection can be applied (Diecy and Morris, 1993). In determining the proper law to be applied, reliance is based on what the contracting parties had expressly stated or inferred from the contract or the conduct of the parties or as imputed from the intention of the contracting parties. In the other words, the proper law is permeated on the notion of freedom of contract (Sheela, 2010). Through condoning this practice, the courts implicitly recognise the principle of part autonomy. Should the contracting parties be allowed to choose any law in the world, however alien it may be to the factual character of the contract without any check and balance? This would be a very dangerous proposition in the context of consumer contracting via the internet. This freedom would encourage forum shopping finding the proper law by the court which could work to the disadvantage of the consumer.

In Iran, as goods are mostly imported, meaning the consumers are Iranian and the producers are foreigners, e-consumer contracts are usually judged by local courts. On the other hand, the law is uncertain where a foreign e-consumer buys goods from an Iranian producer. If a consumer in Iran has agreed to an express choice of law of another country while contracting via the internet, the consumer is agreeing to the legal system of another country which could be to the consumer's disadvantage. A consumer who is presumed to be the weaker party would have to submit to the law of another country which may not be favourable for him. Moreover, the cost of litigation in another country, hiring a lawyer familiar with the other country's legal system and attending court in another country adds to the detriment and disadvantage of the consumer. In such cases, there is no coherence in Iran laws such as ECL or civil code to provide a guide that satisfies the interest and welfare of e-consumers. Private international laws of Iran also do not incorporate consumer protection, exposing opportunities for consumer manipulation. Thus, the development of conflict of laws' rules with the aim of protecting Iranian citizens should be begin by reforming existing laws or through the enactment of new laws which take into account the new phenomena of internet trading which is cross-border in nature.

It should be noted that all countries have their own enforcement laws and no state, its organs or individuals acting on its behalf can enforce judgment in the jurisdiction of another state. Meanwhile, the cross-border nature of e-commerce contracts may require a judgment obtained in one country to be enforced in another. The way to do this will be through reciprocal enforcement agreements. Iran has agreed to the Bilateral reciprocal promotion and protection of investment agreements with 54 countries in the world (Bilateral reciprocal of investment agreement, available at: <http://www.iran-investment.org/irsubpage6.html>: 22/04/2012) but in terms of e-commerce, Iran is not a party to a multinational treaty for the reciprocal enforcement of judgments and has entered into bilateral treaties for such purpose only with a very few countries such as France, Austria and the Republic of Azerbaijan. Enforcement of foreign judgments in Iran, available at: <http://www.mlaw.mihanblog.com/post/127> (22/04/2012). According to Article 169 of civil judgment act 1977, the enforcement of foreign court judgments is subject to its judicial recognition by the Iranian court of competent jurisdiction and the granting of such judicial recognition is subject to satisfaction of the following conditions:

- The judgment is issued by the courts of a country where in accordance with the laws, treaties and agreements of such countries, judgments issued by Iranian courts are enforceable or where reciprocal enforcement of judgments is granted
- Its substance is not contrary to the laws of Iran relating to public policy and good morals
- The enforcement of such foreign judgment is not in violation of any international treaty to which Iran is a party or any specific laws of Iran
- Such foreign judgment is final and enforceable in the issuing country
- No judgment has been issued by the courts of Iran which is contrary to the judgment sought to be enforced
- Adjudication of the case in accordance with the laws of Iran is not within the exclusive jurisdiction of Iranian courts
- The judgment is not rendered with respect to immovable property situated in Iran and rights connected therewith
- The enforcement order of such judgment is issued by competent authorities of the country where such judgment has been issued

The issue of enforcement of foreign court judgments is also ascertained in Article 1295 of the Iranian civil code that states that Iranian courts will give the documents drawn up in foreign countries the same credit as the said documents possess in accordance with the laws of the country in which they have been drawn up, provided that:

- They have not lost their validity for any legal reason
- Their contents are not in contravention with the laws connected with public order or good morals (ethics) in Iran
- The country in which the documents have been drawn up gives credit to documents drawn up in Iran in accordance with its laws or treaties
- The Iranian diplomatic or consular representative accredited to the country where the document has been drawn up or the diplomatic or consular representative of that country in Iran has certified that the document has been drawn up according to local laws

However, the choice of law and law enforcement particularly in e-consumer contracts is controversial. On one hand, it deals with the inequality of bargaining power between consumers and professionals and on the other, it has to achieve a degree of balance between the parties (Tang, 2007). In achieving both, the Iranian laws, such as

ECL and civil code have been unsuccessful. As such, the suitability of existing laws in Iran to contracts entered by consumers via the internet is open to doubt on the issue of choice of law, especially when its provisions are scrutinised for online transactions and non-contractual obligations (tort). Furthermore, updated and properly designed private international laws are essential to the further development of e-commerce in Iran.

CONCLUSION

The application of the conflict of laws doctrine has led to jurisdictional conundrums over e-commerce contract disputes. Conflict of laws issues is still in a state of unsettledness in Iran in conventional transactions what more online dealings. Therefore, Iranian laws in general and particularly in relation to consumer protection rights need to be reformed. At the same time with reformation, the law should not just keep pace with the rapid developments in ICT but be strengthened and enhanced. Iranian legislators tend to choose the nationality measurement when faced with conflict of laws in international contracts. This is prejudicial to consumers because there may be laws of another country which suit the rights of the consumer. However, Article 15 (3) of Brussels regulation 2002 states that in all other cases where the contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumer's domicile or by any means, direct such activities to that member state or to several countries including that member state and the contract falls within the scope of such activities. This provision can be a guide for legislators in Iran to protect consumer rights. Meanwhile, there is an innovation in the Rome convention on behalf of consumer protection in Article 3 (2) of the Brussels regulation.

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