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Review of the Governing Law and the Law Governing the Ability to Refer to Arbitration

SeyyedehMaryam Asadinejad[1*] Dr. Akbar Imanpour[2]
1.Graduate student of private law, Seyyedeh Maryam Asadi nejad Behshar Branch ,Islamic Azad University,Behshahr,Iran
2.Assistant professor at Gilan University

Abstract
One of the effects and results of the principle of independence is that the condition of arbitration from the main contract is to consider separate legal arbitration for each of the principal contracts and the issue of referralability.This means that if the main contract of invalidity was void according to the law, it would not only have no effect on the arbitration agreement, but also has no role in the issue of the possibility of referral to the arbitration, and the arbitration agreement as well as the ability to refer the case to arbitration should have another fate It is governed by the law.What is discussed in this paper is the proof of this theory that by accepting the doctrine of the principle of independence, the condition of arbitration will be different from the main contract of the law governing the main contract and the law governing the ability to refer the matter to arbitration.
Keywords:
The principle of independence is the condition of the arbitration of the original contract, the law governing the main contract, the law governing the ability to refer the case to arbitration

Introduction
It may be assumed that the law governing the ability to refer the matter to an arbitration is the law governing the main contract, but not between the two.There may be a difference between the law governing the ability to refer to arbitration and even the law governing an arbitration agreement and the law governing the original contract, which results from the application of the principle of independence of the condition of arbitration from the original contract.Therefore, one of the most important results of the acceptance of this principle is that the arbitration agreement must not only have a fate other than the fate of the original contract, but must be determined for that separate law, which may in some cases not be different from the law governing the original contract.Thus, according to the law governing the main contract, it may be ruled out that, with the presumption of the principle of independence, the condition of the arbitration of the original contract, the arbitration agreement or the arbitration agreement based on the law governing that, other than the law governing the main contract There is no invalidity as a result of the qualifications of the referees.Thus, according to the law governing the main contract, it may be ruled out that, with the presumption of the principle of independence, the condition of the arbitration of the original contract, the arbitration agreement or the arbitration agreement based on the law governing that, other than the law governing the main contract There is no invalidity as a result of the qualifications of the referees.In any case, for the purpose of explaining this important work, it is necessary to discuss the manner in which the law governing the general contract and the criteria and criteria of the governing law are discussed, each of which is examined.It is assumed that the law governing the power to refer the matter to arbitration is independent of the original contract, so that in some cases two different rules will govern them, and this will result from the acceptance of the principle of independence of the arbitration from the original contract.It should be noted that this is the case in all cases and it does not differ from the viewpoint that the arbitration agreement is an independent contract or arbitration clause.

1. Governing Law:
A rule of law or applicable law is in fact a law or legal system in which the courts of a country apply the rules of conflict resolution of their country to determine the obligations of the parties.In other words, the law governing a contract law is a legal system that is determined and governed by the rules of conflict resolution of the national law, which controls and warrants the contract, which it gives credit or lacks credibility.The legal system refers to the collection of rules and regulations of national (territorial) or international (foreign) rights (Nikbakht, 2005: 12). In general, the laws of each country for concluding each contract, whether or not a certain and indefinite, are considered as conditions of contract, and general principles of contracts.For example, Article 190 of the Iranian Civil Code stipulates the conditions for the validity of all contracts and general principles, so that for the conclusion of each agreement, the provisions of this article must be observed.Obviously, the rules of different countries differ on the conditions for the formation of contracts, which is why the accurate determination of applicable law in determining the validity and invalidity of a contract plays a fundamental role. On the other hand, the principle of independence of the arbitration agreement allows its validity to be assessed in accordance with a law other than the law of the place of the contract.In fact, the condition for referral to the arbitration, the

contractor, is in the other contract and can be subject to a law other than the law of the place where the original contract is made.This attributes the basis of the validity of the arbitration agreement. In fact, one of the important consequences of the independence principle of the arbitration agreement is that the law governing the agreement is not necessarily the same as the law governing the original contract.(A comparative study in OHADA, 2011, p. 244) Although this may not be relevant in domestic arbitration, this is subject to international arbitration laws and regulations, as well as international arbitration awards, including the rules for arbitration and law Ancillary Arbitration Examination as well as various conventions, including the Convention on the Recognition and Enforcement of Judgments in New York, 1958, are fully apparent.Because these regulations are only applicable in the context of the rules governing arbitration agreements and do not regulate the law governing the general contract, as a result, in most cases, the law governing the original contract should be determined on the basis of private international law and the conflict of laws of the countries.In other words, the rules and laws of international arbitration of countries, conventions and treaties have tried to resolve the obligation of the law governing an arbitration agreement, but the determination of the law governing the main contract is either vested in the parties or is the responsibility of the courts of the related countries.

1.1 Principle of the rule of will in determining the law governing the main contract:

In most legal systems, the determination of the law governing the main contract is by the parties and preceded by other methods (Diamond, 2004: 336). Examining the laws of some countries, as well as the rules of the documents and international organizations, reveals that the freedom and the will of the parties in many legal systems is a dominant rule.In fact, today, the sovereignty of will is a fundamental principle, and as the basis of the rules of conflict of laws in contractual obligations, with some limitation, the most appropriate rule among all other rules, which is both in the interest of the parties to the international treaties and Also, it can not harm the interests of the respective governments (Ibid: 9). Therefore, the principle of sovereignty of will in Article 968 of the Civil Code is considered as a default. Obviously, the principle of sovereignty of will is applied to the extent that it is not contrary to the rules of conduct or the general order and morality. Article 968 It stipulates: "The obligations arising from the contract are subject to the place of the contract ...".In any case, the principle of sovereignty can not be ignored in most cases.Failure to mention this in the above article does not mean neglecting. On the contrary, it may be argued that the criterion of the place of marriage is one of the examples of the principle of the will of will, which is often the case.In fact, the above rule follows the interpretation of the will of the parties. However, some of the great professors of the existence of the spirit of the principle of the will of will in the above-mentioned regulation are incompatible with the legal principles and do not supplement the contents of the above article (Shahidi 39: 1377).The principle of sovereignty seems to apply not only to certain contracts, but also to all private contracts, unless it is contrary to public order and ethical rules and norms.The spirit of the principle of the will of will, which in Article 10 of the civil law which deals with the treaty of the wise, is not limited to the said contract, but is subject to all regulations.In any case, the principle of the sovereignty of will requires that the parties determine the contract when entering into a contract of law.As a result, the criterion for verifying the authenticity and incorrectness of the contract will be based on the law that the parties have already introduced.

1.2 Main rule of law in case of silence of the parties:

Sometimes the parties may have neglected or deliberately stay silent on the choice of law governing the main contract.In the event of the silence of the parties to the law governing the original contract under Article 968 of the Criminal Code. The location of the marriage as the primary and usual pattern is often the legal legal system.Article 968 "The obligations arising from the contract are subject to the place of the contract ...". It should be noted that this article is not only about the effects of the contract. It is normal that the terms of concluding and influencing the contract are also subject to the local law where the contract is located (Katouzian, 2009: 376).In addition, when the said regulation states that the obligations arising from the contract are subject to the law of the place where the contract is made, it is necessary to consider the contract itself according to the law of that place (Seljuk, 2: 411), the law of the place of the marriage both in the developmental stage and in the effects of Contract and other things to do.Of course, some lawyers on Article 968 of the Civil Code appear to emphasize that this article deals with the effects of marriage (Nasiri 1352: 57).In fact, Iranian law is silent about the creation of a contract. Therefore, in order to solve the problem and fill the gap created to determine the law governing the creation of a contract, we should refer to the general principle of the territoriality of the laws, reflected in Article 5 of the Civil Code. So that according to the above two months it can be concluded that those who make a contract in Iran are subject to the law of Iran, that is, Iran's law is competent for its contract, unless otherwise stated.In other words, the law of Iran will govern the place of concluding a contract with respect to the conditions for establishing an agreement (Nasiri, the same: 57). Or, as stated above, in the analogy of priority, the contract itself should be subject to the law of the place of the contract.However, it is sometimes difficult to determine the place of the contract, contrary to other criteria, including the place of execution of the contract.An

agreement that can be made through correspondence or other media, including telephone, telegraph and telex, and the Internet, may lead to discrepancies regarding the location of the contract.

2. The importance of the agreement and the law governing it:

Here we look at the law governing the arbitration agreement, but first of all briefly discusses the importance of the arbitration agreement. Obviously, by clarifying the importance of the arbitration agreement, the importance of determining the law governing the arbitration agreement is also clarified.

2.1. The Importance of the Arbitration Agreement:

Before the discussion begins, it must be said that the arbitration agreement should not be misleading. The arbitration is a strategic document that is intended to guide the referees to the referees, but the arbitration agreement is the arbitration agreement that provides for the qualification of the arbitrators on the one hand and the refusal of the proceedings of the state courts on the other hand, so that according to the agreement In the case of arbitration, the case is withdrawn from the process of proceedings of the state courts.Therefore, if the arbitration agreement is concluded as a contract in the right way, it has unique effects that impede the adjudication of the judiciary by the courts and its negative effect is applied in relative terms and this leads to Under the circumstances, the arbitrators shall exercise their powers and resolve the dispute in a variety of ways, including through fairness, fairness and fairness, and issue an appropriate order.While such powers are not the responsibility of the judges of the state courts, they are obliged to comply with the rules and can not be considered on the basis of code.So it turns out that the referee's deal is more flexible due to the correct agreement (susler, 2012: P4).In addition, the agreement has had a special positive effect on the basis of which the judges have found extensive jurisdiction.The significance of the arbitration agreement is such that almost all the rules, in particular the rules of international arbitration, have been applied to its definition. The New York Convention on the Recognition and Execution of Foreign Arbitral Awards 1958, which is an important source of arbitration in Iranian law, deals with the arbitration agreement and its importance, as well as its authenticity and invalidity, and provides a clear indication of the specific solution and conditions. The correctness has been mentioned.In this way, any arbitration agreement based on the assumption that it has been formulated correctly will not only be respected as a separate contract from the original contract but also bears a commitment on the part of the parties.Our legislator, both nationally and internationally, respects the arbitration agreement by regulating civil and international commercial arbitration law, and it has special legal effects for it.So that despite the arbitration agreement and the objection of one of the parties to the state courts in accordance with Article 8 of the International Commercial Arbitration Law, until the end of the first session, the court was required to adjudicate the parties. Respect and recognition of arbitration agreements by existing regulations is such that these regulations reduce the involvement of courts and, in some cases, have filled the judicial support aspect in all stages of arbitration.Therefore, determining whether the arbitration agreement is correct or void is very important. To determine this, the criterion is the determination of the law governing it, and it must be assessed according to the applicable law of the arbitration agreement. If the case has been raised from the outset in the arbitral tribunal, then, with the assumption that the arbitrators have the jurisdiction to examine the validity of the agreement, the first step is to determine the law applicable to the arbitration agreement, in accordance with which the arbitration agreement Assess and determine the validity and validity of it.Although the verdict is finalized by the judges and you will not be able to appeal to the court of reference, the beneficiary can, in any case, refer to the competent tribunals for protest.However, if the case has been initially brought before the courts of justice and one of the parties has insisted on invalidity of the arbitration agreement, then the court will issue the ruling by examining this case. The important effect of recognizing the validity of an arbitration agreement is that the jurisdiction of the judges is also determined.At this stage, the judges must, prior to the commencement of proceedings, determine whether the matter referred to them by reference to the arbitration agreement is capable of referral to the arbitral tribunal. In other words, has the dispute referred to them resolved in accordance with the ruling of the law, the ability to refer the case to arbitration?Namely, both individually and in the subject matter of the judges (Skini, 1391: 48), according to the governing law, the ability to refer the case to arbitration or so-called arbitration should specify the subject of the dispute.For example, Iranian lawmakers do not allow individuals to arbitrate individually, but allow individuals to go to arbitration to prosecute individuals. Article 454 of the Civil Procedure Law of Iran stipulates that:: "All persons who have the right to litigate can, with each other, dispute and dispute, either in court or not, and if they are planning at any stage of the proceedings, refer the arbitration of one or more individuals."So it turns out that, in personal terms, no one can refer his case to arbitration unless he has an affiliation, and the purpose of his or her affiliation is to acquire ownership.In addition, as explained, the legislator in each country may, in some cases, exceptionally, and taking into account the interests of individuals and society, list the limitations and barriers to referral to arbitration under different regulations. Whether referring to arbitration as having contractual implications and based on the principle of the will of the will of the parties to the dispute will resolve their case without going to the state court.Our lawmakers,

in some cases, do not have the right to refer a case to arbitration, including in the following cases:

1. Claims of public and state property:

Article 139 of the Constitution of the Islamic Republic of Iran stipulates: "Peaceful litigation regarding public and state property or referral of arbitration in any matter referred to is approved by the Cabinet of Ministers and must reach Parliament. In the case that the parties to the dispute are foreigners and in important internal matters must also be approved by the parliament, the law determines the important matters. "

2. Claims of bankruptcy (Article 496 AH).
3. Claims of the marriage contract and its termination and divorce.
4. Claims of inventions and trade marks in terms of granting and not granting them in accordance with Article 46 of the Law on Registration of Signs and Inventions.

Reviewing the Arbitration Agreement is not important because some of the lawsuits do not have the ability to refer to arbitration and the parties have no right to conclude an arbitration agreement on this basis.. In addition, if the legislator has prohibited in some cases, the guarantee of its implementation is to invalidate the arbitration agreement, and if the matter, regardless of the provisions in terms of its ability and inability to refer to arbitration, is practically referred to arbitration and the judges regardless of this They have issued a final vote, such a verdict is essentially void and ineffective.This issue is underlined by paragraph 2 of article 5 of the New York Convention: The competent authority of a country whose identification and enforcement of the arbitration clause has been requested, also if one of the following can be met, may request the recognition and enforcement of the sentence:(A) The subject matter of the dispute is not resolved by way of arbitration in accordance with the law of that country; or (B) the identification or enforcement of the sentence is in conflict with the public order of that country.Clause 1 of Article 34 of the Criminal Code. Also, the guarantee of enforcing legal non-arbitration is essentially invalid and there is no need for a request to cancel it through the court. This article stipulates: "Voting in the following cases, the" judge "vote is essentially void and ineffective:

1. If the subject matter of the dispute is not resolved through arbitration under Iranian law.
2. If the provisions of the vote are contrary to the public order or good morals of the country or the rules of law of this law.
3. The arbitration of a proceeding in respect of immovable property located in Iran shall be in conflict with the laws of the Islamic Republic of Iran or with the provisions of authentic official documents, unless otherwise agreed upon by the "Reviewer".

Therefore, determining the law governing arbitration is an introduction to the discussion of the law governing the ability to refer to the arbitration, and without these procedures, after applying the principle of independence, the arbitration clause is virtually problematic from the main contract of authenticity and invalidity of the arbitration agreement. It's all about.

Here again it is emphasized that the recognition of the law governing the ability to refer to arbitration is also a very important and controversial discussion that is beyond our control, so that the ability to refer a case to arbitration is subject to the law governing the main contract and Some consider it to be subject to the law governing itself, that is, the subject of its ability to refer to arbitration, but most scholars believe that the law governing the ability to refer is the same as applicable to an arbitration agreement (Skini, 1365: 25).Therefore, it turns out that, at least according to the recent opinion, the determination of the law governing the ability to refer to the arbitral tribunal ceases to determine the law governing the validity of the arbitration, which in fact, based on the principle of independence of the condition of the arbitration of the original contract, may differ with other rules of the ruling.. Therefore, it is necessary to directly examine the law governing arbitration in this section and, considering the relevance of the issue with the ability to refer the case to arbitration, we will briefly examine the law governing the ability to refer the matter to arbitration.

2. The law governing the power to refer a case to arbitration:

Determining the law governing the power to refer to arbitration at a time when, despite the arbitration agreement, the case has been filed before the court of justice and when the panel is formed and the case has been referred to the court of arbitration.In addition, the issue of determining the law governing the ability to refer to arbitration before and after the commencement of proceedings and after the commencement of proceedings in the court of arbitration, as well as after the issuance of the sentence at the time of the identification and enforcement of the sentence (in the district court) To be.It is assumed that the method of determining the law governing the ability to refer to arbitration is not at least the same as determining the law governing the main contract.Therefore, the invalidation and non-voidness of the main contract has no effect on the manner in which the law is governed by arbitration and this is one of the important results of the acceptance of the principle of independence of the condition of the arbitration of the original contract.First of all, it must be stated that the determination of the law governing the ability to refer to arbitration in accordance with the law governing the main contract, despite the acceptance of the doctrine of the principle of independence, of the condition of arbitration from the original contract, especially in cases where the original contract is invalidated, is not consistent with the legal logic.Therefore, the pattern of determining the law governing the power to refer the matter to arbitration, the law

governing the main contract, can not be a suitable model.But the proper pattern for determining the law governing the ability to refer to arbitration, as stated elsewhere, is primarily based on the will of sovereignty.If the criterion and standard of the law governing the ability to refer judgment to arbitration are the same as the law governing the arbitration agreement, then again, in the first place, is the principle of willful sovereignty under which the law governing the arbitration agreement is also determined. But if the parties not only have not tariffed the law for the arbitration agreement, but generally silent and did not introduce a law as the law governing the ability to refer the matter to arbitration, which law will govern?

The first criterion and benchmark proposed by lawyers to solve the problem is the criterion and standard of the law of the country where the arbitration agreement has been concluded there.

The second proposed criterion is the consideration of the arbitration agreement and consideration of the Emirate which may indicate the implied intention of the parties.

The third criterion is the consideration of the place of arbitration.

The fourth criterion is the country's law, which, in the absence of a condition for arbitration, would have the jurisdiction of the courts of that country to hear the case.

The fifth criterion for considering the law of the country is the probable place of arbitration, and finally the sixth criterion is the combination of these rules (CDI, 1392: 123).Each of these criteria and criteria has the advantages and disadvantages that are partly discussed in relation to the law governing arbitration agreements.For example, the criterion and criterion of the place of conclusion of the original contract will be abolished by declaring its invalidity. The criterion of the law of the place of the conclusion of the arbitration agreement is also better than the law governing the main contract, but this criterion also has its own disadvantages, such as sometimes the determination of the place of the conclusion of the arbitration agreement is difficult, especially In cases where the arbitration agreement is concluded either in writing or electronically, the place of execution of the arbitral proceedings shall also be ignored.Therefore, it is better to respond directly to the International Commercial Arbitration Rules of Iran and the provisions of the New York Convention, but first of all it is necessary to say that according to the law governing the arbitration agreement it becomes clear that the arbitration agreement is null and void, then the words of the ruling rule It is null and void on the ability to refer to arbitration.All these controversial arguments are in cases where, in accordance with the law governing the arbitration agreement, the principle of the arbitration agreement has been properly executed, and then it should be noted that the subject of the dispute, under which the arbitration agreement was set up under which law Is it possible to refer to arbitration?

Accordingly, if the principal of the arbitration agreement or arbitration agreement is in accordance with article 34 (2) (a) of Article 34 of the International Jurisprudence Law of Iran, which is the standard of law of Iran, or in accordance with Article 36 of this Law, which is the criterion and standard of the law of place of issue, as well as In accordance with the law of the place of execution, the issue should also be subject to arbitration. Ultimately, the New York Convention's regulations should also be considered and based on that.

Article 2 of the Convention: 1. Each Contracting State shall give written agreement in which the parties undertake that all disputes or any disputes existing or arising between themselves relating to a specific legal relationship, whether or not it is a contract, The arbitration can be resolved, referenced to a dignity.

2.The term "written agreement" shall include the condition of arbitration in the contract or arbitration agreement signed by the parties or included in the letters exchanged or telegrams transmitted.

A court of a Contracting State shall, at the request of one of the parties, refer the matter to arbitration in the course of a dispute concerning the subject of the parties to that agreement in the sense of this article, unless it decides that That void agreement is either invalid, invalid or unenforceable.

Article 5 of the Convention: .....

2. If the recognition and enforcement of an arbitration award may also be refused, the competent authority of the country whose identification and enforcement of the request is sought shall:

(A) the subject matter of the dispute can not be resolved by way of arbitration in accordance with the law of that country; or

B. Recognition or enforcement of a ruling is in contradiction with the general order of that country.

The result of the discussion

Therefore, one of the most important results of the acceptance of the principle of independence is that the arbitration clause and the arbitration clause in terms of the possibility of referral to the arbitration should not only have a fate other than the fate of the original contract, but must be determined for that separate law. Which in some cases may not be different from the law governing the original contract.Thus, according to the law governing the main contract, it may be ruled out that, with the presumption of the principle of independence, the condition of the arbitration of the original contract, arbitration agreement or arbitration agreement based on the law governing that, other than the law governing the marriage The main thing will not be considered void. In the case of the law governing the main contract, primarily on the basis of the principle of the will of the will, and in

the event of the silence of the parties to the place of concluding the contract, in accordance with Article 968 of the Criminal Code. And also Article 5 of the Criminal Code. Will be the criterion.But regarding the law governing the arbitration agreement, in accordance with Article 33 of the International Commercial Arbitration Rules, in the first place, the law governing the principle of the will of the parties is the rule. In the event of the silence of the parties, due to the ambiguity of the abovementioned article, and in accordance with the provisions of the New York Convention, it is reasonable to regard the criterion of the place or place of arbitration, although Article 33 of the Iranian Law introduces the law, but the Convention Emphasizes the law of the court of judge. In the case of the law governing referral, the arbitration should go directly to the International Commercial Arbitration Rules of Iran and the provisions of the New York Convention, but first of all, it must be stated that, in accordance with the law governing the arbitration agreement, it will become clear that the invalid arbitration agreement In this case, the words of the law governing the ability to refer to the arbitration will be null and void.If, therefore, the validity of the arbitral award is correct, then, as to the relevance of the referral to the arbitration, the validity of the principle of the arbitration agreement or the arbitration clause in accordance with paragraph 2 (a) of Article 34 of the International Jurisprudence Law of Iran, which is a criterion of the law of Iran, or According to Article 36 of the said law, which is the criterion and criterion of the law of place of export, and also according to the law of the place of execution of the sentence, the issue of the ability to refer the case to arbitration. Ultimately, the New York Convention's regulations should also be respected and act accordingly, recognizing that the matter is capable of referral to arbitration.As it is seen, the criteria and criteria for determining the law governing an arbitration agreement, which is in fact the criterion of identifying the invalidity and invalidity, is different from the criterion and standard of law governing the original contract. Thus, the principle of independence of the condition of the arbitration of the original marriage is fully manifested.

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