CONFLICT OF LAWS IN ARBITRATION

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DEDICATION

Special thanks to my parents, my sister, my brothers and friends for their help and understanding

Thanks for Everything….

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ABSTRACT

Generally, arbitration is preferred as an effective method of settling disputes between the parties which are from different countries. Conflict of laws is a part of English law that we will use whenever we face a legal problem which has a foreign element in it. Conflict of laws is defined as a conflict between the laws of two or more states or countries that would apply to a legal action in which the underlying disputes, transaction or event affects or has a connection to those jurisdictions. This research is on conflict of laws in arbitration. The objective of this study is to determine the grounds to solve conflict of laws in arbitration. This study covers the legal cases in England which are related to conflict of laws in arbitration. The methodology of this study has been based on documentary analysis. The research findings show that the grounds to solve the conflict of laws in arbitration are jurisdiction, choice of law and enforcement and recognition of foreign judgment. The court must have jurisdiction to settle the dispute as provided in the agreement signed between both parties. When there was an express or implied choice of law in arbitration, the parties would apply the law as expressed in the agreement. However, in the absence of express or implied choice of law, the parties would apply English conflict of laws rules to determine the dispute. The English court would recognize and enforce the foreign judgment if the judgment was final and conclusive.

ABSTRAK

Secara umumnya, timbang tara adalah kaedah yang lebih berkesan untuk menyelesaikan pertikaian antara pihak-pihak dari negara-negara yang berbeza. Konflik undang-undang adalah sebahagian daripada undang-undang Inggeris yang akan kita gunakan apabila kita berhadapan dengan masalah undang-undang yang mempunyai unsur asing. Konflik undang-undang yang ditakrifkan sebagai konflik antara undang-undang dua negeri atau lebih atau negara-negara yang akan dikenakan tindakan undang-undang di mana pertikaian yang mendasari, urusniaga atau peristiwa yang menjejaskan atau mempunyai hubungan kepada bidang kuasa mereka. Kajian ini adalah mengenai kes konflik undang-undang di dalam timbang tara. Objektif kajian ini adalah untuk menentukan alasan untuk menyelesaikan konflik undang-undang di dalam timbang tara. Kajian ini meliputi kes-kes undang-undang di England dan kes-kes yang berkaitan dengan konflik undang-undang di dalam timbang tara. Metodologi kajian ini adalah berdasarkan analisis dokumentari. Dapatan kajian mendapati bahawa alasan untuk menyelesaikan konflik undang-undang di dalam timbang tara adalah bidang kuasa, pilihan undang-undang dan penguatkuasaan dan pengiktirafan penghakiman asing. Mahkamah mesti mempunyai bidang kuasa untuk menyelesaikan pertikaian itu sebagaimana yang diperuntukkan dalam perjanjian yang ditandatangani antara kedua-dua pihak. Apabila terdapat pilihan nyata atau tersirat undang-undang di dalam timbang tara, pihak-pihak akan menggunakan undang-undang seperti yang dinyatakan dalam perjanjian itu. Walaubagaimanapun, jika tiada pilihan nyata atau tersirat undang-undang, pihak-pihak akan menggunakan peraturan konflik undang-undang Inggeris untuk menentukan pertikaian itu. Mahkamah Inggeris akan mengiktiraf dan menguatkuasakan penghakiman asing jika penghakiman itu adalah muktamad dan konklusif.

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LIST OF ABBREVIATION

ABBREVIATION		FULL NAME
AC	-	Law Reports Appeal Cases
All ER	-	All England Laws Reports
EWHC	-	High Court of England and Wales
RIBA	-	Royal Institute of British Architects
UTM	-	Universiti Teknologi Malaysia

CHAPTER 1

INTRODUCTION

1.1 Background of Study

Arbitration as a dispute resolution method is unique in various ways. It has a long history and it seems to resist any definition in modern legislations. It stands above other kinds of dispute resolution process since there is statute regulating it in most countries and is the preferable method of resolving international commercial disputes compared to other methods.[1]

Besides that, arbitration is preferable as an effective method to settle conflicts between the parties which are from different countries. The parties are always refusing to seek solution for conflicts in the law courts because legal procedure is complex, expensive and takes long time. Furthermore, arbitration was flexible, which is being refused in traditional judicial settlement.[2] When the conflicts are likely to involve complex technical issues which will be beyond the ready

[1] Oon Chee Kheng. (2004). Drafting Effective Dispute Resolution Clauses: Some Considerations. Lawasia Business Law Conference.
[2] Ali Khaled Qtaishat. (2007). Choice of Law in International Commercial Arbitration. India Law Journal.

appreciation and comprehension of a non-professional person, arbitration will be recommended to solve those disputes.[3]

Other than that, arbitration is basically an agreement to create 'confidential justice', for example privy tribunal would settle the private disputes. This is the reason that it is usually accepted nowadays an arbitration agreements have an intercrossed character, consisting both procedural and contractual basics.[4]

In general, arbitration is virtually an option. The parties can select whether to arbitrate their disputes, who will be the decision makers, the place that arbitration will be conducted and what procedures will be used. [5]

Furthermore, arbitration is an important part of commercial life and every legal system must have some degree connected with it.[6] There is no legal necessity for arbitration proceedings to be carried out at the place where one of the parties is legally constituted. On the contrary, a neutral place is generally selected. Another typical characteristic of arbitration is the a-national character of the arbitral tribunal: the nationality and place of residence of the arbitrators are normally independent of the place of the arbitration, unless the parties have expressly decided otherwise.[7]

However, international arbitration proceedings are not totally removed from national legal systems. The most important connection is the seat of the arbitral proceedings, since the law applicable at such place often contains provisions permitting state courts there to revise the procedure and the arbitral award if so requested by one of the parties. Some national laws contain specific rules for

[3] *Ibid*, No. 1
[4] Albert Jan van de Berg. (2006). Re-examining the Arbitration Agreement: Applicable Law-Consensus or Confusion? ICCA Congress Series.
[5] Cindy G. Buys. (2005). The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration. St. John's Law Review. Vol. 79 (Issue. 1), Article 3.
[6] WSW Davidson, Sundra Rajoo. (2006). Arbitration Act 2005: Malaysia Joins the Model Law. The Malaysian Bar.
[7] E. Schafer, H. Verbist, C. Imhoos. (2005). ICC Arbitration in Practice. Kluwer Law International.

international arbitration proceedings different from those governing purely domestic arbitration. This should be checked in each case. The seat of the arbitral proceedings is also relevant as national arbitration laws. It often handles the acknowledgement and enforcement of arbitral awards differently depending on whether they are local or foreign. A foreign award is any award that is not provided within the state where it is to be enforced. [8]

Arbitration is basically a creature of contract although it has some public law components. Arbitration was existed for the agreement of the parties to present some conflicts to the arbitrators for settlement. Arbitration agreement makes an arbitrator have power to discover and decide disputes with limitation.[9]

International Commercial Arbitration (ICA) is the process whereby parties from different countries appoint a person to act judicially and finally settle a given dispute that has arisen between them. The process is consent based and there will be no arbitration unless the parties agree in advance that they will solve any future disputes by arbitration or they submit to arbitration after a dispute has arisen.[10]

Almost all cross-border contracts contain arbitration clauses, the normal way of things being to specify a place where the arbitration will take place, the arbitrator and the parties would comply a set of rules. The arbitration clause will usually be placed near the regulating law clause of the contract where the parties agree the system of law that will regulate the contract.[11]

In an ideal world, if the contract contains both a regulating law clause and an arbitration clause, the law that being applied will be clear and the arbitrators will

[8] *Ibid*, No. 7
[9] *Ibid*, No. 5
[10] S. Lutterll. (2009). An International to Conflict of Laws in International Commercial Arbitration. Kluwer Law International.
[11] *Ibid*

have little need to resort to conflicts of law rules. However, contracts are rarely perfect and for this reason, arbitration clauses are often eleventh hour 'afterthoughts', instead of properly negotiated provisions of the contract. It is often become the job of the arbitrators to define the clause, and this is where conflicts rules come into the equation.[12]

When we are faced by a judicial trouble that has a foreign component, conflict of laws will be use since it is a part of English law. Foreign elements have many forms.[13] The subject of conflict of laws or private international law handles the cases that involving the operation of two or more systems of law. It must be noticed from the beginning that conflict of laws rules do not by themselves provide any substantive rules for the solution of a problem. The purpose of the conflict of laws rules is only to indicate or point the way to the appropriate legal systems for solution.[14]

Conflict of laws defined as a conflict among the laws of two or more states or countries that would enforce to an action at law in which the inherent conflict, dealings or issue affects or has a link to those legal powers.[15] Normally, conflicts are being divided into three components, which are jurisdiction, choice of law and judgments. [16] Consequently new philosophy and case law are presently referring to general conflict of laws rules to be the proper reference to decide the law to be applied relating to contractual relationships, whether of a privy law character or qualified as public contracts.[17]

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[12] *Ibid*
[13] M. Freeman. (2010). Conflict of Laws. University of London.
[14] Rh Kickling & Wu Min Aun. (1995). Conflict of Laws in Malaysia. Butterworths. p.17
[15] Webster's New World Law Dictionary 2010. Retrieved on March 20, 2012, from http://law.yourdictionary.com/
[16] William M. Richman. (2003). Understanding Conflict of Laws. LexisNexis.
[17] A. F. M. Maniruzzaman. (1993). International Commercial Arbitration: The Conflict of Laws Issues in Determining the Applicable Substantive Law in the context of Investment Agreements. Cambridge Journal. Netherlands International Law Review. Volume 40 (Issue 2).

The conflict of laws is related with all of the civil and commercial law. It is not related with criminal, constitutional or administrative cases. It encompasses the law of obligations, contract and tort, and the law of both immovable and movable property, whether a question of title arises *inter vivos* or by way of succession. It covers also the family law which including marriage, divorce, guardianship and the relations of parent and child.[18]

The conflict of laws is an essential component of the law of every country because different countries have different legal systems containing different legal regulations. A contract may contain a clause about arbitration by which the parties agree so as to if disputes arise under the contract they shall be decided by arbitration. Parties may agree to present a specific dispute between them to the decision of a particular arbitrator.[19]

Several complex conflicts of laws questions may develop in the context of international arbitration. There appear to be rather fundamental differences of access to the question of the powers and duties of arbitral tribunals as within common law and civil law systems. It is especially when in differentiating between those matters which are considered to be procedural and those considered to be substantive.[20]

In international arbitration, there automatically develops a conflict of laws and the selection of the substantive law to be implemented in a dispute when the parties are of different legal systems. Generally the substantive law to be implemented in arbitration may be defined by the parties in their original agreement. But problem develop in deciding the law to be applied when the parties unsuccessfully to concur on the choice of law for the resolution of their disputes.[21]

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[18] J. G. Collier. (2001). Conflict of Laws. 3rd Edition. Cambridge University Press.
[19] J. D. McClean. (1993). Morris: The Conflict of Laws.4th Edition. Sweet & Maxwell. p.1
[20] Hunter, Martin & Triebel, Volker. (1989). Awarding Interest in International Arbitration. Retrieved on March 18, 2012, from http://www.trans-lex.org/124400
[21] *Ibid*, No. 2

Without an express agreement between the parties, an arbitral court will normally enforce the conflict of laws rules where arbitration would be held to choose the applicable law on any particular question. However, the rules of some arbitral institutions intentionally provide the arbitral tribunal with a broad basis for this choice.[22]

1.2 Problem Statement

The subjects of conflict of laws focus on conflicts and dealings that have statutory significances affecting more than one monarch. Therefore, the conflicts problems can demand questions that reach the deep relationships among the governments. [23]

Parties, especially foreign parties, are often reluctant to resolve their disputes by an arbitration governed under the laws of a country with which they are unfamiliar for the simple reason because they are uncertain as to how effective the arbitration process would be. Further added to such uncertainty is the concern as to judicial intervention, delays and cost implications. But surprisingly, there are also concerns that the integrity of judicial systems in certain particular states may be in question and therefore it may also affect the integrity of the arbitral system.[24]

In an agreement that includes an arbitration clause, there is a tendency that the parties will select a law which they presume will give effect to the entire

[22] *Ibid*, No. 20
[23] *Ibid*, No. 16
[24] Simon Greenberg, Christopher Kee, J, Romesh Weeramantry. (2011). International Commercial Arbitration: An Asia-Pacific Perspective. Cambridge University Press.

agreement. These parties do not think in terms of substantive parts of the contract, formal parts of the contract, the process and procedural parts of the contract. They are most certainly will not be thinking in terms of conflict of laws separate between substance, process and procedure.[25]

However the modern requirement and the existing legislated requirement are for parties to consider separately the different elements within their contract. It is used to differentiate the substantive contract from the process of arbitration and also to differentiate the process of arbitration from the procedure of arbitration. It is used also actually to consider the possibility of conflict between these particular areas or within these particular areas.[26]

There is not just the question of the substantive law but there is also the question of the law of the arbitration that will regulate the establishment of the arbitration process, the rules or law on the process that the arbitral tribunal will be applied and the law that is applicable when there is a conflict of laws. Choice of procedural rules and choice of conflict of laws rule are also fundamentally choices of laws.[27]

Any conflict of laws problem might develop in international commercial cases from a theoretical perspective. Nevertheless, in practice, not all imaginable conflict issues develop with any significant frequency and some infamous conflict of laws hypothesis concerning an exchange of a conflict, procedural or substantive rule barely develop in international commercial arbitration.[28]

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[25] Belden Premaraj. (2007). The Choices of Law – Better Safe Than Sorry. The Malaysian Arbitration Perspective. Retrieved on March 25, 2012, from http://www.beldenlex.com/pdf/The%20Choices%20of%20Law%20-%20Better%20Safe%20Than%20Sorry.pdf

[26] *Ibid*, No. 25

[27] *Ibid*, No. 25

[28] Filip De Ly. (2011). Conflicts of Law in International Arbitration. Retrieved March 22, 2012, from http://www.sellier.de/pages/downloads/9783866531703_leseprobe.pdf?code=4a8fb234920bc290ddcb75fd50df852a

Deciding the law to be applied in an international arbitration manner can be very complex, yet seductively interesting from an academic perspective. It involves an analysis of the interaction between different legal systems and their rules for deciding the applicable law, usually referred to as 'conflict of laws rules' or 'private international law rules'. [29]

The difficulties and complexities of the topic of private international law in international commercial arbitration cover not only issues of applicable law but also of international authority. Moreover, it also covers acknowledgement and enforcement of judgments and arbitral awards. It stem from the fact that arbitrators in international commercial cases are not only confronting a conflict of laws question about which law applies. They also faced a conflicts of law question about which system of private international law applies. [30]

There is a potential conflict of laws when English law deals lawful questions that have an international component. There are complicated matters, especially because there are many distinct countries with diverse legal systems of rules. The most important thing is when conflict of laws develops, the fundamental matters are whose courts have authority, whose laws are to be employed, and can the judgment be implemented?[31]

Regardless of the increasing harmonization of law at the multinational stage, every arbitration brings up a number of conflicts of laws troubles concerning the procedural questions besides the issues relating the merits of the case.[32]

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[29] *Ibid*, No. 24
[30] *Ibid*, No. 28
[31] *Ibid*, No. 13
[32] Franco Ferrari, Stefan Kroll. (2011). Conflict of Laws in International Arbitration. Wildy and Sons Ltd.

Unlike a state court judge, the arbitrator has no "*lexi fori*" in the common sense furnishing that the relevant conflict rules to deciding the law to be applied. This brings up the question of what conflict of laws rules to apply?[33]

Upon what ground should the rule of conflict to be used by an international arbitrator be determined? Should it be the rule of conflict of the country from which the arbitrator comes or is a national, or that of the country in which the arbitration would be held or from which one or other of the parties comes?[34]

1.3 Objective of the Study

The objective of this research is to determine the grounds to solve conflict of laws in arbitration.

1.4 Scope of the Study

The scope of the study is legal cases reported in Lexis Malaysia related to conflict of laws in arbitration that involves England. The cases that are related to the ground of solving conflict of laws in arbitration should be analysed.

[33] *Ibid*, No. 33
[34] *Ibid*, No. 7

1.5 Significance of the Study

This study is fundamentally anticipated to resolve some unsure issues that develop in conflict of laws in international arbitration. In conformity to that, the issues will be analyzed based on the explanation and decision by the courts. The ground to solve conflict of laws should be analyzed and discussed in order that the objective of this research can be achieved. It is hope that the outcomes of this study will help to solve the conflict of laws in arbitration.

1.6 Research Methodology

The process and method of access function as a strategy to make sure this research could be completed in an organized method to accomplish the objective of this research. The study process consists of 5 stages, which involve initial study, literature review, data collection, data analysis and interpretation and completion. Below would be the five stages that being applied in doing this research.

1.6.1 Stage 1: Initial Study

The first stage of research involves initial study. Firstly, initial literature review was being conducted sequentially to acquire the outline of the theory of conflict of laws in arbitration. Discussions with supervisors, lecturers and friends were conducted simultaneously in order that extra thoughts and information concerning the topic could be composed. The rough idea for the topic of this research was obtained after the initial study. Then, the objective and scope of this

research were identified. Next, a research proposal outline was arranged with the purpose of discover what kind of data and sources would be required in this research.

1.6.2 Stage 2: Literature Review

This stage is literature review in which the research title is further explained and discussed incorporating various types of data and information that are gathered through books, articles, magazines, journals and newspapers. The data and information about conflict of laws in arbitration should be gathered. This stage was vital to support and strengthen the research before the research proceeded to other stages.

1.6.3 Stage 3: Data Collection

Stage 3 involves the collection of related data and information. Data would be collected primarily through documentary analysis and browsing through the Lexis Malaysia database. All data and information that have been collected would be recorded systematically. Relevant cases concerning the conflict of laws in arbitration would be sort out from the database. Significant and relevant cases would be collected for the purpose of case analysis on next stage.

1.6.4 Stage 4: Data Analysis and Interpretation

In this stage, all the collected data, information, ideas, opinions and comments will be arranged, analysed and interpreted. This stage is to study and transfer the data collected into information that is helpful for this research. The cases of conflict of laws in arbitration will be analysed and interpret. The proper arrangement of data tends to make the writing up process more efficient.

1.6.5 Stage 5: Writing-up and Completion

This is the final stage of the research process. It involves primarily the writing up and checking of the written work. Lastly, conclusion and recommendation would be made derived from the findings of the analysis of conflict of laws cases in arbitration.

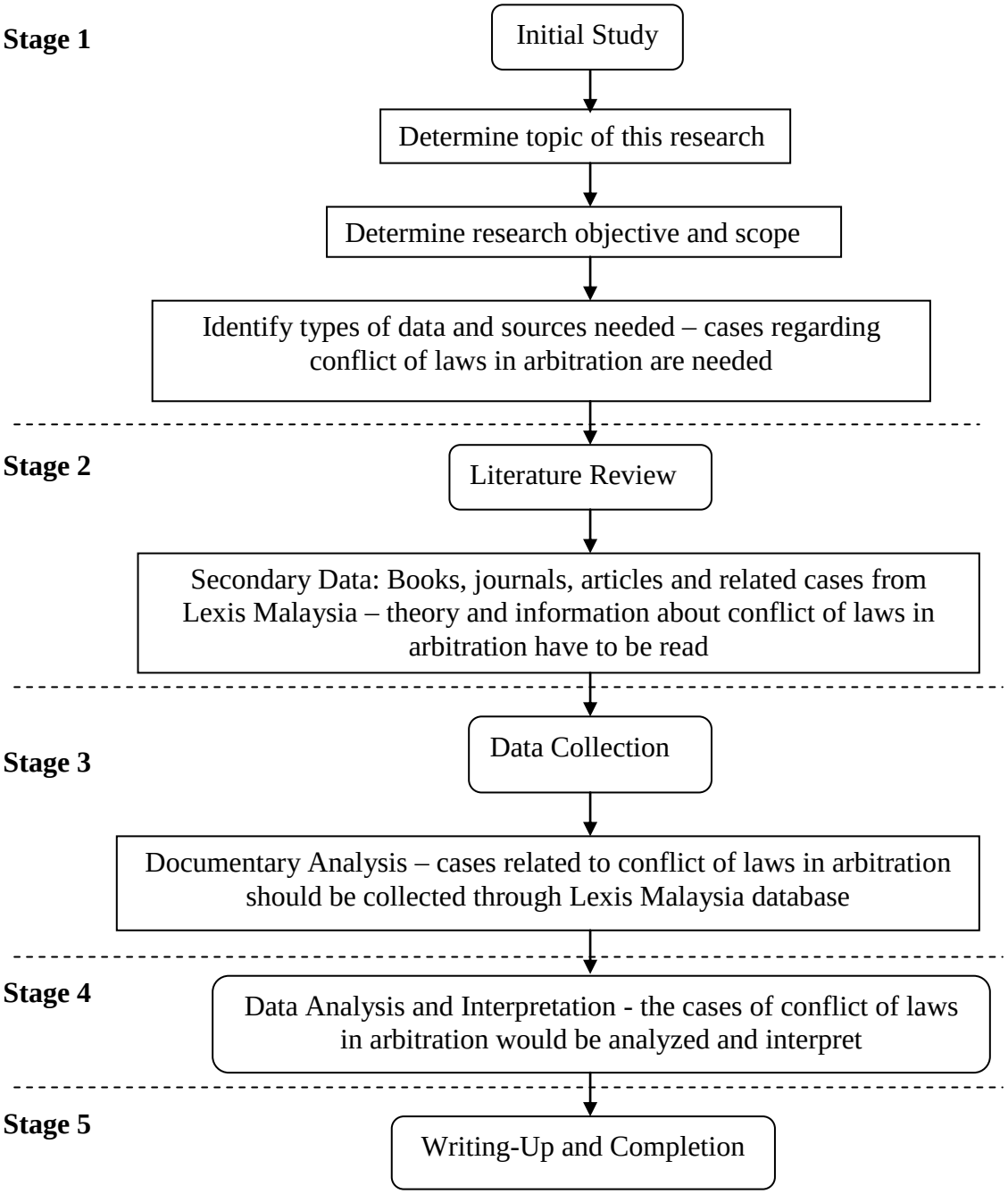

Figure 1.1: Research Methodology

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