The Applicable Law to Arbitration Proceedings: Party Autonomy and *Lex Loci Arbitri* (Extent and Limitations)

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Abstract

The extent to which the principle of party autonomy operates with regard to constructing the arbitration proceedings depends primarily on the place where the arbitration will take place, the so called the "arbitration seat" or "*loci arbitri*".

It is argued that the parties' freedom to designate the rules or select the law governing the procedural aspects of arbitration is not completely free from any limitations; the chosen rules or law cannot entirely circumvent the rules of the *lex arbitri* of the arbitral seat (hereinafter, the *lex loci arbitri*), in particular the mandatory rules to which the parties cannot derogate from. However, it is also argued that international arbitration proceedings should not be subject to the laws of the seat of the arbitration or any national laws (or courts) other than that where the enforcement is sought, for several reasons.

The main objective of this article is to analyse the aforementioned arguments and examine the applicable law to the procedural aspects of arbitration and the extent to which the party autonomy applies in this area taking into consideration the importance of *Lex Loci Arbitri* in relation to Virtual Arbitral Proceedings given its necessity, popularity, and rise due to the COVID-19 pandemic.

Keywords: arbitration proceedings, party autonomy, arbitration seat, *lex loci arbitri*, mandatory rules, delocalization.

1. Introduction

The principle of party autonomy has widely been recognized in the international arbitration regime as well as in the national arbitration laws of most jurisdictions under which the phrase "unless otherwise agreed by the parties" is commonly employed. According to such principle, parties to international arbitration agreements are free to construct the procedural framework of the arbitration process to be followed by the arbitrators.

However, although international commercial arbitration is conducted entirely outside the framework of national legal systems, parties to arbitration agreement are required, to some extent, to comply with the national procedural rules of particular jurisdiction(s) which may differ from one jurisdiction to another.

Therefore, this comparative analysis article seeks to examine the applicable law to the procedural aspects of arbitration and the extent to which the party autonomy applies in this area; the two important related theories in respect of the law governing the arbitration proceedings: the Seat Theory and the Delocalization Theory, are also considered. Moreover, the article underlines the importance of the law of the arbitral seat (*Lex Loci Arbitri*) in relation to Virtual Arbitral Proceedings given its necessity and rise due to the COVID-19 pandemic.

Yet, to fully understand the extent of the party autonomy with regard to arbitration proceedings, the article will begin with a short explanation of the meaning of procedural law in the context of arbitration.

2. Procedural Law of the Arbitration: Definition and Scope

Like court litigation, arbitration involves procedural aspects concerning, for example, the conduct of the arbitration, the rules on evidence, the enforceability of the award and the right to appeal arbitral awards.

In addressing these aspects, the arbitral tribunal or the competent court would refer to either the rules prescribed by the parties in the arbitration agreement or to a "procedural applicable law". The procedural law of arbitration differs from its substantive law, since the latter provides solution to the merit of the dispute, whereas the former regulates, as mentioned above, the procedural aspect of the arbitration from appointing the arbitrators to enforcing the awards[1].

(1) The procedural law of the arbitration governs the "internal procedures" of the arbitration as well as the "external relationship" between the arbitrator and national courts.

It should be noted here that every state may have its own law governing the procedural aspects of arbitration conducted within its territory. Thus, there isn't a uniform law applicable on all states; some states have adopted, with or without amendments, the UNCITRAL Model Law[(2)], whereas, others apply their own national civil and commercial procedural codes[(3)].

However, although the UNCITRAL Model Law contains provisions regulating, as a minimum, how the arbitration process would be conducted, it also contains some provisions that give the court at the seat of arbitration the power to supervise and oversee the arbitration proceedings that take place in its territory[(4)].

Thus, an important question arises here: which law should govern the arbitration proceedings? In other words, do the parties to arbitration agreement enjoy a broad freedom in designating the arbitration proceedings?

3. The applicable Law to the Arbitration Proceedings

3.1 Party Autonomy and Arbitration Proceedings

The principle of party autonomy[(5)] is a well-established and accepted principle in the contemporary international arbitration laws of most jurisdictions[(6)]. According to the aforesaid principle, the parties to the arbitration agreement enjoy broad freedom in setting up their arbitration frame and the conduct of arbitral proceedings from the commencement of the arbitral process to the making of the arbitral award. They can, for example, determine: the place of arbitration, the language to be used during the arbitration process, the number and the appointment mechanism of the arbitrators, the power of the arbitrators to order interim measures, the duties of the arbitrators, the statements of claim

(2) The Model Law on International Commercial Arbitration (adopted by the UN Commission on International Trade Law, June 1985).

(3) It should be noted that some states have wisely adopted the UNCITRAL Model Law including Bahrain, Egypt, Canada and Japan; but unfortunately, this Model Law provides only general principles without any detailed procedural rules making it necessary to refer to a national procedural law. For statistics about the countries that adopted the UNCITRAL Model Arbitration Law, see <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status > accessed 12 September 2021.

(4) See Art 6 of the UNCITRAL Model Law.

(5) The principle of party autonomy means two things: First, the freedom to contract (*pacta sunt servenda*). Second, the freedom to choose the law applicable, whether to the adjudicated subject matter (in litigation or arbitration) or to the procedures (in arbitration).

(6) See Poudret, Jean-François, & Sébastien Besson, *Comparative law of international arbitration* (Sweet & Maxwell, 2007) pp458-459; Born G., *International commercial arbitration*, Vol. 2 (The Hague: Kluwer Law International, 2009) pp.1748-1749.

and defence, and the governing law to the dispute[7].

This is evident in Article 19 (1) of the UNCITRAL Model Law which states that: “subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”. Similarly, the freedom of the parties to choose the arbitral procedure for themselves is stipulated in Article V (1) b of the New York Convention[8], which states that the court may refuse to enforce the arbitral award if it is established that: “the composition of the arbitral authority or the arbitral procedure was not in accordance *with the agreement of the parties*, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”.

The recognition of party autonomy in terms of determining the arbitration rules of procedure isn’t novel. The European Convention on International Commercial Arbitration, which was adopted in 1961, expressly provides in Article IV (1)(b)(iii) that: “parties to an arbitration agreement shall be free to lay down the procedure to be followed by the arbitrators”[9]. Moreover, the Inter-American Convention on International Commercial Arbitration, adopted in 1975, affirmed that the arbitration procedures shall be in accordance with the agreement of the parties[10]. Furthermore, national arbitration laws (*lex arbitri*) of many jurisdictions, such as Switzerland[11], France[12], United Kingdom[13],

(7) See Mia Louise Livinggstone, Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact? (2008) 25(5) Journal of International Arbitration 529, p.530.

(8) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted on 10 June 1958) UNTS Vol. 330, No. 4739. <https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf> accessed 12 September 2021.

(9) The European Convention on International Commercial Arbitration (1961), Art. IV (1)(b)(iii). <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media113534204360520hascher_commentary_on__the_european_convention_1961.pdf> accessed 12 September 2021. See also Articles 19(1), 21, 24 (1), 13 (2) of the UNCITRAL Model Law.

(10) The Inter-American Convention on International Commercial Arbitration (1975), Art. 2,3. <http://www.oas.org/en/sla/dil/inter_american_treaties_B-35_international_commercial_arbitration.asp> accessed 12 September 2021.

(11) Swiss Law on Private International Law, Art. 182(1) <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en> accessed 12 September 2021.

(12) French New Code of Civil Procedure, Art. 1494, Art 1509 <https://www.jus.uio.no/lm/france.arbitration.code.of.civil.procedure.1981/doc.html> accessed 12 September 2021.

(13) English Arbitration Act, 1996, § 1(b), 33, 34. <https://www.jus.uio.no/lm/en/pdf/england.arbitration.act.1996.portrait.pdf> accessed 12 September 2021.

Germany[14], Austria[15], Japan[16], and Singapore[17], expressly give the parties the freedom to tailor their arbitration process[18].

Also, many judicial decisions acknowledged the parties' freedom to determine how the arbitral proceedings shall be conducted. In *Security Ins. Co. of Hartford v. TIG Ins. Co.*, for example, the US court of appeal held that "FAA requires arbitration proceed *in the manner provided for in [the parties'] agreement*"[19]. It also stressed that; "parties can stipulate to whatever procedures they want to govern the arbitration of their disputes"[20]. A similar approach was adopted by the French and English courts as well[21].

The contracting parties may specify the applicable procedural law in the arbitration clause, or in the submission agreement concluded after a dispute has arisen between the parties[22].

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(14) German ZPO - §1024(3); see also Weigand, Frank-Bernd, ed, *Practitioner's handbook on international commercial arbitration* (OUP Oxford, 2009) p83. <https://www.trans-lex.org/600550/_/german-code-of-civil-procedure/> accessed 12 September 2021.

(15) Austrian ZPO *§*594(1); see Schütze, Rolf A., ed, *Institutional Arbitration: A Commentary* (Bloomsbury Publishing, 2013) p1107. <https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2006_1_7/ERV_2006_1_7.html> accessed 12 September 2021.

(16) Japanese Arbitration Law, Art. 26. See also Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry, *International commercial arbitration: an Asia-Pacific perspective* (Cambridge University Press, 2011) p305. <http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=2&re=02> accessed 12 September 2021.

(17) Singapore International Arbitration Act, §15A. See also Merkin, Robert & Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (CRC Press, 2016) p79. <https://www.iaa-network.com/wp-content/uploads/2013/07/Singapore-Arbitration-Law.pdf> accessed 12 September 2021.

(18) See also *Infowaves Ltd v. Equinox Corp.,* (2009) 7 SCC 220, 15, in which the Indian Supreme Court asserted that arbitration parties have "the freedom to choose the … substantive law of [the] arbitration agreement as well as the procedural law governing the conduct of the arbitration".

(19) *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 325 (2d Cir, 2004).

(20) *Baravati* ***v.*** *Josephthal**,** Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir); see also *UHC Management Company Inc. v. Computer Sciences Corporation*, 148 F. 3d 992, 995 (8th Cir. 1998); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Uni.,* 489. U.S. 468, 479 (1989).

(21) *See*, e.g, *CA Paris, 15 May 1985, Raffineries de Pétrole d'homs et de Banias v Chambre de commerce internationale,* 1985 Rev. arb. 141in which the Paris Court of Appeal reasoned "It has been established that the arbitration in question ... is an international arbitration governed by the intentions of the parties. In this case, the rules of domestic law have a purely subsidiary role and apply only in the absence of a specific agreement by the parties". For more details on the French approach, see Fouchard, Philippe, et al. *Fouchard, Gaillard, Goldman on international commercial arbitration* (Kluwer law international, 1999) 483.

(22) Hans van Houtte, 'Conduct of Arbitral Proceedings' in Sarcevic, *Essays on International Commercial Arbitration* (BRILL, 1989) p113. See also Alastair Henderson, *LEX ARBITRI*, Procedural Law and The Seat of Arbitration _Unravelling the Laws of the Arbitration Process (2014), 26 SAcLJ, p. 888.

As discussed in more detail in the subsequent parts, parties to (an ad hoc or institutional) arbitration may agree either to make their own set of rules (purely contractual rules) or to choose foreign procedural rules either national, institutional[23], non-institutional[24] or de-nationalised[25]. However, although it is not preferable to subject an arbitration seated in one country to the procedural law of another[26], however it's sometimes advisable, especially if the chosen law allows the parties, for example, to exclude the right of appeal by agreement for the purpose of implementing the arbitral award without delay[27].

Yet, to what extent the parties are free to conduct the arbitral proceedings, and what is the applicable law to the arbitration proceedings, in the absence of parties' choice of law?

Indeed, there are two main theories that have emerged with regards to the law governing the arbitration proceedings, as discussed below.

3.2 The Law of the Arbitration Seat (*lex loci arbitri*): the Seat Theory

According to the seat theory, the law applicable to arbitration proceedings, in the absence of a choice of law by the parties, would be the law of the chosen arbitration seat (the so called, the *lex loci arbitri*) .It has been emphasized that once the parties chose the arbitration seat[28] they impliedly chose the *lex arbitri* of this place[29] and vice versa, the arbitration seat may be chosen

(23) For example, International Chamber of Commerce (ICC), American Arbitration Association (AAA), International Centre for Settlement of Investment Disputes (ICSID) and London Court of International Arbitration (LCIA).

(24) UNCITRAL Arbitration Rules (adopted by UNCITRAL on 28 April 1976). <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf> accessed 12 September 2021.

(25) It should be noted that the differences in the applicable procedural rules do not (or at least not primarily) depend on the arbitration type (ad hoc or institutional), but on the specific rules that apply to a particular arbitration due to either the parties' agreement, or according to the default regime of the *lex arbitri*: see Ulrich Schroeter, Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases, (2017) 10(2) Contemporary Asia arbitration journal 141, p. 147.

(26) *Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116. See also Jonathan Hill, Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements (2014) 63 International and Comparative Law Quarterly 517, p. 528.

(27) See *Daimler South East Asia Pte Ltd v Front Row Investment Holdings (Singapore) Pte Ltd* [2012] 4 SLR 837.

(28) The place or the seat of arbitration is often determined by the contracting parties in the arbitration agreement, and it is in most cases a *neutral* place.

(29) Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn Sweet & Maxwell, London 2004) p.102; *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* [2002] 1 SLR(R) 492 at [54].

impliedly by the parties' choice of the procedural law of a certain country[30].

In this context, the House of Lords, in *James Miller & Partners Ltd. Appellants v Whitworth Street Estates (Manchester) Ltd*[31], have stated that although "there is no authority which says that, when an arbitration takes place in one country, the law to be applied *must* be the law of that country, but the authorities do show that there is a strong inference that this is so. If the arbitration takes place in Scotland with the acquiescence of the parties and the procedure applied is Scottish procedure, this is sufficient to make the arbitration governed by the Scottish law"[32]. In subsequent decisions, the English courts expressly ruled that: "by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law"[33].

Moreover, the reference to the application of the *lex loci arbitri,* irrespective of the expression used, can be found in many national arbitration laws as well as in international legal instruments[34]. According to the Geneva Protocol on Arbitration Clauses (1923), for example, the arbitration proceedings "shall be governed by the will of the parties *and by the law of the country in whose territory the arbitration takes place*"[35]. It is clear from such a provision that parties' autonomy and the *lex loci arbitri* have been given equal importance in relation to the procedures that must be followed by the arbitrators.

Moreover, Article V 1(d) of the New York Convention shows that the enforcement of the arbitral awards might be refused if the proceedings followed were contrary to the parties' agreement or "not in accordance with the law of the country where the arbitration took place"[36]. This article grants the enforcing court or the enforcing authority the right to annul the arbitration

(30) *Naviera Amazonica Peruana SA v Cia Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116.

(31) *James Miller & Partners Ltd. Appellants v Whitworth Street Estates (Manchester) Ltd. Respondents* [1970] AC 583.

(32) ibid

(33) *See* C v D, [2007] EWCA Civ 1282 (05 December 2007). https://www.trans-lex.org/311360/_/c-v-d-%5B2007%5D-ewca-civ-1282/

(34) For example, the New York Convention refers to the lex loci arbitri by using the terms "the law of the country where the arbitration took place" and "the law of the country where the award was made": see Art V 1 (d); see also UNCITRAL Model Law, Art 36 (1) (a)(i.).

(35) Geneva Protocol on Arbitration Clauses of 1923, Art 2. https://www.trans-lex.org/511300/_/protocol-on-arbitration-clauses-signed-at-a-meeting-of-the-assembly-of-the-league-of-nations-held-on-the-twenty-fourth-day-of-september-nineteen-hundred-and-twenty-three/

(36) Identical to Art 36 of the UNCITRAL Model Law regarding the grounds for refusing recognition or enforcement and Art 34 thereof regarding setting aside the arbitral award.

award if it was issued contrary to the mandatory rules of the *lex loci arbitri*(37).

It should be stressed here that the arbitral seat is the country "where an international arbitration has its legal domicile or juridical home"(38). As the French *Cour de Cassation* held "the seat of arbitration is a purely legal notion carrying with it important consequences"(39). Therefore, when parties select a specific place as an arbitral seat, it means they chose that state's law to govern their arbitration process, regardless of the place where the case will be heard or/and the evidence will be examined(40). It is possible, for example, to select the arbitral seat in state A and hearing the witnesses in state B.

Moreover, the parties or the tribunal can go through the whole arbitration proceedings without any physical engagement with the chosen arbitral seat. Therefore, Article 20(2) of the Model Law states that: "The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents".

In this context, it has been demonstrated that conducting arbitration in several places does not affect the application of the *lex loci arbitri*(41). As such, the arbitral seat is not necessarily the venue for hearings and meetings; its rather a "legal place" selected by the parties for regulating - according to its national

(37) See ICC Case No 5029, Interim Award (1987) XII YBCA 113 at [3] in which it was stated that arbitral procedure 'is governed by the mandatory provisions of the arbitration law of the place of arbitration'. This default option has also been adopted by many institutional rules, for instance, Article 16(4) of the 2020 London Court of International Arbitration Rules (LCIA Rules), provides that "*the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration*".

(38) Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p. 1537. In regards to the choice of a particular place as the seat of arbitration, the parties should take into account the economic factors, such as the possibility of transferring the required finances from/to the seat of arbitration, the availability of local professionals – lawyers, advisors, experts, etc. (including the possibility of the parties to afford their services). There are also other practical considerations, such as the availability of premises suitable for hearings, accommodation for the parties and arbitrators, good communication infrastructure, as well as the availability of clerks, interpreters, and other administrative personnel: see Alexander J. Bělohlávek, Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth (2013) 31 ASA BULLETIN 2, p.275

(39) French *Cour de Cassation, Société Procédés de préfabrication pour le béton c/ Libye* (28 October 1997), *Revue de l'arbitrage* (no. 2, 1998), pp. 399-407, in Solovay Norman, and Cynthia K. Reed, '*The Internet and dispute resolution: Untangling the Web'*, (2003) Vol. 671 Law Journal Press, 36.

(40) See Alexander J. Bělohlávek, Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth (2013) 31 Asa Bulletin 2, p. 262-263.

(41) Alan Redfern (n 29) p.100.

lex arbitri, -the arbitration proceedings(42). Therefore, the parties to arbitration agreement/dispute will generally select the seat of arbitration to be in a state whose law has minimum effect (intervention) on the arbitration in general, and in the arbitration proceedings in particular(43).

Well-drafted arbitration agreements contain an express designation of the arbitration seat. However, the problem may arise when the arbitral seat is not clearly stated in the agreement, or when the law of the arbitral seat that is determined by the parties is not the one that the parties have chosen to govern the arbitration proceedings. In *Braes of Doune Wind Farm Ltd v Alfred McAlpine Business Serviced Ltd*(44), for instance, the arbitration clause stated that the seat of arbitration was Glasgow, Scotland. However, the arbitration clause also named the English Arbitration Act of 1996 as the procedural law. It is stating the following; "[t]his arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow" and "[a]ny such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment"(45).

This case illustrates that, the juridical seat of arbitration is not necessarily the physical location of any hearing. As a matter of contractual interpretation, the court held that although Scotland has been merely selected as the location of any hearing, England was the juridical seat of arbitration, and therefore the English procedural law is applied(46). If no law was explicitly specified, the selection of a place or seat of arbitration will determine the law that governs the arbitration proceedings. Therefore, it is clear that where the procedural law is stated in an arbitration agreement, it will usually dictate the seat of arbitration (and vice versa), even where no seat is specified in the agreement(47).

However, when there is no clear determination of the arbitration seat in the arbitration agreement, the location of the seat should be determined by the tribunal according to the circumstances of the case. For example, Article 20(1) of the UNCITRAL Model Law provides that "the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the

(42) See Dicey Morris, *Collins, The Conflict of Laws* (14th edn, 2006) 16R-001, Rule 57(2).

(43) Advocate Rajveer, 'Parties' autonomy in international commercial arbitration' (2018) 9 International Journal of Scientific & Engineering Research 10, at p. 1207.

(44) See Braes of Doune Wind Farm (Scotland) Ltd v. Alfred McAlpine Business Serviced Ltd [2008] EWHC 426 (TCC)(13 March 2008).

(45) Singapore Academy of Law Journal, (2014) 26 SAcLJ, p. 907.

(46) Ibid.

(47) *See* <https://www.casemine.com/judgement/uk/5a8ff75e60d03e7f57eabcc3> accessed 11 July 2021.

case, including the convenience of the parties", and section 3 of England's Arbitration Act 1996 provides for default determination of the seat "having regard to the parties' agreement and all the relevant circumstances"[(48)].

Generally speaking, localizing the arbitration within a particular legal system (arbitral seat) is necessary for several reasons. One of which is that arbitration process may require supervision by the local courts of the place where the arbitration is held[(49)]. This is logically sound since only such a court[(50)] has jurisdiction to set aside the arbitral award if it has been rendered against the public policy of the law of the forum or because the arbitration proceedings run contrary to the mandatory rules of its state[(51)], "from which the parties cannot derogate from"[(52)].

For example, Article 23 (7) of the UNCITRAL Model Law states that "[i]f the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law."

According to the seat theory, no arbitration can be held without a national legal system that guides its proceedings and ensures that the arbitral process works as it should and this national legal system is the *lex loci arbitri*; it has been emphasized that "the seat of arbitration and the procedural law governing an arbitration are normally two sides of the same coin"[(53)].

3.3 The Delocalization Theory

According to this theory, international arbitration proceedings should not be subject to the laws of the seat of the arbitration or any national laws (or courts) other than that where the enforcement is sought[(54)]. Stated in another way, the concept of delocalization allows the arbitral process to be independent from

(48) In this regard, it is noted that the International Olympic Committee's Court of Arbitration for Sports (CAS) has a "fictional" place of arbitration in Lausanne, Switzerland, irrespective of the actual seat of arbitration (e.g., London, Bahrain, Jordan, Egypt).

(49) *See Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116.

(50) See the UNCITRAL Model Law, Art 34 (2).

(51) The UNCITRAL Model Law, Art 34 2 (a) iv.

(52) Ibid.

(53) Jonathan Hill, "Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements" (2014) 63 International and Comparative Law Quarterly 517, p. 527.

(54) It is argued that national courts should not be allowed to intervene, except for the purpose of giving effect to the arbitral award: see Chenoy Ceil, 'Theory of Delocalization in International Commercial Arbitration' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521053> accessed 15 August 2021.

national legal system(s)[55]. Consequently, this theory asserts that international arbitration must not be restricted by the national laws of the state wherein the arbitration takes place[56].

In general, the delocalization theory is based on the notion that the will of the parties, and not a *lex loci arbitri,* gives the arbitral award a binding effect[57]. It has been argued that the international arbitral proceedings should be based on internationally accepted practices, which are not subject to any national laws, and they should be free from the interference or supervision of domestic courts; the role of the national court is merely to ensure the "minimum standards of legal protection"[58]. Moreover, it has been noted that international arbitration commonly involves parties and arbitrators from different jurisdictions and the parties to arbitration agreement normally seek to have the seat/place of arbitration in a neutral state[59].

It has also been stated that concern should only be given to the law of the place where the arbitration award would be enforced, and not to the place where the arbitration takes place, especially when the latter place has no connection with the parties or/and the substantive matter of the dispute[60]. This was illustrated in the *GoÈtaverken* case[61], in which the Paris Court declined jurisdiction to set aside an award granted in France under the ICC rules since neither the parties nor the contract had any link with France and its national law, although the arbitration took place in Paris. In this context, Lew said "an international arbitration tribunal *is a non-national institution; it owes no allegiance to any sovereign State; it has no lex fori in the conventional sense*"[62].

(55) M. Pryles, "Limits to Party Autonomy in Arbitral Procedure" (2008) International Council for Commercial Arbitration 1, p. 6.

(56) Moses, Margaret L., The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) p. 56. In *Ingeniería Proyersa Limitada v Steag GMBH,* September 1, 2016, Case 2685-2016, the Santiago Court of Appeals held, for instance, that the national procedural rules would always undermine the parties' self-regulation and the principle of minimal court intervention.

(57) Roy Goode, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration" (2001) 19 Arb 31.

(58) See Dejan Janićijević, "Delocalization in International Commercial Arbitration" (2005) 3(1) Law and Politics 63, p. 66.

(59) Lew, Julian DM, 'Achieving the dream: autonomous arbitration' (2006) 22 Arb. Int'll 179, pp179-180; Roy Goode (n 57) p. 32.

(60) Alan Redfern (n 29), p.107.

(61) *General National Maritime Transport Co. v. GoÈtaverken Arendal AB*, Court of Appeal, Paris, 21 February 1980, (1980) Rev de l'Arb 107, (1981) 6 YB Comm Arb 221.

(62) Lew, Julian DM, *Applicable Law in International Commercial Arbitration—A Study in Commercial Arbitration Awards* (1st edn. Oxford, 1978) p 535; see also *Dell Computer Corp v Union des consommateurs* (2007) SCC 34 at [51].

Additionally, the delocalization idea was adopted by the ICC in the words of its award which was decided in 1976:

> "I…do not see any need for referring to any particular set of national law rules or court practice of any particular country in this respect…Nor do I see any necessity for relying …. upon Swedish law as the law of the place of arbitration. Furthermore, the court and other authorities of Sweden can in no way interfere with my activities as arbitrator, neither direct me to do anything which I think I should not do nor to direct me to abstain from anything which I think I should do"[63].

The delocalization theory can also be found in the institutional arbitration rules of the International Centre for the Settlement of Investment Disputes (hereinafter, "ICSID")[64] which contains arbitration procedural rules[65], that are applied outside the boundaries of the national law systems and are binding upon the parties.

Under the ICSID, proceedings are delocalized from domestic procedures, which means that the local courts do not intervene in the process, and the place of proceedings – where the hearing are held – has no legal significance in Member States. Thus, the law of the place of arbitration (*lex loci arbitri*) has no impact at all on the ICSID arbitration process. Regarding the place of proceedings, Article (62) of the ICSID Convention states: "Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided"[66].

Also, Article (63) of the said convention states: "Conciliation and arbitration proceedings may be held, if the parties so agree, (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary General".

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(63) *Preliminary Award in ICC Case no. 2321*, I Y.B. Comm. Arb. 133 (1976). See also *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, award of 23 August 1958 (1963), 27 ILR 117; *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, YCA 1979, at 177 et seq.

(64) The International Centre for Settlement of Investment Disputes was established by the ICSID Convention in 1966; the Centre is an international arbitration institution for legal dispute resolution and conciliation between States and international investors.

(65) See the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) < http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 9 July 2021.

(66) See <https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf> accessed 12 August 2021.

Courts involvement being excluded between the Contracting State and the investor is justifiable, because Contracting States would not expect to apply and submit to the laws of another country, and the investor as well does not prefer to apply and submit to the laws of the host state. These previously mentioned instruments, in addition to the ICSID Additional Facility Rules[67], provide the procedural framework for arbitration, conciliation, and fact-finding proceedings.

In *Mobil Cerro Negro, Ltd., et al v. Bolivarian Republic of Venezuela*[68], *Mobil* commenced arbitration against *Venezuela* challenging the expropriation, in which *Mobil* did so pursuant to a Bilateral Investment Treaty under which *Venezuela* waived its sovereign immunity with respect to *Mobil's* claims . When Venezuela lost the case and did not make the payments they were ordered to make[69], *Mobil* filed an *ex parte* petition to recognize the arbitral award before the United States Federal District Court (Southern District of New York) seeking recognition of the award and entry of judgment to enforce the award[70].

The court rejected Venezuela's sovereign immunity challenge and upheld use of an *ex parte* procedure available under the New York Law, to convert an ICSID award into a U.S. court judgment to allow the arbitration award creditor, in this case *Mobil*, to begin enforcing the award by executing on assets of the arbitration award debtor (*Venezuela)*. This decision highlights the delocalized nature of ICSID awards and illustrates how ICSID award creditors are increasingly resorting to judicial enforcement[71].

Indeed, although we believe that the delocalization theory enables the parties to create procedural rules that fit their interest or to choose a procedural law that can be completely different from the seat of arbitration, arbitration cannot be fully delocalized from the national law or court of the arbitral sea for several reasons, as will be shown in forthcoming section .

(67) *See*< https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf> accessed 12 August 2021.

(68) *See* <https://www.italaw.com/sites/default/files/case-documents/italaw4160.pdf> accessed 12 August 2021.

(69) The arbitration was conducted under the auspices of ICSID, and on October 9th, 2014, the ICSID panel issued a 134-page decision that awarded Mobil $1,600,042,482, plus 3.25% interest, compounded annually from June 27, 2007, until payment.

(70) Ibid.

(71) Ibid.

4. Do we still need a *Lex loci Arbitri* for International Arbitration Proceedings?

A controversial issue of debate is whether the parties to the arbitration agreement, who have decided to carry out their arbitration in a particular state, have the freedom to select a set of procedural rules, whether national, institutional, or non-institutional rules, other than those that are applicable under the law of the arbitration seat.

Generally speaking, the parties to an arbitration agreement are free to choose country A as the seat of arbitration and the law of country B as the *lex arbitri*. As an illustration, in *Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru*(72), the court stated that it was possible for the parties to choose the English procedural law for arbitration which took place in Peru(73). The parties to the arbitration agreement can also adopt institutional procedural rules especially when these rules are much more detailed than the general rules contained in the law of the arbitral seat (*lex loci arbitri)*.

Article V (1) (d) of the New York Convention also allows the contracting parties to select a procedural law, other than that of the arbitration seat, to govern their arbitral proceedings. It expressly affirms the power and supremacy of the parties' agreement concerning the composition of the arbitral procedure, and that the law of the place of arbitration should apply only if there is no agreement on the matter(74).

More importantly, Article V (1) (d) of the New York Convention does not stipulate any minimum requirements for the content of the parties' agreement. Hence, the parties can agree on a national procedural law or on institutional rules to govern the arbitration proceedings or can agree on their own rules

(72) *Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116.

(73) See *Union of India v Mc Donnell Douglas* [1993] 2 Lloyds Rep 48. See also *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 in which the parties to arbitration agreement had chosen London as the seat and the law of Singapore as the procedural applicable law. In *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] 1 CLC 487, the parties expressly agreed that 'the seat of the arbitration shall be Glasgow, Scotland" and any arbitration should be 'conducted in accordance with the English Construction Industry Model Arbitration Rules February 1998 Edition'

(74) However, Article V (1) (d) of the New York Convention is silent as to the form of the parties' agreement. Therefore, such an agreement could be a written agreement or an oral one, and can be express or implied: see Sigvard Jarvin, *Irregularity in the Composition of the Arbitral Tribunal and the Procedure*, in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 729, 730 (E. Gaillard, D. Di Pietro eds., 2008); Gary B. Born, International Commercial Arbitration (2009) 2771.

independent of any system.

For example, a German court rejected a party's argument that the procedures of the composition of the arbitral tribunal was not in accordance with the requirements of the Turkish Code of Civil Procedure, and enforced the award rendered in Turkey where the parties had agreed to the rules of the Arbitral Commission of the Istanbul Chamber of Commerce and Industry[75].

Also, in *Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc.*, the parties entered into a license agreement that contained an arbitration clause, and when a dispute arose between the parties the claimant commenced the arbitration proceedings. The arbitral tribunal rendered an award in favour of the claimant and sought recognition and enforcement (under the New York Convention) in the United States District Court for the Southern District of New York.

However, the District Court denied enforcement, which lead the claimant to appeal before the Court of Appeals for the Second Circuit. The court affirmed the District Court's decision to deny the claimants motion to confirm and enforce the award, because the Court held that the arbitral tribunal was constituted improperly within the terms of Article V(1)(d) of the New York Convention. However, the Court held that the District Court had erred in refusing to enforce the award on the ground that the arbitrators "exceeded their powers" under Section 10 (a)(4) of the Federal Arbitration Act ("FAA") and did not respect the parties' autonomy. The Court of Appeals added that although this is a reason for vacating an award under the FAA, it is not one of the exclusive grounds for denying enforcement under the New York Convention.

Therefore, it can be claimed that Article V (1) of the New York Convention may lead to inconsistency, as it recognizes the parties' autonomy to select the law applicable to their arbitral proceedings even if it opposes the law of the arbitral seat as discussed above, and at the same time, it grants the court in the country where the arbitration took place the right to set aside or annul the award if, for example, the rules of chosen law is inconsistent with its "lex arbitri" rules. Thus, the autonomy given by the Convention in Article V (1) paragraph (d) is limited by the same article; Article V (1) paragraph (e).

It should be borne in mind that the mandatory rules of the *lex loci arbitri* always prevail over the foreign law chosen to govern the arbitral proceedings.

(75) *See* Hanseatisches Oberlandesgericht [OLG] Bremen, Germany, 30 September 1999, (2) Sch 04/99. <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1332> accessed 12 August 2021.

So, although the parties may set out special rules to regulate the arbitrator(s) conduct, they should not totally ignore the *lex loci arbitri* of the arbitral seat, and namely the mandatory rules of this law(76), if any(77). In principle, the mandatory rules of any legal system always reflect the national public policy of the state. Some states, for example, have drawn up particular mandatory provisions with respect to presenting evidence. In civil law countries, there is a well-known principle of *due contradictoire* which states that any evidence or argument submitted by either the claimant or defendant should be presented to the other party(78).

Some notable examples of the mandatory rules of some states' *lex arbitri* are, Article (174) of the Kuwaiti Civil and Commercial Procedure Code which states that: "the arbitrator must not be a minor, under custody or deprived of his civil rights due to a felony or bankruptcy, unless he is since rehabilitated"(79). Furthermore, some states' arbitration law provides that when there are several arbitrators, the number shall in all cases be uneven, otherwise the arbitration is void(80). Similarly, the Spanish Arbitration Act (2003) requires the arbitrator to be a qualified lawyer especially where the matter is related to law(81).

The French Civil Procedure Law took into consideration both, the importance of the *lex loci arbitri* and the parties' autonomy to choose the procedural law applied to the arbitration process. In the absence of the choice of law, the French law applies to international arbitration conducted in France(82); and it will also be applied to the arbitration conducted outside of France if the parties agree to select the French law to be applied to their arbitration procedures(83).

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(76) See Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 205 Int'1 L; Micheal Pryles, Limit to Party Autonomy in Arbitral Procedure (2007) 24(3) Journal of International Arbitration 327, p.329.

(77) Most jurisdictions have very limited mandatory provisions relating to arbitral procedure: Loukas Mistelis, "Delocalization and Its Relevance in Post-award Review" (2013), School of Law, Queen Mary University of London Legal Studies Research Paper No. 144, p.172.

(78) Alan Redfern (n 29) p. 491.

(79) Kuwaiti Civil and Commercial Procedure Code (1980). <https://www.newyorkconvention.org/11165/web/files/document/2/1/21024.pdf> accessed 12 August 2021.

(80) Egyptian Arbitration Law (1994), Art 15(2) <https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg020en.pdf> accessed 12 August 2021.

(81) Spanish Arbitration Act (2003), Art 13 <https://arbitrationlaw.com/sites/default/files/free_pdfs/Spain%20Arbitration%20Act.pdf> accessed 12 August 2021.

(82) French New Code of Civil Procedure, Art. 1493.

(83) French New Code of Civil Procedure, Art. 1493 and 1495.

However, although the French law allows the parties to choose a different procedural law to regulate the arbitration, that is conducted in France, this freedom is not absolute; parties' autonomy is restricted by the mandatory rules provided in the French law[84].

That is, no state is prevented from incorporating mandatory rules to their *lex arbitri* even if such a state has adopted the UNCITRAL Model Law, since doing so relates to the state's legal policies at the first place.

The English Arbitration Act of 1996 has explicitly identified (in Schedule 1) the mandatory provisions from which parties cannot derogate; these provisions are related to various issues including the stay of legal proceedings, the power of court to extend agreed time limits and to remove the arbitrator, securing the attendance of witnesses, and the immunity of the arbitrators[85]. Accordingly, when selecting England as an arbitral seat, the parties to the arbitration agreement should adhere to the mandatory provisions of the *lex arbitri* of England[86]. In the same manner, the Singapore law of arbitration expressly provides that any rules selected by the parties will be disregarded if it is inconsistent with its own mandatory provisions[87].

In this regard, the English Court of Appeal has emphasized that: "our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law"[88]. In *Union of India* case[89], for example, the court has stated that although the parties had agreed that the arbitration should be conducted in London, according to the Indian Arbitration Act of 1940, such Act should not be inconsistent with the English arbitral procedural law, otherwise the English law prevails.

Equally important, Article 3 (a) of the World Intellectual Property Organization Arbitration Rules WIPO (2002) expressly stipulates "[t]hese Rules shall govern the arbitration, except that, where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties

(84) See the French New Code of Civil Procedure, Art.1502.

(85) See English Arbitration Act, 1996, Art. 4(1) & Schedule 1.

(86) Brunet, Edward J., *Arbitration law in America: a critical assessment* (Cambridge University Press, 2006), p.201.

(87) Singapore International Arbitration Act, §15A; see Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry, *International commercial arbitration: an Asia-Pacific perspective* (Cambridge University Press, 2011), 307.

(88) *Bank Mellat v. Helliniki Techniki S.A.* [1984] Q.B. 291, 301.

(89) *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48.

cannot derogate [mandatory provision], that provision shall prevail"(90).

Likewise, Article 1 of the UNCITRAL Model Law (to which most national arbitration laws derived from) provides that "[t]he provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the *place of arbitration* is in the territory of this State" [emphasized added](91). It is clear that this article is of a mandatory effect, since it is not followed by the phrase "unless otherwise agreed by the parties"; and it seeks to ensure that the mandatory rules of the arbitration's seat apply even if the parties have chosen another procedural law as to opt out from the mandatory rules of the *lex loci arbitri*. Thus, the chosen law will only displace the non-mandatory provisions of the law of the nominated seat.

Redfern and Hunter described the importance of the *lex loci arbitri* by simply saying:

> "[T]he procedural law is that of the place of arbitration and, to the extent that it contains mandatory provisions, is binding on the parties whether they like it or not. It may well be that the *lex arbitri* will govern with a very free rein, but it will govern nonetheless"(92).

Moreover, there are several reasons that lead the arbitral tribunal to review the *lex loci arbitri* before commencing the arbitration, irrespective of the parties' choice of another law as to govern the arbitration procedure. First, the arbitral award holds in practice the nationality of the place where the arbitration took place and it should, therefore, be consistent with the law (and namely the mandatory rules) of this place, otherwise it would not be enforced(93). Secondly, if the party against whom the arbitral award is invoked seeks to challenge the award, there should be a national court that has a jurisdiction over the arbitration proceedings, and national courts in the arbitral seat is the competent jurisdiction to investigate the arbitration process which took place in their territory.

Moreover, the parties to arbitration would not be able to challenge the arbitral award unless the law of the seat "*lex loci arbitri*" provides for so and

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(90) *See* <https://www.wipo.int/amc/en/arbitration/rules/2002/index.html> accessed 12 August 2021.

(91) See also English Arbitration Act 1996, Section 2.1; ICC Rules, Art 14(1); M. Storme & F. De Ly., *The Place of Arbitration*, (Mys & Breesch, 1992); Derains, *the Choice of the Place of Arbitration*, (Intl Bus. L.J., 1986).

(92) See Nigel Blackaby *et al*, *Redfern & Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 3.50.

(93) Alan Redfern (n 29) p107; New York Convention, Art 1(3).

specifies the grounds. Thus, although the *lex arbitri* may allow the parties to apply foreign rules, such as the UNCITRAL arbitration rules, to govern the arbitration proceedings, reference must be made to the law of the seat "*lex loci arbitri* " in the case of challenging the award since there are no provisions in the UNCITRAL rules controlling such a matter. In addition to the above reasons, every state exercises its sovereignty over the activities taking place in its territory, and no activity will be allowed in any state if it runs contrary to its public policy or mandatory rules(94).

For all of these reasons, the delocalization theory would be bound to fail. In Belgium, for example, the Belgian Judicial Code of 1985, before it has been amended in favour of the seat theory, did not allow an award to be challenged in Belgian courts even if it was rendered there, unless at least one of the parties had a place of business or inherent link with this country; this had led to unsatisfactory consequences since it created an unattractive environment for traders to arbitrate in Belgium. The law has since been changed(95).

Accordingly, there is no doubt that "international commercial arbitration depends for its full effectiveness upon the support of different systems of law, and in particular the law of the place (or 'seat') of arbitration, which might be a local law (as in Florida) or national law (as in France)"(96).

Accordingly, the adherence to the mandatory rule of lex *loci arbitri* is necessary when the arbitration is an ad-hoc one, in which the parties (and the arbitrators) can independently determine their own rules of procedure. Whereas in institutional arbitrations, where the procedural rules of a particular institution apply, there is no national mandatory rules the arbitral tribunal should be subject to because the default arbitration seat, in the absence of the parties' agreement, is the place of the institution(97). Thereby, it could be said that the institutional arbitration proceedings can be delocalized from domestic procedures.

The main characteristics of delocalized arbitrations are, that it is detached from procedural rules of the place of arbitration, detached from procedural rules of any particular national law. Therefore, delocalization can be seen as a

(94) Alan Redfern (n 29) p.105.

(95) Belgian Judicial Code, 19 May 1998. <https://www.jus.uio.no/lm/belgium.code.judicature.1998/portrait.pdf> accessed 12 August 2021.

(96) Alan Redfern (n 29), p.76.

(97) The seat of arbitration is often provided for in the rules of the institution; however, the provisions of the institution rules usually allow the parties to depart from them to choose a different seat of arbitration.

form of arbitration that is independent of any national legal order[98].

As an illustration, according to Article 16 (1) of the 2016 DIFC-LCIA Arbitration Rules[99], the parties to arbitration "may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal". In default of any such agreement, the seat of the arbitration shall be "the Dubai International Finance Centre, Dubai, unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate"[100].

Therefore, in the absence of agreement on the seat of arbitration between the parties, the default seat is the DIFC. However, once the tribunal is constituted, it can consult with the parties and order that a different seat applies to be the seat of arbitration.

Additionally, according to preceding rules, parties are free to choose any other arbitral institution rules to govern the dispute as long as the arbitration is held in DIFC. It is therefore possible to hold the arbitration in DIFC but using a non-DIFC arbitral institution rule; like the rules of the International Chamber of Commerce (ICC), and still have the award enforced by the DIFC Court.

Moreover, Article 16(3) of the DIFC rules explicitly states that the hearings may be held at any geographical place, and if such place is not the seat of arbitration that shall not affect the process, thus the arbitration shall be considered to be conducted at the seat. Consequently, it is evidently clear that the DIFC rules are delocalized.

5. *Lex Loci Arbitri* and Virtual Arbitral Proceedings

During the COVID-19 pandemic, many arbitral institutions issued guidance notes for the administration of virtual hearings, such as: BCDR-AAA's Guidelines on the preparation and conduct of online ("virtual") hearings in arbitrations administered by BCDR[101] , the ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19

(98) Dejan Janicijevic, "Delocalization in International Commercial Arbitration" (2005) 3(1) Law and Politics 63, p. 64.

(99) See <http://www.difc-lcia.org/arbitration-rules-2016.aspx> accessed 12 August 2021.

(100) Article 16.2 of the 2016 DIFC-LCIA Arbitration Rules
See <http://www.difc-lcia.org/arbitration-rules-2016.aspx> accessed 12 August 2021.

(101) *See*< https://www.bcdr-aaa.org/wp-content/uploads/Guidelines-on-the-preparation-and-conduct-of-online-hearings-in-arbitrations-administered-by-BCDR.pdf> accessed 12 August 2021.

Pandemic(102), AAA-ICDR's Model Order and Procedures for a Virtual Hearing via Videoconference(103), the CIArb's Guidance Note on Remote Dispute Resolution Proceedings(104), and the HKIAC Guidelines for Virtual Hearings(105).

Indeed, the issue of the seat of arbitration in online dispute resolution ("ODR") may be easily determined since arbitration is a legal process based on party autonomy and consent of the parties. The use of such ODR methods isn't novel, as some may think. Before the pandemic, we have already been relying on such methods - in particular aspects - such as submitting electronic evidence or exchanging emails.

The Bahrain Chamber for Dispute Resolution (BCDR-AAA), for instance, in its 2017 Arbitration Rules allow arbitral tribunals and emergency arbitrators to conduct oral hearings and examination of witnesses by video or telephone conference. Thus, Article 22.7 thereof in particular provides that: "The arbitral tribunal may direct that witnesses be examined in person or by telephone or video conference", which would clearly not affect the seat of arbitration(106).

As mentioned above, ODR existed a while ago, however, with the COVID-19 pandemic and travel restrictions, many arbitral institutions faced a clear pivot to virtual hearings in 2020. For example, the Hong Kong International Arbitration Centre hosted 80 out of 117 hearings fully or partially virtual as a result of the pandemic. The China International Economic and Trade Arbitration Commission also saw growth in hearings being held fully or partially virtual, thus in 2020 the CIETAC handled 628 cases virtually(107).

The International Chamber of Commerce, London Court of International Arbitration, and Singapore International Arbitration Centre also reported an increase in caseloads and claim amounts in 2020, however, the statistics did not

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(102) *See* <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf> accessed 12 August 2021.

(103) *See* <https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf> accessed 12 August 2021.

(104) *See* <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf> accessed 12 August 2021.

(105) *See* <https://www.hkiac.org/news/hkiac-guidelines-virtual-hearings> accessed 12 August 2021.

(106) *See*< https://www.bcdr-aaa.org/2017-arbitration-rules/> accessed 12 August 2021.

(107) *See* <https://hsfnotes.com/arbitration/2021/03/03/rise-in-arbitration-cases-in-2020-despite-reduced-volume-of-in-person-hearings-due-to-coronavirus-pandemic/> accessed 25 July 2021.

indicate how many of them were held virtually[108]. In spite of the challenges presented by the pandemic, the use of technology has bridged the gap and introduced adaptive practices in the international arbitration community

Despite the efficiency and effectiveness of virtual hearings[109], in addition to being cost-effective for the arbitral tribunal and the parties, many aspects of ODR arbitrations have been subject to debates, most importantly, the issue of determining the seat of arbitration which is of practical importance for the previous mentioned reasons since the *lex loci arbitri* is the only law which ensures effective control on the arbitration procedures and prevents the abuse of powers of the arbitrators. However, this position may be inconsistent with the purpose of ODR where the seat of arbitration is uncertain.

According to the New York Convention, Article V (d), the recognition and enforcement of the arbitral award may be refused if the *lex loci arbitri* was not given due consideration with regard to the composition of the arbitral tribunal or the arbitral procedure in the absence of the agreement of the parties. The question that arises here is: what is the seat of arbitration in ODR arbitrations?

In general, there are a few approaches to determining the seat of arbitration in ODR arbitrations. According to the first approach, the law applicable on the proceedings shall determine the seat of arbitration. This approach assumes that the procedural law is the law of the seat[110].

The second approach - which is the most contemporary approach - follows the most significant relationship doctrine. It assumes the law of the seat shall be the law most significant and most substantial to the dispute, hence the substantive law would influence determining the law of the seat[111].

The last common approach and conceivably the most practical approach in ODR arbitrations, is for the parties to the arbitration agreement to agree on the seat of arbitration and such designation by the parties confirms and upholds party autonomy.

Recently, some arbitral institutions discussed this debatable subject of determining the seat of arbitration with most arbitrations being completely

(108) *See* <https://hsfnotes.com/arbitration/2021/03/03/rise-in-arbitration-cases-in-2020-despite-reduced-volume-of-in-person-hearings-due-to-coronavirus-pandemic/> accessed 12 August 2021.

(109) See The Future of Disputes: Are Virtual Hearing Here To Stay?; by Baker McKenzie (2021).

(110) Ji Yoon Park, Jae Hoon Choi, *The Issue of the Seat of Arbitration in ODR Arbitration*, Kluwer Arbitration Blog (2020).

(111) Gary B Born, The Law Governing International Arbitration Agreements: An International Perspective (2014) 26 SAcLJ 814, p. 830.

virtual during the pandemic, such as the American Arbitration Association ("AAA"), in which the institution published a "Model Order and Procedures for a Virtual Hearing via Videoconference" providing guidance to issues the arbitrators and parties could consider for virtual hearings(112).

Article 1a of AAA's Model Order regarding Agreement to Videoconference provides an example in which the parties agree on the seat of arbitration. In contrast, Article 1b, provides that in the case of the lack of parties' agreements, the seat of arbitration is determined by the arbitrator or the arbitral tribunal. Accordingly, and in principle, the AAA considers party autonomy; however, if the parties did not agree on the seat of arbitration by mutual agreement, the arbitral tribunal would designate the seat to ensure certainty in this respect(113). They shall ensure that their award is enforceable. Therefore, the tribunal has an obligation to consider whether the use of ODR violates, for example, the arbitration law of the seat.

We believe that arbitration as a time-efficient ADR method, combined with ODR and its advantages would serve every individual in the process, such as the parties, arbitrators, witnesses, and tribunal assistants and secretaries.

6. Conclusion

This article has highlighted the critical issue of the law governing the arbitration proceedings. Although parties to an arbitration agreement may frame their arbitration process as they wish, their freedom remains subject to the mandatory rules provided in the law of the arbitration seat, that is to say the *lex loci arbitri*. In other words, apart from the mandatory rules of the *lex loci arbitri*, parties to arbitration agreement enjoy broad autonomy in selecting the arbitration rules to govern their arbitration procedures.

Accordingly, the efficiency and effectiveness of the ad-hoc arbitration will certainly be influenced by, among other things, the national law of the arbitration seat. Thus, the parties to arbitration agreement should carefully select the seat of arbitration, since they would need to adhere to the mandatory rules of the law of the chosen seat, even if these rules run against their interests.

Therefore, it is advisable for the parties to choose their seat of arbitration in an arbitration-friendly state, otherwise they would have to deal with unfavorable

(112) <https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf> accessed 12 August 2021.

(113) Ji Yoon Park, Jae Hoon Choi, *The Issue of the Seat of Arbitration in ODR Arbitration*, Kluwer Arbitration Blog (2020).

conditions regarding arbitration procedure. And to ensure the enforceability of the arbitral award, it is also advisable to choose, as the seat of arbitration, one of the states that is party to the *New York Convention*.

Nevertheless, the arbitration proceedings can be delocalized from domestic procedures in institutional arbitration, depending on the institution rule, as explained earlier in more detail.

In the end, having unlimited party autonomy in the arbitral process is neither desirable for the success of international arbitration nor for the best interest of the parties.

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