



## HOW DO YOU DETERMINE THE PROCEDURAL LAW GOVERNING AN INTERNATIONAL ARBITRATION?

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The procedural or “curial law” which governs an international arbitration can have a tremendous impact on the proceedings as the arbitral tribunal will turn to it in order to decide any number of key matters ranging from whether or not the dispute is actually capable of being referred to arbitration to whether or not to order interim measures to the final judgment itself.

The purpose of this briefly notes is both to review the existing theories concerning how arbitral tribunals should determine the procedural law and to look at the question as to how one determines the seat of an arbitration in the absence of agreement.

### **Influence of the seat of the arbitration**

English law clearly favours the orthodox theory whereby the law of the seat is necessarily the procedural law governing the arbitration. Authority for this was confirmed in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334 where the Court held that the presumption in favour of the law of the “seat” was “irresistible” in the absence of an explicit choice of some other law.

This position is also supported by the New York Convention (Article V.I(d)) which provides that an award may be set aside by the courts of the country where enforcement of an arbitral award is sought if “the arbitral procedure was not in accordance with the agreement of the law of the country where the arbitration took place.”

In England, the 1996 Arbitration Act has further greatly diminished the prospect of an arbitration conducted in England being governed by the procedural law of another state. As noted by Mustill:

Given that the act is the parliamentary expression of a national policy concerning the arbitral process it seems unlikely that even an express choice of foreign law in relation to an arbitration with a seat in England could have any impact on the mandatory provisions of the Act, and equally that anything other than such an express choice in writing could enable the

rules of the foreign law of arbitration to take precedence over the non-mandatory provisions of the English Act.

Swiss law, like English law, is particularly clear on the link between the curial law and the seat of the arbitration. Article 176(1) of Loi Fédérale sur le Droit International Privé provides that:

The provisions of this chapter [on International Arbitration] shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

The seat of the arbitration is therefore significant, as, under most legal systems, it will determine the procedural law, which will apply to an international arbitration. However, most does not mean all. The same approach is not evident in all jurisdictions.

Fouchard Gaillard and Goldman are advocates of the position that the seat of the arbitration will not necessarily determine the curial law. In their textbook on International Commercial Arbitration, they state:

It is nowadays generally accepted that the law governing the arbitral procedure will not necessarily be the same as that governing the merits of the dispute, or indeed that of the seat of the arbitration. The only rules that will prevail over those of the law which otherwise governs the procedure will be the mandatory procedural rules of law of the jurisdiction where any action to set aside or enforce the award is heard.

In support of this position, the authors also refer to Article 19 of the UNCITRAL Model Law, which, they argue, opts for a considerably reduced role of the seat in determining the law applicable to the procedure. Article 19 (Determination of Laws of Procedure) states, at paragraph 1, that subject to the mandatory provisions of the Model Law:

the parties are free to agree on the procedure to be followed by the arbitral tribunal ... failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a manner as it considers appropriate.

They submit that international arbitration practice has moved away from applying the law of the seat of the arbitration in the absence of a contrary intention of the parties. Instead, it now allows the arbitrators complete freedom in choosing the applicable procedure, or instead, resolving procedural issues as and when they arise. They refer in particular to the 1976 case of *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, 17 I.L.M. (1978) which applied rules of international law and not the law of the seat. According to the authors, this award reflects the dominant trend now found in international case law.

Therefore depending on the nationalities of the parties on the other side and their legal advisors, you may come up against the argument that the seat does not automatically determine the procedural law of the arbitration.

**“Seat” is a juridical rather than geographical concept**

The English Arbitration Act applies to arbitrations whose “seat” is in England. The Act does not explain the term “seat of arbitration” other than stating at section 3 that “seat of arbitration” means the juridical and not the geographical seat of the arbitration”, and it

may be “designated” in various ways by the parties, by an institution or person “vested” with powers to designate or by the Tribunal if authorised by the parties.

The concept of the seat of the arbitration means the place and country where the parties have expressly or impliedly chosen as the centre for arbitration. It is quite common for parts of the proceedings to be held in countries other than the seat for the convenience of the parties. This does not, however, mean that the seat has changed. If, therefore, an arbitration clause nominates Amman, Jordan as the seat of the arbitration, the parties might still agree to hold certain hearings in London or Paris. For enforcement purposes under the New York Convention (see Article VI(d), the seat will however remain Amman.

This has important practical implications as otherwise state courts may have jurisdiction to intervene in all arbitrations, which are only adventitiously taking place on their home soil.

### **When the parties do not agree on a seat**

It is very often the case that the parties will choose a neutral seat for the arbitration, i.e. a place where neither of the parties conducts business. This has the practical implication that the curial law will often differ from the substantive law.

The question arises, however, as to what is the position if no seat is chosen by the parties? If the arbitral proceedings are governed by rules selected by the parties, then these rules will decide how the seat is chosen. For example, under ICC Rules, Article 14.1 provides that the place of the arbitration shall be fixed by the ICC Court unless agreed upon by the parties.

Similarly, under the LCIA Rules, Article 16.1 provides that if the parties do not agree the seat of the arbitration, it shall be London, United Kingdom, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make a written comment, that another seat is more appropriate.

In an ad hoc arbitration, for example one using the UNCITRAL Rules, the decision will be made by the arbitrators if so authorised. Article 16(1) of the UNCITRAL Rules provides that unless the parties have agreed upon the place where the arbitration is held, such place shall be determined by the Tribunal, having regard to all the circumstances of the arbitration.

If there is no authorised third party (such as an institution) and the Tribunal does not have the authority to decide on the seat of the arbitration and the parties cannot agree, the matter may need to be decided by the courts. For example, if the parties need to establish whether Part I of the English Arbitration Act applies at all or if one of the parties wishes to make an application to the Courts in respect of a power given to them by Part I (for example, an application to the Courts for an order requiring a party to comply with a peremptory order made by the Tribunal), it is likely that a determination will have to be made by the Courts on the issue.

## **Conclusion**

Whilst identifying the seat might not always be straightforward, it is of paramount importance that the seat must be identified by the time the award is made. Any award is required to state the seat (for example, section 52 of the English Arbitration Act) and without that, it may be impossible to enforce.

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