AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Case Note

PROCEDURAL LAW ROLE IN THE INTERNATIONAL COMMERCIAL ARBITRATION: SOME REMARKS

Panchenko Viktoriia, Kornieva Polina and Cherevatenko Iryna

Submitted on 22 Jul 2022 / Revised 1st 01 Aug 2022 / Revised 2nd 12 Sep 2022 / Approved **25 Oct 2022** / Published online: **5 Nov 2022** // Published **15 Nov 2022**

Summary: 1. Introduction. – 2. Distinguishing between applicable substantive and procedural law in international commercial arbitration. – 3. Scope of application of procedural law. – 4. Autonomy of will and procedural law. – 5. The rights of the parties to choose the procedural law. – 6. Choice of procedural law. – 7. The influence of the seat of arbitration on the choice of procedural law. – 8. Conclusions.

Panchenko Viktoriia: Cand. of Science (Equiv. of PhD in Law), Associate Professor of Private International Law and Comparative Law Department, Yaroslav Mudryi National Law University, Kharkov, Ukraine v.v.panchenko@nlu.edu.ua vika09panchenko@gmail.com http://orcid.org/0000-0002-9348-4547
Corresponding author, responsible for writing and research (Use Credit taxonomy). The corresponding author is responsible for ensuring that the descriptions and the manuscript are accurate and agreed by all authors.
Competing interests: Any competing interests were included by authors. **Disclaimer:** All authors declared that their opinions and views expressed in this manuscript are free of any impact of any organizations.
Translation: The content of this article was translated with the participation of third parties under the authors' responsibility.
Funding: The author(s) received no financial support for the research, authorship, and/or publication of this article. Funding of this publication was provided by authors.
Managing editor – Dr. Serhii Kravtsov. **English Editor** – Mag. Anastasiia Kovtun.
Copyright: © 2022 Panchenko Viktoriia, Kornieva Polina and Cherevatenko Iryna. This is an open access article distributed under the terms of the Creative Commons Attribution License, (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.
Kornieva Polina: PhD in Law, Assistant Professor at the Department of Private International Law and Comparative Law, Yaroslav Mydryi National Law University, Ukraine p.m.kornyeva@nlu.edu.ua korneva91@ukr.net http://orcid.org/0000-0002-7901-9008 **Co-author**, responsible for writing and data collection.
Cherevatenko Iryna: Cand. of Science (Equiv. of PhD in Law), Associate Professor of Civil Justice and Advocacy Department, Yaroslav Mudryi National Law University, Kharkiv, Ukraine i.m.cherevatenko@nlu.edu.ua https://orcid.org/0000-0003-2937-1529 **Co-author**, responsible for writing and data collection.
How to cite: Panchenko V, Kornieva P, Cherevatenko I 'Procedural Law Role in the International Commercial Arbitration: Some Remarks' 2022 4(16) Access to Justice in Eastern Europe 187-200. https://doi.org/10.33327/AJEE-18-5.4-n000437

This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Keywords: arbitration, autonomy of the parties, procedural law, lex loci arbitri, applicable law.

ABSTRACT

Background: One of the most important features of international commercial arbitration is the autonomy of the will of the parties to a foreign economic dispute. Such autonomy consists of the possibility of independence to resolve issues of a dispute between the parties to such a contract and those issues that already arise during arbitration proceedings. One of the most significant issues that are the subject of autonomy of the will is the choice of the rules of procedural law. In this note, we studied the procedural rules governing the activities of international commercial arbitration, which influence the course of arbitration proceedings, since the arbitral tribunal usually refers to them when determining the number of key issues, starting with questions about whether to refer the dispute to arbitration or not, whether to determine interim measures and also with respect to the arbitral award itself.

Methods: This study was based on an analysis of Ukraine's national law and some doctrine; examples of implementation of the New York convention were analysed.

Results and Conclusions: Although the parties' freedom of choice is a generally accepted principle of international commercial arbitration, it can usually be limited by the imperative norms and public order of a particular country. The trend of moving the international arbitration practice away from using *lex loci arbitri* was underlined. This trend reflects the avonomy of the parties and can also be considered a significant challenge of *lex loci arbitri*.

1 INTRODUCTION

Generally, arbitration proceedings take place in accordance with procedural law, commonly referred to as "lex arbitri". However, at a time when the parties did not choose their procedural law, the arbitration procedure was governed by the law of the venue of the arbitration proceedings.[1]

However, at present, it is widely accepted that the seat of arbitration, which is often chosen for a variety of reasons, such as convenience and the requirement of neutrality, does not necessarily lead to the fact that the arbitration procedure is governed by the law of that jurisdiction of the seat of arbitration. Since the choice of the venue of arbitration proceedings is carried out directly by the parties to a foreign economic dispute, arbitration institutions or arbitrators are often guided by reasons that are completely irrelevant to the arbitration procedure. [2,3]

Since the principle of autonomy of the will has received wide recognition in most national systems, this means that the conduct of arbitration proceedings is mainly regulated precisely on the principle of autonomy of the will. Although the parties are free to choose the right, the exercise of such a choice usually also depends on the venue of the arbitration proceedings.

1 Yann Guermonprez How do you determine the procedural law governing an International arbitration? https://www.fenwickelliott.com/sites/default/files/Arbitration%203%20-%20How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20international%20arbitration.pdf date of access 22 Jul 2022.

2 Redfern and Hunter, with Blackaby and Partasides, Law and Practice of International Commercial Arbitration, 4th Edition, 2004, P. 315.

3 Fouchard G, Goldman B, Savage J Fouchard, Gaillard, Goldman on international commercial arbitration. Kluwer Law International, 1999, P. 635

In general, the scope and content of procedural laws are not the same due to differences between arbitration laws of different countries. Thus, certain contradictions may arise in cases where such different procedural norms interact at any stage of the proceedings. In this regard, this article will analyse the question of how the parties should determine the applicable procedural law, a critical analysis of the role of autonomy of the will in the arbitration proceedings will be carried out, as well as the interrelationships that exist between procedural law, the autonomy of the will and the right of the place of arbitration. The question of how the choice of laws will be limited or otherwise regulated or depend on the law of the place where the arbitration differs between substantive and procedural law will also be considered.[4,5]

2 DISTINGUISHING BETWEEN APPLICABLE SUBSTANTIVE AND PROCEDURAL LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

On the one hand, the law applicable to the dispute's subject matter regulates the parties' substantive rights and obligations. On the other hand, procedural law regulates the procedure for conducting arbitration proceedings and the possibility of appealing an arbitral award. For example, the parties may choose French law to enter into their substantive agreement and English procedural law to conduct arbitration proceedings. In this case, the arbitrators will apply French law on the merits of the dispute and conduct proceedings in accordance with English law.[6]

The relationship between content and procedure as an important element of international commercial arbitration has been widely recognised. In fact, the parties may prefer that their original agreement or contract be governed by specific national law, although at the same time, they consider that the same right is improper for settling disputes that may arise from their substantive legal agreements. The distinction between the law applicable to the merits of the dispute and the law applicable to arbitration is supported by the views of scholars, according to which the arbitration proceedings may or should be free from the system of law governing the rights and obligations of the parties. In other words, substantive law regulates the essence of the rights and obligations of the parties, while procedural law regulates arbitration proceedings[7]. Separating the essence of the dispute from the procedure also assumes that the definition of each applicable law may be due to or determined by different approaches.[8]

Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd recognised for the first time that procedural law could be applied independently and without any connection with the substantive legal system. In this case, a contract was concluded between the English and Scottish companies, according to which the Scottish company had to carry out certain work in the factory of an English company in Scotland. The contract between these companies contained an arbitration agreement that did not specify the law to be

4 Bühring-Uhle Ch, Kirchhoff L, Scherer G Arbitration and Mediation in International Business, 1996, P. 89

5 Born G B International Commercial Arbitration: Commentary and Materials, 2d ed., Ardsley, NY: Transnational Publishers, 2001, P. 415

6 Chukwumerije O Choice of Law in Internation Commericla Arbitration https://digitalcommons.du.edu/cgi/viewcontent.cgi?Art.=1709&context=djilp date of access 22 Jul 2022.

7 Rubino-Sammartano M, Rubino-Sammartano M International arbitration law and practice. P. 281

8 Yann Guermonprez How do you Determine the Procedural Law Governing an International Arbitration? https://www.fenwickelliott.com/sites/default/files/Arbitration%203%20-%20How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20international%20arbitration.pdf date of access 22 Jul 2022.

This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

applied to the arbitration proceedings but stated the place of arbitration – London and the Scottish law to be applied on the merits of the dispute (substantive law). After the arbitration, the court ruled that the nature of the contract proves that English law is its proper right on the merits of the dispute, however, the law to be applied to regulate the arbitration procedure may differ from the right that the parties have chosen to apply when considering the dispute on the merits. In cases where the parties are unable to choose the right that will govern the arbitration proceedings, the proceedings are usually governed by the law of the country in which the arbitration proceedings are conducted.[9]

English courts managed to distinguish procedural law from substantive law. At present, the parties to the contract may, at their own discretion, determine the law to be applied in accordance with the merits of the dispute and the arbitration procedure. Since procedural law regulates arbitration procedure, and substantive law regulates the rights and obligations of the parties, there is a high probability that this issue will go beyond the different legal systems. Domestic laws applicable to arbitration proceedings may not regulate a party's rights and obligations. The separation of procedural law from substantive law expands the freedom of the parties to choose the right, and arbitration becomes more attractive to them in dispute settlement matters.

3 SCOPE OF APPLICATION OF PROCEDURAL LAW

Procedural law plays a very important role in arbitration proceedings. Some scholars have argued that procedural law regulates issues such as the autonomy of the will of the parties in making decisions on procedural issues during arbitration proceedings[10]. Such procedural issues directly include the arbitration proceedings themselves, the issues of proof, the appointment and recusal of arbitrators, the responsibility, and ethical standards of the arbitrators, as well as the form and content of the arbitral award. However, in some cases, procedural law also applies to matters relating to the interpretation and enforcement of an arbitral award, which necessarily includes methods for determining whether a dispute is subject to arbitration, settlement of conflicts arising from the law or rules applicable to the merits of the dispute, including quasi-material issues, including the issue of determining the remuneration of lawyers[11]. Furthermore, in this case, some scholars explain that arbitration is the result of agreements between the parties to a foreign economic dispute, and the arbitration agreement should be determined based on a set of legal norms.

On the other hand, some scholars argue that one of the features of international commercial arbitration is that its consideration usually takes place in a "neutral" country, where neither party to the contract resides and does not have the location of its business. Therefore, in practice, procedural law cannot be the same as the law that regulates substantive legal issues in a dispute.

In addition, in most cases, procedural law is defined as the law that governs the mandatory procedural elements of international commercial arbitration. National laws empower arbitration to exercise its powers, and the process of exercising such powers is reflected in procedural rules, which in turn demonstrate the ability of a particular country to resolve a dispute in a fair and effective manner.

9 Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd https://vlex.co.uk/vid/whitworth-street-estates-v-793191173 date of access 22 Jul 2022.

10 Dicey, Morris, The Conflict of Laws: A Review Ole Lando The International and Comparative Law Quarterly Vol. 47, No. 2, 1998, Pp. 394-408.

11 Mann F A 'Lex Facit Arbitrum', in International Arbitration: Liber Amicorum for Martin Domke, ed. Pieter Sanders, The Hague, Martinus Nijhoff 1967, P. 158.

Therefore, Jan Hermonpretz proposed that procedural law is likely to expand the definition and form of an arbitration agreement; determine whether the dispute can be referred to arbitration; the composition of the arbitral tribunal and any grounds for their recusal; the power of the arbitral tribunal to make decisions regarding their competence; temporary measures of protection; claims and objections to the claim; the form of arbitration proceedings; proceedings in the case of non-fulfilment of obligations; assistance of the national court in case of necessity during arbitration proceedings; the powers of arbitrators; the finality of the arbitral award, including its right in national courts of the location of the arbitration. The scholar fully supports this definition of procedural law since it best reflects the function of arbitration.

4 AUTONOMY OF WILL AND PROCEDURAL LAW

Generally, the parties to the arbitration proceedings are free to choose any procedural rules they wish to use to regulate the arbitration proceedings. The autonomy of the parties' will allow them to freely determine the procedural rules and rules of substantive law or develop their own rules of arbitration proceedings.

In addition to the New York Convention of 1958, which recognises this freedom, the European Convention on Foreign Trade Arbitration of 1961 also provides that in the event that the composition of the arbitration panel or the arbitration procedure did not comply with the agreement of the parties or, in the absence of such, did not comply with the provisions of Art. IV of this Convention, the arbitral award may be annulled, and this constitutes grounds for refusing to recognise and enforce such an arbitral award.

In support of the concept of autonomy of the will of the parties, it is quite appropriate to cite the practice of the Civil Court of Cassation, which in its decision, expressed its own vision on this issue. Thus, this decision states that paragraph 9.3 of Art. 9 of the contract of sale, concluded between PJSC "Rose Company" and Nuseed Serbia d.o.o., provides that two arbitrators must hold the meeting of the arbitral tribunal based on the text of this contract. In response to a letter from the Secretary General of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry regarding the respondent's obligation to inform the name and surname of the arbitrator appointed by the party from the proposed list, PJSC "Rise Company", for its part, proposed to appoint L. F. Vinokurova as an arbitrator by the Resolution on Amendments to the decision on the Adoption of the AU Case to the proceedings of the International Commercial Arbitration Court of July 9, 2015, the Ukrainian Chamber of Commerce and Industry determines that the case will be considered by a sole arbitrator appointed by the parties. The basis for issuing such a decision by the International Commercial Arbitration Court Chairman at the Chamber of Commerce and Industry of Ukraine is that both the plaintiff and the respondent appointed one person as an arbitrator in the case. During the arbitration proceedings, the parties to the dispute did not raise any objections to the inconsistency of the formation of the court's composition with their autonomy of the will. After the arbitration decision was made, PJSC "Rise" Company filed an application to the national court to annul such a decision, arguing that the arbitral tribunal decided not in accordance with the parties' agreement on the composition of the court. Such an application was satisfied by the courts of the first instance and appellate instance. Disagreeing with these decisions, the Civil Court of Cassation annulled them and dismissed the applicant's application for annulment of the arbitration decision on the grounds that the procedural behaviour of PJSC "Rise Company" which exercised its right to appoint an arbitrator, raised objections to the merits of the dispute during the arbitration proceedings, but did not refer to defects in the composition of the arbitral tribunal, and having received an unprofitable decision based on the results of the arbitration proceedings,

This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

used the withheld grounds to appeal in the state court the decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, contains signs of abuse of law and does not comply with the principle of good faith.[12]

For a more detailed understanding of the relationship between the autonomy of the will of the parties to the dispute and the application of procedural norms, both the national legislation of foreign countries and international legal acts should be analysed.

Yes, according to Art. 1509 of the French Code of Civil Procedure (as amended in 2019), an arbitration agreement may, directly or with reference to arbitration rules or procedures, regulate the procedural procedure to be followed during arbitration proceedings. Whatever procedure is chosen, the arbitral tribunal guarantees the equality of parties and adheres to the adversarial principle. French arbitration law allows parties to choose procedural law to settle their international arbitration. The choice in favour of a national procedural rule is only one of the options that the parties may choose, as the parties may choose the procedural rule of any other arbitration institution. They may also choose foreign procedural law. [13]

Similar norms are contained in Art. 1042 of the German Code of Civil Procedure, where it is assumed that the parties to the arbitration proceedings should be treated equally. In exercising the imperative provisions of the applicable procedural law, the parties may settle the arbitration procedure at their own discretion or by reference to the relevant provision on the arbitration procedure. [14]

The beginning of the normative consolidation of the autonomy of the will of the parties in matters of the possibility of choosing a procedural right that will govern their dispute was the adoption of the Geneva Protocol of 1923. Thus, in Art. 2, it was noted that the arbitration procedure, including the formation of the composition of the arbitration, is governed by the will of the parties and the law of the country in whose territory the arbitration proceedings are conducted. A similar thesis is contained in Art. 1(c) of the Geneva Convention of 1927, which provides that the recognition and enforcement of an international commercial arbitration award are permitted provided that such award has been made in the manner prescribed for the transfer of cases to arbitration or in the manner agreed by the parties to the dispute in accordance with the law governing the arbitration procedure.[15]

Generally, it is considered that the phrase "in accordance with the law governing arbitration proceedings" means that the right that can be applied in accordance with the 1927 Convention is the "right of the seat of arbitration proceedings".

To circumvent the limitations specified in both the Geneva Protocol of 1923 and the Geneva Convention of 1927, the United Nations in 1958 adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention became the embodiment of the principle of autonomy of the parties and full readiness to recognise the right of the parties to determine the procedural arbitration law. Art. V (1)(d) provides that if the composition of the international commercial arbitration or the arbitration procedure did not comply with the agreement between the parties or, in the absence of such, did not

12 Civil Court of Cassation decision https://reyestr.court.gov.ua/Review/79805738 date of access 22 Jul 2022.

13 https://ats.msk.ru/docs/paktika/Zakon_ob_arbitrazhe_v_Protcessualnom_kodekse_Frantcii.pdf date of access 22 Jul 2022.

14 German Code of Civil Procedure https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3598 date of access 22 Jul 2022.

15 Geneva Convention of 1927 http://translex.uni-koeln.de/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/ date of access 22 Jul 2022.

comply with the law of the State where the arbitration took place, then the recognition and enforcement of the arbitral award may be refused. After analysing this reason for refusing to recognise and enforce an international commercial arbitration award, it should be noted that the main aspect is cases where the composition of an international commercial arbitration or arbitration procedure did not correspond to the agreement between the parties, and secondary is the case when the composition of international commercial arbitration or arbitration procedure did not comply with the law of the State where the arbitration took place.

Based on the nature of the arbitration procedure, the parties to the dispute may independently determine the procedure or composition of the arbitration panel, provided that such determination is not prohibited by the *lex arbitri* rules. In accordance with the hierarchy of paragraph 1 (d) of Art. V of the New York Convention of 1958, *lex arbitri*'s provisions on these issues are subject to the parties' agreement and, in most cases, are not problematic since there is no conflict between these two rules. *Lex arbitri* on the tribunal's composition and the arbitration procedure is binding because the parties are not free to deviate from them.

Thus, the High Court of Justice (Wales), in the case of *Tongyuan International Trading Group v. Uni-Clam Limited*, noted that if the arbitration was conducted elsewhere that is not provided for by the arbitration agreement and the party to the dispute refused to participate in such proceedings, the other location of the arbitration will not affect the fairness of the proceedings or harm that party. The court argued that the wording of the arbitration agreement did not provide an opportunity to argue that the parties considered the venue of the arbitration to be critical.[16]

The fact that the derogation of the arbitral tribunal from the agreement of the parties concerning the forming of the composition of the arbitrators or the determination of the arbitration procedure (or, conversely, its deviation from *lex arbitri)* may justify the refusal to recognise or enforce a foreign arbitral award pursuant to Art. V (1) (d)) does not mean that courts may always refuse to recognise or enforce on this basis. According to the law of the Member States of the New York Convention of 1958, including Canada, the Netherlands, Hong Kong and Korea, deviation from these orders will result in a refusal to recognise or enforce an award if this deviation affects the integrity of the arbitration process as a whole.

This innovation made it possible to eliminate the shortcomings provided for in the Geneva Protocol of 1923 and the Geneva Convention of 1927, where the arbitration procedure shall be governed by the law of the seat of arbitration. However, it should be noted that the provisions of the New York Convention of 1958 apply only to the procedure for recognising and enforcing an arbitral award and do not apply to or regulate the conduct of arbitration proceedings.

Subsequently, to regulate trade issues that arose between the countries of Eastern and Western Europe, delegates from 22 countries on April 21, 1961, in Geneva adopted the European Convention on Foreign Trade Arbitration. The procedural arbitration law enshrined in the European Convention of 1961 is quite similar to the provisions of the New York Convention of 1958 since it provides that in the event that the composition of the court or the arbitration procedure does not comply with the agreement of the parties, or in the absence of such an agreement, the provisions of Art. IV of the Convention, the award of such arbitration may be invalidated and annulled and may also be grounds for refusing to recognise and enforce such an award.

16 Tongyuan International trading Group v. Uni-Clam Limited, High Court of Justice, England and Wales, 19 January 2001 http://newyorkconvention1958.org/index.php?lvl=notice_display&id=509&opac_view=6 date of access 22 Jul 2022.

This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

In Art. 19 of the UNCITRAL Model Law on International Trade Arbitration provides that, subject to the provisions of the applicable law, the parties may, at their sole discretion, agree on an arbitration procedure. In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of this law, conduct arbitration proceedings as it considers necessary. Thus, in accordance with the UNCITRAL Model Law, when determining procedural arbitration law, preference is given to the parties to the dispute, and the arbitration itself plays only a supporting role in determining the procedure that may be applied.[17]

5 THE RIGHTS OF THE PARTIES TO CHOOSE THE PROCEDURAL LAW

For a long time, the concept that parties have the right to choose procedural law for their arbitration proceedings has acquired particular importance in the doctrine of international commercial arbitration. Regarding the possibility of applying the arbitration rules agreed by the parties, such a reference is a manifestation of dispositivity on the one hand and the realisation of the parties' autonomy on the other since the parties have the right to choose the applicable law independently.

The construction of the parties' choice of procedural law, which is specified in the UNCITRAL Model Law, can be considered the most important provision of this Model Law since it establishes the principle of autonomy of the parties, recognising the freedom of the parties to choose specific rules of arbitration procedure, as well as in general, guaranteeing the parties the freedom to develop rules in accordance with their specific needs and wishes. The parties are free to choose the rules they know, the number of arbitrators, the place of arbitration proceedings, and even the procedure in a completely different legal system. In practice, this means that the parties are free to choose the applicable law, the details of the arbitration proceedings, the time limits for submitting written evidence, and whether the arbitral award should contain grounds for an award or not. [18,19]

Despite the above, there are still some imperative rules, the effect of which the parties cannot exclude even by agreement. For example, in Art. 18 of the UNCITRAL Model Law provides that the parties should be treated equally, and each party should be given every opportunity to state its position.

Art. V(1)(d) of the New York Convention, which generally recognises the right of the parties to choose the relevant procedural law, considers that the recognition of an arbitral award may be refused if the arbitration cannot be conducted under the agreement of the parties. However, these provisions are among the most controversial, as it is not entirely clear whether the parties have the right to agree on procedures regardless of the imperative rules of the venue of the arbitration. In addition, Art. 19 of the Rules of Procedure of the International Chamber of Commerce 2021 provides for a similar rule, which also determines that when considering a case, the composition of the arbitration is guided by the Rules, and on issues not regulated by the Rules, by any rules established by the parties, and in the absence of such, by the rules established by the composition of the arbitration, with or without reference to the procedural rules of national law applicable to arbitration inaccuracy, as questions may

17 Defaultth UNCITRAL Law on International Trade Arbitration https://zakon.rada.gov.ua/laws/show/995_879#Text date of access 22 Jul 2022.

18 Should the Procedural Law Applicable to International Arbitration Be Denationalised or Unified - The Answer of the Uncitral Model Law https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/jia0008&div=22&id=&page= date of access 22 Jul 2022.

19 A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary. By Howard M. Holtzmann and Joseph E. Neuhaus. Deventer: Kluwer in co-operation with the T. M. C. Asser Institute, 1989, P.564

arise as to whether the arbitration rule actually has priority or imperative provision with respect to the place of arbitration.[20]

6 CHOICE OF PROCEDURAL LAW

The principle of autonomy of the parties is currently recognised in almost all national arbitration laws, rules and conventions. Most foreign economic agreements contain arbitration agreements with a clearly defined law, according to which the principle of autonomy of the parties, the choice of the right of the parties, is usually applied by arbitrators.

However, most arbitration proceedings take place in a specific country, and sometimes, there may be no clear agreement on procedural law issues. [21]

In most cases, the parties include a general choice of law clause in a foreign economic contract, providing a right that will apply to their arbitration proceedings. On the other hand, the parties' determination of the procedural law governing their arbitration proceedings will entail the application of external conflict of laws, rules or presumptions. If the parties have not chosen the applicable procedural law, then a certain choice must be made for them, whether[22] this is provided in the arbitration agreement. The most likely or common choice is the right of the seat of arbitration. In other words, in most countries, it is recognised whether it is assumed that the arbitration law is the law of the country where such an arbitral tribunal is located. Another point of view is that lex arbitri is identical to the right chosen by the parties and is thus determined by their independent will. [23]

In addition, the parties are free to agree on a procedure to be followed by the arbitral tribunal during the conduct of the arbitration proceedings. In the absence of such an agreement, methods for determining procedural law become important. At present, the legislation on the definition of applied procedural law in international commercial arbitration is divided into two categories. One of them is the primacy of the parties' autonomy with a subsidiary provision that gives the right to determine a possible arbitrator. For example, the UNCITRAL Model Law states that in the absence of such an agreement, the arbitral tribunal may, subject to this law, conduct arbitration proceedings in the manner it considers necessary.[24]

In Art. 17 of the UNCITRAL Arbitration Rules 2012, Art. 1 of the Rules of the American Arbitration Association (hereinafter referred to as the AAA), and Art. 1494 of the French Code of Civil Procedure contain similar provisions according to which the priority status of an arbitrator is determined within the entire arbitration procedure. For example, Art. 1 of the Rules of the American Arbitration Association provides that any disputes concerning the AAA Rules apply shall be resolved exclusively by the AAA. By a written agreement, the parties may change the procedures set forth in the Rules and Regulations. After the appointment of an arbitrator, such changes may be made only with the arbitrator's consent.

20 Regulations of the International Chamber of Commerce 2021 https://iccwbo.org/content/uploads/sites/3/2021/03/icc-2021-arbitration-rules-2014-mediation-rules-russian-version.pdf date of access 22 Jul 2022.

21 International Commercial Arbitration: Cases, Materials, and Notes on the Resolution of International Business Disputes, Fondation Press, 1997, P.712

22 Gary B Born, International Commercial Arbitration: Commentary and Materials, 2d ed., Ardsley, NY: Transnational Publishers, 2001, P.165.

23 Tongyuan International trading Group v. Uni-Clam Limited, High Court of Justice, England and Wales, 19 January 2001 http://newyorkconvention1958.org/index.php?lvl=notice_display&id=509&opac_view=6 date of access 22 Jul 2022.

24 Mann-Long Chang, A Study of the Law Applicable to the Procedure in International Commercial Arbitrationhttp://www.zhongwang.com.tw/page.php?menu_id=70&p_id=77 date of access 22 Jul 2022.

This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Art. 19 of the Law of Ukraine "On International Commercial Arbitration" also stipulates that subject to the provisions of this law, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal. In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of this law, conduct arbitration proceedings in a manner that it considers appropriate. The powers conferred on the arbitral tribunal include determining the admissibility, propriety, materiality, and significance of any evidence.

On the other hand, if there is no agreement by the parties to the dispute of the procedural rules of law, the applicable law is *lex loci arbitri*. The New York Convention of 1958 provides that if the composition of the arbitral body or the arbitration procedure did not comply with the agreement of the parties or, in the absence of such an agreement, does not comply with the law of the country in which the arbitration took place, then the recognition and enforcement of such arbitral awards is impossible.

This rule indirectly regulates the standard for applying various possible arbitration procedural rules and reveals the important role of *lex loci arbitri*. As noted above, even though different countries that are members of the New York Convention of 1958 may have a variety of legislative acts or rules that relate to the principle of choosing procedural rules applicable to arbitration procedure, there is still agreement to comply with the principle of autonomy of the parties.

The significant influence of procedural law on arbitration proceedings is why procedural law regulates issues related to arbitration proceedings. For example, issues such as the procedure for preparatory actions of arbitration proceedings, time limits, disclosure of information and other issues are usually significantly affected by the procedural law applicable in arbitration. The procedural issues arising during the arbitration proceedings are subject to procedural legislation.

Different national arbitration laws have different methods for determining the choice of procedural law that governs arbitration proceedings. Some directly allow the parties to choose procedural law, including foreign ones. For example, Art. 182 of the Swiss Federal Law on Private International Law establishes that parties may settle the arbitration procedure directly or by reference to the arbitration rules; they may also subordinate the arbitration procedure to their chosen procedural law. If the parties have not settled the arbitration procedure, it shall, if necessary, be established by the arbitral tribunal directly or by reference to the law or the arbitration rules.[25]

7 THE INFLUENCE OF THE SEAT OF ARBITRATION ON THE CHOICE OF PROCEDURAL LAW

As provided by most national arbitration laws, parties may choose the rules by which they intend to regulate arbitration proceedings. Autonomy of the will in the choice of procedural law is a natural consequence of their arbitration agreement when they choose the seat of arbitration and institutional rules to regulate arbitration. The parties' understanding of the law of the seat of arbitration, or any chosen institutional rules forms the basis for their expectation as to which arbitration proceedings take place.

In addition, there is a tendency to conduct international commercial arbitration in a "neutral country" where neither party resides or the location of their business. This means that in

25 Switzerland's Federal Code on Private International Law (CPIL) https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20 in%20red.%202007%20.pdf date of access 22 Jul 2022.

practice, the law of the seat of arbitration (lex arbitri) is not the right that governs the subject matter of the dispute. However, in most cases, the law that usually regulates the conduct of international commercial arbitration should be considered the procedural law of the seat of arbitration.

Purely, in theory, the parties may choose national law to conduct the arbitration proceedings, if it is permitted by law and the public order of the seat of the arbitration. However, one party may argue that the chosen procedural law, which differs from the right of the seat of arbitration, should apply to the arbitration proceedings.

Anglian law supports the traditional theory that lex loci arbitri should properly regulate the arbitration procedure. It was noted that in the contract between Eurotunnel and Trans-Manche Link for the construction of the English Channel tunnel, there was an arbitration agreement in place, which stipulated that the international chamber of commerce would supervise the conduct of the arbitration in Brussels. The contract was concluded in London. In the distance, a dispute arose between the parties. Eurotunnel appealed to the English court for a temporary injunction to prevent the threat from Trans-Manche Link. The House of Lords ruled that the English court has the right to impose a temporary injunction, but this would be inappropriate because the parties agreed that in the event of disputes, the case should be considered in international commercial arbitration in Brussels in accordance with the Regulations of the International Chamber of Commerce[26]. It follows from the above that, nevertheless, the decisive word in the adopted lex loci arbitri as a procedural law for the conduct of arbitration belongs to the national court.

The England Arbitration Act 1996 established stricter restrictions on the possibility of settling arbitration proceedings by the procedural rules of another country if such proceedings are conducted in England. In addition, the provisions of this law shall apply even if the seat of the arbitration is outside of England, Wales or Northern Ireland or if the place of arbitration has not been determined or the suspension of the proceedings has been determined, authorising the enforcement of the arbitral award[27].

In accordance with the procedural (legal) theory of international commercial arbitration, arbitrage is a special form of administration of justice. The administration of justice is a function of the State, and if it allows the parties to go to arbitration and agrees in such cases to terminate the activities of their judicial institutions, it means that the content of the arbitration is to exercise a public legal function.

It is considered that arbitration is vested with rights and obligations only if a particular legal system gives it such powers. This point of view was supported by F. Mann, who argued that the State has the right to control arbitration and regulate any legal relations that arise in its territory. He believed that the term "international arbitration" was incorrect since any system of private international law is a system of national law, and each arbitration is a national arbitration. That is, it is subject to a certain system of national law. From this point of view, the legislative and judicial authorities of the seat of arbitration govern the arbitration process since the legal significance, and consequences of the arbitral process are the product of approval that is provided by the legal infrastructure of the seat of arbitration. The will of the parties, which is reflected in the arbitration agreement, can only be realised when permitted by the laws of the seat of arbitration.

In view of the foregoing, we can conclude that international commercial arbitrations may be governed by national law, which tends to affect both international and domestic arbitration.

---

26 http://expertdeterminationelectroniclawjournal.com/wp-content/uploads/2017/04/Channel-Tunnel-Group-Ltd-Anor-v-Balfour-Beatty-Construction-Ltd-v-Ors-1993-AC-334.pdf date of access 22 Jul 2022.

27 https://www.jus.uio.no/lm/en/pdf/england.arbitration.act.1996.portrait.a4.pdf date of access 22 Jul 2022.

This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

The procedural (jurisdictional) theory of arbitration is reflected in the law enforcement practice of domestic courts and international commercial arbitrations. The special role of arbitration in the selection of procedural rules of arbitration proceedings is recognised. Thus, in accordance with this decision, the defendant, an American manufacturer, to expand his business, acquired from a German citizen three enterprises that belonged to him and were established in accordance with the laws of Germany and Liechtenstein, along with all the rights to the trademarks of these enterprises. The agreement was signed in Austria and completed in Switzerland and contained clear guarantees of the plaintiff that all trademarks are unencumbered. There was a provision in this agreement according to which all disputes or claims arising out of a contract are subject to consideration in the international commercial arbitration of the International Chamber of Commerce in Paris, and the laws of the State of Illinois will govern this contract, its interpretation and enforcement.

Further, when it was discovered that the trademarks were associated with material encumbrances, the plaintiff offered to terminate the contract, and the defendant refused and filed a claim for damages in the district court, alleging certain fraudulent acts in relation to these trademarks. The District Court, as well as the Appellate Court, rejected the defendant's arguments, arguing that, in this case, the arbitration agreement could not be applied to the subject matter of the dispute. However, the U.S. Supreme Court noted that the arbitration agreement must be recognised in accordance with the clear provisions of the U.S. Arbitration Act, which provide that the arbitration agreement (as provided for in the present case) is valid, irrevocable, and enforceable, except as existing in law or in the right of equity to annul any contract.[28]

In the *Sapphire International Petroleums Ltd. v National Iranian Oil Company*, the sole arbitrator had no doubts that lex loci arbitri should regulate the arbitration proceedings.

Thus, in this case, the parties to the dispute agreed that a sole arbitrator would resolve any disputes arising from the contract. But during the consideration of cases, the defendant stated his objections to the formation of the composition of the arbitrators in this case. This arbitration award stated that the jurisdiction of the President of the Federal directly derives from Swiss case law, according to which the judicial authorities are responsible for selecting a sole arbitrator under the conditions specified in the arbitration agreement. as to whether the conditions established for such purpose have been met. The decision made in this way is a court decision and has the full force of the final court decision, except in cases where the law allows the presentation of an appeal to the highest instance. Although doctrine and case law recognise that an arbitrator may determine his own jurisdiction in matters relating to the validity of the arbitration agreement, such matters have not been previously considered in courts of general jurisdiction[29].

Thus, when analysing both the legislation and the law enforcement practice of both arbitrations and national courts of different countries, it remains rather uncertain, and in some cases even controversial, the question of the possibility of parties to foreign economic disputes choosing the rules of procedural law.

8 CONCLUSIONS

Traditionally, when the parties to a dispute do not choose the procedural law to conduct the arbitration proceedings, such a right is determined in accordance with the law of the venue of the arbitration proceedings. However, there are cases when the parties to the dispute can

28 Scherk v. Alberto-Culver Co. https://jusmundi.com/en/document/decision/en-sapphire-international-petroleums-ltd-v-national-iranian-oil-company-arbitral-award-friday-15th-march-1963 date of access 22 Jul 2022.

29 https://www.biicl.org/files/3940_1963_sapphire_v_nioc.pdf date of access 22 Jul 2022.

choose the rules of procedural law themselves that are not related to the right of location of the arbitration. After analysing the national arbitration laws of foreign countries, after the parties to the dispute have chosen the rules that will govern arbitration procedures, such a choice should be recognised and applied as far as possible and appropriate. In other words, although the parties' freedom of choice is a generally accepted principle of international commercial arbitration, it can usually be limited by the imperative norms and public order of a particular country.

At present, international arbitration practice is gradually moving away from the use of *lex loci arbitri*, provided that the intentions of the parties to a foreign economic dispute are clearly expressed in the legal rules for resolving specific combing issues that arise during arbitration proceedings. This trend reflects the avtonomy of the parties and can also be considered a significant challenge of lex loci arbitri.

REFERENCES

1. Born G B International Commercial Arbitration: Commentary and Materials, 2d ed., Ardsley, NY: Transnational Publishers, 2001, P. 415.
2. Bühring-Uhle Ch, Kirchhoff L, Scherer G Arbitration and Mediation in International Business, 1996, P. 89.
3. Chukwumerije O Choice of Law in Internation Commercial Arbitration https://digitalcommons.du.edu/cgi/viewcontent.cgi?Art.=1709&context=djilp date of access 22 Jul 2022.
4. UNCITRAL Law on International Trade Arbitration https://zakon.rada.gov.ua/laws/show/995_879#Text date of access 22 Jul 2022.
5. Dicey M The Conflict of Laws: A Review Ole Lando The International and Comparative Law Quarterly.
6. Fouchard G, Goldman B, Savage J Fouchard, Gaillard, Goldman on international commercial arbitration. Kluwer Law International, 1999, P. 635.
7. Mann F A 'Lex Facit Arbitrum', in International Arbitration: Liber Amicorum for Martin Domke, ed. Pieter Sanders, The Hague, Martinus Nijhoff 1967, P. 158.
8. Redfern and Hunter, with Blackaby and Partasides, Law and Practice of International Commercial Arbitration, 4th Edition, 2004, P. 315.
9. Rubino-Sammartano M, Rubino-Sammartano M International arbitration law and practice. P. 281.
10. Should the Procedural Law Applicable to International Arbitration Be Denationalised or Unified - The Answer of the Uncitral Model Law https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/jia0008&div=22&id=&page= date of access 22 Jul 2022.
11. Tongyuan International trading Group v. Uni-Clam Limited, High Court of Justice, England and Wales, 19 January 2001 http://newyorkconvention1958.org/index.php?lvl=notice_display&id=509&opac_view=6 date of access 22 Jul 2022.
12. Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd https://vlex.co.uk/vid/whitworth-street-estates-v-793191173 date of access 22 Jul 2022.
13. Yann Guermonprez How do you determine the procedural law governing an International arbitration? https://www.fenwickelliott.com/sites/default/files/Arbitration%203%20-%20How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20international%20arbitration.pdf date of access 22 Jul 2022.
14. Yann Guermonprez How do you Determine the Procedural Law Governing an International Arbitration? https://www.fenwickelliott.com/sites/default/files/Arbitration%203%20-%20

This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20 international%20arbitration.pdf date of access 22 Jul 2022.

15. A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary. By Howard M. Holtzmann and Joseph E. Neuhaus. Deventer: Kluwer in co-operation with the T. M. C. Asser Institute, 1989, P. 564.
16. International Commercial Arbitration: Cases, Materials, and Notes on the Resolution of International Business Disputes, Foundation Press, 1997, P. 712.
17. Gary B Born, International Commercial Arbitration: Commentary and Materials, 2d ed., Ardsley, NY: Transnational Publishers, 2001, P. 165.
18. Tongyuan International trading Group v. Uni-Clam Limited, High Court of Justice, England and Wales, 19 January 2001, http://newyorkconvention1958.org/index.php?lvl=notice_display&id=509&opac_view=6 date of access 22 Jul 2022.
19. Mann-Long Chang, A Study of the Law Applicable to the Procedure in International Commercial Arbitrationhttp://www.zhongwang.com.tw/page.php?menu_id=70&p_id=77 date of access 22 Jul 2022.
20. Switzerland's Federal Code on Private International Law (CPIL) https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20 in%20red.%202007%20.pdf date of access 22 Jul 2022.
21. Scherk v. Alberto-Culver Co. https://jusmundi.com/en/document/decision/en-sapphire-international-petroleums-ltd-v-national-iranian-oil-company-arbitral-award-friday-15th-march-1963.