LEX ARBITRI, PROCEDURAL LAW AND THE SEAT OF ARBITRATION

Unravelling the Laws of the Arbitration Process

Distinct from the substantive laws that guide a tribunal's decision on the merits, the procedural laws of arbitration regulate the "internal" processes of the arbitration and the "external" relationship (supportive and supervisory) between the arbitration and the courts. This article discusses the meaning, scope and sources of procedural law and *lex arbitri*; the rights of parties to opt out and create their own procedural framework, and the limits on that freedom; and the process for determining the seat of arbitration (as the primary source of the *lex arbitri*) in the absence of agreement by the parties.

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I. Introduction

1 This article discusses the laws that regulate and support the procedural aspects of arbitration, as opposed to the laws that govern the substantive rights of the parties in dispute. Principally, these are the laws which regulate the "internal" processes of the arbitration and the "external" relationship (supportive and supervisory) between the arbitration and the courts. This matrix of procedural and other laws is clearly distinct from the law which the tribunal must apply in order to reach its decision on the merits.

2 The article begins with a short discussion of the meaning and scope of *lex arbitri* and procedural law. Having clarified terms, we look at the source of the *lex arbitri*, principally in the national laws of the seat of arbitration but with a diversion into an alternative vision of arbitration as a delocalised process that floats free from the parochial restraints of national laws. This is followed by comments on the rights of parties to opt out of the *lex arbitri* and create their own procedural

* The author gratefully acknowledges the assistance of his colleague Elizabeth Kantor in the preparation of this article.

framework, and the limits on this freedom. We look at a more extreme form of derogation from the *lex arbitri*, where parties agree that an arbitration should be subject to the procedural laws of another State, possibly even subject to the oversight of courts in another State. Finally, there is a discussion about the process for determining the seat of arbitration in the absence of agreement by the parties, as a necessary first step towards identifying the applicable *lex arbitri*.

II. *Lex arbitri* and procedural law: Definitions and scope

3 It has been noted that there is a clear distinction between the substantive and procedural laws of arbitration. However, although "procedural law" is often used as a convenient shorthand term for the non-substantive laws applicable to arbitration, it would be wrong to depict those laws as only concerned with procedural matters. Jan Paulsson distinguishes the law applicable *in* arbitration (*ie*, the substantive law) from the law applicable *to* arbitration,[1] with the breadth of the latter term providing a good indication that it extends beyond matters of procedure alone. The law applicable to arbitration certainly includes procedural law but it also regulates non-procedural matters such as, for example, arbitrability, decisions on jurisdiction, national court intervention in support of arbitration, and the grounds on which awards may be challenged and set aside.

4 In short, we are concerned with the totality of national law provisions that apply generally to arbitrations in each country. Greenberg, Kee and Weeramantry describe this as a body of law which:[2]

> … legitimises and provides a general legal framework for international arbitration. The relevant law might itself be found in an independent statute on international arbitration or it might be a chapter in another law, such as a civil procedure code or a law also governing domestic arbitration. [It] can also include other statutes and codes (even those not specifically dealing with arbitration), and case law which relates to the basic legal framework of international arbitrations seated there.

5 This basic framework for arbitration is properly called the *lex arbitri*, which translates from Latin as the law of the arbitration. The precise content of the *lex arbitri* will vary from country to country but in modern arbitral jurisdictions it will typically include provisions which regulate:

1 Jan Paulsson, "Arbitration in Three Dimensions" (2011) 60 ICLQ 291.

2 Simon Greenberg, Christopher Kee & J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at para 2.14.

(a) matters internal to the arbitration, such as the composition and appointment of the tribunal, requirements for arbitral procedure and due process, and formal requirements for an award;

(b) the external relationship between the arbitration and the courts, whose powers may be both supportive and supervisory, such as the grant of interim relief, procuring evidence from third parties and securing the attendance of witnesses, the removal of arbitrators and the setting aside of awards; and

(c) the broader external relationship between arbitrations and the public policies of that place, which includes matters such as arbitrability and possibly also – more controversially – the impact on arbitration of social, religious and other fundamental values in each State.

6 The first of these categories represents the true procedural law of arbitration: a subset of the *lex arbitri* which focuses on internal matters of arbitral procedure. Most national laws include within the *lex arbitri* a default set of procedures for the conduct of arbitration in that territory, available to assist the orderly progress of a case if the parties have not made other arrangements through the adoption of standard (or other) arbitral rules. Dicey and Morris[3] describe this as the "directory" function of the *lex arbitri* (with the second and third functions above being "supportive" and "mandatory") but one could also view it as facilitative, a safety net that offers a basic procedural framework and minimum necessary safeguards of due process, applicable to the extent that the parties have made no other provision.

7 In practice, parties do frequently make alternative provision for matters of procedure, though they may not conceptualise this as a conscious choice to opt out of the *lex arbitri*. They do so by specifying rules of arbitration to apply to their dispute, which has the effect of displacing the default provisions in the applicable law, to the extent that the law and rules are inconsistent and in so far as the law is not of mandatory application.[4] Whether the adopted rules are institutional (for example, International Chamber of Commerce ("ICC"), Singapore International Arbitration Centre ("SIAC"), London Court of International Arbitration ("LCIA"), Grain and Feed Trade Association ("GAFTA"), *etc*) or *ad hoc* (most typically, United Nations Commission on International Trade Law ("UNCITRAL")), the parties are in effect choosing to conduct their arbitration according to a more detailed

3 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 16-031.

4 See paras 32 *ff* below.

procedural code laid out in those rules, supplementing or supplanting the procedural portions of the *lex arbitri*.

8 Due compliance with arbitral rules is of the greatest importance in practice,[5] also observance of any "soft law" instruments that are binding in the proceedings by decision of the parties or the tribunal,[6] but nonetheless these rules and guidelines do not form part of the *lex arbitri* (they coexist with national law but are not part of it) and thus they lie beyond the focus of this article.

III. Identifying the *lex arbitri*

9 If the law of the arbitration (the *lex arbitri*) is found within the national laws of each State (although it will be seen below that this proposition is not without opponents), the question arises: which national laws provide the *lex arbitri* in any particular case?

10 The identification of applicable arbitral law is usually not complex or controversial. Indeed, it is often not addressed at all as a specific, discrete issue in cases in practice; the parties and the tribunal proceed on a common unspoken assumption as to the laws which regulate the proceedings. Yet there is a wealth of academic writing that considers complicated scenarios and possibilities for conflicting claims to be the *lex arbitri*. Another strand of debate considers whether it is right to anchor arbitrations to national laws at all, or whether they should be set free to exist in a delocalised space governed only by transnational principles. In deference to those debates and in recognition of issues that are occasionally confronted in practice, it is appropriate to investigate in more detail the source of the procedural law that applies to each arbitration; how one identifies the *lex arbitri* for each case.

5 In particular, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") (Art V(1)(d)), the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 (Art 34(2)(a)(iv)) and the majority of national arbitration laws provide that awards may set aside and enforcement may be refused if the arbitral procedure in the case was not in accordance with the agreement of the parties.

6 This refers to materials such as the International Bar Association ("IBA") Rules on the Taking of Evidence in International Arbitration, the UNCITRAL Notes on Organising Arbitral Proceedings, and the Chartered Institute of Arbitrators ("CIArb") Guidelines on the Use of Party Appointed Experts in International Arbitration.

A. The law of the seat

11 The Geneva Protocol on Arbitration Clauses 1923 illustrated an early international view that the law applicable to the arbitration should be that of the arbitral seat: "The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by *the law of the country in whose territory the arbitration takes place*" [emphasis added] (Art 2).

12 The same approach is seen in modern international instruments. Most notably, it is seen in the self-restraining stipulation in the UNCITRAL Model Law on International Commercial Arbitration 1985 ("Model Law") that most of its provisions will apply "only if the place of arbitration is in the territory of this State".[7] The basic approach of the Model Law (and all national laws derived from it) is thus that the law applicable to each arbitration (the *lex arbitri*) will be the law of the place where that arbitration takes place (the *lex loci arbitri*),[8] and the selection of a particular place (seat) of arbitration ordinarily results in the arbitration being conducted in accordance with that jurisdiction's legal framework, with such derogation or variation as may be permitted.[9]

13 For example, where Singapore is selected as the seat of arbitration, it follows automatically that the Singapore Arbitration Act[10] ("AA") or International Arbitration Act[11] ("IAA") (as the case may be) will apply to that arbitration:

> If Singapore is the place of arbitration, the curial law of Singapore applies … I would add that the curial law, or the *lex arbitri* as it is sometimes called, is not necessarily restricted to a set of procedural rules governing the conduct of the arbitration.[12]

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7 Article 1(2) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985(GA Res 40/72, UN GOAR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985)) ("Model Law").

8 See para 53 below for further comment on *lex arbitri* and *lex loci arbitri*.

9 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401; and numerous other cases in which the Singapore courts posit or simply assume the automatic nexus between choice of Singapore as the seat of arbitration and the application of Singapore arbitration law. See also *Shashoua v Sharma* [2009] EWHC 957 at [23]: "an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause"; *The Government of India v Cairn Energy India Pty Ltd* [2011] 6 MLJ 441 at [23]–[25]; and the Indian Supreme Court's extensive discussion of territorial restraint and the nexus between seat and applicable law in the BALCO decision, *Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc* (2012) 9 SCC 649.

10 Cap 10, 2002 Rev Ed.

11 Cap 143A, 2002 Rev Ed.

12 *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* [2002] 1 SLR(R) 492 at [54].

> By choosing the 'place of arbitration' the parties would have also thereby decided on the law which is to govern the arbitration proceedings.[13]

14 Conversely, Singapore's arbitration laws do not purport to regulate arbitrations seated outside Singapore.[14] In conformity with the Model Law and New York Convention,[15] Singapore law recognises that the procedural propriety of arbitral proceedings seated in another country must be judged by reference to the agreement of the parties or, failing such agreement, the law of the country where the arbitration took place.[16]

15 Typically, then, the parties do not make a direct choice of the laws applicable to their arbitration. Rather, they make a conscious choice of seat and the applicable *lex arbitri* flows from that. The nexus between seat and applicable law is vividly described by Redfern and Hunter:[17]

> To say that parties have 'chosen' that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has 'chosen' French traffic law, which will oblige her to drive on the right-side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say that this notional motorist had opted for 'French traffic law'. What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.

16 It is common for laws, rules and commentaries to use "place" and "seat" of arbitration interchangeably. However, "seat" seems preferable

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13 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401 at [24].

14 Though see the discussion at para 44 *ff* below concerning the possibility that parties may attempt to apply Singapore procedural law to an arbitration seated elsewhere. This is possible in theory but unwise in practice.

15 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959).

16 International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 1(2) and 31(2)(*e*). See *Re An Arbitration Between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354 at [24], which concerned an attempt to impugn arbitration proceedings in China:

> The defendants did not adduce any evidence that the procedure followed by the Commission in conducting the arbitration had not been in accordance with the Arbitration Rules. Their contention as to how the arbitrators should act was based on English legal principles. These principles were not applicable because this was not an English arbitration. Further, even if there had not been any agreement between the parties as to what procedure was to be followed, the appropriate procedure would not have been English procedure but Chinese procedure since the arbitration took place in China.

17 Nigel Blackaby *et al*, *Redfern & Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 3.61.

to "place" as it reflects more accurately the juridical nature of the concept, the nexus between territorial attachment and applicable law. It is "a legal construct, not a geographical location. The arbitral seat is the nation where an international arbitration has its legal domicile or juridical home".[18] Reference to the "seat" also helps to differentiate juridical attachment from the physical place where hearings and meetings are held, thus avoiding ambiguity and the potential for arguments about the intended location of the seat where arbitration agreements are poorly drafted in this respect (as regularly seen in practice). The Model Law and most arbitration rules draw a clear distinction between the seat of arbitration and the venue for hearings and meetings, and provide that the latter may change according to convenience without affecting the underlying connection to the seat.[19] This article uses "seat" in preference to "place" of arbitration, although both Singapore's arbitration statutes follow the Model Law in using "place".[20]

17 The distinction between the seat of arbitration and the physical venue for hearings was explored by the Singapore court in *PT Garuda Indonesia v Birgen Air*[21] ("*PT Garuda Indonesia*"). In that case, the contract stated that the arbitration "shall be held in Jakarta, Indonesia" and that Jakarta was "the place of arbitration". However, the claimant argued that the seat had been changed to Singapore by subsequent agreement of the parties because, amongst other reasons, the hearing was held in Singapore and a Singapore representative of the ICC had provided administrative and legal support for the case. The Court of Appeal had no difficulty rejecting this contention and holding that the

18 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1537.

19 Article 20(2) of the Model Law: "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". Similarly, see r 18.2 of the Singapore International Arbitration Centre rules, Art 18(2) of the International Chamber of Commerce Rules, Art 18(2) of the United Nations Commission on International Trade Law rules and Art 16.2 of the London Court of International Arbitration rules. The author was involved in an arbitration that was seated in Hong Kong under Hong Kong International Arbitration Centre ("HKIAC") rules but where all participants were based in or around Singapore. All meetings and hearings were held in Singapore and at no stage in the proceedings did the parties or the tribunal find it necessary to travel to Hong Kong. The award was nevertheless deemed to be made in Hong Kong, according to the HKIAC rules.

20 The first and second editions of the Singapore International Arbitration Centre rules also referred to the "place" of arbitration. This was changed to "seat" in the third (2007) and subsequent editions.

21 [2002] 1 SLR(R) 401. See also *The Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34.

procedural law applicable to a case by reference to the choice of seat is unaffected by a decision to hold hearings in another place:[22]

> [T]here is a distinction between 'place of arbitration' and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely, the 'venue of hearing'. The place of arbitration is a matter to be agreed by the parties. Where they have so agreed, the place of arbitration does not change even though the tribunal may meet to hear witnesses or do any other things in relation to the arbitration at a location other than the place of arbitration … It only changes where the parties so agree … While the agreement to change the place of arbitration may be implied, it must be clear. This is in the interest of certainty.

B. The delocalisation debate

18 The position just described reflects modern international orthodoxy. However, those comments would have been more controversial in the second half of the last century, when a debate centred on the extent to which international arbitration should be subject at all to regulation and control by the laws and courts of the seat of arbitration; or, indeed, by any municipal laws and courts other than those in the place where enforcement was sought. Whilst it is impossible to do full justice to that debate here, it is necessary to mention it briefly in view of the conceptual significance that it has for any discussion about *lex arbitri* and procedural laws, and because of its influence on the later international consensus about the role of national laws and courts in relation to arbitration proceedings.[23]

19 With severe over-simplification, this can be portrayed as a debate between traditionalists for whom each arbitration is clearly anchored to and regulated by the national laws of the seat of that arbitration, both in terms of the process itself and in terms of legislative and judicial oversight; and transnationalists for whom the arbitration process should be detached from the parochialism of national laws and regulated instead by the agreement of the parties and a supportive transnational legal order reflecting international norms: "an arbitral legal order that is founded on national legal systems, while at the same

22 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401 at [23]–[25].

23 Among the wealth of writing on this subject, see, for example, William Park, "The *Lex Loci Arbitri* and International Commercial Arbitration" (1983) 32 ICLQ 21; Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 ICLQ 53; and Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010). For a modern treatment, see Loukas Mistelis, "Is There a Transnational Arbitration?", National University of Singapore Faculty of Law Kwa Geok Choo Distinguished Visitors Lecture (29 August 2013).

time transcending any individual national legal order".[24] In the traditionalist view, this article on procedural law would focus primarily on the national laws of the seat of arbitration, with such variations, supplements and derogations that those laws permit. Procedural law would thus be an essentially local matter that varies from place to place, subject to the normative influence of international treaties. On the other hand, the delocalised, transnational view of this article would reference national laws only to the extent that they are seen as reflecting and respecting a transcendent international legal order for international arbitration. Laws and courts at the seat would have no role during the arbitration except to support the proceedings by means of powers to summon witnesses, stay abusive litigation, *etc*.[25] Parochial judicial oversight and review would become relevant only when a party resorts to a national court to enforce an arbitration agreement or an arbitration award.

20 Proponents of delocalisation found support in a number of decisions from international tribunals that upheld the detachment of arbitral proceedings from local regulation, and in judgments from French and other courts to similar effect. The following comments from the Supreme Court of Canada are representative of these views:[26]

> Arbitration is an institution without a forum and without a geographic basis. Arbitration is part of no state's judicial system. The arbitrator has no allegiance or connection to any single country. Arbitration is a creature that owes its existence to the will of the parties alone.

21 In contrast, however, common law courts have typically taken a firmly traditionalist view. In *Bank Mellat v Helliniki Techniki SA*,[27] Kerr LJ in the English Court of Appeal had no doubt that:

> … in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration … Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the

24 Emmanuel Gaillard, "Transcending National Legal Orders for International Arbitration" (ICCA Congress Series No 17, Wolters Kluwer, 2012) at p 373.

25 "When one speaks of delocalising the arbitral proceedings, one refers to removing the functioning of the arbitral tribunal from the supervisory authority of local courts": Jan Paulsson, "The Extent of Independence of International Arbitration from the Law of the Situs" in *Contemporary Problems in International Arbitration* (J Lew ed) (Centre for Commercial Law Studies, Queen Mary College, 1986) at p 141.

26 *Dell Computer Corp v Union des consommateurs* (2007) SCC 34 at [51].

27 [1984] 1 QB 291 at 301. Australian courts have also rejected delocalisation: see *American Diagnostica v Gradipore* (1998) 4 NSWLR 312.

> transnational firmament, unconnected with any municipal system of law ….

22 Similarly in *SA Coppée-Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd*,[28] Lord Mustill in the House of Lords expressed his "doubt whether in its purest sense the doctrine [transnationalism] now commands widespread support … At all events it cannot be the law of England".

23 In Singapore, too, there appears to be no room for delocalised arbitration. Speaking in Parliament at the second reading of the Arbitration Bill in October 2001, the Minister of State for Law noted that:[29]

> … the Bill adopts the territorial criterion recommended by the Model Law and affirms the position that every arbitration held in Singapore must be governed by an applicable law of arbitration either under the International Arbitration Act or under this Bill. The concept of a 'delocalised' arbitration unconnected with any system of municipal laws would not be recognised under Singapore law.

24 Likewise the Singapore Court of Appeal has observed that "[t]he significance of the place of arbitration lies in the fact that for legal reasons the arbitration is to be regarded as situated in that state or territory. *It identifies a state or territory whose laws will govern the arbitral process*" [emphasis added].[30]

25 Whatever the attractions of the transnationalist conception in theory, in practice the traditionalist ethos is now the norm in most modern arbitration laws, which aim to regulate only those arbitrations that are conducted within the territory of the State but then apply to all arbitrations in that State, subject to permitted rights of derogation. It was noted earlier that this is the approach of the Model Law and all statutes derived from it, and it is notable that national laws which went furthest in detaching international arbitration in those States from municipal regulation and control – for example, Pt VI of Belgium's Judicial Code (1985 revision) and Malaysia's Arbitration Act 1952 – have subsequently been amended in favour of an approach that restores greater local oversight.

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28 [1995] 1 AC 38 at 52.

29 *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2215. The Minister's statement tracks the same language in a preceding report by the Singapore Attorney-General's Chambers: *Review of Arbitration Laws* (LRRD 3/2001, Law Reform and Revision Division, Attorney-General's Chambers) at para 2.1.1.

30 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401 at [24].

26 The practical reality is that delocalisation is only achievable to the extent that national law permits it.[31]

> As long as there is a provision in the *lex arbitri* [the arbitration law of the seat] which permits something, then that provision is itself a form of attachment to the seat of arbitration and displaces truly delocalised arbitration.

Nevertheless, the delocalisation debate has exerted a powerful and valuable influence on modern arbitration, by promoting the widespread modern consensus that national laws should be permissive, non-interventionist and respectful of the parties' autonomy wherever possible. Whilst the proponents of delocalisation have not achieved majority acceptance for their vision of international arbitration as a floating, stateless process transcending national laws, the impact of the debate is evident in the modern relaxation of legislative control and the "hands off" philosophy exemplified by the Model Law. Even if arbitration remains subject to the national law of the seat, it is generally now the case that national laws permit derogation to a significant degree, even to the extent of allowing adoption of other national laws in preference to the law of the seat, at least to the extent that the law of the seat is not of mandatory application.

IV. Amending and opting out of the law of the seat

27 It bears emphasis that the law of the seat comprises the totality of national law that applies generally to arbitrations seated in that territory, and that parties will typically enjoy substantial freedom to opt out of those laws (most importantly, the procedural parts of the law) in any particular case. The Model Law-influenced respect for party autonomy is reflected in most modern arbitration laws by the absence of prescriptive detail regarding the internal procedures of the arbitration, and by the considerable latitude afforded to parties to supplement, vary or exclude provisions of the law of the seat either directly or by the adoption of institutional rules. If they do so, the framework of procedural rules applicable to that particular arbitration will be different in some respects from the general law of the seat, and usually much more detailed and prescriptive.

28 The Singapore case of *Daimler South East Asia Pte Ltd v Front Row Investment Holdings (Singapore) Pte Ltd*[32] ("*Daimler*") provides a simple example. The issue before the court was whether the parties'

31 Simon Greenberg, Christopher Kee & J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at para 2.89.

32 [2012] 4 SLR 837.

choice of ICC arbitration rules operated to exclude the statutory right to appeal on a question of law under s 49(1) of the domestic Arbitration Act. Section 49(2) expressly states that the right of appeal can be excluded by agreement and the court found that such an exclusion had been validly effected by the parties' adoption of the 1998 ICC rules of arbitration, which provided at Art 28(6) that:

> By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form or recourse in so far as such waiver can validly be made.

29 *Daimler* illustrates how institutional rules adopted by the parties can prevail over non-mandatory provisions of the *lex loci arbitri*. The English Court of Appeal expressed the point thus:[33]

> *[T]he relevant rules of such bodies are incorporated by reference into the contract between the parties, and their binding effect will be respected and enforced by the Courts of the forum except in so far as they may conflict with the public policy or any mandatory provisions of the* lex fori.

30 Singapore courts have grappled less successfully in the past with the relationship between and coexistence of the law of the seat and the parties' chosen rules. In the case of *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*,[34] the Singapore court held that the parties' adoption of ICC rules had the unexpected effect of excluding the application of the Model Law altogether. In the subsequent case of *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd*,[35] the court held instead that while the Model Law and Pt II of the IAA were not excluded by the parties' choice of UNCITRAL rules, on the other hand those rules were not entirely compatible with the law of the seat (Singapore) and therefore the rules should not apply in their entirety and should only be given effect on an *ad hoc* basis in so far as they filled any gaps in the structure of the law of the seat.

31 The IAA was quickly amended to address these decisions. Section 15(2) of the IAA now clarifies that a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or the IAA to the arbitration concerned; and s 15A(1) provides that the rules of arbitration agreed or adopted by the parties apply to the extent that "such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate". Singapore's Ministry of Law issued an accompanying public statement explaining that the

33 *Naviera Amazonica Peruana v Compania Internacional De Seguros Del Peru* [1988] 1 Lloyd's Rep 116.

34 [2001] 1 SLR(R) 443.

35 [2002] 1 SLR(R) 492.

intention of the statutory amendment was to clarify that parties "have full liberty to agree on their own arbitration rules, and that their choice of arbitration rules will be fully respected by Singapore law".[36] In other words, the *lex arbitri* now allows the parties to create their own procedural framework for the case in hand, by combining elements of the *lex arbitri* and the chosen rules.[37]

V. Limits on party autonomy

32 As s 15(A)(1) of the IAA makes clear, the freedom to modify the *lex arbitri* is not absolute: the parties can only agree variations to the extent that "such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate". What, then, are the limits on party autonomy in this regard, in Singapore and elsewhere?

33 Although the modern philosophy is generally that parties should be at liberty to frame and regulate an arbitration as they see fit, this is only permitted and achievable to the extent that their choices do not conflict with provisions of the law of the seat which are expressly or impliedly of mandatory application. The freedom to derogate from the *lex arbitri* is only achievable to the extent that the *lex arbitri* itself permits it. Redfern and Hunter[38] put the point nicely:

> [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.

34 The Model Law expresses the same concept in the opening words of Art 19(1) ("Determination of Rules of Procedure"): "*Subject to*

36 Ministry of Law press release dated 24 August 2002.

37 Where the applicable law and arbitral rules are both silent on any issue of arbitral procedure, the matter is typically left to the discretion of the tribunal. Article 19 of the International Chamber of Commerce rules of arbitration provides that: "The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration." The Singapore International Arbitration Centre rules of arbitration provide in Art 16.1 that: "The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute." Article 19 of the Model Law similarly provides 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 … Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."

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

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" [emphasis added]. UNCITRAL's Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration[39] ("Analytical Commentary") explains that:

> Paragraph (1) guarantees the freedom of the parties to determine the rules on how their chosen method of dispute settlement will be implemented. This allows them to tailor the rules according to their specific needs and wishes … The freedom of the parties is subject only to the provisions of the model law, that is, to its mandatory provisions.

35 How can one identify the mandatory provisions of the applicable national law, from which the parties may not derogate? The UK's Arbitration Act 1996[40] is unusual in providing an express answer:

> **4. Mandatory and non-mandatory provisions**
>
> (1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.
>
> (2) The other provisions of this Part (the 'non-mandatory provisions') allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.
>
> (3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

36 In contrast, the Model Law and most statutes derived from it do not expressly differentiate between their mandatory and non-mandatory provisions. It is then a matter of language and statutory interpretation to decide whether any particular provision of law does or does not have mandatory effect.[41]

37 This exercise is often quite straightforward. Many sections of the Model Law and related national laws include the express

39 UN Doc A/CN.9/264 (25 March 1985) at pp 44–45.

40 c 23.

41 Guidance may be obtained from the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (UN Doc A/CN.9/264, 25 March 1985), which usefully identifies the provisions which it considers to be mandatory. "The most fundamental of such provisions, from which the parties may not derogate, is the one contained in [Art 18]. Other such provisions … are contained in Articles 23(1), 24 [except for the first sentence of Art 24(1)], 27, 30(2), 31(1), (3), (4), 32 and 33(1), (2), (4), (5)": at p 45. The Article numbering has been amended in this extract to reflect the numbering in the final Model Law: the Analytical Commentary was based on a preceding draft where the numbering differed in some respects.

qualification "unless agreed by the parties" or words to similar effect: such provisions are then clearly non-mandatory. For example, Art 11 of the Model Law ("Appointment of Arbitrators") provides at Art 11(2) that "[t]he parties are free to agree on a procedure of appointing the arbitrator or arbitrators …", thus allowing parties to derogate from the mechanism for appointment of a tribunal which is provided in Art 11(3). Article 11(3) therefore operates as a default procedure in case the parties have made no other provision. In contrast, Art 11(2) goes on to say that this freedom is "… subject to the provisions of paragraphs (4) and (5) of this Article", which are the provisions empowering the court or other appointing authority to step in and appoint a tribunal where the parties cannot agree. Derogation from that part of the statutory procedure is thus not permitted. This exemplifies nicely the legislative distinction between non-mandatory provisions which may be amended by the parties, and mandatory provisions which are considered sufficiently important not to be excludable.[42]

38 Absent such express guidance in the words of the statute, the Canadian case of *Noble China Inc v Lei Kat Cheong*[43] illustrates the approach to statutory interpretation in practice, although the decision itself is not free from controversy. The court was considering a contractual term which stated: "No matter which is to be arbitrated is to be the subject matter of any court proceeding other than a proceeding to enforce the arbitration award." It was common ground that this purported to be a waiver or denial of the right to apply to set aside an award under Art 34 of the Model Law, which had force of law in Ontario, but the parties disagreed as to whether Art 34 was mandatory and therefore non-excludable. The court noted that each of the Model Law articles considered mandatory by the Analytical Commentary "contains the familiar mandatory language of 'shall', whereas other provisions in the Model Law contain the familiar permissive language of 'may'". Article 34 did not contain "shall" language in any material respect; for this and other textual reasons the court concluded that Art 34 was not mandatory and that the exclusion was valid. It should be noted that there is a continuing international debate as to the legitimacy of exclusion agreements which purport to deny the annulment powers of the court at the seat of arbitration.[44]

42 Article 11 of the Model Law also provides a good illustration of the need for care when generalising about procedural law. In Singapore, for example, the discussion in this paragraph holds true but the specifics for default appointment of arbitrators under Art 11(3) of the Model Law have been amended by s 9A of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

43 Ontario Court of Justice, Canada (4 November 1998) [1998] CanLII 14708, available at <http://canlii.ca> (accessed 1 August 2014).

44 Other jurisdictions deny the validity of such agreements: see, for example, the New Zealand case of *Methanex Motonui Ltd v Joseph Spellman* CA 171/03.

39 There may also be matters that are not addressed expressly in the arbitration laws of the seat but which are nevertheless considered by some to be of such fundamental importance that they should be viewed as mandatory and non-excludable provisions of the national *lex arbitri*. To what extent are the parties to arbitration bound not to derogate from these more diffuse and imprecise constraints?

40 The modern orthodoxy is that such matters have no legitimate place in this discussion. Article 5 of the Model Law provides that "[i]n matters governed by this Law, no court shall intervene except where so provided *in this Law*" [emphasis added] and Art 34(2)(a)(iv) similarly states with regard to procedural matters that the court should only intervene where "the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of *this Law* from which the parties cannot derogate, or, failing such agreement, was not in accordance with *this Law*" [emphasis added]. Thus the Model Law limits the relevant mandatory rules to those set out within the law itself, and it was no doubt for this reason that the IAA included express references to matters not in the Model Law but considered by Singapore's legislature to be of sufficient fundamental importance:

> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if –
>
> (*a*) the making of the award was induced or affected by fraud or corruption; or
>
> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

41 "Where the UNCITRAL Model Law is concerned, the key mandatory norm is Article 18 which requires equality of treatment between the parties and an opportunity for each to present its case."[45] It seems very likely that most courts in modern arbitral jurisdictions would refuse to allow parties to opt out of this basic requirement for equality and procedural fairness,[46] unless (perhaps) the opt-out was agreed freely, for good reason and in the clearest possible terms. Specifically in Singapore, the Court of Appeal has commented:[47]

45 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 182.

46 Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure" (2007) 24(3) J Int Arb 327.

47 *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [56]. See also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007]

(*cont'd on the next page*)

> The Judge held that 'natural justice should apply to the entire arbitration proceedings' because these are immutable principles which ought to apply to any tribunal acting in a judicial capacity … We agree. This is fundamental and also finds statutory support in s 22 of the [AA], which states without qualification as follows:
>
> > '**General duties of arbitral tribunal**
> >
> > **22.** The arbitral tribunal shall act fairly and impartially and shall give each party a reasonable opportunity of presenting his case.'

42 There is nevertheless a risk that some laws and some courts may not show similar restraint, and may seek to elevate parochial rules of public policy into mandatory procedural rules from which parties cannot derogate. There are plenty of examples in the literature of courts which have impugned proceedings or awards for alleged procedural violations of domestic laws and policies which, to the outside observer, have little obvious relevance (let alone mandatory application) to arbitrations being conducted in that place. This is inappropriate in principle but it is an undoubted risk in practice where the courts which review and annul awards at the seat are the same courts which are trusted to safeguard public policies in that place, and where it is sometimes easy to elide those two distinct functions. Non-compliance with public policy is (but is not always treated as) an entirely separate ground for impugning awards, unrelated to procedural non-compliance.

43 It must also be noted that on some occasions public policy engages with arbitration not as a defensive weapon to protect the fundamental values of the State, but as an offensive weapon that aims to disrupt or destroy proceedings. In such cases, an allegedly impermissible derogation from public policy in the context of arbitral process is used as a basis for challenging the legitimacy of the arbitrator's role or the validity of an award. Journals, conference papers and law reports are full of examples of interference in this way, but for present purposes it is not necessary to parade particular examples for public criticism. Rather, the general point is made that as the freedom to opt out of provisions of the *lex arbitri* is subject to the mandatory application of some parts of that law, there is inevitable scope for a claim that an alleged procedural infraction has violated a fundamental and mandatory provision of the applicable law, rendering the proceedings or the award vulnerable to challenge. The possibility of such challenges cannot be excluded and in

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3 SLR(R) 86. Other fundamental procedural norms might include, for example, condemnation of awards procured by corruption, or tribunals lacking necessary impartiality: see generally "Procedural Categories of Public Policy" in the International Law Association's Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2000).

some cases they are well founded, but courts and tribunals must be astute to distinguish between genuine and egregious breaches of fundamental public policies on the one hand, and trivial and opportunistic complaints on the other.

VI. Choice of foreign law and/or foreign courts

44 One particular form of derogation requires further comment, which is the conceptual possibility of parties agreeing that an arbitration seated in country A should be made subject to the arbitration laws of country B, to the exclusion (as far as possible) of the arbitration laws of country A. It is difficult to imagine why parties would wish to complicate their affairs in this way; such a proposal would be likely to inspire the greatest scepticism if anyone were to propose it during contract negotiations.[48] Nevertheless it has inspired extensive academic attention over the years, in roughly inverse proportion to its relevance in practice, and the comments which follow are offered in deference to that debate.

45 There is clear judicial recognition of the conceptual validity of such an arrangement; that is, for parties to choose to subject their arbitration to the procedural laws of a country other than the seat. However, this is typically coupled with cautionary words about the complexities that would result and thus a strong reluctance to find that such a dichotomy exists except in the clearest cases. For example, the English Court of Appeal has said that:[49]

> There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve.

48 The example is sometimes given of an arbitration seated in a federal jurisdiction, where the parties may wish the proceedings to be governed by federal arbitration law rather than the arbitration law of the particular State in which the case is seated. Another example occasionally quoted is where parties are required for commercial or political necessity to seat their arbitration in a country whose arbitration laws are considered not fit for the purpose.

49 *Naviera Amazonica Peruana SA v Compania International de Seguros del Peru* [1988] 1 Lloyd's Rep116.

46 The English House of Lords encapsulated both the permissive and the disapproving aspects of the matter in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*:[50]

> Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.

The US Court of Appeals for the 5th Circuit has also commented colourfully:[51]

> Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as 'exceptional'; 'almost unknown'; a 'purely academic invention'; 'almost never used in practice'; a possibility 'more theoretical than real'; and a 'once-in-a-blue-moon set of circumstances'. Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum.

47 Wise or not, the theoretical possibility is formally recognised in some places through the national arbitration law, for example in England where s 4(5) of the Arbitration Act 1996 confirms the right of the parties to adopt a foreign procedural law in respect of matters covered by the non-mandatory aspects of the 1996 Act:

> [T]he choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

48 The position in Singapore is less clear cut. Neither the IAA nor the AA expressly endorses or denies the ability of parties to adopt a foreign procedural law in respect of an arbitration seated in Singapore and there are no judicial pronouncements in this respect. Inasmuch as both Acts assume a simple binary choice between the AA and IAA for any arbitration seated in Singapore,[52] and given that the Minister of

50 [1993] 1 AC 334 at 375A–358A. See also *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48 at 50.

51 *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 291 (5th Cir, 2004) at [32].

52 Section 3 of the Arbitration Act (Cap 10, 2002 Rev Ed) and s 15(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) both say (in effect) that the Arbitration Act shall apply to every arbitration in Singapore unless that arbitration is governed by the International Arbitration Act.

State for Law has stated that "every arbitration held in Singapore must be governed by an applicable law of arbitration either under the International Arbitration Act or under this Bill",[53] it would seem that there is no room for parties to import any foreign procedural law to the exclusion of the Singapore statutes. On the other hand, Singapore law also gives full weight and respect to the freedom of the parties to regulate their arbitration in any way they wish within the limits of mandatory national law, and the adoption of a foreign procedural law should not be objectionable in principle as long as the imported law defers to the IAA or AA (as the case may be) wherever the two overlap. It has been suggested that Singapore courts may recognise and give effect to the adoption of "elements of a foreign statute which are not inconsistent with Singapore curial law, if the parties have so contracted",[54] as a proper recognition of permissive rights granted by the AA and IAA rather than as a usurpation of those laws. It was also and rightly added that Singapore courts would only be likely to allow this where "the contract must make it very clear that the parties do desire this unusual arrangement".[55]

49 If parties do choose to subject their arbitration to the laws of a place other than the seat of the arbitration, it may be asked whether the courts of that other place will thereby acquire supervisory jurisdiction over the arbitration despite the fact that it is taking place in a foreign State. Even if that question is answered in the negative, can the parties voluntarily provide that an arbitration seated in country A should be subject to the supervisory jurisdiction of the courts in country B, with or without the accompanying adoption of country B's procedural laws?

50 The answer must be no, as a basic matter of sovereignty and international comity and also according to basic principles of international arbitration. This has been expressly confirmed by the English courts: "an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X"[56] and it is surely also the case that Singapore courts would not accept the assertion by a foreign court of extraterritorial supervisory jurisdiction over an arbitration seated in Singapore, simply due to the parties' adoption of that foreign country's procedural law to apply to their arbitration or even by the parties' express purported conferral of that authority. Nor (it is suggested) would Singapore courts attempt to assert supervisory jurisdiction over

53 See para 23 above.

54 Chan Leng Sun, "Developments in Arbitration Laws" (2002) 14 SAcLJ 49 at 53, para 17.

55 Chan Leng Sun, "Developments in Arbitration Laws" (2002) 14 SAcLJ 49 at 53, para 17.

56 *Naviera Amazonica Peruana SA v Cia International De Seguros Del Peru* [1988] 1 Lloyd's Rep 116.

an arbitration properly seated in another country merely by reason of the adoption of Singapore procedural law in that case.

51 In particular, it is generally accepted that challenges to arbitrators and awards must be brought in – and only in – the courts of the seat of arbitration.[57] That is the effect of Arts 13(4), 34(1) and 34(2) read with Arts 1(2) and 6 of the Model Law, and similar territorial restrictions have been enacted in non-Model Law jurisdictions. Even if parties can exclude some of those rights of challenge if they wish (itself a controversial proposition), that is very different from saying that they can confer a right to hear challenges on the courts of another country. The Model Law does not contemplate and in fact denies that the restricted territorial jurisdiction of courts under that Law can be extended merely because parties purport to agree on such an arrangement.

52 This discussion is nevertheless useful inasmuch as it illuminates the limits on parties' freedom to contract out of the law of the seat of arbitration. In summary, it confirms that whilst parties can validly contract out of many of the procedural aspects of that law, choosing instead to apply the procedural rules of a foreign *lex arbitri*, they cannot derogate with similar ease from the "external" aspects of the *lex arbitri* at the seat of arbitration, either as regards the connection between the arbitration and the national courts at the seat or as regards any other mandatory aspects of the law and public policy of the seat. Some authors therefore frame discussions on this issue in terms of adoption of a foreign procedural law (as opposed to foreign *lex arbitri*), to emphasise that the conceptual freedom to apply a foreign law is largely confined to the area of arbitral procedure, not to the broader aspects of the *lex arbitri* at the seat.

53 As a further consequence, there is a technical distinction between the *lex loci arbitri* (the law of the place of the arbitration) and the *lex arbitri* (the law of the arbitration). It was noted earlier that in most cases these two concepts will be entirely congruent: the *lex arbitri* will be the *lex loci arbitri* and it is unnecessary to maintain a distinction

57 *C v D* [2007] EWCA Civ 1282; *Shashoua v Sharma* [2009] EWHC 957 (Comm). Gary Born suggests that Art V(1)(e) of the New York Convention makes it "theoretically possible for an award to be subject to annulment outside the seat", on the basis that Art V(1)(e) provides for recognition and enforcement of awards to be refused where the award has been set aside "by a competent authority of the country in which, *or under the law of which*, that award was made" [emphasis added]: *International Commercial Arbitration* (Kluwer Law International, 2009) at p 2994. But even if the Convention can be read as recognising the conceptual possibility that an award may be set aside by courts other than those of the seat, it seems hard to extrapolate this as conferring actual jurisdiction on any court to act extraterritorially in that way.

between them. Strictly speaking, however, they are separate concepts which allow for the possibility that parties will choose to modify the *lex loci arbitri* by the adoption of a foreign procedural law, so as to create a unique *lex arbitri* for the case in hand.

VII. Determining the seat[58]

54 Having discussed the procedural and other components of the *lex arbitri*, and the international orthodoxy that the *lex arbitri* will ordinarily be the law of the seat of arbitration, subject to permitted variations and opt-outs, it remains to consider how the location of the seat is determined where this is not agreed between the parties.

55 Well-crafted arbitration agreements contain an express designation of the chosen seat of arbitration. Modern arbitration laws and rules recognise and give effect to that choice,[59] provided that the arbitration agreement meets the basic requirements for contractual validity under the laws which apply to it.

56 Where the seat is not clearly stated and the parties cannot reach an agreement, it may be necessary to carry out an exercise of contract interpretation under the proper law of the arbitration agreement. The case of *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*[60] provides an example. The English court was required to interpret a contract which provided (with a striking degree of confusion) that it was "governed by and construed in accordance with the laws of England and Wales"; that "subject to Clause 20.2 [Dispute Resolution], the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract"; that "any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration"; that "[t]his arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland"; and finally that "[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". Notwithstanding the statement that "the

58 This topic is addressed in authoritative detail in Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ch 13 ("Selection of Arbitral Seat in International Arbitration").

59 For example, Art 20(1) of the Model Law; r 18.1 of the Singapore International Arbitration Centre rules; Art 18(1) of the International Chamber of Commerce rules; Art 18(1) of the UNCITRAL rules. See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp 1699–1708 for discussion of US cases that override an express choice of seat by the parties, or by an institution empowered by the parties, by reference to Chapter 1, §4 of the Federal Arbitration Act 1925 (9 USC §§1–16). Born is rightly critical of these decisions.

60 [2008] EWHC 426.

seat of the arbitration shall be Glasgow, Scotland", the court held as a matter of contractual interpretation that the remaining provisions cumulatively indicated an intention to seat the arbitration in England under the supervision of English courts (the reference to the Arbitration Act 1996 would otherwise be meaningless), with Glasgow being merely the intended venue for hearings. Though one might disagree with the outcome, it illustrates the contractual interpretation approach to clauses that are unclear as to choice of seat.

57 Where it is not possible to determine the intended seat from the parties' agreement, it is usually left to the tribunal or administering institution to determine the location of the seat. For example, Art 20(1) of the Model Law provides that "the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties" and s 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". Similarly, the SIAC rules of arbitration entrust the decision to the tribunal and provide a rebuttable presumption that the seat shall be Singapore "unless the Tribunal determines, having regard to all the circumstances of the case, that another seat is more appropriate" (r 18.1). The Hong Kong International Arbitration Centre ("HKIAC") rules are in the same terms, though rebuttably in favour of Hong Kong (Art 14.1). The UNCITRAL arbitration rules also entrust the matter to the tribunal "having regard to the circumstances of the case" but without any presumption, reflecting the a-national nature of those rules (Art 18.1). On the other hand, the ICC rules refer the decision to the ICC court (Art 18.1), without guidance as to the basis for the decision; and the LCIA rules empower the LCIA court to decide on the seat of arbitration "in view of all the circumstances", with an initial presumption of London (Art 16.1).

58 Notably, the determination of the seat is generally not entrusted to national courts, although the issue may sometimes emerge in court as a threshold for some other purpose, for example where one party seeks to invoke the supportive or supervisory powers of the court under national arbitration laws and the court must first decide whether it has jurisdiction under such laws by identifying the seat of arbitration. For example, in *PT Garuda Indonesia* discussed above,[61] the Singapore court declined jurisdiction to set aside an award on the basis of its initial finding that the seat of the arbitration was in Indonesia. Similarly in the earlier case of *Woh Hup (Pte) Ltd v Property Development Ltd*,[62] the court was required to determine the seat of arbitration and the applicable

61 See para 17 above.
62 [1991] 1 SLR(R) 473.

arbitral law before deciding whether it had a particular enforcement jurisdiction under Singapore's domestic arbitration laws.

59 Subject to such cases, the involvement of a court in determination of the seat would run contrary to the basic preference for decisions affecting arbitral proceedings to be entrusted to tribunals wherever possible, and for national courts to be engaged only where their decisive and coercive powers are needed in order to support and sustain the process. In the light of these considerations, the preferred approach is for national courts only to assist in the appointment of the tribunal where necessary, and then for the tribunal to decide on the location of the seat.

60 It must be acknowledged that there is some artificiality in this approach. If national arbitration laws only apply to cases seated in that territory, then laws which purportedly empower the court to appoint a tribunal to decide on the seat are of uncertain relevance until the seat has been selected. In other words, there is a false circularity in applying a particular national law in order to appoint a tribunal, and then for that tribunal to determine the seat of that arbitration in order to decide which national laws will apply. Conceptually at least, this could lead to problems if a tribunal is appointed under (for example) Singapore's arbitration laws but then determines that the seat of arbitration should be Hong Kong. Hong Kong arbitration law would then govern the proceedings and the Singapore *lex arbitri* would have no continuing relevance. Could it then be argued that the composition of the arbitral tribunal under Singapore law was not in accordance with the law of the seat (Hong Kong),[63] and that any resulting award is therefore open to challenge and refusal of enforcement?

61 Some laws try to address this by providing expressly that courts in that country may exercise powers to appoint a tribunal even where no seat has been designated or determined. For example, England's Arbitration Act 1996 allows the court to appoint a tribunal where no seat has been stipulated, provided that "by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so" (s 2(4)). However, while this overcomes an objection to the English court exercising powers under its *lex arbitri* even before it is certain that the *lex arbitri* is engaged, it does not remove the jeopardy that arises if the tribunal subsequently determines that the seat is elsewhere and thus that the applicable *lex arbitri* (including the procedures to be followed for proper appointment of a tribunal) is that of another country. To address that concern, the *lex arbitri* at the newly-adopted seat would have to provide retrospective validation for the appointment of the tribunal in these unusual circumstances. The author

63 Article 34(2)(iv) of the Model Law and Art V(1)(d) of the New York Convention.

is unaware of any national arbitration law that contains such a provision and it is noted that Singapore arbitration law is entirely silent on this whole issue.

VIII. Concluding comments

62 In the great majority of international arbitrations, the parties have stipulated a seat of arbitration in their agreement and by that means it is understood and assumed that the law of that seat is the law applicable to their arbitration. Typically they also adopt rules of arbitration which displace the governing arbitral law on detailed matters of procedure. The tribunal will handle contested issues of arbitral procedure and the courts of the seat are available for supportive and supervisory action if the parties require, in accordance with the *lex arbitri*. There is no overt attention given to the potential conflicts of laws and rules discussed above.

63 Nevertheless, there are cases where these matters are more controversial. The parties may fail to agree on a seat and must argue their positions before the entity entrusted with making a determination. Careless or imprecise drafting may give rise to arguments as to which procedural law applies to the arbitration, and whether a foreign procedural law has been applied. The parties or the tribunal may purport to arrange or conduct their arbitration in a way that conflicts (allegedly) with basic mandatory requirements of the applicable law. The references to court judgments in this article are hard evidence that these issues give rise to real conflicts in practice.

64 Discussions around the topic can be rendered more complicated than necessary by the proliferation of terminology (*lex arbitri*, *lex loci arbitri*, *lex fori*, procedural law, curial law, "place" and "seat" of arbitration) and occasional imprecise usage. When these terms are clearly understood and properly applied, it is easier to depict and properly apply the matrix of laws, rules and other standards that apply to the arbitration process.