Lex arbitri: The implications of the arbitral seat.

What are the implications following the choice of arbitral seat in international commercial arbitration, and do we need it?

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1.0 Introduction

1.1 The subject and context of the thesis

The arbitral seat is the jurisdiction which constitutes the judicial home of an international arbitration, and in that way anchors the international arbitration within a national system. Lex arbitri is another term used to describe the arbitral seat, and translates to «law of the arbitration». It is the arbitral seat, or lex arbitri, that governs the arbitration agreement and provides the framework for the arbitration, and the choice of the arbitral seat intuitively seems essential to any arbitration proceeding.

In international arbitration there are a number of applicable laws that need to be clarified in any arbitration or litigation proceeding. These laws include the law governing the substantive agreement between the parties, the law governing the capacities of the parties, the law of the enforcement forum, and the law governing the arbitration agreement (which virtually always include the law governing the procedure of the arbitration). However, international cooperation has lead to international bodies of law that shape and limit national legislation as they evolve parallel to each other. As national legislation is increasingly based on the same international sources of law, and adheres to the same internationally acknowledged principles, in addition to the arguments for detaching the arbitration from national jurisdiction altogether - a question emerges if the choice of arbitral seat has any implications today, or if it has become redundant in the system of international commercial arbitration.

Many commentators state that the choice of arbitral seat is «of considerable, sometimes decisive importance»¹, is «fundamental»², and that «national laws [such as that of the arbitral seat] still have a significant relevance»³. In the words of an English court, the arbitral seat is of «paramount importance».⁴ On the other hand, other commentators have argued that the importance of the arbitral seat has been lost,⁵ or is «tending to diminish»,⁶ or that its signifi-

¹ Born (2014) p. 2055.
⁵ Kaufmann-Kohler (1999).
A Canadian Court has stated that parties are free to design their arbitration completely as they see fit, whilst an often cited arbitral award shows that some arbitrators consider the arbitration completely detached from national legislation including the arbitral seat. Furthermore, anecdotal evidence suggest that the choice of arbitral seat is often not considered to any particular degree. These wildly opposing views may lead to confusion as to what degree the arbitral seat is significant, if it is at all.

These questions regarding the nature of the arbitral seat in international commercial arbitration today, need to be placed in context. Arbitration has been aptly defined as «a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard». Arbitration is an alternative to national litigation, where the parties can agree to let their dispute be settled privately by an agreed-upon process, and by selected arbitrators providing an enforceable award.

Arbitration as a system can be traced back to ancient Greece and also other parts of the antique world, or even to ancient mythology. Even in Scandinavian history, there are precursors to modern arbitration that can be found in the age of the vikings. The viking society had a system called «domr» where the disputing parties chose an even number of «trustworthy» men to decide on the issue, and the decision had to be respected by everyone. Arbitration is a dispute resolution system that is popular in a wide array of disputes, such as inter-state disputes, investments, or disputes of commercial nature.

Contemporary international commercial arbitration has been transformed by the advent of international conventions and national legislation from the 20th century and onwards, aiming to support arbitration in an effort to «promote international trade, investment and peace by pro-

viding workable, effective international dispute resolution mechanisms».

For states, promoting international arbitration is seen as politically and economically beneficial, as it boosts local economy and stimulates growth in commercial and legal sectors. The commercial aspect of international commercial arbitration can be explained as referring to transactions between two parties in the course of their business transactions, and leaving out consumer contracts, as well as other aspects of private law, such as family or inheritance law.

The subject is of international character, and this thesis will for the most part mirror this. However, some focus will be directed towards the Nordic countries and Norway in particular. This serves as an interesting reference point in general due to the legal systems that are particular to the Nordic region, and their similarities and differences.

1.2 International commercial arbitration - the bigger picture

International commercial arbitration as a dispute resolution system is popular across the globe, and there is an increasing number of arbitrations every year in virtually all arbitration institutions. The trend is showing an increasing number of arbitrations in Norway, although the exact numbers are difficult to ascertain, due to the particular preference of ad-hoc arbitrations. A recent survey found that among the Nordic countries the preference among businesses prefer arbitration (61%) to litigation (27%). The preference has decreased since 2016, when arbitration was the preferred choice at 66%. Norwegian businesses seem to prefer litigation (48%) to arbitration (36%), while Swedish businesses prefer arbitration (76%) to litigation (13%). Evidently arbitration contributes to a substantial part of dispute resolution among businesses in the Nordic market, and around the world.

To provide further context to the analysis in this thesis it is necessary to highlight certain objectives particular to international commercial arbitration. As this thesis questions one of the basic elements in the structure of international commercial arbitration it is necessary to consi-

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Croft (2017).
nder to what degree it aids in fulfilling the objectives that explain the existence of this dispute resolution system.

In the authoritative work *International Commercial Arbitration*, Gary Born lists the objectives of arbitration.\(^{21}\) Arbitration aims to provide benefits such as; (i) predictability, in the sense that you know where, how and by whom the case will be tried, and on what grounds, or by which laws the dispute will be governed, or how the tribunal will be constituted; (ii) neutrality, in the sense that you can ensure a neutral forum and decide on neutral arbitrators; (iii) expertise, in the sense that you can decide beforehand on the necessary level of know-how by the arbitrators in light of the context of the possible disputes; (iv) effectiveness, both in terms of cost and time, as parties can tailor the proceedings to fit the particularities of the case, and in the sense that it is a «one-stop-shop» with no appeal system; (v) autonomy, in the sense that the parties themselves can choose how their dispute is best settled.

Arbitration processes do not always fulfil the aforementioned objectives, and arbitrators might occasionally even have to prioritise between them, as it can be a tension between for instance the objectives of cost and time efficient proceedings and fairness and accuracy.\(^{22}\) These tensions, and the policies underneath, might lead to mixed results when the arbitral awards face the enforcement stage. The lack of transparency in international commercial arbitration, as most disputes are confidential, has also lead to a political skepticism towards what is essentially seen as a «privatisation of the justice system».\(^{23}\) The confidential nature has lead to the description of commercial arbitration as a «black box», although the trend is moving towards more transparency most notably due to the increasing use of arbitral institutions and frequency of award publications.\(^{24}\) More transparency due to arbitral institutions provide a sense of trust in the arbitral system, which might explain why for instance Sweden has a much higher number of arbitrations per year than Norway where ad-hoc arbitrations are more common than institutional ones resulting in a «black box» arbitration society.

International arbitration faces many challenges on the international political stage, particularly in the era of Brexit and Trump with increased skepticism towards any supranational judicial

\(^{21}\) Born (2014) p. 70 and following.

\(^{22}\) Park (2011) p. 37.

\(^{23}\) Silver-Greenberg & Gobeloff (2015).

These worries have lead to some arbitrators feeling «the system is under pressure». However, it needs to be nuanced in light of the apparent business-friendly priorities of the Trump Administration, businesses which usually are favourable towards arbitration, and the possibly positive legal consequences for English arbitration such as opening up for pro-arbitration injunctions and making bilateral investment treaties available in investment arbitration between England and EU countries which has been rejected within the EU by the ECJ. Some jurisdictions are more vigilant in their review of challenges, or provide difficulties in enforcing awards, contrary to the main ambition of arbitration of ending a dispute with an enforceable award. These issues lead to classifications of jurisdictions as «arbitration friendly». Other jurisdictions have been regarded as less arbitration friendly. It is important to keep in mind however, that the arbitration friendly jurisdictions also occasionally have their quirks or deficiencies. In today’s political climate, and with continuously evolving international and national law, it seems intuitively essential to consider the jurisdiction that is to be the ‘home’ of the arbitration. The question remains, is this intuition correct?

1.3 Methodology and the source of law

The subject of the thesis is a technical aspect of an international form of dispute resolution. Consequently, the questions will be answered in light of international and national sources of law, and with a dependence on literature. The dependence on literature is necessary in particular due to the usual confidential aspect of international commercial arbitration. There is a lack of precedence to many questions, as it is common for parties to agree to keep arbitration proceedings confidential. However, there will be references and examples of arbitrations and litigation proceedings where appropriate and possible. Furthermore, many aspects will be conducted with a comparative analysis of Norwegian and Swedish law. This fits with the Nordic outlook of the thesis, as well as being an interesting point of reference as two quite similar legal traditions have adopted different approached in regard to several issues.


27 Achmea BV v. Slovak Republic.

28 Vasagar (2016).
Kerr (2017).

As mentioned above, there are some international legal bodies that are of particular importance to international commercial arbitration. The term «arbitral seat», is not defined in any of the international conventions, but the construct is recognised if the provisions of these conventions are read contextually. However, the lack of a clear definition may lead to uncertainty and inefficiency.\footnote{Born (2014) p. 1542.}

1.3.1 The New York Convention

Following the Geneva Protocol of 1923 and the Geneva Convention of 1927, the creation of the New York Convention of 1958 (hereafter «the Convention») provided the framework for contemporary international commercial arbitration. The Convention’s Article II paragraph 1 and 3 anchors international arbitration to be recognised and enforced by national jurisdictions. Furthermore, Article V (1) (d) and (e) of the Convention provides the foundation of the supervisory role of national courts within the arbitral seat. In addition, the Convention also places great importance on the autonomy of the parties, placing international limits on the arbitral seat.

Other conventions that could be mentioned are the European Convention and Inter-American Convention. However, for the purposes of this thesis the highlighted aspects of the Convention will suffice.

1.3.2 The UNCITRAL Model Law

To this date the UNCITRAL Model Law (hereafter «the Model Law») has been adopted by 78 states in a total of 109 jurisdictions. The Model Law was created in 1985 (with amendments added in 2006), to assist states in reforming and modernising their laws on arbitral procedures so as to take into account the particular features and needs for international commercial arbitration.

Among the Nordic countries both the Norwegian and the Danish arbitration acts are based on the Model Law, whilst the Swedish and the Finnish are not. However, Sweden has for years been recognised as an arbitration friendly jurisdiction, and its arbitration statute is well known by practitioners. The adoption by Norway and Denmark of the Model Law has lead to these
jurisdictions being seen as more welcoming by practitioners around the world, and it has been debated whether Finland should follow in the footsteps of Norway and Denmark.\textsuperscript{31}

The Model Law adopts a territorial approach to international arbitration, meaning that the relationship between the national courts and the arbitration are determined by where the «place of [the] arbitration» is located.\textsuperscript{32} This applies for instance to provisions determining the courts competence to appoint arbitrators, to consider jurisdictional issues, to assist in securing evidence, and to annul arbitral awards. Furthermore, the Model Law places great importance on party autonomy and due process. It requires equal treatment of the parties, and the recognition of the parties’ procedural autonomy, from which the parties cannot contract out of in locally seated arbitrations.\textsuperscript{33}

The term «arbitral seat» is not used by the Model Law, but is clearly recognised as a concept. It states that the parties have autonomy to decide on where the «place of arbitration» is located, and absent this decision it should be left to the arbitral tribunal to choose. The Model Law clearly distinguishes between the arbitral seat and the geographical location of where the arbitration is conducted. It expressly states that the tribunal may «meet at any place it considers appropriate ...»\textsuperscript{34}

Although the Model Law is not binding in itself, it is an authoritative body of work, that provide a foundation for interpreting national legislation. In international arbitration it is national arbitration statutes that will be applicable, but looking to the Model Law may provide valuable insight. It is for this reason that space has been assigned for a quick overview of the Model Law in this thesis. References will be made both to national legislation and to the Model Law.

\subsection*{1.4 The structure of the thesis}

In chapter 2 the implications the arbitral seat will be analysed. In this chapter the different was the arbitral seat may lead to legal and practical consequences will be outlined. It will be an overview, which will be followed up by a more in depth analysis on the «external» relationship between the arbitration and the national courts, in chapter 3. This is one of the cate-

\textsuperscript{31} Seppälä (2017) p. 7-9.
\textsuperscript{32} Boye (2017) p. 435.
\textsuperscript{33} UNCITRAL Model Law Art. 18 & 19.
\textsuperscript{34} UNCITRAL Model Law Art. 20(1).
categories in which the arbitral seat may have significant consequences, and in my view is an apt category to place the focus on. It is in the supervisory capacity of the courts that the differences between jurisdictions as arbitral seat is accentuated, for instance in regard to annulment of the arbitral award. In chapter 4 the making of the choice of arbitral seat will be analysed, by studying the implications of making unclear choices, or failing to make a choice at all. Lastly, in chapter 5, the debate on delocalisation will be given a brief outline, and provide what consequences the debate has had for the evolvement of legal and practical significance which is placed on the arbitral seat. After all this, the conclusion will hopefully provide an answer to the questions posed above; what significance follows the choice of arbitral seat in international commercial arbitration - and do we need it?

2.0 The implications of the arbitral seat

2.1 Overview

The Convention and the Model Law has lead to more uniform practice among national legislatures, and a question can be raised if the arbitral seat has any practical importance anymore due to this increased uniformity. The fact that the importance has diminished over the past decades cannot be denied. However, there are still a number of reasons why the location of the arbitral seat may have critical importance.

When deciding on an arbitral seat, the parties will usually consider a neutral forum, as well as the logistics of convenience and cost. The arbitral seat can affect the arbitration both directly and indirectly. The law of the arbitral seat will provide which national arbitration act is applicable to the arbitration. In addition to this it can also directly affect the arbitration by deciding which law is applicable to the «external» relationship between the arbitration and the national law and courts, as well as the «internal» procedures of the arbitration. Furthermore, the arbitral seat can indirectly affect a number of other aspects, such as where the award is ‘made’, the likely nationalities of the arbitrators, and the likely approach to the arbitral procedure. In the following we will explore these different aspects of the arbitral seat.35

2.2 The indirect effects of the arbitral seat on the arbitral process

The arbitral process can be indirectly affected by the arbitral seat both in regard to the nationality of the arbitrator and the likely approach to the arbitral procedure. Most importantly, the

lex arbitri will provide where the award is «made» in regard to the Convention. Where the award is «made» has consequences for the possibilities of annulment, and can also affect the enforcement and recognition process. The possibility of annulling the award is perhaps the most influential way national courts can regulate the arbitration process. This leads us over to the involvement of national courts in international arbitration.

An indirect effect that may occur due to the choice of the arbitral seat is a non-enforceable award, as a result of the reciprocity requirement some states have provisioned for in the Convention. One major nation that has signed a provision for reciprocity is the US, which means that if the award is made in the jurisdiction of a non-signatory to the Convention, the award will not be enforceable in the US. This is similar to reciprocity in international litigation, except with regard to international litigation it is usually dependent on the domicile of the parties, while in arbitration it is dependent on the arbitral seat. This means for instance that the US will not enforce an arbitration made in Taiwan, Libya, Iraq, Yemen, the Seychelles, or any of the other non-signatories of the Convention. For example, if a Taiwanese company and an American company agree to arbitrate in for instance Singapore, the US will enforce the award even if it might prove impossible for the American company to enforce it in Taiwan. The construction of reciprocity in the Convention is therefore illogical. Any contracting parties should be aware of the consequences of agreeing to a seat in a jurisdiction that is a non-signatory of the Convention, and also the possible difficulties of enforcing an award if another company’s assets are within such a state.

2.3 The logistics of the arbitration

The logistics of the arbitration is usually taken into account by the parties. It is a practical, and easily manageable way of assuring some of the objectives for choosing arbitration, such as time and cost effectiveness. These logistics may include; availability of hearing facilities, technical support, accommodations, and transportation connections. As most parties conduct the hearings at the arbitral seat, the choice of the seat can carry practical importance. This also floats into the aspect of neutrality, as the parties will want to find a neutral arbitral seat to ensure the fairness of the proceedings.

2.4 The neutrality of the forum
The neutrality of the forum is a consideration directly linked to the fact that the parties themselves can tailor the proceedings to suit their preferences. It is evident that the arbitrator has to be neutral, but the neutrality of the forum is also far from lacking in importance.

The place of an arbitration can often affect the choice of arbitrator, or, perhaps less frequently, be an effect of the choice of arbitrator. It is not uncommon that in situations where you have two party-appointed arbitrators whom are going to appoint the president of the tribunal, they will choose someone who is familiar with the law governing the contract, especially if that law is different from that of the parties. However, arbitrators are generally capable of applying foreign law to contractual disputes.

The neutrality of the place of arbitration can be divided into three categories; (i) the practical aspect, (ii) the political aspect, and (iii) the judicial aspect.36

It is common practice for parties in international trade to choose a third country as the arbitral seat, as holding the arbitration in the country of one of the parties might give, or appear to give, one party an advantage. The advantage can be of practical nature, for instance travelling, accommodation, and cost. It can also be of psychological nature, as one party might appear as the dominant side, which in turn can affect the appearance of the case. It can even be of a legal character, as the party whose jurisdiction has been chosen as the arbitral seat, will most likely have lawyers familiar with the judicial system and hence will need less time to prepare.

The political aspect of neutrality suggests that the arbitral seat preferably should not be in a country which is in any particular alliance to, or is somehow closely connected to, the country of one of the parties. For example that the country which is the arbitral seat has a particular political or economic tie with one of the parties. Also, internally within the country which is the arbitral seat, the political environment should be taken into account. Even if the arbitrator is immune to these outside pressures, one always has to consider the possibility that national courts might have a role to play in the proceedings. Simply the appearance of fair awards has value in its own sense.

The judicial aspect of neutrality relates to a number of issues, for instance the involvement of the national courts which will be further explored below, and the legal environment and experience as a whole. Many judicial aspects should be considered, such as if the country is a signatory to the New York Convention, and if it fully recognises the principle of competence-

competence, and to what degree the country has a comparative international law approach concerning public policy rules.

2.5 The validity of the arbitration agreement.

The doctrine of separability means that the arbitration agreement is a separate contract to the substantive agreement between the parties, and will be treated separately in regard to any challenge of interpretation or validation of the agreement.\(^{37}\) \(^{38}\) An unfortunate consequence of this doctrine has been the development of a multiplicity of different approaches to choosing the law governing the formation, validity and termination of international arbitration agreements, which may lead to uncertainty regarding the validity of the arbitration agreement. National courts, arbitral tribunals and commentators have adopted a wide variety of choice-of-law approaches to issues of substantive validity, ranging from application of the law of the judicial enforcement forum, to the law of the arbitral seat, to the law governing the underlying contract, to a «closest connection» or «most significant relation» standard, to a «cumulative approach looking to the law of all possibly-relevant states», and also lex mercatoria amongst others.\(^{39}\)

Both the Convention and the Model Law provide that the arbitration agreement is presumptively valid and enforceable.\(^{40}\) Furthermore, that an arbitral award may be annulled or unenforceable if the agreement to arbitrate is invalid under the law chosen by the parties to govern the agreement or under the law of the country where the award was made.\(^{41}\) An example of the consequence of this separability doctrine is a decision by the Supreme Court of Sweden which held that Swedish law governed the contract of an arbitration placed in Stockholm, and not Austrian law that governed the underlying (substantive) contract between the parties.\(^{42}\)

This aspect of choice of law requires an in-depth analysis too extensive for this thesis. The differing choice of law rules do not support objectives of predictability or efficiency. Born

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38 HR-2017-1932-A sec. 96 (MAN).


42 NT 2000: 1881:99 (Bulgarian Foreign Trade Bank v. A.I. Trade Fin).
argues for adopting the validation principle, which has been codified in Switzerland\textsuperscript{43} and has been practiced in England,\textsuperscript{44} as a way of choosing a law which promotes the objectives of arbitration and the international sources of law.\textsuperscript{45} This principle essentially states that it is the law which leads to the arbitration agreement being valid that is applicable, as it is this law which one must assume the parties intended to govern the arbitration agreement. France and the US have on the other hand adopted the approach of applying international standards, but this approach might not sufficiently promote predictability and efficiency.\textsuperscript{46} In my view the approach of the validation principle seems practical, as it will lead to arbitration agreements being predictably enforced.

The choice of law that govern arbitrability have been previously considered to be the law of the arbitral seat, but ultimately that has been rejected. Most jurisdictions, such as the Swedish, the US, French, and Swiss, and others, have adopted the approach to apply the rules of the enforcement forum with regard to non-arbitrability rules.\textsuperscript{47}

### 2.6 The «internal» procedures of the arbitration

Most jurisdictions do not regulate the procedure in detail, but allow the parties and/or the tribunal much freedom in tailoring the procedure according to their needs and preferences. National laws will typically only impose a mandatory rule of fair treatment and the principle of contradiction. However, some jurisdictions provide regulation that provide mandatory local procedural rules, such as time limits and arbitrator qualifications.\textsuperscript{48}

Born highlights the different aspects in which the «internal procedural law» can affect the arbitration: The «internal» procedures that are usually governed by the arbitral seat are matters such as; (i) the required procedural steps and timetable of an arbitration; (ii) evidentiary and pleading rules; (iii) permissibility and administration of oaths for witnesses; (iv) conduct of hearings, including the parties’ opportunities to be heard and the examination of witnesses; (v) disclosure and «discovery» powers of arbitrators; (vi) rights of lawyers to appear, and their

\textsuperscript{43} The Swiss Law on Private International Law Art. 178.

\textsuperscript{44} A.C. (1894) 202 (Hamlyn v. Tallisker Destillery).

\textsuperscript{45} Born (2014) p. 542-549.

\textsuperscript{46} Born (2014) p. 549-559.

\textsuperscript{47} Born (2014) p. 602.

\textsuperscript{48} Born (2014) p. 1531-1532.
ethical obligations, in the arbitration; (vii) parties’ autonomy to agree on substantive and procedural issues in the arbitration; (viii) arbitrators’ procedural discretion; (ix) arbitrators’ relations with the parties, including liability, ethical standards, appointment and removal; (x) arbitrators’ publication of the award. The «internal» procedural law is also sometimes said to govern; (1) interpretation and enforceability of the parties’ arbitration agreement (including issues of non-arbitrability); (2) conflict of law rules applicable to the substance of the dispute; and (3) quasi-substantive issues, such as rules concerning interest and costs of legal representation.49

The arbitral seat frames internal and external rules of which the arbitration process has to obey. The arbitral seat will usually provide a general framework of due process rules, which will then be added to by more specific rules by the parties’ or the tribunal’s choice. The more specific procedural rules can be the seat’s national legislation, institutional rules, or another legislation insofar as it does not conflict with the seat’s public policy or mandatory provisions.50

It used to be mandatory to choose the full procedural law of the arbitral seat,51 but the perception has evolved to that procedural law can be freely chosen as long as it is in accordance with the arbitral seat.52 The new perception is in line with the Model Law provisions, and is expressly accommodated in the French and Swiss arbitration legislation.53 However there are some states that does not follow the liberal approach of the Swiss and French, and instead impose specific local procedures on the arbitration.54 This aspect of national legislation can be imperative to consider when choosing an arbitral seat for the arbitration. Choosing an arbitral seat which does not impose specific procedural laws will provide the parties with the means to tailor the proceedings to their specific needs and means, which is in line with the objectives of the arbitration system.

50 SGHC (2012) 157 (Daimler v. Front Row Investment Holdings).
Swiss Law on Private International Law, Art. 182(1).
54 For instance: Indonesian Law No. 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution.
Modern arbitration regimes recognise the parties’ autonomy to select the procedural law governing their arbitration, regardless of whether they choose the law of the arbitral seat or of another state; at the same time, there are significant limitations on this autonomy, even in these jurisdictions, and many jurisdictions take contrary approaches. And so the autonomy of the parties to derogate from the rules of the arbitral seat is only achievable to the extent that the arbitral seat itself permits it. To quote Redfern and Hunter:

«[T]he procedural law is that of the place of the 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.»

The option of choosing a foreign procedural law is in essence an academic exercise, and is deemed unwise and impractical in practice. There are a number of reasons for this, which can be summed up with «complexity, uncertainty and risks» of which such a choice would likely entail.

The limits imposed on party autonomy to choose procedural law differing from the arbitral seat is limited both in regard to the internal procedure and external procedure. Some jurisdictions provide mandatory external provisions, like court supervision, that cannot be derogated by the parties.

2.7 The «external» relationship between the arbitration and the national law and courts

The matters which can be defined as the «external» relationship between the arbitration and the national law and courts are; (i) the arbitrator’s competence and the allocation of competence to consider and decide jurisdictional challenges between arbitral tribunals and national courts; (ii) judicial assistance in relation to constitution of tribunal, including the selection, removal and replacement of arbitrators; (iii) judicial assistance in issuing provisional measures in aid of the arbitration; (iv) judicial assistance in ordering evidence-taking or discovery in aid of the arbitration; (v) judicial review (if any) of procedural rulings of the arbitral

55 Redfern/Hunter (2009) sec. 3.50.

tribunal; and (vi) often most importantly, judicial review of arbitral awards in annulment actions.\(^{57}\)

The diversity among national laws in their treatment of «external» procedural issues is a reason why the selection of the seat is of critical practical importance in international arbitrations. In the following chapter some aspects of particular importance regarding the relationship between the arbitration and the national courts will be analysed.

### 3.0 The arbitral seat and national court involvement

#### 3.1 Overview

National courts get regularly involved with international arbitration proceedings. The involvement may occur before the arbitral procedure, during, or after the issuing of the arbitral award. Some national courts are more willing to assist the arbitral proceedings in a positive manner than others. This assistance can come in the form of aiding with the constitution of the arbitral tribunal, enforcing disclosure orders made by an arbitral tribunal and enforcing orders for provisional relief or granting court-ordered provisional measures in aid of the arbitration.\(^{58}\)

The Convention does not contain any article on provisional relief, which has lead to some different results in court practice.\(^{59}\) The relevant provision in the Convention that has been applied to this is Article II (3), which states that the «Court of a Contracting State, when seized of an action in a matter in respect of» international arbitration «shall» refer the parties to arbitration. Born argues that the Article does not forbid court-ordered pre-award attachments or other provisional measures in aid of arbitration. On the other hand, he argues that if the provisional measures are meant to frustrate the arbitral process, it is forbidden by Article II (3). The provisional relief sought in national courts, he argues, need to be consistent with the terms of the parties’ agreement to arbitrate and applicable institutional rules.

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The Model Law provides authority for allowing national courts order provisional relief, and Model Law countries have adopted this approach in their national legislation.\textsuperscript{60} Norway is such a nation, and has adopted a territorial approach to the competence of the courts to also provide provisional measures.\textsuperscript{61}

Court involvement is contrary to the parties’ agreement to arbitrate before an arbitral tribunal and to the principle of party autonomy, yet it is required in order to support the arbitral process and for recognition and enforcement of arbitration agreements and awards.\textsuperscript{62} Furthermore, it is only the courts of the arbitral seat that should be involved in the arbitration process.\textsuperscript{63} However, practices differ in regard to jurisdiction, as will be explored in the following.

### 3.2 The arbitration agreement and jurisdiction

The arbitral seat is the judicial home of the arbitration, and not necessarily an indicator of where the meetings or proceedings will take place. Most arbitration legislation will not differentiate the proceedings based on where the locations are held. Parties might choose another location than the arbitral seat purely for convenience. However, national legislation differ to what degree it requires a connection to the arbitration. An arbitrator will also be bound by the applicable mandatory law of the nation where the hearing takes place, for instance with regards to local due process standards, limitations on an arbitral tribunal’s power to require witnesses to swear an oath or criminal penalties for perjured testimony.\textsuperscript{64}

An example of this occurred in Sweden, where Svea hovrätt in 2005 decided an award could not be tried for validity by the courts even though Swedish law had been agreed by the parties as arbitral seat, because the arbitration had not been tried in Sweden and did not have the necessary connection to Sweden.\textsuperscript{65} This decision was subsequently criticised in the arbitration community and in literature. In 2010 Högsta domstolen reached a decision that seems to have

\textsuperscript{60} UNCITRAL Model Law Art. 9 & 17 (17J of 2006).

\textsuperscript{61} Norwegian Arbitration Act §§ 8 & 19.


\textsuperscript{63} Lew (2009) p. 494


\textsuperscript{64} Redfern/Hunter (2009), sec. 3.56 to 3.57.

\textsuperscript{65} RH 2005: 1, T 1038-05 (Titan Corporation v. Alcatel CIT).
abandoned the precedence from 2005, where it was concluded that all that was needed for Swedish courts to be competent to decide was that the parties had agreed that Sweden was the arbitral seat.\textsuperscript{66} Sweden also has a limited form of derogation in its law of arbitration\textsuperscript{67} which opens for parties to agree to another procedural law than the Swedish law on arbitration to apply to arbitrations that take place in Sweden.

Norway, on the other hand, has a different approach. In Norway the localisation must be assumed to have a «real purpose», and the arbitration’s connection to Norway must not be more distant than that of other nations which are linked to the proceedings.\textsuperscript{68} In regard to derogation of the Norwegian arbitral seat it is stated in the Norwegian Arbitration Act § 1 that the scope of the law concerns arbitration (both domestic and international) that takes place within the territory of Norway. This section indicates that the territorial principle applies generally to arbitrations in Norway. It is highlighted in the literature that the preparatory work of the law does not clarify or provide any analysis of this principle, and should therefore be interpreted as a general rule which is open to be negotiated with regard to the first section and where it is openly declaratory.\textsuperscript{69} Therefore parties of an international commercial relationship should in principle be allowed to agree to another procedural law to apply instead of the Norwegian law on arbitration even if the arbitration is situated in Norway.

Two separate issues have been raised here, namely if the jurisdiction chosen by the parties as the arbitral seat can assume competence to review awards or offer provisional measures, and the availability for parties to an arbitration to agree to another arbitral seat than the jurisdiction in which it is conducted.

The first issue was the crux of the Swedish cases from 2005 and 2010. The argument in 2010 to allow the courts to review an arbitral award simply because it was the designated arbitral seat, was that it protects party autonomy.\textsuperscript{70} Good reasons explain the path chosen by the Swedish Supreme Court in the judgement of 2010. The arbitral award is ‘made’ in the arbitral seat, and is given binding effect through Articles II (1) and (3) og the Convention. Therefore, an award is not considered to be made in the various physical locations where the hearings are situated.

\textsuperscript{66} NJA 2010: 508 (RosInvest v. Ryska Federationen).
\textsuperscript{67} The Swedish Arbitration Act § 51.
\textsuperscript{68} Woxholth (2013) p. 189.
\textsuperscript{69} Woxholth (2013) p.193.
\textsuperscript{70} Hobér (2011) p. 301.
held, or following the nationalities of the parties, or the residence of the arbitrators, and so on. This is the solution provided by the UNCITRAL Model Law Article 1 (2) and 31, which enshrines the principle of party autonomy by selecting the arbitral seat as the place chosen by the parties. This is the approach adopted by virtually all jurisdictions, and serves the purpose of fixing one arbitral seat and one place in which the arbitral award is made.\textsuperscript{71} In my view Norway should adopt the same approach as Sweden, assuming competence when Norway has been chosen as the arbitral seat, as it better reflects the parties’ expectations. Furthermore, parties contract the arbitration agreement often before the dispute arises, hence choosing a jurisdiction as Sweden as arbitral seat will leave the parties with more freedom to tailor the proceedings according to their needs and preferences when necessary, than a jurisdiction like Norway which demands a «closer connection».

The second issue concerns the question of whether the parties are completely free to choose the framework applicable to the arbitration as well as the procedural law. The principle of territoriality, on which the Model Law is built, states that it will be mandatorily applicable to arbitrations seated in local territory. This means that where Norway is selected as arbitral seat, the parties may not agree to subject the arbitral proceedings to the arbitration statute of Sweden. The Norwegian arbitration act will be mandatorily applicable, and with it will follow certain external and internal procedural rules that must be adhered to. If the procedural law is defined as identical to the arbitration act, the Model Law and the Norwegian Arbitration Act would not permit contracting out of it. However, if the internal procedural issues are distinguished from the arbitration act, then the Model Law would arguably permit it.\textsuperscript{72} This is also assumed in Norwegian literature to be the case for the Norwegian Arbitration Act, which presumes that declaratory rules may be contracted out of and replaced with rules offered by arbitration institutions or another jurisdiction’s procedural rules.\textsuperscript{73}

Woxholth argues that it is beneficial to differentiate between international and national due process rules, so that when an arbitration is conducted within the territory of a state, the international due process rules must be obeyed along with the chosen procedural rule or chosen arbitral seat. The same approach is argued by Born, who makes the argument that one should distinguish the procedural law of arbitration from the law of the arbitral seat, and procedural

\textsuperscript{71} Born (2014) p. 2946-2951.
\textsuperscript{72} Born (2014) p. 1569.
\textsuperscript{73} Woxholth (2013) p. 195.
law of arbitration from the arbitral procedures. This leads to the parties being free to choose the arbitral seat, and within the framework of the arbitration law of the chosen seat they can choose specific procedures to be conducted after other procedural laws or, if the arbitration law allows it, choose a different procedural law. The parties may decide on arbitral procedures, which also needs to be acceptable within the framework of the arbitration law of the arbitral seat. As most arbitration statutes impose few mandatory rules, parties are relatively free to decide on specific procedures or procedural rules that will apply to the arbitration.

If the parties choose to conduct the hearings in another state, they also need to conduct the hearings with that state’s mandatory international rules. For instance with an arbitration agreement conducted in Denmark, with Sweden as the arbitral seat and Norwegian law as the chosen procedural law, all due process rules within Scandinavia needs to be adhered to.

In general, the pro-arbitration enforcement regimes of most national arbitration legislation apply only to awards made in «international» arbitrations, while such legislation generally prescribes different standards for the annulment and the recognition of «foreign» and «domestic» awards. Under these standards, most arbitration statutes will only provide for annulment of international arbitral awards made within the state and will provide for recognition of international awards made both within and outside the state.

### 3.3 Provisional measures by national courts

In addition to the consequences of separating geographic location from the arbitral seat, the choice of arbitral seat will decide to what degree the national courts may provide provisional measures, such as pro- or anti-arbitration injunctions, or securing evidence.

#### 3.3.1 The jurisdiction to provide provisional measures in the form of injunctions

In the EU has regulated the issue of jurisdiction so that when a national court has accepted a case, no other court in the EU can interfere and it is for that court to either dismiss or stay proceedings. This is in line with the principle of *lis pendens*. However, arbitration is exclu-

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75 The Brussels Regulation Art. 27.
ded from the scope of the regulation, but the question has been raised whether it excludes all matters relating to arbitration or only the procedural matters and enforcement issues.\textsuperscript{76}

It follows the principles of international arbitration that the competence to provide injunctions belong to the courts of the arbitral seat alone, and although judged in isolation it might be justified for another court to do so it is contrary to the system. It is the court of the arbitral seat that have the supervisory role, and is the proper forum to challenge an arbitration agreement or award. Other courts only have a duty to enforce the award, if the parties seek enforcement in that country.

An illustrative case is that of the RAS v. West Tankers, where an arbitration agreement designated London as the arbitral seat, and the insured party commenced arbitration to recover excess losses from a collision.\textsuperscript{77} The insurers commenced court proceedings in Italy, and the insured tried unsuccessfully to get an injunction stopping the proceedings in Italy from the English High Court. The ECJ reached the decision that national courts within the EU cannot order injunctions against other national courts within the EU.\textsuperscript{78} This decision is not necessarily anti-arbitration, but it leaves it to each national court to decide for itself whether the arbitration agreement is valid or not. Furthermore, this will only apply between EU states, and injunctions have been ordered between courts of other states.\textsuperscript{79}

\textbf{3.3.2 The implications of the arbitral seat concerning injunctions by national courts in international arbitration}

Injunctions cut across the whole arbitral procedure, and can be divided into injunctions to aid the process and to hinder it. Anti-arbitration injunctions are only, and should only, be granted where it is absolutely clear that the arbitration proceedings have been wrongly brought.\textsuperscript{80} Pro-arbitration orders are orders that offer powerful support for the arbitration process, however it offers a different set of considerations. The international conventions do not provide a founda-

\begin{itemize}
\item \textsuperscript{76} Brussels Regulation, supra note 146 art. 1(2)(d).
\item \textsuperscript{77} UKHL (2007) 4 (RAS v. West Tankers).
\item \textsuperscript{78} Allianz SpA v. West Tankers, inc.
\item \textsuperscript{79} EWCA (2007) Civ. 1282 (C v. D).
\item 500 F.3d 111, 125 n.17 (2d Cir. 2007) (Karaha Bodas v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara).
\item \textsuperscript{80} Lew (2009) p. 498.
\end{itemize}
tion for national courts to order parties to go to arbitration, but rather a negative enforcement by staying the litigation proceedings.\textsuperscript{81} Forcing parties to arbitrate might also compromise the \textit{competence-competence} principle in the way that arbitrators might feel inhibited to reach an opposing decision to that of the national court.\textsuperscript{82}

With anti-arbitration injunctions there seems to be a difference in practice between common law and civil law jurisdictions. Common law countries tend to be more willing to become involved than civil law countries who are more reluctant to interfere.\textsuperscript{83} This can be explained by the common law system of \textit{forum non conveniens} contrary to the \textit{lis pendens} system used in civil law countries.

In both England and the US, courts have been granted discretion to award injunctions concerning arbitration. In England the High Court can grant injunctions if it deems it «just and convenient», and may also add just conditions.\textsuperscript{84} In the US the courts may grant injunctions based on certain requirements,\textsuperscript{85} but the practice in the US vary from court to court.\textsuperscript{86}

In Switzerland on the other hand, anti-arbitration injunctions are not provided by the national courts.\textsuperscript{87} Therefore, Swiss courts rely on \textit{lis pendens} and \textit{res judicata} in order to avoid contradictory awards.\textsuperscript{88} In France a court shall declare itself incompetent unless the arbitration agreement is manifestly null and void, but this issue must be raised by the party.\textsuperscript{89} The court will then leave it to the tribunal to determine the validity and scope of the agreement, which ensures a proceeding compatible with the \textit{competence-competence} principle. In Sweden the courts

\textsuperscript{81} New York Convention art II(3) and UNCITRAL Model Law art 8.
\textsuperscript{83} Lew (2009) p. 499.
\textsuperscript{84} See section 37 of the Supreme Court Act of 1981 and sanction 72(1) of the Arbitration Act of 1996.
\textsuperscript{85} 837 F.2d 33, 36-37 (2d Cir. 1987) (China Trade v. Long).
\textsuperscript{86} 731 F.2d 909, 937 (D.C. Cir. 1984) (Laker Always v. Sabena, Belgian World Airlines).
\textsuperscript{87} Case No. C/1043/2005-15SP.
\textsuperscript{88} Lew (2009) p. 508.
\textsuperscript{89} French Code of Civil Procedure art. 1458.
will not interfere with the arbitration process, except concerning the validity of the arbitration agreement.

With pro-arbitration orders, the widest discretion in ordering is seen in the US where a party refusing to go to arbitration can be held in contempt of court. The US courts have this power even when the arbitral seat is outside the US. This can have implications on parties’ tactics in regard to refusing to participate as a step for resisting enforcement.

Most national laws do not, however, allow for courts to actively compel parties to participate in an arbitral proceeding, despite their agreement. Neither the Convention, nor the Model Law, opens for national courts to have a duty to compel parties to arbitrate. The only duty put on the courts is to «refer» the parties to arbitration. In France and Switzerland, the courts must «decline jurisdiction» when faced with an arbitration clause. In England the court practice indicate that courts will stay court proceedings in support of an arbitration agreement.

It is arguably best that courts are solely competent to stay proceedings. This keeps court involvement to a minimum, while still providing efficient means to ensure the arbitral process. The system of allowing courts to order pro-arbitration orders leads to the question of how far that competence reach. Courts have answered that question in different fashions, which leads to uncertainty for instance with regard to third parties. While it can be argued favourably for courts to have this competence, as it might save efficiency costs, it is the arbitral tribunal is the correct forum for deciding who the parties are. Furthermore, injunctions might not be respected by other courts, and could lead to a battle of injunctions.

The safest way to intervene in favour of arbitration, is for the courts to do so passively. In England, the courts might also apply damages if a party fails to participate in the arbitral

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91 Channel Tunnel Group v. Balfour Beatty Constr.
94 498 F.3d 1059 (9th Cir. 2007) (Dependable Highway Express v. Navigators Ins.).
95 HR-2017-1932-A sec 106.
process. This is passive, but reactive, solution to apply some incentive to make an unwilling party participate. It should befall to the arbitral tribunal to determine the damages, as it is the arbitral tribunal that has jurisdiction in the case.

### 3.3.3 The implications of arbitral seat concerning the taking of evidence

The Model Law provides that the arbitral tribunal, or a party with the tribunal’s approval, may request the national courts assistance in the taking of evidence. This is a result of the arbitral tribunal itself lacking the competence to impose sanctions and enforce rules concerning the taking of evidence. The taking of evidence will then follow the national civil litigation system, and the rules will therefore vary from state to state. Many states have added supplemental rules to their version of the article.

The Norwegian Arbitration Act has a section which mirrors the Model Law Art. 27, as do the Swedish. There is a difference as to whom can request the taking of evidence from the national courts between these to jurisdictions. The Norwegian system follows that of the Model Law, while the Swedish system is that only the parties themselves may request the aid of the national court and the tribunal shall be notified. The argument for the Swedish system is that the parties themselves are responsible for championing their case. However, the system of the Model Law places more responsibility at the tribunal in an effort to minimise the risk of unnecessary national court intervention since the tribunal is fit to decide what evidence is necessary to enlighten the case.

An arbitration with Norway as the arbitral seat will therefore have the Norwegian civil procedure law as default rule governing the taking of evidence, while the Swedish civil procedure law will govern an arbitration in Sweden. The procedural rules between Norway and Sweden is not particularly different, but it is self evident that there can be a difference between jurisdictions. A particular divide can be seen between common law and civil law jurisdictions. In

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98 UNCITRAL Model Law Art. 27.


common law jurisdictions it is normal to have pre-trial discovery, where the lawyers share evidence and facts but often to such a degree as it swamps the opposition with information and has been described as «excessive, expensive, inefficient and frequently abusive». In civil law countries, the parties are more often solely responsible for acquiring their own evidence, but the downside of this is that sometimes the case is not sufficiently enlightened. Furthermore, the civil procedure laws of each state is written for a civil procedure and not specifically designed for an arbitration procedure, and therefore might be a poor fit. To circumvent all this it can be beneficial for parties to choose another set of evidence rules, specifically designed for arbitration procedures, such as the UNCITRAL Arbitration Rules or the IBA rules on the taking of evidence. Both sets of rules empowers the arbitrators to request evidence they reasonably can assume exists and believe is beneficial for the enlightening of the case.  

Finally an important aspect to the taking of evidence in international commercial arbitration, is that the national courts only have jurisdiction to take evidence within its jurisdiction. This is logical due to sovereignty, and is presumed by the Model Law which follows the principle of territoriality. The parties have often chosen the arbitral seat due to its neutrality, and it will often be the case that evidence is in another state. In these cases the arbitral tribunal is left to request the aid of the court of the state where the evidence is believed to be, and where the legislation of the arbitral seat allows for this, may request the national courts to further request those of the state where the evidence is. Whether the courts where the evidence is will aid in the taking of evidence depend on that state’s legislation.

### 3.4 The annulment of the award

#### 3.4.1 The competence of national courts & sources of law

The most extensive form of judicial review is the capacity of the national courts of the arbitral seat to annul the arbitral award, either completely or partially. Annulment of arbitral awards are contradictory to the objective of arbitration to provide final and enforceable awards. However, it is necessary in order to protect the integrity and fundamental principles of the judicial

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system that encapsulates arbitration and nation’s law as a whole. Furthermore, the judicial re-
view concerns procedural considerations and is not a re-trial.

Both the Convention and the Model Law provides for the courts of the arbitral seat to be the

proper forum for annulment proceedings.\textsuperscript{106} While the Convention opens for two possible fo-
rums to be competent, the jurisdiction where the award is made (lex arbitri) and the jurisdic-
tion under whose laws the award was made (procedural law), The Model Law provides the
territorial approach which means that Model Law countries will not accept annulment proce-
dings for arbitral awards made abroad.\textsuperscript{107} In other words, Model Law countries, and most oth-
er developed jurisdictions, will only accept a challenge to an award if their jurisdiction is the
arbitral seat.\textsuperscript{108} This means that only arbitral awards ‘made’ with the seat in Norway, will
Norwegian courts be competent to annul.\textsuperscript{109} However, some states allow their courts to accept
challenges to arbitral award if the local law has provided the procedural law of the arbitration,
such as Saudi Arabia and Turkey, which is consistent with the Convention if acted alongside
the uniform international standard for interpreting the Convention, namely that only one fo-
rum may be competent to annul an award.\textsuperscript{110} Contrary to the Convention states like India, Pa-
kistan, Indonesia, Brazil, Kenya and Tanzania, which all have opened for courts to have the
power to annul awards made abroad even if their jurisdiction was not the lex arbitri.\textsuperscript{111}

Some states will avoid extensive review, and Swiss and Belgian law allow parties to exclude
the court’s jurisdiction to challenge the validity of the award.\textsuperscript{112} The Swedish law permit the
parties to exclude the court’s jurisdiction to challenge the validity in regard to the relative in-
validity grounds.\textsuperscript{113} In most other states the control of the courts cannot be excluded, which is
also the approach by the Model Law. Norway, as a Model Law country, does not permit par-
ties to exclude the court’s jurisdiction. On the other hand Norwegian law may allow parties to

\textsuperscript{106} The New York Convention Art. V(1)(c).
\textsuperscript{107} UNCITRAL Model Law Art. 1(2) & 34.
\textsuperscript{108} Born (2014) p. 3004-3007.
\textsuperscript{109} Woxholth (2013) p. 188-189.
\textsuperscript{110} Born (2014) p. 3008.
\textsuperscript{111} Born (2014) p. 3008.
\textsuperscript{112} The Swiss Private International Law Act. Art. 192.
\textsuperscript{113} The Belgian Judicial Code Art. 1717 (4).

Swedish Arbitration Act Art. 51.
extend the court’s competence for judicial review, as is presumed to also be the case in Sweden.\textsuperscript{114}

3.4.2 The grounds for annulment

The grounds for annulment vary from jurisdiction to jurisdiction, hence it may be a critical point of consideration when choosing the arbitral seat. The Norwegian Arbitration Act provides an exhaustive list of grounds in its §§ 42 and 43, which mirrors the Model Law Art. 34 (1) and (2). The Swedish Arbitration Act provides an exhaustive list in its §§ 33 and 34, which is broadly similar to that of Norway. Both jurisdictions differentiate between relative and absolute grounds for annulment. In Norway the absolute grounds for annulment are grounds that will lead to annulment \textit{ex oficio}, while the relative are grounds that may lead to annulment. In both cases the award has to be challenged by either of the parties.\textsuperscript{115} In Sweden, on the other hand, the absolute grounds will lead to annulment of the award even if none of the parties have challenged the award, as it is seen as grounds for invalidity that goes beyond the dispute and affect third parties.\textsuperscript{116} Most European states mirror the Model Law Article 34 grounds for invalidity and the Convention’s grounds for non-enforcement.\textsuperscript{117} In some states however, as in England, the judge has relatively wide powers of judicial review, which will be further explored under the next heading.\textsuperscript{118}

The Model Law Art. 34 (2) provides that an arbitral award may be set aside if, the party challenging the award proves that; (i) there was no valid arbitration agreement due to rules on capacity or by the law chosen by the parties or lacking that, the lex arbitri, (ii) due process had not been adhered to, (iii) the arbitrators had surpassed their competence, or (iv) the tribunal or arbitral procedure was not in accordance with the agreement or this Law; or the courts find that; (a) the subject-matter of the dispute is not capable of settlement by the lex arbitri, or (b) the award is in conflict with the public policy of the lex arbitri. The use of the word «may» in this article proves that the power to annul is discretionary, not mandatory.\textsuperscript{119} The grounds for

\begin{itemize}
  \item \textsuperscript{114} Woxholth (2013) p. 858.
  \item \textsuperscript{115} Woxholth (2013) p. 856.
  \item \textsuperscript{116} Hobér (2011) p. 301.
  \item \textsuperscript{117} Cordero-Moss (2013) p. 17.
  \item \textsuperscript{118} Cordero-Moss (2013) p. 17.
  \item \textsuperscript{119} Born (2014) p. 3177.
\end{itemize}
annulment should also be interpreted narrowly, so as to minimise judicial intervention and preserve the autonomy of the arbitral process.\textsuperscript{120}

When no valid agreement to arbitrate exists, the invalidity of the arbitration agreement is inherited by the arbitral award. The invalidity can be due to the parties lacking competency to agree, usually by applying the parties’ own law, which in Norway is the law of the domicile but this may vary from state to state. Although Norwegian courts, and most other modern jurisdictions, now follow a delocalised approach to the choice of law issue.\textsuperscript{121} An example of this was the Swedish case from 2007 of the state Ukraine v. Norsk Hydro, in which the court annulled the arbitral award because the agreement to arbitrate was signed by persons lacking the competency to do so by Ukraine law.\textsuperscript{122}

If rules of due process have not been followed, it threatens the integrity of arbitration and ensure that all parties are afforded equal opportunity to argue their case. This consideration is essential to arbitration, particularly because there are no option for appeal.\textsuperscript{123} Varying due process rules may lead to arbitrations being annulled in some jurisdictions, while it would be enforced in others, which should be a consideration when choosing the lex arbitri.

If arbitrators have surpassed their competence, the tribunal may have provided an award outside what has been agreed to in the arbitration agreement. It is not a question whether the arbitrators have judged a material question correctly, but whether all procedural laws have been adhered to. Although this distinction can be difficult in some cases, as was seen in the US case Stolt-Nielsen v. AnimalFeeds.\textsuperscript{124} In this case the participants agreed to constitute a tribunal to decide on whether the different arbitrations between the ship owners and the customers who had chartered vessels, could and should be consolidated, to what is commonly referred to as «class action arbitration», pursuant to the American Arbitration Association’s Supplementary Rules on Class Arbitration.\textsuperscript{125} The tribunal permitted class arbitration in a partial award, which was subsequently invalidated by the U.S. Supreme Court. The Supreme Court held that the arbitrators had exceeded their authority, holding that procedural fairness giving effect to

\begin{footnotes}
\item[120] Born (2014) p. 3178-3179.
\item[121] HR-2017-1932-A (MAN) sec. 114.
\item[125] AAA Supplementary Rules Art. 3.
\end{footnotes}
the original agreement trumped effectiveness that class arbitration might provide. This ruling has been criticised, and can be explained by the Republican majority of the Supreme Court.\textsuperscript{126} The parties had in this case empowered the tribunal to interpret whether the contracts allowed class arbitration by submitting the AAA Supplementary Rules, as was also recognised by the majority in the Supreme Court. In essence the Supreme Court blurred the lines between the substantive decision by the arbitrators, of which is not a ground for invalidity even if it presents misinterpretation, and the limits of the arbitrators’ jurisdiction. There has been cases concerning the application of this ground of invalidity in Norway\textsuperscript{127} and Sweden\textsuperscript{128} as well, but the application is in principle the same and the distinction has to be drawn between the material and the procedural aspects of the arbitration.

The grounds concerning the tribunal was not correctly construed or the procedural law was not followed, is in Norway split in two separate grounds. Firstly the constitution of the tribunal needs to be correct, following both the arbitration agreement and lex arbitri. Secondly, the procedural law chosen by the parties or following the lex arbitri needs to be adhered to. The procedural law will necessarily depend on which state the arbitration is seated, excluding the expressed choice by the parties. In Norway there is a further qualification attached to this invalidity ground, namely that the flaw of the procedure must be presumed to have affected the outcome. This was seen in a recent trial court case, where some procedural irregularities was acknowledged but deemed not to have affected the outcome, resulting in a judgement of partial invalidity.\textsuperscript{129} The case has been appealed. There is no explicit qualification like this in the Model Law, but it can be presumed that not all minute flaw in the procedure will lead to invalidity and annulment.\textsuperscript{130} For instance, the Appellate Court in Norway overturned a judgement, where an arbitral award had been set aside due to the documents not being formally correct, as the Appellate Court found that this could not have affected the result of the award as due process rules had otherwise been adhered to.\textsuperscript{131} It is important to keep in mind that what a national court consider procedural irregularities might differ from state to state. Some jurisdictions annul awards for formalistic irregularities, while others evaluate the mistakes contex-


\textsuperscript{127} LB-2008-136865.

\textsuperscript{128} NT 2009: 4548-08 (Systembolaget Aktiebolag c. V & S Vin & Sprit Aktiebolag).

\textsuperscript{129} Oslo tingrett 17-125770TVI-OTIR/07 (Torghatten).

\textsuperscript{130} Woxholth (2013) p. 880-883.

\textsuperscript{131} LE-2008-137231.
Some states may have particular local procedural rules. This might also be worth considering when choosing an arbitral seat.

If the dispute is non-arbitrable, the courts may annul the award *ex officio*. There is a trend towards more arbitrability, for example as seen in the US and Sweden, and the rules of arbitrability vary from state to state. However, the general rule is that disputes within the boundaries of private law are arbitrable, whilst taxation, bankruptcy or the protection of intellectual property is not. Courts will always apply their own rules of arbitrability, which in an annulment proceeding will be that of the arbitral seat.

If the award is contrary to *public policy*, the courts may also annul the award *ex officio*. There are no uniform rule that draws up the limits and content of *public policy*, hence these rules vary between states. Following the Model Law it is the law of the state in which the proceedings take place that the public policy rule derives from, which is the approach adopted by most states. However, for example France have adopted a different approach claiming that public policy rules are international, although what constitutes international public policy is debatable. A similar approach has been adopted by the Swiss and Singaporean courts, among others. Irrespective of the approach the «public policy»-ground for invalidity is a narrowly interpreted ground, that is meant to protect the most fundamental principles of a state’s social and legal system. There are no Scandinavian court cases where this ground for invalidity has been applied, which illustrates its applicability. An example from American courts was the case Dry Cargo v. Victrix Streanship, in which a London based tribunal had awarded a Swedish debtor to pay a certain amount to a creditor. The American court found that the award was contrary to American public policy as it had not considered Swedish bankruptcy law on the priorities of creditors.

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135 French Code of Civil Procedure Art. 1520 (5).


138 Danish Supreme Court Case 142/2014 (Taewong v. A/H Industries).

The ECJ has found that awards that violate EU competition laws are contrary to public policy, and must be declared invalid by the courts of the member state, if the domestic laws provide awards contrary to public policy to be invalid.\textsuperscript{140} \textsuperscript{141} The extent of this rule is unclear, as the ECJ did not qualify to what degree a violation would constitute an award being contrary to EU competition law.\textsuperscript{142} There is extensive commentary on this subject, and other related areas of law such as corporate and patent law, among others.\textsuperscript{143} However, the EU competition laws will apply even if the substantive law chosen by the parties is from outside the EU,\textsuperscript{144} which proves that one might have to consider EU law as well as the domestic law when choosing an arbitral seat (or enforcement) within the EU.

3.4.3 Jurisdictions with more extensive grounds for annulment

The Model Law does not open for substantive review of the merits of the arbitrators’ decision. Regardless, many jurisdictions open for the possibility of the courts to conduct such review, such as the US, England, China, Singapore and Saudi Arabia, among others. However, this substantive review is akin to the public policy ground, and is supposed to only correct the most fundamental errors of law.\textsuperscript{145}

In the US the doctrine called «manifest disregard of law» is a ground for invalidity, which is debatable whether is permitted by the FAA. It opens for courts to vacate arbitral awards where the arbitrators’ have erred in their rule of law. Following a Supreme Court decision in 2008 it has become uncertain whether or not the doctrine still is applicable.\textsuperscript{146} Recent court decisions have adopted directly opposing views on the topic, some arguing that it is still a ground for invalidity whilst some hold that it is not.\textsuperscript{147} For the time being there is a great discrepancy in

\begin{footnotes}
\item[141] Eco Swiss China v. Benetton International.
Mostaza Claro v. Centro Móvil.
\item[145] Born (2014) p. 3341.
\item[147] 671 F.3d 472 (4th Cir. 2012) (Wachovia v. Brand).
Compare: Johnson Controls, Inc. v. Tiffany & Co.
\end{footnotes}
how this ground for invalidity is practised in US courts, and whether or not it will continue to be applicable remains to be seen.

The English Arbitration Act provides that courts can review substantive errors of English law, unless the parties have waived those rights of challenge in their arbitration agreement.\textsuperscript{148} However, this is a narrow ground for annulment, and is only applicable if the court finds it «just and proper to do so».\textsuperscript{149}

Other jurisdictions have adopted even wider competence for judicial review of arbitral awards, particularly among Latin American and Arab states.\textsuperscript{150} This shows how the choice of an arbitral seat might threaten the award’s validity.

\textbf{3.4.4 Consequences of annulment proceedings}

The Convention provides the structure in which awards can be recognised or annulled. For instance, if the award was made in Norway, then the Norwegian courts are exclusively competent to annul the award. The award may also be confirmed by Norwegian courts, but also by other courts whose local law permits such actions. An action to annul the award in Norway can be based on any ground available in the Norwegian arbitration legislation, without regard to the Convention’s exceptions. Contrary to this, the defences to actions to recognise and enforce the award in other national courts are limited to the bases for non-recognition following Article V of the Convention.

Even when a competent court annuls the award, another court may still enforce the annulled award. It is important to keep in mind that the possibility for jurisdiction of enforcement to disregard the annulment made by the competent courts, is not the norm. It was seen in a recent case between two Russian parties, where the award had been annulled by the Russian courts. Enforcement proceedings were being sought by the award-creditor in London, Paris and Amsterdam. The reasonings by the courts were conducted differently. The French courts granted enforcement, stating that under French law an annulled award can still be enforced.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{148} English Arbitration Act of 1996 § 69.
\item \textsuperscript{149} English Arbitration Act of 1996 § 69 (3) (d).
\item \textsuperscript{150} Born (2014) p. 3351.
\item \textsuperscript{151} Paris Court of Appeal, 21 February 2017, case no. 15/01650 (Nikolay Maximov v. NLMK). Similarly; Cour de cassation, 23 March 1994, case no. 92-15.137 (Hilmarton Ltd. v. Omnium de traitement et de Valorisation).
\end{itemize}
The English Court rejected enforcement, and stated that setting aside a judgement of annulment required proof that the court’s decision was «extreme» and «incorrect» - but found no such evidence in this case. The Dutch Court also rejected enforcement, contrasting the Yukos-case. However, the Dutch Supreme Court confirmed that Dutch courts have the discretion to enforce awards that has been annulled, if (i) the local annulment decision is based on grounds other than those set out in Article V (1) (a)-(d) and which are not internationally recognised, or (ii) the annulment decision is contrary to Dutch private international law.

This shows that courts are willing to disregard a judgement of annulment, but will only do so after careful consideration of the facts of the case. This is a consequence of the wording of the Convention which provides that non-recognition is discretionary, that a member state «may» decline recognition of an award that has been annulled. There have been several cases dealing with recognition of annulment decisions, and extensive commentary on the subject. Even though there is some discrepancy in how wide discretion should be left to the recognition court, most argue in favour of the recognition court on specific grounds may not give effect to the annulment. These grounds usually entail idiosyncratic local procedural rules, failure to satisfy due process rules, or protecting public policy. That recognition forums may recognise an annulled award, will arguably in some cases protect the integrity and function of the arbitral process.

The annulment proceedings themselves may vary depending on the forum which has been chosen. For instance, in Sweden the annulment proceeding before national courts may only be tried one time with no chance of appeal. This is to keep the system in line with the effectiveness objective of arbitration, and provide swift conclusion to the dispute. In Norway on the other hand there are no rules restricting the standard system of litigation and appeals, and the annulment proceeding may therefore go through all three stages of the civil procedural litigation system.

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152 EWHC (2017) 1911 (Nikolay Maximov v. NLMK).
4.0 Choosing the arbitral seat

4.1 Overview

In the two previous chapters several implications that may follow from placing the arbitration in a specific seat has been outlined. However, many arbitration clauses are quickly assembled and poorly constructed. This can lead to interpretative challenges for the tribunal or the courts, and possibly legal and economic consequences for the parties. There are several issues that might arise from a poorly constructed arbitration clause, such as a confusion as to the choice of law governing the substantive contract, or whether institutional laws apply. However, in this chapter the focus will be specifically on the choice of arbitral seat. At the end, the possibility of changing and inconvenient seat will be analysed.

4.1.1 The drafting of the arbitration clause

There are no set terminology concerning the choice of arbitral seat, which might explain the number of cases about interpretative issues of arbitration clauses. Terms like «arbitral seat» and «lex arbitri» will usually make the choice clear, but sometimes clauses are drafted so they still leave uncertainty on what was chosen. Other terms that sometimes are used are; «lex fori», «venue», «place», or «situ», which all can either designate an arbitral seat or the geographical location of the arbitration. Sometimes the choice of arbitral seat will be unclear due to other choices of law, such as choosing a foreign procedural law.

Arbitration institutions, such as the ICC and LCIA, offer standard arbitration clauses that they recommend to be used.

The ICC outline reads as follows; «All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.» However, on the ICC webpage they also add the following; «The parties may also wish to stipulate in the arbitration clause: - the place of arbitration.» [My highlighting].

The LCIA outline read as follows; «Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be
incorporated by reference into this clause. The Number of arbitrators shall be [one/three].

The number, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [ ]. The governing law of the contract shall be the substantive law of [ ].» [My highlighting].

Both arbitration institutions recommend a clear choice to be made regarding the arbitral seat. However, these outlines are not always used, even when parties choose to arbitrate under the rules of the respective arbitration institution. This may lead to the arbitration clause being a «pathological clause».

4.1.2  Pathological clauses

When clauses designate a number of possibilities of what the parties agreed to, it is known as «pathological clauses». The term was first coined by Eisemann who put forth four conditions for an arbitration clause of which if it is lacking any one of them, it would be a «pathological clause».

The first condition of the arbitration clause is that it is to «produce mandatory consequences for the parties». Second, it is to «exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of an award». Third, it is to «give powers to arbitrators to resolve the disputes likely to arise between the parties». Fourth, it is to «permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement». If the arbitration clause deviates from any of these conditions it is a so-called pathological clause. These can lead to arbitration clauses that does not seem to make arbitration mandatory, or it refers to more than one institution or one that does not exist, or naming a specific but unwilling arbitrator, and so on. Specifically in relevance to our subject, the arbitration clause may not provide a clearly chosen arbitral seat.

An example of a pathological clause can be found in an English case from 2008. The arbitration clause read as follows; «This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any 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». The question was if the arbitral seat was Scotland or England, and

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159 Eisemann (1974).
the court concluded that Glasgow was designated venue of the proceedings while England was the arbitral seat.\textsuperscript{160}

Another example can be found in another English case from 2012.\textsuperscript{161} In this case the parties had chosen London to be the «seat», but that Brazilian law to govern the substantive agreement and Brazilian courts to have exclusive jurisdiction on any dispute arising out of the contract. The question emerged of what was the real choice of arbitral seat. The court concluded that English law was the lex arbitri, and the deciding factor was that if Brazilian law applied the arbitration agreement would be invalid. This was interpreted to not having been the parties’ intention, and is in line with the validation principle in chapter 2 above. Another deciding factor was that the court found that the «closest and most real connection» was English law.

4.1.3 The general rule on deciding the arbitral seat

In the aforementioned case from 2012, the English court stated that the procedure of established common law rules for ascertaining the proper law of any contract, is a three-stage inquiry where firstly express choice is examined, followed by implied choice, and lastly the closest and most real connection. They stated that the three steps is to be proceeded separately in the order stated, but that the second step often mixes with the third. The second step, the implied choice, was qualified as a presumption that the law governing the substantive contract often should be the same as the law governing the arbitration clause. A Singaporean case from 2014 agrees with the approach of the English Court, apart from the «implied choice»-step.\textsuperscript{162} The Singaporean High Court states that the considerations behind choice of law governing the substantive contract and the considerations behind the choice of lex arbitri are different. The first choice is mainly a commercial choice, while the second is more legal in its nature and neutrality becomes a more important factor. They therefore adopted the approach of «the closest and most real connection», where the express choice is lacking.

Born also argues that without the clear and express choice by the parties, the place of the arbitration is that which has the closest and most real connection.\textsuperscript{163} Furthermore, that it must be

\textsuperscript{160} EWHC (2008) 426 (Braes of Doune Wind Farm v Alfred McAlpine).


\textsuperscript{162} SGHCR (2014) 12 (FirstLink Investments v. GT Payment Pte.).

\textsuperscript{163} Born (2014) p. 1614.
presumed that the parties will choose one law to govern all aspects, both internal and external, of the arbitration. The validation principle will come in play as well, as it must be further presumed that the parties intend the arbitration agreement to be valid. I think this approach seem practical, in the sense that it is the most likely to truly find the parties’ intentions and provide a framework for the arbitration in line with the objectives, such as effectiveness and neutrality.

4.2 The competence to decide on arbitral seat

It is clearly advisable that parties pay attention to the arbitration clause as it is a separate agreement, and the choices made should be clear and considered. A question emerges on who is competent to decide on the arbitral seat, absent express choice by the parties.

In the absence of choice of arbitral seat by the parties, it befalls the arbitral tribunal or institution to choose the seat. This result follows from the institutions’ rules, and is also the default rule of most national arbitration statutes. This is also the default rule of the Model Law. This is a result of either express choice by the parties that the tribunal or institution shall decide on the matter, or as a consequence of the parties’ failure or neglect of choosing a seat themselves. The authority of the tribunal or institution’s choice of arbitral seat in the absence of express choice by the parties, must be distinguished from the tribunal’s or institution’s decision on the interpretation or validity of an agreement on the arbitral seat in annulment or non-recognition proceedings. In the cases of the tribunal or institution choosing an arbitral seat, judicial review of the decision should virtually never occur. Perhaps especially if the parties have left it to the arbitral tribunal to decide on arbitral seat, as it reflects the parties’ agreement to adhere to a neutral and fair decision. However, a decision by the tribunal or institution on the validity or interpretation of the arbitration clause selecting an arbitral seat, might be subject to judicial review in an annulment or non-recognition proceeding, as the location of the

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166 UNCITRAL Model Law Article 20(1).
662 N.Y.S.2d 42 (Stevens v. Coudert Bros).
seat is an important aspect of the parties’ agreement to arbitrate, and failure to conduct the proceedings according to the agreement is grounds for annulment or non-recognition.¹⁶⁹

National courts are not permitted under most national statutes to select the arbitral seat in the circumstances that no seat, tribunal or institutional rules have been selected by the parties. This is a logical result of the fact that arbitral statutes apply only to arbitrations with the seat in national territory, and so the national court cannot assume competence outside their jurisdiction. For example, neither the English or Swiss arbitration statutes open for the courts to decide on arbitral seat.¹⁷⁰ However, as shown above, English courts will sometimes have to decide on the interpretation of an arbitration clause. Contrary to the English and Swiss, the statutes of Norway, Sweden, Japan and the US have opened for the courts to be competent to decide in some cases.¹⁷¹ In Norway and Sweden the arbitration law can be applied against a party whom is domiciled in Sweden, whilst in Japan the courts may assist in any case. The US law opens for the possibility that courts may compel to arbitration and designate a place for the arbitration to be conducted. This power should be wielded by the US courts with care, and Born argues the courts should instead take the passive approach of rather staying the proceedings and rather assist in constituting the tribunal if necessary.¹⁷² In any case, if the national courts are involved in selecting an arbitral seat, care should be exercised to ensure neutral, fair and efficient proceedings.

In some rare cases, courts may also have to decide on the arbitral seat during or after an arbitration. This is very uncommon, as the arbitral tribunal will virtually always ensure that the decision on the seat has been made, and will usually have expressed it in the writing of the award. In these cases courts have three different approaches have been applied; (i) either an inferred reading of the contractual relationship between the parties,¹⁷³ (ii) considering where the relevant actions of the arbitration proceedings have taken place,¹⁷⁴ or (iii) deciding on the place of the last oral hearing.¹⁷⁵

¹⁶⁹ UNCITRAL Model Law Article 34(2)(a)(iv) and New York Convention Article V(1)(d).


¹⁷³ Judgement of 26 June 2000, 8 SchH 01/00 (Brandenburgisches Oberlandesgericht).


¹⁷⁵ Judgement of 23 March 2000, 6 Sch 02/99 (Oberlandesgericht Düsseldorf).
Most international conventions and national arbitration statutes impose written requirements for international arbitration agreements.\textsuperscript{176} Agreements to arbitrate that do not meet these requirements will generally be invalid.\textsuperscript{177} If no choice of seat, or no mechanism for choosing the seat, has been agreed by the parties, the arbitration agreement will in some jurisdictions be deemed invalid.\textsuperscript{178} However, some jurisdictions will still hold that the agreement can be valid, and may aid in the constitution of the arbitral tribunal, such as Sweden and Japan.\textsuperscript{179} If the arbitration clause is written such that the will of the parties, expressly or implied, is impossible to interpret, it will be regarded as an agreement to arbitrate without specifying the arbitral seat.\textsuperscript{180} In these circumstances, Born argues convincingly that the appropriate steps is to let the arbitral tribunal decide on the arbitral seat, or if there are no tribunal - the national court. Furthermore, the seat should not be placed in either parties’ jurisdictions.\textsuperscript{181}

### 4.3 Interpretative issues concerning the choice of arbitral seat

When a choice of arbitral seat is deemed invalid, either because the seat has become inconvenient, or the arbitration clause has not been properly written, it remains to be decided whether the arbitration agreement as a whole is invalid or just the choice of arbitral seat. National court decisions vary on this topic,\textsuperscript{182} but Born argues that it will depend on the contents of the agreement despite its faults.\textsuperscript{183} If it is agreed upon a neutral seat, then there are many possible substitutes for this choice which should be considered, and the invalidation of the agreement should generally not occur. Where the parties have selected a seat within the jurisdiction of one of the parties and this choice has been invalidated, the analysis becomes more complex. It needs to be considered if this choice was an integral part of the parties’ decision to arbitrate,

\textsuperscript{177} 93 F.3d 1095. (9th Circuit 1999) (Laxmi Invs. v. Golf USA).
\textsuperscript{178} Born (2014) p. 2105.
\textsuperscript{180} 1993 228028, at *2 (S.D.N.Y.) (Warnes v. Harvic International).
\textsuperscript{181} Born (2014) p. 2087, 2101.
\textsuperscript{183} Born (2014) p. 2088.
and whether a nearby or similar jurisdiction can provide a suitable substitution. It is the law of
the arbitral seat, and not the law of the enforcement jurisdiction, that is applicable to these cir-
cumstances.184

Many international contracts contain general choice-of-law clauses, providing that the law of
a particular state governs the contract. It is sometimes argued that these clauses constitute a
choice of the procedural law governing the arbitration. That argument can rely either on an
interpretation of the choice-of-law clause in the underlying contract or on a broader conten-
tion that selection of an applicable substantive law implies the intention that selection of an
applicable substantive law implies the intention to select the same law as the procedural law
for the arbitral proceedings.

Parties sometimes include references in their arbitration agreements to the arbitration legisla-
tion in a particular jurisdiction. Where this reference is to an arbitration statute of a state other
that the seat, it arguably constitutes evidence of the choice of a foreign procedural law. How-
ever, courts have struggled to avoid this conclusion. It is wise to presume that parties do not
wish to add the complexity of a foreign procedural law in their arbitration agreement.

Moreover, even where the parties’ agreement can be interpreted as expressly selecting a for-
eign procedural law, courts have been reluctant to interpret choice-of-law clauses as selecting
the «external» procedural law of the arbitration (that is the law governing the relationship
between the arbitration and the national courts systems). They have done so because the ap-
plication of multiple, conflicting national laws governing different procedural issues in the
same arbitration invites confusion. The parties may also select a foreign procedural law that
will not validly be applied outside of national territory. All of this is inconsistent with the
promise that arbitration provides a neutral, efficient mechanism for resolving international
disputes.

4.3.1 Express choice of foreign procedural law

A number of authorities have emphasised the desirability of having a single legal system
govern related issues, including both the arbitration agreement and the arbitral proceedings. It
is both practical and appropriate to gather as much as possible of the rules of the procedure
governing the arbitration, within one legal jurisdiction. Because of this, it is uncommon for parties to an arbitration to choose a procedural law different from that of the arbitral seat.\textsuperscript{185}

It is important to note that even though courts sometimes interpret liberally provisions so as to exclude the possibility of a different procedural law than that of the seat,\textsuperscript{186} it is a theoretically possible for the parties to do so.\textsuperscript{187} Most contemporary arbitration laws open up for the possibility, and in the case it is clear that the parties actually have chosen a different procedural law, it is this arrangement that will apply to the arbitration.

Traditionally the law of the arbitral seat had substantial significance for the procedure of arbitrations, and was commonly thought to also signify the national civil procedure of the arbitral seat. Contemporary authorities have rejected this, and most jurisdictions today no longer adhere to the view that the national civil procedure will follow the choice of arbitral seat. By the «procedural law» of the arbitration has become to refer to the arbitration law of the selected state, rather than the national procedural code. In many jurisdictions the local arbitration statute will not specify detailed procedural rules that apply in particular arbitral proceedings. The arbitration law will instead allow the parties substantial autonomy to agree upon procedural rules, and failing agreement, the arbitral tribunal will be granted wide discretion to fashion appropriate arbitral procedures. The arbitration law will also set out a few mandatory procedural principles, for instance equality of treatment, adversarial procedure and an opportunity for all parties to be heard.

With regard to the internal matters the choice of the «procedural law» should therefore not be interpreted as a choice of the national civil procedure code, but instead to the local arbitration law of that state. With regard to the external matters the choice of «procedural law» should not ordinarily encompass such matters, absent clear and explicit language to this effect.

Born argues in favour of severability, that parties should forego the use of «procedural law» when drafting arbitration agreements and instead focus on the various «internal» and «external» issues that are variously grouped under the rubric of the «procedural law of the arbitration»\textsuperscript{188}. By doing so the parties would avoid the definitional uncertainties arising from the

\textsuperscript{185} Henderson (2014) p. 903.


\textsuperscript{188} Born (2014) p. 1601.
concept of a «procedural law», as well as permitting more precise and individual analysis of the interpretation and enforceability of agreements regarding «internal» and «external» procedural issues. Clear specific language, designating what law to govern specific issues, will help avoid ambiguous interpretation.

He states that treating the procedural law as a «single, monolithic procedural law» in every arbitration is unwise, and makes little analytical sense. I think this is true to some extent. In most cases it must be presumed that parties wish one law to govern the arbitration and the procedure. However, by express choice one should consider whether the parties have intended a foreign procedural law. It must be presumed that the parties have not intended several procedural laws to apply to specific issues, as this would probably raise several difficulties regarding the conduct of the arbitration proceeding. Despite this, if the specific case or the parties in the dispute requires this, it should be taken into account. Whether or not it is possible, will depend on the lex arbitri.

There is also a theoretical possibility that parties wish to have more than one lex arbitri, and in principle this should be allowed. However, this is impractical.

4.4 Changing an inconvenient seat

Common law courts apply the doctrine of *forum non conveniens*, which permits a court to dismiss litigations where a more appropriate forum exists. This is similar to the Norwegian doctrine of where the national courts will not be competent if the dispute has a closer connection to another jurisdiction. However, there are little court practice to provide a sufficient foundation for the use of this doctrine with regard to international arbitration. It is doubtful that the Convention allows for this doctrine to be practiced.\(^1\)\(^8\)\(^9\) A court needs to take into account what circumstances has appeared since the drafting of the contract, as any inconvenience that was already present at the drafting would or should have been taken into account by the parties and only exceptional circumstances should lead to the courts overruling that decision. For instance, in the US, there are judgements that go in either direction when applying this doctrine, proving that choice of arbitral seat can have varying consequences.\(^2\)\(^9\)\(^0\)

Where the New York Convention does not open for the *forum non convenience* doctrine, Article II (3) opens for a similar result in the case where a party has agreed to arbitrate but the


choice of forum renders the arbitration process impossible to attend for one party. In these cases the agreement itself can be «inoperative» within the meaning of Article II (3). However, this result requires that the arbitral tribunal cannot provide both parties with equal possibility for hearings and presenting their cases. The most likely result would be to review after the fact if the process has satisfied the requirements of equality, and if not the award would be refused recognition following Article V.

Sometimes circumstances will change from the drafting of the agreement to arbitrate and the arbitration proceeding, that leads to an unfair or inaccessible arbitration. The principle that unforeseen and drastically changed circumstances may lead to contracts becoming invalid, is widely recognised in national as well as international law. As recognition of party autonomy is integral to international arbitration, considering challenges to the choice of arbitral seat should be exercised with restraint.\(^\text{191}\)

Challenge for change of arbitral seat may be raised if the arbitration process is in danger of being unfair due to fraud, mistake, unconscionability or duress.\(^\text{192}\) However, there would still be a high bar for changing seat, only allowing it in the most exceptional circumstances. It has to be taken into account that most circumstances to base these objections on would be apparent at the drafting of the agreement,\(^\text{193}\) and the arbitration agreement is itself meant to hinder litigation - an objective in contrast to allowing challenges for change of seat.

In general it is uncontroversial for parties to change arbitral seat. If no arbitrators have been selected the change will be subjected to the same requirements as the initial agreement specifying the arbitral seat.\(^\text{194}\) A requirement of clarity would generally be expected, but an agreement of changing seat should usually be given effect.

An issue might arise if the arbitral tribunal has been set, and the change of the seat inconveniences the arbitrators. The parties will still have autonomy to change the seat, and the arbitrators cannot deny this and their consent is not a requirement. However, the arbitrator may be free to resign from the arbitral tribunal as a consequence of this change.\(^\text{195}\)

\(^{191}\) Born (2014) p. 2082.

\(^{192}\) Born (2014) page 2084.


\(^{195}\) Born (2014) p. 2073.
5.0 Delocalised arbitrations

5.1 Overview

The idea of delocalisation concerns detaching an international arbitration from national jurisdictions. Extensive debate over the last decades have revolved around the notion that arbitration may be delocalised, and whether national courts could or should recognise arbitrations as such. In general, the debate may be characterised as concerning the tension between party autonomy and the necessity of nationally derived legitimacy. The debate has lead to different theories concerning the nature and extent of delocalisation.

The counterpart to delocalisation is the theory of *territoriality*. As has been mentioned before, the Model Law adopt the territorial approach. Concerning the debate on delocalisation it is a question about how far that principle should reach. Some will argue that the law of the arbitral seat governs the arbitration, and any other solution would mean that arbitrators may disregard the law.\(^{196}\) The territorial approach has some founding in case law, where for instance the English Court of Appeal once stated that, «... our jurisprudence do not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law ...»\(^{197}\)

The idea of delocalisation is that international arbitration is bound and legitimised by an autonomous international legal order. One of the main proponents of this thesis is Gaillard,\(^{198}\) who stated that the arbitration process should be detached from the bounds of national laws, and instead supported by «an arbitral legal order that is founded on national legal systems, while at the same time transcending any individual national legal order».\(^{199}\) This theory seems to have traction in France, as the courts has expressly recognised what it considers delo---

\(^{196}\) Paulsson (2011) p. 294.


\(^{198}\) Paulsson (2011) p. 301.

calised awards, but also abroad have legal scholars and arbitrators argued favourably for the recognition of delocalised awards.

5.2 The New York Convention on delocalisation

During the drafting of the Convention there was proponents suggesting that the Convention should recognise arbitral awards completely detached from any national jurisdiction. An example would be an arbitration completely based on ICC rules and lex mercatoria. This, however, was ultimately rejected, and the New York Convention provides the necessary basic structure of an arbitral seat. Discussion ensued on whether or not the Convention permit recognition of delocalised awards, and to what degree an arbitration is the auspices of the arbitral seat.

In the centre of this is the Article V (1), which states that an arbitral award «may be denied» recognition if «(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.» The debate on the interpretation of these provisions is too extensive to outline here. Born argues that the better interpretation of these provisions is that priority is given to the parties agreement. This means that the arbitrator should follow the procedures of the arbitration agreement, and even if this leads to annulment it may be recognised in an enforcement forum. Furthermore, the arbitral seat is given practical importance in the structure of international arbitration, as it is within the framework of the arbitral seat that the award is made. The arbitral seat is also the exclusive forum for annulment, and the recognition of annulled awards is subject to a limited set of grounds, as was explored in above in chapter 3.

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200 Paris Court of Appeal, 21 February 1980 (Götaverken v. GNMTC).
201 Preliminary award in ICC Case no. 2321.
205 The New York Convention Art. V.
The conclusion on whether the Convention permit delocalisation must be that it does not. However, it may permit a more moderate form of delocalisation.

5.3 A moderate form of delocalisation

Woxholth observes that the debate on delocalisation has been absolute in its use of terms, and arguments have been of the «either-or»-fashion. He states that a complete delocalisation of arbitration disregards essential practical needs, however he disagrees that the process cannot to some degree be delocalised. He argues favourably for a delocalisation of law, that parties should enjoy wide discretion in choosing a procedural law to apply in the arbitration.207

Paulsson argues that since recognition forums may recognise annulled awards, they in fact give recognition to awards that have been detached from its country of origin.208 He stated that, «[t]o seek completely to avoid national jurisdiction would be misguided. Indeed, the international arbitral system would ultimately break down if no national jurisdictions could be called upon to recognise and enforce awards».209 However, he proposes a fluid pluralistic model, which he argues means that the arbitration derives legitimacy from more than one national jurisdiction.210

Born argues similarly. He states that if his interpretation of the Convention, that recognition forum may recognise an annulled award where the courts of the arbitral seat has disregarded the parties’ procedural autonomy which they are entitled to, then in this «limited but critical sense» an arbitration can be recognised as detached from the law of the arbitral seat and instead subject to international standards.211 He argues favourably for the kind of delocalisation of procedural autonomy, and in favour that recognition forum may disregard a judgement of annulment on certain grounds.

The limited delocalisation has support in the fact that case law suggests that national courts assume competency to recognise annulled awards.212 Furthermore, some national jurisdictions

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210 Paulsson (2011) p. 306 and following.
212 Nikolay Maximov v. NLMK.
open for certain degrees of delocalisation, such as Belgium and Switzerland, where the arbitration acts permit parties to contract out of access to local courts. This is also seen in the Norwegian Arbitration Act, as a Model Law country whose arbitration act is built on the principle of territoriality, which has several exceptions to this principle. In conclusion one might say that delocalisation, although not recognised in its purest form, enjoy a reality of moderate form.

5.4 The consequence of the debate

Even though delocalisation is not accepted accorded to how it is proposed by proponents such as Gaillard, it seems clear that the territorial principle as argued by Mann no longer depicts an accurate picture of reality. The moderate, or partial, delocalisation as argued by Paulsson, Woxholth and Born, seems in the light of case law and contemporary arbitration acts to be more descriptive of reality.

The debate seems to have had real consequences in regard to the shaping of the Convention, and the following evolvement of international private law. The observations by Born seems accurate, that the Convention, while placing critical importance to the arbitral seat, also places international limits on to what degree a signatory state may limit party autonomy. This has arguably lead to an effective system where the tensions between predictability and effectiveness and party autonomy, is better balanced.

6.0 Conclusion

What implications follow the choice of arbitral seat. The question was inspired by the debate on delocalised awards, and the increasing similarities between national legislation.

In the second chapter the different implications of the arbitral seat was listed and explained. The arbitral seat may have indirect, logistical, «internal» and, perhaps most critically, «external» implications. The supervisory role of national courts vary from jurisdiction to jurisdiction, and particularly the power to annul awards highlight the practicality of choosing an arbitration friendly home for the arbitration.

The conclusion must be that the arbitral seat carries significant implications, hence the choice of it should perhaps be considered by practitioners to a higher degree than it currently is. Choosing an arbitration friendly jurisdiction as the arbitral seat will help the contracting parties in achieving their ambition of a effective, neutral and expert-based dispute resolution. Considering the arbitration clause outlines provided by arbitral institutions such as the ICC and LCIA, there are no good reason why the clauses should be constructed poorly and ambiguously. The clear recommendation would be to follow the recommended clauses, and take the appropriate time and resources in considering the choices of law.

Delocalisation in its true form never came to pass. However, I would argue that the role of the arbitral seat is to be wanted. Following the limits imposed by the Convention on national arbitration statutes, and the increasing willingness amongst national legislatures to create arbitration friendly laws, the national courts of most developed jurisdictions do not impose restraining oversight. The supervisory capacity of national courts, and judicial review limited by the Convention, is most likely a positive aspect to international commercial arbitration. It provides a safety net, which can aid in the arbitration process fulfilling the objectives upon which the whole dispute resolution system is founded.

In my view the national jurisdictions work in symbiosis with the international character of international commercial arbitration. The Convention and internationally acknowledged principles poses limits on the national jurisdictions, while the national jurisdictions brings legitimacy to the arbitration through its supervisory role.

The arbitral seat carries with it practical and legal consequences, and care should be exercised when choosing it. It is a necessary construct in international commercial arbitration, as it provides legitimacy and a framework for the arbitration procedure.
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