

# Seat Theory in International Commercial Arbitration: Evolution from *Lex Loci Arbitri* to *Lex Arbitri*

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**Abstract:** *Despite the continual effort of the business community to intercept international commercial arbitration from the precinct of national laws and courts, complete detachment is neither possible nor desirable. International arbitrations are affined to a national jurisdiction through the 'seat theory' which serves a profusion of inevitable objects including imparting legal basis to the Award. While serving its purposes, 'seat theory' converts lex loci arbitri of the seat into lex arbitri of the arbitration which results in the inescapable consequence of binding the parties with the mandatory provisions of lex loci arbitri. This conversion often encounters criticism for curtailing party autonomy, the main driving force behind opting for arbitration. This article scrutinizes the intricacies involved in such conversion with a special focus on the amplitude of party autonomy in drafting lex arbitri. After unrolling the relationship between lex loci arbitri and lex arbitri in 'seat theory', the article concludes that the problem inheres in the indifference of the parties in choosing the seat and the overzealous attitude of some States toward controlling international arbitration. It proposes internationalization of the outlook of different States toward international commercial arbitration to liberate 'seat theory' for the condemnation of the opponents.*

**Keywords:** International commercial arbitration, Seat theory, Delocalized theory, *Lex loci arbitri*, *Lex arbitri*.

## 1. Introduction

Increased globalization of world trade and investment has resulted in an abundance of international commercial disputes.<sup>1</sup> As a method of commercial dispute resolution, arbitration has been in place from time immemorial. At its early stage, merchants arbitrated not because of any legal obligation but because

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<sup>1</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern, and J. Martin, *An Overview of International Arbitration* (6<sup>th</sup> edn, Oxford University Press 2015) para 1.01.

of the expectation of the business community, which desired the settler of their own cause to be one of them.<sup>2</sup> Since arbitration probably antedates all the former legal systems,<sup>3</sup> at its tender age, arbitration was informal, essentially private and witnessed freedom from the interference of the courts.<sup>4</sup> However, with the development of the modern concept of state sovereignty, states denied standing back- allowing a system of private justice to flourish without any control from the competent authority.<sup>5</sup> Naturally, the interested stakeholders, i.e., parties of arbitration and arbitrators, were initially skeptical of this approach, as it was an encroachment on the unfettered party autonomy in arbitration proceedings. In order to strike a balance between these opposing interests, i.e., the state's desire to control every arbitration proceeding within its territory and parties' inclination towards freedom from state regulation, 'seat theory' came into being.

'Seat theory' upholds state sovereignty by obliging every international arbitration, occurring within any state territory, to show due reverence to its domestic laws- applicable to international arbitration. On the other hand, the arbitration itself is immensely benefited from this theory as it imparts a legal basis to the award, which is inevitable for the enforcement of the award. 'Seat theory' serves these two-fold purposes by establishing a legal connection of the arbitral process with the seat of arbitration. The Geneva Protocol, 1923, was the first international legal instrument that expressly incorporated seat theory and made arbitral procedures subject to the will of the parties and the law of the country where the arbitration takes place.<sup>6</sup> Subsequently, both the *New York Convention, 1958*,<sup>7</sup> and UNCITRAL Model Law, 1985<sup>8</sup> have endorsed the same approach. Apparently, 'seat of arbitration', as mentioned in these instruments, gives a geographical connotation, but with the development of the international arbitration regime, presently it refers to the legal domicile of arbitration.

In the course of establishing a legal connection with the seat, 'seat theory' binds arbitration with *lex loci arbitri* (the law of the seat) and converts it into *lex arbitri* (law of the arbitration). This conversion has unavoidable consequences on the subsequent proceedings since mandatory provisions of *lex loci arbitri* become

<sup>2</sup> Earl S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 *University of Pennsylvania Law Review* 133.

<sup>3</sup> *ibid* 132.

<sup>4</sup> Blackaby (n 1) para 1.05.

<sup>5</sup> *ibid*, para 1.15.

<sup>6</sup> Geneva Protocol on Arbitration Clauses 1923, art 2 (hereinafter Geneva Protocol).

<sup>7</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art VII (2) (hereinafter New York Convention).

<sup>8</sup> UNCITRAL Model Law on International Commercial Arbitration 1985, art 1(2) (hereinafter UNCITRAL Model Law 1985).

binding for the parties,<sup>9</sup> and they become obliged to bow to such provisions.<sup>10</sup> Because of such inevitable implications, proponents of ‘delocalized theory’<sup>11</sup> often allege seat theory as repugnant to party autonomy.<sup>12</sup> But, in reality, ‘seat theory’ rather complements party autonomy and imparts many more advantages to the arbitral proceeding- in absence of which international arbitration will run the risk of being ineffective. The object of this article is to show the imperative role of seat theory in international commercial arbitration. To have a clear understanding of the theory, this article examines the process of converting *lex loci arbitri* into *lex arbitri*, and the extent of exercising party autonomy within such a process.

## 2. Concept of Seat Theory

Seat theory in international arbitration implies that the law of the place where the arbitration takes place governs international commercial arbitration.<sup>13</sup> In reality, it not only decides the law applicable to the arbitration process, but the competent court at the seat also exercises power over the proceeding as a consequence of the theory.<sup>14</sup> Because of its attachment to a particular state territory, it is also called the ‘localized theory’.<sup>15</sup>

Generally, the law governing the arbitration is fundamentally different from the law governing the merit of the dispute.<sup>16</sup> However, until the 1970s, the law governing the merit of the dispute also governed the law of arbitration in England. The landmark decision of the House of Lords which established the independence of the law governing the arbitration (*lex arbitri*) is *James Millers & Partners Ltd. v. Whiteorth Street Estates (Manchester) Ltd*, where the court opined that, though Scottish law governed the merit of the dispute, it was possible to choose

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<sup>9</sup> Blackaby (n 1) para 3.68.

<sup>10</sup> William W. Park, ‘The Lex Loci Arbitri and International Commercial Arbitration’ (1983) 32 *International Comparative Law Quarterly* 21, 23.

<sup>11</sup> Roy Goode, ‘The Role of The Lex Loci Arbitri in International Commercial Arbitration’ (2014) 17 *Arbitration International* 19, 21 (The author states that ‘in international commercial arbitration, delocalized theory means that, the arbitral procedure and any resulting award are autonomous, unconnected to any national legal system and derive their force solely from the agreement of the parties’).

<sup>12</sup> Andrew Barraclough and Waincymer Jeff, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 *Melbourne Journal of International Law* 205, 206.

<sup>13</sup> Blackaby (n 1) para 3.35.

<sup>14</sup> Julian DM Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 172.

<sup>15</sup> Alexander J. Belohlavek, ‘Seat of Arbitration and Supporting and Supervising Function of Courts’ (2015) *CYArb-CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION: Interaction of Arbitration and Courts* 21, 26.

<sup>16</sup> Blackaby (n 1) para 3.37.

a different law for governing the arbitration procedure<sup>17</sup> Subsequently, this distinction was reiterated in several other cases.<sup>18</sup> With time this severability of the *lex arbitri* resulted in two opposing theories, e.g., ‘seat theory’ and ‘delocalized theory’- both dealing with the determination of *lex arbitri*. Unlike ‘seat theory’, ‘delocalized theory’ doesn’t bind international arbitration with any territorial link, except in the enforcement stage.<sup>19</sup>

### 3. Seat of Arbitration: The Legal or Geographical Dichotomy

The term ‘seat of arbitration’ may sometimes generate confusion. Apparently, it sounds like the geographical link of arbitration with the place where proceedings take place. However, there is a distinction between the ‘seat of the arbitration’ and the ‘physical venue of the proceedings’,<sup>20</sup> which is not maintained when the same place serves both purposes. Yet, it becomes vivid if two or more than two places are engaged in the process. This distinction grew cautiously and prevailed in most international and national arbitration statutes.<sup>21</sup>

#### 3.1 Seat of Arbitration v. Place of Hearing

The seat of arbitration is not merely determinative of the geographical location and indicates the territorial link between arbitration proceedings and law of the seat.<sup>22</sup> Consequently, it has a fundamental role in shaping the legal framework of international arbitration.<sup>23</sup> In reality, the importance lies in the geographical designation of the place, but whether or not to use the place geographically is left to the discretion of the parties. To ensure the convenience of the parties, there is no stringent rule that obliges all or any of the proceedings to occur therein. Consequently, it is possible that several or all the hearings are conducted elsewhere- the place designated by the parties for the hearing of the arbitral proceedings, i.e., the venue of arbitration. Hearings may even take place in more than one

<sup>17</sup> *James Millers & Partners Ltd. v. Whileworth Street Estates (Manchester) Ltd* (1970) 1 All ER 796.

<sup>18</sup> *Bank Millat v. Helleniki Techniki SA* [1984] QB 291,301; *Sumitomo Heavy Industries Ltd v. Oil and Natural Gas Commission* [1994]1 Lloyd’s Rep. 45.

<sup>19</sup> Thilo Rensmann, ‘Anational Arbitral Awards – Legal Phenomenon or Academic Phantom?’ (1998) 15(2) *Journal of International Arbitration* 37.

<sup>20</sup> Alexander J Belohlavek, ‘Importance of Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth’ (2013) 31 *ASA Bulletin* 262, 282.

<sup>21</sup> UNCITRAL Model Law 1985, art 20(2); UNCITRAL Arbitration Rules 2010, r 18(2); The London Court of International Arbitration (LCIA) Rules 2014 (hereinafter LCIA Rules 2014) r 16.2; Singapore International Arbitration Center Rules 2016 (hereinafter SIAC Rules 2016), r 18.2; ICC Rules 2017, r 18(2).

<sup>22</sup> Blackaby (n 1) para 3.56.

<sup>23</sup> Gary Born, *International Arbitration: Law and Practice* (2<sup>nd</sup> edn, Kluwer Law International 2012) 105.

state,<sup>24</sup> but at the end, the seat of arbitration consolidates the whole process.<sup>25</sup> This distinction between the seat of arbitration and the place of hearing is maintained in prominent national and international arbitration legislation.<sup>26</sup> However, unless the parties agree otherwise, the venue generally coincides with the seat.<sup>27</sup> While the venue is selected based on the geographical location of a place, the arbitration law of the place concerned plays the most important role in choosing the seat.

### 3.2 *Arbitration Law: The Prime Concern while Choosing the Seat*

It is often argued that considering the geographical convenience and the neutrality of the place, a particular location is designated as the seat of arbitration, and as a consequence of the seat theory, *lex arbitri* takes an unexpected turn for the parties. Surprisingly, scholars like- Redfern and Hunter corroborated this allegation and gave the example of an English woman driving to France and binding herself with France traffic law to explain the situation.<sup>28</sup> This example sounds too harsh since seat theory permits the parties to go to a particular state- the place of hearing, and bind themselves by the law of another state by choosing the seat. Here, ‘seat theory’ assists the parties to bypass the national law of the ‘place of hearing’, and to make the law of their choice applicable to the proceeding by the prior designation of the ‘seat of arbitration’. Therefore, the English woman can go to France, and be guided by the law of Sweden or any other country of her own choice.

In reality, the ‘argument of convenience’, i.e., the parties choose the seat considering the geographical location thereof, sounds justifiable in selecting the place of hearing but cannot be the sole driving force behind choosing the seat of arbitration. This is because parties can finish the entire proceeding without physically being at the seat. Hence, it sounds more tenable that parties most importantly consider the law of the place and agree on the seat of arbitration accordingly. In other words, the choice of law applicable to the arbitration results in the choice of the seat. This position has been echoed in the decision of the English Technology and Construction Court in *Breas of Doune Wind Farm (Scotland) v. Alfred McAlpine Business Services*, where the court clearly demonstrated that the parties’ choice of law is determinative of the seat of arbitration.<sup>29</sup>

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<sup>24</sup> Belohlavek (n 20) 267.

<sup>25</sup> Born (n 23) 105.

<sup>26</sup> *ibid* (n 21).

<sup>27</sup> Indu Bhan, ‘Seat versus Venue’ (*The Financial Express Dhaka*, 27 February 2014) <<https://www.financialexpress.com/archive/seat-versus-venue/1229641/>> accessed 30 July 2020.

<sup>28</sup> Blackaby (n 1) para 3.63.

<sup>29</sup> *Breas of Doune Wind Farm (Scotland) v. Alfred McAlpine Business Services* [2008] EWHC 426 (TCC) (In this case the parties did not decide the seat of arbitration. The court deemed England as the juridical seat of arbitration owing to the fact that the parties referred to the application of English Arbitration Act, 1996).

Given these points, the proposition that parties choose the seat of arbitration, and applicable law follows therefrom seems to be the other way around, and the real scenario is that parties choose the law governing arbitration, and geographical attachment follows therefrom. Hence, while choosing the seat, the arbitration law of the concerned place is the major concern for the parties. Moreover, the freedom of not being physically present at the seat is turning ‘seat theory’ into a legal fiction from a geographical perspective.<sup>30</sup>

### ***3.3 Seat of Arbitration: Is It Turning into a Legal Fiction?***

At present, it is a common practice to insert a liberty clause in the arbitration agreement that permits the parties to conduct hearing in a place different from the seat.<sup>31</sup> Surprisingly, there is no guideline regarding the degree of geographical attachment required for seat theory’s proper functioning. In a sense, it makes the seat of arbitration rather imaginary from the geographical perspective and turns it into a legal fiction. This tendency to confine the seat of arbitration to ‘legal domicile of the proceeding’ is specifically vivid in online arbitration and sports arbitration. In online arbitration, the parties and arbitrators mostly come from different places and conduct the proceeding through video call or other digital means. Therefore, they designate a particular place as the legal domicile of the arbitration. For example, under the Electronic Transaction Arbitration Rules of Hong Kong International Arbitration Center, the seat of arbitration will always remain fixed, i.e., Hong Kong special administrative region.<sup>32</sup> Likewise, the geographical and legal connection is severed in the Court of Arbitration for Sports, working under the auspices of the International Council of Arbitration for Sports.<sup>33</sup> Under the arbitration legislation of the institution, i.e., *The Code of Sports-Related Arbitration, 2019*, the seat of arbitration always remains fixed.<sup>34</sup> Hearing need not take place at the seat in the strict geographical sense, rather a designation of the place as the seat is enough to connect the proceeding with its legal system, and consequently, seat theory can run effectively without any proceeding occurring therein. In online and sports arbitration, parties choose a particular place as seat of arbitration, not for taking advantage of its geographical location, and in practice, the hearings do not and are not even expected to occur therein.

This position converts seat theory into a legal fiction, devoid of any geographical consideration. Even where the arbitration law does not specifically

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<sup>30</sup> Belohlavek (n 20) 267.

<sup>31</sup> UNCITRAL Model Law 1985, art 17; ICC Rules of Arbitration 2017, r 18; *The Code of Sports Related Arbitration 2019*, r 28.

<sup>32</sup> Electronic Transaction Arbitration Rules of Hong Kong International Arbitration Center 2018, art 14.

<sup>33</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2<sup>nd</sup> edn, Cambridge University Press 2012) 63.

<sup>34</sup> *The Code of Sports-related Arbitration 2019* (Switzerland), r 28.

mention a particular place as the seat, this approach is open for adoption- leaving the parties with the task to consider favorability of *lex arbitri* of the seat. This unique feature of seat theory, which gives the parties the flexibility of not holding the proceedings in the seat, has enhanced the appeal of the theory to the interested stakeholders. This malleability will ensure the smooth functioning of the theory in emergency situations, like COVID-19, where the whole world is at a standstill. In the present situation, though the parties are mostly unable to be physically present at the seat, international arbitration can function at its regular pace by taking full advantage of the seat theory.

However, the attempt to render seat theory into legal fiction runs some risk with it. For instance, in the case *The Titan Corporation (USA) v Alcatel Sit SA (France)*,<sup>35</sup> the Swedish court denied jurisdiction to set aside an award, though Sweden was designated as the seat. Since no proceeding took place in Sweden, the Swedish court refused to acknowledge any territorial link and declared the proceeding to set aside the award outside its jurisdiction. At present, though countries with arbitration-friendly attitudes are unlikely to take such an extreme position, to avoid risk, it is suggested to hold at least some portion of the proceeding at the seat of arbitration. This is because, if the court at the seat denies jurisdiction, it is unlikely for any other court to exercise the same in the absence of specific agreement between the parties.<sup>36</sup>

#### 4. Rationale of the Seat Theory

While determining the law applicable to the arbitration, the historical tendency has always been to establish a link between the legal system of the place of arbitration and the arbitral proceeding.<sup>37</sup> Several factors have reasoned this tendency, and seat theory emerged as a consequence.

##### 4.1 Upholding State Sovereignty

Seat theory in international commercial arbitration is premised on the concept that every state is sovereign within its own territory, and possesses and exercises control over every incident occurring therein. Even international arbitration is no exception to this rule and must bow to the mandatory norms of the country in

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<sup>35</sup> *The Titan Corporation (USA) v Alcatel Sit SA (France)* decision by the Svea Court of Appeal in Sweden rendered in 2005 in case no. t 1038-05; CITSA, YCA 2005= SIAR 2005. (In this case the place of arbitration chosen by the parties and stated in the award was Stockholm. However, neither the parties nor the dispute had any connection with Sweden. The arbitrator was from the U.K. and the hearings were held in London and Paris. The court concluded that the proceedings did not have such a connection to Sweden that the place of arbitration could be said to have been Stockholm).

<sup>36</sup> Goode (n 11) 26.

<sup>37</sup> Blackaby (n 1) para 3.35.



which it takes place.<sup>38</sup>This territorial concept acknowledges the exclusive right of the laws and competent court of the seat of arbitration to determine the legal effect of acts done (and consequently of arbitral awards) made within its borders.<sup>39</sup>

Based on this proposition, seat theory establishes a legal link between the seat of arbitration and the arbitral proceeding. In this connection, the counter-argument of the seat theory, which aims at cutting off this connection, sounds like urging the states to give away a part of its sovereignty. When the parties are designating a particular place as the seat of arbitration, they intend to take benefit of the arbitration-friendly legal system of the place, and it will be irrational to expect that a state will allow extracting benefits of using its '*lex loci arbitri*' without obliging to respect its mandatory legal rules.

#### **4.2 Giving Legal Base to the Proceeding**

The parties to the arbitration make an agreement to arbitrate, which is followed by conflict, initiation of arbitral proceedings, and delivery of the arbitral award. In order to have legal force, the agreement of the parties is dependent on recognition by law.<sup>40</sup>The point has been rightly put forward by Dr. Francis Mann while saying- 'no person has the right or the power to act on any level other than that of municipal law.'<sup>41</sup> The importance of seat theory lies in the fact that it anchors the arbitral proceeding into an established legal system, i.e., of the seat.<sup>42</sup> As a matter of fact, it is possible to anchor human activity into the municipal legal system of a particular state without any physical attachment, of the person concerned, with that place. For instance, if a Bangladeshi citizen commits a crime while on board of a Bangladesh Biman flight that is roaming around the sky over Heathrow Airport and waiting for a landing signal, that person can still be prosecuted under the Penal Code of Bangladesh.<sup>43</sup> His physical absence from Bangladesh is no bar to anchor his act to the municipal law of Bangladesh. Likewise, physical attachment with the seat of arbitration is not mandatory for the proper functioning of seat theory.

Nevertheless, with the increased development of international law, it is possible to derive obligation without the apparent interference of a municipal legal system. For example, the ICSID (International Centre for Settlement

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<sup>38</sup> Park (n 10) 35.

<sup>39</sup> Goode (n 11) 24.

<sup>40</sup> *ibid* 29.

<sup>41</sup> Pieter Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (Nijhoff 1967).

<sup>42</sup> *Bank Mellat v. Helliniki Techniki* [1983] 3 All ER 428 CA (In this case the English House of Lords unanimously decided that despite suggestions to the contrary by some learned writers under other systems, English jurisprudence does not recognise the concept of arbitral procedure floating in transnational firmament, unconnected with any municipal system of law).

<sup>43</sup> *Penal Code 1860* (Bangladesh) s 4.



of Investment Disputes) arbitration is not subject to any domestic law or the jurisdiction of any domestic court;<sup>44</sup> still, there are certain post-award remedies mentioned in the Convention itself.<sup>45</sup> This separation from municipal law has been possible because the Convention has established a supranational legal framework for the supranational award to be enforced and binds all members to recognize and enforce the award rendered by the ICSID tribunal under that legal system.<sup>46</sup>

Therefore, in order to make international arbitration free from the influence of seat theory, a supranational legal framework is required. Until such a framework develops, the connotation that mere agreement of the parties is enough to make the award enforceable is of no practical utility. This is because the proceeding cannot float in the air and produce a legally binding award. If this were possible, the agreement of the parties would have been enough to enforce the award as well. Consequently, enforcement of the award is contingent upon the connection with any state law,<sup>47</sup> which is most conveniently the law of the seat.<sup>48</sup> Since parties' agreement to arbitrate alone cannot produce an enforceable award,<sup>49</sup> seat theory provides the required legal basis by connecting the award with the law of the seat.<sup>50</sup> To avail this advantage of seat theory, different states can draft their arbitration legislation in line with the UNCITRAL Model Law, as the model law expressly incorporates seat theory.<sup>51</sup>

#### 4.2.1 *Availing Advantage of the Court's Supportive Power*

Arbitration is a private dispute settlement procedure capable of resolving disputes like a court of justice. But, this does not bring arbitration to the same compartment as a court of law, and there is a thick line of distinction between these two systems of dispute resolution. Likewise, certain powers are peculiar to the court itself, and the arbitral tribunal cannot exercise them owing to policy reasons or some other grounds. Hence, some situations require the exercise of state power, typically for freezing property, temporary seizure of goods, and the tribunal is devoid of any such power.<sup>52</sup> For instance, the Argentina Code of Civil Procedure expressly deprives the tribunal of any power to give enforceable interim order,<sup>53</sup> and in

<sup>44</sup> Convention on the Settlement of Investment Disputes between States and National of other States 1966, art 53 (hereinafter ICSID Convention).

<sup>45</sup> *ibid*, arts 49, 52.

<sup>46</sup> *ibid*, art 54.

<sup>47</sup> Goode (n 11) 29.

<sup>48</sup> *ibid* 30.

<sup>49</sup> *ibid*.

<sup>50</sup> Blackaby (n 1) para 3.84.

<sup>51</sup> UNCITRAL Model Law 1985, art 1(2).

<sup>52</sup> Belohlavek (n 20) 269.

<sup>53</sup> Argentina Code of Civil Procedure 1871, art 753 (the article states that, 'Arbitrators shall not

situations- warranting interim order, interference of the domestic court becomes inevitable. Otherwise, the long process of arbitration, with a huge investment of time and money, may turn standstill.

At present, considering the private nature of arbitration proceeding, there is an increased tendency of enhancing the power of the arbitral tribunals to issue interim orders. For instance, most of the major arbitration institutions have incorporated the provision of ‘emergency arbitrators’ to provide rapid interim relief before the constitution of the tribunal.<sup>54</sup> Though, in continuation of this favorable attitude, most modern institutional arbitration rules give the power of granting interim relief to the tribunal itself,<sup>55</sup> the assistance of the court is yet important. This is especially true, in cases where interim order involves the duty of third parties since arbitral tribunal usually lacks jurisdiction to bind third parties.<sup>56</sup> This rule has been reflected in the UNCITRAL model law<sup>57</sup> and all the state laws influenced by the model law. Therefore, instead of the arbitral tribunals having the power of giving interim relief, the role of the national courts remains inevitable here.

It is mentionable that there is no controversy as to the supportive role of the court of the seat in localization or delocalization theory. This is because when one speaks of delocalization it refers to removing the functions of the tribunal from the supervisory role of the national courts.<sup>58</sup> But, it is unlikely for any court to extend its support to any proceeding without subjecting the same to its supervisory power. Hence, the absence of seat theory in international commercial arbitration will result in the abolition of the supportive power of court at the seat, which may bring the consequence of rendering the entire proceeding nugatory.

#### 4.2.2 *Determining Nationality of the Award*

Denial of the seat theory will result in the award being stateless. Being unconnected with the national legal system of any state, the award cannot belong to any nationality, e.g., Swiss, English, French or Australian award. Seat theory does the job of imparting nationality and determines the nature of the award from

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issue compulsory or enforcement measures, these shall be requested to the judge who shall give the aid of his jurisdiction for the faster and more effective operation of the arbitral process’).

<sup>54</sup> LCIA Rules, r. 9B; Stockholm Chamber of Commerce Arbitration Rules (SCC Rules) r. 32(4) and Appendix II, r 3; ICC Rules, r 29(1) and Appendix V, r 1(2); International Centre for Dispute Resolution (ICDR) Arbitration Rules, r 6; SIAC Rules 2016, r 26(2), with proceedings governed by Sch. 1.

<sup>55</sup> UNCITRAL Model Law 1985, r 17; UNCITRAL Rules 2010, r 26; ICC Arbitration Rules 2012, r 28(1); LCIA Rules 2014, r 25; ICSID Rules, r 39.

<sup>56</sup> Blackaby (n 1) para 7.18.

<sup>57</sup> UNCITRAL Model Law 1985, art 17 (2).

<sup>58</sup> Jan Paulsson, ‘The Extent of Independence of International Arbitration from the Law of the Situs’ in Julian Lew (ed), *Contemporary Problems in International Arbitration* (Springer 1987) 141, 141.

a territorial perspective (the domicile or the nationality of the award).<sup>59</sup> Such determination bears great significance since a stateless award<sup>60</sup> may result in non-enforcement. This is because, at present, the *New York Convention, 1958*,<sup>61</sup> is the major international instrument for enforcing arbitral awards, and stateless awards do not come within its ambit. Till date, 164 states are parties to the Convention.<sup>62</sup> The legislative history of the Convention is contrary to its applicability to stateless award<sup>63</sup>. Consequently, the scope of the Convention is also limited to awards made in the territory of a state other than the enforcing state.<sup>64</sup> Apart from the *New York Convention, 1958*, bilateral and multilateral treaties take place between different states for mutual recognition of arbitral awards of the concerned jurisdictions.<sup>65</sup> Without seat theory, the award comes out of a blow, unconnected with any legal system, and therefore, is deprived of the protection of *New York Convention, 1958* or any other legal instrument concerning enforcement of award. It is mentionable that, so far, there is no bilateral or multilateral treaty that deals with the enforcement of stateless award. As the argument of the delocalized theory goes on, it aims at producing a stateless award.<sup>66</sup> Such a stateless award will face great difficulties in the enforcement stage. On the contrary, seat theory not only imparts legal basis and identity to the award, but also promotes enforceability by warranting nationality of the award.

#### 4.2.3 *Seat theory: Converting Lex Loci Arbitri into Lex Arbitri*

*Lex arbitri* is the law governing arbitration, and the importance of seat theory lies in the fact that it plays an important role in shaping *lex arbitri* of a particular arbitration, taking place within the territory of the seat state. Seat theory performs this function by moulding *lex arbitri* into the structure of *lex loci arbitri*.<sup>67</sup> To understand this process of conversion, it is imperative to have a clear idea about the meaning of *lex loci arbitri*.

<sup>59</sup> Belohlavek (n 20) 269.

<sup>60</sup> Goode (n 11) 21. (The author states that the term 'stateless award' in international commercial arbitration means that the arbitral procedure and any resulting award are autonomous, unconnected to any national legal system and derive their force solely from the agreement of the parties).

<sup>61</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958.

<sup>62</sup> New York Convention 1958 <<http://www.newyorkconvention.org/countries>> accessed 10 August 2020.

<sup>63</sup> Albert Jan van den berg, *The New York Arbitration Convention of 1958*, (Kluwer Law and Taxation Publishers 1981) 37.

<sup>64</sup> New York Convention 1958, art 1(1).

<sup>65</sup> Moscow Convention 1972, art IV(1)(2); Panama Convention 1975, art 4; Riyadh Arab Convention 1985, art 37 etc.(all these conventions provide for mutual recognition and enforcement of Awards made in member states).

<sup>66</sup> Berthold Goldman, 'Les Conflits de Lois dans l'Arbitrage International de Droit Prive' (1963) 109 *Recueils des Cours* 351.

<sup>67</sup> Park (n 10) 23.

(a) *Meaning of Lex Loci Arbitri*

The terms ‘*lex loci arbitri*’ and ‘*lex arbitri*’ are often used interchangeably in international commercial arbitration.<sup>68</sup> This is because, *lex loci arbitri* bears almost similar meaning as *lex arbitri* with the variation that *lex loci arbitri* is the totality of the generally applicable provisions, governing arbitration, in the state where it takes place. In other words, it is the combination of national law provisions of the seat governing international arbitration, and this combination of local curial norms is the main theme of *lex loci arbitri*.<sup>69</sup> Though it comprises all the available provisions of the law that applies to arbitration seated in any particular state, it is not essential that all such provisions must be applicable in any particular arbitration seated therein. While drafting *lex arbitri*, parties can change the non-mandatory provisions of *lex loci arbitri* while keeping the mandatory provisions un-tempered. Therefore, mandatory provisions will inevitably be part of *lex arbitri* but whether or not the directory provisions will be incorporated is for the parties to decide.

(b) *Distinction between Lex Loci Arbitri and Lex Arbitri*

Despite being very thin, the distinction between *lex arbitri* and *lex loci arbitri* is sturdy in the essence and purpose. For example, The *English Arbitration Act, 1996* is the *lex loci arbitri* for all arbitration seated in England, and the act altogether forms *lex loci arbitri* without any scope for variation. Nevertheless, the *lex arbitri* can be different, and the legal basis for such differentiation is present in the act itself when it approves substitution of the *lex loci arbitri* by any other law in cases where the provisions of the act are not mandatory in nature.<sup>70</sup> As a matter of fact, when allowing any other law, there is no qualifying limitation- leaving the parties with the freedom to combine even the law of any other state with that of England in order to design their desired *lex arbitri*. The following proposition will express the distinction between the two terms best:

*Lex Loci Arbitri* = Totality of the domestic law (substantive + procedural provisions) applicable to international arbitration (mandatory + Directory provisions)

*Lex Arbitri* = *Lex Loci Arbitri* (mandatory provisions) +/- *Lex Loci Arbitri* (Directory Provisions) +/- **Rules added by parties** (not derogatory to the mandatory provisions)

Since all the provisions of the *lex loci arbitri* are not binding upon the parties, they

<sup>68</sup> Alastair Henderson, ‘Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Law of the Arbitration Process’ (2014) 26 *Singapore Academy of Law Journal* 886, 906.

<sup>69</sup> Park (n 10) 21.

<sup>70</sup> Arbitration Act 1996 (UK) s 4(5).

are free to draft their own rules governing the arbitration without derogating the mandatory provisions of the *lex loci arbitri*. Hence, seat theory keeps it open for the parties to draft their own unique *lex arbitri*.<sup>71</sup> This unique *lex arbitri* will contain within itself some elements of *lex loci arbitri* (which are mandatory in nature), but in place of the directory provisions, parties are at liberty to introduce their own rules. Likewise, it is open to the parties to endorse the directory provisions and turn entire *lex loci arbitri* into *lex arbitri*. Nevertheless, parties should remember that while opting out of *lex loci arbitri*, the mandatory and fundamental provisions should be respected since non-compliance therewith renders the proceedings and the award vulnerable to challenge.<sup>72</sup> Moreover, confusion may arise in differentiating mandatory provisions from non-mandatory ones since most *lex loci arbitri* do not contain any express list of mandatory provisions. Hence, it depends on the legislative interpretation and creates hardship for the parties.

### (c) Conversion of *Lex Loci Arbitri* into *Lex Arbitri*

The country where the arbitration is seated, generally has legitimized authority over the proceeding, in the form of mandatory rules of *lex loci arbitri*. Because of the application of the seat theory, the distinction between the terminologies, i.e., *lex arbitri* & *lex loci arbitri* is not often maintained. Rather, localization theory identifies the law of the seat of arbitration (*lex loci arbitri*) with the law governing the arbitration (*lex arbitri*).<sup>73</sup> This is because, although the parties are free to substitute the non-mandatory provisions, their freedom is subject to the grant of *lex loci arbitri*. Hence, in case of mandatory provisions, *lex loci arbitri* reigns without any possibility of modification, whereas though loosely, in case of directory provisions, it reigns nonetheless.

Therefore, under seat theory, *lex loci arbitri* is ultimately taking the shape of *lex arbitri*. Modification is possible but only to the extent permitted by national arbitration law. Notably, substituting non-mandatory provisions is not equal to stepping out of the periphery of *lex loci arbitri* rather it's more like moving freely but within the boundary. A clear understanding of *lex arbitri* will further clarify the role of *lex loci arbitri* in international commercial arbitration.

## 5. *Lex Arbitri* in International Commercial Arbitration

As discussed earlier, international arbitral proceeding shares an inevitable legal link with the seat of arbitration. The role of *lex arbitri* is paramount in this regard since it is the medium which establishes and maintains such link. International commercial arbitration (ICA) is a complex process involving the application of different systems

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<sup>71</sup> Henderson (n 68) 907.

<sup>72</sup> *ibid* 902.

<sup>73</sup> Belohlavek (n 20) 266.

of law governing different issues, and without any undue sophistication, it is possible to identify at least five systems of law having a bearing on ICA.<sup>74</sup> Among these five categories, law governing the arbitration, i.e., *lex arbitri* is one. An attempt to define *lex arbitri* is indeed a burdensome task, and is as illusionary as producing a universal consensus on world peace. This is because, the concept and ambit of *lex arbitri* vary from jurisdiction to jurisdiction, and effectively reflect the limits any legal system imposes on parties' freedom to choose the law governing arbitration procedure.<sup>75</sup> 'Seat theory' provides the mechanism which turns *lex loci arbitri* (law of the seat) into *lex arbitri* (law governing the arbitration) with a view to anchoring the proceeding to the legal system of the seat.

### 5.1 Meaning of *Lex Arbitri*

Since every state has its own standing on arbitration regulation, the content of *lex arbitri* cannot be determined with precision. Generally speaking, the basic framework for arbitration is properly called *lex arbitri*, which translates from Latin as the law of arbitration.<sup>76</sup> A renowned English judge, Steyn J., attempted to define *lex arbitri* in the case *Paul Smith Ltd v. H&S International Holding Inc*<sup>77</sup> in the following words:

What then is the law governing the arbitration? It is .... a body of rules which sets a standard external to the arbitration agreement, the wishes of the parties, for the conduct of the arbitration.

Furthermore, while elaborating the meaning of *lex arbitri*, Steyn J gave an example of the court's power to issue interim measures and other powers (including supportive and supervisory) of the court. Here, it is mentionable that, historically the definition of *lex arbitri*, in English courts and scholarly writings, focuses exclusively on the relation of the arbitration proceeding to the outside world in general and in particular to the courts that may be deemed to have jurisdiction over the proceedings.<sup>78</sup> Since the judgment in the *Smith case* focuses mainly on the relation of the arbitration proceeding with the court at the seat, it excludes party autonomy as a source of *lex arbitri*. But, in the broader sense of the term, the intention of the parties' constitutes an equally important source of *lex arbitri* and plays a vital role in drafting the internal aspect of *lex arbitri* (procedural rules governing the arbitration).

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<sup>74</sup> Blackaby (n 1) para 3.07.

<sup>75</sup> Loukas Mistelis, 'Reality Test: Current State of Affairs in Theory and Practice Relating to *Lex Arbitri*' (2007) 17 *The American Review of International Arbitration* 155, 163.

<sup>76</sup> Henderson (n 68) 887.

<sup>77</sup> *Paul Smith Ltd v. H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 (QBD).

<sup>78</sup> Mistelis (n 75) 163.

In contrast to the English approach, arbitration legislation of multiple countries refer *lex arbitri* to indicate something wider than the relationship between international arbitration and the court at the seat. In reality, divergent approaches of different countries have made it difficult and almost impossible to generate any universal definition of *lex arbitri*. This left the major institutional arbitration rules and the laws of the significant arbitration-friendly countries without an attempt to define the term. Hence, more often than not, arbitration legislations prefer to mention the issues covered by *lex arbitri* to picture its ambit.

## 5.2 Issues Covered within Lex Arbitri

In modern arbitration, *lex arbitri* has two components- internal *lex arbitri* and external *lex arbitri*.<sup>79</sup> Whereas, internal *lex arbitri* deals with the procedural matters governing arbitral proceedings, external *lex arbitri* determines the role of the competent court at the seat to the entire proceeding.<sup>80</sup> Internal and external components together form *lex arbitri* for any given arbitral proceeding.

In this regard, Dicey and Morris classified the functions of *lex arbitri* into three categories, and accordingly described the issues covered by it.<sup>81</sup> The first role embodies the procedural aspect, and serves the ‘directory function’ of *lex arbitri*.<sup>82</sup> However, with the increasing popularity of ‘party autonomy’ concept, this role of *lex arbitri* is losing its connection with the seat. Now-a-days parties can design their own procedural rule or designate the law of any institution or even of any other country as the applicable procedural law, provided that it does not derogate any mandatory legal provision of the seat.

Secondly, *lex arbitri* serves the ‘supportive and supervisory’ function, which encompasses power of granting interim relief and judicial review of the award.<sup>83</sup> As a matter of fact, this function is the center of difference between supporters of localization and delocalization theory.<sup>84</sup> While localization theory/ seat theory binds international arbitration with both supportive and supervisory function of *lex arbitri*, delocalization theory opts out of the supervisory role of the court at the seat.<sup>85</sup> The last role of *lex arbitri* is the ‘mandatory function’, and it determines the relationship between arbitration and public policy of the seat of arbitration.

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<sup>79</sup> *ibid* 165.

<sup>80</sup> *ibid* 156.

<sup>81</sup> Lord Collins and Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15<sup>th</sup> edn, Sweet & Maxwell 2012) 16-31.

<sup>82</sup> Henderson (n 68) 888.

<sup>83</sup> *ibid*.

<sup>84</sup> Belohlavek (n 20) 26.

<sup>85</sup> Jan Paulsson, ‘Arbitration Unbound: Award Detached From the Law of its Country of Origin’ (1981) 30 *International and Comparative Law Quarterly* 358, 367-71.



This role also attracts attention as it facilitates the social, religious, and other fundamental values of the seat at the cost of the international character of the award, and sometimes affects arbitral proceeding in unexpected ways. Since public policy differs from country to country, an award that is valid in one jurisdiction may be set aside in another,<sup>86</sup> and it is possible that public policy at the seat is totally unrelated to the international character of the arbitration. Because of this reason, a new tendency is developing, which emphasizes international public policy rather than that of the seat.<sup>87</sup>

As a matter of fact, in the controversy regarding seat theory, the external component of *lex arbitri* plays a more important role than the internal component. This is because internal *lex arbitri* generally keeps wide scope for the exercise of party autonomy.<sup>88</sup> In contrast, external *lex arbitri* is mostly mandatory in nature, and escaping from those provisions is almost impossible. For example, the *English Arbitration Act 1996*, gives a list of the mandatory provisions in Schedule 1,<sup>89</sup> and these provisions mostly deal with external *lex arbitri*.

### ***5.3 Is Lex Arbitri Purely Procedural in Nature?***

Divergent approaches in different states regarding its ambit have generated different, and sometimes opposing views regarding the scope of *lex arbitri*. For instance, English courts always maintain a restrictive attitude towards *lex arbitri*, and aims at focusing on the relationship between arbitration and the court at the seat,<sup>90</sup> which clearly doesn't fall within procedural issues. On the contrary, there has always been a tendency to recognize *lex arbitri* as a law governing the procedural aspects of arbitration in general. Probably this is because some of the popular seats of arbitration codify their arbitration laws in their code of civil procedure.<sup>91</sup> For example, Germany codifies its arbitration law in the German Code of Civil Procedure, France in the French Code of Civil Procedure, and this tendency of incorporating the law applicable to arbitration within the civil procedure code creates the misconception that *lex arbitri* deals only with procedural issues.<sup>92</sup> However, this idea is not true, and there are number of issues, which despite not being procedural in nature, fit within the ring of *lex arbitri*. Some of such issues are:

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<sup>86</sup> Blackaby (n 1) para 10.84.

<sup>87</sup> *ibid.*

<sup>88</sup> Henderson (n 68) 888.

<sup>89</sup> Arbitration Act 1996 (UK) s 4(1).

<sup>90</sup> Mistelis (n 75) 163.

<sup>91</sup> Blackaby (n 1) para 3.62.

<sup>92</sup> The Code of Civil Procedure 1877 (Germany) ss 1025-1066; the Code de procedure civile, arts 1442-1527 (arts 1504 ff dealing with international commercial arbitration).

### 5.3.1 Agreement to arbitrate

An agreement to arbitrate or a submission agreement is the foundation stone of international arbitration.<sup>93</sup> In the absence of such agreement, no arbitration can take place since it is the expression of parties' intent to arbitrate. Besides, an invalid agreement runs the risk of rendering the entire proceeding nugatory. For example, under the UNCITRAL Model Law, 1985, a void agreement is a ground for setting aside an award.<sup>94</sup> Moreover, the importance increases as invalidity of the agreement is also a ground for refusing the recognition and enforcement of the award both under the Model law, 1985<sup>95</sup> and the *New York Convention, 1958*.<sup>96</sup>

Apparently, the crucial question of validity of the arbitration agreement is subject to the law of the seat, i.e., *lex arbitri*, in the absence of any agreement to the contrary between the parties.<sup>97</sup> In this connection, the English court of Appeal held that in the absence of any express or implicit choice of law governing the agreement, the law of the seat having the closest and most real connection with the proceeding would be the law applicable to the arbitration agreement.<sup>98</sup> This decision has been subsequently followed in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co. Ltd.*<sup>99</sup> Yet, there is an opposing view which advocates that the law applicable to the merit of the contract is the law governing the arbitration agreement. Supporters of this view base their argument on the fact that agreement to arbitrate being a part of the contract should be controlled by the law that governs the whole contract. But, given the fact that agreement to arbitrate is an independent contract within another contract, this argument doesn't sound tenable. Separability of the arbitration clause is a well-established principle in international arbitration,<sup>100</sup> and therefore, the law of the seat is the most relatable to the arbitration agreement. Consequently, the validity of the agreement to arbitrate, which is out and out a substantive question, is an issue covered by *lex arbitri*, provided that the parties have not agreed otherwise.

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<sup>93</sup> Blackaby (n 1) para 1.40.

<sup>94</sup> UNCITRAL Model Law 1985, art 34(2)(a)(i).

<sup>95</sup> *ibid*, art 36(1)(a)(i).

<sup>96</sup> New York Convention 1958, art V(1)(a).

<sup>97</sup> UNCITRAL Model Law 1985, arts 34, 35; New York Convention 1958, art V.

<sup>98</sup> *Sulamerica Cia Nacional de Seguros SA and ors v. Enesa Engenharia SA and ors*[2012] EWCA Civ 638.

<sup>99</sup> *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co. Ltd* [2013] EWHC 4071 (Comm).

<sup>100</sup> *Etablissements. Raymond Gosset v Frère Carapelli S.P.A.*, 7 May 1963 (Dalloz, 1963), 545 (In this case the French Court De Cassation recognized the doctrine of Separability of arbitration agreement, whether concluded separately or included in the contract to which it relates); see also *Prima Paint Co. v Flood Conklin Manufacturing Corporation* 388 US 395, 402 (1967).

### 5.3.2 Arbitrability

Theoretically, arbitration should be capable of resolving every dispute because it is the private counterpart of the court of justice, which has the authority to resolve any dispute. But in practice, since arbitration is a confidential proceeding, every state puts some limitation beyond which arbitration cannot step.<sup>101</sup> Therefore, each state decides the issues it wishes to keep exclusively to the jurisdiction of the court, and normally matters with public bearing are eliminated from the arbitrability criteria.

The question of arbitrability bears great significance since under the Model Law it can be a ground for setting aside the award.<sup>102</sup> Initially, the law of the seat, i.e., *lex arbitri*, determines the arbitrability of the dispute. However, the issue of arbitrability can arise afterward at the enforcement level as well, and both Model Law<sup>103</sup> and the *New York Convention, 1958*<sup>104</sup> empower the enforcing court to consider the issue and refuse recognition and enforcement if it's not arbitrable under the law of the enforcing state. Nevertheless, initially *lex arbitri* decides arbitrability of the dispute, and this decision carries great weight with it as annulment of the award at the seat of arbitration can be a ground for refusing enforcement both under Model Law<sup>105</sup> and the *New York Convention, 1958*.<sup>106</sup>

### 5.3.3 Finality of the award

One of the significant reasons for prioritizing arbitration over court proceeding is to resolve the dispute within the shortest possible time, and to achieve this object it is desirable that the decision of the tribunal shall be final, and will not be interfered by any court. However, the finality of the award depends on *lex arbitri* of a particular place, and the position substantially varies from country to country. For example, where the *English Arbitration Act, 1996* is applicable in any arbitration, the award may be subjected to more than one Appeal. Generally, under the English Arbitration Act 1996, an award can be appealed against on three grounds, i.e., want of jurisdiction,<sup>107</sup> serious procedural irregularity,<sup>108</sup> and Appeal on the point of law.<sup>109</sup> It is noteworthy that, among these three grounds, the first

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<sup>101</sup> Blackaby (n 1) para 2.126.

<sup>102</sup> UNCITRAL Model Law 1985, art 34(2)(b)(i).

<sup>103</sup> *ibid*, art 36(1)(b)(i).

<sup>104</sup> New York Convention 1958, art V(2)(a).

<sup>105</sup> UNCITRAL Model Law 1985, art 36(1)(a)(v).

<sup>106</sup> New York Convention 1958, art V(1)(e).

<sup>107</sup> Arbitration Act 1996 (UK) s 67.

<sup>108</sup> *ibid*, s 68.

<sup>109</sup> *ibid*, s 69.

two are mandatory in nature, and an agreement abridging the right to challenge the award on these grounds is consequently invalid. On the other hand, the third ground is restricted to cases where the interpretation of any English law is the question at issue<sup>110</sup> and directory in nature- giving the parties the liberty to opt-out of the same.<sup>111</sup> Though UNCITRAL Model Law had a strong impression on drafting the arbitration law of England,<sup>112</sup> surprisingly *Arbitration Act of 1996* is in direct contrast with the Model Law in allowing the courts to set aside an award based on error of law.<sup>113</sup>

In ensuring the finality of the award, the most courageous step was taken by Belgium when it amended its arbitration law to exclude the jurisdiction of Belgian court to set aside an arbitral award rendered in Belgium unless one of the parties were Belgian citizen or resided therein or had a principal place of business therein.<sup>114</sup> Surprisingly, this hands-off approach was not welcomed by the interested stakeholders and resulted in the amendment of the provision.<sup>115</sup> In contrast, the current provision keeps the right to initiate a proceeding to set aside an award, but the parties are at liberty to contract out of this provision.<sup>116</sup> This approach is in consonance with the Model Law since it gives the right to initiate a proceeding to set aside the award, but instead of 'Shall', the law uses 'May' in the concerned article,<sup>117</sup> suggesting that this provision is non-mandatory in nature and parties can make themselves free from it by an agreement to that effect.

Apart from the above-mentioned issues, several other issues come within the ambit of *lex arbitri* which lack any procedural connotation. In reality, it is a complex system of interaction between procedural and substantive aspects of the arbitration, which takes different forms in different jurisdictions. Hence, it will be appropriate to consider *lex arbitri* as a combination of substantive and procedural issues. In this regard, Redfern and Hunter took the correct approach in avoiding an attempt to produce a definition of *lex arbitri*; rather they chose to give a list of issues that can come within the ambit of *lex arbitri* depending on the arbitration law of any given state.<sup>118</sup>

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<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> Goode (n 11) 20.

<sup>113</sup> UNCITRAL Model Law 1985, art 34.

<sup>114</sup> The Belgian Judicial Code (Amendment of article 1717, 27 March 1985).

<sup>115</sup> The Belgian Judicial Code 2013, art 1717.

<sup>116</sup> *ibid.*

<sup>117</sup> UNCITRAL Model Law 1985, art 34.

<sup>118</sup> Blackaby (n 1) para 3.36.

## 6. *Lex Arbitri* in Seat Theory: Extent of Party Autonomy

Seat theory associates *lex arbitri* with the seat of arbitration, and parties do not usually make an express choice of the laws applicable to their arbitration.<sup>119</sup> As discussed earlier, relevant arbitral law is the prime consideration while choosing the seat. Still, the theory often encounters criticism for curtailing party autonomy in the disguise of *lex arbitri*. In reality, seat theory patronizes party autonomy, which is the driving force behind opting for arbitration.

### 6.1 Party Autonomy while Choosing Mandatory Provisions

As mentioned earlier, arbitration law of a state plays the most important role in selecting the seat, and since parties are free to hold part of or the entire proceeding in a place other than the seat, the contention that legal effect follows geographical choice is not tenable. In practice, parties enjoy wide discretion in choosing the seat of arbitration, as there is no legal obligation requiring the parties to select a seat contrary to their intention. In this regard, parties are expected to be cautious in choosing the seat as severe legal impact will follow therefrom, and should avail them of the opportunity to exercise party autonomy- especially in ad hoc arbitration.<sup>120</sup> Moreover, the autonomy of the parties subsists in institutional arbitration as well, since most institutional arbitration rules pay tribute to party intention while choosing the seat.<sup>121</sup> In the case of careless failure to select the seat, the parties may become potential victims as unpredictable consequences may follow therefrom.<sup>122</sup>

Nevertheless, when parties fail to make any express agreement regarding the seat of arbitration, the decision is left to the tribunal in ad hoc arbitration<sup>123</sup> and in most institutional arbitration as well. Since the parties have selected the tribunal, it is presumed that the parties have impliedly chosen the seat in such a situation. Hence, impliedly or expressly, the choice remains with the parties to select the seat, which in turn means that parties are free to choose the mandatory provisions of *lex arbitri*. Though there is no scope to modify the mandatory provisions, parties are given numerous options since all states are open to them to select as a seat. Consequently, parties enjoy unfettered discretion in deciding the mandatory provisions of which state serve their purpose best. Hence, party autonomy

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<sup>119</sup> Henderson (n 68) 891.

<sup>120</sup> Belohlavek (n 20) 273.

<sup>121</sup> UNCITRAL Model Law 1985, art 20; ICC Rules 2012, r 18; LCIA Rules 2014, r 16 (all these articles leave it to the parties to determine the seat of arbitration and in default of the parties, transfer the power to the tribunal).

<sup>122</sup> Filip De Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 *Northwestern Journal of International Law & Business* 56.

<sup>123</sup> Belohlavek (n 20) 274.

is upheld in choosing the mandatory provisions of *lex arbitri*. Likewise, party autonomy also applies to directory provisions.

### **6.2 Party Autonomy while Choosing Directory Provisions**

Concerning the directory provisions, the autonomy of the parties is much wider. Yet, it is subject to one restriction, i.e., the provisions selected by the parties should not violate the mandatory provisions of *lex arbitri*. For instance, in most jurisdictions, the procedural aspect of the *lex arbitri* falls within non-mandatory category and *lex arbitri* contains a default set of rules for conducting arbitration in that territory- available to assist the orderly progress of a case if the parties fail to make other arrangements through the adoption of standard (or other) arbitral rules.<sup>124</sup> Since internal *lex arbitri* (the procedural law of arbitration) hardly contains any mandatory provision, parties can substitute those rules, provided that the substituted provisions are not in violation of any mandatory provision.

An example of wide party autonomy in modifying *lex loci arbitri*- in order to create a unique *lex arbitri*, is the possibility to use a foreign procedural law. To explain it rightly, parties are free to arbitrate in country A and choose the procedural law of country B, provided that such modification is not inconsistent with mandatory provisions of country A. In this connection, in the case, *Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru*, the English Court of Appeal upheld the validity of an agreement which makes the procedural law of a state, other than the seat, applicable to arbitration.<sup>125</sup> As stated earlier, most states take a liberal attitude towards internal *lex arbitri* (the procedural law of arbitration), and consequently, the parties may also choose the rules of any arbitral institution or may design their own rules. Therefore, though it is true that seat theory identifies *lex loci arbitri* with *lex arbitri*, an option is open to the parties to make their own convenient *lex arbitri*, keeping the mandatory provisions unimpaired.

## **7. Conclusion**

From the time of its first insertion in the Geneva Protocol, seat theory has attracted much criticism because of its apparent paradoxical role of making an international proceeding subservient to a domestic legal system. Such criticism does not hold firm ground and erodes with the multiple benefits imparted by seat theory. This paper shows the inevitable role of seat theory in international commercial arbitration as it does the exigent task of giving a legal basis to the proceeding. Without such legal basis, the award will run the risk of being non-enforceable, frustrating the ultimate object of international arbitration. Controversy about

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<sup>124</sup> Henderson (n 68) 888.

<sup>125</sup> *Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 (In this case English procedural law was applied to an arbitration held in Lima, Peru).

seat theory revolves mainly around the process of turning *lex loci arbitri* into *lex arbitri*, and the consequences following therefrom.

This paper further shows that in the process of such conversion, reverence is shown to party autonomy in terms of both mandatory and directory provisions. The inconveniences of the theory often put forward by the opponents are not peculiar to the theory but to the arbitration law of some states and the indifference of the parties while choosing the seat. For the smooth functioning of the theory, without warranting any unpredictable consequences, different arbitration jurisdictions should maintain an international approach while drafting their *lex loci arbitri*. Besides, the court at the seat should not deal with an international proceeding with a domestic attitude. Such an arbitration-friendly approach will help seat theory to reconcile the opposing interests of the states and the parties to the proceeding.