INTERNATIONAL ARBITRATION AND LEX ARBITRI

International arbitration is one of the most common ways of resolving international disputes. "***It is a private method of dispute resolution chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the court of law."***[1] So, the parties can choose the state in which it will be conducted. "There can also be many different laws to govern the arbitration; **the proper law of the contract, lex arbitri, procedural law or the curial law.**"[2]

The lex arbitri is a set of mandatory rules of law applicable to the arbitration at the seat of the arbitration.[3] It also can be defined that the juridical seat of arbitration.

Lex arbitri also "determines the relationship between the arbitral tribunal and national courts."[4] For instance, what extent court intervention during the arbitral proceedings is authorized.

"International commercial arbitration is presumed to be governed by the law of the place in which it is held." [5] This is the 'lex arbitri' or the law of the 'seat' of arbitration. But, it includes the principal of party autonomy, which allows the parties to choose the applicable law. "The parties are free to choose rules, which govern their contract."[6] According to Geneva Protocol, "the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."[7] This article demonstrates that there is a strong link between the law of the country where the arbitration takes place and the law governing that arbitration (lex arbitri).

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[1] A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration, Sweet Maxwell, 4th Edition, 2004, page 1.

[2] ***J. Simith Ltd v H & S International [1991], 2 Lloyd`s Rep 127.***

[3] A.Tweedale, K.Tweedale, Arbitration of Commercial Disputes,International and English Law and Practice, Oxford,1st Edition, 2005, Chap. 7.39.

[4] W.M. Reisman, W.L. Craig, W. Park, J. Paulsson, International Commercial Arbitration Cases, Materials and Notes on the Resolution of the Business Disputes, The Foundation Press, 1977, Page 691

[5] A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration, Sweet Maxwell, 4th Edition, 2004, page 92.

[6] D. J. Sutton, J. Gill, Russell on Arbitration, Thomson/Sweet&Maxwell, 22nd Edition, 2003, page 70

[7] Geneva Protocol of 1923, Article 2.

The law of the arbitration agreement (lex arbitri), may be different from the proper law and the procedural law (curial law). "Proper law of the contract governs issues of interpretation, performance, non-performance and liability under the contract and is determined by using the conflict of law rules."[8] Contracting parties usually insert a clause to determine the proper law to govern the contract. "The lex arbitri is generally different from the proper law of the contract."[9]

On the other hand, the curial law is the law that governs the procedure of the arbitration. It can be said that, "it is the part of the lex arbitri,"[10] because, they are, in most cases, the same as the law of the seat of arbitration. And the parties generally do not separate them. "Curial law is determined by parties' choice, if there is no choice, the curial law is the law of the place of arbitration."[11]

It is sometimes possible for the curial law to be different from the law of the seat of arbitration. For instance, "parties can choose to hold arbitration in one country but make it subject to the procedural law of another country."[12] Under the ***Union of India*** case, arbitration clause providing for the seat to be in London but the procedural law was the Indian Arbitration Act 1940. However, "if parties have not made an express agreement as to the law to govern the arbitral proceedings then it is usual the law of the seat of arbitration will apply to the procedure."[13] According to the Union of India case, "English procedural law governed the proceedings, with the addition of the sections of Indian Statute that were not inconsistent with English procedure, because Indian procedural law cannot override the mandatory provisions of the English Arbitration Act 1996."[14]

Furthermore, delocalised arbitration is "to detach an international commercial arbitration from control by the law of the place in which it is held."[15] The idea is that

[8] W.M. Reisman, W.L. Craig, W. Park, J. Paulsson, op cit, page 692.
[9] ***Sonatrach Petroleum Corp. v. Ferrell International Ltd. [2002] 1 All E.R. 627***.
[10] A.Tweedale, K.Tweedale, op cit, chap. 7.39
[11] ***James Miller & Partners Ltd. v Whitworth Street Estates(Manchester) Ltd.[1970] 1 Lloyds Rep. 269***
[12] ***Union of India v Mc Donnell Douglas [1993] 2 Lloyds Rep. 48***
[13] A.Tweedale, K.Tweedale, op cit, chap. 7.62
[14] English Arbitration Act 1996 Article 4[5]
[15] A. Redfern, M. Hunter, op cit, page 106

international commercial arbitration "has no forum".[16] It is not under control of the lex arbitri and the court of the place of enforcement of award. The party autonomy becomes more important and control should come from one place that is "the law of place of enforcement."[17]

One example is given below is that parties have expressly chosen the German law as a proper law of the contract.

Agreement: ICC Arbitration in London, English/Swiss Arbitrator (ie individual with dual nationality) as Chairman.

It is an institutional arbitration. The best-known institutional arbitrations are the ICC, the LCIA and the ICDR (AAA). The main feature is that, "it provides the arbitrators to settle rules directly and do not need to make a specific references to a national law procedure."[18]

When parties are drafting an arbitration agreement, they mostly specify the seat of arbitration. The choice of seat is not a physical choice, but it is a legal choice, which allocates the arbitration law applicable to the arbitration procedure. For instance, if parties choose the seat of the arbitration in Turkey, but they required to be decided the substantive issues in accordance with the law of England, nevertheless, the arbitration process will be subject to the national arbitration law of Turkey. Moreover, "if parties do not make an express choice of place of arbitration, the choice will be made, either by the arbitral tribunal itself or arbitral institution." [19]

According to the ICC Rules 14[20], which provide that "in the absence of agreement the place of arbitration shall be fixed by the Court of Arbitration and a choice is most commonly based upon the most convenient for the arbitrator himself such as his home country."[21] In our case, the arbitrator has a dual nationality (Swiss and English). So,

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[16] A.Tweedale, K.Tweedale, op cit, chap. 7.72, ***Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV) (1994)***

[17] A. Redfern, M. Hunter, op cit, page 107
[18] W.M. Reisman, W.L. Craig, W. Park, J. Paulsson, op cit, page 698-699
[19] UNCITRAL Arbitration Rules, Art 16(1), ICC Arbitration Rules, Art 14(1) LCIA Arbitration Rules, Art 16.1, UNCITRAL Model Law, Art 20(1).
[20] ICC Article 14[1] "The place of the arbitration shall be fixed by the Court unless agreed upon by the parties."
[21] R. Merkin, Arbitration Law, LLP, 3rd Edition, 2004, page 197

there is a possibility for Swiss Law to govern the arbitration agreement but England does not recognise delocalisation. It is not possible to apply Swiss Law in the UK.

It is clear under the Arbitration agreement that the arbitration takes place in London under the ICC arbitration. However, it does not necessarily mean that "the lex arbitri is the place of the arbitration"[22] but, "in the absence of the choice of lex abitri, it will be the seat of the arbitration that has the closest connection."[23] So, the law of the arbitration agreement (lex arbitri) will be the national arbitration law of England. The reasons for that may find under the section 2 of Arbitration Act 1996 provide that **"the provisions of this part apply where the seat of the arbitration is in England and Wales or Northern Ireland."** The seat of arbitration means "the juridical seat of the arbitration"[24], which is mostly lex arbitri of the arbitration.

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[22] ***Channel Tunnel GroupLtd and Balfour Beatley Construction Ltd [1993], AC 334***
[23] ***Bank Mellat v Hellinik Techniki SA [1984], QB 29, at 301***
[24] Arbitration Act 1996, Section 3, ***Union of India v Mc Donnell Douglas Corporation [1993], 2 Lloyds Rep. 48***