LEX ARBITRI, CHOICE OF PROCEDURAL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION IN MALAYSIA

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ABSTRACT
Parties to commercial disputes around the world are now more inclined to agree to arbitration instead of resorting to the national courts in an effort to avoid the jurisdictional and choice-of-law uncertainties that arises when international disputes are litigated in national courts. This is however not always the case because international commercial arbitration can create its own set of issues on choice-of-law.

Issues on choice-of-law can generally be classified into 5 categories. First of all, laws governing the parties’ capacity to enter into an arbitration agreement; second, the law governing the arbitration agreement and the performance of the contract; third, the law governing the existence and proceedings of the arbitral tribunal; fourth, the law, or the relevant legal rules, governing the substantive issues in dispute; and the fifth category on the law governing recognition and enforcement of award.¹

INTRODUCTION
An arbitral tribunal must answer all questions brought by the parties in dispute before it renders a final and binding award on the issues set forth to bring the dispute to a close.
The principle of separability prescribes that it is possible to have different laws governing an arbitration agreement and it’s underlying contract. This is because arbitration operates under the presumption that an agreement to arbitrate established between parties is detachable from its underlying contract. To decide on the applicable law, the arbitral tribunal will usually apply conflict of laws theories derived from private international law to pinpoint the relevant laws that control different aspects of an arbitration proceedings.²

This article will be discussing on one of the issues on choice-of-law determination, that is, on the law governing the proceedings of the arbitral tribunal which is also known as lex arbitri, in

Malaysia. *Lex arbitri* is the law that regulates and supports the procedural aspects of arbitration, as opposed to the laws that govern the substantive rights of the parties in an arbitral dispute.

1. **DEFINITION AND SCOPE OF *LEX ARBITRI***

1.1. *Difference between substantive and procedural laws of arbitration*

The law which governing the subject of the dispute is called as the substantive law, which alternatively called as ‘applicable law’, ‘governing law’ or ‘law of the contract’. In most of the jurisdictions, the parties are given liberty to choose the application of law. The governing law will be generally set out in an arbitration agreement at the outset, and the right of the parties to enshrine in multifarious interventional conventions and institutional rules should not be deprived.

On the other hand, procedural law is the law which used to determine to what extent the local courts will be involved in the process. For instance: the extent to which the arbitration agreement excludes court jurisdiction and any formalities to be complied with. In England and Wales, the procedural law applied is provided for in the Arbitration Act of 1996.

Hence, substantive law of arbitration should be distinct from procedural law of arbitration as substantive law of arbitration tends to focus on the law that can be applied while the concentration of procedural law of arbitration is the process.

1.2. **Definition of *lex arbitri***

In Singapore, *lex arbitri* used to be called as the fundamental framework for arbitration. It is a phrase translated from Latin as the law of arbitration. The understanding of the concept of *lex arbitri* might be different for national boundaries. However, despite of looking at the variation of the precise content of *lex arbitri*, the modern arbitral jurisdictions actually include provisions which regulate the following three matters: matters internal to the arbitration, the external relationship between the arbitration and the courts and also, the broader external relationship between arbitrations and the public policies of that place. ³

*Lex Arbitri* has also been described by as a body of law which:

… legitimises and provides a general legal framework for international arbitration. The relevant law might itself be found in an independent statute on international arbitration or it might be a chapter in another law, such as a civil procedure code or a law also governing domestic arbitration. [It] can also include other statutes and codes (even those not specifically dealing with arbitration), and case law which relates to the basic legal framework of international arbitrations seated there.⁴

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As seen from above, the precise definition of *lex arbitri* may vary among different countries, but it may find a mutual ground when regulating:

1. The formal matters internal to the arbitration, such as the appointment of arbitrators or the requirements to the rendering of an award;
2. The relationship between the arbitration and local courts, the assistance of national jurisdictions; and
3. Some aspects of public policy of a specific country, as mandatory rules.\(^5\)

1.3. *Arising issues in choice-of-law determination in International Commercial Arbitration*

Arbitral tribunals apply the choice-of-law rules in few respects. International commercial arbitration proceedings bring up various choice of-law issues regarding the determination of (i) the law governing the arbitration agreement; (ii) the law governing the arbitration proceedings; (iii) the law applicable to the merits (the applicable substantive law); (iv) the conflict of law rules applicable to determine each of the above-mentioned laws.\(^6\)

In the absence of a choice of law by the parties, this contribution helps to determine the specific question of the determination of the applicable substantive law. For the first issue, which is regarding the determination of the law governing the arbitration agreement, the basis of the presumption of separability could exists.

The second issue is the determination of the law governing the arbitration proceedings. In most of the cases, the procedural law will be the domestic arbitration law of the seat of arbitration. By using this law, it governs all issues relating to the arbitration proceeding. For example, the issue of provisional relief and the appointment of arbitrators. As long as due process is respected, this law normally provides remarkable freedom to the arbitrators to conduct the proceedings.

Moving on to the third issue, which is the determination of the substantive law applicable to the merits of the case. The arbitrators will examine it according to the parties’ agreements, expect for a mandatory national law, or public policy, trumps such an agreement. Alternatively, the arbitral will pick the applicable law depending on the facts of the case at hand if the parties failed to agree, using criteria such as selecting the law with the most related controversy.

Last but not least, the conflict of law rules applicable to determine each of the above-mentioned laws. The arbitral tribunal can choose the conflict-of-law rules for each applicable law. For

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*Perspective* (Cambridge University Press 2011).
\(^5\) Alastair Henderson (n 3).
\(^6\) Markus A. Petsche, ‘Choice of Law in International Commercial Arbitration’. 
example, the tribunal can apply the arbitral seat’s conflict of law rules, or international conflict of law rules.7

1.4. Importance of deciding on the applicable procedural law in an arbitration
There are crucial consequences in terms of the applicable procedural law. Procedural law is applied to govern issues such as the constitution of the tribunal and the requirements of due process. However, in certain exceptional circumstances, the courts will deal with these matters according to the governing law of the place of the arbitration.

The lex arbitri which governs the arbitral proceedings, is almost always the law of the place of arbitration.8 According to Alastair Henderson9, “place” and “seat” of arbitration can be used interchangeably, but “seat” is preferable as it reflects more accurately the juridical nature of the concept, the nexus between territorial attachment and applicable law.10 Similarly, the term “seat” is not equivalent to “venue”. “Seat of the arbitration” flows from the juridical seat of arbitration, whereas “venue of arbitration” ordinarily refers to the geographical or physical seat of arbitration which can be moved to other locations as may suit the convenience of the parties and the arbitral tribunal.11

To understand the law governing the proceedings of the arbitral tribunal, one must first know about the law of the seat. The law of the seat had its early origins in the Geneva Protocol on Arbitration Clauses 1923, where Article 2 states that “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.”12 In recent times, modern international instruments such as the UNCITRAL Model Law on International Commercial Arbitration 1985 (“Model Law”) adopted a similar stance where its provisions will only apply “if the place of arbitration is in the territory of this State”.13

In the context of Malaysia, the Arbitration Act 2005 (Act 646) is the main legislation governing matters pertaining to arbitration, which is closely modelled on the “Model Law”. Currently, two Acts govern arbitration in Malaysia, namely the aforementioned Arbitration Act 2005 (“AA 2005”), which applies to those who started practising as arbitrators after 15 March 2006 and the Arbitration Act 1952, which only applies to arbitrators who started practising prior to 15 March

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9 Alastair Henderson (n 3).
10 ibid.
The People’s In conduct (Revised official provides property among parties. arbitral arbitration with defines The update challenge decision 2005 arbitral 2006. https://uk.practicallaw.thomsonreuters.com/8 Arbitration [2017] Rabindra Belden, Dhillon, a recent A III main section of its newer Arbitration Act permits the arbitral tribunal to determine its own jurisdiction by virtue of Section 18(1) of the Arbitration Act 2005 whilst the older Arbitration Act did not. However, it should be noted that the arbitrator’s decision on the issue of jurisdiction may be challenged via an appeal to the High Court but such challenge shall not delay the arbitration proceedings. 

Besides that, the AA 2005 is also a timely update to the Malaysian lex arbitri which would boost confidence of international businesses towards Malaysian arbitration.

The Arbitration Act 2005 (“AA 2005”) largely resembles Sections 3 to 36 of the Model Law, but Part III and Part IV contain some sections which are not found in the Model Law. The AA 2005 defines “seat of arbitration” as the place where the arbitration is based as determined in accordance with section 22 of the AA 2005. Parties to an arbitration are free to agree on the seat of arbitration but in the event they fail to do so, the seat of arbitration shall be determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. The arbitral tribunal could meet at any place it considers appropriate for consultation among its members for hearing witnesses, experts of the parties, or for inspection of goods, other property or documents, unless otherwise agreed by the parties. Similar to Section 22 of the AA 2005, Rule 7(1) of the Asian International Arbitration Centre Rules (Revised 2017) in Part I provides for Kuala Lumpur to be the seat of arbitration, unless the arbitral tribunal determines according to circumstances of the case, that another seat is more appropriate. According to the official website of the Asian International Arbitration Centre (AIAC), the AIAC Arbitration Rules (Revised 2017) offers a comprehensive procedural process upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The AIAC Arbitration Rules has three parts to it. Part I comprises of AIAC Arbitration Rules (revised 2017), while Part II consists of UNCITRAL Arbitration Rules (revised 2013) and Part III contains three schedules.

In a recent case, the Federal Court in Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People’s Democratic Republic affirmed that the seat of the arbitration establishes the lex arbitri. The main issue was where the governing law of the contract is foreign law and the seat of arbitration is Malaysia, does the parties’ stipulation of Malaysia as the seat constitute an express

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15 Arbitration Act 2005, s 18(9).
18 Arbitration Act 2005, s 2(1).
19 Arbitration Act, 2005, s 22(1).
20 Arbitration Act, 2005, s 22(2).
21 Arbitration Act, 2005, s 22(3).
22 Rule 7 on the Seat of Arbitration, AIAC Arbitration Rules.
agreement that the law governing the arbitration agreement is Malaysian law. The Federal Court used the principle in Section 37(1)(a)(ii) of the AA 2005 which provides that an arbitration agreement must be valid under Malaysian law. The Federal Court held that in the absence of the parties expressly nominating the law governing the arbitration agreement, the lex arbitri or the law of the seat shall be the governing law to prevent any contradiction for enforcement purposes between the lex arbitri and the governing law of the arbitration agreement.\(^{25}\)

### 2.2 DEROGATION FROM LEX ARBITRI

#### 2.2.1 Amending and opting out the law of the seat
The law of the seat comprises totality of the general application of national law to arbitrations seated in that State, and the parties will get to enjoy substantial freedom to opt out of the procedural parts of the law in any particular case. The absence of prescriptive detail regarding the internal procedures of the arbitration in most of the arbitration laws, and by the considerable latitude afforded to parties to supplement, the Model Law is used to vary or exclude provisions of the law of seat either directly or by the adoption of institutional rules. If the parties choose to opt out from the law of seat, the procedural rule applicable to the arbitration will be different from the general law of seat, and it will be more detailed and prescriptive.

In *Daimler South East Asia Pte Ltd v Front Row Investment Holdings (Singapore) Pte Ltd*\(^ {26}\) (“Daimler”), the disputed issue was whether the parties’ choice of ICC arbitration rules operated to exclude statutory right to appeal on a question of law under s.49(1) of the domestic Arbitration Act. Section 49(2) of the Act states that the right of appeal can be excluded by agreement and the court found that such an exclusion had been validly affected by the parties’ adoption of the 1998 ICC rules of arbitration. Article 28(6) of the ICC rules provides that “By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form or recourse in so far as such waiver can validly be made.” This case illustrates that adoption of institutional rules by the parties can prevail over non-mandatory provisions of the *lex loci arbitri*.

#### 2.2.2. Limits on party autonomy (Emphasis on AIAC rules)
The AIAC i-Arbitration Rules are of Syariah compliant, it is a set of procedural rules covering all aspects of the arbitration process, which parties may agree in whole in order to resolve their disputes. AIAC i-Arbitration Rules adopt UNCITRAL Arbitration Rules 2010. Article 35(1) of the AIAC i-Arbitration Rules state, “The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties,

\(^{24}\) [2017] MLJU 1196.  
\(^{25}\) [2017] MLJU 1196.  
\(^{26}\) [2012] 4 SLR 837.
the arbitral tribunal shall apply the law which it determines to be appropriate.”. When there is a conflict between rules prescribed by institutional rules and national procedural laws, party autonomy must be given priority.27 The only exception to this is where institutional rules conflict with a mandatory provision in domestic legislation as Article 1(3) of the AIAC Rules provides that “These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.”

There is no precise definition in AIAC Rules which attempt to define the scope of “mandatory provision”. However, the United Kingdom’s Arbitration Act 1996 provides the answer:

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

It is unusual that only the United Kingdom provides for the scope of mandatory and non-mandatory provisions. In the absence of express guidance in the words of the statute, the Canadian case of Noble China Inc v Lei Kat Cheong28 illustrates the approach taken for statutory interpretation. The court was considering to set aside an award under Article 34 of the Model Law, which had force of law in Ontario, but the parties disagreed as to whether Article 34 was mandatory and therefore non-excludable. The court noted that each of the Model Law articles considered mandatory by the Analytical Commentary which contains the familiar mandatory language of ‘shall’, whereas other provisions in the Model Law contain the familiar permissive language of ‘may’. The court held that Article 34 did not contain ‘shall’ language, and for this the court concluded that Article 34 was not mandatory and that the exclusion was valid and lawful.

As such, although the parties should be at liberty to frame and regulate an arbitration as they think it is suitable, the liberty is only permitted to the extent that their choices do not contravene with the express or implied mandatory application conferred by the provisions in the law of seat. Hence, the freedom to modify the lex arbitri is not absolute: the parties can only agree variations to the extent that such provision is not inconsistent with a provision of the Model Law or the part from which the parties cannot derogate.

2.2.3. Parties choosing to subject their arbitration to the procedural laws of a country other than the seat (lex loci arbitri vs lex arbitri)

The concept of subjecting an arbitration in one state to the procedural law of another has been the subject of much theoretical discussion. There is clear judicial recognition of the conceptual validity of such an agreement; that is, for parties to choose to subject their arbitration to the procedural laws of a country other than the seat. However, this is coupled with cautionary words about the complexities that would result and thus a strong reluctance to find that such a dichotomy exists.

In *Naviera Amazonia Peruana SA v Compania International de Seguros del Peru*\(^{29}\), the English Court of Appeal held that there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. It is further contended that the limits and implications of any such agreement have been much discussed in the literature but apart from the decision in the instant case there appears to be no reported case where this happened.

Even if parties do choose to subject their arbitration to the laws of a place other than the seat of the arbitration, the courts of that other place will not be able to acquire supervisory jurisdiction over the arbitration despite the fact that the arbitration is to be held in a foreign state as a basic matter of sovereignty and international comity and also according to basic principles of international arbitration. This view has been confirmed by the English courts: “an agreement to arbitrate in X subject to English procedural law would not empower out courts to exercise jurisdiction over the arbitration in X”.

As laid down by the court in *Shashoua v Sharma*\(^{30}\), it is generally accepted that challenges to arbitrators and awards must be brought in, and only in, the courts of the seat of the arbitration. This is the effect of reading Article 13(4), 34(1) and 34(2) in conjunction with Article 1(2) and 6 of the Model Law. The Model Law does not contemplate and in fact denied that the restricted territorial jurisdiction of courts under that Law can be extended merely because parties purport to agree on such an agreement. In summary, it confirms that despite of the fact that the parties can validly contract out of many of the procedural aspects of that law, choosing to apply the procedural rules of a foreign *lex arbitri*, they are not able to derogate with similar ease from the external aspects of the *lex arbitri* at the seat of arbitration, either in regards to the connection between the arbitration and the national courts at the seat or in any other mandatory aspects of the law and public policy of the seat. As such, there is clear distinction between the *lex loci arbitri* (the law of the place of the arbitration) and the *lex arbitri* (the law of the arbitration).

\(^{30}\) [2009] EWHC 957.
3. IDENTIFICATION AND DETERMINATION OF LEX ARBITRI

3.1. Agreed in agreement

Arbitral seat is extremely vital in the determination of lex arbitri. Normally, the parties or the arbitral institutions on behalf of the parties will play a role in determining the seat. Lex arbitri is generally the law of the place where the tribunal is seated.\(^{31}\) It should be noted that the arbitral seat is a juridical concept, rather than a geographical location to hold an arbitration.\(^{32}\) Despite the differences spotted in various arbitration legislations around the world, each of them allows for the parties to come to an agreement on the place of arbitration, as seen in the Art. 20 of the UNCITRAL Model Law.

Judicial decisions in Asia are persuaded, towards showing that the arbitral situs is the most relevant factor in determining the law governing the proceedings of the arbitration. The court in *Bharat Aluminium v. Kaiser Aluminium*,\(^{33}\) emphasised that the seat of arbitration is the key element in determining the lex arbitri. Furthermore, the case of *PT Garuda Indonesia v. Bergein Air*\(^{34}\) decided that the arbitration proceedings would be subjected to Indonesian law as Indonesia was agreed to be the place of arbitration. It was stipulated here that “where parties have agreed on the place of arbitration, it does not change even though the tribunal may need to hear witnesses or done any other things in relation to the arbitration in a different location”.

3.2. Absence of agreement by parties

Absence of agreement by parties could happen when the contracts do not clearly specify the seat or there are circumstances whereby parties are unable to come to an agreement as to the law they intend to be bound under. Nevertheless, there are several ways to identify or determine the governing procedural law in arbitration, in such situations. Firstly, the contract would be interpreted based on the proper law of arbitration to identify the lex arbitri. In the case of *Braes of Doune Wind Farm (Scotland) Ltd v Alfred Mc Alpine Business Services Ltd*\(^{35}\), it was held that the majority of the provisions denoted the parties’ intention to seat the arbitration in England under the supervision of the English courts, with Glasgow only merely intended to be the venue for hearings, but not the seat. Hence, the lex arbitri was the law of England in this case.

Besides that, the tribunal or administering institutions could also determine the lex arbitri by resolving the location of the seat. For instance, Article 20(1) of the UNCITRAL Model Law

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35 *Braes of Doune Wind Farm (Scotland) Ltd v Alfred Mc Alpine Business Services Ltd* [2008] EWHC 426.
provides that the arbitral tribunal should determine the place of arbitration by considering the circumstances of the case. This also includes the convenience of the parties, in terms of location. *Union of India v. McDonnel Douglas Corp.* [1993] 2 Lloyd’s Rep. 48 clarified that it is not definite that the determination of a place indicates that all proceedings must transpire there. Convenience could be achieved if parties and arbitrators conduct meetings and hearings in various places, and this change in geographical location of a proceeding does not alter the juridical seat of arbitration changes.

Institutions normally play their role as third parties in a dispute. However, in an event where the tribunal does not hold the authority to determine on the seat of the arbitration and there is an absence of agreement between the parties, matters as to the law governing the procedural law of arbitration would be determined by the courts.36

Generally, the determination of lex arbitri is not actuated by the national courts. However, the courts could execute supervisory powers under the national arbitration laws. To do so, courts must first look into as to whether it has the jurisdiction under such laws by determining the arbitral seat.37 This is illustrated in *Woh Hup (pte) Ltd v Property Development Ltd*38, whereby the court had to decide whether it had a particular enforcement jurisdiction under the national arbitration laws by determining the arbitral seat and the applicable arbitration law of proceedings. For instance, the court in *PT Garuda Indonesia*39 as explained above, declined the jurisdiction to set aside an award on the basis of its initial finding that the seat of arbitration was in Indonesia.

**CONCLUSION**

International arbitration aims to meet parties’ intentions and expectations as a method of dispute resolution and the arbitral tribunal is penultimately entrusted with the duty of adjusting the parties’ expectations to its analysis of all the legal aspects of the arbitration proceeding.

An analysis of the different methodological approaches in determining the procedural law applicable in arbitral proceedings as illustrated above shows that each presents its own advantages and disadvantages. Thus, it then lies on the ability of arbitrators to be able to distinguish and identify the best solution in determining what is the applicable

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38 *Woh Hup (pte) Ltd v Property Development Ltd* [1991] 1 SLR (R) 473.