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Tereza Profeldová

Does Undisputed Jurisdiction of Arbitral Tribunal Also Provide Parties with Effective Control Mechanism from Side of Courts?

Key words:
Domestic and Foreign Arbitral Proceedings | Lex Arbitri | Arbitration agreement | Seat of the Arbitral proceedings | Judicial Assistance of the State Courts | Control Functions of the State Courts | New York Convention | UNCITRAL Model law | Jurisdiction of the State Courts | Arbitral Award | Recognition and Enforcement of Arbitral Awards | Interim Measures

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Abstract *| The jurisdiction of the courts is not something one usually thinks of when it comes to the conclusion of an arbitration agreement. Despite doctrines advocating for a transnational or anational approach to international arbitration, arbitral proceedings are being conducted under the national lex arbitri. In some ways, they are reliant on the courts, especially with regard to judicial assistance and the performance of the controlling functions that the state retains over arbitration.*

Unlike the jurisdiction of the Arbitral Tribunal, which is the direct result of the Parties´ autonomy, the jurisdiction exercised by courts is determined by the law of the particular state and cannot be influenced by the Parties. Contrary to the general belief, the involvement of courts may prove to be quite complicated.

The national lex arbitri usually reserves the full jurisdiction of the courts only for proceedings that are considered domestic in the relevant state. When it comes to foreign proceedings, the scope of jurisdiction of the courts varies significantly. In some cases, the Parties to such proceedings or the Arbitral Tribunal have no access to the courts of another state at all. What makes the situation even more complex is the fact that the seat of arbitration as the decisive (but not exclusive) connecting factor needs to be seen as an "artificial" legal concept. It does not have to have any real connection to the Parties or the subject of arbitration, which makes the need for intervention by the courts of another state (that has an actual

connection to the proceedings) more likely.
There are different ways in which the choice made by the Parties with regard to the seat of arbitration influences the way in which judicial assistance of the courts may be sought. When determining the seat of arbitration, the Parties should take into account several key issues in order to ensure that the arbitral proceedings won´t be jeopardised due to a lack of judicial assistance.

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I. Introduction

4.01. While there are undoubtedly many different reasons for the Parties to an international commercial contract to choose arbitration[1] over litigation as a dispute resolution mechanism, one such motivation to enter into an arbitration agreement may be to avoid the jurisdiction of state courts, especially of those having general jurisdiction over the opposing party.[2] At the same time, the conclusion of an arbitration agreement does not mean the absolute exclusion of possible intervention by state courts. Under national arbitration laws, state courts are often entrusted with the task of providing judicial assistance with regard to procedural steps falling outside the powers of the Arbitral Tribunal.

4.02. The national *lex arbitri* usually reflects the contractual nature of the arbitration agreement, which means that an arbitration agreement is only binding on the Parties. This effectively prevents the Arbitral Tribunal from compelling third persons to appear before the Arbitral Tribunal and to give evidence, to submit documents or to otherwise provide information relevant to the merits of the case.[3] Apart from that, the state courts play an important role when it comes to interim and conservatory measures, as well as preliminary orders. While some national arbitration laws, especially those that are based on the UNCITRAL Model Law on International Commercial

[1] From a commercial perspective, international arbitration is perceived as providing a neutral, expedient and expert dispute resolution process, largely subject to the parties´ control, in a single, centralized forum, with internationally enforceable dispute resolution agreements and decisions. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, VOL. I, Austin: Wolters Kluwer (2009), et. 71.

[2] FRANK-BERND WEIGAND, ANTJE BAUMAN, PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, Oxford: Oxford University Press, (2nd ed. 2009), et. 33.

[3] PHILIPPE FOUCHARD, EMMANUEL GAILLARD, JOHN SAVAGE, BERTHOLD GOLDMAN, FOUCHARD GALLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, The Hague: Kluwer Law International (1999), et. 414.

Arbitration[4] (hereinafter the Model Law), provide the Arbitral Tribunal with the powers to grant interim measures, etc.,[5] other national arbitration laws leave the authority to grant interim measures exclusively with the state courts.[6]

4.03. Another example of state court intervention is the appointment of arbitrator(s) in the event it is not possible to constitute the Arbitral Tribunal in any other way, i.e. if a party fails to choose an arbitrator. Admittedly, the need for the court's assistance in this respect is usually limited to *ad hoc* arbitration. In the majority of cases, the procedural rules applied in proceedings before arbitration institutions (both international and domestic) contain provisions under which an arbitrator can be appointed by the arbitration court.

4.04. However, probably the most important task entrusted to the state courts is the authority to review the arbitral award, should a Party apply for it to be set aside. This is not to be seen as interference with the jurisdiction of the Arbitral Tribunal, but rather as a way to ensure that the arbitral award complies with the basic requirements and procedural principles of fair trial that are needed so that the state can declare it enforceable

[4] As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 07 July 2006, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (accessed on 22 March 2022). The Arbitral Tribunal is granted substantial authority in this respect in Articles 17 through 17G. Whereas the original version of the Model Law from 1985 already provided for the possibility of interim measures being ordered by the Arbitral Tribunal, the 2006 revision of the Model Law significantly broadened the scope of authority of the Arbitral Tribunal in this respect. Nevertheless, even in those cases where the Arbitral Tribunal is authorized to order certain interim and other measures, the state courts may intervene when the person against whom such decision was rendered refuses to comply with it and to perform the respective obligation imposed on said person. Article 17H together with Article 17I of the Model law stipulate conditions for the recognition and enforcement of the interim measure issued by the Arbitral Tribunal. The following Article 17J foresees the possibility of the interim measures being ordered by the state courts. In other words, it is widely accepted that even if the national arbitration law provides the Arbitral Tribunal with the authority to order interim measures, it may be in the interests of the Parties and the effectiveness of the interim measure ordered for the respective decision to be rendered by a state court.

[5] See also (i) Austria - see section 593 of the Austrian Civil Procedure Code - Gesetz vom 01 August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO). StF: RGBl. Nr. 113/1895, available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699 (accessed on 22 March 2022), (ii) Germany – see Section 1041 of the German Civil Procedure Code - Zivilprozessordnung in der Fassung der Bekanntmachung vom 05 Dezember 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781), die zuletzt durch Artikel 3 des Gesetzes vom 05 Oktober 2021 (BGBl. I S. 4607) geändert worden ist, available at: https://www.gesetze-im-internet.de/zpo/BJNR005330950.html (accessed on 22 March 2022), (iii) Ukraine – see Art. 17 of the Ukrainian Act on International Commercial Arbitration - Закон України Про міжнародний комерційний арбітраж, available at: https://zakon.rada.gov.ua/laws/show/4002-12#Text (accessed on 22 March 2022), (iv) Sections 38 and 39 of the UK Arbitration Act 1996 applicable in England, Wales and Northern Ireland, available at https://www.legislation.gov.uk/ukpga/1996/23/contents (accessed on 22 March 2022) or (v) Section 25 of the Swedish Arbitration Act - Lag (1999:116) om skiljeförfarande, available at: https://sccinstitute.com/media/408923/skiljeforfarandelagen_1mars2019_swedish.pdf (accessed on 22 March 2022).

[6] A typical example of this approach, which is nowadays not often seen, is the Czech arbitration law – See section 20 of Act No. 216/1994 Coll., on Arbitral Proceedings and on the Enforcement of Arbitral Awards.

(guarantee its enforceability) in exactly the same manner as judgements of the state courts.

4.05. Whereas the jurisdiction of the Arbitral Tribunal constitutes a necessary precondition for the arbitral proceedings to be held, judicial assistance, together with the exercise of the control functions of the state courts, is to be seen as equally important. Since the scope of the authority of the state court varies significantly based on the content of the national arbitration law, the connection between the jurisdiction of the Arbitral Tribunal and the role of the state courts may play a role when the Parties draft their arbitration agreement. As will be demonstrated below, the Parties to an arbitration agreement cannot automatically assume that a valid arbitration agreement is going to provide them with the possibility to make full use of judicial assistance and the control functions of the state courts.

II. Significance of Seat of Arbitration

4.06. As already stated above, the scope of intervention by the state courts does not fall within the principle of the autonomy of the parties, but it is instead governed by the applicable national arbitration law (lex arbitri). Under the localization theory (seat theory), arbitral proceedings are governed by the *lex loci arbitri* (the arbitration law at the seat of the respective arbitral proceedings). From this perspective, the seat of the arbitral proceedings represents a territorial connection between the proceedings and the arbitration law of the place where the proceedings are formally (legally) localized.[7]

4.07. It follows that the seat (or as it is sometimes referred to, the "place") of the arbitral proceedings is a legal concept, rather than an actual (geographical) one.[8] Usually, the seat of the arbitral proceedings is the place where the award is deemed to be made.[9] Based on the above, the choice of the seat of the arbitral proceedings is crucial. The stipulation of the seat of the arbitral proceedings does not constitute a *condicio sine qua non* for the valid conclusion of the arbitration agreement. Nevertheless, the increasing number of arbitral proceedings in which the seat of arbitration was directly agreed by the Parties is considered to

[7] ALEXANDER J. BĚLOHLÁVEK, ARBITRATION LAW OF CZECH REPUBLIC: PRACTICE AND PROCEDURE, New York: JurisNet LLC (2013), et. 832-833.

[8] See also the place where the hearing is held, evidence is taken or the deliberations of the Arbitral Tribunal take place.

[9] MICHAEL W. BÜHLER, THOMAS H. WEBSTER, HANDBOOK OF ICC ARBITRATION: COMMENTARY AND MATERIALS, London: Sweet & Maxwell (2nd ed. 2008), et. 209.

be positive.[10] It provides additional protection of the Parties' interests.

4.08. In the absence of the Parties' choice of the seat of the Arbitral Proceedings, it is usually the Arbitral Tribunal[11] or the relevant arbitral institution[12] that makes the ultimate decision on the seat of the arbitral proceedings. In accordance with the Model Law,[13] the national arbitration law usually stipulates that when determining the seat of the arbitral proceedings, regard should be given to the circumstances of the case, including the convenience of the Parties. While it is understandable that, because of the individual circumstances of the case and often different interests of the Parties, there are no specific criteria based on which the seat of the arbitral proceedings is to be chosen, with only a general reference to the suitability of the place that should be determined as the seat of the arbitral proceedings, it may lead to results not anticipated and intended by the Parties.

4.09. Some authors try to list specific criteria, such as the logistical convenience of the Parties, the language and the applicable law of the contract, political neutrality, the likelihood of excessive intervention by the state courts, anticipated costs of the proceedings at a certain venue and the legal framework ensuring the enforceability of the arbitral award.[14] Nevertheless, it is to be noted that these criteria have very little connection with the actual purpose of the seat of the arbitral proceedings and do not reflect its significance for the Parties. As has been stated above, the importance of the seat of the arbitral proceedings lies in the fact that it connects the arbitral proceedings with a particular law that governs the procedure - to the extent that this does not fall within the autonomy of the Parties and/or within the

[10] W. LAURENCE CRAIG, WILLIAM W. PARK, JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, New York: Oceana Publications, Inc. (3rd ed. 2000), et. 185-186. For the increase in the number of arbitration agreements containing a valid choice of the seat of the arbitration, compare also PHILIPPE FOUCHARD, EMMANUEL GAILLARD, JOHN SAVAGE, BERTHOLD GOLDMAN, FOUCHARD GALLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, The Hague: Kluwer Law International (1999), et. 675.

[11] Section 17 of Czech Act No. 216/1994 Coll., on Arbitral Proceedings and on the Enforcement of Arbitral Awards, Section 1043 of the German Civil Procedure Code, Section 595 of the Austrian Civil Procedure Code, Article 20 of the Ukrainian Act on International Commercial Arbitration, Section 3(c) of the UK Arbitration Act 1996 applicable in England, Wales and Northern Ireland (however, Section 3(b) of the said legislation specifically refers to the possibility that the seat of the arbitral proceedings be designated by the arbitral institution before which the proceedings are being held), Section 22 of the Swedish Arbitration Act.

[12] Article 18(1) of the ICC Rules of Arbitration available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_18 (accessed on 22 March 2022), Article 25(1) of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), available at: https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf (accessed on 22 March 2022).

[13] See Article 20(1).

[14] W. LAURENCE CRAIG, WILLIAM W. PARK, JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, New York: Oceana Publications, Inc. (3rd ed. 2000), et. 186.

autonomy of the Arbitral Tribunal to decide on the conduct of the arbitral proceedings.

4.10. The Parties' choice of the seat of the arbitral proceedings usually has little to do with the subject of the proceedings. The substantive law governing the contract is independent from the law of the state where the arbitral proceedings are seated. The same can be said about the language. As far as the practicalities, including the potential costs, are concerned, it needs to be reiterated that procedural acts do not necessarily need to be carried out at the seat of arbitration. Similarly, there is little to no connection between the seat of arbitration and the place where it shall be enforced. Since the New York Convention[15] is considered be one of the most successful international treaties and provides an effective mechanism for the enforcement of arbitral awards throughout the world, there is no need for the Parties to insist on a venue where the award is likely going to be enforced to be designated as the seat of the arbitral proceedings.[16]

4.11. Moreover, the interests of the Parties with regard to intervention by state courts may differ. It would not be correct to automatically assume that by consenting to arbitration, a Party has also expressed an interest in minimising the influence of the state courts. One can easily imagine that a Party may want to enjoy the advantages that are usually ascribed to international arbitration, but at the same time requests assurances of possible (strong) legal remedies, should the arbitral proceedings not be conducted in accordance with the procedural principles of fair trial, etc.

4.12. Given the potential individual and possible different interests of the Parties that are not and cannot be known to the person deciding on the seat of arbitration, it somehow seems to be understandable that reference is usually made to general criteria with which the Arbitral Tribunal or arbitral institution can work. However, the limits of this way of designating the seat of the arbitral proceedings are undeniable. Therefore, it is highly advisable for the Parties to decide on the seat of the

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration held between 20 May – 10 June 1958 in New York, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf (accessed on 22 March 2022).

[16] Setting aside the fact that the Parties´ interests may differ here and therefore a conclusion according to which such venue would be suitable for the Parties is unlikely. Under the principle of the fair and equal treatment of the Parties, it would breach the duties of the Arbitral Tribunal (arbitral institution) to determine the seat of the arbitral proceedings based on the interests of one Party only. Secondly, it may often be unclear at the stage of the determination of the seat of the arbitral proceedings, in which state could the arbitral award be enforced.

arbitral proceedings themselves, while thoroughly examining the implications of their choice under the relevant *lex arbitri*.

4.13. The relevance of the Parties' choice is even greater in a situation in which the seat of the arbitral proceedings would be determined by default in the absence of the Parties' will under the applicable procedural rules. They provide little to no space for consideration and choose the seat of the arbitral proceedings directly.[17] It is exactly such default designation of the seat of the arbitral proceedings that may lead to unexpected results that can even harm the Parties' legitimate interests.

III. Seat of Arbitral proceedings and Influence Thereof on Jurisdiction of State Courts to Exercise Judicial Assistance and Control Functions Towards Arbitration

4.14. Such problematics often tend to be diminished to the notion that a direct consequence of the Parties' choice of the seat of the arbitral proceedings is the selection of the state courts responsible for assistance in any aspects of the arbitral proceedings, including the setting aside of the arbitral award.[18]

4.15. While the above is correct in the majority of instances, it needs to be reiterated that the jurisdiction of the state courts can only be determined by the national legislature or by the international treaty that establishes the jurisdiction of the national courts of a certain state in specific circumstances.[19] What this means in practice is that the Parties to arbitral proceedings cannot establish the jurisdiction of the state courts where the seat of the arbitral proceedings is situated, should the national arbitration law stipulate different/additional criteria for the determination of jurisdiction. This is why the Parties should pay extra attention to how the *lex arbitri* defines the jurisdiction of the state courts

[17] See also Article 25(1) of the VIAC (Vienna International Arbitral Centre) Rules of Arbitration and Mediation according to which absent any agreement by the Parties, the place of arbitration shall be Vienna – available at: https://www.viac.eu/en/arbitration/content/vienna-rules-2021-online (accessed on 22 March 2022). Similarly, Article 16.2 of the LCIA (London Court of International Arbitration) Arbitration Rules stipulates that in default of any agreement by the Parties, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances, that another arbitral seat is more appropriate – available at: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (accessed on 22 March 2022).

[18] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, VOL. I, Austin: Wolters Kluwer (2009), et. 176 or MICHAEL W. BÜHLER, THOMAS H. WEBSTER, HANDBOOK OF ICC ARBITRATION: COMMENTARY AND MATERIALS, London: Sweet & Maxwell (2nd ed. 2008), et. 208-209.

[19] As will be elaborated on further, a typical example is the New York Convention stipulating the jurisdiction of state courts with regard to the enforcement of certain arbitral awards.

and whether they will be able to revert to the state courts, if need be.

4.16. Moreover, the content of the national arbitration law is only one of the things that needs to be considered. As will be demonstrated, the consequences of the choice of the seat of the arbitral proceedings may also differ based on additional circumstances, such as the existence of an international element in the legal relationship that is the subject of the arbitral proceedings,[20] or the possibility to establish (based on additional facts) the jurisdiction of the state court of another state than the one on the territory of which the seat of the arbitral proceedings is situated. The approach of the individual states may differ. The most common approaches are the following.

III.1. Jurisdiction of State Courts Based on Existence of Seat of Arbitral Proceedings

4.17. An example of national arbitration law based strictly on territorial principle is the German Civil Procedure Code.[21] The jurisdiction of German state courts is, however, not limited to domestic arbitral proceedings, i.e. proceedings that have their seat on the territory of Germany. Paragraphs 2 through 4 of Section 1025 of the German Civil Procedure Code determine the international jurisdiction of German state courts. The reason for this provision is the protection of the legitimate interests of the persons concerned.[22] The clear and unambiguous determination of the seat of the arbitral proceedings is therefore recommended not only because of the need for legal certainty with regard to the *lex arbitri* governing the proceedings, but also as a way to exclude any doubts as to the jurisdiction of state courts.[23]

4.18. Paragraph 2 stipulates general jurisdiction without the need for a specific connection to Germany. The Parties are free to revert to the German state courts regardless of the place of arbitral

[20] The lack of which led in the past even to the rejection of jurisdiction by the courts of the state of the seat of the arbitral proceedings.

[21] Section 1025(1) thereof provides that the provisions governing arbitration are to be applied where the seat of the arbitral proceedings in the sense as defined by Section 1043(1) of the German Civil Procedure Code is located in Germany. The last mentioned provision simply confirms the principle of Party autonomy, when it comes to the determination of the seat of the arbitral proceedings, and establishes the powers of the Arbitral Tribunal to determine the seat of the arbitral proceedings in the absence of the Parties choice. The provision is clearly influenced by Article 1(2) of the Model Law, according to which it shall apply (with the exemption of certain measures concerning the judicial assistance of the state courts) only if the only the seat of arbitration is in the territory of said state.

[22] INGO SAENGER, ZIVILPROZESSORDNUNG – HANDKOMMENTAR, Beden-Baden: Nomos Verlagsgesellschaft (2nd ed. 2007), et. 1949.

[23] JENS-PETER LACHMANN, HANDBUCH FÜR DIE SCHIEDSGERICHTSPRAXIS, Köln: Verlag Dr. Otto Schmidt (3rd ed. 2008), et. 263.

proceedings[24] or any other circumstances. Undisputedly, the German legislature clearly acknowledges that the state courts exercise powers that need to be performed regardless of the foreign character of the arbitral proceedings in question. At the same time, such international jurisdiction is limited to the minimum of indispensable tasks that are essential to the effective conduct of arbitral proceedings and the protection of the Parties' legitimate rights and interests.

4.19. Under Section 1032 of the German Civil Procedure Code, the German state courts are obliged to refer the Parties to arbitration, should an actin be brought before the state court that concerns a dispute falling within the scope of an arbitration agreement concluded between the Parties.[25]

4.20. Furthermore, the state courts are authorized to rule on a petition that a provisional measure or one serving to provide security be taken with regard to the subject matter of the dispute being dealt with in the arbitration proceedings.[26] From the Parties' perspective, this provision is a practical one that will commonly be used. Finally, the state courts are authorized to provide support by taking evidence or by taking any other actions reserved for judges that the Arbitral Tribunal is not in a position to take.[27]

4.21. Apart from the general international jurisdiction described above, the scope of competence of the state courts is broadened as long as the following conditions are met: (i) the seat of the arbitral proceedings has not yet been determined, and (ii) either of the Parties has its registered seat or habitual place of residence in Germany.[28] Under these circumstances, the state courts are authorized to provide judicial assistance and perform

[24] Including a situation in which the seat of the arbitral proceedings has not been determined yet, since such situation also amounts to the seat of arbitral proceedings not being in Germany.

[25] To provide the state courts with the power to do so as part of Section 1025(2) of the German Civil Procedure Code seems unnecessary, because a similar duty stems for the courts from Article II(3) of the New York Convention. The priority of international is undisputed – see THOMAS RAUSCHER, PETER WAX, JOACHIM WENZEL, MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG (ZPO) §§ 946 – 1086, München: C. H. Beck (3rd ed. 2008), et. 87. At the same time, Section 1025(2) of the German Civil Procedure Code refers to the whole Section 1032 thereof. Regardless of the (actual or envisioned) seat of the arbitral proceedings, the German state courts are also authorized to determine the admissibility or inadmissibility of arbitration proceedings (in other words, the existence and validity of the arbitration agreement). A compelling argument can be made that this is a typical task that should only be performed with regard to domestic proceedings. It is likely that the general international jurisdiction has been established in order to enable the declaration of the inadmissibility of arbitral proceedings in cases where the jurisdiction of the German state courts to hear the case would otherwise be given. Since the pending action according to Section 1032(2) of the German Civil Procedure Code does not hinder the Arbitral Tribunal from initiating and continuing the arbitral proceedings, the danger of misuse of this provision is relatively small, but still, to include this provision in Section 1025(2) of the German Civil Procedure Code seems somehow misplaced.

[26] Section 1033 of the German Civil Procedure Code.

[27] Section 1050 of the German Civil Procedure Code.

[28] Section 1025(3) of the German Civil Procedure Code.

tasks in connection with the appointment of arbitrators[29] and to decide in certain cases when a challenge against an arbitrator is raised.[30]

4.22. While such rule is not specifically mentioned in the German *lex arbitri*, a conclusion has been made that the Parties may enjoy the benefits of the jurisdiction of the German state courts if they enter into a respective agreement on jurisdiction (prorogation agreement), or instead if they agree on the application of German procedural law.[31]

III.2. Switzerland

4.23. The applicability of the *lex arbitri* and thus the jurisdiction of state courts is also governed by the territorial principle in Switzerland.[32] The distinction between national and international arbitral proceedings, together with the fact that either of them is governed by a different set of rules, results in a separate scope of jurisdiction depending on whether the proceedings are deemed to be national or international.

4.24. The revisions of arbitration law brought a more precise[33] definition of international proceedings. According to Article 176(1) IPRG, the proceedings are considered international, if at the time that the arbitration agreement was concluded, at least one of the parties thereto did not have its domicile, its habitual residence or its seat in Switzerland.[34]

4.25. The constellation at the time of the commencement of the arbitral proceedings is not relevant. The definition specifically refers to the parties to the arbitration agreement, whereas it is possible that the list of the parties taking part in the proceedings

[29] Sections 1034 and 1035 of the German Civil Procedure Code.

[30] Sections 1037 and 1038 of the German Civil Procedure Code.

[31] ADOLF BAUMBACH, WOLFGANG LAUTERBACH, JAN ALBERS, PETER HARTMANN, ZIVILPROZESSORDNUNG: MIT FAMGB, GVG UND ANDEREN NEBENGESETZEN, München: C.H. Beck (72nd ed. 2014), et. 2610.

[32] See Article 353(1) of the Swiss Civil Procedure Code, available at: https://www.fedlex.admin.ch/eli/cc/2010/262/en (accessed on 23 March 2022), with regard to domestic arbitral proceedings, and Article 176(1) of the Swiss Federal Act on Private International Law (IPRG), available at: https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en (accessed on 23 March 2022), with regard to foreign arbitral proceedings.

[33] This seems to be a more accurate description of the changes, despite the fact that they are presented as something almost completely new (see also Vanessa Alarcon Duvanel, Updated PILA: Switzerland revamps arbitration law, available at: http://arbitrationblog.practicallaw.com/updated-pila-switzerland-revamps-arbitration-law/ (accessed on 23 March 2022)).

[34] Formerly, it was required that at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. This led to discussions whether the parties to the arbitration agreement or future parties conducting the proceedings are meant. The ambiguity of the wording led to legal uncertainty on the part of the persons involved. One of the main reasons for the change was the effort to strengthen the foreseeability of the application of the relevant rules (see also the explanatory note to the amendment to PILA, available at: https://www.fedlex.admin.ch/eli/fga/2018/2548/de (accessed on 23 March 2022)).

will slightly differ.[35] As a result, proceedings that are (due to the change of the parties' legal status and other circumstances) conducted as purely domestic, without any international element, may be classed as international under the Swiss IPRG due to the situation having been different at the moment of the conclusion of the arbitration agreement.

4.26. As far as the access to judicial assistance provided by the state courts is concerned, there are no substantial effects for the Parties. Since the international proceedings are still classed as domestic due to the seat of the arbitral proceedings being in Switzerland, there is no doubt that Parties to international arbitration have sufficient access to the state courts in case of a need for judicial assistance.[36] Even before the 2020 amendment to the IPRG that strengthened the jurisdiction of the state courts, they were able to step in where the Arbitral Tribunal did not possess sufficient power to take certain procedural steps. The changes just deepened the authority of the state courts in this respect.

4.27. They can be called upon when it comes to the constitution of the Arbitral Tribunal,[37] when the arbitrator is challenged and a Party requests his/her removal,[38] the state courts are able to order interim or conservatory measures and may assist with the enforcement thereof, should the Party against whom such measure were ordered not comply with it.[39] Apart from that, the state courts may assist with the taking of evidence, should it become necessary due to the Arbitral Tribunal not being able to conduct the full taking of evidence itself.[40] Finally, in order to make sure that the Parties and the arbitral Tribunal will be supported by the state courts in any way possible, Article 185 IPRG stipulates that if any further assistance by a state court

[35] The question of the extent to which arbitration agreement can be binding on third persons (i.e. other than their signatories) is a longstanding issue in international arbitration. This question arises especially with regard to legal concepts such as the piercing of the corporate veil, estoppel (in the United States, equitable estoppel and intertwined estoppel are used by the state courts in order to determine the personal scope of the arbitration agreement) and naturally legal succession.

[36] It can be concluded that the major differences lay in the procedural side of the proceedings. The rules governing international proceedings provide for more party autonomy and a less restrictive approach. The main differences can be found when it comes to the review of the arbitral award. In addition to the grounds based on which an arbitral award can be challenged in both national and international proceedings, Section 393(e)(f) of the Swiss Civil Procedure Code allows for a limited substantive review of an award rendered in national proceedings. A Party can argue that the award is arbitrary in its result, because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity. The award can further be found defective if the right to the reimbursement of costs of the proceedings as granted by the Arbitral Tribunal is obviously excessive.

[37] Article 179 IPRG.

[38] Articles 180a and 180b IPRG.

[39] Article 183 IPRG.

[40] Article 184 IPRG.

is required, the court at the seat of the arbitral tribunal has jurisdiction.

4.28. What was missing up until the 2020 amendment to the IPRG was any rule governing the relationship of the state courts towards arbitral proceedings having their seat outside Switzerland. Being in force since 01 January 2021, the new Article 185a IPRG enables Arbitral Tribunals conducting proceedings with their seat abroad, as well as the Parties thereto, to request that the state court having territorial jurisdiction over the place where evidence is to be taken participate and assist. Similarly, the state courts are called upon to enforce interim or conservatory measure ordered in foreign arbitral proceedings.

4.29. When describing the changes to the IPRG, it is emphasized that the new Article 185a IPRG does not expressly codify the jurisdiction of the state courts that has already been recognised and actually exercised. There is no doubt that the possibility to petition Swiss state courts for assistance by an Arbitral Tribunal or the Parties to foreign arbitral proceedings only exists as of 01 January 2021.[41] Until the new law came into effect, the Swiss state courts could not take any procedural steps concerning foreign arbitral proceedings.[42]

III.3. Austria

4.30. Austria is an interesting example of a state that makes a clear doctrinal distinction between the seat of the arbitral proceedings and the place of the rendering of the arbitral award. The revised *lex arbitri* is (similarly to Germany) based on the Model law.[43] Originally, the Austrian doctrine also linked the identification of the award as domestic or foreign to the seat of the arbitral proceedings.[44]

4.31. The law preceding the current regulation divided foreign and domestic arbitral awards based on the place where the arbitral

[41] Vanessa Alarcon Duvanel, Updated PILA: Switzerland revamps arbitration law, available at: http://arbitrationblog.practicallaw.com/updated-pila-switzerland-revamps-arbitration-law/ (accessed on 23 March 2022).

[42] Dominik Elmiger, Switzerland's revised international arbitration law from a litigation perspective, available at: https://www.ibanet.org/article/664E1D2C-A795-468F-94EC-78C4CD695889 (accessed on 23 March 2022). The same is implied in: Simon Gabriel, Axel Buhr, Johannes Landbrecht, Andreas Schregenberger, *International Arbitration – Switzerland, Law & Practice*, CHAMBERS, GLOBAL PRACTICE GUIDES (2021), available at: https://www.gabriel-arbitration.ch/en/arbitration-in-switzerland (accessed on 23 March 2022).

[43] See Section 577 of the Austrian Civil Procedure Code, which contains a general rule that links the application of this legal regulation to the set of arbitration on the territory of Austria.

[44] See also the decision of the Austrian Supreme Court (OGH – der Oberste Gerichtshof) from 30 September 1930, Ref. No. 4 Ob 321/30, published under ZBl 1930/360, in which the conclusion was reached that the place where the arbitral tribunal had its seat determines whether the arbitral award is foreign, provided that the parties were aware of that place and concurred (see STEFAN RIEGLER, ALEXANDER PETSCHE, ALICE FREMUTH-WOLF, MARTIN PLATTE, CHRISTOPH LIEBSCHER, ARBITRATION

award was rendered.[45] The rule was, however, interpreted so as to stipulate that the place of the rendering of the arbitral award cannot merely be factual and accidental, but needs to correspond with the expressed or at least logically inferable will of the Parties at the moment of the conclusion of the arbitral agreement. Should this not be the case, the place of the actual hearing of the case determined either by agreement of the Parties or in accordance with the applicable procedural rules takes precedence.[46]

4.32. The result of the identification of an arbitral award as foreign resulted in the absence of any recourse against it that would be available against so-called domestic awards.[47] The courts were probably aware that, under certain circumstances, the jurisdiction of the Austrian courts could have been established in spite of the otherwise relevant criteria if the case were heard on the territory of Austria.[48] Such approach can be seen as a result of the fact that different states can define the jurisdiction of the state courts with regard to arbitration in a different

LAW OF AUSTRIA: PRACTICE AND PROCEDURE, New York: Juris Publishing, Inc. (2007), et. 460), or the decision of the Austrian Supreme Court from 13 September 1935, Ref. No. 1 Ob 694/35, which further explains that the seat is only decisive for the determination of the character of the arbitral award in case the Parties anticipated such arbitration seat at the time of the conclusion of the arbitration agreement. Further to such problematics, see RUDOLF STOHANSL, MANZ GROßE, AUSGABE DER ÖSTERREICHISCHEN GESETZE, 6. Band: Jurisdiktionsnorm und Zivilprozeßordnung, Wien: Manzsche Verlags und Universitätsbuchhandlung (15th ed. 2002), et. 1611. It is seen that the concept of the seat of the arbitral proceedings as described in these decisions is in some ways different from its purely fictional (artificial) nature as we know it today. It was clearly anticipated – apart from the fact that the seat of the arbitral proceedings corresponds with the Parties´ will – that such place has some actual relevance to the proceedings. For example, the latter decision refers to the place where the arbitral tribunal hears the case. At the same time, it would be wrong to draw a conclusion of a completely different concept of the seat of the arbitral proceedings. More likely, the different characterization is a result and reflection of the lack of technology that nowadays allows the seat of the arbitral proceedings to be detached from the place where the actual procedural measures are being carried out. In fact, the procedural rules governing proceedings before the major arbitral institutions provide for the possibility of so-called online proceedings.

45 Section 79 of the Austrian regulation on enforcement (Gesetz vom 27. Mai 1896, über das Exekutions- und Sicherungsverfahren (Exekutionsordnung – EO). StF: RGBl. Nr. 79/1896, available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700 (accessed on 23 March 2022). It is to be noted that the aforementioned provision does not constitute *lex specialis* concerning arbitral proceedings, or rather the definition of a foreign arbitral award. It is a general provision dealing with the conditions for the recognition and enforcement of acts and decisions rendered outside the territory of Austria. Since the Austrian law did not contain an individual provision that would only be applicable in arbitration (see PETER ANGST, KOMMENTAR ZUR EXEKUTIONSORDNUNG, Wien: Manzsche Verlags und Universitätsbuchhandlung (2000), et. 529). Thus, it is questionable whether one can really speak of a doctrinal change or whether the reference to the place of the rendering of the arbitral award simply stems from the wording of the provision in question. The fact that the latter is the case is supported by the references to the respective case law, which is exactly the same case law from the 1930's quoted above and which works with the concept of the seat of the arbitral proceedings, even if with a different definition.

46 HANS W. FASCHING, ANDREAS KONECNY, KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, BAND IV/2, Wien: Manzsche Verlags und Universitätsbuchhandlung (2nd ed. 2007), et. 784.

47 Section 595 of the Austrian Civil Procedure Code in the wording before the 2006 arbitration law reform.

48 HANS W. FASCHING, ANDREAS KONECNY, KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, BAND IV/2, Wien: Manzsche Verlags und Universitätsbuchhandlung (2nd ed. 2007), et. 784, and the decision of the Higher Regional Court, Vienna (OLG - Oberlandesgericht – Wien) from 21 February 1985, Ref. No. 2 R 30/85 (published under EvBl 1985/120) mentioned therein.

manner, which may result in a situation in which, from a strictly formal point of view, neither state will accept the jurisdiction of its courts. The problem is that unless the *lex arbitri* expressly provides for the jurisdiction of state courts with regard to proceedings that do not (from the point of view of the criteria stipulated by the *lex arbitri*) result in the rendering of a domestic arbitral award, the Parties to foreign proceedings or Arbitral Tribunal with its seat outside Austria do not have access to the Austrian state courts.

4.33. Nevertheless, the jurisdiction of the state courts was established by the case law only and with regard to the recourse against an arbitral award. The problematics are, however, more complicated, and as has been explained above, judicial assistance is provided in many other ways. Due to the lack of any express provision, it was up to the individual decision of the state courts that would have to determine on a case-by-case basis whether they are competent to provide the judicial assistance needed. This lessens the legal certainty for the Parties to the arbitral proceedings and may create practical problems concerning the conduct of the arbitral proceedings.

4.34. As stated above, the current legislation adopted the approach taken by the Model Law and follows the criteria of the seat of the arbitral proceedings. What is more important from the perspective of this paper is that the Austrian legislature is well aware of the issues that may arise if the *lex arbitri* applies exclusively to proceedings with their seat in Austria. The state courts are – among others – provided with the jurisdiction[49] to order interim or conservatory measures,[50] to enforce such measures ordered by the Arbitral Tribunal,[51] to provide general judicial assistance pursuant to Section 602 of the Austrian Civil Procedure Code, and to decide on the existence or non-existence of an arbitral award, if the Party requesting such determination proves it has legal interest in such decision.[52]

4.35. As far as assistance with the constitution of the Arbitral Tribunal in the event of a failure to appoint an arbitrator is concerned, the Austrian state courts have jurisdiction to perform tasks entrusted thereto in connection therewith, even before the determination of the seat of the arbitral proceedings, in case one of the Parties has its seat, actual or habitual residence in Austria. This might be especially important because, should none of the

[49] Section 577(2) of the Austrian Civil Procedure Code.
[50] Section 585 of the Austrian Civil Procedure Code.
[51] Section 593(3)-(6) of the Austrian Civil Procedure Code.
[52] The Austrian state courts are authorized to decide on such declaratory relief under Section 612 of the Austrian Civil Procedure Code if the person making the application shows legal interest in the declaration.

state courts of the state having some connection to the arbitral proceedings and the parties thereto assume jurisdiction, it might be impossible to constitute the Arbitral Tribunal at all. Such result would be contrary to the Parties' will to exclude the jurisdiction of the state courts and resolve their disputes in arbitration.[53]

4.36. While the current legislation effectively ensures that the Parties can make full use of the judicial assistance provided by the state courts, the former *lex arbitri* left the question open as to whether it can be applied and the jurisdiction of the Austrian courts is to be established even if the seat of the arbitral proceedings is outside Austria.[54] While it could not be excluded that, when taking into consideration the overall circumstances of the case and the connection to Austria, the state court would provide judicial assistance with regard to foreign arbitral proceedings in individual cases, there was no guarantee for the Parties that they would be able to rely on the Austrian state courts.

III.4. Czech Republic

4.37. The Czech Republic serves as an example of a state that has its arbitration law based on the criterion of the place of the rendering of an arbitral award. Such place is usually identical to the seat of the arbitral proceedings, but Czech Act No. 216/1994 Coll. and Act No. 91/2012 Coll., on Private International Law,[55] do not contain any specific (expressed) presumption to this effect.[56]

4.38. In theory, this may lead to a situation in which the Parties situate the seat of the arbitral proceedings abroad (outside the Czech Republic), but at the same time agree that the arbitral award should be situated on the territory of the Czech Republic. At first glance, this constellation seems to benefit the Parties' interests and could provide for the jurisdiction of the state courts of both

[53] A similar solution was chosen by the Swedish legislature. According to Section 46, the Swedish Arbitration Act shall apply to arbitral proceedings seated in Sweden only, regardless of the otherwise international character of the proceedings. The Act further contains detailed regulation of international matters. Section 50 stipulates that provisions of Section 26 in connection with Section 44 regarding the taking of evidence during the arbitral proceedings in Sweden shall be applied in arbitral proceedings seated abroad, if the proceedings are based upon an arbitration agreement and, pursuant to Swedish law, the issues referred to the arbitrators may be resolved through arbitration (i.e. so-called objective arbitrability pursuant to Swedish law is given). Contrary to the Austrian law, which generally provides for the jurisdiction of the Austrian state courts when it comes to providing judicial assistance with regard to foreign arbitral proceedings, the Swedish Arbitration Act establishes such jurisdiction exclusively with regard to the specific case of the taking of evidence. It follows that in all other cases not specifically mentioned by the Swedish Arbitration Act, Swedish state courts are able to decline judicial assistance due to their lack of jurisdiction.

[54] Supposing the conditions for the jurisdiction of the Austrian state courts would otherwise be met.

[55] This law provides specific rules concerning the conduct of international arbitration.

[56] ALEXANDER J. BĚLOHLÁVEK, ARBITRATION LAW OF CZECH REPUBLIC: PRACTICE AND PROCEDURE, New York: JurisNet LLC (2013), et. 861.

the state of the seat of the arbitral proceedings, as well as of the Czech state courts, based on the fact that the arbitral award is or shall be rendered there.

4.39. Looking at the issue more closely, the (potential) concurrent jurisdiction of the state courts of multiple states can in practice ultimately have the opposite effect, with the courts of both states declining jurisdiction, arguing that the Parties can revert to the courts of the other state, which are more suitable to provide judicial assistance with regard to the arbitral proceedings. Thus, the Parties may, in the worst case, end up without any judicial assistance, or they would have to make a compelling argument proving that the refusal to assume jurisdiction would result in *denegatio iustitiae*.

4.40. There is also the opposite possibility, i.e. that the Parties agree on the seat of the arbitral proceedings being situated in the Czech Republic, but at the same time express their joint will that the arbitral award be rendered abroad. The Czech courts are likely to decline jurisdiction due to the fact that that the arbitral award will be considered foreign, whereas the foreign state courts will argue[57] that the seat of the arbitral proceedings is in the Czech Republic and therefore they also lack jurisdiction.

4.41. The Czech state courts have repeatedly refused to extend their jurisdiction when it comes to proceedings that are considered foreign under Czech Act No. 216/1994 Coll.[58] The acceptance of jurisdiction was even refused in a situation in which all aspects of the arbitral proceedings pointed to the Czech Republic, and the only foreign element that was ascertained consisted of the Parties' choice of the seat of the arbitral proceedings (which was identical with the formal place of the rendering of the arbitral award). Apart from that, the proceedings were held between two Czech persons under Czech law. All procedural steps, such as the taking of evidence, oral hearing, etc., were conducted on the territory of the Czech Republic.

4.42. Despite all of the above, the Czech Supreme Court insisted on the strict adherence to the criteria for the establishment of the jurisdiction of the Czech courts stipulated by Czech arbitration law. It is correct that the aforementioned decisions specifically concerned the jurisdiction to hear a motion for the setting aside of the arbitral award. Considering the argumentation of the Supreme Court, a justifiable conclusion can be made that a

[57] Supposing their *lex arbitri* distinguishes between domestic and foreign proceedings based on the seat of the arbitral proceedings.

[58] See resolution of the Czech Supreme Court, Ref. No. 23 Cdo 1034/2012 from 30 September 2013, and judgment of the same court, Ref. No. 23 Cdo 2542/2011 from 27 November 2013.

similar decision would be reached as far as other acts of judicial assistance are concerned.

4.43. This does not exclude the possibility that the Czech state courts would assume jurisdiction in an individual case, possibly if the Party to the arbitral proceedings would otherwise be deprived of any possibility to defend their rights and legitimate interests. The undisputed point is that there is no legal ground based on which the Parties to arbitral proceedings taking place outside the Czech Republic would be able to revert to the Czech courts, if need be. This doctrinal stance taken and approved both in the case law as well as by academics highlights problems that the Parties may encounter if they only concentrate on ensuring that the jurisdiction of the Arbitral Tribunal is undisputed, while forgetting to consider whether the structure of their arbitration agreement provides for sufficient access to state courts.

IV. Relationship between State Courts and Foreign Arbitral Proceedings

IV.1. General Remarks

4.44. The aforementioned examples of national *lex arbitri* all show that unless the legislature specifically establishes the jurisdiction of the state courts when it comes to foreign proceedings, the state courts are not authorized to act on any corresponding request. The jurisdiction of state courts may be acknowledged in individual cases. This does not guarantee sufficient protection of the rights and legitimate interests of the Parties.

4.45. The access to state courts is even more important considering the development in the understanding of the relevance and meaning of the seat of the arbitral proceedings, especially in the international context. Whereas in the past, it was implied that the seat of the arbitral proceedings has some actual relevance to the merits of the case (the Parties' underlying legal relationship). The doctrine went so far as to suggest that in the absence of the Parties' choice of governing substantive law, the Parties' will was that their legal relationship be governed by the respective substantive law of the state in which the proceedings are to be legally situated.

4.46. Technological advances enabled the further detachment of the seat of the arbitral proceedings from the subject of the dispute and the Parties. The Parties are now able, without any practical difficulties or additional costs, to choose a seat of the arbitral proceedings based solely on the content of the respective *lex arbitri,* with the proceedings in their entirety being conducted

elsewhere. Whether this possibility for a completely artificial seat of arbitral proceedings is something to aim for is up to a completely different discussion.

4.47. With regard to the subject of this article, this means that the need to conduct the taking of evidence or to take other procedural steps and to order or enforce interim or conservatory measures is now greater than ever, and that the state courts of the state where the seat of the arbitral proceedings is situated are often not in a position to provide the necessary legal assistance. This, on the other hand, significantly influences and even endangers the result of the arbitral proceedings.

4.48. As paradoxical as it may sound, it may result in the Parties' reluctance to rely on an arbitration-friendly venue and to draft their arbitration agreement in accordance with their choices concerning the conduct of the proceedings. To *quasi force* the Parties to only consider venues with some actual relevance to the subject of the dispute would contradict the primary principles governing international arbitration and undermine the Parties' autonomy.

4.49. It is recognised on an international level that the state courts may need to intervene with regard to arbitral proceedings that don't have their seat within the jurisdiction of the state courts.

IV.2. UNCITRAL Model Law

4.50. The 2006 revision of the Model Law is based on the principle that the national arbitration law should only apply if the seat of the arbitral proceedings is in the territory of the respective state. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the fact that the Model Law grants the Parties wide freedom in shaping the rules of conduct of the arbitral proceedings, so there is little need for the Parties to seek elements of a foreign (arbitration) law to be applied.

4.51. It is exactly the principle of party autonomy that is of considerable practical importance in respect of the provisions of the *lex arbitri*, which entrust the state courts at the seat of the arbitral proceedings with functions of supervision and assistance to arbitration.[59]

4.52. The drafters of the amendment to the Model Law were aware that despite the territorial approach being considered sufficient,

[59] United Nations Commission on International Trade law: UNCITRAL Model Law on International Commercial Arbitration 1985. With amendments as adopted in 2006 – et. 26-27, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (accessed on 23 March 2022).

some forms of judicial assistance might be necessary and justifiable when it comes to foreign proceedings. Thus, the revised Article 1(2) of the Model Law contains important exceptions to that principle, to the effect that certain provisions thereof apply, irrespective of whether the seat of the arbitral proceedings is in a state that based its *lex arbitri* on the Model Law or elsewhere.[60]

4.53. Apart from the provisions concerning the recognition and enforcement of arbitral awards,[61] the provisions establish the jurisdiction of the state courts with regard to the recognition of the arbitration agreement and the duty of the state courts to refer the Parties to arbitration if a claim falling within the scope of the arbitration agreement is brought before a state court, and the possibility to order interim measures despite the existence of an arbitration agreement.[62] Finally, the newly added Articles 17H, 17I and 17J establish the jurisdiction of the state courts when it comes to ordering, recognising and enforcing interim measures.

4.54. In practice, it is not sufficient for the Model Law to include the establishment of the jurisdiction of the state courts with regard to foreign arbitral proceedings. In fact, unless the applicable *lex arbitri* of the state where the arbitral proceedings are seated specifically prohibits the Parties and/or the Arbitral Tribunal to seek the assistance of the state courts, it is irrelevant whether it contains provision(-s) that would provide for the jurisdiction of the state courts with regard to foreign arbitral proceedings. The national *lex arbitri* does not and cannot have any effect on the

[60] United Nations Commission on International Trade law: UNCITRAL Model Law on International Commercial Arbitration 1985. With amendments as adopted in 2006 – et. 27, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (accessed on 23 March 2022).

[61] Articles 35 and 36 of the Model Law. These provisions do not differentiate between the enforcement of domestic and foreign awards (they apply to arbitral awards "irrespective of the country in which it was made"), which is also a reason why the jurisdiction of the state courts with regard to foreign arbitral awards needed to be established. As far as domestic arbitral awards are concerned, the grounds for setting such award aside as stipulated in Article 34 of the Model Law basically correspond with the grounds for the refusal of the recognition and enforcement of the arbitral award. The Model Law reflect that some states, such as Germany, don't automatically consider domestic arbitral awards to have the binding effects of a final judgment rendered by state courts, and insist on specific enforcement proceedings before a Party can rely on the award. What is interesting is that the Model Law herewith establishes equal treatment of domestic and foreign arbitral awards. So far, the national *lex arbitri* usually provided additional grounds for the setting aside of domestic arbitral awards. The Model Law does not differentiate in this respect, and even domestic awards can only be subject to limited review by the state courts, which allows for the refusal of enforcement of the arbitral award only if it shows major deficiencies.

[62] Articles 8 and 9 of the Model Law. The latter is clearly a reflection of the fact that the 2006 amendment to the Model Law opened the possibility for the state courts to order interim measures concerning foreign arbitral proceedings.

jurisdiction of foreign courts. Any other interpretation would be contrary to the principle of state sovereignty.

4.55. What determines whether a Party or Arbitral Tribunal may seek judicial assistance outside the state where the arbitral proceedings are seated is not the *lex loci arbitri,* but rather the *lex arbitri* of the state whose courts should be called upon to provide judicial assistance. It is something that the Parties should take into consideration when deciding on the seat of the arbitral proceedings. They would be well advised to review not only the *lex arbitri* that they intend to govern their proceedings, but also the *lex arbitri* of the state in which evidence or other procedural steps (including the ordering of interim measures) could potentially be taken.

IV.3. New York Convention

4.56. The primary criterion for the classification of an arbitral award as domestic or foreign used by the New York Convention is not the one generally used when determining the governing *lex arbitri*, i.e. the seat of the arbitral proceedings. Instead, according to Article I(1), the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of the awards are sought. The provision is generally interpreted as identifying the place of the rendering of the award with the seat of the arbitral proceedings. It would, however, be wrong to suggest that an award is always made there and that these terms are identical. The qualification would have to be made individually based on the rules in force in the state where recognition and enforcement are being sight.

4.57. It is acknowledged that such narrow interpretation does not fully cover all situations that may occur in practice, since the distinction between domestic and foreign arbitral award may vary based on the national *lex arbitri,* which can use different criteria.

4.58. The scope of the Convention was therefore broadened and also encompasses arbitral awards rendered on the territory of a state where recognition and enforcement is sought, but is not considered domestic by the respective *lex arbitri*.[63] This effectively excludes the possibility that an arbitral award would not gain (because of the relevant *lex arbitri*) the effects of a domestic arbitral award, but at the same time would not be

[63] Yet again, the Convention does not provide any definition of a non-domestic arbitral award, and it is left up to the national legislature to stipulate which (if any) arbitral awards rendered on its territory are to be deemed foreign.

classified as foreign, and thus enforceable under the New York Convention.

4.59. The definition of a non-domestic award does not necessarily need to be included in the general provisions of the *lex arbitri,* but can form part of the regulation that (should this be a standard procedure for international treaties) implements the Convention in the national legal system.[64] There are several instances under which a state would consider an award to be non-domestic:

- an arbitral award made under the national *lex arbitri* of another state;
- an arbitral award rendered as a result of arbitral proceedings involving an international element; and
- an arbitral award that could be called anational.[65]

4.60. While it has been suggested that the first situation can only arise in case the *lex loci arbitri*[66] allows the Parties to agree to submit the proceedings to other arbitration law than the one in force in the state where the seat of the arbitral proceedings is situated,[67] it is only one of the possibilities. Moreover, the statement only holds true if we accept the assumption that the place of the rendering of the arbitral award always corresponds with the seat of the arbitral proceedings. As already explained, while it is so in the majority of cases, it is not a definite rule that always applies.

4.61. Such situation may further occur if the Parties deliberately agree on a place of the rendering of the arbitral award different than the seat of the arbitral proceedings. Since the award would be rendered on the territory of said state, the primary condition stimulated by Article I(1) of the Convention is not fulfilled. As a result, a Party would not be able to seek recognition and enforcement in said state, because the award was rendered there. This state would at the same time not consider the award to be domestic, as the seat of the arbitral proceedings lies in

[64] See INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, et. 22, available at: https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf (accessed on 23 March 2022).

[65] INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, et. 22, available at: https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf (accessed on 23 March 2022).

[66] Which incidentally is the *lex arbitri* of the state where the recognition and enforcement of the arbitral award is being sought.

[67] INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, et. 22, available at: https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf (accessed on 23 March 2022).

another state and the proceedings were subjected to another *lex arbitri*.

4.62. The second example refers to the doctrine under which an arbitral award is only considered domestic if the proceedings did not have any connection to any other state. The United States follows this approach, and the United States Federal Arbitration Act (Title 9, Chapter 2) contains a provision to this effect.[68]

4.63. The national legislature is free to follow such doctrine. The Parties should nevertheless be careful when deciding on the seat of the arbitral proceedings in a state whose *lex arbitri* only sees proceedings without any international element as domestic. On one hand, the applicability of the Convention in this situation enables the recognition and enforcement of arbitral awards that were rendered on the territory of a particular state, but are not recognised there because of the international nature of the proceedings. It is up to the Parties to ascertain whether the enforcement regime set by the Convention is sufficient for them. They need to be prepared that, apart from the refusal of recognition and enforcement based solely on the grounds foreseen by the Convection,[69] there is no recourse against the award.

4.64. The state courts of the United States long took the view that an arbitral award made in the United States, under American law, falls within the purview of the Convention – and is thus governed by Chapter 2 of the Federal Arbitration Act – when one of the parties to the arbitration is domiciled or has its principal place of business outside the United States.[70] The Parties cannot make use of the remedies against an award otherwise available under Title 9, Chapter 1 of the United States Federal Arbitration Act.

4.65. As a general notion, the prevailing view is that the Convention can apply to arbitral awards that are the result of proceedings detached from any national arbitration law and conducted only based on transnational rules and general principles of arbitration

[68] See Section 202, pursuant to which an agreement or award arising out of a legal relationship, whether contractual or not, which is considered as commercial and which is entirely between citizens of the United States, shall be deemed not to fall under the Convention, unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. Á contrario, in order for the Convention to be applied, an international element as described above needs to be present.

[69] Article V of the Convention.

[70] See also US No. 276, *Industrial Risk Insurers* v. *Barnard & Burk Group, Inc., Barnard and Burk Engineers and Constructors, Inc.* v. *M.A.N.* Gutehoffnungshütte GmbH, United States Court of Appeals, Eleventh Circuit, 94-2982; 94-2530, 22 May 1998, available at: https://www.kluwerarbitration.com/document/IPN17923 (accessed on 23 March 2022), or US No. 969, *Grupo Unidos por el Canal, S.A., et al.* v. *Autoridad del Canal de Panama*, United States District Court, Southern District of Florida, Civil Action No. 17-23996-Civ-Scola, 20 June 2018 and 13 November 2018, available at: https://www.kluwerarbitration.com/document/KLI-KA-ICCA-YB-XLIV-219-n (accessed on 23 March 2022).

law.[71] It cannot be excluded that especially state courts exercising their jurisdiction in civil law countries might be tempted not to accept arbitral proceedings not linked to any legal system at all.[72] An arbitral award rendered in such proceedings would be subject to enforcement. On the other hand, it is at least imaginable that the state in which the proceedings were conducted and arbitral award rendered would not see the award as domestic, since it was not rendered under its *lex arbitri*.

IV.4. Problems That May Arise in Connection with Choice of Seat of Arbitral Proceedings

4.66. Problems for the Parties may arise even if their choice of the seat of the arbitral proceedings is unambiguous. First and foremost, there is the question of the possibility of the so-called subjective internalization of an otherwise purely domestic dispute. Some authors argue that it is not possible to move the jurisdiction over a purely domestic dispute abroad by agreeing on a foreign forum. This is usually rejected based on the fact that the Parties cannot exclude the control functions of otherwise competent state courts, which would constitute the evasion of the arbitration law that should govern the proceedings.

4.67. This argument would be acceptable when it comes to litigation before the state courts. Considering the autonomy of the Parties, including their legitimate interest in minimising the intervention of the state courts, to limit the Parties' choice of the seat of the arbitral proceedings would undermine the primary principles governing arbitration. The Parties' extensive freedom to submit a dispute to the legal regime they consider appropriate is widely recognised.[73]

4.68. Apart from the doctrinal argument, even those who reject the concept of subjective internalization accept that, from a practical point of view, it is impossible to prevent the Parties from entering into an arbitration agreement that would place

[71] INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, et. 23, available at: https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf (accessed on 23 March 2022).

[72] This may in theory even lead to the refusal to recognize and enforce the award due to the breach of the *ordre public*.

[73] For example, arbitration is considered international under the Model Law (Article 1(3)(b)(i)) if the seat of arbitral proceedings as determined in, or pursuant to, the arbitration agreement lies (is situated) outside the state in which the Parties have their places of business.

the arbitral proceedings outside the state in which all elements of the Parties' legal relationship are situated.[74]

4.69. This does not prevent some state courts from rejecting jurisdiction if they consider the connection to the state in which they exercise jurisdiction to be too week.[75]

V. Conclusion

4.70. As has been demonstrated, the conclusion of a valid arbitration agreement that establishes the jurisdiction of the Arbitral Tribunal does not guarantee the successful conduct of arbitral proceedings. Since the arbitrators exercise their jurisdiction as private persons based on the free will of the Parties, they do not possess any powers towards third persons.

4.71. The outcome of the arbitral proceedings may therefore depend on the judicial assistance provided by the state courts. Similarly important is their ability to exercise control functions. While the conclusion of an arbitration agreement is usually seen as a manifestation of the Parties' will to exclude the jurisdiction of the state courts, it remains undisputed that in order for the arbitral awards to gain the effects of a final court judgment, the state needs to retain at least some degree of control over the conduct of arbitral proceedings within its territory.

4.72. Unlike the jurisdiction of state courts, the location of arbitral proceedings is not strictly determined by the law. The determination of the seat of the arbitral proceedings - which influences the arbitration law governing the proceedings - forms a facet of the autonomy of the Parties. Due to technological advancements, the proceedings are more than ever situated in a state that the Parties consider arbitration-friendly or otherwise suitable, but that has no real connection to the Parties or the subject of the dispute. This may result in a need to take evidence or order, recognise and enforce interim measures in various jurisdictions outside the state of the seat of the arbitral proceedings.

4.73. What is often forgotten is the fact that the seat of the arbitral proceedings, together with additional circumstances, play a decisive role when it comes to the jurisdiction of the state courts. Many national arbitration laws now establish jurisdiction not only with regard to domestic arbitral proceedings, but also

[74] NADĚŽDA ROZEHNALOVÁ, ROZHODČÍ ŘÍZENÍ V MEZINÁRODNÍM A VNITROSTÁTNÍM STYKU, Praha: ASPI/Wolters Kluwer (3rd ed. 2013), et. 65.

[75] See also the decision of the Court of Appeal in Paris (Cour d´appel de Paris) in *SA Compagnie Commerciale André* v. *SA Tradigrain France* or the decision of the Svea Court of Appeal in *Titan Corporation* v. *Alcatel CITISA* as referenced in ALEXANDER J. BĚLOHLÁVEK, ARBITRATION LAW OF CZECH REPUBLIC: PRACTICE AND PROCEDURE, New York: JurisNet LLC (2013), et. 852.

establish the powers of the state courts to provide judicial assistance to arbitral proceedings seated in another state. However, this is not always the case, and the Parties cannot take for granted that they will have free access to the courts of any state with any connection to the subject-matter. The unavailability of judicial assistance by the state courts can significantly influence the outcome of the arbitral proceedings, and as such affect the rights of the Parties.

4.74. Furthermore, the use of different criteria in various national arbitration laws when it comes to the distinction between domestic and foreign arbitral proceedings impacts the jurisdiction of the state courts as well.

4.75. The content of the *lex loci arbitri* should therefore not be the only criterion for the Parties to consider when they decide on the seat of the arbitral proceedings. It is advisable for the Parties to take into account the consequences of their choice for the possibility of the state courts to provide judicial assistance or to take other necessary measures, including the performance of control functions towards arbitral proceedings.

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Summaries

FRA [***La compétence incontestable des arbitres offre-t-elle aux parties un mécanisme de contrôle efficace de la part des juridictions nationales ?***]

La compétence des juridictions nationales n'est pas un facteur que l'on prendrait systématiquement en compte lors de la conclusion d'une convention d'arbitrage. Nonobstant les théories doctrinales prônant des approches transnationales ou non-nationales de l'arbitrage international, ce dernier est mené sur la base des règles nationales de la loi du tribunal arbitral. Dans le même temps, il s'appuie dans une certaine mesure sur les juridictions nationales, notamment en ce qui concerne leur fonction auxiliaire et l'exercice du contrôle de l'arbitrage, qui reste une prérogative de l'État.

Contrairement à la compétence de l'arbitre, qui résulte directement de la volonté des parties, la compétence de la juridiction est fondée sur la loi de l'État concerné et ne peut être influencée par les parties. Cependant, et en dépit de l'opinion générale, l'intervention des juridictions peut s'avérer complexe.

Les règles nationales de la loi du tribunal arbitral prévoient généralement une pleine compétence des juridictions en matière

d'arbitrage pour les procédures arbitrales considérées comme nationales dans l'État concerné. Lorsqu'il s'agit d'une procédure arbitrale étrangère, l'étendue de la compétence des juridictions varie considérablement. Dans certains cas, ni les parties à la procédure arbitrale ni les arbitres n'ont accès aux juridictions d'un autre État. Cette situation est encore compliquée par le fait que le lieu d'arbitrage, critère de rattachement décisif (mais pas exclusif) doit être considéré comme un concept juridique « artificiel ». En effet, le lieu de l'arbitrage peut être dépourvu de tout lien réel avec les parties ou l'objet de l'arbitrage, ce qui rend plus probable la nécessité d'une intervention des juridictions d'un autre État, qui a un lien de fait avec l'arbitrage.
Il existe plusieurs facteurs qui influent sur la possibilité des parties ayant choisi le lieu du tribunal arbitral de demander aux juridictions l'exercice de leur fonction auxiliaire. Les parties devraient ainsi tenir compte de plusieurs circonstances essentielles lorsqu'elles déterminent le lieu du tribunal arbitral, afin de ne pas compromettre le déroulement de la procédure arbitrale par l'absence de la fonction auxiliaire des juridictions.

CZE [***Poskytuje nezpochybnitelná pravomoc rozhodců stranám efektivní kontrolní mechanismus ze strany soudů?***]
Pravomoc soudů není něčím, na co by člověk obvykle myslel v souvislosti s uzavíráním rozhodčí smlouvy. I přes doktrinální přístupy obhajující transnacionální či anacionální přístup k mezinárodnímu rozhodčímu řízení, koná se rozhodčí řízení na základě národní úpravy lex arbitri. V určitých směrech se spoléhá na soudy, zvláště pokud jde o jejich pomocné funkce a výkon kontroly, kterou si stát nad rozhodčím řízení ponechává.
Oproti pravomoci rozhodců, která je přímým výsledkem svobodné vůle stran, pravomoc soudů vymezují právní předpisy tohoto kterého státu bez možnosti jejího ovlivnění stranami. V rozporu s obvyklým přesvědčením se však může angažovanost soudů ukázat jako komplikovaná.
Národní úprava lex arbitri obvykle vyhrazuje plnou pravomoc soudů ve vztahu k rozhodčímu řízení pro rozhodčí řízení, která jsou v daném státě považována za domácí. Co se týče cizího rozhodčího řízení, rozsah pravomoci soudů se značně liší. V některých případech nemají strany rozhodčího řízení ani rozhodci vůbec žádný přístup k soudům jiného státu. Co činí celou situaci ještě komplexnější, je skutečnost, že na místo rozhodčího řízení, jako rozhodující (ale nikoli výhradní) kolizní určovatel, je nezbytné pohlížet jako na „umělý" právní koncept. Místo rozhodčího řízení nemusí mít žádnou reálnou spojitost se stranami nebo předmětem rozhodčího řízení, v důsledku čehož

je potřeba intervence ze strany soudů jiného státu (který má k rozhodčímu řízení faktický vztah) pravděpodobnější.
Existuje více faktorů, jejichž prostřednictvím stranami učiněná volba místa rozhodčího řízení ovlivňuje možnosti dožadovat se výkonu pomocných funkcí ze strany soudů. Strany by tedy při určení místa rozhodčího řízení měly zohlednit několik klíčových okolností tak, aby průběh rozhodčího řízení nebyl ohrožen v důsledku absence pomocných funkcí soudů.

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POL [***Czy niepodważalne kompetencje arbitrów jest dla stron efektywnym mechanizmem kontrolnym ze strony sądów krajowych?***]
Miejsce postępowania arbitrażowego jako podstawowe kryterium rozróżniające dla postępowania arbitrażowego krajowego i zagranicznego nie tylko określa właściwe lex arbitri, ale również wpływa na zakres kompetencji sądów w odniesieniu do postępowania arbitrażowego. Pojawia się coraz więcej przypadków, kiedy sądy innego kraju zmuszone są tu do interwencji (wykonywania funkcji pomocniczych). Relacje między sądami i zagranicznym postępowaniem arbitrażowym bywają niełatwe. Różnice w krajowych przepisach lex arbitri oznaczają, że nie istnieje tutaj żadna uniwersalna zasada. Dlatego tak ważne jest, by strony w postępowaniu arbitrażowym miały świadomość problemów praktycznych, z którymi mogą się spotkać oraz tego, jak wybrane przez nie miejsce postępowania arbitrażowego wpływa na kompetencje sądów.

DEU [***Verschafft die unzweifelhaft gegebene Zuständigkeit der Schiedsrichter den am Rechtsstreit beteiligten Parteien einen wirksamen Mechanismus für die gerichtliche Kontrolle?***]
Der Ort des Schiedsverfahrens – als das primäre Kriterium für die Unterscheidung zwischen inländischen und ausländischen Schiedsverfahren – bestimmt nicht nur das anzuwendende lex arbitri, sondern beeinflusst auch die Reichweite der Kompetenz der Gerichte in Bezug auf das Schiedsverfahren. In einer wachsenden Anzahl von Fällen entsteht der Bedarf an einer Intervention (in Form der Ausübung von Hilfsfunktionen) auch seitens der Gerichte eines Drittstaates. Die Beziehung zwischen den Gerichten und dem ausländischen Schiedsverfahren ist nicht immer einfach. Die zwischen den nationalen Ausgestaltungen des Schiedsrechts bestehenden Differenzen bedeuten außerdem, dass es keine einheitliche Regel für das lex arbitri gibt. Von daher

ist es wichtig, dass sich die am Schiedsparteien die praktischen Probleme bewusst werden, mit denen sie möglicherweise zu kämpfen haben werden, und sich des Einflusses bewusst sind, den ihre Wahl des Schiedsorts auf die Kompetenzen der Gerichte hat.

RUS [***Предоставляет ли сторонам несомненная компетенция арбитров эффективный механизм контроля со стороны судов?***]

Как первичный критерий разграничения между внутренним и иностранным арбитражем место проведения арбитража не только определяет применимое lex arbitri, но и влияет на объем компетенций судов в отношении арбитража. С возрастающим количеством дел возникает необходимость вмешательства (выполнения вспомогательных функций) судов другого государства. Отношения между судами и иностранным арбитражем не всегда просты. Различия между национальными нормаами lex arbitri также означают, что для них не существует единого правила. В этой связи важно, чтобы стороны арбитража осознавали практические проблемы, с которыми они могут столкнуться, а также влияние выбранного ими места проведения арбитража на компетенцию судов.

ESP [***¿Proporciona la jurisdicción incuestionable de los árbitros a las partes litigantes un mecanismo de control efectivo por parte de los tribunales nacionales?***]

El lugar del arbitraje como criterio principal para distinguir entre el arbitraje nacional y el extranjero no solo determina la lex arbitri aplicable, sino que también influye en el alcance de la jurisdicción de los tribunales en relación con el arbitraje. En una número creciente de casos, se hace necesaria la intervención (el ejercicio de funciones auxiliares) de los tribunales de otro Estado. La relación entre los tribunales nacionales y el arbitraje extranjero no siempre es sencilla. Además, las diferencias entre los regímenes nacionales de lex arbitri hacen que no exista una norma uniforme para ellos. Por lo tanto, es importante que las partes litigantes del arbitraje sean conscientes de los problemas prácticos a los que se pueden enfrentar, así como del impacto de la elección del lugar del arbitraje en el alcance de la jurisdicción de los tribunales.

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