

Importance of the Place of Arbitration

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1. Two aspects should be distinguished:
  - the procedural aspect, the applicable arbitration law;
  - the material aspect, the law applicable to the substance of the dispute.
  
2. It is generally accepted that the place of arbitration determines the applicable arbitration law. According to the New York Convention the arbitral procedure must "failing agreement of the parties" be in conformity with "the law of the country where the arbitration took place" (Article V, para. 1 under d.)

The applicable arbitration law may interfere during the course of the arbitration:

  - assistance of the Court when arbitrators must be appointed and the parties have not regulated the appointment-procedure completely;
  - challenge of arbitrators;
    - Rules of arbitration institutions usually contain a regulation of the challenge-procedure to be followed when one of the arbitrators is revoked. The decision on the challenge taken by a neutral third party, as provided in the Rules, is however subject to revision of the Court in those countries where the arbitration law gives exclusive jurisdiction to the Court in matters of challenge.
  - compelling witnesses to appear before arbitrators;
  - deposition of the award with the registry of the Court (in some countries).

An important aspect of the applicable arbitration law is the setting aside of the award after an award has been rendered. The grounds for setting aside are those contained in the applicable arbitration law. According to the New York Convention this is the law "of the country in which the award was made" (Art. V, para. 1 under e.)

The award will be made in the country "where the arbitration took place". The rendering of the award forms part of the arbitral procedure. When e. refers to the country "where the award was made", it does not refer to another law than the arbitration law of the country "where the arbitration took place" (1).

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(1) Schlosser, Das Recht der internationalen Schiedsgerichtbarkeit (1975) nos. 236 and 238

A special aspect is the enforcement of the award. Enforcement may take place in the country where the award was made. It may also be another country. Grounds for refusal of enforcement - to be distinguished from the setting aside of the award - are summed up in Article II of the New York Convention.

Enforcement may be greatly facilitated when the enforcement takes place in the country where the award has been made (its home country) and not in a foreign country.

3. Some countries take the view that the place of arbitration is also a decisive factor in the determination of the law, applicable to the substance of the dispute. This view we find especially in England (Russell, *On Arbitration*, 1970, p. 54).

Some arbitral awards can be quoted, where the arbitrators regard the place of arbitration as a decisive factor for the determination of the applicable municipal law (German and Dutch examples available).

In the mind of those who propagate an advance decision on the place of arbitration the determination of the law applicable to the substance of the dispute (a delicate question on which advance agreement of the parties in practice is often difficult to achieve) may also play a rôle. They might hope to introduce indirectly, by designating the place of arbitration, also the choice of the law applicable to the substance of the dispute.

4. Article 14

What conclusion might be drawn from these observations for the drafting of this Article?

- As We could insert *éché* the choice of the place of arbitration determines the law applicable to the arbitral procedure (the arbitration law).

"Agreement of the parties on the place of arbitration or determination by the arbitrators of the place of arbitration, determines the law applicable to the arbitral proceedings, including the deposition of the award if required by that law and the grounds for setting aside of the award".

This could also be mentioned in the commentary. This conclusion is also in accordance with the New York Convention 1958.

B. The added para. 5 of Article 14 is confusing. When the parties have agreed upon the place of arbitration the award must be rendered at that place (country or town). The arbitrators have no freedom to render their award in another country or at any other place than agreed upon by the parties (or decided by the arbitrators).

C. For the terminology it might be preferable to stick to the usual term "place of arbitration (lieu de l'arbitrage) instead of seat. I cannot see any difference between "seat" and "place".

I cannot see any use to introduce "the place where the award is made is the place where the award is delivered". What is delivery <sup>other</sup> ~~also~~ than the rendering of the award? New York Convention uses "where the award is made". The word "made" is in my opinion the same as "rendered", but I would stick, where necessary, to the terminology of the New York Convention and speak of "where the award was made".

5. In view of the above observations I submit for discussion the following text of Article 14.

Article 14

1. Unless the parties have agreed upon the place where the arbitration is to be held (~~country or city~~), such place shall be <sup>determined</sup> ~~decided~~ by the arbitrators.

2. Subject to these Rules the place of arbitration determines the law applicable to the arbitral proceedings, including the deposition of the award if required by such law and the grounds for setting aside of the award.

3. The arbitrators may determine the locale of the arbitration within the country or city agreed upon by the parties. They may hear witnesses <sup>and</sup> or hold interim meetings for consultation among themselves at any place they deem appropriate having regard to the exigencies of the arbitration.

4. The arbitrators may meet at any place they deem appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

5. The award shall be made at the place of arbitration.