

The myth of absence of *lex fori* towards the international arbitrator

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Abstract

The national and foreign doctrines uphold the absence of *lex fori* for the international arbitrator since the origin of the international arbitration. Our goal is to emphasize the demand of electing a *lex fori* for the international arbitrator for as much there is a collection of issues concerning the intervention of the State Courts in the role of arbitration support. The *lex fori*, that is supposed to inquire, will assist the arbitrator in determining the applicable law to the dignity of the dispute, and will regulate, undoubtedly, the litigation issues of arbitration. Based on the predominately upheld position in the doctrine, we will provide evidence to the specific limitations of the most aimed efficacy of the arbitration decisions. We will demonstrate through the jurisprudential (arbitration) analysis the necessity of appealing to the State Courts, excelling their contribution for the arbitration success. For the international arbitrator, the focus of the arbitration in the quality of *lex fori* comes up as important. We will draft its potential regulation capacities while cohesive juridical system, mainly in the dissension subsystem, the principles and proceeding rules, without forgetting the legitimacy to apply other transnational system rules. To deny the existence of a *lex fori* to the international arbitrator is a redundancy, for, beyond the arbitrator having a lordship, the arbitration court also has a *lex fori*.

Keywords: arbitration; arbitrator; international; *lex fori*;

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1. Introduction

This paper involves a critical analysis of the arbitrator's need for a *lex fori*. The globalization of international commercial relationships has contributed for the development of international arbitration. This alternative method has generalized concluding that most of international contracts have an arbitration clause. Notice the importance of some entities that administrate arbitrations. Such as CCI (Chamber of Commerce and Industry), LCIA (London Court of International Arbitration) and AAA (American Arbitration Association), as well as the contribution of arbitral case law. Since the beginning some persecutors defend the absence of *lex fori* in international arbitration.

In section 2 and 3 we shall consider the importance of the principle of the autonomy of the parties' will and their natural connection with the determination of the arbitrator's *lex fori*. The principal of autonomy of will acquires its relevance here. The determination of the *lex fori* becomes relevant always when the parties don't choose the ground of action law, nor the arbitration seat, nor the procedure arbitration law. The states legislatures previewed in their laws suppletives criteria's to the absence of choice of the parts.

Point 4 draws attention to the importance and significance of headquarters in the conduct of international arbitration and to its unquestionable existence. Concerning the procedural arbitration questions and in the absence of that choice the arbitrator is responsible to determine the seat where the arbitration will take place. Only this way we can know what is arbitration law. However there are some concerns that relate to the assistance and cooperation of the national courts. Notice the lack of agreement of both parties about the constitution of arbitral court for the determination of arbitrator's honorable and as well as the impugnation of the arbitral court and the arbitration awards itself. Remembering the necessity of interim measures, aid production of legal evidence, execution of arbitral award and recognition and execution of a foreign arbitral award.

We conclude that denying the existence of the existence of a *lex fori* is nonsense. The arbitrator has a venue, the arbitral court, and has also a *lex fori*, the arbitration law of seat. Note that the connection of arbitration with a State can be an orientation for the arbitrator about the procedural rules and indication for the judicial authority that will cooperate with the arbitration. In international arbitrations we must recognize an arbitration seat and an arbitrator's *lex fori* will assume an important role ex ante, during and ex post arbitration

2. The arbitral function

The separation of powers principle assures an adequate order of functions from the State, reflecting in the judicial power structure. It is only possible to guarantee liberty if we know who makes the laws, who applies them and who judges. Only with an independent magistrate is it possible to reach justice in freedom. For the courts as constitutional organs it is to recognize the jurisdictional function. Its independence forms one of the bases rules of law (J.J. Gomes Canotilho, 2015). From here results the necessity for a fair process and adequate access to law as well as its own law function (J.J. Gomes Canotilho, 2015).

Today's social acquaintanceship imposes the existences of a system capable of protecting all citizens' rights. The right to access courts means the right to obtain a juridical solution, impartial, independent and respectful of the procedural principals as well as in a reasonable schedule. The right of access to court is known as effective judicial protection, which not only defends the access to courts but also defends the rights and interests of those juridically protected.

The judicial power is a separate power and can only be exercised by courts. Consequently the activity done by magistrates is a jurisdictional activity. This function is not limited to the applying of law enforcement but also executes the awards. In resume it is up to the State the creation of courts, making them accessible, demanding substantiated awards in a resalable time. The process as result

from acts destined to resolve disputes should be understood as a private public juridical relationship. Justice does not constitute a public service to citizens. It represents a special service that was recognized by the constitution to the judicial power (F.C. Sainz de Robles *apud* I. Alvarez Sacristan, 1998).

The jurisdictional power is based in two opposite principles: the principle of the plurality of jurisdictions – judicial function given to some bodies framed in different jurisdictions and independent from each other – and the principle of jurisdictional unity – judgment function in one juridical organization that monopolizes the jurisdictional power respecting the exclusivity principle (Canotilho, 2015). The monopoly of the judge (monopoly of jurisdiction exercised by state judges and understood as a state judge's reservation) is not a closed system (Canotilho, 2015). As the judicial system is unable to provide in useful time the rights of individuals will have to rethink the whole judicial organic (Canotilho, 2015). The constitutional recognition of volunteer arbitral courts will allow the judicial system to overcome its limitations.

The plenitude jurisdiction allows subject of a specific legal relationship to be able to request the intervention of a third party to resolve the dispute. The jurisdiction does not necessarily have to be exercised by State organs. Some disputes can be resolved by arbitrators in virtue of the parts having the power through arbitral convention. The arbitral courts do not go under the category of courts as organs of sovereignty however they can be qualified as courts being an autonomous category. So, the arbitrator has a jurisdictional function, applies the law through an award. Notice that he or she cannot execute it. The arbitrator has not the *potestas* although he has the *autoritas* permits his or hers awards to be recognized as juridical acts endowed with authority. The national legislators through arbitration laws recognize to the arbitration awards the same binding force of judgments.

3. The limitations of the arbitrator's power

Due to dual nature of arbitration, contractual by the origins, because it comes from arbitral agreement, and jurisdictional by effects, because the national juridical system recognizes that an arbitration award is a true jurisdictional act (Calvo, 2001; Oppetit, 1990; Fouchard, 1990; Boissesson, 1990; Motulsky, 1974; David, 1982; Robert, 1980).

It is believed that the arbitrator has a jurisdictional function. Being the arbitration convention in an agreement between two parts in a contractual juridical relationship - preexistent or actual to this agreement (a contract within another contract) – through which the parties give the arbitrator the power for resolving a conflict. So we must admit that besides obligational effects, there are procedural effects (A. Bernardo San Jose, 2002). The negative effect of according arbitration shows the procedural efficiency of this contract (Schwab Rosenberg, 1986; San Bernardo, 2002).

We should not mistake the procedural characteristic of the arbitration convention with the jurisdictional characteristic of arbitration. The first one refers to the negative efficiency, the preclusive effect of the jurisdiction of state courts; the second one through the attitude from national jurisdictions facing arbitration. Because of its jurisdictional dimension we must notice another processual effect, arbitration seat location. As we will see the seat rules will not be indifferent. Remember the 1st article of the NYC (Convention concerning the recognition and execution of foreign arbitration awards celebrated in New York on the 10 of June 1958) that recognizes international character to an arbitral award when this one has been issued out of the State where the recognition has been asked for. The positive effect of arbitration convention, constitution of arbitral court shows a procedural nature. This because the arbitrators competence, *maxime* their decision power, results from the agreement between two parts by submitting a conflict to a third part.

For our subject the negative effect assumes a great importance. Its preclusive effect is not be absolute. There are some situations that need the intervention of State courts. Their intervention is not only for the effective enforcement of decisions, nor the declarative stage in the arbitration process. Its collaboration might appear previous to the constitution of arbitral court, regarding the

necessity of interim measures and the own establishment of the arbitral court. In international arbitration the arbitrator has big protagonism in virtue to his or hers skills in international contracts. Note the not so suitable practice of national juridical systems to regulate these types of relationships.

The different origin of parties, the juridical security that they wish to have, the contractual equality and the need to solve conflicts using impartial and fair criteria's, demand that the arbitrator should be neutral and have enough information about the case. Not questioning the arbitrator's skills, he or she, naturally has limitations. Given its weaknesses we cannot accept their complete removal from a certain state legal order. The dual nature of arbitration reflects in arbitral power. Let's not forget that the arbitrator doesn't have a permanent jurisdiction. He or she can be faced with problems about arbitral courts constitution or with the necessity to declare an interim measure. During the instance some questions regarding the validity of arbitral convention might appear and consequently about the arbitral court's competence, denial of arbitrators and their substitutions, interim measures, among others. There are interim measures that need *potestas* and the arbitrator doesn't have it for example attachment of goods.

After the sentence is handed down it is still possible to appeal, its execution and the recognition and execution of foreign arbitral awards. Usually these questions are committed by law to State courts. We cannot stop referring that the arbitrator doesn't have a venue and because so he or she is not subject to a *lex fori*. The arbitrator has a venue, the arbitral court, has a *lex arbitrii* that will be the law of the venue, the arbitration courts seat law. This law imposes to the arbitrator respect for the procedural principals contributing for a good justice administration and the required juridical security by the parts.

4. The *lex fori* of the arbitrator - the meaning of the seat of international arbitration

We can find juridical regime of arbitration in the several States, where we can also find ratified international conventions and treaties as well as soft-law. These legal instruments are dedicated to arbitral accords, which are the subjects that can be solved by arbitration, constitution of arbitral courts, principles of arbitration procedure, the effects of award, acknowledgement of foreign awards and cooperation of the national courts.

Even though there is the liberty of choice in the international contracts and international arbitration. The involved cannot choose the arbitration law. This law is determined by selected seat of arbitration. This is concerning the location of the arbitration. This is a legal concept that validates the place where the arbitration occurs (Vazquez, 2011). This is called the *lex fori* of arbitration or the *lex arbitrii*. These two expressions are similar. In the context of international arbitration we recognize a big autonomy to the parts. However these cannot separate the legitimating law of arbitration. The use of this law will be very important always when the parties have not foreseen some aspects of the arbitration.

The law of the seat is the one that guides the resolution of the conflicts through arbitration. It is an important law because the intervenient may have not predicted some aspects of arbitration. There are some factors that could influence the choice of the seat, for example: the position of the institutional center of arbitration, attractive arbitration law, the prevision of period for the practice of same acts (due date for award), nomination of arbitrators and the quantification of cost for the arbitration.

The *lex fori* has a crucial role in the development of the arbitration. Firstly it limits the respective law enforcement field. The application of arbitration law is dependent on the location of the seat in each country. Even though, it can occur somewhere else (material or geographic seat) to collect evidence, testimonial hearings and sin investigation (Kauf-Mann-Kohler, 1998). Some defend that it can be retrieved from any State. This way of the arbitration is not subject to any national law, it can be subject to *lex mercatoria* and also to international public law. There are situations where an act of international law establishes an international jurisdiction, arbitration generally, to hear disputes

arising from the contract. The most striking example is the investment contracts between a State, or an autonomous public entity, and of another national State, where the parties consent to their emerging disputes to be settled by ICSID arbitration "(International Centre for the Settlement of Investment - ICSID), created in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Pinheiro, 2006). These first two situations deserve a comment. About the first one we will say that the recognition of the foreign award will not be possible if the award doesn't have a nationality, art 1, 1st NWC. The second situation, *lex mercatoria*, as a law that also regulates the arbitration process – regulations of the arbitral centers. In this regard see the regulation of the International Chamber of Commerce, articles 28th nº2 and 29th nº7. The parts will always be able to require at any moment to the judicial court, the enactment interim measures. These cannot be auto sufficient because they need the help of national courts, especially concerning the constitution of arbitral court, the decline the arbitrators and to challenge of an award. The necessity of the intervention from these is not previewed nor for the constitution of arbitral court, neither arbitrator's denial nor the award appeal. The *lex mercatoria*, as a soft law, intends to settle rules and practices of international commerce, even though it is centered in the substantive rules of the international contacts. Note the importance of the arbitration role in the development of the procedural rules to be allied by arbitrators.

Going back to the national arbitration laws we observe that the legislators apply their laws depending on the location of the arbitration in their States. Not forgetting the importance of seat for the national or international qualification of arbitration. This law shall regulate all stages of arbitration from the stage prior to the constitution of the arbitral court, through the course of the proceedings culminating in the judgment and the possibility of recognition and enforcement of foreign arbitral awards.

The *lex fori* is a legal and normative basis applicable. The arbitrators can apply the rules of arbitration rules, because the parties have mentioned it in the arbitration agreement and if necessary he or she can use the rules of national States arbitration seat. Consequently, either for reasons of positioning, both for reasons of efficiency and legal certainty, the courts of the *lex fori* are the ones that are in the best position to support and supervise the arbitration process, proceeding in accordance with applicable law, in particular, the removal of referees, the lack of independence or impartiality of the same and the annulment of the sentence for incompetence of the arbitrator or violation of procedural rules.

The *lex fori* arbitration emerges only from the will of the parties as to the establishment of the seat of arbitration. The parties choosing the seat may not choose another law to regulate arbitration. Only autonomy will work, as the election of the place where the arbitration it will roll out, means the arbitration seat. It is in according to the principle of autonomy of the will that we can fix the arbitration seat, consequently the *lex fori*. This principle is previewed in national legislations, in UNIDROIT Principles, European Law Contracts Principles, in resume in soft-law.

If the intervenients haven't chosen the seat, the arbitrator must select it. We verify that the arbitrator doesn't have the *potestas*. Due to this, it is completely necessary the national courts intervention. We note eagerly, that the parties do not directly elect the seat of arbitration. They may do so indirectly, either by choice of the *lex arbitrii* or referring to the rules of arbitration. The seat will be fixed in the State which arbitration law are been chosen or in the country where the managing entity arbitrations have its seat. As for the location of the seat of arbitration various positions arise: presumption in favor of the place where the arbitration will take place, equivalence of *lex fori* with the law of the place where arbitration takes place and the choice of the merit law. This one should be a strong indicator of the *lex arbitrii*.

When doubt sets in, the arbitrator should make a careful interpretation of the arbitration agreement and perhaps the main contract. If it is found that the existence of pathological clause (poorly drafted arbitration clause) the solution should be to ask the state court to determine, depending on the circumstances, the seat of the arbitration (Eisemann, 1974). This court must make

certain what is the real intention of the parties, Task that will prove difficult whenever the parts have referred different places (Hill, 2014). Everything is brought back by the interpretation of the respective clauses, the determination of the meaning of words or phrases used, without forgetting the context of all the circumstances of the case. Not forgetting the weaknesses of the arbitration, such as the absence of the arbitrator's potestas, the nonexistence of a supranational judicial body, it is essential to assist/ collaborate with the state courts.

Only this way can the arbitral activity contribute for the security of the international operating agents. The assistance verifies in two aspects: *stricto sensu* assistance and arbitration activity control. The first one is verified during the arbitral *iter* and the second in the context of annulment of the arbitration award and recognition and execution of the foreign arbitral award. When it is the arbitrator's duty to choose the arbitration seat, he or she should do it having in mind the circumstances of each case, proximity of the intervenients and the court, production of the evidence and cost reductions, art. 20 UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 of UNCITRAL (United Nations Commission on International Trade Law).

We note, however, that much of the foreign doctrine, particularly francophone, defends the "detachment" of the arbitration by a predetermined place, stating that the seat is an irrelevant element, not showing any substantial connection with the controversial issue, and is therefore, a fiction. They go further, stating that the applicable law to the merits of the case and / or the arbitration proceedings, the various geographical headquarters or arbitration materials and the place of delivery of the judgment and / or its implementation does not exhibit any connection to the dispute. We cannot accept the pulling apart of the arbitration from any place. It is not true that the arbitrator doesn't have a jurisdiction or a *lex fori* (Goldman, 1981; Fouchard, 1965; Mimoso, 2009).

These allegations can cause some perplexity because of the fragilities of arbitral power. We should have in mind the efficiency of arbitration. As for the choice of law applicable to the merits we do not see in principle any problems. The parties under the principle of autonomy accorded to them by the state legal systems –don't forget that it was the national legislators in their legislation that recognized the principle of the autonomy and hence their contractual freedom corollary - may elect rules of law to be applied by the arbitrators.

Currently it is common ground that, in the absence of designation by the parties, the arbitrators can apply a national or transnational law. They can also decide according to equity or as friendly composers, apply the most appropriate law to the dispute or to display a closer link with the object of the dispute (direct way) or authorize the arbitrators to choose the most appropriate conflict rules (indirect way). These methods of regulation are enshrined in State law about voluntary arbitration and also in international instruments (conventions and soft law). Thus its success goes through the assistance of judicial national authorities. This being the ones of the seat and the best to settle the case. It is not only a physical place but it determines the application of discipline for the action of arbitral court. However the seat location law regulates all the arbitration process. To complete this we utilize the process law of the seat State. In international arbitration we verify that the law of the seat contributes for arbitration recognition as a way of ADR (Alternative Dispute Resolution). It is important to mention the contribution of NYC, the private international instrument law with the most ratifications in the world that aids the homogenization of the rules of the many juridical systems about recognition and execution of foreign arbitral awards helping juridical security (Soriano, 2007).

The globalization phenomenon imposes a special attention in the context of the juridical sanction. The movement of goods through the States imposes a juridical protection forcing the international operators to obey the previous agreements. The rejection by pairs concerning future contractual relationships can't answer satisfactorily face to the dimension of the international commercial conflicts. It is necessary an identity with *potestas* to ensure the arbitral awards. So it is evident the necessity of intervention of State courts. The NYC has contributed for the cooperation arbitrators/judges. Always remember that the Convention locates the international arbitration. The *lex*

fori arbitration is without doubt the security part for international arbitration. The NYC issues a division of duties between arbitration courts and States courts of the arbitration seat and States courts where the recognition is applied. Regarding this last one previews that an award coming from a contracted State is recognized and executed in any other contracted State, unless the award has been annulled or suspended by an authority where the award occurred (art. V, 1st, al e) NYC). This way we will guarantee the respect of the seat arbitration awards helping the beliefs of the parts and their justice security.

5. Conclusions

The globalization of the international commercial relationships has contributed decisively to the development of international arbitration. Since the beginning of international arbitration, *maxime* commercial, part of the doctrine and jurisprudence argue the absence of *lex fori* to the international arbitration. The principle of autonomy of the parties', paradigm of international contracts, acquires here its maximum expressiveness. The issue of arbitrator *lex fori* puts up with greater evidence when the parties did not elect the law governing the substance of the case, have not designated the seat of the arbitration and have not chosen the law governing the arbitration proceedings. The judiciary is a separate power that can be exercised only by the courts and this activity has been exercising by the magistrates. The fact that the judicial system will not be able to "(...) ensure, by itself, the legal peace and to assign in a reasonable time the rights and interests of people cause necessarily the emergence and legitimation of alternative modes of litigation composition. The constitutional legitimacy of voluntary arbitration courts allow the judicial system to overcome their disabilities, recognizing the use of this category of courts under certain legal relations. Relevant is the negative effect of the arbitration agreement, its preclusive effect is not absolute. The dual nature of arbitration has repercussions on the essence of arbitration power. Whether the stage prior to the constitution of the arbitral court, either during the arbitral instance or in time of the award, the collaboration/assistance is needed from state courts. State laws on arbitration are concerned arbitration agreement, the arbitrability of disputes criteria, the constitution of the arbitral court, procedural principles to be observed during the arbitration, the effects of the arbitration award, recognition of arbitral awards and the possibility of assistance and control by the state courts. While it is recognized in the context of international arbitration great autonomy to the parties, they cannot fend off legitimating laws of arbitration. This determination cannot fail to take into account the place chosen by the parties for the conduct of the arbitration. It is the seat of the arbitration. This law will be the *lex fori* of the arbitration and play a crucial role in the conduct of the arbitration.

The *lex fori* is the legal and normative basis applicable. Although the arbitrators can apply the rules of arbitration rules, may, alternatively or in addition, to make use of national rules of the seat State. The *lex fori* arbitration emerges only from the will of the parties to the establishment of the arbitration seat. The parties choosing the seat but they don't choose another law to regulate the arbitration. We find often that the parties do not directly elect the seat of arbitration, settling in this state of the law of the chosen arbitration or in case of reference to an arbitration rules in the country of arbitration managing entity status. In view of the "weaknesses" of the arbitration, *maxime* the absence of the arbitrator *potestas*, the absence in international arbitration of a supranational judicial body, will become indispensable collaboration / assistance from state courts. If the parties do not speak out on the seat of arbitration, not fixing the respective *lex fori*, will be returned to the arbitral court its implementation, which must according to the circumstances taking into account, inter alia the place of production of evidence and the minimization of the costs involved. As regards the effectiveness of arbitration, we will say that its success needs the help the national judicial authorities and will be the courts seat the best to intervene. The law of the seat of the arbitral court (the *lex fori* of the arbitrator) will give the legal basis of the aid of the state courts of arbitration proceedings. The State law at the seat of arbitration, *maxime* international, contributes decisively to the recognition of arbitration as an alternative way of justice to the State courts, recognizing to the arbitrators their autonomy and independence. The articulation of the New York Convention with the arbitration laws

of States will undoubtedly have a multiplier effect of autonomy. In the context legal and disciplinary the phenomenon of globalization requires careful attention. It is essential the existence of an entity with *potestas* to enforce arbitration awards. The inevitability of the intervention of the State courts is insurmountable evident. The cooperation / assistance, despite constantly called into question, has proved an effective means for the credibility and success of the arbitration. The *lex fori* of arbitration is undoubtedly the safe haven of international arbitration. In short, it contributes to legitimate protection of the expectations of the parties and the much desired legal certainty.

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