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Articles

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Applicable Procedural Law in International Commercial Arbitration

Prawo procesowe stosowane w międzynarodowym arbitrażu handlowym

ABSTRACT

The article is of a scientific research nature and its main goal is to determine the legal nature, sources of regulation and key features of the law, governing the procedure in international commercial arbitration. The issue is analyzed through investigation of relevant provisions of international documents, national laws on arbitration and arbitration rules of leading permanent institutions. It is established that under the applicable procedural law it is possible to understand a single legal system only within a certain context, in particular, when referring to procedural rules of *lex arbitri*. Authors also substantiate the position according to which in the most general sense, the law applicable to the arbitration process should be understood as chosen by the parties or determined by the arbitral tribunal or by other authorized body procedural law of a state, with its own legal nature and instrumental purpose, which is usually the law of the place of arbitration (*lex arbitri*); and rules of procedure

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agreed by the parties by specifying the arbitration rules of a particular institutional arbitration or other similar rules in the arbitration clause.

Keywords: international commercial arbitration; *lex arbitri*; place of arbitration; procedural rules

INTRODUCTION

Law governing the arbitration procedure or applicable procedural law in juridical science is also known by a simple but capacious name – "the law governing the arbitration" as such (law governing the arbitration itself[1] or *lex arbitri*). Traditionally, the law that regulates the arbitration process in its content and purpose, is opposed to the substantive law applicable to the merits of the dispute (substantive applicable law). Differences are also apparent in the aspect of the implementation of the principle of party autonomy. Parties often do not make a direct choice of procedural law when constructing arbitration clauses, noting mostly only the rules of the arbitration institution. However, this does not eliminate the need for arbitrators to apply the national law of the country of the place of arbitration both in order to supplement in case of "deficiencies" in the rules of procedure[2] and to take into account the mandatory rules of the *lex arbitri*.

In this case, under the applicable procedural law, it is possible to understand a single legal system only within a certain context, in particular, when referring to procedural rules of *lex arbitri*. In general, the law governing arbitration includes rules of different legal nature with different mechanisms of adoption and application, different nature of binding and the degree of variability that determine the admissibility and limits of choice and amendment of these rules by the parties or arbitrators. Determining the content of the law governing arbitration, we begin with the provisions of the arbitration clause, further establishing the legal limits of the party autonomy in the context of the issue.

At the same time, along with the limits of the party autonomy in choosing the applicable procedural law, the problem of hierarchical interaction of norms of different legal nature that regulate various aspects of the arbitration procedure needs to be addressed. In substantiating and proposing such a hierarchical structure within this scientific article, we take into account the experience of leading arbitration institutions of Europe and the provisions of their arbitration rules and therefore seek to reach general conclusions in the field. In addition, a number of conclusions and proposals

[1] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, Oxford 2009, p. 173; *The Freshfields Guide to Arbitration Clauses in International Contracts*, eds. J. Paulsson, N. Rawding, L. Reed, Alphen aan den Rij 2010, p. 18.

[2] V.V. Komarov, V.N. Pogoretskii, *Mezhdunarodnyi kommercheskii arbitrazh*, Kharkiv 2009, p. 101.

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will relate specifically to Ukrainian arbitration realities, taking into account the legal background and research interests of the authors.

Therefore, the main issues to be addressed in this article are the principles, underlying the choice of procedural law in international commercial arbitration (*lex arbitri*), its connection with the place of arbitration and its choice, the scope of party autonomy regarding to the choice of *lex arbitri*, and the overall hierarchical structure of legal sources, all of which are aimed to regulate different aspects of arbitration procedure.

SOURCES AND METHODS

According to Article 19 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: the UNCITRAL Model Law), subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.[3] The same principles of choice of rules of procedure are enshrined in the arbitration laws of both countries that have adopted the UNCITRAL Model Law (in particular, Article 1184 of the Polish Civil Procedure Code,[4] Section 594 of the Austrian Arbitration Act [Fourth Chapter of the Austrian Code of Civil Procedure],[5] Section 30 of the Hungarian Act on Arbitration,[6] Section 26 (2) of the Slovak Act on Arbitration,[7] Article 19 of the Law of Ukraine "On International Commercial Arbitration")[8] and those that have gone through the development of

[3] UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (access: 5.6.2021).

[4] Part V of the Polish Civil Procedure Code following amendments introduced by the Act of 16 September 2011 amending the Civil Procedure Code and certain other acts, http://arbitraz.laszczuk.pl/_akty-prawne/en_132/POLISH_CIVIL_PROCEDURE_CODE_1964_valid_from_03_May.pdf (access: 5.6.2021).

[5] Austrian Arbitration Act 2013 (Sections 577–618 of the Austrian Code of Civil Procedure) in force as of 1 January 2014, https://www.viac.eu/en/arbitration/content/austrian-arbitration-act-2013 (access: 5.6.2021).

[6] Hungarian Act LX of 2017 on arbitration (as in force on 2 January 2018), http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/106843/131257/F-266585574/J2017T0060P_20180102_FIN.pdf (access: 5.6.2021).

[7] Slovak Act No. 244/2002 of 3 April 2002 on Arbitration, https://www.iaa-network.com/wp-content/uploads/2013/07/Slovakia-Arbitration-Law-1.pdf (access: 5.6.2021).

[8] Law of Ukraine "On International Commercial Arbitration" of 24 February 1994, https://icac.org.ua/wp-content/uploads/Law-of-Ukraine-On-International-Commercial-Arbitration-2.pdf (access: 5.6.2021).

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their own acts. In particular, Article 1494 of the French Code of Civil Procedure (hereinafter: the French CPC) provides that an arbitration agreement may, directly or by reference to arbitration rules, determine the arbitral procedure or subject to any procedural law. If the arbitration agreement is silent, the arbitrator shall determine the procedure inasmuch as necessary, either directly or by reference to a law or to arbitration rules.[9] Based on the above-mentioned in the study of the provisions of these legal acts and analysis of the principles underlying law enforcement practice in choosing the law applicable to the arbitration procedure, were widely used methods of analysis and synthesis, comparative legal method, jurisprudential method, while the research of the positions of scientists on relevant issues required the use of structural and dogmatic methods of jurisprudence.

RESEARCH AND RESULTS

The most common primary instrument chosen by the parties and establishing the arbitration procedure are the rules of the arbitration institutions or the rules applicable to *ad hoc* arbitration (e.g., UNCITRAL Arbitration Rules 2010[10]). Herewith, the parties' discretion is not limited to the choice of arbitration rules, as well as, in order to establish applicable procedural law, to the choice of a specific national legal system, based on the universally recognized freedom to subject arbitration to other legal constructions. The latter, as E. Gaillard and J. Savage summarize, may include "transnational rules of arbitral procedure, derived from an analysis of comparative law or arbitral case law; stipulated by the parties their own rules, within which the procedural elements inherent in different legal systems are borrowed and agreed upon; settlement of the dispute in accordance with the principles of *amiable compositeur* (friendly mediation) or *ex aequo et bono* (which directly affects the procedure of arbitration); and situations, when the parties deliberately refuse to choose any procedural rules until a potential dispute arises".[11] P. Sanders notes in this regard the considerable freedom of the parties to choose the rules of procedure, which is established, i.a., by the legal status conferred on international commercial arbitration, among others, by the Convention on the Recognition and Enforcement

[9] French Code of Civil Procedure, Book IV – Arbitration of 14 May 1981, https://www.jus.uio.no/lm/france.arbitration.code.of.civil.procedure.1981/doc.html (access: 5.6.2021).

[10] UNCITRAL Arbitration Rules (with new Article 1 (4), as adopted in 2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf (access: 5.6.2021).

[11] P. Fouchard, B. Goldman, E. Gaillard, J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, The Hague 1999, p. 633.

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of Foreign Arbitral Awards (hereinafter: the 1958 New York Convention),[12] covering both the possibility of recourse to the rules of arbitration and the development of its own detailed provisions on the procedure for arbitration *ad hoc*. The researcher sees in this situation another example of the gradual denationalization of arbitration, which in this case takes place in relation to the arbitration procedure.[13] However, due to the practicality, ease of use, and support of the arbitration institution, the parties to the arbitration clause often prefer the rules of institutional arbitration or the UNCITRAL Arbitration Rules developed according to the same logic.

Thus, the primary level of legal regulation of the arbitration procedure is the rules that are directly or indirectly selected by the parties or determined by the arbitral tribunal for this purpose. A classic example is the rules of a permanent arbitration institution. Characteristic features of the arbitration rules are the focus on consolidating the phasing and predictability of the arbitration process by standardizing the specific stages and aspects of the initiation of arbitration, the appointment of arbitrators, the conduct of arbitration proceedings, and related issues. In addition, it is generally accepted that regulations are not procedural codes in terms of rules of application or scope. Their purpose, as well as the tasks of other legal mechanisms described above (systems, structures), is to provide flexibility in the consideration and resolution of the case by arbitral tribunal, to provide opportunities for the most efficient use of time, financial, mental resources involved in the arbitration procedure.

For example, according to Article 42 of the new edition of the Rules of the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce and Industry (CCI) ("Rules Governing the Arbitral Proceedings"), subject to the provisions of the Law of Ukraine "On International Commercial Arbitration" and general principles of the arbitral proceedings specified in the present Rules, the parties shall at their own discretion agree on the procedure of the arbitral proceedings to be followed by the Arbitral. Failing such agreement, the Arbitral Tribunal may, subject to the provisions of the Law of Ukraine "On International Commercial Arbitration", conduct the arbitration in such manner, as it considers appropriate with the purpose to ensure an effective dispute order observing in this respect an equal treatment to each party and giving each party an equal and reasonable opportunities for their interests' protection. Parties and their representatives should act in the way to keep the arbitral proceedings fast and cost

[12] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), https://www.newyorkconvention.org/english (access: 5.6.2021).

[13] P. Sanders, *Trends in the Field of International Commercial Arbitration*, "Collected Courses of the Hague Academy of International Law" 1975, vol. 145, p. 271.

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effective, preventing abuse of procedural rights.[14] Similar provisions can be found in the Rules of the Court of Arbitration Lewiatan (§ 22),[15] Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic (Section 6),[16] Rules of Arbitration and Mediation of VIAC – Vienna International Arbitral Centre – "Vienna Rules" (Article 28).[17] The adaptability of the arbitration procedure, its adjustment by the arbitral tribunal (in the absence of agreement between the parties on something else) to the specifics of a particular process is generally provided by most of institutional arbitration rules,[18] which meets the needs of business and the arbitration community.

It is also worth mentioning the establishment of a link between the arbitration rules and the permanent arbitration court, as the institution that administers the arbitration which, therefore, not only determines the rules of arbitration, but can directly affect the proceedings in cases specified by arbitration rules or applicable law. Rules of the ICAC at the Ukrainian CCI in Article 2 (2) establish, that where the parties have agreed to submit the dispute to the ICAC, they shall be *ipso facto* deemed to have agreed on applying to the Rules. Conversely, in accordance with item 3 of the Article 2 of the Rules, in any case, where the parties have agreed to refer to the dispute in accordance with the provisions of the ICAC Rules and have not agreed on an arbitral institution or have inaccurately/incompletely specified the name of the ICAC, it is considered that the parties agree to submit the dispute to the ICAC. Similar provisions are contained in Article 6 (2) of the ICC Rules of Arbitration,[19] Preamble to the LCIA Arbitration Rules,[20] Article 1 of the Vienna Rules, Preamble to the SCC Arbitration Rules. In addition, the analysed connection is enshrined in the recommended arbitration clauses, the texts of which are offered in the relevant arbitration regulations (rules). It is worth noting the provisions of

[14] Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, with amendments that are effective as of 1 November 2020, https://icac.org.ua/wp-content/uploads/Reglament_ENG_2020_print.pdf (access: 5.6.2021).

[15] Rules of the Court of Arbitration Lewiatan as in force from 1 March 2012 with amendments in force since 23 March 2015 and 8 May 2017 and from 13 May 2020, consolidated text, https://www.sadarbitrazowy.org.pl/Content/Uploaded/files/REGULAMIN%20ze%20zmianami_Teks%20jednolity%2013_05_2020.pdf (access: 5.6.2021).

[16] Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic (in effect since 1 October 2015, consolidated text, 1 December 2020), https://en.soud.cz/rules/rules-consolidated-text-1st-december-2020 (access: 5.6.2021).

[17] Vienna Rules 2018: Rules of Arbitration and Mediation, in force as from 1 January 2018, https://www.viac.eu/en/arbitration/content/vienna-rules-2018-online (access: 5.6.2021).

[18] J.D.M. Lew, L.A. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, The Hague 2003, p. 524.

[19] ICC Rules of Arbitration, as of 1 January 2021, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration (access: 5.6.2021).

[20] LCIA Arbitration Rules, effective from 1 October 2020, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (access: 5.6.2021).

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Article 1 (3) of the Vienna Rules, according to which the Board may refuse to administer the proceedings if the arbitration agreement deviates fundamentally from and is incompatible with the Vienna Rules.

Naturally, in practice, difficulties in establishing the appropriate arbitration rules chosen by the parties are possible only in the presence of defects in the arbitration clause, often with incorrect indication of the arbitration institution or indication of an arbitration institution that does not exist. Without focusing on this aspect, we can only say that in pro-arbitration jurisdictions such inaccuracies are interpreted in favour of arbitration, which is in line with the spirit of the 1958 New York Convention.

Therefore, the choice of arbitration institution and arbitration rules is an integral part of the arbitration clause, the presence and correctness of their indication directly affect the enforceability of the clause as such and the possibility of initiating arbitration. In this case, the rules of procedure actually applied in a particular arbitration process are the result of the party autonomy, decisions made by the arbitral tribunal and the provisions of the regulations (rules) agreed by the parties, regardless of their institutional or other nature.[21] In this regard, the set of procedural rules, formed in this way, reflect the procedural component of independence and autonomy of arbitration, guarantee the flexibility and efficiency of the latter, allowing to speak about the success of regulatory and organizational self-regulation inherent in international commercial arbitration.

However, the freedom of the parties and the arbitral tribunal to determine and apply procedural rules is not absolute. In other words, the principle of party autonomy does not allow the parties to remove the provisions of the legal system or certain elements of this system from the regulation of their relations for consideration and resolution of the case via arbitration.[22] In the procedural dimension, arbitration may require judicial assistance and, in the interests of public policy, may be subject to judicial review. The performance of both of these functions (auxiliary, supervisory and controlling)[23] is traditionally ensured by the requirements of the law of the place of arbitration (*lex arbitri*). The key difference between *lex arbitri* and the rules of procedure used by the arbitral tribunal in considering and resolving a dispute, apart from the clear difference in legal nature, can be revealed by comparing their rules as "external" and "internal" to the arbitration process. In other words, *lex arbitri* is

[21] M. Hunter, *Introduction: The Law Governing the Procedure*, "ICCA Congress Series" 1996, no. 7, p. 320.

[22] M.-L. Chang, *Harmonisation of Procedural Law in International Commercial Arbitration*, 2009, https://dspace.stir.ac.uk/handle/1893/9931#.XuNojkUzZPY (access: 5.6.2021), p. 20.

[23] T. Varady, J. Barcello, A.T. Mehren, *International Commercial Arbitration: A Transnational Perspective*, St. Paul 2012, p. 683.

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"the law governing arbitration under the control of a national jurisdiction",[24] determining the rules of interaction between arbitration and state courts, while the rules of procedure are internal and, albeit within the limits set by the *lex arbitri*, autonomous in relation to the jurisdictional influence of the judicial authorities of the state of arbitration. Section 578 of the Austrian Arbitration Act (Fourth Chapter of the Austrian Code of Civil Procedure), Article 5 of the Law of Ukraine "On International Commercial Arbitration", which is based on a similar provision of the UNCITRAL Model Law, contains a classic formula on the limits of national court intervention, according to which "in matters governed by this Chapter/Law, no court shall intervene except where so provided in this Chapter/Law". Similarly, Article 1159 (1) of the Polish Civil Procedure Code states that "in matters governed by this part, the court may act only as provided by statute".

Issues requiring assistance and control over the arbitral proceedings by the jurisdictional organs of the state of the place of arbitration, including verification of the arbitrability of the subject matter, assistance in appointing arbitrators, and the grounds for setting aside of the arbitral award, are resolved in accordance with the provisions of the law of the place of arbitration. The place of arbitration and the *lex arbitri* also affect the recognition and enforcement of the arbitral award. As a general rule enshrined in the arbitration rules of the leading arbitration institutions, the place of making the arbitration award is the place of arbitration.

In this regard, the importance of the law of the place of arbitration, in particular in the context of establishing a link between the arbitral award and the place of its adoption and, consequently, the *lex arbitri*, derives from the provisions of the 1958 New York Convention. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that, among others: 1) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made (Article V (1) (a) of the Convention); 2) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (Article V (1) (d) of the Convention); 3) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made (Article V (1) (e) of the Convention).

In close connection with the regulation of all these elements of the arbitration process, the provisions of the *lex arbitri* form a procedural legal framework of arbi-

[24] J.-F. Poudret, S. Besson, S.V. Berti, A. Fonti, *Comparative Law of International Arbitration*, London 2007, p. 84.

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tration, linking arbitration to a particular jurisdiction, which will directly affect the form and validity of the arbitral award, indicating in the view of 1958 New York Convention the place, where the award was made. Thus, the Rules of the ICAC at the Ukrainian CCI indicate the obligation to comply with the provisions of the Law of Ukraine "On International Commercial Arbitration" in determining the procedure for consideration of the dispute by the arbitral tribunal. Appointment of arbitrators in accordance with Article 11 of the Law of Ukraine "On International Commercial Arbitration", at the request of any party, among other cases may be carried out by the President of the Ukrainian CCI. Same provision is enshrined in Section 62 (1) (c) of the Hungarian Act on Arbitration. Violations of a number of procedural principles established by the *lex arbitri* are grounds for setting aside the award of the international commercial arbitration. According to Article 1206 (1) (1) and (4) of the Polish Civil Procedure Code, Section 611 (2) (2) and (4) of the Austrian Arbitration Act (Fourth Chapter of the Austrian Code of Civil Procedure), Section 40 (1) (a) (2) and (4) of the Slovak Act on Arbitration, Section 47 (1) (ab) and (ad) of the Hungarian Act on Arbitration, Article 34 (2) (1) of the Law of Ukraine "On International Commercial Arbitration", and Article 459 (2) (1–2) of the Code of Civil Procedure of Ukraine,[25] the award of the international commercial arbitration may be set aside (annulled) if the party who filed the application for setting aside provides evidence that it was not duly notified of the appointment of an arbitrator or of arbitration proceedings or for other valid reasons this party could not file its explanations; the composition of the international commercial arbitration or the arbitration procedure did not comply with the agreement of the parties, unless such agreement contradicts the law from which the parties may not derogate, or, in the absence of such an agreement, did not comply with the law.

The Belgian Judicial Code in Article 1700 (1–2)[26] establishes, that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of Part 6 of this Code, determine the rules of procedure applicable to the arbitration in such manner as it considers appropriate. Article 1699 of the Belgian Judicial Code, among the main requirements for conducting the arbitration proceedings by the arbitral tribunal, provides that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case, pleas in law and arguments in conformity with the principle of adversarial

[25] Code of Civil Procedure of Ukraine of 18 March 2004 No. 1618-IV (as amended on 14 July 2020), https://cis-legislation.com/document.fwx?rgn=8686#:~:text=The%20code%20of%20civil%20procedure%20of%20Ukraine%20determines%20jurisdiction%20and,procedure%20of%20civil%20legal%20proceedings (access: 5.6.2021).

[26] Belgian Judicial Code, in force as from 1 September 2013 (as amended on 25 December 2016), http://www.cepani.be/en/arbitration/belgian-judicial-code-provisions (access: 5.6.2021).

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proceedings. The arbitral tribunal must ensure that these requirements are met, as well as the principle of fairness. Article 182 (3) of the Switzerland's Federal Code on Private International Law (hereinafter: the CPIL) stipulates that, irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding.[27] The UK Arbitration Act in Article 33 (1) names among the general duties of the arbitral tribunal the performance of procedural actions on the basis of fairness and impartiality, as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, as well as the obligation to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.[28] The French CPC in Article 1460 clearly distinguishes between the rules of procedure established by the arbitrators in the arbitration proceedings and the procedural rules established for the trial, indicating that fundamental principles of litigation (such as determining the subject matter of the dispute in the statement of claim, the judge's decision only within the claims, the party's obligation to prove the circumstances to which it refers, the obligation to hear the party, ensure adherence to adversarial proceedings, etc.) apply to arbitration. It should also be noted that the scope of the *lex arbitri* includes other generally accepted, in particular, enshrined at the conventional level, procedural standards of fair and impartial arbitration.

Although the content of the *lex arbitri* (relevant legal norms) should be established by referring to the provisions of national arbitration laws or procedural codes (chapters or parts devoted to arbitration), the arbitration may need to consider other potentially important rules of law of the place of arbitration in light of certain aspects of the arbitration procedure, taking into account the principles and approaches underlying the case law. Thus, in contrast to the extensive and detailed UK Arbitration Act, the much shorter and more limited US Federal Arbitration Act, adopted and not updated since 1925, was expanded precisely by case law and judicial interpretation.[29] Some foreign court precedents also refer to the application of transnational general principles of public policy concerning arbitration and are applied regardless of the connection of the dispute with a particular country.[30]

[27] Switzerland's Federal Code on Private International Law (CPIL), 18 December 1987, https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20%D0%B2%20%D1%80%D0%B5%D0%B4.%202007%20(%D0%B0%D0%BD%D0%B3%D0%BB.).pdf (access: 5.6.2021).

[28] Arbitration Act 1996, http://www.legislation.gov.uk/ukpga/1996/23/contents (access: 5.6.2021).

[29] M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, Chicago 2008, p. 64.

[30] A. Tweeddale, K. Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, New York 2005, p. 238.

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Some researchers, including A. Tweeddale and K. Tweeddale, emphasize the categorical distinction between the applicable procedural law of a particular jurisdiction (so-called curial law) and the *lex arbitri* chosen by the parties. While the *lex arbitri* is a system of mandatory rules of law applicable to arbitration at the place of arbitration, curial law is the law governing the arbitration procedure. The authors note that it is accepted to consider curial law as part of the *lex arbitri*, because for the most part they are the same national law.[31] Therefore, the reference to the notion of *lex arbitri* or *lex loci arbitri* always indicates mandatory procedural rules enshrined in the law of the place of arbitration, which cannot be changed, but, both in a more general sense and depending on the context, this the term for convenience also covers dispositive provisions of the chosen or established law of the place of arbitration. An example is the UK Arbitration Act, Article 4 of which divides the provisions of this law into mandatory (listed separately and applicable regardless of the agreement of the parties) and optional (which allow deviations from their instructions by agreement of the parties, but provide rules applicable in the absence of such agreement). Thus, when the place of arbitration establishes the jurisdiction to which this law applies, the *lex arbitri* in the narrow sense will be binding provisions of the law, and in the broad sense – all its rules and additional applicable court precedents, and so on.

The application of procedural law, other than *lex arbitri*, is based on the party autonomy and, subject to the mandatory requirements of the law of the place of arbitration, is permissible in theory. On the other hand, there is a gradual extension of the prohibition on determining the procedural law of the legal system other than the law of the place of arbitration, along with the complexity and risk of such an approach, which may directly affect the possibility of state court to take measures to facilitate arbitration[32] and generally lead to a conflict between the chosen by the parties procedural law and public policy of the country of the place of arbitration.[33] Some successful examples of the subordination of arbitration process to the procedural law of a country other than the place of arbitration occur within English jurisdiction and case law. In the case of *Union of India v. McDonnell Douglas* parties agreed on the location of the arbitration in London, but subject the arbitration process to the 1940 Indian Arbitration Act. In its judgment, in this case, the High Court of England and Wales concluded that Indian law could be applied as procedural law governing matters internal to the arbitration process to the extent that these provisions did not conflict with the mandatory provisions of the English

[31] *Ibidem*.

[32] J.F. Morrissey, J.M. Graves, *International Sales Law and Arbitration: Problems, Cases and Commentary*, Austin 2008, p. 344.

[33] V.V. Komarov, V.N. Pogoretskii, *op. cit.*, p. 102.

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lex arbitri.[34] It should be noted that this position of the Court has been the subject of well-founded criticism of the arbitration community.[35] However, para. 16.4 of the LCIA Arbitration Rules allows the possibility, with the written consent of the parties, of the application of other laws or rules of law other than the law applicable at the seat of the arbitration, unless such agreement is prohibited by law applicable at the arbitral seat.

Scholars also emphasize the contradictions and risks of implementing the doctrine of denationalization or delocalization of arbitration, which, if fully adopted, will lead to the abolition of judicial control at the place of arbitration. J.G. Frick in this regard argues that "the possibility of delocalization of arbitration only exists by amending or supplementing the 1958 New York Convention, creating a unified international arbitration system, which, however, in the short term is neither possible nor necessary".[36] Despite the spread and introduction of certain elements of the theory of delocalization in the practice of international commercial arbitration, the complete denationalization of arbitration in the current conditions of the arbitration institution is unlikely.

In view of the above, later in the text of this study, we will use the concepts of *lex arbitri* (in the sense of law governing the general rules of procedure and aspects of interaction between arbitration and state courts) and the law of arbitration (*lex loci arbitri*) as synonymous. In this regard, J.D.M. Lew points at the traditionality of subordination of arbitration to the private international law rules of the place where the arbitration is being held or where the arbitration tribunal has its "seat". The author concludes that "this view is developed from the assumption that there must and can only be one legal system which governs the arbitration", the relevant provision of which "is known as the *lex* (*loci*) *arbitri*, the law of the arbitration, the *loi de l'arbitrage*". However, although the principle of party autonomy allows the parties to decide on most aspects of arbitration governed by the law of the place of arbitration (determination of the subject matter of the dispute referred to arbitration, appointment and removal of arbitrators, scope of arbitration, arbitration procedure, form and validity of arbitration decisions and conflict-of-law rules to be applied), the permissible limits of the discretion of the parties and the decisions made by the arbitral tribunal shall be established by the *lex arbitri*.[37]

It is generally accepted that the parties are free to choose the *lex arbitri* both at the stage of preparation and signing of the arbitration clause and after the dispute

[34] D.T. Hascher, *The Law Governing Procedure: Express or Implied Choice by the Parties – Contractual Practice*, "ICCA Congress Series" 1996, no. 7, p. 335.

[35] A. Vakharia, *Splitting Procedural Law: Examining the Implications of Union of India v. McDonnell Douglas*, "Dispute Resolution Journal" 2019, vol. 73(4).

[36] J.G. Frick, *Arbitration and Complex International Contracts*, Zürich 2001, p. 285.

[37] J.D.M. Lew, *Applicable Law in International Commercial Arbitration*, Dobbs Ferry 1978, p. 245.

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arises. However, most often in the arbitration clause the choice of law applicable to the dispute resolution procedure is not made, which, among other considerations, encourages the arbitral tribunal or, in certain cases, the state court to use the *lex arbitri* of the place of arbitration as the most appropriate law. For example, in the case of *Union of India v. McDonnell Douglas*, J. Saville stated that "if the parties do not make an express choice of procedural law to govern their arbitration, then the court will consider whether they have made an implicit choice. In this circumstance, the fact that the parties have agreed to a place for the arbitration is a very strong pointer that implicitly they must have chosen the law of that place to govern the procedures of the arbitration".[38]

Based on the above, it is fair to say that if the parties do not agree in the arbitration clause of the place of arbitration and, accordingly, the *lex arbitri*, it does not invalidate or make the arbitration clause unenforceable, as such a choice may be made later by the arbitral tribunal.[39]

The request of the party to arbitration to state court to determine the place of arbitration, for example, is allowed under the provisions of the UK Arbitration Act, provided that the defendant or probable defendant in the case is a resident of England, Wales or Northern Ireland, regardless of the defendant nationality. In this case, the court may recognize its jurisdiction and establish the place of arbitration,[40] and hence most likely to determine the *lex arbitri*.

On the other hand, the importance of the place of arbitration as a connecting factor does not indicate that the court of another state considering a foreign arbitral award is obliged to be guided by the *lex arbitri*.[41] 1958 New York Convention in Article V (2) clearly indicates the application of *lex fori* by a national court. A problem that deserves a separate study is the issue of recognition and enforcement of an arbitral award in another jurisdiction, when at the place of its issuance (place of arbitration) it was set aside. In this context, with the possibility of choice of *lex arbitri*, as well as with the existence of a stable territorial connection (enshrined in the 1958 New York Convention and the UNCITRAL Model Law), between the chosen (designated) place of arbitration and the *lex arbitri* is linked the importance of the place of arbitration as a legal category[42] and the established in the science and practice of international commercial arbitration theory of the place of arbitration.[43] The general definition in this regard was formulated by W.W. Park: "The law of the arbitration is the law of the place of the proceedings: the *lex arbitri* is the *lex*

[38] A. Tweeddale, K. Tweeddale, *op. cit.*, p. 242.

[39] *Ibidem*, pp. 233–234.

[40] I. Yoshida, *Determination of the Seat of Arbitration under the Arbitration Act 1996*, "Arbitration: Journal of the Chartered Institute of Arbitrators" 1998, vol. 64(4), p. 293.

[41] J.-F. Poudret, S. Besson, S.V. Berti, A. Fonti, *op. cit.*, p. 89.

[42] G.B. Born, *International Commercial Arbitration*, Alphen aan den Rijn 2014, p. 345.

[43] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *op. cit.*, p. 180.

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loci arbitri. Thus, an arbitrator must bow to mandatory norms of the country in which he sits".[44]

The link between the place of arbitration and the *lex arbitri* is established at the level of national arbitration laws and arbitration rules. For example, UK Arbitration Act in Article 2 (1) establishes that the provisions of its first part apply where the seat of the arbitration is in England and Wales or Northern Ireland. Article 176 (1) of the CPIL explicitly indicates that the provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland. According to Article 1 (1) of the Law of Ukraine "On International Commercial Arbitration", the present Law applies to international commercial arbitration if the place of arbitration is in the territory of Ukraine. Another approach is also used. Thus, the French CPC does not contain provisions on the mandatory or automatic application of the provisions of this Code to arbitration held in France, unless the parties determine it as applicable or the arbitral tribunal decides that the relevant provisions of the French CPC will serve as *lex arbitri*.[45] This rule is generally in line with the consistent French approach aimed at the flexible application of the provisions of the French CPC to arbitration.

At the same time, the choice of the place of arbitration, in accordance with the provisions of these acts, is made by the parties, and in the absence of such choice – by the arbitral tribunal or arbitration institution designated by the parties (in particular, under Swiss law). Article 3 of the UK Arbitration Act regulates in some detail the question of determining the place of arbitration, indicating that it is designated by the parties to the arbitration agreement, or by any arbitral or other institution or person vested by the parties with powers in that regard, or by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances. The Law of Ukraine "On International Commercial Arbitration" in Article 20 (1) only states that the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Rules of the ICAC at the Ukrainian CCI in Article 39 (1) unambiguously establishes the place of arbitration in Kyiv, Ukraine. The ICC Arbitration Rules, on the other hand, determines, that the place of the arbitration shall be fixed by the court, unless agreed upon by the parties. The LCIA Arbitration Rules in paras. 16.1 and 16.2 regulates the aspect of determination of the place of arbitration in more detail, stating that the parties may agree in writing the seat (or legal place) of their arbitration at any

[44] W.W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, "The International and Comparative Law Quarterly" 1983, vol. 32(1), p. 23.

[45] D.T. Hascher, *op. cit.*, p. 329.

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time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal. In default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate. The Vienna Rules in Article 25 only determines that the parties are free to agree on the place of arbitration. Absent party agreement, the place of arbitration shall be Vienna. The SCC Arbitration Rules (Article 25) also, first of all, gives the right to determine the place of arbitration to the parties, in the absence of such an agreement the place of arbitration is determined by the SCC Board. The UNCITRAL Arbitration Rules in Article 18 (1) states that if the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case.

CONCLUSIONS

Thus, with the exception of the ICC Arbitration Rules, the above provisions of the arbitration rules of other leading arbitration institutions indicate a tendency, on the one hand, to determine the place of arbitration by the parties or the arbitral tribunal, and on the other – to establish a subsidiary link to the location of the arbitration institution and refer to the application of the *lex arbitri* of the relevant jurisdiction. This approach contributes to legal certainty, allows to establish the place where the arbitration award was made (and hence the procedure and grounds for its setting aside, governed by the *lex arbitri*), and generally continues the logical and legal relationship between the arbitration institution, the arbitration rules and the place of arbitration, allowing effectively and unequivocally to establish the law of the place of arbitration and extend the jurisdiction of national courts over the above-mentioned aspects of the facilitation of arbitration process. It is seen that taking these positions into account led to the decision of the developers of the new version of the Rules of the ICAC at the Ukrainian CCI to establish a universal link of the place of arbitration to Kyiv, and therefore to determine the relevant provisions of Ukrainian law. The difference is the UNCITRAL Arbitration Rules as amended in 2010, the authors of which deliberately did not indicate the existence of a legal link between the place of arbitration and the *lex arbitri*, arguing that "the legal consequences arising from the choice of the seat of arbitration might differ in different legal systems", and that "the Rules regulate the internal process of the arbitral proceedings, subject to the mandatory terms of the law governing the arbitration, and do not themselves speak to that law".[46]

[46] D.D. Caron, L.M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford 2013, p. 79.

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An important reservation propagated in recent years at the level of most arbitration rules and even arbitration laws of developed pro-arbitration jurisdictions is the consolidation of the possibility of holding hearings, debates, hearing witnesses, and other procedural actions outside the legal place of arbitration, which is purely practical and does not affect the territorial connection between the arbitration process, the arbitration agreement and the *lex arbitri*. One of the most detailed provisions on this aspect is the provision of para. 16.3 of the LCIA Arbitration Rules, according to which if the arbitral tribunal is to meet in person to hold its deliberations, it may do so at any geographical place of its own choice. If such place(s) should be elsewhere than the seat of the arbitration, or if any hearing or deliberation takes place otherwise than in person (in whole or in part), the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat. Rules of the ICAC at the Ukrainian CCI in Article 39 also pays sufficient attention to this issue, pointing out that the parties may agree to hold hearings outside the ICAC location. The arbitral tribunal may after the parties' approval hold oral hearings and other hearings outside the ICAC location, at any place it considers appropriate for meetings of arbitrators, by hearing witnesses, experts or representatives of the parties, or for inspection of goods, other property or documents. If oral hearing and/or other meetings are being held at the place other than the place of arbitration, or by videoconference (which have become widespread in arbitration practice in recent years under the influence of the COVID-19 pandemic, becoming part of the virtual hearing mechanism[47]), the arbitration is deemed to be held at the place of arbitration indicated in this Article (Part 1). The Arbitral Award is considered to be made at the place of arbitration.

The parties are also free to supplement the provisions of the applicable procedural law (both in the context of dispositive provisions of the *lex arbitri* and within the limits established by the arbitration rules or other rules of procedure) by any specific procedural rules at the level of the arbitration agreement. Researchers attribute to such cases the settlement of issues that are not set at the level of applicable law, or the right to change such provisions for the purposes of a particular case, which will always prevail over the rules of procedure, which in turn will prevail over the rules of *lex arbitri* (with exception of imperative norms).[48]

Thus, in the most general sense, the law applicable to the arbitration process should be understood as chosen by the parties or determined by the arbitral tribunal or by other authorized body procedural law of a state, with its own legal nature and instrumental purpose, which is usually the law of the place of arbitration (*lex arbi-*

[47] C. Chinn, *Some Reflections on Arbitration Hearings in the COVID-19 Era*, "Biuletyn Arbitrażowy" 2021, no. 27, p. 5.

[48] J. F. Morrissey, J. M. Graves, *op. cit.*, p. 334.

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tri); and rules of procedure agreed by the parties by specifying the arbitration rules of a particular institutional arbitration or other similar rules in the arbitration clause.

The main principles of determining and applying the *lex arbitri* are party autonomy, the possibility of subsidiary establishment of the law of the place of arbitration by the arbitral tribunal, the existence of a stable territorial and jurisdictional link between the place of arbitration and the *lex arbitri*, and the unconditional application of mandatory provisions of the law of the place of arbitration, which determines the principles of arbitration proceedings, establishes occurrences and limits of interaction of the parties and the arbitral tribunal with the national courts, determines the form and conditions of validity of the arbitral award, the procedure for challenging it and the grounds for setting aside. Instead, the rules of procedure are characterized by considerable flexibility and adaptability to the needs of a particular arbitration process, allowing the parties or the arbitral tribunal to form their own procedures. Hierarchically, the interaction of the analysed norms is built according to the following formula:

- mandatory norms of *lex arbitri*,
- rules agreed by the parties in the arbitration clause,
- rules of procedure established by the arbitration rules or other instrument chosen by the parties or determined by the arbitral tribunal,
- dispositive norms of the *lex arbitri*, which may supplement the requirements of the above-mentioned sources.

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ABSTRAKT

Artykuł ma charakter naukowo-badawczy, a jego celem jest przede wszystkim określenie prawnego charakteru, źródeł regulacji i głównych cech prawa regulującego postępowanie w międzynarodowym arbitrażu handlowym. Problematyka ta jest analizowana poprzez badanie odpowiednich postanowień aktów międzynarodowych, przepisów prawa krajowego i regulaminów postępowania arbitrażowego czołowych stałych instytucji arbitrażowych. Przyjmuje się, że zastosowane prawo procesowe można rozumieć jako pojedynczy system prawny tylko w pewnym kontekście, w szczególności odwołującym się do zasad proceduralnych *lex arbitri*. Autorzy uzasadniają również stanowisko, zgodnie z którym – w najszerszym sensie – prawo stosowane w postępowaniu arbitrażowym należy rozumieć jako państwowe prawo procesowe o swoistym charakterze prawnym i określonym celu, wybrane przez strony lub określone przez sąd arbitrażowy lub inny uprawniony organ, przy czym zwykle jest to prawo właściwe ze względu na miejsce arbitrażu (*lex arbitri*) oraz przepisy proceduralne uzgodnione przez strony poprzez wskazanie w klauzuli arbitrażowej regulaminu postępowania danej instytucji arbitrażowej lub innych podobnych przepisów.

Słowa kluczowe: międzynarodowy arbitraż handlowy; *lex arbitri*; miejsce arbitrażu; zasady proceduralne