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Hypochondria About the Place of Arbitration in Online Proceedings

Mirèze Philippe · Wednesday, September 16th, 2015 · ArbitralWomen

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Hypochondria is defined as an excessive preoccupation with one's health, usually focusing on some particular symptom. Could excessive preoccupation about the place of arbitration in online dispute resolution be assimilated to hypochondria? Are discussions that we hear from time to time and recently during the electronic conference on Technology in International Arbitration (*see information* on https://www.jurisconferences.com) about defining the place of arbitration in online procedures justified?

The issue of the place of arbitration in online arbitration has been clarified since 1998 by Gabrielle Kaufmann-Kohler in an article in which she emphasised that, irrespective of the material place where the procedure is conducted such procedure is deemed to take place at the place of arbitration, and that the place of arbitration has become a fiction ("*Le lieu de l'arbitrage à l'aune de la mondialisation*", *Revue de l'Arbitrage, 1998, page 517*, and "*Identifying and applying the law governing the arbitration procedure – The role of the law of the place of arbitration*", *ICCA Congress, series No.9, 1999, page 336*). Kaufmann-Kohler referred to two new forms of arbitration in which procedures are deemed to be held at the place of arbitration: Lausanne for the Court of Arbitration for Sport where "*the games move around, but the legal framework is stable*" as she states, and the place of arbitration in cyberarbitration. She concluded that "*the place is becoming a non-issue*".

The author has also raised this issue in conferences and articles (see "*ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR*", International Journal of Online Dispute Resolution, 2014, volume 1, issue 1, page 57, and "*Now where do we stand with online dispute resolution (ODR)*", *Revue de Droit des Affaires Internationales, 2010, n°6, page 563*). The real question is not about the place, i.e. the venue, but about the legal framework as mentioned by Kaufmann-Kohler. The legal framework is meant to determine the law governing the procedure (the mandatory procedural provisions of the seat of arbitration are crucial) and the jurisdictional place, *i.e.* the country which should preferably be a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in order for the award to be enforced in other states. Similarly, the question should not be the determination of law applicable to the internet environment or location, because the environment refers only to the virtual or physical meeting location, whereas the choice of procedural law determines the

jurisdiction to which the parties (or an arbitration institution that fixes a place of arbitration if no agreement is reached by the parties) decide to submit the procedure and the award.

Determining a place of arbitration has logically the same purpose in a traditional offline arbitration than in an arbitration taking place partially or exclusively online: the choice of the place represents the law chosen by the parties to govern their proceedings. The autonomy of the parties to determine such place – and thus such law – is not affected by the fact that the procedure may be conducted online or offline. One thing that never changes about arbitration is the autonomy from which parties benefit to determine procedural issues, mainly the choice of arbitration mechanism, the choice of language, law and place, and such power is usually recognised by all jurisdictions. Why would anyone who is not a party to the agreement question the choice of law applicable to the procedure just because the parties opted for a swifter and more practical communications means?

Whether the arbitration procedure is conducted online or offline makes no difference: the choice of the dispute resolution mechanism, the law applicable to the merits, the place of arbitration and thus the procedural law will be interpreted the same way. The only difference resides in the fact that the procedure is conducted in an online environment.

In a traditional offline arbitration parties and arbitrators do not always meet at the place of arbitration and can meet in any other geographical location they find convenient. They may even meet each time in different places. As provided by the ICC Arbitration Rules and by most dispute resolution rules, the arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties (Article 18.2). The *lex arbitri* will apply whether meetings take place physically in a geographical location or do not take place at all, whether parties and arbitrators hold a hearing in an electronic environment or over the telephone. Likewise, case management conferences are often held over the phone or through internet and not at the geographical place of arbitration, and the same is the case in emergency arbitrations.

Courts have already decided on different occasions that holding hearings and deliberations or rendering awards at places other than the place of arbitration have no impact on the designated place of arbitration (*Tribunal Fédéral Suisse, arrêt 24 mars 1997, bulletin ASA 1997, p.316 & 319-320; Gabrielle Kaufmann-Kohler, Le lieu de l'arbitrage à l'aune de la mondialisation, Revue de l'Arbitrage, 1998, p. 517*). The same solution applies to online dispute resolution where no meeting in person may take place.

As long as the parties agree to submit to the procedure of a determined jurisdiction, and provided that due process is respected, why should courts or dispute resolution practitioners not accept such choice on the ground that no hearing, meeting, deliberation or signature of the award physically took place at the seat of arbitration (save where the law of the place of jurisdiction requires that the award be physically signed at the seat of arbitration), knowing very well that the same happens in a traditional arbitration. On 27 January 2014 the High Court in London rejected a challenge to an award brought on the basis of the respondent's non-participation in a telephone conference and evidential hearing (*Global Arbitration Review "Procedural fairness when a respondent fails to participate", report by Tom Cummins from Ashurst London about Interprods Ltd v De La Rue International Ltd [2014] EWHC 68 (Comm), 10 February 2014*).

In a domestic arbitration where all elements of the case – parties' place of business, conclusion of the contract and its performance, choice of law applicable to the merits, and choice of place (and

thus of the law applicable to the procedure) – are located in the same country, it is to be doubted that the same concern about the place of arbitration in an online procedure would be raised.

When the parties have selected a law to apply to their procedure through the selection of a place of arbitration, this choice should not be jeopardised or refused by the simple fact that they also chose an electronic environment for the conduct of their procedure. Their choice of an online environment using Web platforms is first a natural consequence of the virtual environment in which parties conduct their business, primarily over the past fifteen years. Parties need not leave the virtual environment to resolve their dispute. Secondly, the parties' choice is also certainly dictated by the benefits that such virtual environment offers, namely: swift communications and instantaneous access to information; documents and messages normally exchanged in a protected environment; the same environment shared by all stakeholders involved in a case (parties, arbitrators, administrative secretaries, experts, arbitration institution with different rights of access) who can access the same information and at the same time; an environment in which documents, messages and information are permanently available and can be accessed any time and from anywhere; the possibility to travel to the meeting or hearing location without carrying volumes of documents which can be accessed from their laptop by connecting to the electronic environment; electronic communication means which allow savings in cost and time (namely stationery, private courier services, travelling for meetings and hearings, space for archiving documents).

Considering the above arguments regarding the choice of procedural law which is independent from the location where parties and arbitrators may meet, and to help avoid confusion between the physical place and the legal place, I would venture to suggest that arbitration agreements clearly distinguish both notions:

– State of Jurisdiction: whereby the legal framework is reflected in the parties' choice of a procedural law and of a state signatory of the New York Convention (the choice of the procedural law is hardly ever mentioned in arbitration agreements). The parties may indicate the law governing the arbitration procedure, and that the arbitration shall be deemed to have been held and the award to have been rendered in that given state.

– Meetings Venue: whereby the geographical or the virtual place is provided, in case parties and arbitrators do not subsequently agree on a location or on a virtual environment for their meetings.

To conclude, I will use the words of Gabrielle Kaufmann-Kohler who stated that the place of arbitration is a non-issue. The material place is independent from the law to govern the proceedings, irrespective of where the meeting or hearing may be held and whether it may be held at all.

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