SPLITTING PROCEDURAL LAW: EXAMINING THE IMPLICATIONS OF *UNION OF INDIA V. MCDONNELL DOUGLAS*

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I. INTRODUCTION

Parties choose arbitration as their preferred means of dispute resolution because it allows them an opportunity to customize resolution of potential conflicts. In other words, parties are able to choose everything about their dispute resolution process from who hears their case to where it will take place to which laws will apply. Sometimes, however, this freedom to customize gives way to confusing and pathological[1] arbitration clauses,[2] as was with the case in *Union of India v. McDonnell Douglas Corp.* In this case, the parties chose two sets of procedural law, likely by accident. Instead of forcing the parties to choose one or the other, the Court arrived at a bizarre decision: to create a distinction between "internal" and "external" procedural law. This distinction appears to be a stretch. It is problematic for several reasons. First, it creates a level of confusion in interpreting arbitration agreements. Second, such a practice would create issues in compliance with arbitration laws in several countries. Third, making such a distinction renders arbitration agreements unnecessarily granular and theoretical, thus facilitating the creation of pathological arbitration clauses.

II. *UNION OF INDIA V. MCDONNELL DOUGLAS*

As most disputes of this kind, *McDonnell Douglas* started with a dispute arising out of a contract containing a vague, confusing and

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[1] A Pathological arbitration clause is one that is unclear and ambiguous enough to cause a problem between parties when a dispute rises between them in connection with the underlying container contract. *See* SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 199 (2011).

[2] The terms "arbitration clause" and "arbitration agreement" are used interchangeably throughout this article. These terms are limited to those for international commercial contracts.

arguably pathological arbitration clause.[3] The procedural law portion of this agreement read, "The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940. . . . The seat of the arbitration proceedings shall be London, United Kingdom."[4] Once a conflict arose in connection with the container contract, the parties disputed whether English or Indian law would govern the procedure of their arbitration. The plaintiffs, bringing the claim to a court in the United Kingdom, contended that the applicable procedural law would be the Indian Arbitration Act of 1940, whereas the defendants argued that it was the law of London, since that had been stipulated to be the "seat."[5] The Court decided that *both* parties were correct. They held that the container contract and the law governing the arbitration agreement itself would be Indian law, whereas the law governing the "external" proceedings themselves would be the law of London, the seat. This was because by electing London as the "seat," they implicitly chose to follow English procedural laws (or "external" procedure), while simultaneously having the Indian Arbitration Act govern the "internal" procedure, governing the "internal conduct of their arbitration."[6] Thus, the Court held that it is possible to choose a procedural law that is distinct from the law governing the "seat." This is problematic when examining the distinction (or substantial lack thereof) between the definitions of "seat" and "procedural law."

III. THE SIGNIFICANCE OF USING TERMS OF ART

The significance of an arbitration clause such as the one in *McDonnell Douglas* lies in the nuances contained within the terms of art. First, it is important to understand what exactly "procedural law" means. While it is easy to assume, from the name itself, that it is the law that governs the general procedure of the arbitration, this type of law covers a

[3] A contract containing an agreement is known as a "container contract." A "container contract" is the substantive portion of a contract, and is distinct from the arbitration clause. This concept is known as "separability." *See* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE (2d ed. 2016) ("Most courts have held that termination, expiration, rescission or repudiation of the underlying contract does not affect the separable arbitration agreement."); *see e.g.* CODE DE PROCÉDURE CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] Article 1447 (Fr.).

[4] *Union of India v. McDonnell Douglas* [1993] 2 Lloyd's L. Rep. 48 Queen's Bench Div. (Commercial Court).

[5] This is problematic because "seat" is a term of art, which means more than simply the "place" of arbitration. *See infra* Part III.B.

[6] McDonnell Douglas, 2 Lloyd's L. Rep. at 51.

number of different aspects. When examining "procedural law" next to the term "seat" of arbitration, you see that these concepts are two sides of the same coin. This is because parties usually understand that when they select a seat of arbitration, they also agree to the procedural law of that seat. Thus, trying to differentiate the two terms in an arbitration agreement can lead to a great deal of confusion.

A. Procedural Law: What's Covered

Procedural Law covers a variety of different issues. These issues include rules of procedure within the arbitration, conflicts of law rules. It also covers which advocates are qualified to represent parties, as well as which arbitrators are allowed to serve on a panel. Procedural law also governs issues such as statutes of limitations, interest, attorney's fees and what kinds of provisional relief can be granted by a court. Finally, it covers the grounds on which an award is either confirmed or vacated.

1. Rules of Procedure

First, and most obviously, "procedural law" covers the rules of procedure in the arbitration.[7] Some countries, such as Guatemala, require that parties whose arbitrations are seated in their legal systems follow a specific set of procedural rules.[8] For example, the Guatemala Code of Civil Procedure mandates that "The arbitral proceedings shall be conducted in accordance with the provisions of [Articles 287 and 288] and *may not be modified under any circumstances by agreement of the parties*."[9] This means that if parties choose Guatemala as the seat of arbitration, then they are bound by a particular set of procedural rules, which they absolutely may not depart from.

On the other hand, countries such as Switzerland and the United States have a more liberal approach.[10] These countries allow parties to contract as to any type of procedure they like, so long as it conforms with the New York Convention and the rules of whatever arbitral

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[7] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 428 (2d ed. 2001).

[8] *See generally Id*. at 444.

[9] CODUL DE PROCEDURA CIVILA [C.P.C.] [CIVIL PROCEDURE CODE] Articolul 287 (Guat.) (emphasis added); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 417 (2d ed. 2001).

[10] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 444 (2d ed. 2001).

institution the parties agreed to arbitrate with.[11] For example, while the FAA does not explicitly grant a party the right to freely choose the procedures that will govern their arbitration, some courts have held that parties are not bound by federal procedural rules, and may depart from them.[12] US courts generally show even more deference to a party's procedural preferences in the case of international arbitration than in a domestic arbitration.[13] Thus, in formulating the procedural part of an arbitration agreement, it is important to note the existence of a spectrum between the Guatemalan approach and the American approach, and where exactly on this spectrum your seat and procedural law of choice fall. It is also particularly important to understand how the different sets of laws you chose work (or do not work) together.

2. Conflicts of Law Rules

Second, procedural law covers which conflicts of law rules are applicable should a tribunal need to use them.[14] The traditional approach, which has been adopted in the United States, applies the conflicts of law rules of where the arbitration is taking place, if not otherwise indicated.[15] This is because the seat of arbitration is usually chosen as a result of what their laws on arbitration say.[16] However, this approach is not the norm in the case of international arbitration.[17] For example, some arbitration agreements call for the conflicts of law rules to be chosen by a particular arbitral institution through such institution's (or the parties') choice of a seat.[18] However, the analysis of which conflicts of law rules to use becomes complicated when there are multiple

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[11] *Id.*; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517 [hereinafter referred to as "New York Convention"].

[12] *See Card v. Stratton Oakmont*, 933 F. Supp. 806 (1996) (holding that parties who choose to arbitrate are not bound by the Federal Rules of Evidence, and noting that parties should not expect the same procedural rules from the Courts to apply in arbitrations).

[13] *See* Federal Arbitration Act, 9 U.S.C. ch. 1 §10(a)(3); *See e.g. Hotel Condado Beach v. Union de Tronquistas Local* 901, 763 F.2d 34, 38 (1st Cir. 1985) ("An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration hearings are not constrained by formal rules of procedure or evidence.").

[14] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 428 (2d ed. 2001).

[15] *Id.* at 536–37.

[16] *Id.*; *infra* Part III.B.

[17] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 537 (2d ed. 2001).

[18] *Id.*

procedural laws to be applied. Moreover, many arbitrators in the international realm do not consider themselves to be bound by the conflicts of laws rules of the seat of their arbitration.[19] Some institutional rules, such as those of the American Arbitration Association (and their International Center for Dispute Resolution), the International Chamber of Commerce and the London Court of International Arbitration even allow arbitrators to select the rules that they feel are appropriate.[20] These factors combined can create confusion as to which conflicts of law rules apply, especially for those disputes whose arbitration clauses contain multiple types of procedural law.

3. Advocate Appearances

Third, procedural law covers whether a specific advocate is allowed to appear at an arbitration, and what his or her ethical obligations are.[21] Most arbitral institutions allow parties to be represented by an advocate of their choice.[22] However, this freedom is limited by several factors. First, while some countries, such as Australia, statutorily allow parties the freedom to choose their advocates in an international arbitration, other countries, such as Japan, limit representation to those attorneys who are admitted to practice in their respective jurisdictions.[23] Also, it is unclear what ethical obligations apply to advocates in international arbitrations. Normally, such ethical obligations are dictated by each jurisdiction's courts, however it remains unclear how these issues should be dealt with in an international arbitration.[24] This issue becomes even more unclear when more than one set of procedural rules apply to a particular arbitration.

4. Arbitrator Qualifications

Fourth, procedural law covers whether an arbitrator is qualified to serve on a tribunal.[25] For example, countries such as Switzerland

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[19] *Id. at* 539.

[20] *Id. at* 537.

[21] *Id. at* 428.

[22] *Id. at* 514.

[23] *Id. at* 514; *Australian International Arbitration Amendment Act 1989* § 29; *See generally* Charles R. Ragan, *Arbitration in Japan: Caveat Foreign Drafter and Other Lessons*, 7 Arb. Int'l 93 (1991).

[24] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 515 (2d ed. 2001).

[25] *Id.* at 428.

allow parties to essentially select any person that they want to serve as an arbitrator.[26] Similarly, in the United States, arbitrators may not be judicially appointed if the parties have agreed upon a method of selection.[27] On the other hand, Saudi Arabia requires that an arbitrator whose panel is seated in that jurisdiction be either a Saudi national or expatriate, and further requires that the chairperson, or "umpire" in a panel of more than one arbitrator be knowledgeable about Sharia law.[28]

5. Statutes of Limitations, Attorney's Fees and Interest

Fifth, procedural law covers rules such as statutes of limitations, attorney's fees and issues regarding interest.[29] The rules for each of these differ, sometimes significantly, from country to country.[30] For example, when dealing with interest, an arbitrator can either look at the substantive law, the law of the seat, or an "international standard."[31] While the United States sees interest as a "procedural" issue, quite a few civil law countries consider it to be a "substantive" issue.[32] Moreover, some countries, such as France, have set interest rates that must be awarded, and others, such as Middle-Eastern countries, prohibit awarding interest altogether, due to their adherence to the principles of Sharia Law.[33] Similarly, the issue of how to allocate attorneys' fees is dealt with differently in different countries. For example, in the United States, each side is generally responsible for paying their

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[26] BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [SWISS PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, art. 179-80 (Switz.).

[27] Federal Arbitration Act, 9 U.S.C. 1 § 5; *see e.g. Cargill Rice, Inc. v. Empresa Nicaraguense de Alimentos Basicos*, 25 F.3d 223 (4th Cir. 1994).

[28] RULES FOR THE IMPLEMENTATION OF THE SAUDI ARABIAN ARBITRATION REGULATION, art. 3.

[29] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 428 (2d ed. 2001).

[30] *Id.* at 904.

[31] *Id.* at 905.

[32] *Id.* at 906; *see* Martin Hunter & Volker Triebel, *Awarding Interest in International Arbitration* 6 J. Int'l Arb. 1 (1989); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 comment e (AM. LAW INST. 1971).

[33] CODE DE PROCÉDURE CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] Article 1652 (Fr.); *see* S. Saleh, *The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 348, 349; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 906 (2d ed. 2001).

own attorneys' fees whether they win or lose a case.[34] However, in civil law countries, as well as in England, the winning party is entitled to a reasonable amount for legal fees, which is sometimes calculated by a statutory formula.[35] If parties are allowed to choose multiple procedural laws within their arbitration agreements, such matters as interest and attorneys' fees can become unnecessarily complicated.

6. Provisional Relief from Courts

Sixth, procedural law covers the availability of provisional relief from the courts.[36] Courts are often called on to determine a variety of issues, including threshold questions such as whether there is a valid arbitration agreement or whether an arbitrator is eligible to serve on a panel.[37] Procedural law further determines whether a court or an arbitration panel decides on such an issue. For example, in France, once an arbitration panel has been selected, the panel is empowered to decide on any issue related to the arbitration, and the arbitrators' determination cannot be challenged until the final award is submitted to the court for confirmation or vacatur.[38] In the United States, however, the analysis is slightly more complicated. First, the question of whether an issue is actually arbitrable is to be decided by a court.[39] In the absence of an agreement to the contrary, an arbitration panel may only decide on whether "conditions precedent to an obligation to arbitrate" (such as statutes of limitation, estoppel, notice, etc.) were met.[40]

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[34] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 911 (2d ed. 2001); *see generally Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975).

[35] *Id.* at 911.

[36] *Id.* at 428.

[37] *See* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 70 (Franco Ferrari ed., 2013).

[38] French Civil Code 1448 (The only time an issue will not be referred to an arbitrator is if the arbitration agreement is manifestly void and inapplicable); FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 87 (Franco Ferrari ed., 2013).

[39] *Kaplan v. First Options* 19 F.3d 1503 (1994).

[40] *Howsam v. Dean Witter Reynolds* 537 U.S. 79 (2002); FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 119-20 (Franco Ferrari ed., 2013).

7. Confirmation and Vacatur

Seventh, procedural law covers which courts have the jurisdiction to confirm or vacate an award, and on which grounds.[41] Generally, all countries who are parties to the New York Convention are required to recognize awards made in their fellow contracting states.[42] However, Article V(2) of the Convention allows for courts to vacate an award if an issue is inarbitrable under an applicable jurisdiction's laws, or if recognition of the award would be contrary to such jurisdiction's public policy. For example, as mentioned above, many Islamic countries' courts would undoubtedly vacate and refuse to enforce an award that calls for a party to pay interest because it is contrary to Sharia law, whereas such an award would be perfectly acceptable in the United States.[43] Whether such an award would be enforced or vacated depends on the procedural law chosen in the arbitration agreement.

B. Seat of Arbitration

Another important term of art is the "seat," or "situs" of arbitration. "Seat" often gets confused with "procedural law," since the meanings of these terms are not mutually exclusive. By choosing a location of the seat of arbitration, a party is agreeing to several things. Most obviously, the seat is typically the location where an arbitration is held. More importantly, the seat of the arbitration determines the procedural law that will be used. This has several implications. First, the courts in the seat of arbitration are responsible for resolving any interlocutory issues that fall out of the arbitrators' jurisdiction.[44] Second, the law of the seat is the law that governs the arbitration agreement itself (which is a different law than the "substantive" law, which governs the container contract).[45] Third, the courts at the seat are considered the most competent in determining whether an award rendered there should be vacated.[46] Fourth, the rules of the seat

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[41] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 428 (2d ed. 2001).

[42] New York Convention Art. V(2).

[43] *Supra* note 28.

[44] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 574 (2d ed. 2001).

[45] *Id.*

[46] *Id.* However, parties are no longer required to file a motion to confirm an award at the seat of the arbitration, as the New York Convention did away with the double exequatur requirement. Nonetheless, if an award is vacated at the seat, it is not likely that another

determine who can be an arbitrator, as well as what jurisdictions an advocate needs to be licensed in to represent a party to an arbitration taking place in that jurisdiction.[47]

In examining the definitions of "procedural law" and the "seat" of arbitration above, it becomes clear that the two concepts are very much interrelated. Essentially, the seat of arbitration is what determines the procedural laws to be used in a particular arbitration. In fact, the seat of arbitration exists as a concept to give parties legal certainty as to which procedural law will apply, as most of the procedural actions are taken at the seat itself.[48] The main distinction between the two is that "the country 'in which' an award is made is the seat of arbitration; the law 'under which' the award is made is the *lex arbitri* (which will, in almost every case, be the law of the seat)."[49] In other words, "seat" and "procedural law" are "two sides of the same coin."[50] As such, trying to create a distinction between the two ideas would lead to a great deal of confusion.

IV. "EXTERNAL" VS. "INTERNAL" PROCEDURAL LAW

In order to understand the distinction between "external" and "internal" procedure, one must look to *Union of India v. McDonnell Douglas*. Per the *McDonnell Douglas* court, "external" procedural law as governing the confirmation/vacatur of an award. Conversely, "internal" procedural law is that which governs what goes on inside of the arbitration proceedings.

New York Convention jurisdiction will enforce it. *See* Tibor Varady et al., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 916 (6th ed. 2015); FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 65 (Franco Ferrari ed., 2013); *see generally* New York Convention.

[47] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 575 (2d ed. 2001).

[48] FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 61 – 62 (Franco Ferrari ed., 2013).

[49] Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 Int'l & Comp. L. Q. 517, 527 (2014). *Lex arbitri* is essentially the law that governs the procedure of arbitration. It is considered synonymous with "procedural law." *See* SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 58 (2011).

[50] Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 Int'l & Comp. L. Q. 517, 527 (2014).

A. External Procedural Law

The Court in *McDonnell Douglas* defined "external" procedural law as "the external supervision of arbitration by the Courts."[51] This includes any issues that arise outside of the arbitration itself, such as confirmation of the award.[52] The Court's analysis as to this determination began at the parties choosing London as their seat of arbitration.[53] The Judge reasoned that since "seat" is a term of art, the parties most certainly intended for England's procedural laws to apply.[54] Even if the parties chose Indian law as "procedural law," choosing one law and throwing out the other would yield an absurd result to which the parties did not agree in their arbitration clause.[55] As such, the Court held that English law would govern the "external" procedural law, through which the courts of the seat would determine whether to confirm or vacate the award.[56]

B. Internal Procedural Law

This court went on to hold that by choosing the Indian Arbitration Act to govern "procedural law," the parties meant for it to govern "the internal conduct of their arbitration" in a way that is "not inconsistent with the choice of English Arbitral Procedure law."[57] Essentially, this means that the Indian Arbitration Act governed the internal conduct of the arbitration.[58] Although the Court was not more specific, it can be inferred that by "internal" conduct, the Court meant that Indian law would govern areas such as which issues are arbitrable by the panel and what kind of evidence is admissible at hearings.[59]

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[51] *Union of India v. McDonnell Douglas Corp*., [1993] 2 Lloyd's Law Rep. 48.

[52] Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 Int'l & Comp. L. Q. 517, 528 (2014).

[53] *Union of India v. McDonnell Douglas Corp*., [1993] 2 Lloyd's Law Rep. 48.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 Int'l & Comp. L. Q. 517, 528 (2014).

[59] Indian Arbitration Act, No. 10 of 1940.

V. SHOULD WE SPLIT THE DIFFERENT TYPES OF PROCEDURAL LAW?

Splitting the different types of procedural law will create confusion among attorneys who are not mindful of the nuances between different countries' arbitration laws, and among arbitrators who are tasked with figuring out which of the conflicting procedural laws apply to their arbitration. It will also create more opportunity for attorneys who are not knowledgeable about international arbitration procedure to inadvertently create pathological clauses that will create a number of issues at the time of a dispute.

A. The McDonnell Douglas Analysis was Wrong

An arbitration clause that selects both a distinct "seat" and a distinct "procedural law" cannot work, as demonstrated by the court's method of reasoning in *Union of India v. McDonnell Douglas*. The Court in *Union of India v. McDonnell Douglas* essentially validated a pathological arbitration clause. The concept of "seat" and "procedural law overlap so much that they are practically two sides of the same coin.[60] Although the *McDonnell Douglas* court issued a verdict that made the two terms seem distinct, they acknowledged, after reading the arbitration agreement, "the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities."[61] And in fact, it did, since choosing London as the seat is in direct conflict with choosing Indian procedural law to govern the arbitration. The court further acknowledged that interpreting there to be a procedural law different than that of the seat would have "unsatisfactory and possibly absurd results."[62] As such, the court went with dividing procedural law in a bizarre way that was inconsistent with the laws and principles governing international arbitration and its associated terms of art.

In their analysis, the court further acknowledged that, "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 laws of that place to govern the procedures of the arbitration."[63] In saying this, they implied that by choosing a seat, the parties

[60] *Supra* note 48.

[61] *Union of India v. McDonnell Douglas Corp*., [1993] 2 Lloyd's Law Rep. 48.

[62] *Id.*

[63] *Id.*

acknowledged that they submit to such seat's procedural rules. However, such an analysis is directly contrary to the arbitration agreement, which states that "[t]he arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof."[64] This demonstrates that the parties agreed to Indian arbitration law to cover procedural law, to the extent that it falls within the scope of the Indian Arbitration Act of 1940.

This is further demonstrated by the fact that the Indian Arbitration Act of 1940 also covers what the court defined as "external" procedure. In fact, while the *McDonnell Douglas* court assumed that the parties intended for English law to apply to confirmation of an award, it failed to recognize that this issue falls squarely within the four corners of the Indian Arbitration Act of 1940. In fact, Section 17 explicitly discusses rules for confirming an award and Section 31 explicitly discusses jurisdiction. Thus, it is unclear why, after all of this explicit evidence as to intent, this court failed to conduct a thorough analysis in its three-page opinion, and it is further unclear why this court still chose to bifurcate the procedural law.

It is clear that this is a pathological arbitration clause, and that the parties did not understand the significance of terms of art when drafting it. This is demonstrated by the fact that procedural law is distinct from that of the seat. Based on the wording of the agreement, it is clear that they chose the Indian Arbitration Act to govern procedure. In contrast, instead of referring to the seat of arbitration just as the seat, they used the wording "seat of the arbitration proceedings." This phrase, accompanied by the choice of a different procedural law, indicates that the drafters may not have understood the significance of the word "seat" as going beyond merely the location of the arbitration proceedings because the agreement demonstrates an "inconsistency in doctrinal terms."[65] Furthermore, pathological arbitration clauses are not a rarity.[66] Despite the amount of information and jurisprudence addressing the issue, attorneys continue to draft pathological clauses.[67]

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[64] *Id.*

[65] *Supra* note 48.

[66] Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 Int'l & Comp. L. Q. 517, 533 (2014).

[67] *Id.*

Instead of recognizing this as a pathological arbitration clause, the Court strained to "make sense" of an agreement that, per its own reasoning, would otherwise be considered absurd. In fact, this English court found a way to construe this pathological clause in a way that would grant them the power to decide the fate of this award instead of finding a way for the agreed-upon procedural law to apply. The arbitration clause had a clear and fundamental inconsistency that called for the procedural law of one country, and the seat of another, demonstrating a lack of understanding of at least one of these terms, specifically the "seat" of arbitration. The Court argues that in the arbitration agreement, the parties agreed to have two different sets of procedural rules. However, the Court did not indicate any language in the arbitration agreement that specified a clear consensus as to which procedural rules would apply to which procedural issues. This is because the agreement failed to do so. As such, it is a pathological clause and the court should have chosen one set of procedural rules over the other instead of creating an artificial framework that granted them power over the award, but was unsupported by the arbitration agreement. Nor should the court have created ambiguous terminology that fails to encompass all of the procedural issues that arise over the course of an international arbitration.

B. Aftermath of McDonnell Douglas

A particularly telling factor is that only three years after this case was decided, both the Indian and English arbitration laws were revised. These revisions reflect a desire for disputes over procedural matters to be resolved by the arbitration tribunal rather than the courts of a particular jurisdiction. For example, The English Arbitration Act of 1996 says that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree to any matter."[68] Similarly, the Indian Arbitration and Conciliation Act of 1996 says "The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. . . . Failing any [such agreement], the arbitral tribunal may . . . conduct the proceedings in a manner it considers appropriate."[69] Through the enactment of these laws, both the Indian and English governments recognized the dangers of letting courts decide on procedural issues and instead rightly

[68] England Arbitration Act of 1996 § 34(1).

[69] Indian Arbitration and Conciliation Act 1996 §§ 19(2) – 19(3).

transferred that power to the tribunals, who are usually more balanced between both parties' interests than a court of the country of a single party. Giving this power to arbitrators is especially important because English courts have not been consistent in their rulings for *McDonnell Douglas* type situations, and a solid framework for this type of an issue has still not been developed.[70]

C. The Rules on Drafting Arbitration Clauses

Parties choose to arbitrate because doing so gives them the power to tailor the dispute resolution process based on their preferences. As such, parties have the benefit of choosing which laws will govern their container contract, their arbitration agreement and their arbitration process. Theoretically, parties can get even more specific than that, and tailor their preferences any way they want to, whether it's choosing different laws for the "internal" and "external" procedure, or something even more granular.

Many laws support parties' rights to tailor their arbitration agreements as they please. At the very top of this list is the New York Convention. Article II mandates that states are to recognize arbitration agreements made between parties, but does not mandate how these arbitration agreements are to be structured.[71] This is particularly significant because over 150 countries have signed the convention.[72] At the next level, quite a few countries' laws allow parties freedom in structuring their arbitration agreements. For example, the United States Federal Arbitration Act does not impose any additional restrictions on what can be agreed upon in an arbitration agreement.[73] Nor does the French Arbitration Law, which explicitly states that the form of an arbitration

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[70] Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 Int'l & Comp. L. Q. 517, 517 (2014).

[71] *See* e.g. New York Convention Art. 2(1), (stating that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

[72] Contracting States, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/countries (last visited Apr. 21, 2018).

[73] *See e.g.* Federal Arbitration Act § 202 (stating, in part, that "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.").

agreement is completely up to the parties.[74] At the final level, Arbitral institutions also do not impose restrictions on how an arbitration agreement is drafted.[75] The International Chamber of Commerce allows parties who choose their arbitration rules to contract as they please to the applicable procedural law without placing further restrictions on them.[76] The American Arbitration Association's International Center for Dispute Resolution rules grant the same freedom of choice.[77] In an *ad hoc* arbitration, the UNCITRAL rules also grant parties the same kind of freedom.[78] Thus, theoretically, if parties are in a jurisdiction that allows as much freedom as the United States or France, they may draft their arbitration agreement in as much or as little detail as they would like.

D. Drawbacks of Allowing a McDonnell Douglas-Style Arbitration Clause

In order to create a nuanced arbitration clause that calls for different laws to apply to different procedural aspects, the drafter must have a thorough understanding of what each term of art means, and what the implications of choosing each type of law are. The reality is that arbitration clauses are often drafted by transactional attorneys who are more concerned with the substantive aspects of the container contract than the dispute resolution clause. Thus, it is very easy for an attorney who is not familiar with the intricacies of international arbitration to draft a pathological clause, which leads to major problems if a dispute arises that falls within the scope of the arbitration clause.

One example of a pathological clause is the kind in *McDonnell Douglas*. In the case of that specific case, the court believed that they

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[74] CODE DE PROCÉDURE CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] Article 1507 (Fr.) (stating that "La convention d'arbitrage n'est soumise à aucune condition de forme. [An arbitration agreement shall not be subject to any conditions as to its form.]".

[75] Note that parties are not required to conduct arbitrations with an institution.

[76] *See e.g.* International Chamber of Commerce Arbitration Rules, Article 4 (which does not place a restriction on the applicable procedural law, so long as ICC rules apply); Articles 18-19 (which allow parties to contract on the place of arbitration, and the rules that will apply thereto).

[77] *See* ICDR Arbitration Rules Art. 17 (stating that parties may decide the place of arbitration), 19 (stating how parties may agree to arbitral jurisdiction), and 31 (stating that parties are free to choose the law).

[78] *See* UNCITRAL Arbitration Rules Arts. 18 (allowing parties to choose the location/seat of their arbitration), 23 (stating that the tribunal has the power to ascertain their jurisdiction based on the arbitration agreement).

found a way to make the clause work by creating a distinction based on what the court thought the parties meant by the phrase "seat of the arbitration proceedings." However, had the seat been Guatemala instead of London, then the court would have had a much more difficult time in accommodating both sets of procedural law. This is because countries like Guatemala require that parties who choose their procedural law (or, in other words, parties who choose Guatemala as their seat of arbitration) are bound to conduct their arbitrations in a manner consistent with the procedures outlined in the Guatemalan Arbitration Law.[79] Consequently, the choice of Guatemala as a seat would have knocked out the Indian Arbitration Act, thus voiding the parties' intent for this Act to govern their arbitration. It is very easy for people who are unfamiliar with the intricacies of international arbitration laws to unknowingly draft a pathological clause that would lead to this type of a result. Such a clause would confuse an arbitration panel who is trying to determine which law governs their proceedings. More importantly, however, this type of a pathological clause could result in an outcome that is contrary to what the parties intended when drafting and agreeing to their arbitration clause. Moreover, the party at a disadvantage would have to wait for an award, and then would have to prove grounds for vacatur under Article V(1)(d).[80]

VI. CONCLUSION

Theoretically, parties are allowed to construct their arbitration agreements as granularly and creatively as they'd like. However, doing so can create a variety of issues. For example, the arbitration agreement in *Union of India v. McDonnell Douglas* called for London as the seat of arbitration, but stated that the Indian Arbitration Act of 1940 would govern procedural law. This was problematic because "procedural law" and the "seat of arbitration" are two sides of the same coin, thus rendering this agreement pathological. However, the *McDonnell Douglas* court conducted a strained analysis to make this

[79] "The arbitral proceedings shall be conducted in accordance with the provisions of the following articles and may not be modified under any circumstances by agreement of the parties." Guatemala Code of Civil and Commercial Procedure Art. 287; *see* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 416 (2d ed. 2001).

[80] *See e.g.* CODE DE PROCÉDURE CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] (Fr.); CODE DE PROCÉDURE CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] Article 1652 (Fr.); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [SWISS PRIVATE INTERNATIONAL LAW] Dec. 18, 1987 (Switz.).

pathological clause work. This is problematic for a number of reasons. The court's distinction of "internal" procedural law and "external" procedural law does not cover all of the aspects associated with procedure. Moreover, the court's analysis is inconsistent with the parties' agreement.

In looking at the bigger picture, allowing for such granular distinctions can lead to a number of problems. Arbitration clauses are typically drafted by transactional attorneys who do not pay as close attention to a contract's dispute resolution mechanism as they do to its more "substantive" clauses. Such attorneys are unaware of the nuances of choosing certain types of law to govern certain aspects of the arbitration. Consequently, allowing parties to agree to different types of procedural law can lead to pathological clauses by attorneys inadvertently choosing laws that conflict with one another. Thus, even though parties have the freedom to structure their arbitrations however they want to, such freedoms must be exercised using a great amount of care and knowledge about which laws and terms of art they choose, as well as how such laws and terms of art interact with each other.