

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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Ramifications Of Selecting A Particular Seat In International Arbitration

Authored By - Sanskar Saraf

Introduction

The concept of international arbitration

Fundamentally, and cross border disputes can be settled in one of two ways, firstly, by judicial settlement, when cases are decided by a standing tribunal like ICJ or ICC, or through arbitration, which the parties to a dispute themselves essentially design. The arbitrators, applicable law, and procedural laws are all chosen by the parties in an arbitration case. The popularity of international arbitration has risen many folds in the last two decades; according to a study by the International Bar Association [“IBA”], arbitration has become more prevalent in nations across the globe, including “even those where it has long been established,” for example the United States.¹ Furthermore, it was stated that “growth in international arbitration is anticipated in regions where litigation before national courts is currently more prevalent than alternative resolution methods.”²

The concept of Arbitration Seat

The arbitral seat or the location of the arbitration is the legal location of the arbitration³, i.e. “the jurisdiction in which an arbitration takes place legally.”⁴ The terms venue and seat of arbitration have a fine line of difference between them; While the seat of arbitration refers to a legal site rather than a physical location⁵, the venue of arbitration refers to the geographic site where the arbitration procedures are held⁶. Despite the fact that the two oftentimes coincide in practise, the seat describes the legal structure that governs the arbitration, and not

¹ International Bar Association. (n.d.). The Current State and Future of International Arbitration: Regional Perspectives. Retrieved January 11, 2023, from <https://cvdvn.files.wordpress.com/2018/10/int-arbitration-report-2015.pdf>

² Id.

³ CLAYTON UTZ, A GUIDE TO INTERNATIONAL ARBITRATION 6 (2d ed. 2012).

⁴ Hsu, L. (2011). International Commercial Arbitration — an Asia-Pacific perspective, by Simon Greenberg, Christopher Kee, and J Romesh Weeramantry (Australia: Cambridge University Press, 2010). Asian International Arbitration Journal, 7(Issue 2), 54. <https://doi.org/10.54648/aij2011008>

⁵ Supra 3

⁶ Laura Warren, The Seat of Arbitration: Why is it so Important?, CLYDE & CO (Sept. 13, 2011), <http://www.clydeco.com/insight/article/the-seat-of-arbitration-why-is-it-so-important>.

the venue chosen by stakeholders or the tribunal for ease.⁷ Consequently, the choice of seat has several legal ramifications and therefore becomes a key issue in any international arbitration dispute.

The term “seat of arbitration” is neither defined nor used in The Arbitration and Conciliation Act, 1996; instead, the legislation uses the expression “Place of arbitration”. In essence, the place or seat of an arbitration is the legal link that binds the arbitral procedure to a certain set of rules and guidelines. The technical and legal implications of selecting an arbitration seat make it “one of the most important aspects of any international arbitration agreement,”⁸ compelling the parties to decide on it thoughtfully. Usually, arbitral firms are expected to offer “a supportive legal environment, a positive attitude of the nation's courts towards arbitration, adequate facilities, political stability and the availability of experienced practitioners.”⁹

Factors affecting the choice of Arbitral Seat

The Queen Mary University of London performed a study on international arbitration in 2015. It depicted that the “neutrality and impartiality of the local legal system,” the national arbitration regulations, the “track record of enforcing agreements to arbitrate and arbitral awards,” and the “availability of quality arbitrators familiar with the seat” were the fundamental reasons for favoured seats.¹⁰ It was also noted that cultural familiarity with the venue, the effectiveness of local judicial proceedings, location, the accessibility of qualified advocates, prices, hearing facilities, language, and transportation links played a significant role in the choice of arbitration seat.¹¹

The Chartered Institute of Arbitrators recognised certain fundamental qualities that a forum must have in order to be an appealing arbitral seat.¹² They laid down a list of ten

⁷ Latham & Watkins LLP. (n.d.). Guide to International Arbitration. Retrieved January 11, 2023, from <https://www.lw.com/admin/Upload/Documents/Guide-to-International-Arbitration-May-2014.pdf>

⁸ Born, G. B. (2010). International Arbitration and Forum Selection Agreements: Drafting and enforcing (3rd ed.). Kluwer Law International.

⁹ Gonzalo Vial, Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration, 50 INT'L L. 329 (2017); Cherro Varela, K. (2006). The New Chilean Arbitration Law: Will Chile become a new international arbitration venue? Max Planck Yearbook of United Nations Law Online, 10(1). <https://doi.org/10.1163/187574106x00155>

¹⁰ Queen Mary University of London. (n.d.). Improvements and Innovations in International Arbitration. Retrieved January 11, 2023, from <https://arbitration.qmul.ac.uk/research/2015/>

¹¹ Id.

¹² Introduction ciarb london centenary principles. (n.d.). Retrieved January 11, 2023, from <https://www.ciarb.org/media/4357/london-centenary-principles.pdf>

characteristics which, in summary, stated that a competent arbitral seat should enable the parties to carry out the procedures efficiently and without excessive influence from outside forces.

This publication briefly describes the idea of international arbitration and arbitral seat, followed by a brief discussion of what makes a specific arbitral institution an appealing arbitral seat. This publication aims to throw light on the legal and material ramifications of selecting a specific seat of arbitration and analyse the cruciality of seat selection in an International arbitration dispute based on its effect on the outcome.

Analysis

The seat selection is a fundamental decision considering it influences the “lex arbitri and the court’s supervisory jurisdiction over the arbitration,”¹³ which provides an essential structure for the proceedings.¹⁴ The “totality of national law provisions that generally apply to arbitrations in each country”¹⁵ and “the law governing the arbitral proceedings”¹⁶ have been characterised as the “lex arbitri.” It is possible to identify several arbitration-related issues by seat selection; therefore, seat selection is a crucial decision in an arbitration dispute.

1. *Recognition and enforcement of arbitral awards*

The choice of seat may influence how foreign arbitration awards are recognised and enforced. An award's recognition varies from its enforcement; hence, it's possible to recognise but not enforce an award, but it is impossible to execute it without prior recognition.¹⁷ By recognising a foreign arbitral award, a state commits to uphold its validity. In any legal action brought before the courts of the relevant state on the topic of the award, such awards may be

¹³ Capper, P., Hill, R., & Segesser, G. von. (2009, November 25). When is the 'venue' of an arbitration its 'seat'? Kluwer Arbitration Blog. Retrieved January 11, 2023, from <http://arbitrationblog.kluwerarbitration.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/>

¹⁴ International Arbitration. (2017, January 22). The importance of the seat of Arbitration • Arbitration. International Arbitration Attorney. Retrieved January 11, 2023, from <https://www.international-arbitration-attorney.com/importance-seat-arbitration/>

¹⁵ Henderson, A. (2014). Lex Arbitri, Procedural Law and the Seat of Arbitration. Retrieved January 11, 2023, from <https://journalonline.academyPublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/335/Citation/JournalsOnlinePDF>

¹⁶ Belohlávek, A. J. (2013). Importance of the seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an outdated myth. *ASA Bulletin*, 31(Issue 2), 262–292. <https://doi.org/10.54648/asab2013030>

¹⁷ Bahta, T. H. (2011). Recognition and enforcement of foreign arbitral awards in civil and commercial matters in Ethiopia. *Mizan Law Review*, 5(1). <https://doi.org/10.4314/mlr.v5i1.68771>

utilised as a defence or set off. In contrast, enforcement is a state's commitment to enforcing a foreign arbitral award in conformity with its domestic procedural standards.¹⁸ The credibility of international commercial arbitration is primarily dependent upon the cross-border enforcement of arbitral rulings.¹⁹ This ensures that the successful party is able to recover the object of a favourable award.²⁰

2. *Determination of supervisory jurisdiction of arbitration*

The seat of arbitration specifies which courts will have jurisdiction over the arbitration²¹, which is indispensable since such courts may have a significant impact on matters such as the repudiation of the arbitral award, the efficiency of the proceedings, and the expenses associated with the arbitration.²² Unsurprisingly, many people believe that “the attitude of local judges toward international arbitration is as important as the law.”²³

The extent to which domestic courts intervene varies between seats,²⁴ In pro-arbitration nations such as France, they often interfere solely to assist arbitration, such as by providing interim relief. In others, they “may intervene in the arbitration and even refuse to respect the arbitration agreement, having a significant impact on the proceedings.”²⁵ In general, the procedure should be held in a location where courts do not meddle with arbitration but instead aid it when required.²⁶

Because the award is technically rendered at the arbitral seat, its laws regulate the steps to annul it²⁷, defining the scenarios where an award may be “contested by the parties and

¹⁸ Id.

¹⁹ Sathyapalan, H. K. (2015, July 4). Annulment versus enforcement of International Arbitral Awards: Does The New York Convention Permit Issue Estoppel? Academia.edu. Retrieved January 11, 2023, from https://www.academia.edu/13638114/Annulment_versus_Enforcement_of_International_Arbitral_Awards_Does_the_New_York_Convention_permit_Issue_Estoppel

²⁰ Bishop, R. D. (2009, September 1). Enforcement of arbitral awards against Sovereigns. Google Books. Retrieved January 11, 2023, from https://books.google.com/books/about/Enforcement_of_Arbitral_Awards_Against_S.html?id=Kqg6CnxiBMUC

²¹ Supra 6

²² Id

²³ LLC, A. L. (2020, January 16). Arbitraje de la Cámara de Comercio Internacional. ACERIS LAW. Retrieved January 12, 2023, from <https://www.acerislaw.com/arbitraje-de-la-camara-de-comercio-internacional/>

²⁴ Kirtley, W. (2017, January 22). The importance of the seat of Arbitration. International Arbitration attorney. Retrieved January 12, 2023, from <https://www.international-arbitration-attorney.com/importance-seat-arbitration/>

²⁵ Id

²⁶ Id

²⁷ Supra 8

possibly set aside by a judge.”²⁸ Furthermore, the courts in the arbitral seat shall decide on any legal actions to be taken to invalidate an arbitration award.²⁹ Nevertheless, “only courts with primary jurisdiction may effectively vacate an arbitral award,”³⁰ and For this reason, several rules exist under various national laws.³¹

In essence, the basis for overturning arbitral awards is outlined in the arbitration laws of the seat. The level and scope of judicial review available to stakeholders will be determined by those same regulations³² and the local court's approach toward international arbitration.

Furthermore, national courts may have an influence on the pace and cost of the proceedings as they could be involved in issues such as arbitrator selection, challenge, removal, and appointment,³³ decisions about the arbitral tribunal's jurisdiction,³⁴ evidence collection in aid of the arbitration,³⁵ and the grant of interim measures.³⁶ As can be seen, all of the factors mentioned above may have an impact on the parties' spending as well as the timeliness of the procedure.

3. *Procedural issues*

The parties "select the procedural law that applies" by selecting the arbitral seat.³⁷ If London is chosen as the place for the arbitration, the parties will use United Kingdom's arbitration law. As a result, it is vital to analyse the potential that a specific arbitration act may contain procedural rules which the parties must follow.³⁸

²⁸ Chioma O.(2014), What is the Significance of the Lex Arbitri in International Arbitration? Retrieved January 12, 2023, from https://dmail-my.sharepoint.com/personal/rbausch_dundee_ac_uk/Documents/OneDrive%20Student%20Extra/CAR%201996-2020/CAR%2017_%202013-14/cepmlp_car17_39_442689951.pdf

²⁹ Supra 8

³⁰ Giambastiani, Catherine A. "Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in U.S. Courts." American University International Law Review 20, no. 5 (2005): 1101-1112.

³¹ Supra 8

³² Supra 6

³³ UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, at 6-8, U.N. Sales No. E.08.V.4 (2008), available at https://www.uncitral.org/pdf/English/texts/arbitration/ml-arb/0786998_Ebook.pdf.

³⁴ Id.

³⁵ Supra 8

³⁶ Id.

³⁷ Supra 7

³⁸ Id.

In other words, the laws of the arbitral seat will influence certain procedural issues in a certain arbitration. For example, the appointment and dismissal of arbitrators,³⁹ the gathering of evidence in assistance of the arbitration,⁴⁰ and the provision of providing interim measures.⁴¹ Furthermore, the seat's laws may govern topics like the parties' independence to settle on procedural issues, the rights of overseas counsel to participate in the arbitration, and the application of pleading and evidence procedures.⁴²

In less arbitration-friendly regimes, courts have greater authority to resolve conflicts within their jurisdiction. They are more interventional (especially when there is a political component to the conflict). "There are also sometimes constraints upon the conduct of the arbitration, such as the requirement to use locally qualified lawyers and restrictions upon who can act as arbitrators."⁴³ In summation, the implementation of certain arbitration regulations may compel the parties to follow certain procedural requirements.

4. *Costs and practical matters*

International arbitration proceedings are usually very expensive,⁴⁴ with costs growing at an "unsustainable rate."⁴⁵ Costs are now "perceived as the worst characteristic of international arbitration"⁴⁶ Therefore, when choosing an arbitral seat, parties must consider "relatively mundane issues of convenience and cost,"⁴⁷ which might be crucial to "the conduct and outcome of an arbitration."⁴⁸

Since the venue and the seat generally coincide,⁴⁹ the choice of the seat might alter the expenses of the arbitration, mainly due to collateral expenditures such as hotels and

³⁹ Supra 8

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Trusz, Jennifer. (2013). Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration. *The Georgetown law journal*. 101. 1649-1682.

⁴⁵ Boule, T. D. (2018, September 11). "Third-Party Funding" in International Commercial Arbitration. International Arbitration attorney. Retrieved January 13, 2023, from <https://www.international-arbitration-attorney.com/thibault-de-boulle-guest-post-on-third-party-funding-in-international-arbitration/>

⁴⁶ Queen Mary University of London. (2015). 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration. Retrieved January 13, 2023, from https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf

⁴⁷ Id.

⁴⁸ Supra 6

⁴⁹ Id.

transportation.⁵⁰ Furthermore, practical and relatively low-cost issues such as visa restrictions, hearing facilities, and supporting personnel must also be addressed while picking the arbitral seat.⁵¹

5. *Choice of law*

When the parties come from different legal systems, there is bound to be a conflict of laws, and the substantive law to be applied in a particular case must be determined. The substantive law to be applied in arbitration is frequently specified in the parties' initial agreement. However, when the parties cannot agree on a choice of law for the resolution of their dispute, difficulties arise in defining the appropriate law.⁵²

In international arbitration, four types of 'choice of law' issues may arise: (i) the law applicable to the substance of the dispute; (ii) the law governing the arbitration agreement; (iii) the procedural law applicable to the arbitral proceedings; and (iv) the conflict-of-law rules applicable to selecting each of the aforementioned laws.⁵³ The arbitral seat would be decisive in all four scenarios.

6. *Mandatory Requirements*

Concerning the rules governing international arbitration, it is possible to differentiate between dispositive norms "that can be changed by the parties involved"⁵⁴ and mandatory norms, which "purport to apply irrespective of the law chosen by the parties to govern their contractual relations,"⁵⁵ Mandatory norms put "important restrictions to parties' authority to define the arbitration framework" and may differ depending on the seat of arbitration.⁵⁶ As a result, regardless of the discussion "regarding the strictness of the actual limits created by mandatory norms on the parties' autonomy to set the rules of the arbitration," It is clearly evident that the laws of the arbitral seat may set requirements that are mandatory and have the

⁵⁰ Supra 8

⁵¹ Id.

⁵² Qtaishat, A. K. (2007). Choice of Law in International Commercial Arbitration. *India Law Journal*, (3rd ed.).

⁵³ Supra 8

⁵⁴ Francisco Blavi and Gonzalo Vial, The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales, 39 *Hastings Int'l & Comp. L. Rev.* 41 (2016).

⁵⁵ BARRACLOUGH, A. N. D. R. E. W., & WAINCYMER, J. E. F. F. (n.d.). MANDATORY RULES OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION. *Melbourne Journal of International Law* (Vol 6)

⁵⁶ Supra 54

ability to alter the arbitral process.⁵⁷ In essence, choosing an arbitral seat may entail obligations that the parties must consider before making their choice.

conclusion

Given the increased use of international arbitration to resolve cross-border disputes, the implications of selecting an arbitral seat are among the most important factors to consider when drafting an arbitration agreement. Choosing a specific seat determines issues that have the potential to significantly influence the outcome of arbitration, such as (1) acceptance and execution of arbitral awards; (2) which courts will have supervisory jurisdiction over the arbitration; (3) which procedural rules may be applicable to the arbitration; (4) what would be the costs of the procedure; (5) how the conflict of laws is solved; and (6) what norms mandatorily apply to the arbitration.

As a result, the arbitral seat has a considerable impact on the possibility of fulfilling the goals of arbitration. A poor decision may result in unenforceable awards that are susceptible to legal challenges. Foreign arbitral verdicts are more likely to be overturned if the rules of the seat require a comprehensive examination.

Furthermore, the arbitral seat chosen affects a party's practical and economic prospects in international commercial arbitration, impacting the cost and chance of success of arbitrating within a specific framework. For example, if the chosen court does not assist in the selection of arbitrators or if the court intervenes unnecessarily in the arbitration, the parties will inevitably have to spend more time and money processing the case. Given the foregoing, it is clear that seat selection is essential, and may even be decisive. As a result, such judgements must be made carefully and on a case-by-case basis, adapting the choice to the specific set of circumstances as much as feasible.

⁵⁷ Id.