

April 4, 2022

THE IMPORTANCE OF THE ARBITRAL SEAT IN INTERNATIONAL COMMERCIAL ARBITRATION

The arbitral seat is the juridical home of the arbitration.¹ Also referred to as the “place of arbitration,” the seat is the relevant connecting factor determining the *lex arbitri*.² The term must be understood in a legal sense and not in a geographical one,³ since meetings and hearings can normally be held elsewhere.⁴

The choice of the place of arbitration is typically made by the parties, either in the arbitration agreement or when a dispute has arisen. Otherwise, selection will be made by either the arbitral institution⁵ or by the arbitral tribunal.⁶ Some institutional rules contain a default arbitral seat.⁷

Although the choice of the *situs* had for a long time been dismissed by the parties in the negotiation process,⁸ it is a decision that entails important practical implications and far-reaching legal consequences.

PRACTICAL CONSIDERATIONS

❖ **Neutrality.** To guarantee equal standing, parties may opt for a seat of arbitration that is located where none of them has its residence or place of business. Similarly, *ad hoc* arbitrators tend to select neutral places to avoid any perceived bias.⁹

❖ **Convenience.** The arbitral seat should be easily accessible to all parties involved in the arbitral proceedings and have adequate facilities, transportations, and resources to conduct the arbitration. Proximity to the dispute and availability of witnesses and evidence can also be weighed in the decision. The relevance of this factor is, however, tempered considering the possibility of conducting the meetings and hearings in a different location.

¹ Born, G. (2021). *International Commercial Arbitration*. Kluwer Law International, p. 1659.

² Philip, A. (1999). The Seat of Arbitration as Place of Arbitration, and Limits to Court Intervention in Procedural Decisions. In A. J. Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Vol. 9, pp. 383 - 386). ICCA & Kluwer Law International, p. 383.

³ De Ly, F. (1991-1992). The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration. *Northwestern Journal of International Law & Business*, 48 - 133.

⁴ [UNCITRAL Model Law, Article 20](#); [ICC Arbitration Rules, Article 18\(2\)](#) or [LCIA Arbitration Rules, Article 16\(3\)](#).

⁵ E.g., [ICC Arbitration Rules, Article 18\(1\)](#) and [SCC Arbitration Rules, Article 25\(1\)](#).

⁶ E.g., [PCA Arbitration Rules, Article 18\(1\)](#) and [AAA Commercial Arbitration Rules, Rule 11\(a\)](#).

⁷ E.g., [LCIA Arbitration Rules, Article 16\(2\)](#) and [HKIAC Administered Arbitration Rules, Article 14\(1\)](#).

⁸ Belohlavek, A. (2015). Seat of Arbitration and Supervising Function of Courts. *Czech (& Central European) Yearbook of Arbitration*, p. 22.

⁹ Belohlavek, A. (2013). Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth. (A. S. de, Ed.) *ASA Bulletin*, 3(2), p. 275.

❖ **Familiarity with legal and business environment.** The arbitration proceeding will likely run more smoothly when parties or their counsel are acquainted with the legal tradition and business culture of the arbitral seat.¹⁰

❖ **Language.** In the absence of agreement by the parties, the language of the arbitration might turn out to be that of the arbitral seat under certain national laws.¹¹

LEGAL CONSEQUENCES

❖ **Recognition and enforcement of arbitral awards.** The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NY Convention”) applies to the awards *made in the territory* of a Contracting State,¹² imposing its signatories the obligation to recognize them as binding and enforce them. Under the NY Convention, opposition to the recognition and enforcement of awards is only possible under limited grounds.¹³ An award rendered in a non-party jurisdiction will not benefit from these protections and can find its enforceability hampered.

❖ **Supervisory jurisdiction.** Courts of the place of arbitration have exclusive jurisdiction for vacating arbitral award. Grounds for annulling arbitral awards and the extent of judicial review will depend on the domestic laws of the seat.¹⁴ Many national laws mirror the grounds listed in Article V of the New York Convention,¹⁵ especially in those jurisdictions in which the UNCITRAL Model Law has been adopted. However, some domestic legislations might include more expansive or narrower annulment grounds.¹⁶ For instance, the US Courts have in some cases (inconsistently) applied judicially created grounds in addition to the limited grounds of the Federal Arbitration Act (“FAA”) for the annulment of awards, namely the ground of “manifest disregard of the law.”¹⁷ On the other hand, the French system is considered to be less restrictive than that derived from the New York Convention.¹⁸ Under the New York Convention, an award that has been set aside by the courts of the place of arbitration is in itself a ground for refusing enforcement elsewhere.¹⁹

¹⁰ Sabater, A. (2010). When Arbitration Begins Without a Seat. *Journal of International Arbitration*, 27(5), pp. 468 – 471.

¹¹ Born, G. (2021). *Op. cit.*, p. 2216.

¹² [NY Convention, Article I\(1\).](#)

¹³ [NY Convention, Article III.](#)

¹⁴ Vial, G. (2017). Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration. *International Lawyer*, 50(2), p. 338.

¹⁵ Lew, J. D., Mistelis, L. A., & al., e. (2003). *Comparative International Commercial Arbitration*. Kluwer Law International, p. 673.

¹⁶ Born, G. (2021). *Op. cit.*, pp. 3632 – 3660.

¹⁷ Orłowski, V. (2017). Chapter 22: FAA Section 10 Applications to Vacate an Award (Including "Manifest Disregard"). In L. Shore, T.-H. Cheng, & et al., *International Arbitration in the United States* (pp. 503 - 540). Kluwer Law International, pp. 528 – 534.

¹⁸ Gaillard, E., & Savage, J. (1999). *Fouchard Gaillard Goldman on International Commercial Arbitration*. Kluwer Law International, p. 922.

¹⁹ [NY Convention, Article V\(1\)\(c\).](#)

❖ **Judicial Assistance.** Typically, national courts have the power to appoint and remove arbitrators;²⁰ grant interim relief;²¹ assist with the taking of evidence;²² or secure the attendance of witnesses and the production of documents.²³ Jurisdictions party to the NY Convention are also bound to recognize and enforce arbitration agreements,²⁴ and one party may request that an agreement to arbitrate be enforced when the other party is resisting arbitration.

❖ **Internal procedures for the conduct of the arbitration.** Although parties will frequently specify the arbitration rules applicable to the dispute, most national laws contain a default set of procedures for conducting arbitrations in that territory.²⁵ In the absence of specific agreement, the place of arbitration may influence, for example, the arbitrator's power to order discovery, which can vary greatly depending on the arbitral seat (discovery is extensive in common law countries like the UK and the US but very limited or inexistent in most civil law jurisdictions).²⁶

❖ **Conflict of Laws.** Although the traditional arbitral seat rule has been largely abandoned for a “direct choice”²⁷ or by the application of international conflicts' principles, arbitrators still resort to the choice-of-law rules of the *situs* to determine the applicable law absent the parties' agreement.²⁸

❖ **Mandatory laws.** Some laws of the arbitral seat are considered mandatory (*e.g.*, antitrust; labor protection laws; or criminal laws). Due to the power of national courts for annulling an award, arbitrators often consider and apply mandatory rules of the *lex fori*.²⁹

❖ **Arbitrability.** Arbitral tribunals and courts will usually determine the arbitrability of a dispute on the basis of the law of the seat.³⁰ Most domestic legislations will provide for the annulment of an award if the subject matter of the dispute is not capable of being settled by arbitration under the law of that State.³¹ Matters of intellectual property, antitrust, securities-related transactions, insolvency, bribery and

²⁰ *E.g.*, [U.S. FAA, 9 U.S.C. §5.](#)

²¹ *E.g.*, [Swiss Law on Private International Law, Article 183\(2\).](#)

²² *E.g.*, [Spanish Arbitration Act, Article 33.](#)

²³ *E.g.*, [English Arbitration Act, Section 43\(1\).](#)

²⁴ [NY Convention, Article II.](#)

²⁵ Henderson, A. (2014). Lex Arbitri, Procedural Law and the Seat of Arbitration. *Singapore Academy of Law Journal*, p. 888.

²⁶ Jarvin, S. (1988). Choosing the Place of Arbitration - Where do We Stand. *International Business Lawyer*, 16(9), pp. 421 – 422.

²⁷ Blackaby, N., Partasides, C., & et al. (2015). *Redfern and Hunter on International Arbitration (Sixth Edition)*. Kluwer Law International. Oxford University Press, pp. 222 – 223.

²⁸ Born, G. (2021). *Op. cit.*, pp. 2855 – 2856.

²⁹ Commandeur, M., & Gößling, S. (2014). The determination of mandatory rules of law in International Arbitration – An attempt to set out criteria. In J. Risse, G. Pickrahn, & et al., *SchiedsVZ | German Arbitration Journal* (pp. 12 - 20). Kluwer Law International; Verlag C.H. Beck oHG, p. 16.

³⁰ Mistelis, L. (2009). *Arbitrability: International & Comparative Perspectives*. Kluwer Law International, pp. 108, 134.

³¹ In accordance with the [New York Convention, Article V\(2\)\(a\)](#) and [UNCITRAL Model Law, Article 34\(2\)\(b\)\(i\)](#).

corruption, fraud, natural resources or corporate governance might be deemed non-arbitrable in certain jurisdictions.³²

❖ **Formation, validity, illegality of the arbitration agreement.** Either through a theory of an implied choice of the parties or based on the closest connection, the law of the seat might be the law applied to the arbitration agreement.³³ In those instances, the validity of the arbitration agreement will depend on domestic legislation, which can establish its own set of requirements for the validity of the agreement. The NY Convention recognizes this possibility and includes the invalidity of the arbitration agreement (under the law applicable to the underlying agreement or the law of the seat) as a potential ground for opposing to the enforcement of an award.³⁴

CONCLUSION

The importance of the seat is highlighted by the different implications of its choice. While in many transactions the negotiation of arbitration agreements is left to the very last minute (these provisions are commonly referred to as “midnight clauses”) and, in many cases, they are simply copy-pasted from previous agreements, practitioners dealing with these provisions should consider them an important piece of the underlying agreement. Understanding the effects of the seat of choice prior to making such a choice can provide for a smoother navigation of a future dispute.

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³² Blackaby, N., Partasides, C., & et al. (2015). *Redfern and Hunter on International Arbitration (Sixth Edition)*. Kluwer Law International. Oxford University Press, pp. 112 – 124.

³³ Scherer, M., & Jensen, J. O. (2021). Towards a Harmonized Theory of the Law Governing the Arbitration Agreement. *Indian Journal of Arbitration Law*, X(1), p. 16.

³⁴ [NY Convention, Article V\(1\)\(a\)](#).