Importance of the Seat of Arbitration

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I. Introduction

1. In this article, I will answer the following questions, with reference to national laws, arbitration rules and international conventions:

   (i) Why is the seat of arbitration important to the arbitral procedure?

   (ii) How is the seat of arbitration decided?

II. Why is the seat of arbitration important to the arbitral procedure?

Meaning of arbitral seat

2. Before discussing *why* the arbitral seat is important, I will briefly explain *what* the arbitral seat is, and what it is not. The arbitral seat (also referred to as the "place of arbitration" or "*siège*") is the state where the arbitration has its formal legal or juridical seat, and where the arbitral award will be formally made.[1] The seat of arbitration must be distinguished from the place where the actual hearings take place.[2] As is recognized in most modern arbitration statutes and institutional rules,[3] it is not necessary for the seat and the venue of the arbitration to be in the same location, although often they are; even when hearings take place during the course of the arbitration in several different countries, the seat of arbitration will remain unaffected.[4] However, if all the hearings are held in another jurisdiction, parties run in exceptional cases the risk that courts in the seat of arbitration refuse their jurisdiction to challenge an award due to the missing link between the arbitration and the seat of arbitration, at least according the Swedish Court of Appeal decision of February 2005 in *Titan v. Alcatel*.[5] (I disagree with this decision as parties should have the autonomy to choose the arbitral seat of their liking.)

Importance of arbitral seat

3. The arbitral seat is of paramount importance to the arbitral procedure,[6] for the reasons discussed below.

Arbitral seat determines lex arbitri

4. The arbitral seat primarily determines the procedural law applicable to the arbitration (*lex arbitri*).[7] The *lex arbitri* includes, without limitation, the following matters: the formal validity of the arbitration agreement, the arbitrability of the dispute, the composition of the arbitral tribunal, fundamental procedural guarantees, time limits (depending on the jurisdiction this may be viewed as a question of procedural or substantive law), the supervisory role of the court, and judicial review of arbitral awards (these final two topics are discussed in further detail below).

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[1] Born, "International Arbitration", 2012, at 37.
[2] Lew, Mistiles and Kröll, "Comparative International Commercial Arbitration", 2003, 172 at 8-26; Born, at 106.
[3] See, e.g. Article 20(2) of the Model Law, which provides that, unless otherwise agreed, the tribunal may meet at any place it considers appropriate for hearing witnesses, experts or the parties.
[4] Clyde & Co, "The Seat of Arbitration – Why is it so important?", September 10, 2011.
[5] The Swedish Court of Appeal ruled that as neither the dispute nor the parties had any other connection to Sweden and none of the hearings or the sole arbitrator's deliberations had been carried out in Sweden, the court concluded that the place of arbitration could not be said to have been Stockholm.
[6] See, e.g.: Star Shipping As v. China National Foreign Trade Trans. Corp. [1993] 2 Lloyd's Rep. 445.
[7] See, e.g. Philip Capper, "When in the 'Venue' of an Arbitration its 'Seat'?", http://kluwerarbitrationblog.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/), Kluwer Arbitration Blog, November 25, 2009.

5. Article 2 of the Geneva Protocol on Arbitration Clauses 1923 (which was replaced by the New York Convention) provides an early illustration of the link between arbitral procedure and the seat: "The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties *and by the law of the country in whose territory the arbitration takes place*." Further support that the *lex arbitri* is the law of the seat of arbitration can be found in Article 1(2) of the Model Law, which provides that most of its provisions will apply "*only if* the place of arbitration in the territory of this State." The New York Convention confirms the territorial link with the law of the country where the arbitration took place.[8] Examples of national arbitration laws that confirm the connection between the seat of arbitration and the *lex arbitri* can be found in English law[9] and Swiss law.[10]

Courts of arbitral seat can provide judicial assistance and exercise supervision

6. The national courts of the arbitral seat can provide judicial assistance and exercise supervisory jurisdiction over the arbitration.[11] Under modern arbitration laws, the courts' intervention will typically be limited to assist the arbitration proceedings, e.g. freezing assets and taking of evidence. However, some countries have laws that restrict party autonomy, for example by imposing conditions on the eligibility of arbitrators.

7. The courts in the country of the seat are usually exclusively competent to entertain actions to annul or set aside arbitral awards made in the seat.[12] This result is prescribed by Article V(1)(e) of the New York Convention and virtually all national arbitral laws. Every country will allow an award to be challenged on certain, limited grounds (e.g. the award was outside the scope of the arbitral agreement), but some jurisdictions allow the challenge of the award based on errors of law[13] or manifest disregard of law,[14] while most other arbitration friendly jurisdictions do not contain these grounds for annulment, e.g. France or the Netherlands.

Enforcement and recognition

8. An arbitral award is only as good as the ability to effectively enforce it. The arbitral seat determines the nationality of the award, see, e.g. Article 18(1) of the UNCITRAL Arbitration Rules: "*The award shall be deemed to have been made at the place of arbitration*." The nationality of the award determines the availability of multilateral treaties on recognition and enforcement of awards. An award issued in a seat which is a contracting state to the New York Convention can be recognized and enforced in the courts of any of the other 156 states party to the New York Convention.[15]

Transnationalist approach

9. The primacy of the seat of arbitration (the traditional / territorial approach) for the application of national arbitration law is not universally accepted and many authors argue that the importance

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[8] Article V(1)(d) New York Convention provides that recognition of the award may be refused if "the 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.*"

[9] Article 2(1) of the 1996 Arbitration Act provides that certain parts of the Act shall apply if the seat of arbitration is in England, Wales, or Northern Ireland.

[10] Article 176(1) of the Swiss Private International Law Act provides that the Act shall only apply if the seat of arbitration is in Switzerland.

[11] Philip Capper, "When in the 'Venue' of an Arbitration its 'Seat'?", http://kluwerarbitrationblog.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/), Kluwer Arbitration Blog, November 25, 2009.

[12] Born, at 109.

[13] E.g. the English law allows for challenge of an award based on an error of law, although the threshold is very high (the decision must be obviously wrong).

[14] This is the case in New York State.

[15] Allen & Overy LLP, International Arbitration: Choosing the Seat, 2013, at 2.

of the seat of arbitration has been gradually declining.[16] Transnationalists are proponents of the "delocation theory" which takes as its starting point the autonomy of the parties. An example of this approach is Section 1494 of the French Code of Civil Procedure.[17] Transnationalist argue, to a large extent convincingly, that an international arbitration should be detached from control by the law of the place in which it is held. The idea is that instead of a dual system of control, first by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control: that of the place of enforcement.[18] In addition, it has been argued that national procedural rules applicable to international arbitrations have become increasingly homogenised as a result of the UNCITRAL Model Law so that the concept of choosing the arbitral seat to take advantage of a country's legal system, has become less important. It should be noted that differences between procedural laws remain, e.g. French law grants an arbitrator the power to impose penalties on parties that refuse to comply with its interim orders, unlike most other modern arbitration laws.

10. It is true that the increasing importance of party autonomy and harmonization of arbitration rules have diminished the importance of the seat of arbitration. However, in practice the *lex arbitri* still plays an important role in international arbitrations which require the exercise of state power, typically for freezing assets or temporary seizing of goods. The arbitrators usually lack jurisdiction to perform such acts and it is the *lex arbitri* that regulates the role and powers of the courts in arbitration.[19] [20]

Investment arbitration

11. The arbitral seat is to a large extent irrelevant in investor-state arbitrations under the ICSID Convention.[21] The reason is that the ICSID Convention contains a self-contained arbitration and annulment process that does not depend on the arbitral seat (see Article 50 and further of the ICSID Convention).

III. How is the seat of arbitration decided?

12. The principle of party autonomy also applies to the arbitral seat; the seat will be the state that the parties have specified as such in their arbitration agreement. This is not usually controversial because the arbitral seat will in most cases be determined *ex ante* by the parties in the arbitration agreement.

13. The New York Convention (in Article II) and virtually all national arbitration regimes recognize the parties' autonomy to agree upon an arbitral seat in international matters. Article 20(1) of the Model Law is representative, providing that: "*The parties are free to agree on the place of arbitration [..]*". Other arbitration laws and most institutional rules contain similar provisions. See, e.g. Article 3(a) of the English Arbitration Act, 1996, Article 18(1) of the UNICITRAL Arbitration

[16] Haersolte-van Hof and Erik Koppe, "International Arbitration and the *lex arbitri*", Arbitration International 2015, 31, at 30; Alexander Belohlávek, "Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth, ASA Bulletin, 2013, Volume 31, issue 2, at 264.
[17] Article 1494 of the French Code of Civil Procedure provides that "an arbitration agreement may, directly or by reference to arbitration rules, determine the arbitral procedure or subject [it] to any procedural law. If the arbitration agreement is silent, the arbitrator shall determine the procedure insamuch as necessary, either directly or by reference to a law or to arbitration rules.
[18] Redfern, at 180.
[19] Alexander Belohlávek, at 268.
[20] Belgium opted for a high degree of delocalization by implementing Article 1717 of the Belgian Judicial Code, pursuant to which the losing party did not have the right to challenge an international arbitration award if at least one of the parties had its seat in a foreign country. This article was subsequently repealed because it deterred parties from choosing arbitration in Belgium.
[21] Pursuant to Article 62 of the ICSID Convention, Washington D.C. is usually the arbitral seat in case of ISCID arbitrations, with only limited exceptions.

Rules,[22] Article 18(1) of the ICC Rules and Article 176(3) Swiss Law on Private International Law.[23]

14. If parties don't agree on the arbitral seat, administering institutions or, more frequently, the arbitral tribunal designate the arbitral seat. The institutional rules contain many variations. Article 18(1) of the ICC Rules provides that the place of arbitration shall be fixed by the International Court of Arbitration of the ICC. Some institutional rules contain a presumption favoring a particular location if no such agreement exist among parties. The LCIA Rules are representative, providing for London as the seat unless otherwise decided by the arbitral tribunal, see Article 16(1) and (2) of the LCIA.[24] Article 14(1) of the HKIAC Rules is similar.[25] Article 18(1) UNCITRAL Rules provide that the tribunal is to select the seat, absent contrary agreement, while the ICDR Rules adopt a mechanism that provides for the ICDR to provisionally select the seat, subject to subsequent confirmation or revision by the tribunal. Article 20(1) of the Model Law provides that, failing agreement by the parties, the place of arbitration shall be determined by the tribunal having regard to the circumstances of the case. Likewise, in *ad hoc* arbitrations, the lack of agreement by parties will usually force arbitral tribunal to select the place of arbitration.[26]

15. The decision by the arbitral tribunal on the location of the arbitral seat is presumptively for the arbitrator to decide because it raises an arbitrable procedural question. The U.S. Court of Appeals for the Eleventh Circuit ruled on July 17, 2017 in *Bamberger Rosenheim, Ltd. v OA Development, Inc.* that the court's standard of review of the arbitral seat decision by the arbitrator is whether the arbitrator (even arguably) interpreted the parties' contract, not whether the arbitral tribunal got the meaning of the arbitration agreement right or wrong.

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[22] Article 18(1) of the UNCITRAL Arbitration Rules provides 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.
[23] Article 18(1) of the ICC Rules provides that the place of arbitration shall be fixed by the International Court of Arbitration of the ICC, unless agreed upon by the parties.
[24] Article 16(2) of the LCIA provides that, absent agreement from the parties, the seat of arbitration shall be London, unless the Arbitral Tribunal decides that another arbitral seat is more appropriate.
[25] Article 14(1) of the HKIAC Rules provides that the parties may agree on the seat of arbitration, failing which the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines that another seat is more appropriate.
[26] Born, at 105 and 115.