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# The Seat of Arbitration: To What Extent does it Influence Important Aspects of the Arbitration Process?

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## ABSTRACT

*Disputes in the world today can be perceived as one of the negative impacts of globalization.<sup>2</sup> They arise in diverse forms and milieus including in the field of business.<sup>3</sup> Most business entities nowadays find solace in referring their disputes to arbitration than litigation.<sup>4</sup> Even in the midst of such considerations, the seat still remains a mother concept in arbitration that gives birth to others such as the law governing the procedural aspects of the arbitration, the supervisory role of the courts over certain aspects of the arbitration like the award as well as the enforceability of the award. This paper will there seek to provide answers to the questions; what is a seat of arbitration? What is the difference between seat and Venue of hearing? What to consider when making the choice of a seat? And, how important is a seat to important aspects of arbitration? Probing into concepts such as party autonomy, an arbitration clause and the election and competence of the arbitrators are not within the scope of this paper.*

## I. INTRODUCTION

Disputes in the world today can be perceived as one of the negative impacts of globalization.<sup>5</sup> They arise in diverse forms and *milieus* including in the field of business.<sup>6</sup> Most business

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<sup>2</sup> Alessandro Gobbicchi, 'War and Security in a Globalized World' in Alessandro Gobbicchi (ed) *Globalization, Armed Conflict and Security*, (Rubbettino 2004) Page 9. Available on: Globalization, Armed Conflicts and Security (ethz.ch). Accessed: 03/05/2021.

<sup>3</sup> Dennis O. Oricho Understanding benefits of alternative dispute resolution (ADR) in the work place mediation, [2010] Vol. 2(1), Journal of Law and Conflict Resolution pp. 011-019, January, Available online at <http://www.academicjournals.org/jlcr>. Accessed: 03/05/2021.

<sup>4</sup> Curtis H. Barnette, The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective, august [1984] Antitrust Law Journal, vol. 53, no. 2, thirty-second annual meeting (August 6-8, 1984), pp. 277-282, American Bar Association, Available at: <https://www.jstor.org/stable/40840735>. Accessed: 03/05/2021.

<sup>5</sup> Alessandro Gobbicchi, 'War and Security in a Globalized World' in Alessandro Gobbicchi (ed) *Globalization, Armed Conflict and Security*, (Rubbettino 2004) Page 9. Available on: Globalization, Armed Conflicts and Security (ethz.ch). Accessed: 03/05/2021.

<sup>6</sup> Dennis O. Oricho Understanding benefits of alternative dispute resolution (ADR) in the work place mediation, [2010] Vol. 2(1), Journal of Law and Conflict Resolution pp. 011-019, January, Available online at <http://www.academicjournals.org/jlcr>. Accessed: 03/05/2021.

entities nowadays find solace in referring their disputes to arbitration than litigation.<sup>7</sup> However, the choice of an arbitration seat is always a difficulty common in Arbitration. From the very point of contemplation on whether or not to resort to arbitration to the point of drafting the arbitration clause, the choice of seat is always given maximum consideration and attention. This is because unlike other concepts in arbitration, the seat has a practical influence in determining other aspects of the arbitration process. That notwithstanding, some Scholars still ponder if the arbitration seat is still of any practical significance anymore given that there has been an increased uniformity in the practice of Arbitration stemming from international arbitration treaties and the UNCITRAL model Laws on international commercial Arbitration?<sup>8</sup> Even in the midst of such considerations, the seat still remains a mother concept in arbitration that gives birth to others such as the law governing the procedural aspects of the arbitration, the supervisory role of the courts over certain aspects of the arbitration like the award as well as the enforceability of the award. This paper will there seek to provide answers to the questions; what is a seat of arbitration? What is the difference between seat and Venue of hearing? What to consider when making the choice of a seat? And, how important is a seat to important aspects of arbitration? Probing into concepts such as party autonomy, an arbitration clause and the election and competence of the arbitrators are not within the scope of this paper.

## II. DEFINITION OF “ARBITRATION SEAT”

The concept of arbitration seat is often times misconstrued for the venue of arbitration.<sup>9</sup> However, a closer look reveals that it is hardly a geographical destination than it is a legal construction.<sup>10</sup> In simple terms, the seat of arbitration can be described as the “juridical place of arbitration”<sup>11</sup> It’s the Legal home of the arbitration process<sup>12</sup> or the institution of the place where the arbitration takes place<sup>13</sup>. A better perception of the concept of the seat of arbitration

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<sup>7</sup> Curtis H. Barnette, The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective, august [1984] Antitrust Law Journal, vol. 53, no. 2, thirty-second annual meeting (August 6-8, 1984), pp. 277-282, American Bar Association, Available at: <https://www.jstor.org/stable/40840735>. Accessed: 03/05/2021.

<sup>8</sup> University of Oslo, Faculty of Law. Lex Arbitri: The Implications of the Arbitral Seat. (2018)

<sup>9</sup> Milos Novovic, Lecture notes on International Commercial Arbitration: Seat of arbitration, procedural law (lex Arbitri) and substantive law, Department of Private Law, University of Oslo, 2015. Available at: PowerPoint Presentation (uio.no).

<sup>10</sup> Ibid.

<sup>11</sup> Belma Bulut, The Role of the Place of Arbitration in International Commercial Arbitration Proceeding; Turkey as a Place Of Arbitration (2011) 1, Ankara Bar Review. Page 36. Available at: [www.ankarabarasu.org.tr/siteler/AnkaraBarReview/tekmakale/2011-1/3.pdf](http://www.ankarabarasu.org.tr/siteler/AnkaraBarReview/tekmakale/2011-1/3.pdf). Accessed date: 07/05/2021.

<sup>12</sup> Milos Novovic, Op. Cit.

<sup>13</sup> Alexander J. Bělohávek, ‘Seat of Arbitration and Supporting and Supervisory Function of Courts’ Alexander J. Bělohávek Naděžda Rozehnalová (eds), *Czech (& Central European) Yearbook of Arbitration*, Volume 5, (JURIS, 2015). Available at: Seat of Arbitration and Supporting and Supervising Function of Courts by Alexander J. Bělohávek :: SSRN.

is gotten when certain theories such as the *Localization theory* in arbitration is considered. This model links the arbitral process to the legal system of a particular state.<sup>14</sup> This approach also has textual basis in international conventions. Article 2 of the Geneva Protocol on Arbitration clauses, 1923, for instance, is to the effect that the Law of the arbitration procedure should be the law of the seat.<sup>15</sup> The New York Convention, 1958 on its part associates the seat of arbitration to the Law of the place where the arbitration award is made<sup>16</sup> and the law of the place where the arbitration took place<sup>17</sup>. The venue of arbitration is the physical place where the hearing takes place.<sup>18</sup> However, in practice, the seat and venue of arbitration are like to coincide in some situation. However, in such a situation, the normative framework of the arbitration will be determined by the seat and not the venue of arbitration.<sup>19</sup>

Certain case laws are important in clarifying how different is an arbitration seat to the venue.

In the case of *Enercon (India) Ltd and Ors v Enercon GmbH and Another*<sup>20</sup> an issue that rose before the Supreme Court of India was whether or not London had a concurrent jurisdiction with India which was the seat, given that London was the Venue of Arbitration. In this case, dispute arose over who had jurisdiction for non-delivery of supplies under an Intellectual Property License Agreement (“IPLA”) which had an arbitration clause. The clause elected the Indian law as the governing law of the IPLA and secondly, it chose London as the venue of the arbitration. Issues thereafter arose as when anti-suit injunctions were sought and the Honourable Bombay High Court held that London would have concurrent jurisdiction as the courts in India even though it was only the venue and not the seat. The matter then went before the Hon’ble Supreme Court which held otherwise based on the reasoning that the fact that London was clearly listed as the arbitration venue in the arbitration clause does not characterize London as the Seat because of the fact that governing law, *the lex Arbitri*, the law of the arbitration agreement.<sup>21</sup> It was therefore held that “once the Seat was in India, Indian Courts would have exclusive supervisory jurisdiction and English Courts cannot have concurrent

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<sup>14</sup> Ibid. At 26

<sup>15</sup> The Geneva Protocol on Arbitration clauses, 1923, Article 2. Available at: Geneva Protocol 1923 - Protocol On Arbitration Clauses Signed At A Meeting Of The Assembly Of The League Of Nations Held On The Twenty-Fourth Day Of September, Nineteen Hundred And Twenty-Three | Trans-Lex.Org. Accessed on: 09/05/2021.

<sup>16</sup> UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 10 JUNE 1958), ARTICLE 5 (1) A.

<sup>17</sup> Ibid. Article 5 (1) b.

<sup>18</sup> Gonzalo Vial, Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration, (2017) 50 Int'l L 329, Available at: <https://scholar.smu.edu/til/vol50/iss2/5>.

<sup>19</sup> Ibid.

<sup>20</sup> SLP (C) No. 10924 of 201

<sup>21</sup> Devesh Juvekar & Dikshat Mehra, Seat of Arbitration, (Indian Legal Update, 2015). Available at: Newsletter-Sep-2015.cdr (manupatrafast.in). Access date: 09/05/2021 and 10/05/2021.

jurisdiction".<sup>22</sup>

The case of *Bharat Aluminium Company Ltd v. Kaiser Aluminium Technical Service Inc ("Balco")*<sup>23</sup> corroborates the decision of the Supreme Court in *Enercon (India) Ltd and Ors v Enercon GmbH and Another*. The Supreme court of India held in this case that the when parties choose a country as the Seat of arbitration, they unequivocal elect the law of that country to be as the Lex Arbitri.<sup>24</sup> Similarly, in *Atlas Power v National Transmission*<sup>25</sup> "Mr Justice Phillips heard an application in the Commercial Court for a final anti-suit injunction to restrain the defendant from challenging a Partial Final Award made in the London Court of International Arbitration (LCIA) arbitration. In ordering the final injunction, Phillips J confirmed that the seat of the arbitration in question was London and this entitled the claimant to permanently restrain the defendant from challenging the Final Partial Award in Lahore, Pakistan or anywhere other than England & Wales."<sup>26</sup>

### III. CHOICE OF ARBITRATION SEAT

Choosing the seat of arbitration is one of, if not the most important task to accomplish when making the choice to refer a dispute to arbitration.<sup>27</sup> This is because the choice of arbitration seat is a key determinant to the entire process of arbitration in far more ways than could be perceived.<sup>28</sup> Traditionally, the choice of seat is made by the parties in exercise of their right to autonomy as parties. But exceptionally, it could be made by the arbitration institution or the courts. The seat would be determined by the arbitration institution where parties concurred on the jurisdiction of a permanent arbitration centre in which case, the seat will be determined by the Rules of such a centre<sup>29</sup>. Also, where parties also fail to agree on the seat, the arbitral tribunal will decide thereupon<sup>30</sup>. In the case of *Merrill & Ring Forestry L.P v. The Government*

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<sup>22</sup> Ibid.

<sup>23</sup> (2012) 9 SCC 552.

<sup>24</sup> Loc. Cit.

<sup>25</sup> *Atlas Power v National Transmission* [2018] EWHC 1052 (Comm)

<sup>26</sup> David Hesse (Clyde & Co.) The Seat of Arbitration is Important. It's That Simple. (Kluwer Arbitration Blog. June 10, 2018), Available at: <http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/> Accessed on: 04/05/2021 and 09/05/2021.

<sup>27</sup> Devesh Juvekar & Dikshat, 'Seat of Arbitration' *India legal Update* (September 2015) 2-3. Available at: Newsletter-Sep-2015.cdr (manupatrafast.in). Accessed: 03/05/2021. Accessed date: 04/05/2021 and 09/05/2021.

<sup>28</sup> Holman Fenwick Willan, 'International Arbitration' *International Arbitration Quarterly* (March, 2012) Page. 2, Available at: International Arbitration Quarterly [A4 8pp] March 2012.pdf (hfw.com). Accessed: 03/05/2021.

<sup>29</sup> Alexander J. Bělohávek, Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth, ASA Bull. 2/2013, Kluwer Law International. Pp. 262-292. Available at: (99+) (PDF) Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth | Alexander Belohlavek - Academia.edu. Accessed. 09/05/2-21.

<sup>30</sup> UNCITRAL Model Rules, Article 16 (1).

of Canada<sup>31</sup>, the parties failed to agree on the place of the arbitration seat and therefore the matter was brought to the International Centre for Settlement of Investment Disputes (ICSID) to determine the seat. The courts will determine the seat if there is pathology in the arbitration clause or where the parties fail to agree on the seat<sup>32</sup> “However, even the provisions of the Rules usually allow the parties to depart from them to choose a different seat of arbitration.”<sup>33</sup>

#### IV. THE CONCEPT OF SEAT: HOW RELEVANT?

The choice of arbitration seat could be considered as a composite decision. This is because it is inextricably linked to other vital aspects of the arbitration process. The Seat of arbitration gives birth to the *Lex Arbitri* or the Law governing the procedural aspects of the arbitration, the courts that have the competence to supervise over the jurisdiction as well as the enforceability of the award.

##### (A) *Lex Arbitri*<sup>34</sup>

The choice of the arbitration seat has an automatic implication on the laws which will govern the arbitration process.<sup>35</sup> Its trite principle that the procedural law which will govern the arbitration is the law of the place of the seat.<sup>36</sup> This principle has textual precedent in the Geneva Protocol on Arbitration clauses, 1923, which provides that the Law of the arbitration procedure should be the law of the seat.<sup>37</sup> This follows for instance that if, Rwanda is chosen as the seat of arbitration then the laws of the arbitration procedure will be the Law on Arbitration and Conciliation in Commercial matters 2008 in force in Rwanda.<sup>38</sup> According to Alastair Henderson the *lex Arbitri* is not only important in the determination of the ““*internal*” processes of the arbitration”<sup>39</sup> but also the ““*external*” relationship (supportive and supervisory) between the arbitrator and the courts”<sup>40</sup>

Even though it is conventionally said that the arbitration seat influences the *Lex Arbitri*, it is also true that the procedural laws of countries influence the choice of arbitration seat. This is

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<sup>31</sup> ICSID Case No. UNCT/07/1.

<sup>32</sup> Loc. Cit.

<sup>33</sup> Ibid.

<sup>34</sup> The *Lex Arbitri* is the Law governing the procedural Aspects of Arbitration

<sup>35</sup> Latham & Watkins, Guide to International Arbitration. Page 22, Available at: <https://www.lw.com/admin/Upload/Documents/Guide-to-International-Arbitration-May-2014.pdf>. Accessed on the 06/05/2021 and 09/05/2021.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid. Note 13.

<sup>38</sup> This is the main Law governing Arbitration and Conciliation in Rwanda. Sometimes, though unconventional, it is referred to as the Rwandan Arbitration Act.

<sup>39</sup> Alastair Henderson, *Lex Arbitri*, Procedural Law and the Seat of Arbitration (2014) 26, Singapore Academy of Law Journal. Available at: Microsoft Word - 00b Prelims (Conflict of Laws in Arb).docx (academypublishing.org.sg). Accessed date: 08/05/2021.

<sup>40</sup> Ibid.

because parties to arbitration will turn to elect as their seat those centres whose procedural laws are liberal and more arbitration friendly.<sup>41</sup> Statistics have proven that countries like France, Singapore, New York, London and Hong Kong are most arbitration friendly centres because of their laws and thus feature among the most elected or chosen arbitration seats.<sup>42</sup>

**(B) “Courts with Supervisory Jurisdiction over the Arbitration”<sup>43</sup>**

Generally, the seat of arbitration is the country which supplies its judicial facilities or institutions to support the arbitration process.<sup>44</sup> It determines which court has jurisdiction to receive issue arising from an arbitration.<sup>45</sup> In the case of *Indus Mobile Distribution Pvt. Ltd. Vs. Datawind Innovation (P) Ltd*<sup>46</sup>, it was held that the determination of a seat vest the courts of that place with exclusive jurisdiction for purposes of regulating the arbitration proceedings stemming from of the agreement between the parties.<sup>47</sup> The courts intervention in an arbitral process are in manifold dimensions such as intervening in the proceedings concerning the validity of the arbitration award, injunctions restraining arbitration proceedings, injunctions restraining parallel court proceedings, as well to render assistance in the collection of evidence.<sup>48</sup> If the seat of arbitration for instance is lodged in Rwanda, then the competent court to hear issues arising concerning the challenge of the award would be the Commercial High court of Rwanda.<sup>49</sup> The role of the courts in relation to arbitration has been succinctly defined by the domestic laws of their respective countries. In Rwanda for instance, the law governing arbitration provides that the court can only intervene in an arbitral process where the law so provides.<sup>50</sup> It further states that the courts of the place of the seat can challenge the arbitral award.<sup>51</sup>

The participation of the courts in an arbitration process can be qualified as either active or passive and their activeness or passiveness will depend on whether or not the country of the centre where the court is located is arbitration friendly or not. For instance, “the role of the courts in connection with arbitrations in arbitration-friendly centres is kept to a minimum;

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> John Rutta, Lectures on Arbitration, Institute of Legal practice and development, 2021.

<sup>45</sup> Ibid.

<sup>46</sup> (2017) 7 SCC 678, Available at : Indus Mobile Distribution Pvt. ... vs Datawind Innovations Pvt. Ltd. ... on 19 April, 2017 (indiankanon.org). Accessed date: 10/05/2021.

<sup>47</sup> Ibid.

<sup>48</sup> Julien D M Lew et Al. Comparative international Commercial Arbitration, Kluwer Law International, 2003. Pp. 362-366.

<sup>49</sup> Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts in Rwanda, Article 82.

<sup>50</sup> Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, Article 8.

<sup>51</sup> Ibid. Article 47.

being primarily to support the arbitration process and to assist, if necessary, with the enforcement of the award.<sup>52</sup> Sometimes, they may come in to determine other issues apart from matters of setting aside of an arbitral award. Such other issues may involve the determination of interim reliefs. This is the case with countries like France<sup>53</sup> The participation of courts in an arbitration process in arbitration non-friendly centres could be considered as active. This is in the sense that, “in less arbitration-friendly countries, the courts have greater powers to assume control over disputes within their jurisdiction and tend to be more interventionist (particularly if disputes have a political dimension). 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.”<sup>54</sup>

Traditionally, an arbitral award is final and therefore should be enforceable. However, the laws of most countries including the UNCITRAL Model laws provides for recourse to be sought with the courts of the Place of the seat<sup>55</sup> in case any of the parties to the arbitration process finds some irregularities hence decides to challenge the award. In the advent of setting aside an award before a national court, the applicable laws will be that of the country where the award was made.<sup>56</sup>

### **(C) Enforcement of Award**

The choice of the arbitral seat plays an important role in determining the enforceability of the award.<sup>57</sup> Whether or not there would be difficulties in enforcement is dependent on whether the country of the centre is a member of a particular convention and what the former says about the enforcement of awards. The new York convention for example is in existence solely for the purpose of rendering the arbitral award enforceable in the courts of member states.<sup>58</sup> “According to the New York Convention, In broad terms, by becoming party to the Convention, each of the States (see Annex 2) has agreed, subject to limited grounds of refusal, to enforce commercial arbitral awards made in other States party to the New York Convention.”<sup>59</sup> Consequently, if the seat of the arbitration is lodged in a country which is a signatory to the New York Convention, then the award will have a broader scope of enforceability since it could be enforced in any of the states which are parties to the former. However, there are some

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<sup>52</sup> Ibid. Note 22.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid. Note 16.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid. Note 22.

<sup>58</sup> Stephen J. Ware and Ariana R. Levison, *Principles of Arbitration Law*, West Academic Publishing, 2006. Page 275.

<sup>59</sup> Ibid.

countries which have not subscribed to the New York Convention and hence their courts are under any such obligation to enforce an arbitral award.

## **V. CONCLUSION**

The choice of arbitration over litigation has gained ascendancy in recent times. However, the decision of choice of the seat of arbitration seems to be more difficult to make than the will to come for an arbitration. Choosing a seat goes beyond the election of a place or venue of arbitration. It affects as a matter of fact the laws that govern the entire process of the arbitration, as well as courts that will have jurisdiction over post-award contentions such as setting aside of the arbitration award and also the enforceability of the award. This goes to highlight the entire process of arbitration as one which requires expertise and professionalism especially at the point of drafting the arbitration agreement.

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