Analysis of the Basic Considerations in the Choice of Seat of Arbitration in International Commercial Arbitration

Abiodun Oduwole*

Abstract

In the conduct of international commercial arbitration, one major decision parties have to make is the selection of the seat of arbitration since every international arbitration is attached to a legal place. Selecting the seat of arbitration is one of the fundamental foundations of an effective international commercial arbitration agreement and there are factors parties should consider when making the decision as to seat since such choice would ultimately have an impact on the entire process. This article therefore examines the factors the parties should consider when making a choice of the seat of arbitration in international commercial arbitration. It adopts a doctrinal research approach with emphasis on the review of legislation, case law, rules, conventions, literature, internet sources, reports, considered essential to the subject of the article. It found that the choice of the seat comes with certain consequences such as the extent of judicial assistance available from the national court of the seat of arbitration and available measures for the enforcement of arbitration agreement among others. The article therefore recommends that parties take into consideration when selecting seats in international arbitration, some or all of the legal and tactical factors set out in this article.

Keywords- International commercial arbitration, Seat of arbitration, Lex arbitri, UNCITRAL Model Law, New York Convention

* Ph.D, MCIArb (UK) Lecturer in Law at Nile University of Nigeria, Abuja.

1. Introduction

The commercial relationships between investors, businesses and states have become more complex due to factors which among others include globalization and expansion of cross-border trade and investments. Since some of these commercial relationships inevitably break down, there is the need for parties, as a matter of priority, to consider the most appropriate and acceptable means of resolving such disputes from the outset. Oftentimes, the method chosen to resolve this dispute is arbitration. It is a form of dispute resolution mechanism which emanates from the agreement of the parties, conducted before an impartial tribunal but regulated and enforced by the state. It is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.[1] It is a consensual and voluntary process which usage and acceptability have increased tremendously over time in the determination of international commercial disputes.[2] The use of arbitration as a dispute resolution mechanism has some key benefits which make it appealing to users. Foremost among them is the flexibility of the process. One fundamental consequence of the flexibility is the ability of the parties to choose for themselves a 'seat' or 'place' of arbitration. Choosing a seat or place (as it is sometimes referred to) of arbitration in international commercial arbitration proceeding is fundamental and will have a significant bearing on the process. This article therefore examines the significance and basic factors that parties may consider in their choice of a seat of arbitration in the conduct of an international commercial arbitration proceeding. It begins with a discussion on the concept of seat and thereafter looks at the legal and tactical considerations that influence the parties' choice of seat and the implications in international commercial arbitration.

2. The Concept of Seat in International Commercial Arbitration

A seat refers to the jurisdiction to which an arbitration is attached or the legal place of arbitration. It refers to that legal system that governs the

1 Moses Margaret, The Principles and Practice of International Arbitration (2nd edition, Cambridge University Press 2012) 1.

2 Paul Friedland and Loukas Mistelis, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' [2015] *Centre for Commercial Law Studies, Queen Mary, University of London*.

procedure of the arbitration.[3] Section 3 of the English Arbitration Act 1996 states that the seat of arbitration means the juridical seat of the arbitration designated –

i. By the parties to the arbitration agreement, or

ii. By any arbitral or other institution or person vested by the parties with powers in that regard, or

iii. By the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.[4]

It is common for laws, rules and commentaries to use 'seat' and 'place' of arbitration interchangeably. However, 'seat' seems preferable to 'place' as it reflects more accurately the juridical nature of the concept, the nexus between territorial attachment and applicable law. It is a legal construct, not a geographical location. The arbitral seat is the nation where international arbitration has its legal domicile or juridical home.[5] This article therefore uses "seat" in preference to "place" of arbitration. Reference to the seat helps to differentiate juridical attachment from the physical place where hearings and meetings are held, thus avoiding ambiguity and the potential for arguments about the intended location of the seat where arbitration agreements are poorly drafted in this respect as regularly seen in practice.

The concept of seat in arbitration is fundamental and parties are expected to carefully set out the seat in their contractual provisions or by subsequent agreement and where the parties have omitted to choose a seat, the tribunal is empowered under several arbitration laws to make a choice of the seat. For example, Article 20(1) of the UNCITRAL Model Law on International Commercial Arbitration (also known as the Model Law) provides that: The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. A similar provision is contained in Article

---

3 Rashda Rana, *International Arbitration, Law Practice & Procedure* (Chartered Institute of Arbitrators 2017) 88.

4 English Arbitration Act 1996.

5 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1537.

16(1) of LCIA Rules[6] and Article 13(1) of ICDR International Dispute Resolution Procedures- International Arbitration Rules.[7] Section 16(1) of the Arbitration and Conciliation Act provides that: Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.[8] Parties therefore have a choice in their nomination of the legal system that will apply to the arbitration. This is the seat. It gives the award an anchor or juridical home from which most matters are assessed. It is also known as the *lex arbitri*, the curial law or the procedural law.[9]

The seat should ordinarily be a neutral place that has no connection between the parties to arbitration. In this way, the parties will have equal representation and opportunities. No one takes advantage of playing at home. By contrast, in the litigation process, generally, the claimants have to apply to the court of the place of residence or place of business of the defendant(s). In such cases, the systems of law, language, procedures of that place will be familiar to the defendants while they might be unfamiliar to the claimants. Thus, the parties need to ensure that they choose the seat of their arbitration from the onset. Even if the determination is made by the arbitral tribunal, the tribunal should choose a neutral place.

The Model Law and most arbitration rules draw a clear distinction between the seat of arbitration and the venue for hearings and meetings, and provide that the latter may change according to the convenience of the parties without affecting the underlying connection to the seat. Article 20(2) of the UNCITRAL Model Law provides that the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. Section 16(2) of the Arbitration and Conciliation Act also allow the arbitral tribunal to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the

---

6 London Court of International Arbitration Rules 2014.

7 ICDR International Dispute Resolution Procedures- International Arbitration Rules 2009. American Arbitration Association.

8 Arbitration and Conciliation Act Cap 18 LFN 2004.

9 Rashda Rana, *International Arbitration, Law Practice & Procedure* (Chartered Institute of Arbitrators 2017) 89.

parties, or for the inspection of documents, goods or other property. A classic example of this is in Sports Arbitration. The Code of Sports-related Arbitration provides that the seat of the arbitration is Lausanne, Switzerland even though hearing may be held elsewhere and in the practical sense most of its proceedings and hearings at the Olympics games for example are held at the site of the game but the seat nonetheless is Lausanne.[10] The fact that hearing may take place in various countries or venues does not detract from the fact that there can only be one seat of arbitration.

The distinction between the seat of arbitration and the physical venue for hearings was explored by the Singapore court in the case of *PT Garuda Indonesia v Birgen Air*.[11] In that case, the contract stated that the arbitration shall be held in Jakarta, Indonesia and that Jakarta was the place of arbitration. However, the claimant argued that the seat had been changed to Singapore by subsequent agreement of the parties because, amongst other reasons, the hearing was held in Singapore and a Singapore representative of the ICC had provided administrative and legal support for the case.

The Court of Appeal had no difficulty rejecting this contention and holding that the procedural law applicable to a case by reference to the choice of seat is unaffected by a decision to hold hearings in another place. It stated that:

> There is a distinction between 'place of arbitration' and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely, the 'venue of hearing'. The place of arbitration is a matter to be agreed by the parties. Where they have so agreed, the place of arbitration does not change even though the tribunal may meet to hear witnesses or do any other things in relation to the arbitration at a location other than the place of arbitration ... It only changes where the parties so agree. While the agreement to change the place of arbitration

[10] Moses Margaret, The Principles and Practice of International Arbitration (2nd edition, Cambridge University Press 2012) 63.

[11] [2002] 1 SLR(R) 401.

> may be implied, it must be clear. This is in the interest of certainty.[12]

One major effect of the seat of the arbitration therefore is that it determines the applicability of the arbitration law. The arbitration law of a certain jurisdiction, the lex loci arbitri, applies to an arbitration as soon as the seat of that arbitration has been fixed in that jurisdiction. Fixing the seat in a certain country, therefore, establishes a legal relationship between the arbitration on the one hand, and the arbitration law and the courts of that country on the other. It follows from this that the seat of an arbitration must not be understood in a naturalistic, empirical fashion. Rather, it is a term of art and provides the formal legal domicile or juridical home of the arbitration. This function of the seat means that in modern times, there is no de-localized arbitration. Every arbitration is subject to a legal and regulatory regime. This regime is the law at the seat of the arbitration, the lex loci arbitri.

The parties cannot escape this consequence. The juridical seat of an arbitration functions as a connecting factor in conflict of laws.[13] This position reflects modern international orthodoxy. However, this would have been more controversial in the second half of the last century, when a debate centred on the extent to which international arbitration should be subject at all to regulation and control by the laws and courts of the seat of arbitration; or, indeed, by any municipal laws and courts other than those in the place where enforcement was sought.[14]

The seat of arbitration is also significant because it forms part of the factors which define the rules and procedures that governs the arbitration, the extent of intervention from the court and which domestic court can intervene in the arbitration proceedings. The seat also has the implication of making the mandatory national law of the state of the seat applicable to the arbitration and the arbitral tribunal may be required to apply the mandatory law of the seat of arbitration in order not to have its award

---

12 *PT Garuda lndonesia v Birgen Air* [2002] 1 SLR(R) 401 at [23]-[25].

13 Alastair Henderson, 'Lex Arbitri, Procedural Law and the Seat of Arbitration' [2014] (26) *SAcLJ*; 886.

14 Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010); Loukas Mistelis, 'Is There a Transnational Arbitration?' National University of Singapore Faculty of Law Kwa Geok Choo Distinguished Visitors Lecture (29 August 2013).

vacated. The seat of arbitration would define the extent to which an award from arbitration may be challenged. The law of the seat defines the permissible judicial review and most challenges to the arbitral awards are heard at the court of the seat although an award can also be challenged at the point of enforcement.[15] Selecting the seat of arbitration is one of the fundamental foundations of an effective international commercial arbitration agreement and there are factors parties should consider when making the decision as to seat since such choice would ultimately have an impact on the entire process. These considerations for the purpose of this article are classified under two major headings: legal considerations and tactical considerations.

3. Legal Considerations in Choice of Arbitration Seat

There are certain legal considerations and factors that can influence the parties' choice of the seat in international commercial arbitration. These factors are important and also facilitate the efficient conduct of the process. It is therefore imperative that parties consider some or all when making their choice of seat in international arbitration.

i. Procedural Law (Lex arbitri)

One significant impact of the choice of seat in international commercial arbitration is that the arbitration is governed by the law of the seat of arbitration. The concept that an arbitration is governed by the law of the place in which it is held, which is the seat of the arbitration is well established in both the theory and practice of international commercial arbitration.[16] It has influenced the wording of international convention from the 1923 Geneva Protocol on Arbitration Clauses to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (known as the New York Convention of 1958). Article 2 of the 1923 Geneva Protocol provides that 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.[17] The New York Convention of 1958, which by

---

15 Loukas Mistelis, 'Seat of Arbitration and Indian Arbitration Law' [2016] (4) (2) *Indian J Arb L 1*; 1.

16 Kaufmann Kohler, 'Identifying and Applying the Law Governing the Arbitral Procedure: The Role of the Place of Arbitration' [1999] (9) *ICCA Congress Series*; 336.

17 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.

virtue of its Article VII(2) replaces the 1923 Geneva Protocol on Arbitration Clauses to the extent that contracting states become bound by it, maintains the reference to 'the law of the country where the arbitration took place'[18] and synonymously, to 'the law of the country where the award is made'.[19]

This is an indication of the clear territorial link between the seat of arbitration and the law governing the arbitration known as the *lex arbitri.* This territorial link is further reflected in Art. 1(2) of the UNCITRAL Model Law which provides that: 'The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.' The basic approach of the Model Law (and all national laws derived from it) is that the law applicable to each arbitration (the lex arbitri) will be the law of the seat where that arbitration takes place (the lex loci arbitri), and the selection of a particular seat of arbitration ordinarily results in the arbitration being conducted in accordance with that jurisdiction's legal framework, with such derogation or variation as may be permitted.[20]

In Singapore for example, it follows automatically that the Singapore Arbitration Act will apply to an arbitration if Singapore is selected as the seat of arbitration. In the case of *PT Garuda Indonesia v Birgen Air,*[21] the court stated as follows:

> If Singapore is the place of arbitration, the curial law of Singapore applies ... I would add that the curial law, or the lex arbitri as it is sometimes called, is not necessarily restricted to a set of procedural rules governing the conduct of the arbitration. By choosing the 'place of arbitration' the parties would have also thereby decided on the law which is to govern the arbitration proceedings.[22]

---

18 New York Convention Art. V(1)(d).
19 New York Convention Art. V(1)(a) and (e).
20 *The Government of India v Cairn Energy India Pty Ltd* [2011] 6 MLJ 441 at [23]-[25].
21 [2002] 1 SLR(R) 401.
22 *PT Garuda lndonesia v Birgen Air* [2002] 1 SLR(R) 401 at [24].

Similarly, in the case of *Shashoua v Sharma,*[23] the court held that an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause.

One inference here is that it seems the parties do not make a direct choice of the laws applicable to their arbitration. Rather, they make a conscious choice of seat and the applicable lex arbitri flows from that. The nexus between the seat and applicable law is vividly described by Redfern and Hunter as follows:[24]

> To say that parties have 'chosen' that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has 'chosen' French traffic law, which will oblige her to drive on the right-side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say that this notional motorist had opted for 'French traffic law'. What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.

Therefore, the seat of arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated. Claude Reymond espoused this position when he wrote that:

> When one says that London, Paris, or Geneva is the place of arbitration, one does not refer to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and

---

23 [2009] EWHC 957 at 23.

24 Nigel Blackaby et al, *Redfern & Hunter on International Arbitration* (5th edn, Oxford University Press 2009) 3.61.

> procedural rights and obligations between parties and the arbitrators.[25]

It is therefore clear that the arbitration law of a particular state applies when such state is selected as the seat of that arbitration and as such a legal relationship is established between the arbitration on one hand and the arbitration law and the courts of that state/country on the other hand by the simple fact of selecting the seat in that country.[26] This impact of the seat suggests therefore that international arbitration is subject to a regulatory and legal structure and this regulatory and legal structure is the law at the seat of arbitration.

A further case illustrating this, is the decision of the court in *Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A.*[27] In this case, the arbitration agreement specified London as the seat of arbitration within an insurance policy which also specified Brazilian law as the controlling law. The English Court of Appeal was confronted with the question of the law which governs the arbitration agreement. The claims related to insurance coverage for the building of a hydroelectric power plant known as Jirau Greenfield Hydro Project in Brazil. The English Court of Appeal dismissed the appeal upholding injunction of coverage dispute in Brazilian courts because in its opinion the arbitration clause which specified London as the seat of arbitration takes precedence over the policy's controlling law provision. The court firstly observed that it is not unusual for the law of the substantive contract to be different from that applied to an arbitration and proceeded to examine the question of which law applies using a three-step examination into the implied choice of law, the express choice of law and which law has the closest and realest connection to the arbitration. There was no question that the policy was to be governed wholly by the Brazilian law. For the court, this selection, however, did not expressly carry over to the interpretation of the arbitration agreement. Relying principally on the decision in *C v D*,[28] the court ruled that there is increasing consciousness of the significance of the principle that an arbitration agreement is separable from, in some ways almost juridically

---

25 Claude Reymond, 'Where is an Arbitral Award Made?' [1992] *108 LQR*; 1.

26 Cap Michal, 'The First Link Case: Implied Governing Law of the Arbitration Agreement is That of the Seat of Arbitration' [2014] (16) *Asian Disp. Rev.*; 202.

27 [2012] EWCA Civ 638.

28 [2007] EWCA Civ 1282.

independent of, the principal contract of which it is physically part. The court further cited an increasing appreciation of the point that, at least where the seat is the UK, certain substantive provision of the (UK Arbitration Act of 1996) would apply to the arbitration, which could be said to suggest that, the parties intended the law of the arbitration to be that of the seat. Ultimately, the court concluded that Brazilian law, which would have allowed the suit to proceed in the Brazilian courts, did not apply to the arbitration agreement. Effectively, the court concluded that the selection of the seat of arbitration was the de facto express choice of English law, Brazilian law was not likely to have been the implied choice because application of Brazilian law requires the express consent of the parties before arbitration could commence and such an intention was not clear from the agreement and the law of the selected seat of arbitration has the closest and real link to the arbitration agreement. The insured also argued that the policies mediation provision, which it asserted was a condition precedent to arbitration, was unquestionably governed by Brazilian law and thus a strong indicator of the parties' intention to apply Brazilian law to the arbitration agreement. The court did not accept the logic of the argument and did not find clear language creating a condition precedent. The policies at issue include express provisions that Brazilian law is the law governing the contract and Brazilian courts have exclusive jurisdiction for any disputes arising under the Policy. But the policies also include an arbitration clause which provides that London is the seat of arbitration and that provision was key to the court in determining the choice of law as to the arbitration agreement.[29]

From the foregoing and considering the relationship between the choice of seat and the procedural law, parties to international commercial arbitration are expected to carefully select as seat a jurisdiction where the procedural laws will best serve the course of the arbitral process.

ii. Judicial Assistance

The extent of support an arbitral tribunal would receive from a national court or its level of intervention would depend on the seat of arbitration in international arbitration. This is because by selecting a particular state or city as the seat of arbitration, the parties place their arbitral process within

[29] *Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A* [2012] EWCA Civ 638.

the framework of the state's national laws and the seat dictates which national courts have supervisory jurisdiction over the arbitration.[30]

In *Union of India v. McDonnell Douglas Corporation,*[31] the court held that the English law governs an arbitration with a seat in London notwithstanding a stipulation in the arbitration clause to the effect that, arbitration shall be conducted in accordance with the Indian Arbitration Act.

Whereas some states permit their courts to interfere in a process agreed by parties in the arbitration agreement and have legislations that limit party autonomy in relation to procedure, others have relatively permissive or arbitration-friendly national laws which restrict interference by the courts and allow the parties a high level of procedural autonomy. In such states, interim reliefs and other supportive measures may be available to the parties. Such measures may be to prevent the other party from destroying evidence that the other party needs to prove its case, hiding or removing assets, removal of arbitrators, jurisdictions and such other reliefs as may be required. In countries like Italy and Argentina where arbitrators do not have powers to issue interim measures, recourse in such circumstances is to the court for such measures.[32] If tribunals have not yet been constituted, parties may seek temporary measures from the court to protect against some immediate harm and if urgent relief is needed in such case, it may be attainable only through the local court and moreover even in countries where the tribunal is empowered to grant interim measures, the assistance of the local courts are still required for enforcement of such reliefs and it is the local courts at the seat of arbitration that provides such assistance.[33] Therefore, the extent of judicial assistance available and the likelihood of access to it when required is fundamental and parties should give due consideration to its availability when choosing a seat. Therefore, parties to international arbitration should refrain from choosing as a seat jurisdiction whose legal system does not aid the course of arbitration or have a history of proven hostility to international commercial arbitration.

---

30 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015)173.

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

32 Article 753 of Argentine Code of Civil Procedure; Article 818 of Italian Code of Civil Procedure.

33 Eric Schwartz and Jurgen Mark, 'Provisional Measures in International Arbitration - Part II: Perspectives from The ICC and Germany' [2009] (6) *World Arb. & Mediation Rep.*; 52.

iii. Local Arbitration Law

Some domestic laws lend support to arbitration in their provisions. Such laws operate to complement the arbitration process. It is therefore pertinent that a seat of arbitration be selected where domestic arbitration laws are favourably disposed to support international commercial arbitration. Such support may be required in the following areas:

a. Decision on Arbitral Jurisdiction

The competence of the arbitration panel to rule or make findings as regards its jurisdiction under the principle of competence-competence[34] for instance has the backing of some local laws in its application in some jurisdictions while in other jurisdictions the tribunals are stripped of such powers by the local laws. It is a common occurrence that a party to an arbitration may object to the tribunal's jurisdiction to hear the matter. This challenge may be as to the tribunal's constitution, or that the containing contract is defective or non-existent. It can also relate to the non-existence of arbitration agreement, or that the agreement is a nullity and other grounds a party may wish to raise.[35] The question thus arises as to who is empowered to determine whether an arbitral tribunal has jurisdiction in a dispute that is subject of an arbitration agreement. The answer to this is rooted in the principle of competence-competence. The principle of competence-competence is the conferral of inherent power on the tribunal to determine whether it has jurisdiction to hear a dispute and subsequently, on the existence of the main contract.[36] Its origin can be traced to the Federal Constitutional Court of Germany.[37] It has since then been an important principle in international commercial arbitration. Competence-competence is an indispensable contributor to the efficiency of arbitral proceedings. It removes from them a very significant disadvantage vis-a-vis the alternative of having courts deal with the merits of a dispute since the sufficient competence of the court is never doubted.

---

34 Kompetenz-Kompetenz in German.

35 Lawrence W. Newman and Richard D. Hill, The Leading Arbitrators' Guide to International Arbitration, (2nd edn, JurisNet, LLC 2008) 98.

36 Jean Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) 168.

37 P. Y. Lo, 'Master of One's Own Court' [2004] (34)(1) *Hong Kong LJ 47.*

In countries like France which has a strong competence-competence doctrine, the law supports the tribunal in deciding matters relating to its own jurisdiction. In contrast, a country like China does not recognise the principle of competence-competence and as such the tribunal is stripped of the competence to determine its jurisdiction. Because the arbitration law of China does not allow for the tribunal to determine its own competence, it is an arbitration institution such as China International Economic and Trade Arbitration Commission (CIETAC) or the People's Court that will determine the validity or otherwise of the arbitration agreement and thereby competent to decide the jurisdiction of the tribunal.[38] Under the 2005 CIETAC Rules, the People's Court is empowered to intervene in disputes on the validity of arbitration agreement.[39] So where parties choose China as a seat, their tribunal automatically loses its competence to determine questions on jurisdiction based on China's own CIETAC Rules. Parties may not be aware of this at the time of making their contract especially, where they have scant knowledge of the law and implication of choosing a particular state as a seat.

b. Enforcing Arbitration Agreement

Some local arbitration laws of states contain provisions in their various domestic laws to protect, encourage and support the use of arbitration. For example, Section 5(1) of the Arbitration and Conciliation Act provides that if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay proceedings.[40] Subsection (2) of the Act requires any court to which such application is made to make an order staying the proceedings if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement. Furthermore, these laws also have provisions which are valuable in the enforcement of arbitration agreement and

38 Arbitration Law of the People's Republic of China Art. 20.

39 Michael J. Moser & Peter Yuen, 'The New CIETAC Arbitration Rules' [2005] (21) *Arb. Int.3*; 395.

40 The Arbitration and Conciliation Act Cap 19 LFN 2004.

which obliges the domestic courts to give priority to the enforcement of arbitration agreement. Such provisions usually have an impact on international commercial arbitration when such states/countries are selected as the seat of arbitration. For example, section 4(1) of the Arbitration and Conciliation Act provides that a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so request not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration. Subsection (2) of the Act in favour of arbitration provides further that where an action referred to in subsection (1) of the section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued and an award may be made by the arbitral tribunal while the matter is pending in court. The purport of the above is to limit judicial intervention in both domestic and international arbitration and as well guide against parties using dilatory tactics to frustrate the process of arbitration.

Article II (3) of the New York Convention of 1958 contains a similar provision. The English Arbitration Act of 1996 for instance lends tremendous support to arbitration because under the Act the courts in England are empowered to grant orders in support of arbitration which includes compelling witnesses to give evidence while also making orders for the preservation of evidence, granting of injunctive reliefs and other supportive measures which may be important to the effective conduct of arbitration especially where an uncooperative party is involved.[41]

Lord Steyn alluded to this in *Lesotho Highlands Development Authority v. Impregilo SpA and others,*[42] where he stated that international users of London as the seat of arbitration should be able to rely on the clear user-friendly language of the English Arbitration Act and should not have to be put to the trouble or expense of having regard to the pre-1996 Act law on issues where the provisions of the Act set out the law.

41 English Arbitration Act 1996, s44.
42 [2005] 3 WLR 129.

In a similar vein, Lord Hoffman in *Fili Shipping v. Premium Nafta Products ltd*,[43] in relation to section 7 of the English Arbitration Act stated that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.[44]

Parties must therefore avoid choosing as seat countries whose laws are contrary to the basic principles of arbitration or where the instrumentality of the state can be used to sabotage the arbitral process in its entirety.

In *Himpurna California Energy Ltd. (Bermuda) v PT. (Persero) Perusahaan Listruik Negara (Indonesia)*.[45] The case arose from various contracts for the construction and operation of an electrical generation plant in Indonesia. The contracts provided for ad hoc arbitration with the seat in Jakarta under the UNCITRAL Model Law and Rules. The court in Indonesia granted an anti-arbitration injunction to stop the arbitral tribunal from rendering an award against an Indonesian state-owned corporation.

The actions of the Indonesian court in the case amounted to gross interference with the arbitral process which was made possible because the seat of arbitration was in the Indonesian territory. The anti-arbitration posture of the court may serve as a red flag and a sign of what to expect where parties propose to use such jurisdiction as the seat of arbitration.

iv. The Law Governing Arbitrability

One requirement for the validity of an arbitration agreement is that its subject matter must be capable of being resolved using the mechanism of arbitration. The choice of a seat by the parties to arbitration aside from defining the law governing the proceedings also basically deals with the issue of arbitrability. Arbitrability determines if a dispute is capable of being resolved by arbitration or whether such a dispute must be submitted to the court. This concept of arbitrability goes to the root of the arbitral

43 [2007] 4 All ER 951

44 *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] EWCA Civ 20.

45 UNCITRAL Ad Hoc-Award of 4 May 1999, YCA XXV. 13.

award. It is pertinent to note that some matters such as patent regulation, bankruptcy, crime, tax evasion are generally not permitted by law to be arbitrated.[46] In selecting the seat of arbitration, parties should bear in mind the nature of their dispute and whether such dispute is arbitrable under the laws of the seat. Selecting a seat in a jurisdiction where such dispute is not arbitrable may render any award from such proceedings not enforceable. If a dispute upon which an award was rendered is not considered arbitrable in the seat of arbitration, it is probable that such award would be vacated by the court in that jurisdiction. This is in consonance with Article 34(2) (b) (i) of UNCITRAL Model Law on International Commercial Arbitration which provides that an arbitral award may be set aside by the court if the subject matter of the dispute is not capable of settlement by arbitration under the law of the State of the place of arbitration. For example, in a jurisdiction where issues of bankruptcy were not considered arbitrable, if an arbitration of bankruptcy issues were held within that jurisdiction, and an arbitral award rendered, the losing party would probably be able to have the award set aside by the court in that jurisdiction. Also, the non-arbitrability of the dispute could affect the recognition and enforcement of the award where such is sought under the New York Convention.[47]

v. Challenge to Awards

The courts of the seat of arbitration are by priority the courts entitled to hear appeals emanating from arbitral awards,[48] although with few exceptions which include investment arbitration under the International Centre for Settlement of Investment Disputes between States and Nationals of Other States where a party to an award under the ICSID Convention can only appeal to another ICSID arbitral panel under Article 52 of the ICSID Arbitration Rules.[49] The implication of this is that the seat may determine the extent to which an award may be challenged. Arbitral awards are meant to be final and binding and, in many jurisdictions, there exists no right of appeal even if arbitrators make a mistake of law or fact. Instead, there exists just few bases upon which a party can bring a motion to set aside the award. Thus, the applicable law in the jurisdiction where

---

46 Nigel Blackaby et al, *Redfern & Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 112.

47 New York Convention 1958, Art. V(2)(a).

48 UNCITRAL Model Law, Art. 34(1).

49 ICSID Arbitration Rules, Art. 52.

such challenge is brought defines the ground that can be used.[50] Also akin to this is that the choice of jurisdiction or seat determines the degree to which judicial review would be available to the parties. The finality of an award is often a priority to the parties and the factors above basically regulate the degree to which an award may be final.

vi. Enforcement

The designation of a seat in international commercial arbitration serves to influence the legal framework for enforcement and recognition of the award emanating from the process. A fundamental reason for inserting an arbitration clause in an international contract is the existence of a legal framework for the enforcement of most of the awards. The New York Convention to which over 145 states are now parties, provides the legal framework in international arbitration for the enforcement of an award.[51] By Article I(1), the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.[52]

The question of whether an award is deemed to be given under the New York Convention or not is a function of the seat of arbitration and this would largely determine if an award would have mutual recognition and enforcement in other states. Furthermore, by Article I (3) of the Convention, any State may on the basis of reciprocity while signing, ratifying or acceding to the Convention declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. Consequently, to guarantee the recognition and enforcement of the award, it is in the best

---

50 Gary Born, *International Commercial Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016) 389.

51 Jennifer L. Price, 'Why Where Matters: The Seat of Arbitration in International Energy Contracts' [2013] available at <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2013/August/article1.html> **accessed March 31 2020.**

52 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

interest of parties to choose a seat in a state that is party to the Convention. Furthermore, Article III of the Convention enjoins each Contracting State to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. The import of the above is that where parties select a contracting State as a seat of arbitration, they stand to benefit from the application of the Convention and the cooperation of states as to the enforcement of such award. A study noted that for corporate counsel, the most important reason for choosing arbitration over litigation to settle disputes was the enforceability of awards.[53]

The New York Convention stipulates that each Member State should adopt local law allowing the application of the Convention in its region, setting terms for the recognition and enforcement of agreements and awards consistent with circumstances set out in the Convention and by virtue of this requirement places local law at the centre of its implementation.[54] The enforceability of the award using the legal framework afforded by the New York Convention is a significant advantage of arbitration over other means of dispute resolution as it provides a veritable platform for the enforcement of the award and parties would often likely take advantage of this international legal framework which has received tremendous acceptance from contracting states considering the number of its signatories.

4. Tactical Considerations

The seat of arbitration may oftentimes be chosen in some circumstances for other reasons which may not be legal but purely tactical. Such tactical reasons may include the need for parties to focus their mind on a settlement; the necessity to involve an independent arbiter where the other party's representatives are not able or reluctant to make a decision; putting pressure on the other party through the probable costs and time of the process; constituting a tribunal with the needed expertise availability and repute for being efficient; the prospect of the enforceability of the resulting award; cost control; the availability of a wide range of party autonomy to reduce costs and delays by agreeing on such measures as, limited discovery, conciseness in statements of case, and limited or no oral

---

53 Loukas Mistelis, 'International Arbitration-Corporate Attitudes and Practices- 12 Perceptions Tested: Myths, Data and Analysis Research Report' [2005] (15) *Am. Rev. Int'l Arb.*; 545.

54 New York Convention 1958, Art. III.

testimony; neutrality of the forum.[55] Reasons adduced so far and others are in no doubt factors to be considered in the choice of a seat. In international commercial arbitration, parties often choose different countries and cities as the seat of arbitration.

One seat of arbitration often stands out as a result of its frequent usage by parties in international arbitration. It is London. Some reasons have been adduced for the increasing reputation of London as a seat of arbitration. Prominent amongst them is the efficacy of the English Arbitration Act of 1996. The Act lends support to arbitration and party autonomy. It serves to harmonise the arbitration law of England with laws of other countries where possible, makes arbitration law more user friendly and accessible and operates to preserve England and particularly London as the preferred hub of commercial arbitration. Prior to the advent of the Act, the level of intervention of English courts in arbitral proceedings presupposes that England was outdated and detached.[56] The guiding principles are contained in section 1 of the Act. It states that;

(a) The object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) The parties should be free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) That the court should not intervene except as provided by the Act. [57]

Furthermore, English law seldom questions the validity of arbitration clauses and largely gives them a wide-ranging effect. It will in appropriate circumstances grant an antisuit injunction which serves the use of restraining a party to arbitration from starting proceedings in overseas court when an arbitration clause is stipulated in the contract agreement. Furthermore, section 33 of the Act mandates an arbitral tribunal to adopt proceedings which will reduce delay and avoid unnecessary expense in arbitration. Section 40(1) of the Act goes further to provide that parties

---

55 Stephen Bickford-Smith, 'Which Seat to Choose-London, Stuttgart, Paris or Edinburgh?' [2009] <http://www.landmarkchambers.co.uk/userfiles/documents/resources/SBS_Which_Seat_to_Choose_-_Arbitration_Talk.pdf>. Accessed September 18, 2020.

56 Ibid.

57 English Arbitration Act 1996.

shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This and many more positive sections of the law make London a seat more suitable for international commercial arbitration. It is not surprising therefore, the frequency with which it is picked as a seat of arbitration.

5. Conclusion

The selection of a seat of arbitration is no doubt important in every international arbitration proceeding. The choice of seat in international commercial arbitration may be premised on different reasons and factors which include legal, tactical or even personal considerations. The effect of the choice of seat on arbitration cannot be overemphasized since by selecting a place as the seat in international arbitration, parties inevitably place their arbitral process within the state's national law. As such, the decision as to the seat of arbitration has some crucial impact on the arbitration proceedings and its outcome which is the award. It is therefore pertinent that parties ensure great caution in the selection of a seat by taking into consideration various factors which may have an impact that spans from the commencement of proceeding to the final outcome of the arbitration process. Furthermore, parties should take every caution to ensure that decision on the choice of seat is made by them and not left in the hands of arbitrators. Doing so will put them in a position where they can fully maximize the benefits inherent in the considerations set out in this article.