



**AN EXAMINATION OF THE CONCEPT OF THE 'SEAT OF ARBITRATION' IN  
THE CONTEXT OF INTERNATIONAL COMMERCIAL ARBITRATION**

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## Introduction

Arbitration is one of the mechanisms for settlement of dispute. It is different from mediation or conciliation because in arbitration, there is a third-party arbiter who renders a final and binding award. It is also different from litigation, because arbitration is consensual and constituted by the parties or based on agreement between the parties, while litigation and the court system is set up by the State. Common advantages of arbitration include party autonomy, speed of adjudication, confidentiality, expert arbitrators/tribunal, less acrimonious and less costly, and it does not constitute a strain to parties' commercial relationship.

The seat of Arbitration (“the seat”), otherwise called Place of Arbitration, which is the focus of this article, relates to international commercial arbitration, as opposed to domestic arbitration. Determining of the Seat is one of the important points that parties to an arbitration agreement must agree on when entering into the agreement. This is because, the choice of the Seat determines other ancillary matters, such as the procedural law that will apply to the arbitral proceedings, the rights relating to recognition and enforcement of arbitral award, and/or the right of the aggrieved party to apply for setting aside and annulment of the award.

The concept of the Seat of arbitration, has long been recognised and entrenched in international arbitration. The Geneva Protocol of 1923 states 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.*”**

The New York Convention adopted in 1958 and which replaced the Geneva Protocol, also maintains a clear reference to ‘*the law of the country where the arbitration took place*’, which is used interchangeably to mean ‘*the law of the country where the award is made*’.<sup>1</sup>

The point being made here is that the seat of arbitration is not merely a matter of geography.<sup>2</sup> It is the territorial link between the arbitration itself and the law of the place in whose territory the arbitration is legally situated. According to Reymond:<sup>3</sup>

“When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of

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<sup>1</sup> See Article V(1)(d) and Article V(1)(a) and (e)

<sup>2</sup> Redfern and Hunter on International Arbitration, 5<sup>th</sup> Edition (Oxford University Press) 2009, p. 181, para. 3.54.

<sup>3</sup> Claude Reymond, ‘Where is an Arbitral Award made?’ (1992) 108 LQR 1 at 3



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 procedural rights and obligations between the parties and the arbitrators.”

For the above reasons, the importance of the determination of the Seat cannot be overemphasised. Often, parties to an arbitration agreement stipulate composition of the tribunal, expertise of the arbitrators, language of the Tribunal and substantive law of the arbitration, but neglect to determine the all-important issue of the seat of the arbitration. In such a situation, where there is no agreement between the parties on the seat of arbitration, the duty falls on the Arbitrators to determine the seat, resulting in the parties, or one of them, losing a strategic advantage of choosing the seat.

### **Definition of the Seat of Arbitration**

The Seat of Arbitration is the legal or juridical place of arbitration. It is the place where the arbitral proceedings are held. Generally speaking, the Seat is where the arbitral award is issued and may be compared to the venue of a Court sitting. However, in arbitration the role it (the Seat) plays is much more important. In court proceedings, the place where the judge signs his judgment is not material and has no impact on the judgment. In contrast, in arbitral proceedings, the place where the arbitral award is signed has several consequences.<sup>4</sup>

The Blacks’ Law Dictionary which adopts the term ‘arbitral seat’ defines same as “*the legal or juridical home of an arbitration*. An arbitration award is “made” at the arbitral seat. - Also termed place of arbitration; arbitral situs.”<sup>5</sup>

A distinction must be made between the seat of arbitration and the place of arbitral hearings. An arbitral hearing can take place in a different place from the designated seat, subject to parties’ consent and the convenience of the arbitrators. In the *Gautier’s*<sup>6</sup> case, the French Court of Cassation held thus:

*“The expression ‘arbitration in Lyon’ does not mean that the entire proceedings must necessarily take place in Lyon but that at least the decision has to be made there by the arbitrator, the place where the decision is made being relevant for challenges against the award.”*

The seat may be determined directly by the parties upon entering into an arbitration agreement, or may be agreed upon after the declaration of dispute. The seat may also be determined indirectly, where, in the absence of any agreement by the

<sup>4</sup> Mauro Rubino-Sammartino, *International Arbitration Law and Practice* (2<sup>nd</sup> Edition, Wolter Kluwer, India Pvt. Ltd, New Delhi) 563

<sup>5</sup> Black’s Law Dictionary, 10<sup>th</sup> Edition, by Bryan A. Garner, p. 1554.

<sup>6</sup> *Gautier v. S.te Astra Plastique*, Court of Cassation (France), February 9, 1994, Rev arb. 1995, 127



parties, the seat is determined by the Arbitrators or Arbitral Institution<sup>7</sup>, as the case may be. Article 16 of the Arbitration Rules<sup>8</sup> provides that:

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstance of the arbitration.
2. The arbitral tribunal may determine the location of the arbitration within the place agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

The above provisions allow for a wide discretion on the part of the arbitrators or the tribunal, where the parties did not determine the seat themselves. It is essential for parties and/or the arbitrators to choose a neutral place as the seat of arbitration, to avoid giving undue advantage to any of the parties. The parties should also consider the local laws and arbitration-friendliness of, and the extent of judicial review available in the country contemplated as the seat of arbitration.

It must be pointed out here that to ensure enforceability of an award, the applicable rules of international arbitrations imposed by national laws of the country of the Seat, must be adhered to, even if the parties or the arbitrator(s) had selected other rules of procedure.<sup>9</sup> A study of corporate attitudes on international arbitration has shown that factors such as neutrality, geographical convenience, as well as proximity to evidence and witnesses are key elements to parties' choice of the seat/place of arbitration.<sup>10</sup>

## Factors for determining the seat of arbitration

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<sup>7</sup> Article 12 of the International Chambers of Commerce (ICC) Rules provides that the International Court of Arbitration will fix the place of arbitration provided the parties had no agreement on this issue. ICC Publication No. 447 (1987), in force in January 1, 1988.

<sup>8</sup> The First Schedule to the Arbitration and Conciliation Act ("ACA") (Arbitration Rules), CAP. A. 18, Laws of Federation of Nigeria, 2004. These Rules were fashioned in line with the UNCITRAL Model Law on International Commercial Arbitration. See Article 20 of the Model Law.

<sup>9</sup> Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (West Africa Book Publishers Ltd, 1997) 51. Also, section 47(1) of the ACA.

<sup>10</sup> Redfern and Hunter, *op cit.*, p. 173, para. 3.34, note 28. See PricewaterhouseCoopers and the Queen Mary School of International Arbitration, University of London's "International Arbitration Corporate Attitudes and Practice (2006)", available at "[http://www.pwc.com/extweb/pwcpublishations.nsf/docid/B6COIBC8008DD57680257171003177FO/\\$file/pwc\\_LA\\_Study.pdf](http://www.pwc.com/extweb/pwcpublishations.nsf/docid/B6COIBC8008DD57680257171003177FO/$file/pwc_LA_Study.pdf)"



- a. **Lex arbitri/ the law of the seat of arbitration:** This refers to the local laws of the country chosen as the seat of arbitration. It may also be referred to as the proper law of the arbitration, as opposed to the substantive law of the arbitration. The *lex arbitri* influences a number of issues including the arbitrability of the arbitration agreement. For instance, where a party furnishes evidence that ‘*the arbitration agreement is not valid under the law of the country where the award was made*’<sup>11</sup>, this is a ground for refusal of enforcement of an award

Also, as a general rule, the *lex arbitri* impacts on the party autonomy, because the parties as well as the arbitrators must act within the ambit of the *lex arbitri*. The parties must therefore pay special attention to the *lex arbitri* of the seat. Countries world over have different systems of law. A party that is accustomed to the English common law system should think twice before agreeing to a *lex arbitri* which is based on the civil law system. If possible, the parties should first embark on forum shopping before deciding on the appropriate *lex arbitri*, after all other factors have been considered.

Furthermore, the choice of a seat of arbitration may have important and unintended consequences, especially where the *lex arbitri* confers powers on the Court or on the arbitrators that were not contemplated by the parties. An example of this is the power to order consolidation of arbitrations.<sup>12</sup>

- b. **Neutrality of the seat:** Parties to international commercial arbitration must ensure that the proposed seat or venue is neutral as regards the parties, in order to guarantee equal standing to both of them. For instance, if the seat is the country or registered office of any of the parties, it might result in an advantage to that party. It is therefore common place for parties to an arbitration agreement, especially ad hoc international arbitration, to settle for a neutral seat.
- c. **Strategic and logistical considerations:** The parties may also want to consider the distance of the seat to the parties to ensure that none of them is disfavoured by virtue of distance of the seat.<sup>13</sup> Also of crucial importance is that the choice of the seat should guarantee easy accessibility to the parties and the arbitrators within a reasonable period of time, without any excessive travel expenses; easy visa procurement by the parties, arbitrators as well as potential witnesses. The costs in a particular country may also be a major consideration, although this

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<sup>11</sup> See section 52(a)(ii) ACA. Also, Article 34(2)(b)(i) of the UNCITRAL Model Law

<sup>12</sup> The Netherlands Arbitration Act 1986 provides in Article 1046 that related arbitral proceedings before another arbitral tribunal in the Netherlands may be consolidated by order of the court notwithstanding the objection of one of the parties, unless the parties have agreed otherwise.

<sup>13</sup> Mauro Rubino-Sammartino, op cit. at p. 566



may be cushioned by transferring hearings to some other country, subject to the consent of all parties and arbitrators.<sup>14</sup>

- d. **Enforcement of Award:** The end result of any arbitral proceedings is a binding and enforceable award. An unenforceable award is a waste of the parties' time and resources. Therefore, it is advisable for parties to an arbitration agreement to pick as seat of arbitration, a country that has subscribed to the New York Convention,<sup>15</sup> to ensure that the award can be enforced in as many countries as possible.

Other considerations for selecting a seat of arbitration may include availability of local professionals, such as lawyers, advisors, experts, etc. (including the possibility of the parties to afford their services); availability of suitable venue for hearings, affordable hotel accommodations for both the parties, their witnesses and the arbitrators; good communication infrastructure, as well as availability of clerks, interpreters and other administrative personnel.<sup>16</sup>

## EFFECTS OF THE CHOICE OF SEAT OF ARBITRATION

### Assistance/supervision over arbitral proceedings

In most jurisdictions, there is some degree of judicial interventions in international commercial arbitrations. Indeed, in *ad hoc*<sup>17</sup> international arbitration, the Court's intervention is, in most cases, inevitable. For example, if parties to an arbitration agreement cannot agree on a choice of an arbitrator or one of the parties fails to exercise its right of appointment of an arbitrator, the other party is enjoined to apply to Court for appointment of the arbitrator. Also, any decision of the Court on the appointment of an arbitrator is final and binding on the parties.<sup>18</sup> The Court that has the jurisdiction to render assistance in the above regard is invariably the Court

<sup>14</sup> Alexander J. Belohlavek: *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth* (ASA Bulletin) Vol. 31, No. 2, 2013, 375

<sup>15</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Award, adopted on June 10, 1958, but entered into force on 7<sup>th</sup> June 1959. As of March 2017, the Convention has 157 state parties. Nigeria ratified the Convention on the 17<sup>th</sup> of March 1970. The New York Convention now forms part of the ACA having been incorporated in Schedule 2 to the Act. See section 54(1) thereof.

<sup>16</sup> Alexander J. Belohlavek, *op. cit.*, p. 276.

<sup>17</sup> An *ad hoc* arbitration is one which is not administered by an institution such as the ICC, LCIA, etc. Here, the parties determine all aspects of the arbitration themselves - for example, the number of arbitrators, appointment of the arbitrators, the applicable law and the procedure for conducting the arbitration. If the parties approach the arbitration with cooperation, *ad hoc* proceedings are more flexible, faster and cheaper than institutional proceedings. The absence of administrative fees alone provides an excellent incentive to use the *ad hoc* procedure.

<sup>18</sup> Articles 6 and 7 of the Arbitration Rules, First Schedule to the ACA, LFN 2004. Similar provisions are contained in Article 11(3) and (4) of the UNCITRAL Model Law.



in whose territory the arbitral tribunal is situated, i.e., the Court of the seat of arbitration.

The assistance of the Court of the seat may also be enlisted in relation to evidence. A Court of law, upon request, may compel the attendance of a witness to testify at an arbitral hearing. This is because, an arbitral tribunal generally lacks coercive powers, especially on third parties who are strangers to the arbitration agreement.<sup>19</sup> In addition, the competent Court of the seat of arbitration has power, upon application by an interested party, to grant interim protective measures. Although, an arbitral tribunal also has the power to grant interim measures within the confines of its sphere of authority, the same may only be limited to the parties before the tribunal and will generally not apply to third parties. Therefore, the Court's intervention in this regard is much more robust and effective. More importantly, a party to a dispute which is subject to arbitration agreement, in a case of urgency, may apply to the Court for interim measures of protection even before the arbitral proceedings commence, and same may be granted by the Court.<sup>20</sup> A request for interim measures addressed by any party to the Court will not be deemed to be incompatible with the arbitration agreement, or as a waiver of that agreement.<sup>21</sup>

Generally, the interventions described above can only be made by the Court of the seat of arbitration. There are however some exceptions to this general rule. For example, German law takes the position that the connecting factor which determines a court's intervention and supervision should not be the place of arbitration but rather the law applicable to the arbitral procedure.<sup>22</sup> This position would however not mean much, considering the fact that in most cases, the law applicable to the arbitral procedure would be the law of the seat of arbitration.

### **Annulment/ Review of the Arbitral Award**

Another major implication of the choice of the seat of arbitration is with respect to the annulment or review of an arbitral award. When an arbitral award is rendered in an international arbitration, the losing party may want to challenge or petition for annulment of the award. As a general rule, the aggrieved party can only apply for the annulment of the award at the competent Court in the seat of arbitration.

There is, however, an exception to this rule. Party autonomy applicable to arbitration, allows the parties to agree on the rules applicable to the proceedings and parties may choose the procedural rules of a country different from the seat of

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<sup>19</sup> See Article 27 of the UNCITRAL Model Law

<sup>20</sup> Article 9 of the UNCITRAL Model Law. See also sections 21 - 30 of the Arbitration Law of Lagos State No. 55, Vol. 42 of 2009, which empower the Court to issue interim measures, whether in the form of an award or in another form, or to maintain or restore status quo pending the determination of the dispute.

<sup>21</sup> See Article 26 Arbitration Rules, *op cit.*, and Article 17 UNCITRAL Model Law.

<sup>22</sup> Filip De Ly, The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning (Northwestern Journal of International Law & Business) Vol. 12, Issue 1 Spring, 1991, p. 71



arbitration.<sup>23</sup> Even though the above possibility can also be deduced from the provisions of Article V(1)(e) of the New York Convention<sup>24</sup>, the practicability of choosing a foreign procedural law is mostly an illusion which, if parties make it real, would only complicate the arbitration proceedings. This is because procedural laws are mostly territorial, and Courts are usually unwilling to apply the procedural laws of a foreign country, which, in any case, the courts are not in a position to enforce. It has therefore been suggested that if the procedural law of a country is so attractive or so familiar to the parties that they wish to adopt it, it is preferable that the parties locate their arbitration in that country.<sup>25</sup>

### Enforcement of the Arbitral Award

Finally, the choice of a seat of arbitration may have significant implication on the enforcement of the arbitral award. In an international commercial arbitration, the parties may have no domicile or business connection with the seat of arbitration. On the other hand, the country of enforcement of an arbitral award has a connection with the parties, or any of them, particularly, the party against whom an award is rendered. This is because, the victorious party at the arbitral tribunal, will naturally proceed to the country a state, where the losing party has assets, in order to enforce the arbitral award and levy execution on the assets.

Article 1(1) of the New York Convention provides that the convention shall apply to the recognition and enforcement of awards made in the territory of a state other than the state where recognition and enforcement of such awards are sought. The implication of this is that the New York Convention does not apply to a local or domestic arbitration. Under Article 1 (3) of the New York Convention, contracting States can limit the application of the Convention on the grounds of reciprocity. Accordingly, if the State of the seat of arbitration is not a party to the Convention, the provisions of the Convention will not apply to allow for the recognition and enforcement of the award in a different country.

In this regard, and since majority of enforcement of foreign awards are done under the New York Convention due to its wide acceptability world-wide, it is important and advisable for parties to choose a seat of arbitration in the territory of a State which is a signatory to the New York Convention, so that the award can be enforced in as many States as possible.

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<sup>23</sup> ASA Bulletin (Kluwer Law International) Volume 31, No. 2, 2013, p. 280; available at 'www.kluwerlawonline.com'

<sup>24</sup> Which provides that "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." (underlined for emphasis)

<sup>25</sup> Redfern and Hunter, op cit., p. 186, para. 3.65.



## CONCLUSION

The choice of the seat of arbitration is an important clause with far-reaching implications. The parties to an international arbitration must give careful and thoughtful consideration to the choice of the seat, because of the all-pervasive impact of the seat of arbitration on all facets of the arbitration proceedings, from commencement to enforcement of the award and/or the annulment of the award. Parties to an arbitration agreement with international dimension must also endeavour to choose a seat of arbitration in the territory a State favourable to arbitration and with less judicial intervention. Finally, contracting parties should choose their seat of arbitration in a State party to the New York Convention, so that the successful party can enforce the award in other States, where the losing party has assets.

