

Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration

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I. Introduction: Increasing Use of International Arbitration

There are different types of international arbitrations.¹ Categories of international arbitrations include disputes between nations regarding issues of international public law, investment arbitrations confronting states with private investors, and commercial arbitrations between foreign companies.² International commercial arbitration applies to conflicts of private law.³ It is an “alternative method of resolving disputes arising out of commercial transactions between private parties across national borders that allows the parties to avoid litigation in national courts.”⁴

Different systems of law are expected to apply to different types of international arbitration.⁵ For example, the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes include provisions for the administration of state-to-state arbitrations,⁶ while the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965⁷ provides a popular mechanism and forum for investment disputes between a contracting state and nationals of another signatory state.⁸ The cornerstone of international commercial arbitration is the

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1. Dyalá Jimenez Figueres, *El Sistema de Arbitraje de la Corte Internacional de Arbitraje de la Cámara de Comercio Internacional [The System of Arbitration of the International Court of Arbitration of the International Chamber of Commerce]*, in ESTUDIOS DE ARBITRAJE: LIBRO HOMENAJE AL PROFESOR PATRICIO AYLWIN AZÓCAR, 519, 519-20 (Editorial Jurídica de Chile, 2007).

2. *Id.* at 520-21.

3. Luis Malpica de Lamadrid, *El arbitraje internacional y el derecho maritime [International Arbitration and Maritime Law]*, in PANORAMA DEL ARBITRAJE COMERCIAL INTERNACIONAL (SELECCIÓN DE LECTURAS) 413, 414 (Serie 1. Estudios De Derecho Económico, núm. 9, 1983).

4. Georgetown Law Library, *International Commercial Arbitration Research Guide*, <http://guides.ll.georgetown.edu/InternationalCommercialArbitration> (last updated Sept. 14, 2016).

5. Jimenez Figueres, *supra* note 1, at 520-21.

6. GARY B. BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 28 (2d ed. 2015).

7. International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *ratified* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

8. BORN, *supra* note 6, at 41. As stated by the same author, the commented convention has unusual features for the field of international arbitration because “ICSID awards are subject to

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Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention),⁹ which “amounts to a universal constitutional charter for the international arbitral process.”¹⁰ The New York Convention sought to increase the efficiency of arbitration as an international dispute resolution method.¹¹ For that purpose, the provisions focus on the recognition and enforcement of arbitral agreements and arbitration awards.¹²

The success of the New York Convention came gradually, but ultimately it has “promoted arbitration as a mode of settlement of international commercial disputes by means of increasing confidence in recognition and enforcement of the arbitral awards in foreign countries.”¹³ This growth in arbitration contrasts with challenges national court decisions face, such as recognition and enforcement abroad.¹⁴

As a matter of fact, international commercial arbitration has grown in popularity over the last twenty years and shows no signs of slowing down.¹⁵ A 2015 report prepared by the International Bar Association (IBA) shows the use of arbitration increased in countries around the world, “even those where it has long been established,” such as the United States.¹⁶ Moreover, according to the same report, “‘growth in international arbitration is anticipated’ in regions where litigation before national courts is currently more prevalent than alternative resolution methods.”¹⁷

immediate recognition and enforcement in the courts of Contracting States without setting aside proceedings or any other form of other review in national courts.” *Id.* Additionally, “ICSID awards are subject to a specialized internal annulment procedure, in which *ad hoc* committees selected by ICSID are mandated, in limited circumstances, to annul awards for jurisdictional or grave procedural violations.” *Id.*

9. *Id.* at 32.

10. *Id.*

11. Joseph T. McLaughlin & Laurie Genevto, *Enforcement of Arbitral Awards Under the New York Convention – Practice in U.S. Courts*, 3 BERKELEY J. OF INT’L L. 249, 251 (1986).

12. As noted by the same author, the United States Supreme Court stated the following in this regard: “The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” *Id.* n.8 (citing *Scherk v. Alberto-Culver*, 417 U.S. 506, 520 n.15 (1973)).

13. Tetiana Bersheda Vucurovic, *50th Anniversary of the New York Convention: Any Progress in Recognition and Enforcement of Foreign Arbitral Awards in Ukraine?*, 11 INT’L ARB. L. REV. 165, 165 (2008).

14. *Id.*

15. Mark Bezant, James Nicholson & Howard Rosen, *Trends in International Arbitration: A New World Order*, FTI J. 1, 5 (Feb. 2015), <http://www.fticonsulting.com/~media/Files/us-files/insights/journal-articles/fti-journal-trends-in-international-arbitration.pdf>.

16. IBA Arb. 40 Subcomm., *The Current State and Future of International Arbitration: Regional Perspectives*, INT’L BAR ASS’N, 9 (2015), <http://www.ibanet.org/Document/Default.aspx?DocumentUId=2102ca46-3d4a-48e5-aa20-3f784be214ca>.

17. *Id.*

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In this context of increasing use of international commercial arbitration, several cities and states have promoted themselves as attractive arbitral seats.¹⁸ In some cases, this has been done with the intention of receiving the economic benefits flowing from the international legal industry, such as growth in the use of hotels, translators, expert witnesses, and lawyers.¹⁹ Additionally, in the opinion of this author, becoming an important arbitral forum can have profound consequences to an emerging country in the international political arena because it could provide the opportunity to show the world the country's capacity of duly conducting processes under international standards. Also, it has been stated that having a modern framework for solving international commercial disputes could favor international commerce within a country.²⁰

Currently, there are identifiable differences between international, regional, and emerging arbitral seats, which were highlighted in the 2015 IBA report.²¹ This article does not analyze characteristics that make a particular forum attractive. But it focuses on the selection of a particular arbitral seat and the influence that decision could have on the outcome of an international commercial arbitration. In other words, it focuses on the consequences flowing from conducting an international commercial arbitration within a particular jurisdiction.

For reference purposes, this article first explains the concept of the arbitral seat and then briefly describes what makes a particular forum attractive. Next, it notes the juridical and material consequences of selecting a particular arbitral seat. Finally, it elaborates the conclusion by showing how crucial the selection of the seat could be for the outcome of an arbitration.

II. The Notion of the Arbitral Seat

The arbitral seat is the legal location of the arbitration,²² meaning it is “the jurisdiction in which an arbitration takes place legally.”²³ It is not the

18. This has been the case in Latin America. See María Fernanda Vásquez Palma, *Importance of Arbitral Seat and Criteria for Venue Selection*, 16 R. CH. D. PRIV. 75, 76-77 (2011).

19. Juan José Obando Peralta, *¿Turismo legal in Costa Rica? El caso de la nueva ley de arbitraje comercial internacional* [Legal Tourism in Costa Rica? The Case of the New Law on International Commercial Arbitration], https://www.academia.edu/10838821/Arbitraje_comercial_internacional_en_Costa_Rica_turismo_legal_y_la_nueva_Ley.

20. Cameron Weil, *Has Florida Become an Attractive Seat for International Arbitration? The Adoption of the ICAA*, N.Y.U. L. SCH. BLOGS: TRANSNAT'L NOTES (Apr. 16, 2014), <http://blogs.law.nyu.edu/transnational/2014/04/has-florida-become-an-attractive-seat-for-international-arbitration-the-adoption-of-the-icaa/>.

21. IBA Arb. 40 Subcomm., *supra* note 16, at 12.

22. CLAYTON UTZ, A GUIDE TO INTERNATIONAL ARBITRATION 6 (2d ed. 2012).

23. SIMON GREENBERG, CHRISTOPHER KEE & ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 54 (Cambridge Univ. Press 2011).

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same as the venue of the arbitration²⁴ because the seat “refers to the legal, rather than physical, location of the arbitration.”²⁵ The venue is the geographical setting where the proceedings occur and the “location where hearings are to take place.”²⁶

Most arbitration statutes and institutional rules distinguish “between the seat of the arbitration and the venue in which hearings are held.”²⁷ For instance, Article 16.3 of the Arbitration Rules of the London Court of International Arbitration (LCIA) states, “[t]he arbitral tribunal may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice,” which could be “elsewhere than the seat of the arbitration.”²⁸

Despite the distinction, the seat and the venue are decidedly connected, being likely to coincide.²⁹ In fact, when the arbitration agreement is silent about the seat, the venue will be a deciding factor to determine the jurisdiction of the appropriate court.³⁰ This has been clearly explained in the following terms:

There is an important distinction between the legal place (the “seat”) of any arbitration and the place where one or more of the hearings or other procedural steps physically take place. Although the two often coincide in practice, it is the seat which determines the legal framework within which the arbitration takes place, not the location where the parties or the tribunal choose (as a matter of convenience) to meet.³¹

24. Laura Warren, *The Seat of Arbitration: Why is it so Important?*, CLYDE & CO (Sept. 13, 2011), <http://www.clydeco.com/insight/article/the-seat-of-arbitration-why-is-it-so-important>.

25. UTZ, *supra* note 22, at 6.

26. Warren, *supra* note 24.

27. *Id.*

28. LONDON COURT OF INT’L COMMERCIAL ARBITRATION RULES, LONDON CT. INT’L ARB. 6 (2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx (“The Arbitral Tribunal may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice; and if such place(s) should be elsewhere than the seat of the arbitration, the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat.”).

29. Warren, *supra* note 24.

30. Indu Bhan, *Seat Versus Venue*, FIN. EXPRESS (Feb. 27, 2014, 8:26 AM), <http://www.financialexpress.com/archive/seat-versus-venue/1229641/>. As stated by another author, “Certainly, the designation of ‘venue’ will be considered as strong evidence of intention that the seat should be in the same jurisdiction.” Phillip Capper, Dipen Sabharwal & Clare Connellan, *When is the ‘Venue’ of an Arbitration its ‘Seat’?*, KLUWER ARB. BLOG (Nov. 25, 2009), <http://kluwerarbitrationblog.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/>.

31. LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION, 17 (2014), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014>.

In summary, the seat of a particular arbitration is the juridical connection of the arbitral process with a given system of rules and principles.³²

III. Brief Review of the Characteristics of an Attractive Arbitral Seat

The practical and legal consequences flowing from the selection of the seat of the arbitration makes the decision “one of the most important aspects of any international arbitration agreement,”³³ forcing the parties to choose it carefully.³⁴ Considering its significance, the reputation and recognition of certain locations as proper forums to conduct arbitral procedures have been considered the main reasons explaining the selection of a particular city or country as the seat of an international arbitration.³⁵

Generally, attractive forums are expected to provide “a supportive legal environment, a positive attitude of the nation’s courts towards arbitration, adequate facilities, political stability and the availability of experienced practitioners.”³⁶ According to a 2015 survey on International Arbitration by Queen Mary University of London, the most important considerations for preferred seats were the “neutrality and impartiality of the local legal system,” the national arbitration laws, the “track record of enforcing agreements to arbitrate and arbitral awards,” and the “availability of quality arbitrators familiar with the seat.”³⁷ Other factors mentioned by respondents were cultural familiarity with the seat, efficiency of local court proceedings, location, availability of prepared lawyers, costs, hearing facilities, language, and transport connections.³⁸ Findings from a different

32. Matthias Scherer, *The Place or ‘Seat’ of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration No. 10’623*, 21 ASA BULL. 112, 112 (2003).

33. GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 64 (3d ed. 2010).

34. Capper, Sabharwal & Connellan, *supra* note 30.

35. QUEEN MARY UNIV. OF LONDON ET AL., 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 2 (2015), <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>. According to the survey, the preferred seats for arbitration in the world are London, Paris, Hong Kong, Singapore, and Geneva. *Id.*

36. Gonzalo Vial, *Australia as a Seat for Arbitration: lesson from the Andes*, 2 AUSTRALIAN ALTERNATIVE DISPUTE RESOLUTION LAW BULLETIN, 97, n. 5 (2015) (citing Karina Cherro Varela, *The New Chilean Arbitration Law: Will Chile Become a New International Arbitration Venue?* 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 681; Elina Mereminskaya, *Arbitraje Comercial Internacional en Chile: Una Mirada jurisprudencial*, REVISTA ECUATORIANA DE ARBITRAJE 265; Jonathan Sacher, *Traditional arbitration centres hold strong, but South East Asia emerges as a new challenger* (2014), <https://www.blplaw.com/media/press-releases/traditional-arbitration-centres-hold-strong-south-east-asia-emerges-new-challenger/>; SYDNEY ARBITRAL ADVANTAGE, <http://www.sydneyarbitration.com> (last visited Sept. 21, 2015)).

37. QUEEN MARY UNIV. OF LONDON ET AL., *supra* note 35, at 14.

38. *Id.*

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survey on international arbitration showed that having a personal connection with a city was an important factor in choosing it as a seat.³⁹

Recently, in an effort to understand the features of an attractive arbitral seat, the Chartered Institute of Arbitrators identified the following “key characteristics” that a forum shall present: (1) a modern international arbitration law that limits court intervention in the arbitral process; (2) “an independent judiciary. . . respectful of the parties’ choice of arbitration as their method for solving disputes;” (3) a pool of practitioners with experience in international arbitration; (4) the commitment to educate actual and future professionals in transnational disputes; (5) the possibility that the parties could be represented by the counsel of their choice; (6) an accessible and safe seat; (7) the material conditions to properly conduct arbitration procedures; (8) ethics and professional norms that govern the behavior of participants according to the diversity of legal cultures and traditions of international arbitration; (9) the participation of treaties promoting the enforceability of foreign arbitral awards; and (10) the protection of the arbitrator from liability if acting in good faith.⁴⁰ As can be concluded from the above, generally, a proper arbitral seat shall give the parties the possibility to conduct the procedures in an efficient manner and without undue interferences from external factors.

IV. Consequences Flowing From the Selection of the Arbitral Seat

The selection of the seat is crucial because it generally determines the “*lex arbitri* and the courts with supervisory jurisdiction over the arbitration,”⁴¹ providing an essential framework for the proceedings.⁴² The *lex arbitri* has been defined as the “totality of national law provisions that apply generally to arbitrations in each country”⁴³ and as “the law governing the arbitral proceedings.”⁴⁴ Some state that this concept is broader than the procedural norms affecting a particular arbitration, including matters like “arbitrability,

39. Press Release, Jonathan Sacher, Traditional Arbitration Centres Hold Strong, but South East Asia Emerges as New Challenger (Sept. 24, 2014), <https://www.blplaw.com/media/press-releases/traditional-arbitration-centres-hold-strong-south-east-asia-emerges-new-challenger/>.

40. Chartered Institute of Arbitrators, *CI Arb London Centenary Principles* (2015), <https://www.ciarb.org/docs/default-source/centenarydocs/london/the-principles.pdf?sfvrsn=4>.

41. Capper, Sabharwal & Connellan, *supra* note 30.

42. William Kirtley, *The Importance of The Seat of Arbitration*, INTERNATIONAL ARBITRATION ATTORNEY NETWORK (Feb. 8, 2016, 6:19 PM), <https://www.international-arbitration-attorney.com/importance-seat-arbitration/>. This is notwithstanding the fact the principle of party autonomy allows the parties to derogate that law if the “*lex arbitri* itself permits it,” as stated by the same author citing NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (5th ed. 2009).

43. Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration*, 26 SING. ACADEMY OF L. J. 886, 887 (2014).

44. Alexander J. Belohlávek, *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, 31 ASA BULLETIN 262, 265 (2013), available at https://www.academia.edu/10270800/Importance_of_the_Seat_of_Arbi

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decisions on jurisdiction, national court intervention in support of arbitration, and the grounds on which awards may be challenged and set aside.”⁴⁵ One author explains the content of the *lex arbitri* in the following terms:

The precise content of the *lex arbitri* will vary from country to country but in modern arbitral jurisdictions it will typically include provisions which regulate: (a) matters internal to the arbitration, such as the composition and appointment of the tribunal, requirements for arbitral procedure and due process, and formal requirements for an award; (b) the external relationship between the arbitration and the courts, whose powers may be both supportive and supervisory, such as the grant for interim relief, procuring evidence from third parties and securing the attendance of witnesses, the removal of arbitrators and the setting aside of awards; and (c) the broader external relationship between arbitrations and the public policies of that place, which includes matters such as arbitrability and possibly also—more controversially—the impact on arbitration of social, religious and other fundamental values in each State.⁴⁶

As explained below, it is possible to recognize that the following arbitration-related issues are affected by the selection of the arbitral seat: (A) the recognition and enforcement of arbitral awards; (B) the courts with supervisory jurisdiction over the arbitration; (C) some procedural rules that could apply to the arbitration; (D) the costs of the procedure; (E) the way in which conflict of laws are solved; and (F) mandatory norms that could apply to the arbitration.

A. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

The recognition of an award is different from its enforcement, therefore, it is possible to recognize and not enforce an award, but impossible to enforce it without previous recognition.⁴⁷ The following excerpt clearly describes the difference between these two concepts:

Recognition is an undertaking by a state to respect the bindingness of foreign arbitral awards. Such awards may be relied upon by way of defence or set-off in any legal proceedings concerning the subject-matter of the award commenced in the courts of the state concerned,

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_an_Outdated_Myth.

45. Henderson, *supra* note 43, at 887.

46. *Id.* at 887-88.

47. Teclé Hagos Bahta, *Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia*, 5 MIZAN L. REV. 105, 107 (2011) (citing ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 10-09 (3d ed. 1999)).

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whereas enforcement is an undertaking by a state to enforce foreign arbitral awards, in accordance with its local procedural rules.⁴⁸

The selection of the seat could have consequences in the recognition and enforcement of a foreign arbitral award because selecting a jurisdiction that is not party to the New York Convention could impede its recognition and enforcement in a different country.⁴⁹

Indeed, even though the treaty focuses on the recognition and enforcement of arbitration agreements and arbitral awards without requiring reciprocity,⁵⁰ several parties only apply the New York Convention to awards rendered in other contracting parties.⁵¹ In other words, if the arbitration is seated in a state that participates from in the treaty, “the parties ensure they may obtain the benefits and protections of the Convention with respect to the aid of the local courts in recognizing and enforcing their arbitration agreement, the arbitral process, and any arbitral award.”⁵² The aforementioned has been explained in the following terms:

The seat of arbitration is also of critical importance to the enforceability of the resulting award pursuant to the New York Convention. 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 contracting states. Accordingly, by selecting a state which is party to the New York Convention as the seat for any arbitration, parties provide considerable scope for enforcement of their awards.⁵³

Even though a majority of arbitral awards are “voluntarily complied with and do not require judicial enforcement,”⁵⁴ the possibility of enforcing arbitral awards is crucial because the enforcement is perceived as arbitration’s most appreciated characteristic,⁵⁵ and “perhaps one of the most important aspects to be considered when deciding to submit a particular dispute to arbitration,”⁵⁶ especially in the field of international commercial

48. *Id.* at 107-08. As stated by the author: “The recognition of an award by a court gives a res judicata effect thereto. Enforcement, however, goes a step further than recognition. As Redfern and Hunter noted, ‘ . . . where a court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award, but also to ensure that it is carried out by using such legal sanctions as are available.’”

49. UTZ, *supra* note 22, at 14.

50. Jennifer L. Price, *Why Where Matters: The Seat of Arbitration in International Energy Contracts*, ENERGY NEWSLETTER, (King & Spalding) Aug. 2013, <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2013/August/article1.html>.

51. *Id.*

52. *Id.*

53. LATHAM & WATKINS, *supra* note 31, at 18.

54. R. Doak Bishop & Elaine Martin, *Enforcement of Foreign Arbitral Awards*, (King & Spalding), <http://www.kslaw.com/library/pdf/bishop6.pdf>.

55. QUEEN MARY UNIV. OF LONDON ET AL., *supra* note 35, at 2.

56. Catalina Andrea Medel Lucas, *RECONOCIMIENTO Y EJECUCIÓN DE LAUDOS EXTRANJEROS: La Convención de Nueva York y la Jurisprudencia Chilena Actual* [Recognition and

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arbitration.⁵⁷ In fact, the “credibility of international arbitration as a preferred method of dispute resolution in commercial matters depends mainly on the cross border enforceability of arbitral awards,”⁵⁸ one way in which the successful party can guarantee that it will recover the object of a favorable award.⁵⁹

**B. COURTS WITH SUPERVISORY JURISDICTION OVER THE
ARBITRATION**

The selection of the seat will determine which courts exercise jurisdiction over the arbitration,⁶⁰ which is extremely relevant because such courts could have important roles to play in issues related to the annulment of the arbitral award, the speed of the proceedings, and the costs associated with the arbitration.⁶¹ Unsurprisingly, some state that, “as important as the law is the attitude of local judges towards international arbitration.”⁶²

The degree to which national courts interfere varies among different seats.⁶³ For instance, in pro-arbitration jurisdictions like France, they “usually intervene only in support of arbitration, for instance to offer interim relief,” but in others, they “may intervene in the arbitration and even decline to respect the arbitration agreement, severely impacting the proceedings.”⁶⁴ Generally, it is suggested to conduct the proceeding in a place where courts do not unduly interfere with arbitration, but assist with it when necessary.⁶⁵

Even though arbitration laws usually declare that the rendered awards are final, they frequently leave open the possibility of requesting an annulment or setting aside or vacating the award.⁶⁶ In other words, the law may allow

Enforcement of Foreign Arbitral Awards] (Dec. 2010) (unpublished undergraduate thesis, University of Chile School of Law Department of International Law) (on file with the University of Chile), http://repositorio.uchile.cl/tesis/uchile/2010/demedel_c/pdfAmont/demedel_c.pdf.

57. *Id.*

58. Harisankar K. S., *Annulment versus Enforcement of International Arbitral Awards: Does the New York Convention Permit Issue Estoppel?*, 3 INT'L. A.L.R., 47, 47 (2015), available at https://www.academia.edu/13638114/Annulment_versus_Enforcement_of_International_Arbitral_Awards_Does_the_New_York_Convention_permit_Issue_Estoppel?auto=download.

59. Bishop & Martin, *supra* note 54 (citing GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 460 (1st ed. 1994)).

60. Warren, *supra* note 24.

61. *Id.*

62. Jiménez Figueres, *supra* note 1, at 526.

63. Kirtley, *supra* note 42. As stated, the seat will also influence the degree to which national courts could involve themselves in a procedure, because the degree of procedural autonomy given to arbitration could vary in different countries. Warren, *supra* note 24.

64. Kirtley, *supra* note 42.

65. *Id.*

66. FERNANDO LEILA, *Setting Aside an Arbitration Award*, in FROM THE SELECTED WORKS OF FERNANDO LEILA 1, 1 (Fordham Univ., 2010), https://works.bepress.com/fernando_leila/2/.

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awards to be declared “disregarded in whole or in part.”⁶⁷ For instance, Article 34 of the UNCITRAL Model Law considers the application for setting aside an award the only avenue of recourse.⁶⁸ Following suit, Article 34 of the Chilean International Commercial Arbitration Act also treats the nullification of awards as the only recourse against a court’s ruling.⁶⁹

As the arbitral seat is the place where the award is formally made, its laws govern the proceedings to annul it,⁷⁰ indicating the situations in which an award could be “contested by the parties and possibly set aside by a judge.”⁷¹ Moreover, the courts located in the arbitral seat will decide on the actions to annul an arbitral award.⁷² Indeed, “only courts in countries with primary jurisdiction may effectively vacate an arbitral award,”⁷³ and different standards under different national laws exist for these purposes.⁷⁴ As explained by one author, every “country will allow an award to be challenged on certain, limited grounds. . .but some also allow the challenge of the award based on errors of law or grounds of public policy, which means different things in different jurisdictions.”⁷⁵ In sum, the grounds for vacating arbitral awards are set out in the arbitration laws of the seat,⁷⁶ and the degree and extent to which judicial review would be accessible to parties will depend on those same laws⁷⁷ and the national court’s attitude towards international commercial arbitration.

Regarding the aforementioned, it is worth clarifying that there is a difference between refusing the enforcement of a foreign arbitral award—which may or may not be sought in the place where the award was made—and the annulment of such decision,⁷⁸ an issue that necessarily has to be requested in the arbitral seat, that is to say, the place where the award was

67. *Id.* (citing ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 404 (4th ed. 2004)).

68. UNITED NATIONS COMM’N ON INT’L TRADE LAW, *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006*, at 19, U.N. Sales No. E.08.V.4 (2008), *available at* https://www.uncitral.org/pdf/English/texts/arbitration/ml-arb/0786998_Ebook.pdf.

69. Law No. 19971, Septiembre 10, 2004, DIARIO OFICIAL [D.O.] (Chile), *available at* <http://www.anfitrion.cl/ley/19971.html>.

70. BORN, *supra* note 33, at 599.

71. Chioma Okafor, *What is the Significance of the Lex Arbitri in International Arbitration?*, web document (Feb. 9, 2016 9:40 PM), file:///C:/Users/usuario/Downloads/cepmlp_car17_39_44_2689951.pdf; Kirtley, *supra* note 42.

72. BORN, *supra* note 33, at 599.

73. Catherine A. Giambastiani, *Lex Loci Arbitri and Annulment of Foreign Arbitral Awards in U.S. Courts*, 20 AM. U. INT’L. L. REV. 1101, 1101 (2005).

74. BORN, *supra* note 33, at 65.

75. Kirtley, *supra* note 42.

76. Teresa Giovannini, *What Are the Grounds on Which Awards Are Most Often Set Aside?*, THE INSTITUTE FOR TRANSNATIONAL ARBITRATION (June 15, 2000), http://www.lalive.ch/data/publications/tgi_what_are_the_grounds.pdf.

77. Warren, *supra* note 24.

78. Harisankar, *supra* note 58, at 47.

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formally made.⁷⁹ An author explains the difference between the refusal of enforcement and annulment of arbitral awards in the following terms:

Despite the copiousness of academic literature on the enforcement of foreign arbitral awards a distinction that is not always fully recognised is the difference between refusal of enforcement and annulment of arbitral awards. Concisely, the supervisory court at the seat of arbitration has the power to annul an award made within its territory, while the enforcement court abroad has power only to consider granting or refusing the recognition and enforcement of an award in its territory. Frequently, in international arbitration jurisprudence, this distinction has been generally referred to as a segregation between “Primary Jurisdiction” and “Secondary Jurisdiction.”⁸⁰

Additionally, national courts could certainly affect the speed and costs of the proceedings because they might have to involve themselves in issues like the selection, challenge, removal and appointment of arbitrators,⁸¹ decisions about the jurisdiction of the arbitral tribunal,⁸² collect evidence in aid of the arbitration,⁸³ and grant of interim measures.⁸⁴ As could be easily noted, all of the referred issues could affect the expenses incurred by the parties and the swiftness of the process.

C. PROCEDURAL-RELATED ISSUES

By choosing the arbitral seat, the parties are “selecting the procedural law which applies.”⁸⁵ If London is selected as the seat of the arbitration, the parties will bring the application of the United Kingdom 1996 Arbitration Act,⁸⁶ but if they prefer to seat the arbitration in Santiago (Chile), it would be necessary to apply Law 19.971 of 2004 on International Commercial Arbitration.⁸⁷ Thus, it is necessary to consider the possibility that a

79. Leila, *supra* note 66, at 2.

80. Harisankar, *supra* note 58, at 47 (citing *Karaha Bodos Co., L.L.C. v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2004); W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION—BREAKDOWN AND REPAIR* (Duke University Press, 1992)).

81. UNITED NATIONS COMM’N ON INT’L TRADE LAW, *supra* note 68, at 6-8.

82. *Id.* at 8.

83. BORN, *supra* note 6, at 536.

84. *Id.*

85. LATHAM & WATKINS, *supra* note 31, at 17.

86. *Id.*

87. Which was enacted to offer an effective mechanism to adjudicate transnational business disputes, and to promote the country as an important arbitral seat, as appreciated in the message from the executive power of June 2003 initiating the project of a new law for international commercial arbitration. See Ricardo Lagos Escobar, Luis Bates Hidalgo & María Soledad Alvear Valenzuela, *MENSAJE DE S.E. PRESIDENTE DE LA REPUBLICA CON EL QUE INICIA UN PROYECTO DE LEY SOBRE ARBITRAJE COMERCIAL INTERNACIONAL* [Message S.E. the President of the Republic That Starts with Bill on International Commercial Arbitration], in *HISTORIA DE LA LEY NO. 19971 SOBRE ARBITRAJE COMERCIAL*

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particular arbitration statute can contain procedural norms with which the parties would be forced to comply.⁸⁸

In other words, some procedural issues of a particular arbitration will be affected by the laws of the arbitral seat. For instance, the selection and removal of arbitrators,⁸⁹ evidence taking in aid of the arbitration,⁹⁰ and the possibility of granting interim measures.⁹¹ Additionally, the seat's laws could determine issues such as the parties' autonomy to agree on procedural issues, the rights of foreign counsels to act in the arbitration, and the application of pleading and evidentiary rules.⁹²

Generally, it has been recommended to arbitrate a dispute within a legal framework that contains few mandatory provisions and allows the parties to tailor the arbitration according to their real needs.⁹³ The way in which applying certain procedural laws could affect the outcome of an arbitration is clearly explained in the following excerpt:

The procedural laws applicable in arbitration "friendly" centres (such as London, New York, Paris, Hong Kong and Singapore) have few mandatory provisions and allow the parties considerable freedom to agree upon the lawyers to represent them, the procedure to be followed, the language of the arbitration and the tribunal to decide their dispute. The result is that these centres and the specialist lawyers, experts and technical staff (such as translators, stenographers and IT personnel) who service them are able to accommodate the considerable diversity of disputes which arise in the international arena. Arbitration is encouraged (often in order to promote trade) and, accordingly, the role of the courts is kept to a minimum, being primarily to support the arbitration process and to assist, if necessary, with the enforcement of the award.⁹⁴

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 where 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."⁹⁵ In summary, the application of particular arbitration laws could force the parties to comply with certain procedural issues.

INTERNACIONAL, BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, 5 (2004) (providing the official history of the enact process for Chile's international commercial arbitration legislation).

88. LATHAM & WATKINS, *supra* note 31, at 17.

89. BORN, *supra* note 6, at 599.

90. *Id.*

91. *Id.*

92. *Id.*

93. LATHAM & WATKINS, *supra* note 31, at 17.

94. *Id.*

95. *Id.*

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D. COSTS AND PRACTICAL MATTERS

International arbitration procedures tend to be costly,⁹⁶ with expense levels rising—according to some—“at an unsustainable rate.”⁹⁷ Nowadays, costs are “perceived as the worst characteristic of international arbitration”;⁹⁸ thus unsurprisingly, when selecting the arbitral seat, parties must consider “relatively mundane issues of convenience and cost,”⁹⁹ which can be relevant to “the conduct and outcome of an arbitration.”¹⁰⁰

Due to the fact that the venue¹⁰¹ and the seat are likely to coincide,¹⁰² the selection of the seat can influence the costs of the arbitration in part because of collateral costs like hotels and transportation.¹⁰³ Additionally, practical and relatively uncostly matters—like visa requirements, hearing facilities and supporting staff—shall also be considered when selecting the arbitral seat.¹⁰⁴

E. CHOICE OF LAW

The conflict of laws is the legal reality that there may be a “difference between the laws of two or more jurisdictions with some connection to a case, such that the outcome depends on which jurisdiction’s law will be used to resolve each issue in dispute.”¹⁰⁵ The act of deciding which law should be applied is known as a choice of law,¹⁰⁶ for which conflict of law rules are useful.¹⁰⁷ An author explains the aforementioned in the context of international commercial arbitration in the following terms:

However, in International Commercial Arbitration, when the parties are of different legal systems, there automatically arises a conflict of laws, and a choice of the substantive law to be applied in a given dispute has to be made. Many a time, the substantive law to be applied in arbitration may be specified by the parties in their original agreement. But problems arise in determining the applicable law in situations when

96. Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L. J. 1649, 1663 (2013) (citing *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993); GARY BORN, *KLUWER LAW INT’L COMMERCIAL ARBITRATION* 1462, 84 (2009)).

97. Thibault De Boule, *Third-Party Funding in International Commercial Arbitration*, at 26 (2013) (unpublished Master’s thesis, Ghent University), http://lib.ugent.be/fulltxt/RUG01/002/163/057/RUG01-002163057_2014_0001_AC.pdf.

98. QUEEN MARY UNIV. OF LONDON ET AL., *supra* note 35, at 7.

99. BORN, *supra* note 6, at 598.

100. *Id.*

101. The “location where hearings are to take place.” Warren, *supra* note 24.

102. *Id.*

103. BORN, *supra* note 6, at 598.

104. *Id.*

105. *Conflict of Laws*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/conflict_of_laws.

106. *Id.*

107. *Conflict of Laws*, USLEGAL, <http://conflictoflaws.uslegal.com/>.

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the parties fail to agree upon a choice of law for the settlement of their dispute.¹⁰⁸

It is possible to distinguish between four different choice of law issues that could arise in relation to an international commercial arbitration: (a) the law applicable to the substance of the dispute; (b) the law governing the arbitration agreement; (c) the procedural law applicable to the arbitral proceedings; and (d) the conflict-of-law rules applicable to select each of the aforementioned laws.¹⁰⁹ In each of the four scenarios, the arbitral seat could play an important role.

Indeed, if the law applicable to the substance of the parties' dispute is not agreed to, the arbitral tribunal will have to determine the dispute according to some conflict of law rules, traditionally applying the seat's national conflict of law rules.¹¹⁰ Moreover, in cases where the law applicable to the substance of the dispute was agreed upon by both parties, the arbitrators could still choose not to enforce such agreement based upon mandatory national laws and public policy issues.¹¹¹

In turn, the law of the arbitral seat could be important for determining the law applicable to the arbitration agreement.¹¹² This is expressly recognized by Gary Born, who argues that the law of the arbitral seat is an alternative of particular importance when it comes to the law governing an arbitration agreement.¹¹³ A different author describes a situation in which the law of the arbitral seat was important for determining the law governing the arbitration agreement in the following terms:

The Court reaffirmed the principles for determining the applicable law of the arbitration agreement which were set down in *Sulamérica* and considered in *Arsanovia*. The Court summarised the guidance provided by these cases, including the three stage test set out in *Sulamérica* that the proper law of the arbitration agreement is to be determined by undertaking a three stage enquiry: (i) whether the parties expressly chose the law of the arbitration agreement; (ii) whether the parties

108. Ali Khaled Qtaishat, *Choice of Law in International Commercial Arbitration*, INDIA L. J. (2007), http://indialawjournal.com/volume3/issue_3/article_by_ali.html.

109. BORN, *supra* note 6, at 629. Other authors identify more types of laws. As one states: "It is possible to encounter as many as five different legal systems which regulate the status of a particular arbitration and which may differ in the individual proceedings applicable: (i) the law applicable to the capacity of the parties to enter into an arbitration agreement and the law applicable to the arbitrability of the dispute; (ii) the law governing the arbitration agreement; (iii) the law governing the arbitral proceedings (*lex arbitri*); (iv) applicable substantive law (the law applicable to the merits of the dispute); (v) the law applicable to the recognition and enforcement of the arbitral award (if a party seeks recognition and enforcement in multiple countries, the number of applicable legal systems can be higher)." Belohlávek, *supra* note 44, at 265.

110. BORN, *supra* note 6, at 628.

111. *Id.* at 633.

112. *Id.* at 639.

113. *Id.*

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made an implied choice of the arbitration agreement; and (iii) in the absence of express or implied choice, the system of law with which the arbitration agreement has the “closest and most real connection.” Applying these principles, the Court found that the applicable law of the arbitration agreement was the law of the country of the seat, i.e. English law. It dismissed the argument that the seat should not be relevant to the “closest connection” test, because Habas’ agents had exceeded their actual authority when agreeing to London arbitration.¹¹⁴

In the case of the procedural law of the arbitral proceedings, the three-stage inquiry would generally apply the arbitral seat.¹¹⁵ In other words, the arbitral seat could determine the procedural provisions that will apply to a particular arbitration.¹¹⁶ Even though some jurisdictions allow the parties to freely select the law governing the proceedings of the arbitration, this is a circumstance that rarely occurs in practice.¹¹⁷

Finally, the arbitral seat may determine the conflict of law rules applied to solve conflict of laws,¹¹⁸ at least when it is necessary to reconcile laws from different jurisdictions.¹¹⁹ As noted:

[S]electing each of the bodies of law identified in the foregoing . . . sections—the laws applicable to the merits of the underlying contract or dispute, to the arbitration agreement, and to the arbitral proceedings—ordinarily requires application of conflict-of-laws rules. In order to select the substantive law governing the parties’ dispute, for example, the arbitral tribunal must ordinarily apply a conflict-of-laws system An international arbitral tribunal must therefore decide at the outset what set of conflicts rules to apply.¹²⁰

Needless to say, the arbitral seat could play an important role resolving choice of law issues in international arbitration.

F. MANDATORY REQUIREMENTS

Regarding the rules applying to an international commercial arbitration, it is possible to distinguish between dispositive norms “that can be changed by

114. Henry Orsmy, *Governing Law of the Arbitration Agreement: Importance of Sulamérica Case Reaffirmed Where Choice of Seat Was Agreed Without Actual Authority*, KLUWER ARB. BLOG (Jan. 29, 2014), <http://kluwerarbitrationblog.com/2014/01/29/governing-law-of-the-arbitration-agreement-importance-of-sulamerica-case-reaffirmed-where-choice-of-seat-was-agreed-without-actual-authority/>.

115. LATHAM & WATKINS, *supra* note 31, at 17.

116. *Id.*

117. BORN, *supra* note 6, at 636.

118. *See id.* at 599.

119. *Choice of Law*, USLEGAL, <http://definitions.uslegal.com/c/choice-of-law/>.

120. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 44 (Transnational Publishers, 2d ed. 2001).

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the parties involved”¹²¹ and norms that “‘purport to apply irrespective of the law chosen by the parties to govern their contractual relations,’” known as mandatory norms.¹²² Mandatory norms impose “important restrictions to parties’ authority to define the arbitration framework” and can vary depending on the arbitral seat.¹²³ For instance, in Chile, it is not possible to waive the right to request interim relief.¹²⁴ Therefore, despite the debate “regarding the strictness of the actual limits created by mandatory norms on the parties’ autonomy to set the rules of the arbitration,” it is evident that the laws of the arbitral seat could impose mandatory requirements capable of affecting the arbitral procedure.¹²⁵

As noted, the law governing “the law of the seat of arbitration . . . might impose mandatory requirements on the parties as to the form and/or contents of the arbitration agreement.”¹²⁶ For instance, “the arbitration agreement might have to be [initialed] or signed, the seat might have to be that of a governmental party and/or the involvement of an arbitral institution might have to be clearly stated.”¹²⁷ Quite simply, the selection of a particular arbitral seat could impose mandatory requirements that the parties ought to consider before selection.¹²⁸

G. SUMMARIZING THE POINTS

A good summary of the most relevant issues affected by the selection of the arbitral seat in the field of international arbitration can be found in the following excerpt written by Gary Born:

The arbitration legislation of the arbitral seat governs a number of “internal” and “external” matters relating to arbitral proceedings. The “internal” matters potentially governed by the arbitral seat’s law include: (a) the parties’ autonomy to agree on substantive and procedural issues; (b) standards of procedural fairness in arbitral proceedings; (c) timetable of arbitral proceedings; (d) consolidation, joinder and intervention; (e) rights of lawyers to appear, and their ethical obligations, in the arbitral proceedings; (f) pleading and evidentiary rules; (g) permissibility and administration of oaths; (h) disclosure, “discovery,” and related issues; (i) confidentiality; (j) rights and duties of the arbitrators; (k) arbitrators’ remedial powers, including to grant provisional measures; and (l) form of the award. In addition,

121. Francisco Blavi & Gonzalo Vial, *The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales?*, 39 HASTINGS INT’L AND COMP. L.R. 41, 57 (2016).

122. *Id.* (citing Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELB. J. INT’L L. 205, 216-17 (2005)).

123. *Id.* at 57.

124. *Id.* at 58.

125. *See* Blavi & Vial, *supra* note 121, at 59.

126. LATHAM & WATKINS, *supra* note 31, at 22.

127. *Id.*

128. *See id.*

and less clearly, the law of the arbitral seat sometimes governs: (m) conflict of law rules applicable to the substance of the dispute; and (n) quasi-substantive issues, such as rules concerning interest and costs of legal representation.¹²⁹

The “external” matters governed by the law of the arbitral seat concern judicial supervision of the arbitral proceedings by the courts of the arbitral seat. Among other things, this includes:

(a) annulment of arbitral awards; (b) selection of arbitrators; (c) removal of arbitrators; (d) evidence-taking in aid of the arbitration; and (e) provisional measures in support of the arbitration. In most instances, “external” matters entail affirmative actions of the local courts of the arbitral seat, which consider and decide applications seeking judicial intervention in, or support for, the arbitral process (e.g., annulling an award; selecting an arbitrator).¹³⁰

V. Conclusion

In the context of an increasing use of international commercial arbitration for solving transnational disputes, the consequences flowing from the selection of the arbitral seat are some of the most important aspects to be considered when drafting an arbitration agreement. Choosing a particular seat determines issues that have the potential to profoundly affect the outcome of an arbitration, namely: (a) the recognition and enforcement of arbitral awards; (b) the courts with supervisory jurisdiction over the arbitration; (c) some procedural rules that could apply to the arbitration; (d) the costs of the procedure; (e) the way in which conflict of laws are solved; and (f) the mandatory norms that could apply to the arbitration.

Therefore, the arbitral seat directly affects the chances of effectively obtaining the goals pursued through arbitration. A poor selection could result, at the very least, in unenforceable awards susceptible of broadsided challenges. If the country where the award was made is not a party to the New York Convention, it might not be possible to enforce the award in a different location where valuable assets may be located. In turn, if the laws of the seat allows for an extensive review of international arbitral awards, it is more likely that those decisions will be set aside.

Additionally, the selection of the arbitral seat determines the economical and practical possibilities of a party participating in international commercial arbitration—affecting the cost and the chance of success of arbitrating within a particular framework. For instance, if the selected court does not assist with the appointment of arbitrators, or if the court unduly interferes with the arbitration, the parties will likely have to spend additional money and time on processing the dispute. In light of the aforementioned, it is

129. BORN, *supra* note 6, at 598-99.

130. *Id.* at 599.

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undeniable that seat selection is crucial and might even be outcome determinative. Thus it is necessary to make such selection carefully and on a case-by-case basis, tailoring the decision, as much as possible, to the particular situation.

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