Kluwer Arbitration Blog

The Issue of the Seat of Arbitration in ODR Arbitration

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Online dispute resolution ("ODR") in international arbitration has been made feasible by the development of technology and its use has been stimulated by the Covid-19 pandemic that gave rise to higher demand for virtual proceedings. UNCITRAL Technical Notes on Online Dispute Resolution defines ODR as "*a mechanism for resolving disputes through the use of electronic communications and other information and communication technology.*" Together with academic research and actual practice, many legal aspects of ODR have been brought up including the issue of determining the seat of arbitration. An earlier Blog post discussed the importance of the seat in virtual arbitrations.

Approaches to determine the seat

The New York Convention provides the circumstances under which an arbitral award may be refused if seat or place of arbitration is not given due consideration. In our view there are four main approaches for determining the seat of ODR arbitrations.

First, the law applicable to the ODR arbitration proceedings shall determine the seat of arbitration. This approach assumes that the seat of arbitration reflects parties' desire to submit to arbitration under the law of the seat, thus the procedural law of the arbitration should be presumed to be the law of the seat.

The second approach is to follow the nationality that the dispute has the most substantial link to. This follows the doctrine of the most significant relationship, arguing that the arbitration should be detached from the control imposed by the law of the place of arbitration. Under this approach, determining the seat of arbitration would be highly influenced by the substantive law of the dispute.

The third is to follow the determination of the arbitral tribunal. When there is no parties' agreement on the seat of arbitration, the arbitral tribunal shall determine the seat of arbitration with regard to the circumstances of the case, including the convenience of the parties.

The last approach – perhaps the most feasible one – is for the parties to agree on the seat of arbitration. Choosing the seat of arbitration upholds party autonomy.

Examples of institutional practices in determining the seat

On April 9, 2020, KCAB Next held a webinar titled 'Testing out virtual arbitration in real life' where some key questions regarding the seat of arbitration in virtual arbitration were received. The questions centered on the official "*place of arbitration*" and discussed how the place of arbitration, or the legal seat, should not be affected by using a virtual platform.

On March 18, 2020, KCAB INTERNATIONAL announced the Seoul Protocol on Video Conferencing in International Arbitration where "*hearing venue*" was defined as "*the site of the hearing, being the site of the requesting authority, typically where the majority of the participants are located.*" In this regard, the KCAB International Arbitration Rules ("KCAB Rules") stipulates in its Article 24(1) "[t]*he place of the arbitration, in the absence of an agreement by the parties, shall be Seoul, the Republic of Korea, unless the Arbitral Tribunal determines that another place is more appropriate in light of the circumstances.*"

Thus, if there is no agreement between the parties on the seat of arbitration, the tribunal under the KCAB Rules may consider the definition of hearing venue in order to determine the seat of arbitration.

The American Arbitration Association ("AAA") published the Model Order and Procedures for a Virtual Hearing via Videoconference ("AAA Model"), providing a model template to refer to when opting for a virtual hearing. Article 1a of the AAA Model provides that "*the parties and the panel/arbitrator agree that the hearing in this case will be conducted via* [Platform Name] *videoconference. This confirms that the hearing will be deemed to have taken place in* [locale/place of arbitration]." In addition, Article 1b provides an example of an order by the arbitral tribunal in case of a lack of parties' agreement. Therefore, the AAA considers party autonomy first and foremost and if the seat of arbitration is not decided by mutual agreement, the tribunal is to step in from the start to ensure certainty and to prevent potential dispute from arising in this regard.

China International Economic and Trade Arbitration Commission ("CIETAC") published its Online Arbitration Rules in 2009. These Rules clearly provide for the determination of the seat of arbitration in Article 8 which provides that "[w]*here the parties have agreed on the* [seat] *of arbitration, their agreement shall prevail. In the absence of such an agreement, the* [seat] *of arbitration shall be the location of CIETAC* [in Beijing]." In other words, if there is no agreement between the parties, precise instruction as to the place of arbitration, namely Beijing, is stipulated to prevent potential dispute and to ensure certainty.

In addition, the arbitration rules of China Guangzhou Arbitration Commission ("CGAC") provide in Article 7 that, unless otherwise agreed by the parties, the location of GAZC shall be the seat of arbitration. The CGAC may, according to the specific circumstances of the case, designate a third place as the seat for arbitration. The arbitration award shall be deemed as made at the place of arbitration. This means in case of no agreement, CGAC may determine the seat of arbitration which gives more discretion to the institution.

The above examples are not exhaustive. Another Blog post discussed other institutional examples such as Russian Arbitration Association and Georgia Dispute Resolution Center.

Comments

Arbitration is a legal process that is based on the concept of party autonomy and consent. Therefore, party autonomy is of absolute priority and parties' agreement shall be respected. The issue of the seat of arbitration in ODR can be resolved and overcome with sufficient inter-party dialogue. Institutions may assist by explaining to each party involved, the relevance of parties' consent and try to get the parties to agree on the seat of arbitration while being mindful that the agreement is to be made at the parties' own will.

Where parties do not reach an agreement as to the seat of arbitration, empowering the arbitral tribunal to determine the seat of arbitration is the best approach. Conferring arbitral tribunals with the power to determine the seat of arbitration does not derogate from the party autonomy principle. In the KCAB Rules, Article 24(2) provides that "[t]*he Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate*," which does not exclude virtual locations. This is because the arbitral tribunal can make comprehensive assessment with regard to the circumstances of the case, including the convenience of the parties, the most relevant place to the dispute to make a fair and effective decision. In addition, the arbitral tribunal shall ensure that its award is enforceable. Therefore, the tribunal has an obligation to consider whether the use of ODR violates, for example, the arbitration law of the seat.

KCAB INTERNATIONAL and Seoul IDRC have conducted multiple virtual hearings. The KCAB Rules do not explicitly include ODR arbitration, so parties need to opt in to conduct virtual hearings. Parties should submit their respective proposals on ODR procedures to the institution including the choice of the seat. If parties do not come to an agreement, the tribunal may determine the seat of arbitration under the KCAB Rules and the Secretariat would liaise with the tribunal to ensure enforceability of the arbitral awards.

Conclusion

The use of ODR is no longer science fiction. We have already been relying on certain aspects of the ODR system by exchanging letters via e-mail and submitting electronic evidence. Arbitration is meant to be a time-efficient and cost-effective dispute resolution under parties' agreement. Combined with ODR, arbitration will benefit from more efficiency from automation and advantages of artificial intelligence. Insofar as we do not lose sight of the essence of arbitration that is party autonomy, the determination of the seat of arbitration shall be *de jure* and valid.

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