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Is Legal Reform Enough to Succeed in the 'Battle of the Seats'?

Fernando Dias Simões (The Chinese University of Hong Kong) · Tuesday, September 30th, 2014

In an article published recently in The New York Times, entitled 'Cities compete to be the arena for global legal disputes', Elizabeth Olson discusses a phenomenon that has been labeled 'the Battle of the Seats'. This concept refers to the competition between different cities to be considered as 'arbitration hubs'. Cities all over the world compete to be chosen by the parties as suitable venues for international arbitration. In the last months several jurisdictions that are not traditional arbitration hubs have enacted new arbitration laws or declared the intention to do so (examples include the Netherlands, Western Australia, the British Virgin Islands, India, and Myanmar). The globalisation process turned international arbitration into the preferred method of dispute resolution. As a result, countries recognise a market opportunity in the expansion of international arbitration and aspire to assert themselves as focal points for arbitration proceedings.

The article focuses on the case of Miami, but several other cities all over the world aspire to be recognised as contenders. The battle of the seats is no longer limited to the traditional heavy-weights. As international arbitration becomes a global business, the market of international commercial arbitration expands and many cities are positioning themselves to collect a share of that market. Cities such as Milan, Madrid, Vienna, Shanghai, Seoul, Kuala Lumpur, and Cairo have stepped into the arena. As more venues refresh and harmonise their legal systems to achieve an international benchmark, parties may feel persuaded to select them as the seat of their arbitration proceedings, looking beyond the 'traditional' options. The emergence of new arbitral centres enlarges the pool of available institutions, giving parties the possibility to choose institutions with closer cultural affinity and greater geographic or linguistic convenience.

Normally governments strive to enlarge their share in the market of international arbitration by revamping their legal frameworks. The quality of the legal infrastructure and the predictability of its laws are essential for a jurisdiction to attract international arbitrations. The creation of an adequate legal framework is a rapid and cheap technique for countries to draw international commercial opportunities. Jurisdictions use their legal systems to compete for business. Countries contend to adjust their laws to what they feel to be the consumers' tastes and needs, thereby attracting a greater number of cases. The adoption of a new arbitration law is seen as a 'marketing strategy' intended to send a signalling effect to the international arbitration community of the user-friendliness of a certain legal system. The UNCITRAL Model Law on International Commercial Arbitration (enacted in 1985 and amended in 2006) plays a decisive role in this process. This legal instrument was purposely conceived to assist states in reforming and modernising their laws on arbitral procedure so as to take into consideration the specific features and needs of international

commercial arbitration. It reflects worldwide consensus on essential aspects of international arbitration practice having been recognised by members of different legal traditions and states from all parts of the world. In the last years many countries have modernised their arbitration laws so as to accommodate the specific demands of the international business community. By adopting the Model Law legislators favour a legal framework that is easily recognisable by the arbitration community and perceived as an accepted international standard.

The Model Law's purpose is to harmonise the law and practice of international commercial arbitration on a global scale. The modernisation of national arbitration laws according to this archetype results in the synchronisation of legal frameworks across borders. Harmonised national laws on international commercial arbitration bring about clear advantages for the effectiveness and efficiency of international arbitration practice. The harmonisation of different national laws prevents an arbitration clause from being considered as valid in one state but void in another, or the recognition and enforcement of an arbitral award in one state but its refusal elsewhere.

However, adoption of the Model Law is not a magic potion that instantaneously solves all problems or turns a jurisdiction into an arbitration paradise.

First of all, even though it is frequently said that the UNCITRAL Model Law represents a legal standard recognised worldwide, it is not the only legal standard available, or even the most efficient or sophisticated. In fact, around two-thirds of arbitration proceedings take place in jurisdictions that have not enacted the Model Law. Interestingly, almost all of the 'arbitration superpowers' (in terms of numbers of cases) have designed their own laws. Amongst them are England, France, Switzerland, Sweden, and the US. Therefore, it seems that the Model Law may set relevant regulatory standards but it alone is not sufficient to establish a jurisdiction (or a city) as a popular seat of arbitration. This assertion is confirmed by the fact that many countries that have adopted the Model Law are not popular arbitration venues.

Second, the law of the place of arbitration (*lex arbitri*) may have more impact in some cases than in others. If both parties are willing to take part in the proceedings without useless confrontation and are prepared to accept the award voluntarily, the *lex arbitri* is fairly irrelevant. If, inversely, one of the parties raises procedural objections during the proceedings or is unwilling to comply with the award voluntarily, the other party will need to request support from national courts, either during or after the arbitral proceedings. It has been argued that, in those instances where there is no need for support by local courts, the seat of arbitration may be merely fictitious. As a matter of fact, in the vast majority of the cases there is no need for the arbitration proceedings to interact with the local law or the local courts. On the other hand, it is generally accepted that hearings can be held in places other than the seat of the arbitration. This is the rule under the UNCITRAL Model Law and under national legislation adopting it, as well as under recent non-Model Law statutes, and most institutional arbitration rules. In addition, arbitration laws are increasingly harmonised. As a result, they tend to become fairly compatible. If arbitration laws are becoming truly interchangeable, which one applies becomes irrelevant. In this sense, the impact of individual national laws decreases.

Third, it should be taken into account that the *lex arbitri* is not necessarily decisive in all international arbitration proceedings. In fact, quite frequently such law has only marginal relevance. Many disputes are determined by arbitral tribunals with no more than a passing reference to the law of the place of arbitration. In such cases arbitrators focus on matters of fact: what the parties said, what the parties did, etc. Just as a national court frequently reaches its

decision on the merits of a dispute without detailed reference to the applicable law, so an arbitral tribunal may well pay little or no attention to the law that governs its own existence and proceedings as an arbitral tribunal. It is expected, however, that local laws will provide adequate support to the arbitration, respecting, recognising, and enforcing its proceedings and outcomes.

Finally, and even though the choice of the seat of arbitration is a key decision from a legal perspective, it also has a factual component. This choice involves not only legal but also sociological, political, and psychological factors. Repeatedly, practitioners and scholars have insisted upon the fact that practical considerations also determine the choice of the place of arbitration. Put simply, the seat of arbitration is the physical location where the arbitration proceedings take place (even though hearings and deliberations may be conducted elsewhere). Hence, when selecting a proper seat of arbitration parties also need to consider its geographical and material convenience. There are several practical factors affecting the choice of a seat of arbitration. Basically, the seat should be conveniently located and have the proper physical amenities and human resources. A seat with inadequate infrastructures may have a negative impact on the arbitral proceedings.

The availability of qualified human resources in the seat on arbitration or nearby is fundamental. The existence of reputable arbitral institutions capable of administering the arbitration or provide support and of a pool of qualified and experienced arbitrators are of the essence. Depending on the nature of the dispute, the availability of lawyers able to give advice on matters relevant to the conduct of the arbitration, or from other professionals (engineers, economists, etc.) to provide expert witness assistance may be decisive. The availability of support services such as translators, interpreters, stenographers, secretaries, and court reporters is also important. Language ability and cultural familiarity ease communication between all involved parties.

Parties should consider all of these practical questions when choosing the seat of arbitration. At the end of the day, many of these reflections will be highly dependent on the overall costs associated with a certain city. The parties' costs, including the travel expenses for the parties and witnesses, as well as the arbitrators' fees, will be impacted by the parties' choice of the place of arbitration. Affordability may be a decisive aspect in cases involving small claims or parties with limited resources. An expensive arbitral seat may inhibit the parties from pursuing their claims. The importance of these factors may explain the migration of arbitration cases from traditional seats to less popular venues which allow the parties to reduce some of the costs incurred in international arbitration proceedings.

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