# Kluwer Arbitration Blog

## Virtual Hearings to the Rescue: Let's Pause for the Seat?

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The COVID-19 pandemic catapulted discussions on online dispute resolution methods like no other phenomenon. With this, determining the proper seat for online arbitration has become the center of conversation. As the world adapted to the challenges presented by the pandemic, so too did international arbitration. Suddenly, there was a wave of virtual hearings, webinars and video calls and even moot court competitions. Practitioners who were otherwise skeptical or doubtful of online dispute resolution's benefits were suddenly advocating its usefulness and advantages. This proved that it might be a good time to revisit online dispute resolution procedures, particularly online arbitration.

The benefits of virtual proceedings are obvious. Online dispute resolution management, and for that matter virtual hearings, increase overall efficiency in an arbitration. Arbitrations are often document intensive exercises involving large volumes of trial bundles and sifting of documents. Managing the documents through electronic bundles and subsequently referring to these during a virtual hearing save time and cost. Cost is also saved as parties; tribunal members and lawyers do not have to travel from different parts of the globe to attend the hearing. At first blush, it sounds like an all-round winner, albeit with a proviso-the seat.

### The ever-important seat

Despite its benefits, the question remains what, if anything, happens to the seat of arbitration in a virtual hearing. The seat of arbitration is crucial as it affects arbitrability, determination of the governing law, whether substantive or procedural and determination of the place for the annulment proceedings of the arbitral award. It is generally accepted that the venue of the arbitration, that is, where the hearing and deliberations take place, may be different to the seat of arbitration. This often happens because of sheer convenience when deciding where to hold the hearings. This arises from accepting the seat only as a legal concept; simply as the *lex arbitri*. It allows parties to select a seat and submit to the procedural law of a specific jurisdiction without being physically tied to that place.

The *caveat* to this position is that, depending on the seat of arbitration chosen by the parties, some national laws may require that the proceedings or at least part of it take place in the State which is the chosen seat. Failing a sufficient connection of the proceedings with the State, the arbitration law at the seat may not apply or may only partially apply and the host State may not accept an

award from such proceedings. This will cause difficulty for a party seeking to enforce a successful award. In common law jurisdictions such as England and Wales, an argument for an arbitration without a seat may not gain traction; but the situation may be different in civil law jurisdictions.

For example, in the ICC Arbitration No. 10'623, Decision of 7 December 2001, the Tribunal consisting of prominent practitioners Emmanuel Gaillard, Piero Bernardini and Nael Bunni found that the decision to hold the arbitration hearing in Paris and not at the seat of the arbitration was made for practical reasons and was without prejudice to the venue of future hearings. It would be interesting to know if this award was successfully enforced.

Therefore, before getting caught up in the wind of virtual hearings, parties should consider if there are any peculiarities that they need to consider in the national laws of the seat which may affect virtual hearings. Where an issue does appear to arise under the national laws of the relevant seat, the parties may consider changing their *lex arbitri* to a more arbitration friendly State. However, changing the place of arbitration often comes with challenges, particularly where the claimant faces a recalcitrant respondent. In such cases, the arbitral tribunal will find itself in a precarious position of considering changing the seat, whilst keeping within its jurisdiction and considering relevant institutional rules and arbitration laws.

**What happens if there is no seat?**

The question of the seat in online arbitration is not any different than the discussion on delocalized arbitration. There will be no issue, where the parties respecting due process agree the jurisdiction that is to be the seat of online arbitration.

The problem arises where the parties did not agree the seat in their arbitration agreement. There has been a long-standing debate between those who argue that the seat of arbitration is mandatory and those that argue that the seat of arbitration need not be determined, that is, the arbitration is floating/decentralized. When it comes to online arbitration, the issue becomes even more controversial as there is no geographical location in cyberspace. The internet does not fall within the borders of any sovereign jurisdiction. Online arbitration, because of its nature, will not have a seat, rather it will be ruled by the parties' convenience. Therefore, adoption of delocalized arbitration in cyberspace becomes the sensible option. Yet, jurisdictions may have different views on delocalized arbitration. For instance, France may be open to not having a seat, given its history of enforcing annulled awards. In contrast, majority of courts in England do not recognize floating arbitrations. However, there seems to be hope for delocalized arbitration in England as the English Arbitration Act 1996 is based on UNCITRAL Model Law, which in fact provides for the delocalized system. For example, Section 3 of the Act allows the seat to not be directly related to a forum.

Even if online arbitration is allowed to continue without being tied to a *lex arbitri*, some argue that it may not survive under the current international arbitration regime as it could be inconsistent with the framework drawn by the New York Convention, particularly with Article V(1)(e) that allows the court of the seat to reject enforcement.

With this in mind, there are various ways to determine the seat of an online arbitration. These include the following:

1. The place where the website of the case in question is. This web site would be established by determining where all case files and submissions by the parties are
2. The place where the servers are
3. The place where the computer is based or where the emails of the arbitrator are sent and collected.
4. The place where the e-arbitration provider is located.
5. The place where the e-platform used for the conduct of the e-arbitral proceedings is located.

It is also suggested that the arbitral tribunal or the e-arbitration provider should determine the seat of arbitration. Domicile or place of business of the parties, nationality of the parties and the location of the e-arbitration provider are listed as the connecting factors while establishing the seat.

Some ahead-of-their-time institutions have online arbitration rules that may provide guidance on how to take on this issue. Although some of them such as Russian Arbitration Center or Shenzhen Court of International Arbitration (SCIA) have a set of rules for online arbitration, they do not have a specific rule on the seat of online arbitration. On the other hand, China International Economic and Trade Arbitration Commission (CIETAC) Online Arbitration Rules give precedence to the parties' agreement. If the parties fail to reach an agreement, the seat of online arbitration is considered to be the location of the CIETAC. Russian Arbitration Association (RAA) Online Arbitration Rules provide the seat of arbitration to be in Moscow, Russia unless parties agree otherwise. The Georgia Dispute Resolution Center (DRC) Online Arbitration Rules also do not address the seat of arbitration but recommend an online arbitration agreement which states the place of arbitration as Tbilisi.

Parties entering into arbitration agreements post COVID-19 should take into account lessons learnt from this crisis and perhaps should consider expressly providing for online dispute resolution (either as the main arbitration agreement or an ancillary provision) and choose an appropriate seat which will accommodate this. Institutions could also take this time to renovate their approach towards dispute resolution as it is anticipated that the ADR providers will be the winner of the outbreak since it is likely that the parties will go for the alternatives to litigation. Going forward, the institutions providing ODR services that minimize the handicaps with their rules could be favored more, since it seems like online arbitration is here to stay.

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