Kluwer Arbitration Blog

To Seat Comfortably—Choose Wisely: The Evolving Seat Selection Factors

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Factors relevant to the selection of the seat—or place—of international arbitration are generally well-known. Indeed, even clients, long oblivious to the perils of choosing the seat unwisely, are increasingly wary of the importance of giving at least some consideration to what is rightly considered as the single most important choice in arbitration. Yet, as the dispute resolution landscape continues to evolve, so do the factors informing the selection of the seat, and their role in ensuring that arbitration continues to deliver on its key promise of being an expeditious, expert and efficient process for resolving cross-border disputes.

Traditional considerations such as neutrality, quality of the judiciary, and a track record in enforcing arbitral awards remain paramount. But other factors play an increasingly important role—namely, the scope of post-award review of arbitral jurisdiction, sanctions regimes and licensing attitudes, and availability of effective anti-suit relief. These factors can have major implications for the quality of the process and finality of arbitral awards but are sometimes insufficiently observed. This post discusses such additional considerations and explains their significance in the choice of the seat.

Judicial Review of Arbitral Jurisdiction at the Post-Award Stage

While almost all national systems permit full, independent assessment of arbitrators' findings on jurisdiction, typically at the post-award stage, the modalities of review sometimes differ, particularly with respect to the treatment of new evidence and review of relevant elements of fact (see **here**). In England and Wales, for example, courts conduct full *de novo* assessment of arbitral jurisdiction both as to law and facts, with new evidence and arguments permitted as of right (albeit subject to the courts' case management powers) (see **here**). (The Arbitration Act 2025, which recently completed its parliamentary passage, seeks to improve this framework, by limiting the grounds for advancing new arguments and evidence at the post-award stage (see here)). In Switzerland, by contrast, courts employ a more deferential approach to the review of arbitral jurisdiction: the tribunal's findings of fact are generally final, with new evidence and arguments generally inadmissible in post-award challenges (see **here**).

The impact of these differences on the finality of arbitral awards and the efficiency of the process

can be significant. At the very least, a full *de novo* review of arbitral jurisdiction could add considerably to the length and costs of the proceedings. At its most extreme, it could allow the losing party to re-run its entire case on jurisdiction—possibly with the support of additional evidence and arguments—as if the underlying arbitration never existed or happened.

The stakes are higher—and implications for the efficiency of the process potentially more pronounced—when it comes to the review of investment treaty awards. ISDS cases are complex, take longer, and are often more costly to resolve, exacerbating the consequences of any unjustified attempts of national courts to reassert their power to scrutinise awards more closely. It is also not clear that domestic judges in all relevant jurisdictions are sufficiently well-equipped to address challenges to the jurisdiction of investment treaty tribunals, given the (often obvious) limits to their public international law expertise and daily caseload. Although judicial review of investment treaty awards in popular seats like Switzerland has so far not revealed any particular cause for concern (see here), not all jurisdictions can boast of the same calibre of judges and quality of judiciary.

As challenges to jurisdiction proliferate (particularly in the investment treaty space) (in Switzerland, for example, half of all challenges against investment treaty awards were brought in the last five years (see here)), parties valuing the finality of arbitral awards should pay more attention to the scope of judicial review of jurisdiction when choosing the place of arbitration.

Sanctions Regimes and Licensing Attitudes

Sanctions can make arbitration unpredictable and messy. While the effect of early restrictive measures against Russia on the administration of arbitral proceedings was fairly confined, the impact of more recent restrictions introduced in response to Russia's invasion of Ukraine is clearly meaningful. From getting arbitration off the ground to post-award proceedings, the entire dispute resolution machinery can get stalled—or altogether break—because of sanctions.

Parties can reduce the impact of sanctions on their dispute resolution processes by avoiding sanctioning jurisdictions altogether or choosing a seat in a jurisdiction with a more favourable sanctions regime. While all major sanctions regimes against Russia pursue the same policy objective—for the time being at least—and use broadly the same tools to achieve it, they also differ in a number of important respects. For example, the EU's main Russia sanctions regime, **Regulation 269/2014**, contains a so-called "no claims" clause, which generally prohibits the satisfaction of any claim brought by a Russian party under a contract or transaction affected by the EU sanctions. The UK and the US sanctions regimes, by contrast, do not typically include such clauses.

Jurisdictions also diverge with respect to licensing grounds and practices. In contrast to the EU position, where there is no legal basis for open general licences to be granted in connection with EU asset freezes, under the autonomous UK sanctions regime, the Office of Financial Sanctions Implementation ("OFSI") can grant general exemptions from certain restrictions. Historically, this power was used sparingly, but the broad nature of the new UK sanctions against Russia has seen OFSI demonstrating a new flexibility and willingness to use it. This is evident, for example, in the issuance of **the general license for legal fees under the Russia and Belarus sanctions regimes**.

With **nearly 25,000 restrictions against various Russia-related targets** currently in place, the disruptive effect of sanctions on cross-border disputes is bound to continue. No dispute resolution

clause will make your arbitration sanctions-proof. But choosing the place of arbitration with sanctions considerations in mind can help reduce the risks.

Availability of Effective Anti-Suit Relief

The promise to arbitrate is fundamental, yet fragile. Recalcitrant parties may seek to disrupt the proceedings and renege on their promise to arbitrate in various ways, potentially derailing the process before it even begins. The courts are there to uphold the contractual bargain but their willingness and ability to do so can vary considerably across jurisdictions.

The latest in the ever-growing list of recalcitrant tactics is the use of **Article 248 of the Arbitrazh Procedure Code** to frustrate otherwise valid Western-seated arbitration agreements with Russian parties (see e.g. here, here, or here). This provision allows Russian courts to assume jurisdiction over disputes covered by an arbitration agreement, or to issue an anti-suit injunction to restrain arbitration proceedings, where the agreement becomes unenforceable as a result of "obstacles in access to justice" created by sanctions. Russian litigants have successfully deployed this provision to transfer disputes to the Russian courts, and/or obtained anti-arbitration injunctions to restrain foreign arbitral proceedings in "unfriendly states", in many cases affected by sanctions. In 2024 alone, Russian courts invoked Article 248 over 200 times to assume exclusive jurisdiction or issue anti-arbitration injunctions (see **here**).

There is little foreign companies can do to counter these tactics effectively where they have assets in Russia and/or intend to continue doing business there. (The penalty for failure to comply with anti-arbitration injunctions is draconian—up to the full value of claims in foreign proceedings—and few would risk jeopardizing their operations and/or assets in Russia.) However, where the seat of arbitration is in a jurisdiction that grants anti-suit injunctions in support of arbitration agreements, this can offer relief to foreign parties in some cases. Foreign courts have been increasingly willing to issue such injunctions in recent years (see e.g. here, here, or here). While they are generally not enforceable in Russia, sanctioned entities may nonetheless choose to comply with them, not least to avoid the risk of being in contempt of a foreign court.

These developments highlight the importance of choosing the place of arbitration in a country that not only recognises arbitration agreements but also has the means to enforce them, including by way of effective anti-suit relief.

Concluding Remarks

Not long ago, there was a sense that the seat of arbitration was diminishing in importance. Indeed, with the harmonization of national laws and increased convergence of arbitration practices, the place of arbitration might often seem to be a matter of convenience with little practical implications. However, as this contribution shows, in an era of heightened court involvement and growing threats to party autonomy, the choice of the seat remains paramount, and new factors play an increasingly important role.

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