SILENT SEATS IN INVESTMENT TREATIES

INTRODUCTION

Investment treaties, including Free Trade Agreements (**FTAs**) and Bilateral Investment Treaties (**BITs**), often provide a range of dispute resolution options, including *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (**UNCITRAL Rules**) and arbitration at the International Centre for Settlement of Investment Disputes (**ICSID**). Unlike arbitration proceedings at ICSID, which take place on a supra-national plane beyond the control of any national court, arbitral proceedings under the UNCITRAL Rules have a legal place or "*seat*" that connects them to the law of a State and places them under the supervision of that State's courts. Because only the courts of the seat have the power to annul or set-aside the arbitral award, the choice of seat bears directly on the finality of the award and is therefore critical to efficacy of the arbitration process.

Most investment treaties that provide for arbitration under the UNCITRAL Rules do not specify the legal seat or "*place of arbitration*". In the event the investment treaty is silent and the parties are unable to agree on the place of arbitration, the tribunal has jurisdiction to determine the place of arbitration "*having regard to the circumstances of the arbitration*" pursuant to Article 16(2) of the UNCITRAL Rules. Beyond this basic stipulation, the UNCITRAL Rules do not provide any further guidance on the factors that the tribunal should consider in its determination of the seat. This means that, in exercising its discretion to determine the seat, a tribunal may have regard to the decisions of other tribunals and soft law instruments such as the UNCITRAL Notes on Organizing Arbitral Proceedings (**UNCITRAL Notes**). To optimise their prospects of success in the dispute on the seat, parties should familiarise themselves with these sources.

Key issues

- FTAs and BITs often provide for the resolution of disputes between investors and States by way of *ad hoc* arbitration pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (**UNCITRAL Rules**).
- In the event the parties to the dispute are unable to agree on the legal seat of the arbitration, an UNCITRAL tribunal has the power to determine the legal seat or "*place of arbitration*" in light of the "*circumstances of the arbitration*".
- The place of arbitration can have serious consequences, as the courts of the seat have supervisory jurisdiction over the arbitration and exclusive jurisdiction to annul or set aside the arbitral award.

DETERMINATION OF THE "*PLACE OF ARBITRATION*"

Paragraph 22 of the UNCITRAL Notes suggests the following five factors should be considered by an arbitral tribunal in determining the seat of arbitration:

1. suitability of the law on arbitration procedure of the place of arbitration;
2. whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may be enforced;
3. convenience for the parties and the arbitrators, including the travel distances;

4. availability and cost of support services needed; and
5. proximity to the subject-matter in dispute and the location of evidence.

While the UNCITRAL Notes are non-binding, many investment treaty tribunals have considered them in determining the place of arbitration, so there is a good basis for parties to argue they should be taken into account by the tribunal in determining the seat of arbitration.

It bears noting that the nationalities of the disputing parties are part of the "*circumstances of the arbitration*" for the purposes of Article 16(2) of the UNCITRAL Rules. In the context of an arbitration against a State under an investment treaty or FTA, this means the seat will not be on territory of the respondent State or any State whose nationality is asserted by a claimant investor. This mutual exclusion ensures the seat is neutral *vis-à-vis* the disputing parties, both in actuality and appearance. The neutrality of the seat was an important factor considered by the UNCITRAL tribunal in *Philip Morris Asia Limited v Australia*.

According to the UNCITRAL tribunal in the case of *Ethyl Corporation v Canada*, each factor listed in paragraph 22 of the UNCITRAL Notes is to be "*accorded paramount weight irrespective of its comparative merits*". In relation to factors (3) to (5), the analysis is straightforward. It is important to note that while the place of arbitration is usually also the physical venue for any hearing, it is possible to agree to have hearings at locations other than the seat (and, in large cases with multiple hearings, this is often done). The flexibility to use other locations as venues may be raised to rebut an argument that a proposed seat is inconvenient in terms of its location or lacks the facilities needed to host major hearings. Consideration of factor (2) is also likely to be relatively straightforward, as the most popular arbitral seats are in States that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the multilateral treaty that is most often invoked in proceedings to enforce awards rendered by tribunals constituted under the UNCITRAL Rules).

Factor (1) is likely to require a more involved analysis and is often where the parties focus their arguments in disputes on the seat. When it comes to assessing the "*suitability of the law*" of a proposed arbitral seat, the advice of qualified local counsel will be required. One of the key considerations is the extent to which the arbitration law of the proposed seat imposes mandatory requirements on arbitrators and arbitral proceedings: the more mandatory requirements the law of the seat imposes, the more scope there will be for a losing party to seek annulment of the award in the courts of the seat. It is important, therefore, that parties properly understand what will be required of them and their arbitrators if they seat the tribunal in the jurisdiction proposed.

ARGUING FOR A SAFE SEAT

As noted above, the place or seat of the arbitration can have serious consequences for the arbitral process and its product, the award. The key risk is judicial intervention: how likely is it that, during or after the arbitration, the courts of the seat will intervene in the arbitral process or set-aside the tribunal's award?

To assess this risk (and present a case for or against a proposed seat), a range of factors need to be considered, including (i) the substantive content and modernity of the arbitration law of the proposed seat (what is the basis of

the law and when was it last updated), (ii) the strength of the rule of law at the proposed seat (no State in which the rule of law is weak should be accepted as a seat for any investor-State arbitration) and (iii) the experience of the courts of the proposed seat in dealing with arbitration matters (including applications to set-aside awards). The advice of experienced local counsel should be sought on these matters, so as to ensure the assessment is informed by an accurate view of law and practice and that any submissions made to the tribunal are reflective of the reality of arbitration in the jurisdiction concerned.

The most efficient way of managing the risk of judicial intervention is by selecting as a seat a State that has adopted the UNCITRAL Model Law on International Commercial Arbitration (**UNCITRAL Model law**). The UNCITRAL Model Law is a template arbitration law which seeks to: (i) limit unnecessary involvement by domestic courts in the decision making processes of the tribunal; (ii) remove restrictions on the enforcement of arbitral awards; and (iii) limit the avenues for appeal of a tribunal's award or decision. Examples of UNCITRAL Model Law States that are often selected as seats for international arbitration in the Asia-Pacific include Australia, Hong Kong and Singapore. As more than 60 countries have adopted the UNCITRAL Model Law, most active international arbitrators are familiar with the procedural framework it creates and many arbitrators will have a preference for a seat where the UNCITRAL Model Law is in force (for example, because they know the mandatory rules they must adhere to and they understand the grounds on which annulment of their award may be sought). For this reason, depending on the composition of the tribunal, it may make strategic sense to argue for an UNCITRAL Model Law seat from the outset. The compatibility of the UNCITRAL Model Law with the UNCITRAL Rules supports such an approach.

However, just because a jurisdiction has not adopted the UNCITRAL Model Law does not mean it is unsuitable and will not be selected by the tribunal. For example, London and the Paris are well established seats, and English and French statutes and case law are widely considered to be arbitration friendly, even though neither England nor France has adopted the UNCITRAL Model Law. Though there will be cases where a broader suite of post-award remedies is considered desirable, parties should be aware that the selection of a non-UNCITRAL Model Law seat may increase their exposure to court processes, both during and after the arbitration is completed.

CONCLUSION

Without the right seat, the arbitration process may be inefficient and even futile. There is much to be said for the UNCITRAL Rules as a framework for the resolution of disputes between investors and States, but it needs to be understood that, if an investor intends to bring its claim under the UNCITRAL Rules, a seat for the proceedings will need to be agreed with the respondent State or, failing that, determined by the tribunal. If the seat cannot be agreed, parties need to understand how the circumstances of their arbitration, including issues that will be raised in the dispute, make some seats more suitable than others and how to use sources such as the UNCITRAL Notes to advocate for a seat that will ensure a fair and final result.

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