The Seat of Arbitration - Why is it so important?

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The amount of information contained in arbitration clauses varies greatly from contract to contract. Some parties, in their arbitration clauses, specifically state the rules to be applied, the number of arbitrators (and sometimes the requisite qualification and experience of these arbitrators), the language of the arbitration proceedings, the location of hearings and the seat of arbitration. The degree of certainty that properly detailed arbitration clauses bring to the handling of disputes is to be encouraged. Others clauses may merely refer disputes to arbitration. This is not to be recommended. Identification of the seat of arbitration (as opposed to the location where hearings are to take place, which is often referred to as the venue of arbitration) is one of the most important features of an arbitration clause. The selection of the seat determines the law governing the arbitration procedure and often, more importantly, the process and rights relating to enforcement of the arbitration award.

Most arbitration statutes and institutional rules recognise the distinction between the seat of the arbitration and the venue in which hearings may be held (For example: Article 14 of the International Chamber of Commerce (ICC) Arbitration Rules and Article 16 of the London Court of International Arbitration (LCIA) Arbitration Rules). It is not necessary for the seat of arbitration and the venue of the arbitration to be the same location (though often they are) and even when hearings take place during the course of the arbitration in several different countries, the chosen seat of arbitration will remain unaffected.

As mentioned above, the seat of the arbitration is significant as it will normally determine the law of the procedure which the arbitration adopts as well as the involvement/intervention, as appropriate, which the courts exercising jurisdiction over the seat, will have. As an example, I set out the effect of a contract governed by English law where the parties have agreed to an ICC arbitration with its seat in Qatar.

In this example, issues of the interpretation of the contract are stipulated to be governed by English law, therefore, the arbitrators when reviewing the effect of the contractual provisions are required to apply English law. The institutional rules which the arbitrators adopt in "running" the arbitration with be those of the ICC, therefore, the appointment of the arbitrators, timing for the various submissions and costs etc of the arbitration are set out in the ICC Arbitration Rules. However, one must keep in mind that the seat of the arbitration is Qatar. In this example, therefore, Qatar law as applicable to arbitration (generally contained in the Civil and Commercial Procedure Code) will apply to the procedure of the arbitration and this is important particularly in respect of, amongst other things, certain time limits but also in respect of the enforcement of the award. In Qatar as in many other jurisdictions, the courts are required to "ratify" an arbitration award which is sent to the execution courts by the "winning party" for enforcement against assets based in Qatar. An award rendered in Qatar (that is, through an arbitration with its seat in Qatar) will be considered by the court as a "domestic" award whereas an award submitted to the execution court from an arbitration with its seat, say in England, will be considered an "international" award. The difference in the principles applied by the execution courts to the ratification of domestic and international awards are significant. In the case of domestic awards, the procedure is governed by local law. However, in the case of international awards, the courts will look to an agreement or convention in respect of the countries involved. Where the award is English, for example, the court would be required to apply the principles of the New York Convention on the Recognition and Enforcement of Foreign
Arbitral Awards 1958 (the "New York Convention"). Signatories to the New York Convention often only recognise and enforce an international or foreign arbitral award under the Convention if that arbitral award has been rendered by an arbitral tribunal sitting in a country which is also a signatory to the New York Convention. However, in the case of Qatar, when the New York Convention was acceded to, Qatar did not adopt the reservation, therefore, theoretically at least, any foreign award may potentially be enforced in Qatar through the New York Convention. In respect of GCC awards, the principles of various GCC Agreements recognising court judgments and arbitral awards may also apply.

The seat will also determine the extent to which the local court will involve itself in the arbitral process. Some countries have laws which restrict party autonomy, for example, in imposing conditions on the eligibility of arbitrators and allow the courts to intervene in the process agreed by the parties in their arbitration agreement. Conversely, some countries' laws are relatively "arbitration-friendly" and allow the parties a high degree of procedural autonomy. Such courts also offer supportive relief such as interlocutory awards.

The degree to which an arbitral award may be challenged will be determined according to the seat of the arbitration, as it is common that the local courts hear appeals in relation to arbitral awards. Further, the extent to which judicial review is available to parties will be dependant on the principles of the law of the seat. Both factors will govern the extent to which an award is considered final.

In view of the above, when drafting the details of an arbitration clause in a new contract, it is important to consider a myriad of questions particularly when deciding upon the seat, including, how the local arbitration law of the seat operates and whether the local courts are "arbitration-friendly". However, it is also important to consider often difficult issues in respect of the contractual relationship itself, such as, what are the likely types of dispute that may arise, what are, and where are, the assets which a party would wish to enforce its award against and how can a party take measures to protect its assets from an award against it. The answers to these questions will have an impact on the choice of seat agreed.