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**NAVIGATING THE UNCHARTED WATERS: DETERMINING SEAT OF
AN ONLINE ARBITRATION IN A POST-COVID WORLD**- Nooransh Grover¹**OBJECTIVES**

1. To lay down the methods of determining seat in an ODR under varied situations.
2. To emphasize upon the distinction of Seat and Venue of Arbitration in an ODR
3. To trace and examine the Institutions Rules which allow for ODR and its relevance in determining Seat of Arbitration in ODR
4. To examine the Arbitration and Conciliation Act, 1996 and whether it permits for an ODR or not

HYPOTHESIS

Venue of Arbitration to be considered as a seat of arbitration if parties fail to decide seat based on mutual consent.

INTRODUCTION: Kindling the Spark of Perplexity

Arbitration has emerged as the most delicious fruit in the dispute resolution market. From small scale to large scale contracts, arbitration has been the one of the most sought-after dispute resolution mechanisms. The entire arbitration mechanism, from its inception till the enforcement stage, requires skillful interpretation and drafting skills. A well drafted arbitration clause possesses the ability to subvert ambiguity and obscurity. The COVID-19 Pandemic, apart from its other multifaceted ramifications, posed certain challenges within the domain of arbitration. The pandemic compelled the arbitral proceedings to be conducted in a virtual manner rather than in a physical manner. As simple and effective as it may sound, but a nuanced approach shall let

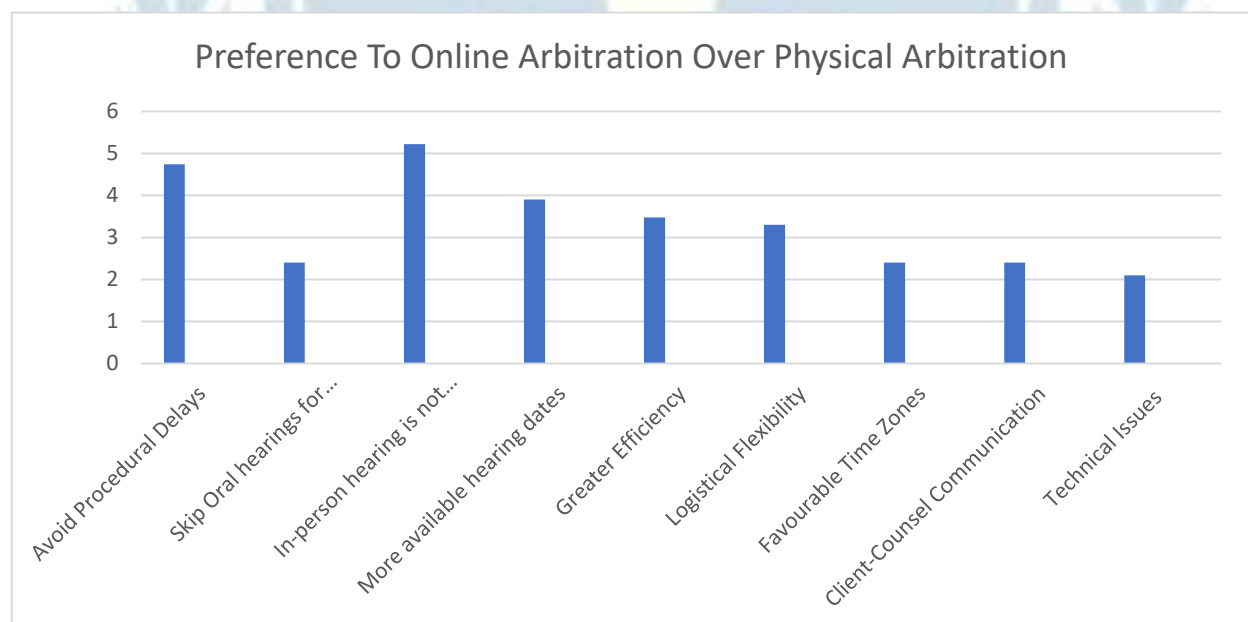
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us witness the most obvious and difficult challenges with regard to its governing laws, enforcement of awards and many others as well².

In an International Commercial Arbitration, the seat of arbitration has a crucial role to play. The venue of the arbitration also holds similar significance, if not equal. The effects of the pandemic culminated in perplexing these two concepts as well. On one hand wherein the contract is silent with regards to the seat of arbitration and the venue being an online platform, it poses challenges for deciding the law governing the arbitration agreement as well as the enforcement of the awards passed by an Online Dispute Resolution (ODR) mechanism. In cases wherein the agreement is silent on the seat of arbitration, it is a settled principle that the venue shall be an indicator with regard to the seat. Yet, this principle gets faded away in the light of the pandemic. The seat of arbitration in an International Commercial Arbitration is of pivotal importance and settling of this ambiguity is an absolute necessity.



THE EMERGENCE OF ONLINE ARBITRATION

Emerging trends strongly suggest a significant surge in the adoption of Online Arbitration, primarily attributed to the repercussions of COVID-19-related limitations. A survey by White &

² Virtual arbitrations and the new normal, <https://www.khaitanco.com/sites/default/files/2020-12/Virtual-arbitrations-and-the-new-normal.pdf> (last visited Sept. 29, 2023).

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Case, Queen Mary University, and the School of International Arbitration³ found that virtual hearings gained popularity due to the COVID-19 pandemic. The survey showed that 79% preferred virtual hearings to avoid procedural delays, 40% of arbitrators were willing to skip oral hearings for procedural matters, and 87% favored virtual hearings when in-person wasn't possible. Benefits included more available hearing dates (65%), greater efficiency (58%), and logistical flexibility (55%). Concerns included time zones (40%), client-counsel communication (40%), and technical issues (35%). The survey suggests that virtual arbitrations are gaining acceptance and that innovation is needed.

The adoption of Online Arbitration faces significant challenges too like lack of digital infrastructure and digital literacy, privacy and confidentiality concerns, and difficulties in enforcing ODR outcomes due to complex processes. Additionally, a lack of trust in online services and the requirement for mutual consent between parties are key obstacles.

The Arbitration and Conciliation Act, 1996, do not explicitly address virtual arbitrations. Section 18⁴ of the Act focuses on ensuring equal treatment of parties and providing them with adequate opportunities to present their case, aligning with the principles of natural justice. Therefore, if the seat of the online arbitration is in India, it is essential to guarantee:

- (i) The availability of proper internet and infrastructure for all involved parties, ensuring they have a fair opportunity to present their arguments.
- (ii) No party is heard without the presence of the other party, as this would violate fundamental principles of natural justice⁵.
- (iii) Additionally, real-time transcripts or video recordings of the proceedings will be accessible to individuals with disabilities.

³White & Case, https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (last visited Sept. 28, 2023).

⁴ Arbitration and Conciliation Act, 1996, §18, No. 26, Acts of Parliament, 1996 (India).

⁵Sulaikha Clay Mines v. Alpha Clays, AIR 2005 Ker 3.

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SEAT OF ARBITRATION VS. VENUE OF ARBITRATION

It's essential to distinguish between 'seat,' 'venue,' and 'place' in arbitration. Designating a 'seat' has significant implications, as it subjects the process to the jurisdiction's courts and its procedural laws. 'Venue' is often used interchangeably with 'seat,' but 'place' simply refers to a convenient location chosen by the parties for the proceedings. 'Seat' carries more weight than 'venue' or 'place'^{6,7}.

In *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*⁸, the Indian Supreme Court established that the seat of arbitration holds paramount importance in arbitration proceedings, even in domestic cases, as it determines which courts have supervisory jurisdiction over the arbitration. This clarified the distinction between the seat and venue of arbitration. In *BGS SGS Soma JV v. NHPC Limited*⁹, the Supreme Court of India further emphasized that the seat of arbitration need not be where the cause of action arose or where contract obligations were performed. In situations with an express designation of a "venue" but no clear "seat," the chosen venue can be construed as the juridical seat, subjecting the proceedings to the jurisdiction of the court where the arbitration is held, in the absence of an explicit seat designation.

THE DILEMMA OF NO SEAT IN AN ARBITRATION

There are broadly four benchmarks in determination of seat in an Arbitration which are as follows:

Law Governing the Arbitration Agreement

A detailed analysis of a regular ICA proceeding demystifies the question of determination of the seat in an event when the arbitration agreement is silent on the seat. It is sufficiently clear by

⁶Hiroo Advani, Sheikh Yusuf Ali, Manav Nagpal, Seat v. Venue in Contemporary Arbitral Jurisprudence, SCC Online Blog (Sept. 28, 2023, 9:25 PM), <https://www.sconline.com/blog/post/2021/05/06/seat-v-venue-in-contemporary-arbitral-jurisprudence/>

⁷Rajeev Agarwal, Prateek Badhwar, *India: The Curious Case Of 'Seat/Venue/Place' In Arbitration – Need For Legal Practitioners To Employ Clear Phraseology*, MONDAQ (Sept. 29, 2023, 1:24 PM), <https://www.mondaq.com/india/arbitration--dispute-resolution/1099776/the-curious-case-of-seatvenueplace-in-arbitration--need-for-legal-practitioners-to-employ-clear-phraseology>

⁸*Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*, AIR 2016 SC 1285.

⁹*BGS SGS SOMA JV v NHPC Ltd.*, (2020) SCC 4 234.

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now that the law governing the arbitration agreement shall be a determinant in deciding the seat of arbitration. Thus, in an event when the seat is not made clear, the country whose laws governs the arbitration agreement shall be the seat of arbitration

Eg, If an arbitration agreement is silent on the seat and the arbitration agreement is governed by the laws of Japan, Japan shall be the seat of arbitration.

Closest Connection Test

The Closest Connection Test is an effective tool in determination of jurisdiction or the seat in an arbitration wherein the agreement is ambiguous with respect to the seat of arbitration. The Closest Connection Test incorporates various factors in its pursuit to determine the seat of arbitration. Some of these factors are:

1. Intention of Parties
2. Nationality of Parties
3. Place of Performance
4. Place of Contracting
5. Location of Subject Matter
6. Default Rules

The Tribunal considers these factors and arrives at a conclusion to this dilemma. The primary concern of the Tribunal is to consider the Intention of the Parties. The entire regime of the Arbitration rests on the principle of party's autonomy and it is the endeavor of the Court's to fulfil this objective.

Determination by Arbitral Tribunal

When an international commercial arbitration agreement is silent on the seat of arbitration, it can lead to uncertainty. The seat of arbitration is crucial because it determines the applicable procedural laws, the supervisory jurisdiction of the courts, and the extent to which local courts may intervene in the arbitration process. Some of the factors involved in arriving at the decision are as follows:

- **Communication with Parties:** It is customary for arbitrators to consult with the parties prior to making a decision, particularly on a matter of such critical importance.

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- **Considerations of the Tribunal:** If the parties have not designated a hearing location, the tribunal may examine the location where hearings and proceedings are typically held. This may influence the selection of the seat.
- **Applicable Laws:** The tribunal may examine the laws selected by the parties to regulate the dispute's substance. If the parties have chosen the law of a specific jurisdiction, it may make sense for the arbitration to be held there.
- **Neutral and Arbitration-Friendly Venue:** The tribunal will frequently consider a jurisdiction that is neutral, has a robust legal framework supporting arbitration, and where arbitral awards can be easily enforced internationally.
- **Proximity to the Evidence and Witnesses:** The tribunal's decision may be influenced by the location that is most convenient for amassing evidence and locating witnesses.

Typically, the decision of the arbitral tribunal regarding the location of the arbitration is rarely challenged unless there is a clear abuse of power or a violation of the right to due process. Nevertheless, this can differ depending on the applicable laws and institutional regulations.

It's essential for parties engaging in international commercial agreements to specify the seat of arbitration plainly to avoid any ambiguity. When the seat is not specified, the parties should be prepared for the tribunal to determine it, selecting arbitrators who have experience with international arbitration and an understanding of the complexities involved in determining the seat.

Determination by the Parties

In the absence of a specified seat, parties may still mutually concur on the seat of arbitration¹⁰. After a dispute has arisen, the parties can negotiate and concur on the location of the arbitration. To avoid future disagreements regarding the seat, this agreement should be explicitly memorialized in writing. If the parties are unable to reach an agreement on the seat, they may consider submitting the dispute to an arbitral institution that can aid in the selection process.

¹⁰MoloLamken LLP, <https://www.mololamken.com/knowledge-what-is-the-seat-of-an-arbitration> (last visited Sept. 29, 2023).

Numerous institutions of arbitration have rules and procedures for determining the location of the arbitration in such circumstances. In the absence of an accord between the parties, certain countries' arbitration laws provide default criteria for determining the seat of arbitration. The UNCITRAL Model Law on International Commercial Arbitration, for instance, provides default principles if the parties cannot concur on the location.

If the parties cannot agree and there are no applicable default rules, they may choose a neutral jurisdiction with a strong legal framework supporting arbitration and where arbitral awards are easily enforceable internationally. Major international arbitration centres such as London, Paris, Geneva, Singapore, or Stockholm are popular options.¹¹

INSTITUTIONAL RULES AND ONLINE ARBITRATION

Singapore International Arbitration Centre (“SIAC”)

SIAC stated under its online arbitration guidelines¹² that it is important to consider several specific sets of laws in a given legal context. These may encompass the laws governing the contract in question, the laws associated with the arbitration agreement, the laws relevant to the location where arbitration is conducted, the laws applicable in seat of the arbitration, and the laws pertaining to the legal capacity of any party involved in the arbitration process.

Korean Commercial Arbitration Board (“KCAB”) Rules

On April 9, 2020, KCAB Next organized a webinar titled 'Trying Out Virtual Arbitration in Real Life.' During this event, people had questions about where virtual arbitration cases should be officially located. They were concerned whether using a virtual platform would change the designated place for arbitration, known as the legal seat. The discussion aimed to clarify whether the traditional concept of where arbitration happens should change when moving to virtual proceedings. The key point that was made was, regardless of the online setting, the place of arbitration and legal seat will not be affected.

¹¹ Ji Yoon Park, Jae Hoon Choi, *The Issue of the Seat of Arbitration in ODR Arbitration*, KLUWER ARBITRATION BLOG (Sept. 28, 2023, 11:34 AM), <https://arbitrationblog.kluwerarbitration.com/2020/08/05/the-issue-of-the-seat-of-arbitration-in-odr-arbitration/#:~:text=When%20there%20is%20no%20parties,the%20convenience%20of%20the%20parties.>

¹²SIAC, <https://siac.org.sg/wp-content/uploads/2022/07/SIAC-Guides-Taking-Your-Arbitration-Remote-August-2020.pdf> (last visited Sept. 28, 2023).

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On March 18, 2020, KCAB International introduced the Seoul Protocol on Video Conferencing in International Arbitration¹³, defining the "hearing venue" as where the arbitration occurs, typically where the requesting party and most participants are located. According to Article 24(1) of the KCAB International Arbitration Rules ("KCAB Rules"), in the absence of a prior agreement, Seoul, the Republic of Korea, serves as the default arbitration location. However, the Arbitral Tribunal has the discretion to choose a different location if circumstances warrant it.

The American Arbitration Association ("AAA")

AAA has issued the Model Order and Procedures for Virtual Hearings¹⁴ via Videoconference ("AAA Model") as a reference for conducting virtual hearings. Article 1a emphasizes that parties and the panel must agree on the use of a specific videoconferencing platform, establishing the hearing's location. Article 1b addresses scenarios where parties cannot agree, allowing the arbitral tribunal to determine the seat of arbitration. The AAA prioritizes party autonomy but provides a mechanism to avoid disputes over the arbitration seat when necessary.

The China International Economic and Trade Arbitration Commission ("CIETAC")

CIETAC established its Online Arbitration Rules in 2009, clarifying the process for determining the arbitration seat. According to Article 8, if the parties agree on the seat, that prevails; otherwise, it defaults to Beijing (where CIETAC is located) to prevent disputes.¹⁵

Similarly, the China Guangzhou Arbitration Commission (CGAC) stipulates in Article 7 that its location is the default arbitration seat unless parties specify otherwise. CGAC can designate a different seat based on the case's circumstances, with the arbitration award considered made at the newly chosen location, allowing for greater flexibility when no party agreement exists.

¹³KCAB International, http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024 (last visited Sept. 29, 2023).

¹⁴American Arbitration Association, https://www.adr.org/sites/default/files/document_repository/AAA270_AAA-ICDR_Model_Order_and_Procedures_for_a_Virtual_Hearing_via_Videoconference.pdf (last visited Sept. 29, 2023).

¹⁵China International Economic and Trade Arbitration Commission Online Arbitration Rules, https://arbitrationlaw.com/sites/default/files/free_pdfs/CIETAC%20Online%20Arbitration%20Rules.pdf (last visited Sept. 29, 2023).

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DETERMINATION OF SEAT IN AN ONLINE ARBITRATION: Demystifying the Bone of Contention

It is now sufficiently clear that seat of arbitration holds primary importance in an International Commercial Arbitration. Even if we were to consider the virtues of a delocalized arbitration as is advocated by many across the globe, still the present international arbitration regime is to pose certain impediments to it. Delocalized Arbitration advocates for the annulment of Lex Arbitri or the Law governing the arbitration agreement. This principle propounds an idea that there should be a floating jurisdiction and the non-application of the jurisdiction of national courts of both, the seat court as well as the court where the award is to be enforced. There are undoubtedly certain impediments to it such as under the New York Convention. Under Article V (1)(e) of the New York Convention, the seat court has the power to reject enforcement of an arbitral award. Under Part 1 of the Arbitration and Conciliation Act, 1996 which also applies to International Commercial Arbitration seated in India, the High Court has the power to set aside arbitral awards of ICA seated in India. The Court can also refuse to enforce foreign awards in India under Section 48 if the court is of the opinion that the agreement is not valid as per the law governing the arbitration agreement.

Thus, it becomes pivotal to determine the seat of arbitration in ODR mechanism as well leaving aside the argument of a Delocalized arbitration.

In a situation wherein the seat is not determined, the parties can submit a joint application or a joint affidavit to the tribunal to decide the seat of arbitration. The tribunal can also apply the closest connection test and all the principles abovementioned.

In addition to that, we can take inspiration, if not reference, of the rules applicable to e-contracts¹⁶ in determining a seat of arbitration. The place where the contract formation shall take place, that country shall be the seat of arbitration. Under the electronic contracts' regime, the Receipt Rule is the general rule meaning thereby that contract takes place where the receipt of the electronic communication takes place. It is a settled principle of contract law that the place of receipt of acceptance shall be the place of the originator. Upon the receipt of acceptance to the originator (with reference to the acceptor), contract formation takes place. The place of originator

¹⁶ The Information Technology Act, 2000, §13, No. 21, Acts of Parliament, 2000 (India).

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shall be the place of his residence or his place of business. This is so, because the place of the computer resource may be different from the place of his residence or business which shall lead to unnecessary hassles and obscurity.¹⁷

Thus, in a situation wherein the parties are unable to arrive at an amicable settlement with regards to the seat of arbitration, the tribunal can consider these principles if the agreement is an e-contract. The Tribunal shall consider the place of residence or business of the originator (with reference to the acceptor) as the place of contract formation and thus the seat of arbitration.

The Tribunal can also consider the following factors:

1. The location where the case's website can be found. This website would be created by identifying the location of all case files and party submissions.
2. The location of the servers.
3. The location of the arbitrator's computer or where his or her emails are sent and collected.
4. The location of the e-arbitration providers such as Indian Dispute Resolution Centres
5. The location of the electronic platform used to conduct e-arbitration proceedings¹⁸.

It is of utmost importance for the tribunal to give primacy to the autonomy of parties. But it is of also of great significance, if not equal, that the institution's rules should also allow an online arbitration to take place. If that is not ensured, then the court can refuse to enforce such an award as being inconsistent with the law governing the arbitration agreement or the curial law.

Under the Arbitration and Conciliation Act, 1996, Section 20 defines the Place of Arbitration¹⁹ and provides liberty to the parties to decide upon the place of arbitration. Section 2(6)²⁰ and

¹⁷ Archana Balasubramaian, *E-Contracts in India*, MONDAQ (Sept. 28, 2023, 7:29 PM), <https://www.mondaq.com/india/contracts-and-commercial-law/1104590/e-contracts-in-india>

¹⁸ Cemre Kadioglu, Sadaf Habib, *Virtual Hearings to the Rescue: Let's Pause for the Seat?*, KLUWER ARBITRATION BLOG (Sept. 28, 2023, 4:11 PM), <https://arbitrationblog.kluwerarbitration.com/2020/07/13/virtual-hearings-to-the-rescue-lets-pause-for-the-seat/>

¹⁹ Arbitration and Conciliation Act, 1996, §20, No. 26, Acts of Parliament, 1996 (India).

²⁰ Arbitration and Conciliation Act, 1996, §2(6), No. 26, Acts of Parliament, 1996 (India).

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Section 2 (8)²¹ confers the parties an autonomy to decide upon the procedure of arbitration and their authority to let a person or institution to decide the matter.

Thus, as is similar in case of an emergency arbitrator wherein Section 2 (1)(d)²² defines arbitral tribunal and does not exclude an emergency arbitrator, an intricate analogy can be drawn. The non-exclusion of an online medium under Section 20 of the Arbitration and Conciliation Act confers the parties a right to hold their arbitral proceedings in an online manner. But they must be in accordance with the Institutions Rules. They are also empowered to submit an affidavit before the Tribunal in determination of the applicable laws.

CONCLUSION

Determining the seat in online arbitration presents unique challenges and opportunities due to the digital nature of the proceedings. The seat of arbitration still holds significant importance as it determines the legal framework and the extent of court intervention in the arbitration process.

Thus, in order to set the motion at rest, the determination of seat in an online arbitration is a sensitive a complex matter which requires considering multifaceted aspects. But the bottom line, in such determination, is to uphold the autonomy of the parties. Such autonomy must be exercised in a manner which is in consonance with the Institutions Rules.

²¹ Arbitration and Conciliation Act, 1996, §2(8), No. 26, Acts of Parliament, 1996 (India).

²² Arbitration and Conciliation Act, 1996, §2(1)(d), No. 26, Acts of Parliament, 1996 (India).