The London Principles and their Impact on Law Reform

Janet Walker*

Abstract

Critical to the effectiveness of an arbitral seat is its arbitration law, a feature that, unlike the geographic location or the basic infrastructure, can readily be improved by legislators who appreciate the financial benefits of attracting international arbitrations. The forthcoming GAR–CIArb Seat Index, which is based on the London Principles, will establish a reliable and accessible reference point for commercial parties to make wise choices of seats and for all to be aware of the relative strengths and weaknesses of seats on the world stage. It is hoped that this will provide the incentive to legislators to reform arbitration statutes where this is necessary.

1. Choosing the seat in international arbitration

Choosing the seat for the arbitration of disputes that might arise in a business relationship is a critical feature of sound dispute management. The seat of an arbitration—the legal system within which it will be conducted—is one of the most important features of the arbitration agreement. It sets the framework for the law governing the arbitration and the rights relating to challenges to and the enforcement of an eventual award. With the increasing use of international arbitration, there is heightened awareness of the importance of choosing a good seat in planning for arbitration, and a heightened awareness among those in potential seats around the world of the financial benefits of attracting arbitrations to them.

This article describes the global competition among centres to attract arbitrations, the growing awareness of the importance of choosing a seat wisely, and the significance of the national law to that choice. It also describes recent developments in this area including two key initiatives to establish standards for assessing the suitability of traditional and emerging seats (the London Principles) and to provide ready access to reliable assessments of the range of potential seats (the GAR–CIArb Seat Index), and their potential to prompt law reform.

2. The global competition among arbitral seats

The options for effective arbitral seats were once limited, and contracting parties chose from among a few cities in Europe, but in recent years many alternatives have emerged and many centres have begun to compete for arbitrations.

One striking example of a traditional seat promoting itself to international business was the 2006 publication of the Law Society of England and Wales, "England and Wales: The jurisdiction of choice".[1] The brochure contained a Foreword by the Secretary of State for Justice and Lord Chancellor, the RT Hon Jack Straw MP, in which he said:

> "The Ministry of Justice is committed to supporting the legal sector's success on the international stage. I am therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising all over the world. Our courts, particularly those in London, play

* This article is based on the author's contribution to a panel discussion at the CIArb International Arbitration Conference 2017, Paris, 7–8 December 2017.

[1] Available at <*http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf*> accessed 13 March 2018.

> host to many parties from overseas: at the specialised Commercial Court, a staggering 80% of cases involve a foreign claimant or defendant. Of course, that has a knock-on effect and the success of the legal services sector plays an unquantifiable role in helping London to maintain its position as a major centre for global commerce. This brochure sets out the reasons for our success and lets people know why it is in their own interests to use English law and to settle their disputes here."[2]

This publication was released by the Law Society, but it was sponsored by leading London law firms.[3] Indeed, the enthusiasm to promote a city as a seat of international dispute resolution, including through arbitration, is based on far more than civic pride; it is fuelled by a keen sense of the financial benefits of attracting international arbitrations and, ultimately, hearings to the seat. In the thirty-fifth Annual Donald O'May Maritime Law Lecture London, Gross LJ underscored the fact that the interest in promoting a seat is more than a matter of patriotism, and is an interest not limited to the legal profession. Lord Gross set out the relevant considerations as follows[4]:

> "Let us be clear as to the figures[5]: the UK's legal services sector contributes £25.7 billion to the UK economy, or 1.6% of gross value added. It generates £3.3 billion in annual export revenue. Such figures matter in themselves. They also bolster the attractions of the City as a financial centre—a mutually supportive process, in that there can be no realistic doubt that the strength of the City is a key driver for the attractions of English legal services.[6] CityUK and LegalUK enjoy a symbiotic relationship."

London is far from the only centre in which it is appreciated that there are benefits to it as a financial and commercial centre of attracting international dispute resolution. In launching Arbitration Place, the leading hearing facility and chambers for international arbitration in Toronto, the founders commissioned a study by the consulting firm Charles Rivers Associates (CRA) to measure the economic impact of arbitrations in the city. According to the study, "CRA estimated approximately 425 arbitrations will occur in Toronto in 2012 with an economic impact on the economy of $256.3 million".[7]

In an even more dramatic fashion, the promotion of Singapore and the commitment to pursuing international recognition as a "dispute resolution hub" for the region and beyond have been explicit policies of the Singapore Government for many years. Indeed, the recognition of the benefit to the local economy is such that it has garnered far more government support than an endorsement in an industry-sponsored publication as occurred in London. In 2017, it was announced that the local hearing centre at Maxwell Chambers would be expanded:

> "In a bid to boost Singapore's position as an international dispute resolution hub, the Ministry of Law is planning to triple the current size of Maxwell Chambers, which houses hearing facilities and top international arbitration institutions."[8]

[2] See <*http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf*> 5 accessed 13 March 2018.

[3] Eversheds, Herbert Smith and Norton Rose.

[4] Gross LJ, "A Good Forum to Shop in: London And English Law Post-Brexit" available at <*https://www.judiciary.gov.uk/wp-content/uploads/2017/11/gross-lj-omay-maritime-law-lecture-20171102.pdf*> accessed 13 March 2018 (citations in original).

[5] Taken from The City UK, *UK Legal Services 2016* (July 2016) <*https://www.thecityuk.com/research/uk-legal-services-2016-report/*> accessed 13 March 2018.

[6] "The UK Maritime Sectors Beyond Brexit" University of Southampton Report (2017), Executive Summary, para 1.10.

[7] Gregory Bell and Andrew Tepperman, "Arbitration in Toronto: An Economic Study" available at <*http://www.crai.com/publication/arbitration-toronto-economic-study*> accessed 13 March 2018.

[8] Andrea Soh, "Singapore's arbitration hub status to receive boost with Maxwell Chambers expansion" *Business Times* 5 January 2017 available at <*http://www.businesstimes.com.sg/government-economy/singapores-arbitration-hub-status-to-receive-boost-with-maxwell-chambers*> accessed 13 March 2018.

While the public-sector commitment to build local infrastructure and expertise in arbitral centres in other countries may be less pronounced, there is undoubtedly a growing recognition of the financial benefits of attracting arbitrations. This, in turn, is fuelling growth not only in established arbitral centres, but in newer centres around the world.

3. Selecting the seat wisely

The rapidly expanding range of choices for arbitral seats has been accompanied by a growing awareness among corporate counsel of the importance of an arbitral seat as a term in negotiating their contracts to maximise the value of their business arrangements. In a panel discussion at the CIArb 2015 Hong Kong Conference on "How Seats are Chosen: An Inside View" senior corporate counsel explained the significance to their clients of the selection of the seat in an arbitration agreement.

According to Jun Hee Kim, then General Counsel of Hyundai Heavy Industries, the largest shipbuilder in the world, "It can be a deal breaking situation … in a case where there are other inherent risks with the project itself, and there is concern about what will happen …".[9] Daniel Desjardins, Corporate Secretary of Bombardier, the world's leading manufacturer of planes and trains, echoed this sentiment:

> "In public tendering [in] … our transportation world, we rarely have the choice of law. The public utilities will insist that their local law will apply. So our battle is mostly then: Can we have arbitration?; Can we have a seat in neutral ground? That's key to us because at least, as I said, we will have the certainty of a fair hearing; and for us, choosing our battle as to applicable law and seat, obviously seat and neutrality would matter in that context."[10]

Paul Bruno spoke as Managing General Counsel of Fluor, the largest engineering and construction company in the Fortune 500 rankings, which provides services in oil and gas, industrial and infrastructure, government and power. According to Mr Bruno:

> "We do have the opportunity to negotiate within a dispute resolution clause, often the seat—or the substantive law … as a compromise. If in fact [the counterparty] is governmentally owned or has a large percentage of government-owned corporations such as in the Middle East or in certain countries in South America, the substantive law is a critical issue for those kinds of clients and they insist upon it. But the substantive law, keep in mind, usually governs the parties' rights and obligations under the contract, but not always does it apply to disputes about the validity and formation of a given contract or portion, disagreements about arbitrability of a given issue, and some other kinds of disputes that may arise, which are usually the province of a seat. So the seat is very important to us."[11]

With a growing recognition of the importance of the seat and the range of options, the question for commercial parties is how to identify and evaluate the seats best able to support the arbitrations that might be needed in their business relationships.

[9] Jun Hee Kim, General Counsel of Hyundai Heavy Industries, "How Seats are Chosen: An Inside View" 21 March 2015; programme available at <*http://www.ciarbasia.org/Centenary_Celebration/*> accessed 13 March 2018; transcript on file with the author.

[10] Daniel Desjardins, Corporate Secretary of Bombardier, "How Seats are Chosen: An Inside View" 21 March 2015; programme available at <*http://www.ciarbasia.org/Centenary_Celebration/*> accessed 13 March 2018; transcript on file with the author.

[11] Paul Bruno Managing General Counsel of Fluor, "How Seats are Chosen: An Inside View" 21 March 2015; programme available at <*http://www.ciarbasia.org/Centenary_Celebration/*> accessed 13 March 2018; transcript on file with the author.

4. The significance of the national law

Before turning to the means for making a comprehensive assessment of the seat, it is worth considering the significance of the national law. The "seat" or "place" of the arbitration—its home—has long been recognised as far more than a place where the main evidentiary hearing might be held. Indeed, in many arbitrations, procedural meetings and evidentiary hearings are often held remotely or in places other than the seat when this is more convenient to the parties and the tribunal. Still, it is now widely accepted that the choice of seat has a range of potentially significant implications for supporting—or undermining—the effective and efficient conduct of the arbitration and the enforceability of the result. Central to this is the national law.

It is easy for busy arbitration practitioners, whose workdays are filled with challenging legal issues in cases in established seats, to lose track of the basic assurances on which they rely in conducting their arbitrations. Chief among these are the provisions of the national law. It has long been clear that the support for international arbitration set out in the New York Convention is achieved in practical terms only with the benefit of a clear and effective international arbitration law. That recognition led to the development by UNICTRAL of a model law that has since been adopted around the world.[12]

Among the many features of the arbitral process that can be determined by the national law, as exemplified by the UNCITRAL Model Law, are:

- the extent of court intervention (art 5);
- the form of the arbitration agreement (art 7);
- the obligation of courts to refer matters to arbitration (art 8);
- the process for constituting the tribunal and grounds for challenge to an arbitrator (arts 10–15);
- the power of the tribunal to determine its own jurisdiction (art 16);
- interim measures (arts 9, 17);
- the entitlement of the parties to be treated equally (art 18);
- the freedom to set the procedure (art 19);
- the freedom to choose the seat and the place for hearings (art 20);
- the freedom to choose the language of the arbitration (art 22);
- the requirements for written pleadings and hearings (arts 23–24);
- the conduct of default proceedings (art 25);
- the use of experts (art 26);
- the availability of court assistance (art 27);
- powers of arbitrators (arts 28–29);
- settlement (art 30);
- the form, validity and finality of an award (arts 31, 33); and
- the right to challenge an award (arts 34–36).

The features noted above are cited to the Model Law, but they are equally to be found in the national laws of other well-established seats. To be sure, the features of the national law are routinely supplemented by provisions in the arbitral rules chosen by the parties and the specifications that the parties make in their arbitration agreement. However, where the provisions of the national law are mandatory, they can have important implications for arbitrations seated in the jurisdiction.

In this regard, the explanatory note to the Model Law points out that lack of clarity and significant disparity in the national law have the potential to create fundamental obstacles to the successful conduct of arbitrations. These were among the most compelling reasons to develop the Model Law.

[12] The UNCITRAL Model Law on International Commercial Arbitration, available at <*https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf*> accessed 13 March 2018.

One notable example of the importance of clarity is the current restatement project by the American Law Institute concerning the international commercial arbitration law of the US.[13] As the Institute's website explains:

> "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. ALI drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education."

Under the direction of Reporter Professor George Bermann, and Associate Reporters Professors Catherine Rogers, Christopher Drahozal and Jack Coe the multi-year project is in its final stages of completing an authoritative work that "restates" the law in terms that improve its clarity and accessibility. On one view, the need for a restatement to achieve this result could be regarded as an indication of the lack of clarity in the statute. However, in all common law jurisdictions and many civil law jurisdictions, judicial interpretation forms an essential part of the law where it is based on legislation. Accordingly, with the Restatement in place, the arbitration law of the US could be assessed for clarity and efficacy with the Restatement as an integral feature. Similarly, the significance of judicial interpretation and its value to countries that have adopted the Model Law is demonstrated by the 2012 *Digest of Case Law on the Model Law on International Commercial Arbitration*[14] published by UNCITRAL. This digest aims to present information on the interpretation of the Model Law in a clear, concise and objective manner.

Turning from the importance of clarity to issues with major disparities in the law, a recent example of a legislative development that has caused concern for international commercial arbitrations seated in the country is the amendment to art 257 of the UAE Penal Code to impose criminal liability on, inter alia, arbitrators, who issue decisions and opinions run contrary to the duties of impartiality and neutrality.[15] The result of this amendment, coupled with the potential for sanctions for resigning from an arbitral appointment, is that it has become dangerous to serve as arbitrator in a matter seated in the UAE and many arbitrators are reluctant to accept appointments to do so.[16] There are indications that, if this is not amended, it may lead to a practice of counsel agreeing to change the seat upon the emergence of a dispute before commencing the arbitration.

All in all, it may fairly be said that of the many important features that affect the quality of an arbitral seat, there is, perhaps, none so significant as the national arbitration law.

5. Introducing the London Principles

In 2015, for the Chartered Institute of Arbitrators' centenary year, a working group led by Lord Peter Goldsmith QC and CIArb Companion, Professor Doug Jones AO, developed a series of ten principles (the London Principles) comprising the elements of a safe seat for international arbitrations. The working group included Judith Gill QC, Julian Lew QC, Constantine Partasides QC, Karyl Nairn QC, Toby Landau QC, Sir Vivian Ramsay, Wendy Miles QC, Peter Rees QC, Maxi Scherer and Audley Sheppard QC.

The Principles were developed to provide a balanced and independent basis for the assessment of existing seats and to encourage the development of new seats. At its London centenary conference, the Working Group introduced "The CIArb Centenary Principles for a Safe Seat" and invited attendees to comment on the formulation and operation of the Principles.

[13] See <*https://www.ali.org/projects/show/international-commercial-arbitration/*> accessed 13 March 2018.
[14] See <*http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf*> accessed 13 March 2018.
[15] Federal Law No 7 of 2016, in force 18 October 2016.
[16] See <*http://www.tamimi.com/law-update-articles/changes-to-uae-penal-code-may-scare-arbitrators-away-and-international-businesses-with-them/*> accessed 13 March 2018.

The Working Group initially resisted the name "London Principles". They were of the view that every seat could be improved, and that a broad-based analysis would indicate particular strengths in a range of seats that were worth emulating even in seats that were otherwise sound and frequently chosen. However, in the end, as the Principles were introduced at the CIArb London conference, the name "London Principles" won out.

The London Principles[17] comprise ten elements:

- an arbitration law providing a good framework for the process, limiting court intervention, and striking the right balance between confidentiality and transparency;
- an independent, competent and efficient judiciary;
- an independent, competent legal profession with expertise in international arbitration;
- a sound legal education system;
- the right to choose one's legal representative, local or foreign;
- ready access to the country for witnesses and counsel and a safe environment for participants and their documents;
- good logistical support, including facilities for transcription, hearing rooms, document handling and translation;
- professional norms embracing a diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel;
- adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements; and
- immunity for arbitrators from civil liability for anything done or omitted to be done in good faith as an arbitrator.

Covering the full range of considerations that affect the ability of a seat to support the arbitral process and secure the enforceability of the result, the London Principles are coming to be relied upon to assist in the wise choice of a seat for arbitrations.

6. Introducing the GAR–CIArb Seat Index

With the establishment of the London Principles, it is now possible to make a balanced assessment of the options among potential seats. However, there remains a practical need for an accessible body of information across the range of possible seats and a reliable source providing a comparative assessment on which to base a wise choice. To fill this critical gap, GAR is assisting with the development and maintenance of an index of the world's arbitral seats based on the London Principles.

The index will be developed from information provided by the arbitration community around the world and subjected to careful analysis by an assessment panel and an advisory board in a rigorous process chaired by Lord Goldsmith QC and Professor Jones AO. For the inaugural year, the assessment panel is convened by Professor Janet Walker, CArb, and includes: Francisco González de Cossío (Mexico), Daniel Kalderimis (Wellington), Sae Youn Kim (Seoul), Lawrence Schaner (Chicago) and Nathalie Voser (Zurich).

The initial confidential analysis by the assessment panel is based on the submissions of members of the GAR community and the wider arbitration community pursuant to well-publicised invitations to contribute through a survey portal maintained by GAR. Contributors must identify themselves and their geographic base for data control purposes, but their identities remain confidential, even from the assessment panel, who see only the geographic bases from which the various submissions are made.

[17] CIArb London Centenary Principles, available at <*http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4*> accessed 13 March 2018.

Contributors are invited to provide comments with specific examples of the strengths or challenges faced in respect of any of the principles in the seat on which they have chosen to respond. These may include key features and notable developments that enhance or detract from the effectiveness of international arbitration in a particular seat in relation to the Principles. The initial assessment for each seat is conducted by a rotating group of a three-member Assessment Panel. The Panel draws on the information provided in the survey results, discounting any purely subjective impressions (eg "great arbitration law") and irrelevant observations (eg "fantastic night life") and supplementing, where necessary, available information and direct experience in areas in which responses are lacking or deficient. Should the panel members lack sufficient information to assess a seat in respect of a particular principle, they are instructed to refrain from doing so.

The initial analysis yields a report for each seat based on the assessment of the three-person panel that is then reviewed by members of the advisory board. It is expected that the requirement that contributors identify themselves, together with the natural enthusiasm for participation among persons who have an interest in the success of a particular seat, will have the effect of emphasising the positive qualities of a seat and de-emphasising any features that may detract from its effectiveness in supporting arbitration. It is the role, therefore, of the advisory board to provide a sober second look at the reports, supplementing missing information with their own experience in arbitrations in the seats assessed and suggesting any adjustments that they consider appropriate to the assessments. The members of the inaugural advisory board are: Yves Derains, Hilary Heilbron, Michael Moser, Peter Rees, John Townsend, and Carita Wallgren-Lindhomm. Following the advisory board review, the reports and recommendations are then ready for review by the co-chairs.

While the granularity necessary for a rigorous multi-factorial internal assessment warrants the use of a numbered rubric, the final comprehensive assessment is neither mathematical nor in the form of a ranking. Rather, the assessment assigned to each seat is based on a format similar to the well-known country credit ratings as follows:

- AAA—Highly desirable;
- AA—Desirable;
- A—Generally desirable;
- BBB—Reliably supportive of the process and the result;
- BB—Generally supportive of the process and the result;
- B—Supportive in some respects of the process and/or the result;
- CCC—Some risk to the process and/or the result;
- CC—Moderate risk to the process and/or the result;
- C—Substantial risk to the process and/or the result;
- D—Not recommendable.

In the inaugural year, six leading seats will be assessed: Hong Kong, London, New York, Paris, Singapore and Switzerland (comprising Geneva and Zurich). More seats will be added in coming years. These seats were chosen for assessment in the first year on the basis that they are among the best known and most frequently selected seats.

It is important in the inaugural year to establish a credible baseline of results in which the distinctive features of seats—their strengths and challenges—will be familiar to many of those viewing the assessments. In this regard, it is intended that the "news" in the results will relate more to the way in which the index operates than to the particular results it produces, and it will be easiest to see this with seats that are more familiar to the wider international arbitration community.

This will set the stage in the years ahead to highlight the qualities of other seats—in many cases, newer, smaller and less-well-known seats, many of which will have features that compare favourably with or exceed the standards set by this initial group in relation to particular principles.

In early public discussions of the index, there has been an interesting divide among persons closely associated with seats that have yet to be included among those reviewed. On the one hand, there has been an eagerness to be included in the process by those who anticipate that wider publicity for the strengths of the seat in question will attract more arbitrations to it. On the other hand, there has been concern on the part of those anxious that a lower overall rating than more popular seats will slow the trend of increased use of the seat that may support improvements.

The need to introduce seats into the process on a staged basis has already been discussed. As for exempting from assessment seats that might receive a lower rating, the reasons for resisting this impulse are threefold. First, the index is ultimately designed to serve the needs of commercial parties and arbitration practitioners in making wise choices that best suit their own needs. It is unreasonable to assume that, in the hands of increasingly sophisticated businesses and their advisors, this information will not be factored into the broader context of the particular local and regional interests of their operations and their dispute resolution needs. Secondly, the inexorable trend in the world of international arbitration to greater and greater transparency undermines any justification for concealing or camouflaging faults and deficiencies in arbitral seats. Thirdly, and perhaps most significantly, as the local businesses and governments in a seat increasingly appreciate the value of attracting arbitrations to them, a balanced and broad-based index of seats that highlights areas of potential improvement provides those who are in a position to support improvements with the necessary drive and impetus to do so.

Significantly, these rationales are applicable to all seats, from those that aspire to attract their first international arbitrations to those that have led the field for decades or centuries. While in the early years, members of the international arbitration community will look forward to the initial ratings accorded to each seat included, it is anticipated that, ultimately, it will be the way in which the ratings of developing and well-established seats are adjusted in response to positive and negative developments that will be of interest to users of international arbitration.

7. The impact of the London Principles on law reform

The national arbitration law is among the most central factors in determining the strength of a seat and among those factors whose improvement is most readily achievable. In places where legislators have not yet seen the financial benefits of competing for international arbitrations and in relation to this, the need to place legislative reform in this area high on the agenda, the local international arbitration community may struggle to make the case for it. The development of the GAR–CIArb Seat Index based on the London Principles seeks to establish a reliable and accessible reference point for commercial parties to make wise choices of seats and for all to be aware of the relative strengths and weaknesses of seats on the world stage. Where an index rating can be improved by law reform, it is hoped that these initiatives will provide the necessary impetus to pursue it.