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RESEARCH ARTICLE

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On the legal place of arbitration and its determination

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Abstract The paper studies the concept of the place of arbitration in comparing with the legislation and practices of international commercial arbitration. It also stresses on the connection and distinction between the place of arbitration, the place of hearing, and the place where the arbitration tribunal deliberates the case, as well as the method of deciding the place of arbitration. The author also analyzes the current legislation and practices of the determination on the place of arbitration in China. The paper pointed out that it is important in both theory and practice to promote international arbitration in China and amend domestic arbitration legislation in determing place of arbitration properly.

Keywords international commercial arbitration, place of arbitration, place of hearing, place of deliberation

摘要 本文结合国际商事仲裁立法与实践，阐述了法律意义上的仲裁地点的含义，仲裁地点、开庭地点与仲裁庭合议地点之间的联系与区别，以及仲裁地点的确定方法。作者还结合我国确定仲裁地点的立法与实践，提出了准确地确定仲裁地点对于不断地完善我国现行国际仲裁和国内仲裁立法，具有重要的理论与实践意义。

关键词 国际商事仲裁，仲裁地点，开庭地点，合议地点

1 Introduction

Arbitration is one of the methods for the settlement of disputes which the parties agreed voluntarily via arbitration agreement. According to the arbitration

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legislation and practices of many states, the parties may reach agreement on any matters of arbitration, including but not limited to the application of the arbitration rules, the choice of arbitration institution, arbitrator, place of arbitration, the applicable law for the arbitration agreement, arbitration proceedings and merits of the case, as well as the language, in their arbitration agreement.

In the practices of international commercial arbitration, it is most important that the parties may agree on the place of arbitration than any other items in their arbitration agreement either in ad hoc or institutional arbitration, because the place of arbitration plays an important role in deciding the jurisdiction of the arbitration institution and the validity of the arbitration agreement. Even in domestic arbitration, the place of arbitration concerns such a matter that court has jurisdiction on the arbitral award. Therefore, it is necessary to make clear over the relationship and distinction between the place of arbitration and any location where the arbitration hearings or meetings are conducted, as well as determine the place of arbitration.

2 Definition of the seat of arbitartion

The concept of the place of arbitration has special meaning in international commercial arbitration. Section 3 of the British Arbitration Act 1996 defines the place of arbitration as "judicial place". Some prestigious scholars described in the book "Russell on Arbitration Twenty-First Edition" that, "Like other jurisdictions, England regards it as essential for an arbitration to have a 'seat', a geographical location to which the arbitration is ultimately tied and which prescribes the procedure law of the arbitration. The parties are free to choose a place, or specifically, a procedural law of the arbitration, which may be different from the proper law of the contract and the proper law of the arbitration agreement. English law does not recognize the possibility of 'delocalized' arbitral procedures which do not have a connection with any national system of law." (Sutton et al., 1997)

In international commercial arbitration legislation and practices, the seat of arbitration usually refers to the place for arbitration, where the award was made. The terms "seat" and the "place" of arbitration could be used interchangeably in practices. Once the place of arbitration is decided, the arbitral tribunal may conduct hearings and meetings in any location of the states other than the place of arbitration. For instance, the parties from Hong Kong and Macau may agree in their arbitration agreement that the ICC (International Chamber of Commerce) Arbitration Rules shall apply and the place of arbitration shall be Singapore. In such a case, the ICC Court of Arbitration is responsible for the administration of

the case, while the legal place of arbitration is Singapore. Supposing the arbitrators are from Tokyo, Bangkok and Beijing, After establishing the tribunal, the hearings were conducted in Hong Kong or Macau for the parties' convenience and the tribunal deliberated the case in Tokyo. In a legal sense, in spite of the fact that Singapore, Macau, Tokyo and Bangkok related to the arbitration procedure, the legal place is Singapore due to the parties' agreement on the place of arbitration.

3 Relationship and distinctions between the seat of arbitartion and location where the hearings or meetings are conducted

As we discussed above, in international commercial arbitration practices, the place of arbitration has special meaning which is different from any other places, where the hearings or meetings are conducted. Of course, the place of arbitration and those of hearings or meetings are both related and distinct from each other.

3.1 Relations between the place of arbitration and the location of hearing or meeting

The relations reflected that while the place of arbitration in the arbitration agreement is the same location where the hearings and the tribunal's deliberation will be taken in the case. In such circumstances, the place of arbitration itself is the place of hearings and the award rendered. Take the Chinese arbitration as an example; there are about 185 arbitration commissions in China currently. The parties agreed to submit their disputes to a certain arbitration commission, in practices the location of which is the very place of arbitration, so is the place of hearings and the same place where the tribunal deliberates the case.

3.2 Distinctions between the place of arbitration and the location of hearings or meetings

The distinctions usually take place in international arbitration practices. The parties from different countries in their arbitration agreement agreed to submit their disputes to a permanent arbitration institution in one country (ICC Court of arbitration in Paris, France) and the place of arbitration in another country (Singapore). When the arbitration tribunal was composed, the arbitrators may decide to have hearing in the third country (New York, USA) for the parties' convenience. The tribunal agreed to deliberate the case in the fourth country (Mexico City, Mexico) for the arbitrators' convenience since they were from

difference countries. In such a case, the legal place is Singapore agreed by the parties in their arbitration agreement. New York is the place where the hearing takes place while Mexico City is the place where the tribunal deliberates the case. New York and Mexico are simply the locations for hearing and deliberation and have no meaning referring to the legal place of arbitration. The award is considered in Singapore, even though the hearing was not held there. If any of the party intends to set aside the award, it should apply for the competent court in Singapore in accordance with the local law.

We could also find the distinction from the Arbitration Rules of the London Court of International Arbitration (LCIA). Article 16 of LCIA Rules provided the following aspects.

16.1 The parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.

16.2 The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of arbitration and any award as an award made at the seat of the arbitration for all purposes.

16.3 The law applicable to the arbitration (if any) shall be the arbitration law of the seat of arbitration, unless and to the extent that the parties have expressly agreed in writing on the application of another arbitration law and such an agreement is not prohibited by the law of the arbitral seat.

4 The significance of the place of arbitration in international commercial arbitration practices

The place of arbitration played a very important role in international commercial arbitration. Its significance reflected in the following aspects.

4.1 It decides the validity and the nationality of the award

The most significance of the place of arbitration closely related to the origin of the legal binding force of the award, in another word, where the binding force of an award came from. Article 39 of the Japanese Arbitration Law provided, "(3) The arbitral award shall state its date and place of arbitration. (4) The arbitral award shall be deemed to have been made at the place of arbitration." The award is considered to be made at the place of arbitration. If the national court set aside

a award made in the place of such court, foreign court may refuse to enforce it, as provided by Article 5 (1) (e) of the New York Convention provided.[1]

4.2 It decides the court entitled to set aside the award

As usual practices, the national court may only set aside its own award. As to the foreign arbitral award, the court may decide whether to enforce it or not. According to New York Convention, the national court to which a party applies for the enforcement of foreign arbitral award may refuse the other party's application on the basis of the court-confirmed proof that it had been set aside by the national court where it was made. Therefore, only the court, where the award was made, is entitled to set aside the arbitral award.

5 Determination of the place of arbitration

In international commercial practices, the place of arbitration is ultimately determined by the applied arbitration rules and law, which provided the following methods for the determination of such a place.

5.1 By the applied arbitration rules

If the parties did not mention the place of arbitration in their arbitration agreement, but the particular arbitration rules or the permanent arbitration institution, the place of arbitration should be decided by the applied arbitration rules. In international commercial arbitration practices, the fact that the parties agreed to present their disputes to a particular arbitration institution, implied to apply the arbitration rules of such an institution, unless the parties agreed otherwise. For instance, if the parties agreed to present their disputes to China International Economic and Trade Arbitration Commission (CIETAC), it means to apply the CIETAC Arbitration Rules, and the determination of the arbitration place relied on such applied rules. As to the decision on the place of arbitration in such rules, it could be divided into the following provisions.

[1] The provision of Art. 5 (1) (e) of the New York Convention as following, "(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that … (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." By the end of 2006, there were 142 contracting parties. China became a party in 1987. As to the contracting parties in detail, see www.uncitral.org.

5.1.1 The place of arbitration is the same as the headquarter of the arbitration institution

Some arbitration rules have special provisions on such a place. Article 16 of the LCIA Arbitration Rules of 1998 mentioned that if the parties failed to agree on the place of arbitration, the place of arbitration shall be London, unless and until the LCIA Court determines in view of all circumstances, and after having given the parties an opportunity to make a written comment, another place is more appropriate. The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the place of the arbitration, the arbitration shall be treated as arbitration conducted at the place of the arbitration and any award as an award made at the place of arbitration for all purposes.

According to 2006 International Commercial Arbitration Court of Russian Federation Arbitration Rules, the place of arbitration is only Moscow.[2] As a result, if the parties submit their disputes to Russian arbitration court, the award made by the court is always in Moscow due to the applied rules.

To sum up, if the parties failed to agree on the place of arbitration, it is the applied arbitration rules that determine such a place. Some arbitration rules provided that the place of arbitration is the same place for the permanent arbitration institution.

5.1.2 The place of arbitration is different from the headquarter of the arbitration institution

There are such circumstances in international commercial arbitration practices. If the place of arbitration is different from that of the arbitration institution, how to determine the nationality of such an international arbitral award turns out to be another issue. In my personal opinion, it should be the arbitration rules applied and the applicable national law that decide the nationality of such an international award. For example, the title of Article 20 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, effective on January 1, 2007, is the seat of arbitration. It provides the following provisions.

(1) Unless agreed upon by the parties, the Board shall decide the seat of arbitration in accordance with Article 9.

(2) The arbitral tribunal may, after consultation with the parties, conduct hearings at a place which it considers appropriate. The arbitral tribunal may meet and deliberate at any place that it considers appropriate. If any hearing, meeting,

[2] Article 22 of 2006 Arbitration Rules of Russian Federation Arbitration Court.

or deliberation is held elsewhere than at the seat of arbitration, the arbitration shall be deemed to have taken place at the seat of arbitration.

(3) The award shall be deemed to have been made at the seat of arbitration.[3]

Article 14 of the ICC (International Chamber of Commerce) Rules of Arbitration of 1998 provided the following determinations for the place of arbitration.

(1) The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.

(2) The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location that it considers appropriate unless otherwise agreed by the parties.

(3) The Arbitral Tribunal may deliberate at any location that it considers appropriate.

That is to say if the parties failed to determine the place of arbitration in their arbitration agreement, it is the ICC Court of Arbitration that makes such a decision. In addition, the place of arbitration could be in Paris, where the ICC Court locates, or in other cities out of France, no matter it is decided by the parties or by the Court. The award made in the state other than France should be considered as the award of the state where it is made. And the local court could set aside such an award upon the parties' requirement in accordance with the local law.

In ICC international arbitration practices, most parties agreed on the place of arbitration. For instance, in 2003, the parties agreed on the place of arbitration in 76% of the cases and by subsequent agreement in 11% of the cases. In the remaining 13% of cases, the ICC Court determined the place of arbitration. The following two tables expressed the arbitration place distributed by ICC Court practices during the period from 1999 to 2003. (Drahozal and Naimark, 2005)[4]

Table 1 Places of arbitration agreed by the parties in ICC arbitrations

	1999	2000	2001	2002	2003	Total
France	89	56	103	72	97	417
Switzerland	74	72	73	99	69	387
UK	46	48	52	48	43	237
USA	35	37	35	40	46	193
Germany	16	21	20	15	17	89
Singapore	11	11	13	14	14	63
Austria	10	11	8	10	7	46
Netherlands	6	4	10	12	9	41
Italy	2	11	4	5	12	34
Sweden	8	6	3	6	6	29

[3] www.sccinstitute.com

Table 2 Places of arbitration agreed determined by ICC court

	1999	2000	2001	2002	2003	Total
France	23	23	25	16	17	104
Switzerland	10	12	12	12	5	51
USA	9	6	4	10	7	36
UK	2	7	9	5	6	29
Germany	5	2	4	1	5	17
Belgium	4	3	0	4	2	13
Singapore	1	4	4	0	2	11
Netherlands	3	2	2	1	2	10
Canada	2	1	1	2	3	9
Austria	3	0	2	0	3	8

In 2005, a total of 521 new cases were registered, which brought the number of cases handled by the ICC Court since its establishment over 14,000.[5] In 87.4% of the cases introduced in 2005, the parties had chosen the place of arbitration either by the arbitration rules or by subsequent agreement. In the remaining 12.6% of cases, the Court was required to fix the place of arbitration either because the parties had not been sufficiently specific (e.g. they had merely specified a country without specifying a city, had expressed no choice at all, or had been unclear of their choice), or because they disagreed on the place of arbitration. The places of arbitration chosen by the parties or fixed by the Court in 2005 were situated in 85 cities in 50 different countries.[6]

As to the distinction between the place of arbitration and that of hearings and deliberation, the WIPO (World Intellectual Property Organization) Arbitration Rules of 2002 has similar provisions in Article 39.

(a) Unless otherwise agreed by the parties, the place of arbitration shall be decided by the Center, taking into consideration any observations of the parties and the circumstances of the arbitration.

(b) The Tribunal may, after consultation with the parties, conduct hearings at any place that it considers appropriate. It may deliberate wherever it deems appropriate.

(c) The award shall be deemed to have been made at the place of arbitration.

We may conclude from above-mentioned arbitration rules that the place of arbitration could be the same place of arbitration or different from that of the institution, such as provided by the ICC Rules and LCIA Rules. In the later

[4] Also "2003 Statistical Report", (2004) 15(1) ICC Int'l Ct. Arb. Bull, at 7–12.
[5] ICC International Court of Arbitration Bulletin, Vol. 17/No.1–2006, at 5.
[6] ICC International Court of Arbitration Bulletin, Vol. 17/No.1–2006, at 10–11.

circumstances, in spite of the fact that under the administration of the arbitration rules, the arbitration could be conducted in the place which is different from that of the arbitration institution. The award is to be made in the place of arbitration other than the place where the institution locates. And the nationality of the award is that of the place of arbitration instead of where the arbitration institution locates. For instance, the parties agreed on the application of ICC Rules, the place of arbitration is London. The award made in accordance with ICC Rules should be treated as a British award instead of a French award. This author disagrees with the point that the place of arbitration is the place where the arbitration institution locates proposed by some scholars in China.[7] Due to the fact that almost all the arbitration rules of the permanent arbitration institutions, including UNCITRAL Arbitration Rules, have special provisions on the place of arbitration, which could be selected by the parties in their arbitration agreement. Such a place could be the same or different from the location of arbitration institution, whether the parties agreed in arbitration agreement or decided by the arbitration institution or the arbitral tribunal in accordance with the applied arbitration rules.

5.2 By the applied arbitration law

If the arbitration agreement did not provided applicable arbitration rules, any party may apply to the national court for the determination of the place of arbitration in accordance with the local arbitration law. For instance, Article 20 of the Model Law on International Commercial Arbitration drafted by the United Nations Commission on International Trade Law in 1985 adopted by dozens of countries and regions currently has special provisions as to the determination of the place of arbitration.

(1) The parties are free to agree on the place of arbitration. Failing such an agreement, the place of arbitration shall be determined by the arbitral tribunal regarding to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place that it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 28 of the Japanese Arbitration Law[8] also provided clearly the basic principles for the determination of the place of arbitration. (1) The parties are free

[7] Mr. Kang Ming, deputy secretary of CIETAC, holds such a point. He holds that in institutional arbitration, the place of arbitration is the place where the arbitration institution locates. The place of ICC Arbitration should be Paris (France).

[8] Law No. 138, 2003, effective on March 1, 2004.

to agree on the place of arbitration. (2) Failing such an agreement as prescribed in the preceding paragraph, the place of arbitration shall be determined by the arbitral tribunal regarding to the circumstances of the case, including the convenience of the parties. (3) Notwithstanding the place of arbitration determined in accordance with the provisions of the preceding two paragraphs, the arbitral tribunal may, unless otherwise agreed by the parties, carry out the following procedures at any place that it considers appropriate: (1) consultation among the members of the arbitral tribunal; (2) hearing of parties, experts or witnesses; and (3) inspection of goods, other properties or documents. Among the basic principles to determine the seat of arbitration, the principle of the parties' autonomy is in priority. Only the parties failed to decide such a seat, the arbitral institution or tribunal may have the right to make a decision.

To sum up, the agreement of the parties as to the place of arbitration is respected by both the arbitration rules and the applicable law of the state. The place of arbitration agreed by the parties in their arbitration agreement should be the place of arbitration in legal sense. In the absence of such agreement, the arbitral tribunal or the arbitration institution may decide the seat of arbitration. In some special circumstances, the national court may also design such a place in accordance with the local law.

6 Determination of the seat of arbitration in arbitration law and practices in mainland China

The arbitration conducted under the current Arbitration Law of China refers only to institutional arbitration instead of ad hoc arbitration. If the parties agreed to settle their disputes by arbitration in China, they should present it to the selected arbitration commission.[9] According to the Arbitration Law,[10] Arbitration agreements shall include arbitration clauses in the contracts, and agreements on application for arbitration that are agreed in another written form before or after the dispute arises. And the following items should be included in the arbitration agreement: (1) a declaration of the intention to apply for arbitration; (2) the arbitrable matters; and (3) the selected arbitration commission.[11] If an arbitration agreement contains no or unclear provisions concerning the arbitrable matters or the arbitration commission, the parties may reach a supplementary agreement. If no

[9] There are 187 arbitration commissions in China, including CIETAC and CMAC (China Maritime Commission).

[10] This law was adopted on August 31, 1994 at the Ninth Session of the Standing Committee of the Eight National People Legislation's Congress and implemented on September 1, 1995. English translation available at http://www.cietac.org.cn/english/laws/laws_5.htm (accessed Apr. 18, 2006).

[11] Art. 16 of the Arbitration Law of the PRC.

such a supplementary agreement can be reached, the arbitration agreement shall be void.[12]

In current arbitration legislation and practices in China, the place of arbitration is usually the place where the arbitration commission is situated. The parties agreed to submit their dispute to a particular arbitration commission, which usually conducts the arbitration in the place of its location. Therefore, the party should turn to an Intermediate People's Court where the arbitration commission locates, if it intended to challenge the award for setting aside after it was made.[13] The People's Court that has accepted the application shall rule to vacate the award or to reject the application within two months of the accepted date.[14]

In the international commercial arbitration practices in China, there could be also cases that are accepted by the Chinese arbitration institution where the place of arbitration is out of China. For instance, Article 31 of the CIETAC 2005 Arbitration Rules specially provides the place of arbitration as follows.

(1) Where the parties have agreed on the place of arbitration in written form, the parties' agreement shall prevail.

(2) Where the parties have not agreed on the place of arbitration, the place of arbitration shall be the domicile of the CIETAC or its sub-Commission.

(3) The arbitral award shall be deemed as being made at the place of arbitration.

Supposing one Chinese party entered a contract with another Japanese party. The arbitration clause provided that "any dispute arising from the contract should be settled by the CIETAC, the place of arbitration is Singapore", we could infer from the arbitration clause that the CIETAC has jurisdiction over the contract. The place of arbitration is in Singapore. The award shall be deemed made in Singapore by the arbitral tribunal composed in accordance with CIETAC Rules under the auspices of CIETAC. After the award was made, both parties dissatisfy and intend to set aside the award, for which national court the party should apply? By applying different national law, there could be the following possibilities.

First, the Chinese party may turn to the Chinese court where CIETAC is situated for vacating award in accordance with Chinese law on the basis of Article 58 of the Arbitration Law of the People's Republic of China (hereinafter refers to as CAL), "If a party can produce an evidence which proves that an arbitral award involves any of the following circumstances, he may submit an application for vocating the award to the Intermediate People's Court regarding the place where the arbitration commission is located"

Second, the Japanese party may also turn to the Singapore court for application vacating the CIETAC award. Because according to Art. 31 of the CIETAC Rules

[12] Art. 18 of the Arbitration Law of the PRC.
[13] Art. 58 of the Arbitration Law of the PRC.
[14] Art. 60 of the Arbitration Law of the PRC.

2005, the award should be deemed made in Singapore, since the parties had already selected Singapore as the place of arbitration. The Singapore court of course is entitled to set aside such a CIETAC award in accordance with Article 48 of its Arbitration Act 2001.

As a result, once the award is made, the Japanese party could apply to the Singapore court where the award was made for setting aside the award, while the Chinese party may apply to a competent court in Beijing where CIEATC Beijing is situated for setting it aside in accordance with Art. 58 of CAL, where CIEATC Beijing was situated.

Foreign arbitral awards under New York Convention generally refer to the awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, as provided in Art. 1(1) of New York Convention. Such a provision reflected the standard of territoriality as to the determination of the nationality of arbitral award. According to the current CIETAC Rules of 2005, awards made under the auspices of CIETAC are not necessarily Chinese awards.

The amendment of CITAC Rules reflect the parties' autonomy that is much respected in CIETAC and the trend of development in the international commercial arbitration, which has some significance for the domestic arbitration. For example, the cases arbitrated by Beijing Arbitration Commission could be heard in Tianjin between the parties from Hebei and Shandong, and the award is to be made in Tianjin, so the party may apply for setting aside by Tianjin Intermediate People's Court. Of course, there exists room for amendment of both the rules for different arbitration commissions and the Civil Procedure Law of China (hereinafter refers to as CPL). Until the CPL amendment, application for setting aside arbitration awards in China should be the Intermediate People's Court where the arbitration commission is located.

As to the competition in the international service trade as arbitration, the parties may choose whatever arbitration institution they want. Some services provided by arbitration commissions could be widely used while others could be reduced due to the quality of service. The place of arbitration is worth to be paid much more attention even in our domestic arbitration service market. It is important for the domestic arbitration commission to pay much attention to the place of arbitration in their arbitration rules.

7 Conclusions

We could draw the following conclusions from above-analyzed.

(1) In international commercial arbitration, the place of arbitration refers to the place, where the award was considered to be made. It is the court, where the arbitral award was made, that is entitled to set aside the arbitral award.

(2) It is the applied arbitration rules and arbitration law that determine the seat of arbitration.

(3) According to the applied arbitration rules and law, the basic principles to determine the seat of arbitration are: a) the parties may agree to the place of arbitration in their arbitration agreement; b) if they failed to agree on it, the place of arbitration should be determined by the arbitral tribunal or institution in accordance with the applied arbitration rules or law.

(4) Under the institutional arbitration, the seat of arbitration could or could not be the same as the business place of such a permanent arbitration institution. The deciding point is the provision of the applied arbitration rules of the institution. Under ad hoc arbitration, the seat is decided by the applied arbitration law.

(5) The nationality of the international arbitral award should be the state where the arbitral award is made in accordance with the universally applied standard.

(6) The place of arbitration also has some significance for the domestic arbitration. And there is room for further reform on the CPL and CAL as to the determination of the place of arbitration in order to keep up with the international commercial arbitration legislation and practices.

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