Attracting International Arbitration With a Predictable and Transparent National Law

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Advantages of the UNCITRAL Model Law for an Aspiring Arbitral Seat

Introduction

The selection of the seat of an international arbitration is a critical decision for parties to an international commercial contract, as this decision has a significant impact on the resolution of the parties' potential future disputes.

The seat of arbitration determines, among other things, the national arbitration law that applies to the conduct of the arbitration or to any action for setting aside an arbitral award. It often also determines the law that applies to the validity of the arbitration agreement, and it may influence the process and rights relating to enforcement proceedings.[1] Further, hearings are often held at the seat of arbitration, even though this is not mandatory unless provided for in the arbitration agreement.

For some time now, there has been competition among more and more jurisdictions seeking to attract international arbitration through the choice of seat of the arbitration. There are several reasons behind this phenomenon, sometimes described as the "Battle of the Seats".[2] Jurisdictions worldwide recognize that international arbitration is not only a means to attract business but also a means to build prestige.[3] Hosting international arbitrations is a way to build a jurisdiction's reputation as a modern, neutral and reliable place to do business, promoting commerce and respecting the rule of law. In addition, attracting international arbitration benefits the local legal community, namely, the lawyers, arbitrators and arbitral institutions, by increasing demand for their services. The increase in arbitrations seated in a certain jurisdiction also naturally increases the amount of arbitration-related case law and legal writing in that jurisdiction, thus contributing to the development of its law and doctrine. And hearings conducted at the seat of arbitration generate business opportunities for the hospitality industry. Thus, arbitration is seen as an export product by many jurisdictions.

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1 For further discussion regarding the scope of application of the law of the seat, see, *e.g.,* Born, Gary B., *International Arbitration: Law and Practice* (Second Edition), 2015, pp. 111–128 and Born, Gary B., *International Commercial Arbitration* (Second Edition), 2014, pp. 1535–1598.

2 See, *e.g.,* Dias Simões, Fernando, *Is Legal Reform Enough to Succeed in the 'Battle of the Seats'*, Kluwer Arbitration Blog, 30 September 2014, "kluwerarbitrationblog.com/2014/09/30/is legal reform enough to succeed in the battle of the seats/" (accessed 16 August 2018); or Olson, Elizabeth, Cities Compete to Be the Arena for Global Legal Disputes, The New York Times, 11 September 2014, "dealbook.nytimes.com/2014/09/11/cities compete to be the arena for global legal disputes/?php=true&_type=blogs&_r=1" (accessed 16 August 2018). See also, Seraglini, Christophe, Nyer, Damien, Templeman, John, and de Ferrari, Lucas, *The Battle of the Seats: Paris, London or New York?* 6 December 2011, "http://www.whitecase.com/publications/article/battle seats paris london or new york" (accessed 16 August 2018).

3 Dias Simões, Fernando, *Commercial Arbitration between China and the Portuguese Speaking World*, Kluwer Law International 2014 ("*Dias Simões 2014*"), p. 64.

The increased popularity of arbitration[4] can also bring significant savings for the local court system, as directing commercial disputes to arbitration may save court time and resources. This is particularly relevant as in many countries international commercial disputes are not ideally suited for ordinary courts: their scale and complexity may overburden the already stretched courts and the courts' possible unfamiliarity with the issues that oftentimes arise – starting with questions of conflicts of laws that may lead to the application of a foreign law – may lead to lengthy and inefficient proceedings.

Several attempts have been made over the years to measure the economic benefits of attracting arbitration. For instance, in a study published in January 2018, the Stockholm Chamber of Commerce estimated that arbitration adds almost SEK 9 billion per year (*i.e.,* approximately EUR 865 million) to the Stockholm economy.[5] Even if critics have questioned the estimated figures that different studies have attributed to the economic gain arbitration is said to generate, there is little doubt that attracting international arbitrations has multiple benefits.

This article analyzes the role that a country's national arbitration law plays in the selection of a seat and what factors weigh in favor of one national arbitration law over another. The article will focus in particular on the advantages that an aspiring arbitral seat can gain from adopting the United Nations Commission on International Trade Law's (*UNCITRAL*) Model Law on International Commercial Arbitration (the "*UNCITRAL Model Law*"), adopted by UNCITRAL and approved and recommended by the General Assembly of the United Nations in 1985 and amended to take its current form in 2006.[6]

Finland will be used as a practical example of the impact that a modern arbitration law – or the lack of one – can have on an aspiring seat. Indeed, despite Finland's strong reputation as a neutral state with a functioning legal system and despite its advantageous geographical location between east and west, close to the Baltic countries, Finland does not attract many international arbitration proceedings. This article will discuss the possible reasons behind that phenomenon and address ways to remedy to it.

Which Seats Are Preferred and Why?

According to a survey conducted by Queen Mary University of London in 2018,[7] the most preferred arbitral seats are London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm.[8] These same seven seats stood out in a similar survey conducted in 2015,[9] whereas in 2010 Tokyo figured on the list and Hong Kong and Stockholm were absent.[10]

From an aspiring seat's perspective, the interesting question is what the most preferred seats have in common. Some of the above-listed seats, such as Paris and London, are traditional arbitration hubs that have a long history of hosting international arbitral proceedings. In addition, two of the world's most well-known arbitral institutions are located in these cities. But alongside these traditional hubs, "new" arbitration centers have emerged in recent years, particularly in Asia.

The respondents in the 2018 International Arbitration Survey were asked to indicate the four most important reasons for their preferences for certain seats. They identified "general reputation and recognition of the seat" as the overriding reason, followed by "neutrality and impartiality of the local legal system", the seat's "national arbitration law" and the seat's "track record in enforcing agreements to arbitrate and arbitral awards".[11] These results support the conclusion that parties want to arbitrate at a place where they trust in the legal system – *i.e.,* at a seat with a good reputation, in which the parties can be certain that they will be treated neutrally and impartially,

4 As noted by Mr. Christopher R. Seppälä, the number of cross-border commercial contracts containing arbitration clauses and international treaties favoring arbitration has increased and, thus, the number of cases submitted to international arbitration has drastically grown, especially since 1970. Seppälä, Christropher R., Why Finland Should Adopt the UNCITRAL Model Law on International Commercial Arbitration, Liikejuridiikka 3/2016, pp. 190–191.

5 Stockholm Chamber of Commerce, *Tvister Säljer Sverige*, 2018, pp. 22–23. For the entire study, please see "https://www.chamber.se/rapporter/tvister saljer sverige.htm" (accessed 16 August 2018). In addition, the authors of a study published in 2012 estimated that the total impact that arbitration would bring to the economy of the City of Toronto in 2013 would range around CAD 273 million (*i.e.,* approximately EUR 185 million). (Charles River Associates, *Arbitration in Toronto: An Economic Study*, 2012, pp. 3–4. For the entire study, see "www.crai.com/sites/default/files/publications/Arbitration in Toronto An Economic Study.pdf" (accessed 16 August 2018)).

6 Resolution of the General Assembly of the United Nations 40/72, *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, 1985; Resolution of the General Assembly of the United Nations 61/33, *Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*, 2006.

7 Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (the *"2018 International Arbitration Survey"*). The 2018 International Arbitration Survey is an empirical study the objective of which was to identify the principal drivers and stakeholders that the arbitration community expects to influence the future direction of international arbitration. The research for the survey was conducted from October to December 2017 and comprised two phases: an online questionnaire completed by 922 respondents (quantitative phase) and, subsequently, 142 personal interviews (qualitative phase). For the entire study, please see "https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018 international arbitration survey.pdf" (accessed 16 August 2018).

8 2018 International Arbitration Survey, p. 9.

9 "http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul international arbitration survey 2015 _0.pdf" (accessed 16 August 2018)", p. 12.

10 2015 International Arbitration Survey, p. 12.

11 2018 International Arbitration Survey, pp. 10–11.

their arbitration agreement will be enforced,[12] the proceedings will receive support from the local court system where needed and the award will be recognized and not set aside.

The high ranking of "neutrality and impartiality of the local legal system", "national arbitration law" and "track record in enforcing agreements to arbitrate and arbitral awards" shows that the characteristics of a seat's legal infrastructure also affect strongly parties' preferences for certain seats.[13]

Although the emergence of new seats can perhaps be explained by the upward trend of certain countries' economies in international markets, based on the 2018 and 2015 International Arbitration Surveys, those seats share certain points of convergence with the more traditional seats: they have ratified the New York Convention, they have court systems enforcing that Convention and they have either case law supporting the application of the New York Convention or they have adopted the UNCITRAL Model Law, which law is backed up by an array of case law from a variety of jurisdictions.

In the 2015 International Arbitration Survey, the respondents were also asked which seats had improved the most and in what ways. The reasons given by the respondents for improvement centered mainly on elements of convenience, such as the quality of hearing facilities, and only one out of the five most important reasons for improvement related directly to the formal legal infrastructure (*i.e.*, improvements to the national arbitration law).[14]

When this data is compared with the grounds for preferring a certain seat over another (discussed above), it appears that the factors of convenience become important once a seat's formal legal infrastructure has reached a certain threshold of quality:[15] the seats are selected and preferred on the basis of their reputation, neutrality, local arbitration laws and their track record in enforcing agreements and awards. It seems that it is only after these fundamentals are in place that convenience plays a role in improving the seat's already well-established reputation.

Hong Kong rising among the top five most preferred seats of arbitration in 2015, after it reformed its arbitration law in June 2011 to expand the UNCITRAL Model Law's application to all arbitrations seated in Hong Kong,[16] would seem to confirm this conclusion: a rising seat gains most from adopting a legal framework that is familiar to the international arbitration community when seeking to attract arbitrations.[17] It is only once the foundation for a functioning and foreseeable legal framework has been laid that seats benefit from building better hearing facilities and improving their hospitality services. London, Paris and New York appear to fit this model: they have been well-established seats for decades and have been building upon that foundation.[18]

As a conclusion, new, aspiring seats should ensure proper development of their formal legal infrastructure first, as that structure, if it creates a predictable legal framework, is essential for a jurisdiction to attract international arbitrations. In addition, improvements to the legal framework are a relatively rapid and cheap technique for countries to draw international commercial opportunities.[19] Conversely, a jurisdiction without such a legal structure will have difficulty attracting international arbitrations.

Achieving Predictability through the UNCITRAL Model Law?

What Is the UNCITRAL Model Law

The UNCITRAL Model Law, often referred to simply as the "Model Law", is considered by some to be "the single most important legislative instrument in the field of international commercial arbitration".[20] Its ultimate goal is to "facilitate international commercial arbitration and to ensure its proper functioning and recognition".[21] It "is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration".[22]

12 In practice, this should lead the parties to select a seat in a state that has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "*New York Convention*") and that has case law enforcing Article II of that Convention.

13 Similar results were found in the 2015 International Arbitration Survey (2015 International Arbitration Survey, p. 14). In the same vein, the respondents' answers in 2010 indicated that neutrality and impartiality (according to 34 percent of respondents) and "arbitration friendliness" of a seat (*i.e.*, the record of the courts in enforcing agreements to arbitrate and arbitral awards) (25 percent) were aspects that significantly influenced the parties' selection of a seat. Another important factor for choosing a certain seat that was mentioned in the 2010 International Arbitration Study was whether a country had signed the New York Convention (20 percent). See, 2010 International Arbitration Survey, p. 18.

14 2015 International Arbitration Survey, pp. 15–16. This topic was not covered by the 2018 International Arbitration Survey.

15 2015 International Arbitration Survey, pp. 16–17.

16 Except if the "opt-in" provisions under Schedule 2 to the Arbitration Ordinance, Cap. 609 are to be applied.

17 In the 2010 International Arbitration Survey, Hong Kong did not figure on the list of preferred seats, whereas it was among those seats in the 2015 and 2018 surveys. Based on these results, Hong Kong has established its position as a reputable and well-functioning seat.

18 See also 2015 International Arbitration Survey, pp. 16–17.

19 O'Hara, ErinandRibstein, Larry E., *The Law Market,* Oxford University Press 2009, p. 98.

20 Born 2014, p. 133.

21 UNCITRAL, *Report of the Secretary General: possible features of a model law on international commercial arbitration,* U.N. Doc. A/CN.9/207, 1981, p. 77.

22 UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,* "http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html" (accessed 16 August 2018).

The Model Law covers all stages of an arbitral process, including the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention and the recognition and enforcement of the arbitral award. In addition, the Model Law furthers the goals of and is compatible with the New York Convention.[23] The Model Law can be adopted by any jurisdiction in its entirety or a jurisdiction can choose to depart from certain of its provisions.

According to the corresponding report of the UN Secretary-General, the freedom of the parties was considered as one of the most important principles when creating the Model Law.[24] Indeed, the UNCITRAL Model Law is "recognized worldwide as a legal point of reference that grants parties maximum autonomy while limiting the intervention of local courts to extreme cases".[25] This freedom may, however, be limited by local mandatory provisions, designed to prevent or remedy certain major defects in the arbitration proceedings, such as any instance of denial of justice or violation of due process.[26] In addition, the UNCITRAL Model Law provides parties with supplementary rules that are designed to avoid uncertainty about, or controversy over, the smooth functioning of the arbitration proceedings.[27]

UNCITRAL maintains a list of states and jurisdictions that have adopted the Model Law (the so-called "*Model Law countries*"). There are no fixed criteria for a country or jurisdiction to be considered a Model Law country, but generally speaking, the arbitration law of the jurisdiction should include the key elements of the UNCITRAL Model Law and not go against its spirit and purpose.[28] To date, the UNCITRAL Model Law has been adopted in 80 states and in a total of 111 jurisdictions.[29] In addition, the Model Law has set the standard for many other jurisdictions, such as Sweden and Finland, which are not considered as Model Law countries, but which have sought to align their legislations with the premises of the Model Law.

Of the seven most preferred seats listed in the previous section, Hong Kong and Singapore are listed as Model Law countries.

Why Should an Aspiring Arbitral Seat Adopt the UNCITRAL Model Law?

For traditional seats, providing a predictable legal framework to the users of international arbitration is hardly a challenge: these seats have the required reputation and recognition, and their long operating history has often resulted in extensive case law and legal literature, making familiarizing oneself with the legal system and how it is likely to function easy. Achieving a reputation as a predictable and trustworthy seat with a reliable legal infrastructure is, however, a lot more difficult for aspiring arbitral seats that have not yet established themselves as go-to seats in the highly competitive international arbitration market. These jurisdictions tend to have very little or even no case law available to parties for them to forecast the procedural outcome of their arbitration (for example, whether their agreement will be enforced or the proceedings receive the support from the local court system where needed), and where such case law does exist, it is rare for it to be translated into different languages. Familiarizing oneself with an unknown legal regime takes time and incurs cost, and even after extensive investigation, there is the risk of unwanted surprises resulting from local idiosyncrasies. These factors drive users of international arbitration to other, better known, and less risky seats.

The simplest remedy to this problem is to adopt a clear and predictable legislation which is familiar to the users of international arbitration: the UNCITRAL Model Law. This is because, as explained above, the seat's statutory environment must be easily accessible, clear and in compliance with best international practice to attract international arbitrations. The UNCITRAL Model Law serves this purpose, as it provides a "safe and approved" model and a tested structure that parties, or at the least their advisers, are usually familiar with.[30] Potential users may rely on a minimum legislative standard in the adopting state, in contrast to the danger of unwanted legal surprises in an unknown jurisdiction.[31] Indeed, the predictability discussed several times in this article results from the stability, transparency and foreseeability in the application of the national law, which is the very purpose of the UNCITRAL Model Law.

23 For example, as noted in the explanatory note by the UNCITRAL Secretariat, the grounds on which recognition or enforcement may be refused under the UNCITRAL Model Law are identical to those listed in article V of the New York Convention. See UNCITRAL, *Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*, p. 37.

24 UNCITRAL 1981, p. 78.

25 Dias Simões 2014, p. 56.

26 UNCITRAL 1981, p. 78.

27 UNCITRAL 1981, p. 77.

28 Sorieul, Renaud, *UNCITRAL Seminar: The Role of UNCITRAL in International Arbitration,* held on 16 July 2012.

29 UNCITRAL, *Status – UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,* "http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html" (accessed 16 August 2018).

30 Born 2014, p. 138.

31 Binder, Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd Edition, Sweet & Maxwell 2009, p. 13.

Further, while providing a pro-arbitration legal framework, the UNCITRAL Model Law offers countries a low-cost standard to upgrade their arbitration laws. Thus, adopting the UNCITRAL Model Law saves an enacting jurisdiction from "the strenuous and time-consuming task of drafting its own law".[32] In the same vein, the UNCITRAL Model Law remedies to a great extent one of the major issues for countries that do not have a long tradition of hosting international arbitration proceedings, namely, the lack of case law and doctrine. This is because the Model Law has been the subject of a substantial amount of case law and commentary over many years and in many jurisdictions around the world, thus making its application predictable.

As mentioned above, a good example of the UNCITRAL Model Law's power to enhance a seat's reputation can be found in Hong Kong. Hong Kong was the first Asian jurisdiction to adopt the 2006 version of the UNCITRAL Model Law, which it did in 2010, with entry into force in 2011. Before that, Hong Kong's national arbitration law had a split regime under which the UNCITRAL Model Law applied only to international cases.[33] Under the current arbitration law, the Model Law applies to all arbitrations that are seated in Hong Kong, which was designed to enhance foreign parties' and practitioners' confidence in choosing Hong Kong as the seat of arbitration.[34] In addition, the unitary regime should "avoid the often complicated issue of which regime governs a particular dispute".[35] Pursuant to the Consultation Paper prepared by the Department of Justice, an important consideration behind the reform was that "Hong Kong should also be clearly seen as a Model Law jurisdiction as the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings".[36] Overall, the revision of the national arbitration law was met with open arms, and Hong Kong figures today among the most preferred seats (see above). Hong Kong's willingness to be among the first jurisdictions to adopt the revised version of the UNCITRAL Model Law can also be seen as an important message to the international arbitration community of Hong Kong's support for international arbitration.

Adopting the UNCITRAL Model Law does not, however, automatically make a jurisdiction attractive for arbitration. Despite having adopted the UNCITRAL Model Law, some countries, such as Australia and Ireland, have not (yet) been able to become leading arbitral seats.[37] This is because, as shown in the 2015 and 2018 International Arbitration Surveys, there are multiple other factors that affect parties' choice of seat, such as the availability of specialized lawyers at the seat, cultural familiarity, geographical location and the quality of hearing facilities.[38] But it remains that parties wish to avoid the risk of unwanted legal surprises resulting from local idiosyncrasies, and in this regard the UNCITRAL Model Law provides an excellent option.

Why Has Every Jurisdiction Not Adopted the UNCITRAL Model Law and Should an Aspiring Seat Follow that Lead?

As adopting UNCITRAL Model Law provides several advantages, it is noteworthy that many of the world's leading arbitration centers, including France, England, Switzerland, the United States and Sweden, have not adopted the UNCITRAL Model Law but rather each have their own bespoke arbitration law. Adopting the UNCITRAL Model Law has been considered and debated in each of these jurisdictions but, in the end, the legislators have decided in favor of alternative solutions.[39] Several reasons explain their success despite maintaining arbitration laws with local particularities.

First, these jurisdictions have a long tradition in international arbitration and established their position as reputable and well-functioning seats with mature arbitration laws and jurisprudence well before the UNCITRAL Model Law came about. Therefore, they were already predictable and transparent, despite "local idiosyncrasies" that are looked at with suspicion in the legislation of less well-known seats.

Second, some of these jurisdictions provide an even more liberal arbitration law than the UNCITRAL Model Law does. The criticism that some practitioners in these countries have formulated against the UNCITRAL Model Law is that the

32 *Ibid.*

33 The UNCITRAL Model Law has applied to international arbitration in Hong Kong since 4 April 1990.

34 Arbitration Ordinance, Cap. 609, Section 5; Fan,Kun, *The New Arbitration Ordinance in Hong Kong*, Journal of International Arbitration, Volume 29, Issue 6, 2012, p. 717.

35 Fan2012, p. 717; see also, *Report of Committee on Hong Kong Arbitration Law*, 30 April 2003, p. 19.

36 Department of Justice, *Consultation Paper, Reform of Arbitration in Hong Kong and Draft Arbitration Bill*, December 2007, p. 4.

37 See, *e.g.*, Tomkinson, Deborah and Barhoum, Margaux, *Arbitration World International Series: Australian Centre for International Commercial Arbitration Chapter*, Thomson Reuters 2015, p. 28. According to the report, ACICA's caseload shows an increasing number of foreign parties choosing Australian seats. However, there seems to be no evidence that adopting the UNCITRAL Model Law could be identified as the single most influential factor for this increase.

38 2015 International Arbitration Survey, p. 14.

39 Born 2014, pp. 138–139.

law is an overly detailed and conservative basis for national arbitration legislation.[40] Indeed, for instance, the French legislation is more liberal towards international arbitration than the UNCITRAL Model Law and, thus, adopting the Model Law would have decreased its pre-existing "arbitration friendliness". Therefore, in 2011, France reformed its old legislation by, among other things, codifying the international arbitration case law that French courts had been applying since the previous reforms of 1980 and 1981.[41] Thus, the French example does not constitute a valid point of comparison for new, aspiring arbitral seats, as France is, and was at the time of the legislative reform, a well-established arbitral seat with a long tradition of being very arbitration-friendly supported by a long line of arbitration-friendly case law and doctrine.

Conversely, being recognized as a Model Law country by UNCITRAL is important for an aspiring seat,[42] as it sends a similar message of arbitration-friendliness. Thus, adopting the UNCITRAL Model Law without significant changes is a more advisable option for these countries than aiming at drafting an even more liberal and arbitration-friendly legislation. This is because for an aspiring seat of arbitration, international arbitral institutions' and foreign users' perception of the seat's national arbitration law is of utmost importance.[43] And those institutions and users might not be willing to spend an extensive amount of time familiarizing themselves with a new seat's national arbitration law, which may not have much in the way of case law to assist in assessing the predictability of an arbitration seated in that jurisdiction.

Case Study on Finland

Why Arbitrate in Finland?

Finland is a prime example of an aspiring arbitral seat. It has a developed legal culture and is considered a neutral, safe and accessible country. Finland ranked first in World Economic Forum's Judicial Independence Ranking 2017-18, which measures how independent a country's judicial system is from influences of the government, individuals and companies.[44] Finland's high education level and Finns' generally high knowledge of languages – most Finns speak at least Finnish, Swedish and English – contribute to the availability of qualified arbitrators and counsel for arbitral proceedings. In addition, Finland has ratified the New York Convention without any declarations or reservations, as early as in 1962.[45]

The Arbitration Institute of the Finland Chamber of Commerce (the "*FAI*"), established in 1911, is one of the world's oldest arbitral institutions. The FAI has been active in promoting arbitration in Finland: the Arbitration Rules of the Finland Chamber of Commerce (the "*FAI Arbitration Rules*") and the Rules for Expedited Arbitration of the Finland Chamber of Commerce were both revised in 2013 to be fully consistent with the best international norms and practices, and their revision was preceded by a wide consultation of international arbitration practitioners. Finland has an active arbitration community, and the popularity of arbitration-related events seems to grow annually.

Nevertheless, Finland still attracts significantly fewer international arbitrations than, for example, Sweden or Denmark. Indeed, the ICC International Court of Arbitration did not select Helsinki once as the seat of arbitration between 2006 and 2016.[46] Some consider that an important reason for this was the perception of the Finnish national arbitration law being outdated and unpredictable.

Finnish Arbitration Act

Arbitration in Finland is governed by the Finnish Arbitration Act (967/1992, as amended), which entered into force in 1992. The Finnish Arbitration Act applies to all arbitration proceedings seated in Finland, both national and international ones. The Act is influenced by the original text of the UNCITRAL Model Law from 1985, but it is not based on that law. The substantive differences between the UNCITRAL Model Law and the Finnish Arbitration Act relate to their respective scopes of application, their form requirements that apply to the arbitration agreements, challenge of arbitrators, arbitrators' decisions on jurisdiction and interim measures.

Only minor changes have been made to the Finnish Arbitration Act since its enactment. Major amendments to the Finnish Arbitration Act are currently not contemplated,

40 Born 2014, pp. 138–139.

41 Carducci, Guido, *The Arbitration Reform in France: Domestic and International Arbitration Law*, Arbitration International, Vol. 28, No. 1, 2012, p. 125.

42 See Seppälä 2016, p. 209.

43 See Seppälä 2016, p. 198.

44 World Economic Forum, *The Global Competitiveness Report 2017–2018*, "https://www.weforum.org/reports/the global competitiveness report 2017 2018" (accessed 16 August 2018).

45 New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, *Contracting States*, "http://www.newyorkconvention.org/countries" (accessed 16 August 2018).

46 Between 2006 and 2016, the ICC selected Sweden as the place of arbitration 11 times and Denmark as the place of arbitration 10 times over the same period. As noted by Mr. Seppälä, Finnish parties are, however, increasingly involved in ICC arbitration. Seppälä 2016, p. 199.

although discussion about revising the Act is ongoing. This is facilitated by Sweden currently amending its Arbitration Act, as Finland often follows the trends in other Nordic countries. Therefore, it is possible that the Finnish Arbitration Act will be revised in the foreseeable future, especially as the Finnish Arbitration Act is based on the Swedish Arbitration Act to some extent.

Such a revision would be welcome, as there are several parts of the current Finnish Arbitration Act that should be revised.[47] For instance, as the Finnish Arbitration Act is relatively old, certain provisions are clearly outdated and are not consistent with international practice, such as its references to the Finnish Code of Judicial Procedure.[48] In addition, the Finnish Arbitration Act refers to some parts of the Finnish Code of Judicial Procedure that have been revised since the enactment of the Finnish Arbitration Act.[49] Yet, as one authority notes, many of these revised provisions are not suitable for arbitration and, therefore, the provisions of the Finnish Arbitration Act are somewhat troublesome in this regard.[50] Even though Section 49 of the Finnish Arbitration Act includes a reservation that the Code of Judicial Procedure should be applied only "as appropriate", the outdated provisions of the Finnish Arbitration Act cause unnecessary confusion.

The Finnish Arbitration Act also gives rise to unpredictability, as there is very little case law and legal literature in relation to it. For example, pursuant to the FAI Arbitration Rules, arbitrators are allowed to grant interim measures. Yet, the Finnish Arbitration Act does not include any provisions on interim measures granted by an arbitral tribunal. As, at least to these authors' knowledge, there is no case law regarding interim measures granted by an arbitral tribunal in Finland, this leaves uncertainty as to how Finnish courts would deal with such measures granted by an arbitral tribunal seated in Finland.

Should Finland Follow the Swedish Lead?

Even if the FAI has been in operation for a few years longer than the Arbitration Institute of Stockholm Chamber of Commerce (the "*SCC*") (the FAI was established in 1911, whereas the SCC followed in 1917), Finland has been less successful than Sweden in attracting international arbitration proceedings.[51] In 2017, the SCC administered 200 new cases, whereas the FAI received only 79 requests. Parties from 40 different countries chose to resolve their disputes with the SCC in 2017, while parties from only 19 different countries chose the FAI, which thus administered proceedings where a substantial majority of the parties was Finnish.[52]

In 2014, Sweden launched the revision work of its Finnish Arbitration Act, with the aim of increasing Sweden's attractiveness as a venue for dispute resolution, especially for foreign parties and other foreign actors.[53] A committee was given the task of assessing how well the Swedish Arbitration Act has worked in practice and how it measures up internationally. The new legislation was originally supposed to enter into force in July 2016. However, two years later, the revision process is still ongoing.[54] One question that was considered already in 1998, in the preparatory works of the current Swedish Arbitration Act (SFS 1999:116) which entered into force in 1999, was the extent to which it should build on the UNCITRAL Model Law. The deliberations led to the conclusion that the Swedish Arbitration Act should not be directly based on the UNCITRAL Model Law.[55] However, it was considered important to take into account the provisions of the UNCITRAL Model Law in every aspect.[56]

47 See Möller, Gustaf, *Behovet av en översyn av Finlands lag om skiljeförfarande*, JFT 5 6/2015, pp. 408–419. In his article, Mr. Möller does not support adopting the UNCITRAL Model Law in Finland. However, he clearly concludes that various provisions of the Finnish Arbitration Act should be amended to correspond to the UNCITRAL Model Law.

48 See, *e.g.*, Finnish Arbitration Act (967/1992; as amended), Sections 10 and 49.

49 For example, pursuant to Section 49 of the Finnish Arbitration Act, unless otherwise agreed by the parties, compensation of the other party's costs shall be ordered in accordance with the provisions of the Code of Judicial Procedure dealing with compensation for legal costs. However, numerous exceptions to the general rule that "costs follow the event" have been included in the Code of Judicial Procedure since the Finnish Arbitration Act was enacted. See Section 49 of the Finnish Arbitration Act: "*Unless otherwise agreed by the parties, the arbitrators may, in their award or in any other decision concerning the termination of the arbitration proceedings, order a party to compensate, in whole or in part, the other party for his or her costs in the arbitration proceedings, in accordance, as appropriate, with the provisions of the Code of Judicial Procedure on the compensation for legal costs.*"

50 Möller 2015, p. 415.

51 Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Statistics*, "http://www.sccinstitute.com/statistics/", (accessed 16 August 2018); and The Finland Arbitration Institute, *Statistics*, "https://arbitration.fi/fi/2018/02/07/review fais year 2017/", (accessed 16 August 2018). Although the location of the institute does not determine the seat of arbitration, a link between these two factors oftentimes exists. As described by Mr. Fernando Dias Simões, "[i]n the global 'battle of the seats', success is measured by how effective arbitral institutions are in transforming their jurisdiction into a hub for arbitration, where parties are willing to go in case any dispute arises". Dias Simões 2014, p. 73.

52 For FAI cases, 201 out of 234 parties were Finnish, whereas for SCC, 137 out of 307 parties were Swedish.

53 Statens offentliga utredningar, *Översyn av lagen om skiljeförfarande* – SOU 2015:37, Stockholm 2015, p. 11.

54 See Lagrådsremiss, *En modernisering av lagen om skiljeförfarande*, Stockholm 2018, p. 1.

55 Regerings proposition 1998/99:35 Ny lag om skiljeförfarande, Stockholm 1998, p. 43.

56 *Ibid.*

As the Finnish Arbitration Act has been influenced by its Swedish equivalent, the Swedish revision work highlights the need for similar actions in Finland. It is also noteworthy that the current Swedish Arbitration Act dates back to 1999, whereas the Finnish Act was enacted in 1992 – yet, no revision procedure has been started in Finland. Considering the substantial differences in the Swedish and Finnish arbitration tradition and current market, reliance on the Swedish example to avoid adopting the UNCITRAL Model Law in Finland seems, however, unwarranted.

Finland is a prime example of a country that could attract a larger number of international arbitrations but fails to do so presumably in part because of its outdated arbitration law. It is clear that the Finnish Arbitration Act in its current form does not reflect international best practices and, in order to promote arbitration in Finland, the legislation should be modernized. An easy and efficient way to do this would be to adopt the most recent version of the UNCITRAL Model Law without making significant changes.[57]

Conclusion

An attractive, modern, transparent, accessible and predictable international arbitration law is a necessary requirement for any jurisdiction to build a reputation as a reliable and desirable seat of arbitration. This basic element is essential so that other elements become relevant and important, such as institutional rules or hospitality services. Thus, although adoption of a new national arbitration law is not alone sufficient to attract international arbitration proceedings, it is undeniable that national legislation has a big impact on the attractiveness of a seat and an unclear or outdated national law will be a barrier for an aspiring arbitral seat to participate in the highly competitive "Battle of the Seats".

Adopting the UNCITRAL Model Law provides multiple benefits for an aspiring arbitral seat. It is tried and tested and mirrors international best practices in arbitration, making it an attractive option for seats that wish to promote their jurisdiction. Unless exceptional circumstances warrant, an aspiring arbitral seat would be well advised to resist the urge to continue or add local idiosyncrasies to its arbitration law. In fact, many well-established arbitral seats could also gain from losing some of their local idiosyncrasies and aligning their legislation even more with the UNCITRAL Model Law.

57 As described by Mr. Seppälä, adoption of the UNCITRAL Model Law without significant change is necessary in order to optimize the positive perception in the international community. See Seppälä 2016, p. 209.