

## When is a Seat not a Seat?

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The recent English High Court decision in [Atlas Power Ltd -v- National Transmission and Despatch Co Ltd \[2018\] EWHC 1052](#) concerns a number of power purchase agreements entered into by Pakistani independent power producers and the national grid company of Pakistan. It highlights the pitfalls of overly complex drafting in an arbitration agreement and the importance of clearly specifying the seat of arbitration.

The key points arising from the decision are:

1. It is the seat of arbitration that determines the curial law of the arbitration, not the governing law of the contract.
2. The choice of the seat of arbitration is akin to an exclusive jurisdiction clause in favour of the courts of the place designated as the seat of the arbitration having the supervisory role over the arbitration.
3. The English courts can and will use their powers to grant anti-suit injunctions to prevent a party from commencing foreign proceedings in breach of an arbitration agreement.
4. Complex drafting increases the risk of satellite litigation and the accompanying delay and expense.

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### Case Summary

#### Who were the parties?

National Transmission and Despatch Co Ltd ("**NTDC**") is the national grid company of Pakistan and is owned by the Pakistani government. Between 2006 and 2008, a number of Pakistani independent power producers (the "**IPPs**") entered into power purchasing agreements (the "**PPAs**") with NTDC. Each PPA was governed by Pakistani law and contained an arbitration clause.

#### What did the arbitration clause provide?

The arbitration clause provided that all disputes should be settled by arbitration in accordance with the London Court of International Arbitration ("**LCIA**") Rules. By attempting to provide for

various threshold scenarios, the clause became inherently complex.<sup>1</sup> Specifically:

1. It started by providing that the “*arbitration shall be conducted in Lahore, Pakistan*”.
2. It then stated that if the value of the dispute was above a certain threshold or fell within a certain category, either party could require that the arbitration be conducted in London.
3. Finally, the clause provided that, notwithstanding the previous sentences, either party may require that the arbitration of any dispute be conducted in London, provided that if the dispute did not satisfy the threshold or category requirements set out earlier in the clause the referring party would pay the costs of the arbitration incurred by the other party in excess of the costs that would have been incurred had the arbitration taken place in Pakistan.<sup>2</sup>

#### **What was the dispute about?**

The dispute concerned the sums owed by NTDC to the IPPs. The IPPs commenced LCIA arbitration proceedings claiming a declaration that the result of an expert determination concerning those sums was final and binding and seeking an order that NTDC pay the amount specified in the declaration. The IPPs designated London as the seat of the arbitration on the basis that the value threshold in the arbitration clause had been exceeded.

In its response to the request for arbitration, NTDC stated that the IPPs were not entitled to select London as the seat of the arbitration. It asserted that the purpose of the option in the arbitration agreement was to determine the venue of the arbitration, not its seat, and that the seat was Lahore, Pakistan.

The IPPs disagreed, but pointed out that if NTDC’s argument was correct, the parties had not in fact agreed any seat and that, in those circumstances, the seat would be London pursuant to Rule 16.1 of the LCIA Rules 1998.

A number of hearings in the Pakistani courts took place concerning whether or not the parties could participate in the arbitration. NTDC considered that it was prevented from participating in the arbitration due to interim orders that had been granted in Lahore. However, the arbitrator decided that it was appropriate to proceed and a partial final award was delivered (the “**Partial Final Award**”). It made a number of findings, including that the seat of the arbitration was London.

NTDC commenced proceedings in the English High Court challenging the Partial Final Award under section 68 of the English Arbitration Act 1996 (the “**Act**”). It claimed that there had been a serious procedural irregularity. However, the challenge was discontinued the same day. The following day NTDC filed a claim in the Pakistani courts challenging the Partial Final Award.

The IPPs commenced proceedings in the English High Court seeking an anti-suit injunction preventing NTDC from challenging the Partial Final Award by way of proceedings in any jurisdiction other than England and Wales.

#### **What was the key issue for the court to decide?**

There were two key issues for the court to decide:

1. Whether the parties had validly and lawfully chosen London as the seat of the arbitration; and
2. Whether, in light of Pakistani law (which was the law governing the PPAs), the choice of London as the seat of arbitration did not result in the English courts having exclusive supervisory jurisdiction with the effect that the courts of Pakistan had at least concurrent jurisdiction.

**What was the result?**

In relation to whether London was the seat of the arbitration, Mr Justice Phillips found as follows:-

1. The seat of arbitration had been designated as London in accordance with Section 3 of the Act.
2. Even if NTDC had an argument to the contrary, it had not mounted a timely challenge to the relevant decisions and awards.
3. Consequently, NTDC could not resist the anti-suit injunction on the basis that the seat of arbitration was not London.

In relation to whether the courts of Pakistan had concurrent jurisdiction with the English courts, Phillips J:

1. Found that it is the seat of arbitration that determines the curial law of the arbitration, not the governing law of the contract. He agreed with previous authority that the choice of the seat of an arbitration is akin to an exclusive jurisdiction clause in favour of the courts of the place designated as the seat of the arbitration having the supervisory role over the arbitration; and therefore
2. Rejected NTDC's contention that the courts of Pakistan had concurrent supervisory jurisdiction. He explained that the alternative would result in an unsatisfactory situation where more than one jurisdiction could entertain challenges to an award.

Consequently, Phillips J granted the final anti-suit injunction sought by the IPPs.

**What conclusions can be drawn from this case?**

This case illustrates how overly complex drafting in an arbitration clause can lead to satellite litigation and jurisdiction challenges. Had a clear choice of one seat been made, this dispute might never have found itself in the English courts.

It also highlights the importance of choosing an appropriate seat, understanding the implications of that choice, and the need to challenge decisions and awards in a timely fashion and in the correct forum.

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