Commentary

How To Select The Best Seat For Your International Arbitration — The Case For The United States

By
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[Editor's Note: The Honorable William G. Bassler has more than 40 years of dispute resolution experience. He served for 15 years in U.S. District Court, District of New Jersey. In addition, he served three years on the Superior Court of the State of New Jersey and was in private practice for 23 years. During his distinguished legal career, Judge Bassler has presided over, ruled on, arbitrated, and been involved with virtually every type of complex case. At JAMS, he is frequently called upon to resolve business/commercial disputes. He may be reached at wbassler@jamsadr.com or 212-751-2700.

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As the use of international arbitration continues to grow, more attorneys and their clients are faced with multiple options in choosing the best place in which to arbitrate an international dispute. The United States continues to be a viable and preferable option for many parties in international arbitration. Two resolution experts from JAMS, the largest private mediation and arbitration provider in the United States, Hon. William G. Bassler, Ret. and Robert B. Davidson, Esq., provide some helpful tips for parties who are looking for the best places to arbitrate and discuss the advantages of arbitrating in the United States.

Lex Arbitri vs. Lex Causae

The "seat," sometimes called the "juridical seat" or the "place," of the arbitration is the place designated by the parties in their contract as the place where the arbitration is to occur. Under most institutional rules, the actual hearings might occur elsewhere.[1]

The choice of the seat is important in an international arbitration because its law — often called the *lex arbitri* or the *lex fori* — will be the procedural law deemed applicable to the arbitration. By contrast, the rights and obligations of the parties will be governed by the substantive law applicable to the dispute. That law — called the *lex causae* — is often found in a choice of law clause contained in the parties' contract. Absent such a choice of law provision, the *lex causae* is the law ultimately selected for application by the arbitrators. The *lex causae* could be, but most often is not, the same as the *lex fori*.

The seat of the arbitration is critical in many ways. Under Article V.1.(e) of the New York Convention, for example, the losing party may defend against the winner's attempted enforcement of the award by having the award set aside or suspended "by a competent authority of the country in which, or under the law of which, that award was made."

The local law applicable in the place of arbitration may also become important in various ways. For example, it may play a determinative role in the context of preliminary relief. If one party needs a local court to grant a preliminary remedy (or a local court to enforce a preliminary remedy awarded by an arbitral Tribunal), the availability of such a remedy may be dependent upon the law of the place of arbitration.

Local law may also govern the issuance of subpoenas or other compulsory process for the appearance of third party witnesses, or may ultimately determine questions of arbitrability. Who, for example, a court or an arbitrator, determines whether a statute of limitations applies to bar a claim that a party seeks to arbitrate?[2]

Legal Considerations In Choosing A Seat

Most parties consider it important in selecting a seat for the arbitration that a place be chosen that has a judicial system that is free from corruption; that has an arbitration regime that permits no interference in the process itself; and that generally upholds awards that are rendered in its jurisdiction. The United States, the U.K., France, The Netherlands, Germany, Switzerland, Sweden, Canada, Australia and Hong Kong, even with its close connection with China, are popular venues because they enjoy reputations as jurisdictions favorable to arbitration and where awards are rarely set aside.[3]

Non-Legal Reasons For Choosing A Particular Seat

There are also non-legal reasons why some places are better than others. Questions that a contracting party should ask include: What place offers to you and your team the best logistics? What is the availability of hotels? Will they accommodate your needs? Will you have easy access to videoconferencing facilities, copying facilities, court reporters? While all of this may seem obvious at first glance, in fact in some countries these facilities may not be readily available. For example, finding English language court reporters in some places in Europe outside of the UK at a reasonable cost can sometimes be a challenge.

The United States As A Preferable Seat

Our experience has shown that New York, Washington, D.C., Houston, Miami, Chicago, Los Angeles and San Francisco are all contenders for the conduct of international arbitrations in the United States. Of these, New York is clearly the most popular venue although Miami is the choice for Latin American arbitrations and Houston has its share of oil and gas disputes. Washington, of course, is the place for investment disputes administered by ICSID. New York appears at the top of the list for many of the non-legal factors listed above. New York substantive law is also often selected as the *lex causae*, especially in share purchase or merger agreements. New York is also a hospitable place for financial disputes. The NASD has its headquarters in New York, as does virtually every U.S. based investment bank.

Local New York State law is also hospitable to international arbitrations. Perhaps the last qualification to that statement was resolved when the New York legislature amended CPLR Section 7502(c) in 2005. Prior to the amendment, New York state courts did not permit a party to obtain a provisional remedy in aid of an international arbitration. In denying litigants such remedies, the state courts in New York relied upon an interpretation of the New York Convention at odds with that of most other courts that had considered the issue. This resulted in a precedent, *Cooper v. Ateliers de la Motobecane, S.A., 57 N.Y.2d 408,442 N.E.2d 1239 (1982)*, that declared that New York state courts were powerless to grant provisional remedies in aid of an international arbitration. By contrast, the federal courts in New York routinely issued injunctions in aid of international arbitration. The New York state rule, however, precluded any New York court (state or federal) from issuing an order of attachment in aid of an international arbitration. Further, the existence of two different rules relating to equitable relief made the process uncertain. That changed in October 2005 when New York enacted an amendment to the CPLR overruling *Cooper* and expressly enabling all courts in New York to entertain applications for preliminary remedies in aid of an international arbitration.

The United States Vs. Other Seats

Realistically, there are pluses and minuses with any seat. Considerations of cost can be quite important as international arbitrations are getting longer and more complex. Those considerations now militate for the choice of a U.S. forum. The U.S. dollar is now quite affordable in terms of other major currencies, and the fees for administering an international arbitration charged by provider organizations such as JAMS or

the ICDR can compare quite favorably with those charged by their European counterparts. Providers such as JAMS are also known to furnish high quality administration and case management.

When considering the best seat for arbitration, attorneys need to make other qualitative judgments. Some historical providers can be slow in impaneling arbitrators. After a Request for Arbitration is filed, it could easily be three months before a panel is in place. One of the competitive advantages is that providers in the U.S. like JAMS offer advantages of speed.

There is a concern about a U.S. forum, however, and that concern involves the fear of intrusive discovery. U.S. style discovery is understandably suspect outside of the United States, and parties use this concern as a reason not to arbitrate in the United States, thinking that arbitrating in the U.S. will only serve to encourage discovery. This, however, is not necessarily true. Attorneys should not be overly concerned about encouraging U.S. style discovery if they select a U.S. forum. It is our experience that international arbitrators act with remarkable consistency no matter where they are sitting. The IBA Guidelines are generally used. Indeed, it is more important who the arbitrators are than where the arbitration is being conducted. Common law lawyers tend to have a more liberal view of discovery than their civil law counterparts.

Many of the concerns about discovery, however, can readily be addressed by inserting appropriate language into the pre-dispute arbitration agreement. For example, the clause might include the following: "Discovery will last no longer than 60 days from the date the arbitrators are appointed. Document discovery will be limited to one request from each side for directly relevant documents. No depositions will be permitted. The hearing will take no longer than six days with time divided equally and so on. . . ." In short, there are ways to control time and costs in arbitration while ensuring a fair and informed process.

Ironically, choosing a U.S. forum might ensure less discovery than a proceeding outside of the United States. A statute in the U.S., 28 U.S.C. 1782 permits a federal court to order extensive discovery within the United States to assist a foreign or international tribunal. That statute has recently been interpreted to include assistance to an international arbitration tribunal. By contrast, U.S. courts rarely, if ever, get involved in discovery (or other) issues in a pending arbitration that is occurring within the United States. Thus, parties may achieve greater discovery — certainly against third parties — in the context of an international arbitration outside of the U.S. than they could if the arbitration was being conducted in the U.S.

Enforcement Of Arbitration Awards In The United States

Not surprisingly the specific procedures in the United States for enforcing international arbitration awards ensure speed and efficiency. The practice of converting an international arbitration award into an enforceable judgment is neither complex nor time-consuming. The U.S. federal courts have original jurisdiction of such proceedings as they arise under the New York Convention. This ensures knowledgeable, as well as impartial, decision-makers.

As a practical matter awards are rarely set aside. The doctrine of "manifest disregard of law" so often discussed in the United States is rarely invoked successfully and, in any event, cannot form a basis for setting aside an award unless the arbitration was conducted in the United States. Further, we are not aware of any case in which an international arbitration award was overturned by a U.S. court as contrary to public policy pursuant to Article V.2.(b) of the New York Convention.

Perhaps most importantly, the U.S. economy is large and diverse. It is often likely that parties to an international arbitration will have assets in the form of receivables or otherwise located in the U.S. Thus, if eventual enforcement is a concern, a U.S. forum may assure efficiency in the collection of a favorable award.

Envisioning The Worst Case Scenario And Picking The Appropriate Seat

Attorneys and their clients often try to envision what disputes might look like down the road. This is how they determine what their pre-dispute arbitration clauses will look like and how they select the seat of arbitration.

In-house attorneys should solicit the advice of outside counsel experienced in international arbitra-

tion. Such counsel will identify the types of disputes that may arise, which in turn should engender a lot of questions. What does the business relationship entail? Where are the potential minefields? Who is going to be holding the money? If the deal goes sour, which side is likely to initiate litigation? And where? What kind of dispute will it be? What are the available remedies? Will a letter of credit likely be dishonored? If a container arrives filled not with product but empty boxes, can the letter of credit be stopped? Was product delivered that was not ordered? All of these and more are questions and issues that need to be discussed.

The answers to these and other questions will dictate not only the choice of law to govern the transaction but the forum in which to arbitrate the dispute.

Conclusion

In sum, in determining where to arbitrate the first thing to insist upon is that the place under consideration be a country that is a signatory to the New York Convention. The second consideration is whether the country has a friendly arbitration regime. That is one that will not tamper with an award once it is made or interfere with the process while it is underway. The third consideration is to ensure that the seat has the logistical support for the effective and efficient resolution of complex disputes that an international arbitration generates. Finally, it is important to consider whether the chosen arbitration provider has an office, a Resolution Center, or other place to conduct the arbitration. Anyone with experience of using a hotel as an arbitral arena knows how awkward and inconvenient it can be. As important as the legal considerations are, these non-legal factors and others such as easy access and the availability of hotel and logistical facilities for attorneys, executives, witnesses and experts are also critical.

The United States measures up well to all of these criteria. But it also offers something more: an environment conducive to the mutual and cost effective resolution of disputes with trained and experienced arbitrators.

Endnotes

1. See Article 14(2) of the ICC Rules of Arbitration, which provides: "The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties."

2. See, e.g., *New York's Civil Practice Law and Rules, Section 7502(b)*: "Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court. . . ." There is an interesting interplay, of course, between CPLR Sec. 7502(b) and those cases governed by the Federal Arbitration Act. The latter apply a different rule. See, *Howsam v. Dean Witter Reynolds, Inc. 537 U.S. 79 (2002).*

3. A word about nomenclature is in order. The New York Convention applies "to the recognition and enforcement of arbitral awards" (Art. 1.1.). Thus, an arbitration award is "recognized and enforced" in a Convention country like the United States or — in accordance with Article V.1.(e) quoted above — is "set aside." The words "confirm" and "vacate" are terms used in the Federal Arbitration Act and in state statutes in the United States to refer to analogous concepts. Correctly, however, a Convention award — even in the United States — is granted recognition and enforcement, not confirmed; or it is set aside, not vacated. ■