The battle of the seats: Paris, London or New York?

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One of the most important factors of any international arbitration is the location of the seat, or legal place, of arbitration. Paris, London and New York have traditionally been three of the most popular seats for international arbitration. This article examines the pros and cons of choosing London, Paris or New York as a seat of international arbitration.

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One of the most important factors of any international *arbitration (www.practicallaw.com/4-107-6426)* is the location of the seat, or legal place, of arbitration. The seat usually determines, among other things:

- The procedural law of the arbitration.
- Which courts will have supervisory jurisdiction over the arbitration.
- The nationality and scope of review of the arbitral award.

Paris, London and New York have traditionally been three of the most popular seats for international arbitration. The seat may also influence the nationality of the chair of the arbitral tribunal, especially if the chair is institutionally appointed. Recent developments in all three centres have enlivened the debate as to which of these seats is preferable. But does one seat really trump the others? This article considers the legal framework, court system and practical aspects of Paris, London and New York as seats of international arbitration.

Paris

Paris has historically been one of the main arbitration hubs in the world. This is notably due to the fact that Paris has been the home of the Court of Arbitration of the *International Chamber of Commerce (www.practicallaw.com/8-201-5878)* (ICC) since its founding in 1923. The ICC has announced that it intends to maintain its headquarters in Paris.

While the presence of the ICC has certainly been a favourable factor, France has also fostered a consistently pro-arbitration policy, reflected in the advantageous legal framework and arbitration-friendly court system. Combined with efficient and complete arbitration facilities, as well as a large pool of competent professionals, these salient features make Paris one of the leading arbitration forums in the world.

Legal framework

Since the 1930s, France has provided a favourable legal framework for arbitration. The major source governing international arbitration, a succinct Decree enacted in 1981, was complemented by many innovative decisions of the French courts. While French law was among the most modern arbitration laws in the world, this reliance on case law also made some of the provisions difficult to understand for non-specialists.

This is one of the reasons why France reformed its arbitration law in 2011, codifying the rules that were previously based on case law and enhancing the clarity and predictability of its provisions (see *Legal updates, French arbitration law comes into force (www.practicallaw.com/1-505-9240)* and *The new French international arbitration law (www.practicallaw.com/9-504-7007)*). For instance, the new article 1447 of the French Code of Civil Procedure (Code) now expressly provides that arbitration agreements are independent and severable from the underlying contract, while this rule previously derived from case law only. Similarly, article 1466 now states that a party is prevented from raising irregularities in the arbitral process at the enforcement or annulment stages, if it failed to do so before the arbitral tribunal.

France's updated legal framework also innovates on several aspects, providing flexibility to the parties and improving the overall efficiency of the arbitral process. For example, under article 1526, awards are now provisionally enforceable as soon as they are granted *exequatur* and any challenges to the award (such as annulment proceedings or appeal against the *exequatur* order) do not stay a party's right to enforcement. However, a party remains free to apply to the French courts to request the suspension of the provisional enforcement, but this suspension should only be granted in exceptional circumstances. In addition, article 1522 provides that the parties are now entitled to waive their right to challenge an award rendered in France by way of annulment. These measures help to avoid dilatory actions before the courts after an award has been rendered.

Court system

The French judiciary has traditionally been supportive of the arbitral process. This is, in part, due to the fact that all arbitration matters are referred to specialised sections, exclusively dedicated to arbitration within three major courts:

- Paris First Instance Court.
- Paris Court of Appeals.
- Court of Cassation.

This guarantees that any action in connection with an international arbitration will be tried by specialised judges, resulting in predictable decisions. The evolution of French arbitration law has been shaped by innovative decisions of these specialist arbitration judges, who have consistently given deference to the finality and efficiency of arbitration in issuing their decisions.

These ideas were confirmed in a February 2011 decision of the Paris Court of Appeals in relation to the award in *Dallah Real Estate and Tourism Holding Company v Government of Pakistan*. In an unusual turn of events, both the English and French courts were asked to decide, under the same applicable law (French), whether the Government of Pakistan was bound by an arbitration agreement entered into by Saudi company, Dallah, and a trust constituted by Pakistan. Dallah argued, in essence, that because the Government of Pakistan had directly negotiated the agreement and had signed it on behalf of the trust, it was a party to the arbitration clause it contained.

This argument was accepted by the ICC tribunal hearing the case, but later rejected by the UK Supreme Court at the enforcement stage (*Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan [2011] UKSC 46*, discussed in *Legal update, Dallah Supreme Court decision: full update (www.practicallaw.com/3-503-8421)*).

In an application by Pakistan to set aside the award in France, the Paris Court of Appeals held that the arbitral tribunal had validly decided that Pakistan was a true party to the arbitration agreement (*Gouvernment du Pakistan v Société Dallah Real Estate & Tourism Holding Co, Cour d'Appel de Paris, Pôle 1: Ch 1, no 09/28533*, discussed in *Legal update, Paris Court of Appeal upholds ICC award in Dallah case (www.practicallaw.com/4-504-9971)*).

This decision confirms the pro-arbitration stance of the French courts, which is intended to give full effect to the parties' intent (express or tacit) to submit their disputes to arbitration. It follows the pro-enforcement stance of the Court of Cassation in the *Hilmarton* and *Putrabali* cases, which held that, under French law, the fact that an arbitral award has been set aside in the country in which it was made does not bar its recognition and enforcement in France.

Furthermore, because the sections of French courts in charge of arbitration matters are specialised in this particular area of law, they are used to dealing with such matters and are well-prepared to handle requests of parties seated in France (for example, regarding interim measures, constitution of the tribunal and the like). In this regard, article 1505 of the Code provides that all procedural requests in international arbitrations are to be submitted to the same judge (the President of the Paris First Instance Court).

Practical considerations

Paris offers a comprehensive set of facilities for conducting arbitrations. The ICC Hearing Centre, which opened in 2008, includes several state-of-the-art hearing rooms, specifically designed for arbitration and other forms of alternative dispute resolution.

In addition, Paris is home to many competent legal professionals operating in the field of arbitration, from various backgrounds and nationalities. Parties choosing Paris as their seat of arbitration have access to a wide variety of specialised lawyers, arbitrators and related support professionals (such as interpreters, translators and

court-reporters). By contrast with other large arbitration centres, the Paris legal market is also less concentrated. In addition to the large international full-service law firms that traditionally handle arbitrations, there are also various boutique law firms that specialise in arbitration, thereby encouraging competition and reasonable costs.

London

According to the 2010 Queen Mary, University of London and White & Case LLP International Arbitration Survey, London is the most preferred seat of international arbitration among corporate users. Some of the main reasons parties preferred London were:

- Its reputation as a neutral and impartial jurisdiction.
- The prevalence of English law as a governing law.
- The large pool of specialist lawyers (solicitors, barristers and arbitrators).

(See *Legal update, QMUL 2010 International Arbitration Survey: choices in international arbitration (www.practicallaw.com/1-503-5329)*.)

London is also home to the *London Court of International Arbitration (www.practicallaw.com/0-205-6434)* (LCIA), a well-respected and frequently used arbitration institution.

Legal framework

The legal framework for any arbitration seated in London is the Arbitration Act 1996 (the 1996 Act). The 1996 Act is a modern arbitration law passed after a long period of consultation dating back to the publication of the UNCITRAL *Model Law (www.practicallaw.com/7-205-6044)* on International Commercial Arbitration (the Model Law) in 1985.

The 1996 Act provides a detailed procedural code setting out both the powers of arbitral tribunals and the powers of the courts to supervise and support the arbitral process. In the 15 years since it was enacted, a significant body of case law interpreting the provisions of the 1996 Act has also developed. English arbitration law is thus modern, relatively self-contained, stable and predictable. It is common practice for parties in certain industries (for example, insurance and reinsurance) to agree to *ad hoc arbitration (www.practicallaw.com/5-107-6360)* under the 1996 Act instead of agreeing to institutional arbitration (such as under the LCIA or ICC Rules).

The 1996 Act implements the vast majority of provisions in the Model Law (which has itself been enacted in over 60 jurisdictions worldwide), though there are certain minor differences. For example, where the parties fail to determine the number of arbitrators, the Model Law defaults to three arbitrators, whereas the 1996 Act defaults to a sole arbitrator. The 1996 Act also contains certain procedural tools not contained in the Model Law. For example, section 66 provides that arbitral awards rendered by a tribunal seated in England may, by leave of the court, be enforced in the same manner as a judgment or order of the court.

One of the more distinctive features of the 1996 Act is that section 69 preserves a limited right of appeal to the English court on a question of law arising out of an arbitral award. This is sometimes used as a basis for stating that London is less "arbitration-friendly" than competing jurisdictions. However, section 69 is a non-mandatory provision that will not apply where the parties have agreed to exclude any right of appeal (and an appeal can only be made with the permission of the court). Most major sets of arbitral rules contain a provision whereby the parties agree to waive any right of recourse against the arbitral award, which has the effect of excluding any right of appeal under section 69 (*Lesotho Highlands Development Authority v Impregilo SpA and others [2005] UKHL 43*).

Court system

Any arbitration-related application to court will typically be made in the Commercial Court or Technology and Construction Court in London and will, therefore, be heard by a judge who has specialist experience of international arbitration (generally, the judges will have been leading *Queen's Counsel (www.practicallaw.com/6-508-1192)* at the commercial bar before their appointment).

The attitude of the English courts can be described as "pro-arbitration". For example:

- Arbitration clauses are construed liberally, starting from the presumption that "the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" (*Premium Nafta Products Ltd and others v Fili Shipping Company Ltd [2007] UKHL 40*, discussed in *Legal update, Fiona Trust: House of Lords uphold Court of Appeal (www.practicallaw.com/8-378-7347)*). This reduces the possibility of satellite litigation.
- Except where constrained by EU law (see *Allianz and another v West Tankers Inc [2009] EUECJ Case C-185/07*, discussed in *Legal update, West Tankers ECJ judgment: full report (www.practicallaw.com/5-385-0043)*), the English courts will routinely issue anti-suit injunctions to prevent litigation being brought in violation of an arbitration agreement (for example, *The Angelic Grace [1995] 1 Lloyds Rep. 87*).
- The English courts will typically uphold the validity of arbitration agreements even where disputes involve elements of public policy (for example, *Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855*, discussed in *Legal update, Court of Appeal upholds decision that unfair prejudice allegations may be arbitrable (www.practicallaw.com/9-507-0366)*).

The doctrine of *Kompetenz-kompetenz (www.practicallaw.com/4-205-6045)* (that is, that an arbitral tribunal can determine its own jurisdiction) is accepted by the English courts, but any such determination is ultimately subject to review by a court on an application to challenge an award (under section 67 of the 1996 Act) or to enforce an award under the New York Convention. It was on this basis that the English courts refused to

enforce the award in *Dallah*. Although arguably reconcilable, the *Dallah* decisions do illustrate a tendency of the English courts to subject arbitral awards to more detailed scrutiny than the French courts.

Practical considerations

London is a major hub for international business and travel, as well as being home to many of the world's largest international law firms. Facilities for hearings can be easily arranged at the purpose-built International Dispute Resolution Centre on Fleet Street. Many law firms, hotels and barristers' chambers can also accommodate large arbitration hearings.

London is often perceived to be an expensive place to arbitrate. While it remains true that legal fees in the London market can be relatively high, the comparative weakness of sterling against the Euro and US dollar since 2008 mean that London may no longer be significantly more expensive than New York or Paris.

New York

New York is the main arbitration centre in North America. It has long been an established place of arbitration for commercial and financial disputes, as well as disputes in the maritime and insurance sectors. New York is also emerging as one of the preferred seats of arbitration for disputes with a Latin America nexus. By some accounts, almost a third of international arbitrations taking place in New York involve Latin American parties or projects.

Legal framework

The law governing international arbitration in New York, while broadly consistent with international practice, is sophisticated and complex, and may appear daunting to foreign lawyers. It consists of:

- The *Federal Arbitration Act (www.practicallaw.com/6-501-6615)* (FAA).
- New York's Civil Procedure Law and Rules.
- The *New York Convention (www.practicallaw.com/6-205-5196)* 1958.
- A considerable body of case law that interprets these sources.

The key consideration for foreign parties contemplating New York as a seat of arbitration, however, is that courts in New York consistently interpret the legislative framework governing arbitration in a liberal way and as articulating a strong pro-arbitration policy, especially in international transactions. As explained by the highest federal court in New York, "federal policy strongly favors arbitration as an alternative dispute resolution process" and that "[t]he policy in favor of arbitration is even stronger in the context of international business transactions" (*David L Threlkeld Co, Inc v Metallgesellschaft Ltd (London), 923 F.2d 245, 248 (2d Cir. 1991)*).

Foreign parties are sometimes concerned that New York arbitration law diverges from international practice. While there are a few divergences, their practical significance is minimal and often over-stated. A first reputed divergence concerns issues of arbitral jurisdiction. While international arbitrators are ordinarily empowered to decide issues regarding their own jurisdiction (*Kompetenz-kompetenz*), the New York (and US) courts consider that questions of arbitral jurisdiction are for the courts and not the arbitrators to decide, unless there is "clear and unmistakable" evidence that the parties intended otherwise. The point is mostly of academic interest, however, as in practice New York courts are liberal in finding the required evidence of intent: an agreement to submit "any and all controversies" to arbitration suffices, as does the standard language regarding arbitral jurisdiction found in the main international arbitration rules. Even when no such evidence of intent is found, the difference is merely one of timing, as courts in Paris and London will also ultimately review for themselves questions of arbitral jurisdiction, but will do so post-award rather than pre-arbitration (as is the case in the US).

A second reputed peculiarity of New York law concerns review of arbitral awards. While arbitral awards may not be reviewed for errors of fact or law, New York courts have historically recognised an implied ground of annulment (*vacatur*) where an award is rendered in "manifest disregard of the law", thus allowing some review of arbitral awards on the merits. The continuing existence of the manifest disregard of the law doctrine as an independent ground for *vacatur* has, however, been called into question by the US Supreme Court in *Hall Street Associates, LLC v Mattel, Inc, 552 U.S. 576 (2008)*. In any event, courts have made clear that an arbitral tribunal's interpretation and application of the law is not subject to review and that a party challenging an award on this basis bears the heavy burden of showing that both:

- The arbitrator knew of a governing legal principle yet chose not to apply it.
- That legal principle was well-defined, explicit, and clearly applicable to the case.

Courts in New York have vacated awards on this basis in exceedingly rare circumstances.

A third reputed peculiarity of New York law is the availability of class arbitrations, brought by one or several representative claimants on behalf of a full "class" of claimants situated in like circumstances. This topic has been the subject of much controversy in recent years, but is now essentially a dead letter, absent specific consent of the parties. In two recent decisions, the US Supreme Court has significantly limited the scope of class arbitration. In *Stolt-Nielsen SA, et al v Animalfeeds International Corp, 2010 WL 1655826 (U.S. Apr. 27, 2010)*, the Supreme Court held that an arbitration agreement, absent specific language, could not be read as constituting consent to class arbitration (see *Legal update, Supreme Court rules class arbitration is unavailable when agreement is silent (www.practicallaw.com/7-502-2201)*). In *AT&T Mobility v Concepcion, 563 U.S. No. 09-893 (2011)*, the Supreme Court confirmed that this was the case even where some mandatory laws (especially in the consumer context) prohibit contractual waivers of the right to resolve disputes in class proceedings (see *Legal update, Supreme Court holds that Federal Arbitration Act preempts California rule on unconscionability: full update (www.practicallaw.com/6-506-3094)*).

New York sometimes suffers from the erroneous perception that, by agreeing to arbitrate there, parties might be taken to have agreed to adopt US-style litigation practices, such as extensive discovery and large punitive damages awards. Courts and arbitrators in New York are aware of the expectations of parties to international arbitrations, and have repeatedly held that, by choosing to arbitrate, parties opt for a less-formalistic dispute resolution process. Arbitrators in New York routinely draw inspiration from international sources in making decisions, such as the *IBA Rules on the Taking of Evidence in International Arbitration (www.practicallaw.com/4-502-4254)*.

In a further effort to guarantee compliance with international practices, the New York State Bar Association has recently published *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations*. If any concerns remain with respect to US litigation practices, these can always be addressed explicitly in the arbitration clause.

Court system

New York courts, like their counterparts in London and Paris, are available to assist international arbitral proceedings seated in New York, such as by appointing arbitrators in case of default or ordering provisional remedies (for example, interim injunctions and attachments of assets).

In contrast to London and Paris, New York courts have the authority to enforce arbitration agreements. At the request of a party to a valid arbitration agreement, in addition to staying court proceedings brought in breach of an arbitration agreement, a New York court may compel the other party to arbitrate a given dispute (*section 4, FAA*). A party disregarding such an order commits a contempt of court. Like their counterparts in London, New York courts also have the authority to issue anti-suit injunctions and enjoin parties from commencing or continuing proceedings in the US or abroad in breach of an arbitration agreement.

Matters relating to international arbitrations seated in New York are ordinarily heard by the federal courts in Manhattan, namely, the US Court for the Southern District of New York and the US Court of Appeals for the Second Circuit. The federal judges in New York are senior members of the legal profession who are widely respected for their commercial experience and acumen, and can be trusted to render independent, no-nonsense decisions. Over the years, they have proven to be highly supportive of international arbitration.

Practical considerations

New York offers all the facilities and infrastructures required to conduct international arbitration proceedings. As a major financial centre and the home of the United Nations, New York is an international travel hub with world-class hotels and conference centres. Support services, such as document management, transcription and translation services, are readily available at any time of the day, and anecdotal evidence suggests that the "City that Never Sleeps" may have an edge over London and Paris in this respect.

New York is also home to many international arbitration specialists, both arbitrators and counsel, practising in many languages. Some of the largest international law firms are headquartered in New York, as are prominent arbitral institutions, such as:

- The *American Arbitration Association (www.practicallaw.com/5-205-6417)* and its International Centre for Dispute Resolution (by some metrics the busiest arbitral institution in the world).
- The International Institute for Conflict Prevention and Resolution (CPR).
- JAMS.
- The Society of Maritime Arbitrators.

One facility that New York currently lacks is a permanent hearing centre dedicated to international arbitrations. However, the New York City Bar Association recently endorsed a proposal to establish such a hearing centre in New York.

Conclusion

It is evident from the above that each of these traditional centres of arbitration ticks all the main boxes required for a good seat of arbitration. Interestingly, this is despite the fact that not one is a Model Law jurisdiction. Of the three cities, Paris is perhaps doing the most to re-invent itself with innovative enhancements to its national arbitration law. Both London and New York, in part relying on their positions as world financial and commercial hubs, with widely-adopted and predictable governing laws, remain popular seats for users of international arbitration. In recent years, London has seen a noticeable increase in arbitrations involving Eastern European and Russian parties, while New York has experienced an uptick in arbitrations involving Latin American parties. The competition is heating up, and whether any of these cities steals a march on the others and asserts itself as the dominant seat of international arbitration remains to be seen.

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