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A Neutral's Perspective on "Seating" International Arbitration Proceedings in the U.S.

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Parties negotiating international commercial deals often leave any discussion of an arbitration clause to the end. Whether they use an "off the shelf" clause provided by an arbitration service or prepare their own clause, they will need to designate the place, or as referenced in this article, the "seat," of any arbitration. When is the United States a suitable seat?

The international arbitration framework

Proceedings to enforce international agreements to arbitrate and/or to confirm, enforce or vacate arbitral awards typically occur within the framework created by the 1958 New York Convention, which has been adopted by 173 countries. If the Convention applies, a signatory nation is bound—subject to a few exceptions—to enforce international arbitration agreements and recognize arbitration awards made in other signatory nations.

The seat of arbitration is the jurisdiction in which an application to compel arbitration will typically occur. Likewise, it is the venue with primary jurisdiction over an application to confirm or vacate an award. Instead of designating the physical location of any arbitration hearings, the seat of arbitration refers to the legal or juridical home of the arbitration proceeding. Thus, it may or may not be the location of any evidentiary hearings. In fact, it is not necessary that hearings be physically convened at the place of arbitration.

Under the circumstances, parties are free to designate the seat of arbitration in any jurisdiction they like. But there are hazards.

The arbitrability hazard

First, while the Convention generally obliges signatories to enforce agreements to arbitrate, it does not require a signatory jurisdiction to enforce an agreement to arbitrate a matter not concerning "a subject matter subject to arbitration" within that jurisdiction. Convention Article II(a). Typically, jurisdictions have at least some exceptions to the general rule of arbitrability. Some, for example, will not allow arbitration of disputes relating to intellectual property, consumer protection or employment. So care must be taken to ensure that the type of dispute likely to arise is arbitrable in the designated jurisdiction.

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The adjournment hazard

Second, historically an award could not be enforced outside the seat unless it was first confirmed at the seat. The Convention dispensed with this so-called "double exequatur" requirement. Note, however, that only a court at the seat can confirm or annul an award, and Article VI of the Convention contemplates—within the discretion of a court outside the seat being asked to enforce a foreign award—deferring the enforcement proceeding pending a decision in an annulment proceeding pending at the seat. The lesson of Article VI—all things being equal—is to designate as the seat a jurisdiction that can both entertain applications for annulment and execute an award against local assets. Such a designation avoids risking a delay pending annulment proceedings outside the enforcement jurisdiction.

The United States and the Convention

The U.S. is a signatory to the Convention, and Chapter 2 of the Federal Arbitration Act (FAA) implements it by, among other things, providing for federal jurisdiction over matters within its scope. FAA § 202.

As for arbitrability, Congress has exempted from enforcement pre-dispute arbitration agreements relating to sexual harassment and sexual assault. Also, Congress has enacted an exception relating to motor vehicle franchises. Otherwise, pre-dispute agreements to arbitrate commercial claims, including statutory claims, are enforceable in the U.S. The Supreme Court of the United States (SCOTUS) has, for example, countenanced arbitration of statutory antitrust and employment discrimination claims.

Again—all things being equal—arbitration proceedings should be seated where assets can be found. Based simply on the size of its economy, the U.S. will often be on the short list of such jurisdictions. According to *The Economist* (April 13, 2023), the U.S. accounts for 25% of the world's GDP and 58% of the G7's GDP.

Are all other things equal in the U.S.?

The FAA is the primary source of U.S. arbitral law. Arguably, it could profitably be replaced as to international matters by adoption of the UNCITRAL Model Arbitration Law, now applicable in 87 countries, including Canada and Mexico. Adopting the Model Law would align U.S. law with a modern global standard. Nevertheless, U.S. law is highly supportive of international law. Moreover, the aggregate body of U.S. arbitral law and jurisprudence, based on the FAA and its judicial interpretation, ends up being very similar to the Model Law. Thus, for example, the doctrine of separability—requiring courts to assess the validity of an agreement to arbitrate separately from the validity of the underlying commercial agreement—has been repeatedly confirmed by SCOTUS.

One notable caveat: Although Article XVI of the Model Law gives arbitrators the power of competence-competence—i.e., jurisdiction to determine their own jurisdiction—the FAA has no parallel provision. Under the 1995 SCOTUS decision in *First Options of Chicago v. Kaplan*, courts will find that the parties have delegated to arbitrators the power to determine their own jurisdiction only if their intent is "clear and unmistakable." That said, U.S. courts routinely hold that by adopting institutional rules that provide for competence-competence—e.g., JAMS International Arbitration Rule 17—parties have made such a delegation. Still, to avoid any doubt, parties may wish to confirm (or disclaim) the delegation expressly in their arbitration agreement.

U.S. law also typically enforces other contractual expansions or restrictions relating to arbitrators' powers—for example, limitations on the scope of discovery and disclosure, choice of law provisions and restrictions on the joinder of additional parties. And U.S. law imposes no impediment to third-party funding or virtual hearings.

Lastly, the U.S. maintains a hospitable arbitration infrastructure. It is home to important arbitral institutions, including JAMS and the American Arbitration Association, and various non-U.S.-based institutions have subsidiary offices in the U.S. Foreign arbitrators face no special requirements to serve in U.S.-seated arbitrations and enjoy the same immunities provided to U.S.-based arbitrators.

Certainly, there may be other jurisdictions where an arbitration might appropriately be placed in any given case, but the U.S. is frequently a good choice and often the best choice.

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