

**Canadian Bar Association
International Section**

**Few Barriers or New Barriers?
Ottawa, 30-31 May 2002**

**Getting the Best Seats
(in International Commercial Arbitration)**

Professor Janet Walker
Osgoode Hall Law School of York University
4700 Keele Street, Toronto M3J 1P3

(416) 736-5580
jwalker@yorku.ca

Getting the Best Seats (in International Commercial Arbitration)

Janet Walker¹

A typical conversation beginning with “I have tickets to tonight’s concert/game” will almost inevitably move on to a discussion of where the seats are located in the venue. Any tickets will get you in, but the seats you get may make a great difference to your ability to appreciate and enjoy the event. In international commercial arbitration the choice of the seat can be just as important—so important that it is surprising how little forethought is often given to choosing the location for the arbitration. And this is particularly surprising in view of the potential benefits that can be gained without paying more or lining up, but simply by considering the options. This paper highlights some of the factors that can influence the choice of an arbitral seat and the ways in which choosing the seat wisely can provide subtle but important benefits.

1. Authorized Ticket Agents? (The New York Convention)

First things first: if you would hesitate to purchase your tickets from the gentleman on the street in dark glasses and a rumpled raincoat who appears to have no surname, then you should probably take similar care to ensure that you choose a place of arbitration in a country that is a party to the New York Convention.² While international commercial arbitrations can, in theory, be conducted in almost any country, one of the key objectives in any form of dispute resolution is to obtain a binding and effective result, and this can often best be ensured by locating an arbitration in a New York Convention country.

Indeed, one of the most attractive advantages of arbitration over litigation in international disputes is that the result—in the case of arbitration, the award—is often

¹ Professor Walker teaches Conflict of Laws at Osgoode Hall Law School and she is co-author of *Canadian Conflict of Laws* (5 ed, 2002) and a member of the Canadian Panel of Arbitrators of the International Chamber of Commerce.

² The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (“The New York Convention”). The full text of the New York Convention may be found on the UNCITRAL website at <http://www.uncitral.org/en-index.htm>, under “Adopted Texts.”

capable of being enforced in far more countries than would be the judgment of a national court. In international disputes, the international enforceability of the result of the dispute resolution process can be of critical importance to the parties and this is often what has persuaded them to choose arbitration. Having “purchased a ticket” to enjoy an internationally enforceable result by opting for arbitration, it is important to ensure that the arbitral award will be widely recognized and this can be achieved most effectively by choosing a seat for the arbitration a country that is a party to the New York Convention.

With well over a hundred states parties, this consideration does not seem likely to restrict by much the range of suitable seats, but to those familiar with the provisions of the New York Convention, it may not be immediately obvious why it should affect the choice of seats at all. The New Convention establishes obligations for member states that relate primarily to the *recognition and enforcement* of arbitral awards, not to the *rendering* of arbitral awards. However, while the provisions of the New York Convention do not necessarily confine the obligation to recognize and enforce arbitral awards to those rendered in member states, the first of two permitted reservations to the Convention has this effect. This reservation provides that “any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made *only* in the territory of another Contracting State.”³ More than half the states that have become parties to the New York Convention have invoked the reciprocity reservation, although some have since withdrawn it.⁴

When considering the effect of this reservation, it is important to bear in mind that its significance is not confined to whether it has been invoked by the country of the proposed seat of the arbitration. On the contrary, what matters is the invocation of the reciprocity reservation by the country or countries to which the award might ultimately be taken for recognition or enforcement. These are the countries in which a successful claimant might want to enforce a judgment against a defendant’s assets, or in which a

³ Article 1.3, New York Convention (emphasis added).

⁴ A complete and current listing of the status of the Convention, including the dates for signature, ratification and entry into force for member states and the reservations and other factors affecting states’ membership may be found on the UNCITRAL website <http://www.uncitral.org/en-index.htm>, under “Status of Texts”.

successful defendant might want to obtain recognition of an award to protect its assets. And this is a consideration that might not arise during the performance of the contract or even during the dispute resolution process should arbitration be invoked, but only upon the rendering of an award. Accordingly, in view of the proliferation of member states and the diffuse and uncertain array of countries that might be relevant to this consideration, where there is a choice available in the arbitral seat, it is generally wise to choose a country that is a party to the New York Convention so that the invocation of the reservation in the state where the award might be enforced will not affect the enforceability of the award.

The recommendation of New York Convention countries is, subject, of course, to special circumstances, such as the presence of the respondent's assets only in a country that, although not a party to the New York Convention, would give effect to an arbitral award if rendered in a particular manner or in a particular country.

2. Orchestra or Upper Balcony? (Delocalization and Institutional Arbitration)

Beyond the obvious choice just discussed is a second broad range of considerations that operates on a somewhat more subtle level. Like the choice of Orchestra, or Upper Balcony, the choice between institutional or *ad hoc* arbitration can have an important and potentially complex relationship with the law that will govern the resolution of the dispute.

If one of the most attractive features of international commercial arbitration is the enforceability of the award that is rendered, then the neutrality of the forum surely must come a close second. Parties to an international commercial venture who choose international commercial arbitration may never get so far in their strategic planning as to consider the enforceability of the result of dispute resolution. Indeed, in many cases, the very notion of seeking to enforce their rights through a binding dispute resolution process in an international venture may be unnerving. To the extent that this is so and they still manage to address in their negotiations the question of dispute resolution, the parties are very likely to be concerned to ensure that the fairness of the resolution of any dispute is

not impaired by the application of unfamiliar or unfavourable national laws, whether they are the laws of the other party's country or of a third country, perhaps the place of the performance of the contract.

The neutrality of the forum is, therefore, another very attractive feature of arbitration. This desire for neutrality has inspired an ongoing debate about the degree to which arbitral proceedings can be "delocalized," or segregated from national laws, particularly those of the place in which they are conducted. While the debate over delocalization can sometimes touch on profound philosophical issues reflecting diverse and evolving approaches to the arbitral process itself, the potential for delocalization can have important practical implications for the extent to which the law of the arbitral seat will govern the resolution of the dispute—not only with respect to the finality of the award, but also with respect to the procedural rules by which the arbitration will be conducted.

The delocalization debates echo the debates over the extent to which any contractual relationship can operate independently of its foundation in the general law, and independently of the state-regulated coercive measures to which the parties may resort to give effect to its terms. The debates as they relate to the autonomy of commercial contracts operating in *domestic legal systems* may be quite abstract. However, delocalisation debates in the international commercial arbitration setting tend to be of more immediate and practical effect. Parties may well be anxious about the prospect of finding that a key term of their contract that they thought they readily understood is given a substantially different interpretation by a tribunal in the course of resolving a dispute. Equally, the parties may be anxious about the possibility that the process by which a dispute will come to be resolved might be conducted according to rules that will substantially impair their ability to make claims or defences—claims or defences on which they had relied in conducting their affairs in the course of their business relationship.

The first of these anxieties—that of unanticipated interpretations of key contractual provisions—is well recognized, and it is readily addressed by including in the

contract a clause stipulating the governing law. The way in which the parties should agree upon a governing law, the way in which they should express their choice in their agreement, and the effect of this choice comprise a large and important subject that is not specific to arbitration and that is beyond the scope of this paper.⁵

The second of these anxieties—that of the possibility that a dispute arising from the contract will come to be resolved according to rules that will substantially impair the parties’ ability to make claims or defences to which they thought they were entitled—falls squarely within the scope of this paper. The rules that govern the resolution of the dispute through arbitration have often been described as the *lex arbitri*, and the *lex arbitri* has traditionally been thought to be determined by the choice of the arbitral seat. But before discussing the particular effect of the choice of arbitral seat on the law governing the resolution of the dispute, it is worth pointing out the potentially preemptory effect of opting for institutional rather than *ad hoc* arbitration.

Choosing to arbitrate disputes pursuant to the rules of an arbitral institution such as the International Court of Arbitration of the International Chamber of Commerce (ICC),⁶ or the London Court of International Arbitration (LCIA),⁷ or the American Arbitration Association (AAA)⁸ can have important standardizing effects on the proceedings. The rules of these and many of the other arbitral institutions regulate a range of logistical matters such as the appointment of arbitrators, the administration of the process, including the expenses of the tribunal, and the rendering of the award. In many disputes they can usefully fill the void that is created when the choice of arbitration restricts the parties’ access to the coercive powers of national courts. For example, when a recalcitrant party in an institutional arbitration fails to cooperate in appointing an arbitrator, the rules of the arbitral institution may provide for an appointment of an arbitrator by the institution itself. Likewise, provisions exist for filling vacancies that can

⁵ More on this can subject be found in Chapter 31 of Castel and Walker, *Canadian Conflict of Laws* (5 ed).

⁶ The ICC Arbitration Rules can be found at www.iccwbo.org/court/english/arbitration/rules.asp

⁷ The LCIA Arbitration Rules can be found at www.lcia-arbitration.com/lcia/rulecost/english.htm

⁸ The AAA International Arbitration Rules can be found in the “International Services” section of their website at www.adr.org

arise from time to time. Further, provisions for matters such as interim measures and multi-party arbitrations are in various stages of development. Once established, they too will supply some assurance that the divergences between the national laws that might become relevant through the application of the *lex arbitri* will not unfairly surprise the parties.

As with all situations that involve a choice between customized and standardized solutions, opting for institutional arbitration instead of *ad hoc* arbitration will depend on the parties' needs and resources. Institutional arbitration provides a series of ready-made solutions, which can be very helpful provided that the problems they solve, given the amount in dispute or the nature of the dispute do not warrant customized solutions. But, regardless of the reasons for choosing institutional or *ad hoc* arbitration, the effect of choosing institutional arbitration is that it supplies the rules for determining a range of issues that, if left unaddressed by the parties' agreement, could otherwise be governed by the national law of the place of arbitration.

There is one obvious exception to this. In 1976, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Arbitration Rules to serve this function in respect of *ad hoc* arbitrations.⁹ Parties may wish for a variety of reasons such as those relating to the desire for flexibility in the conduct of their arbitration, or concerns about the expense involved in institutional arbitration, to choose *ad hoc* arbitration and yet, by adopting the UNCITRAL Arbitration Rules, they will have withdrawn from the ambit of the application of the law of the seat of the arbitration many of the procedural issues that otherwise might fall within its purview.

3. Centre stage or Extreme Left? (The Important Details)

Even within a particular price range or block of seats, a ticket agent will generally confirm the precise location of the seats to ensure that your preferences are adequately accommodated. You may be happier in the fourth row of the balcony at the extreme left

⁹ United Nations Commission on International Trade Law Arbitration Rules (UNGA Res 31/98, adopted December 15, 1976). The full text of the UNCITRAL Arbitration Rules may be found on the UNCITRAL website at <http://www.uncitral.org/en-index.htm>, under "Adopted Texts."

but not in the twenty-fourth row at centre stage, or vice-versa. Depending on the circumstances, your preferences even at this level of detail could still be quite strong.

Similarly, despite having identified the single most effective way of delocalizing the arbitration, or distancing it from the law of the seat of the arbitration, a number of qualifications and related points remain to be discussed. These include: situations in which the parties might wish not to delocalize their arbitration at all but, instead, to agree that the law of the seat will have a substantial role to play in determining the arbitral process; residual issues that will remain to be determined, possibly by the law of the seat of the arbitration, even when the parties have chosen a set of procedural rules to govern their arbitration; and features of the law of the seat of the arbitration that cannot be avoided by the choice of the parties.

First, with respect to the possibility of locating the arbitration firmly in a particular country, in the current context of the widespread adoption of the UNCITRAL Model Law and the New York Convention, it may be difficult for all but senior practitioners to recall a time when international commercial arbitration flourished, but only in a very few major centres. In such places—London, Paris, Geneva, New York—there were well-developed local laws providing for the conduct of international commercial arbitration. As a result, much in the same way that the choice of institutional arbitration served as a substantial gap-filling device in terms of the rules that would govern the resolution of the parties' dispute, so too would "Arbitration in London" invoke (and still does invoke) the application of the English Arbitration Act—a national law that provides for many of the same details regarding the permissible level of involvement of the local courts in support of the arbitration, etc, as do the institutional rules.

With the advent of the UNCITRAL Model Law, however, the benefit to international commercial arbitration of a well-developed national law is no longer confined to those few major centres. As is explained on the UNCITRAL website, the "Model Law 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. It was adopted by UNCITRAL in 1985 and has been enacted into law by a large number of jurisdictions from both developed and developing countries.”¹⁰ Accordingly, in principle at least, choosing an arbitral seat in one of the dozens of countries that has adopted the Model Law should have a similar effect in determining the law governing the arbitral process to that of choosing one of the traditional centres. While the jurisprudence in many of these countries may be far less developed, and the level of experience of the courts and counsel in addressing issues arising in arbitration may be similarly reduced, the adoption of the Model Law provides some reassurance that the basic ground rules are the same from one country to the next.

All in all, despite the factors militating in favour of delocalizing the arbitration to the extent possible, there may be good reason to take the opposite tack and locate the arbitration firmly within the confines of a national law (for international commercial arbitration). Among these reasons may be the simple one that the parties or their representatives are comfortable operating within a particular national law; or that they regard a particular local law, such as the laws that apply in the Canadian provinces, as acceptably moderate in themselves, or that the dispute resolution process as a whole may be simplified by nominating a single law to govern the contract and the arbitral process. And at the risk of blurring the earlier suggestion that institutional arbitration often mutes the effect of the choice of the seat by clarifying many of the rules that would otherwise be left to be determined by the *lex arbitri*, the choice of certain institutions, such as The London Court of International Arbitration, can itself import a default choice of a seat.¹¹

It should also be mentioned, for completeness sake, that it is possible for the parties to nominate a particular national law as the *lex arbitri*, or as the procedural law for

¹⁰ The full text of the UNCITRAL Model Law may be found on the UNCITRAL website at <http://www.uncitral.org/en-index.htm>, under “Adopted Texts.” According to the section on “Status of Texts,” as of 28 March 2002, “Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran (Islamic Republic of), Ireland, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Oregon and Texas; and Zimbabwe.

¹¹ Article 16, London Court of International Arbitration Rules.

their arbitration, regardless of where the arbitration is held. In the ordinary course, however, it would seem likely to complicate matters considerably where it formally required arbitrators to apply different laws to the substance of the dispute and to the procedure by which the arbitration would be conducted, particularly where the arbitrators' backgrounds might be in legal systems other than those nominated.

Second, there may be residual issues that remain to be determined even where the parties have opted for institutional arbitration, possibly by the law of the seat of the arbitration. Among the most notable of these are the nuts and bolts features of pre-hearing disclosure and the rules of evidence. Even where the parties choose institutional arbitration, these issues are not necessarily resolved, as the major institutions tend to provide for considerable flexibility in this area. For example, apart from the general edict requiring that each side be given a reasonable opportunity to present its case, arbitrators has considerable latitude under ICC Rules to determine the means by which it will establish the facts of the case.¹² The Rules of the American Arbitration Association and the London Court of Arbitration are stated in similarly permissive form subject only to overall guiding principles concerned with general procedural fairness.¹³

Indeed, the open-ended quality of the procedures in the major institutions for establishing the record has led to the development by the International Bar Association of "Rules on the Taking of Evidence in International Commercial Arbitration."¹⁴ As the Preamble to the Rules explains, the Rules are "designed to supplement the legal provisions and the institutional or *ad hoc* rules according to which the Parties are conducting their arbitration." The Rules are available to be adopted in whole or in part, or to be used as guidelines by tribunals and parties. Perhaps most importantly, though, they "are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration."

¹² Article 20, ICC Rules.

¹³ Articles 16-20, AAA International Arbitration Rules; Articles 14-22, LCIA Rules.

¹⁴ The IBA Rules on the Taking of Evidence in International Commercial Arbitration can be downloaded as a "Book" by the Arbitration and ADR Committee (Committee D of the Section on Business Law) in the "Reading Room" of the International Bar Association's website at www.ibanet.org/general/FindDocuments.asp

This latter point cannot be over-emphasized. One of the hallmarks of a successful arbitration is the ability of the tribunal and counsel, based on the individual needs of the case, to establish a consensus regarding the nature and extent of pre-hearing disclosure necessary to ensure a fair hearing and regarding the conduct of the hearing or hearings (where this is required) that will inspire confidence in the parties that their case has been presented adequately and has been received effectively by the tribunal; and then to pursue that course without the undue formality and rigidity that produce the kind of waste and inefficiency that arbitration is invoked to avoid.

In this regard, while the IBA Rules on Taking Evidence provide useful guidance on procedures that are generally suitable for international commercial arbitration, this does not mean that the lack of detailed requirements in some of the institutional rules is a deficiency because these are the very areas in which skilled arbitrators customize the procedures to suit the needs of the parties and the case. The question remains though, as to what guidance the arbitrator should take from the parties' choice of a seat for the arbitration: Does "arbitration in New York" mean that the parties have bargained for "American-style discovery"? Does "arbitration in London" categorically rule out depositions? The answers to these questions are probably not best given in the abstract and yet the answers are likely to be obvious in the individual cases. As is suggested by the flexibility afforded by institutional arbitration and the moderate quality of the IBA Rules, it seems unlikely that the parties intended in choosing arbitration to oblige themselves to comply with the exacting requirements of the local procedural law of a particular country, and it does seem likely that they were bargaining for procedure that would be tailored to suit their particular needs. However, the choice of a particular seat for the arbitration may afford some indication of the general tenor of the procedural approach with which the parties would feel comfortable.

Third, it is important to be alert to features of the law of the seat of the arbitration that cannot be avoided by the choice of the parties, and to be aware of the potential effect of these features of the law on the arbitration. Every national law contains mandatory rules and rules of public policy from which no derogation is permitted, even in international commercial dealings. It is important, where possible, not to choose a seat for

the arbitration that will frustrate the *bona fide* intentions of the parties, either with respect to their underlying agreement or with respect to the resolution of disputes arising from that agreement. Further, each national law prescribes a particular balance between deference and intervention in the judicial supervision of arbitral proceedings, although the widespread adoption of the Model Law has had a moderating effect on such differences. As Professor Park has noted, “From a legal perspective, the best place for international arbitration will be a country with a balanced approach to review of awards; where the judiciary promotes an arbitration’s basic procedural integrity, but does not intervene to correct an arbitrator’s honest mistake of law or fact.”¹⁵ Nevertheless, there may be subtle but important differences in the appreciation of this balance from one legal culture to another.

Where the award has been rendered in a state that either is a party to the New York Convention, or that has adopted the UNCITRAL Model Law, it is possible to anticipate with some certainty the bases on which an award may be successfully challenged or set aside, because this is a step that must be taken in the state where the award was rendered, and because the grounds for challenge are set out exhaustively in these instruments.¹⁶ The precision with which these grounds can be anticipated is limited, however, by the fact that one of the grounds—public policy¹⁷—may vary to a certain extent from country to country, despite the fact that the reference point is not “domestic public policy” but “international public policy.”¹⁸ For states that are not parties to the New York Convention, and that have not adopted the UNCITRAL Model Law, the bases for challenging an award will be a matter of local law. The important point to note is that pursuant to the New York Convention¹⁹ and to the UNCITRAL Model Law²⁰ states

¹⁵ William Park, *International Forum Selection* (Kluwer, 1995) at 78.

¹⁶ Article V, New York Convention; Article 34, UNCITRAL Model Law.

¹⁷ Article V.2(b), New York Convention, Article 34(b)(ii).

¹⁸ See the International Law Association, New Delhi Conference 2002 Report of the Committee on International Commercial Arbitration, available at www.ila-hq.org under “Committees.”

¹⁹ Article V.1(e), New York Convention.

²⁰ Article 36(1)(v), UNCITRAL Model Law.

parties may refuse to recognize or enforce an award that has been successfully challenged in the place where it was rendered.

4. Standing Room Only/Partially Obstructed Seats? (Important Logistical Factors)

Any discussion of the considerations affecting the choice of the place of arbitration would be incomplete without addressing the logistical issues that, although mundane and uninspiring from a theoretical standpoint, can be of critical importance to the smooth conduct of the arbitral hearing. You may be able to live with the crick in your neck that you get from sitting in the very front row, or you may have the stamina to stand through a four-hour opera, if these are the only seats available. But as with the logistical implications of the choice of the place of arbitration, it is unwise to overlook them when planning for dispute resolution. While you may become so absorbed in the action on stage to forget that you are peering around a column to see it, or that you had to climb past ten other patrons to reach your seats, these kinds of things can have a considerable bearing on your comfort level.

Similarly, in international commercial arbitration it makes good sense to be mindful of the likely location of the parties, and of the witnesses and evidence in the event of a dispute, and of the cost of transporting them to the hearing. Further, to the extent that the counsel who would be likely to represent the parties, and the person or persons likely to serve as arbitrators are already known to the parties, it makes good sense to choose a seat which is readily accessible to them and one in which they would feel comfortable working. In the ordinary course, this means that counsel and arbitrators, (particularly where the arbitrator is acting as a sole arbitrator), should have a general familiarity with the local law and procedure should the features of that law that have been discussed earlier come into play. In more extreme cases, however, this can mean that it should be ensured that counsel and the arbitrator(s) will not have difficulty obtaining visas or other forms of permission necessary to gain access to the country,²¹ or that they

²¹ Indeed, this may serve to render an arbitration agreement “incapable of being performed” and thereby form the basis for disregarding the arbitration agreement under Article II.3 of the New York Convention, or Article 8(1) of the UNCITRAL Model Law.

will not regard themselves as likely to be endangered by travelling to the country, and that they will be permitted to serve in the intended role under the laws of that country.

In addition, particularly where a lengthy hearing is anticipated, it is worth advertent to the general cost of accommodations and other associated expenses as the variation from one country to another and from one city to another within a country can be significant. Extra costs associated with conducting hearings in certain centres can readily mount up in the course of the hearings without enhancing the fairness of the process or the quality of the results. Further, quite apart from the legal or practical significance of the choice of the seat, there may be subtle psychological implications for the confidence or the anxiety levels of one or both of the parties that are associated with particular choices of the arbitral seat. To the extent that the effective conduct of an arbitration depends upon the cooperation and active participation of the parties, this factor should not be overlooked.

A major caveat on this discussion is that it is often sensible and permissible, at least in principle, to hold hearings and other meetings, where it is necessary to do so in person, in places other than the seat of arbitration.²² Moreover, this is frequently done, for all the practical reasons noted above, many of which may not emerge until the arbitral process is underway. As with most things in international commercial arbitration, the most important considerations can often be those of the greatest practical significance under the circumstances. And so all things being equal, to the extent that there is a strategy involved in getting the best seat, it can sometimes come down to the old observation that when a long journey must be undertaken before a battle, it can be wise to arrange for it to be undertaken by your opponent.

²² Article 20(2), UNCITRAL Model Law.