Expert Q&A: International Arbitration in New York

by **Practical Law Arbitration**

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An expert Q&A with Richard L. Mattiaccio, Chartered Arbitrator and partner of Allegaert Berger & Vogel LLP, discussing the reasons behind New York's growing status as a global center for international arbitration.

London and Paris traditionally have been the preeminent forums for complex international arbitration, with foreign parties routinely resisting efforts to arbitrate in the US. Recently, however, New York has emerged as an increasingly popular venue for resolution of cross-border disputes. Practical Law asked Richard L. Mattiaccio, FCIArb C Arb, of Allegaert Berger & Vogel LLP to discuss this trend and the reasons behind New York's growing status as a global center for international arbitration.

Richard has 40 years of experience in commercial and international arbitration and litigation in the federal and state courts of New York, and over 30 years of service as chair, panel and sole arbitrator in commercial and international cases. He serves on AAA, ICDR, ICC and CPR arbitration panels and in ad hoc arbitration cases. He chairs the Chartered Institute NY Branch, is a Fellow of the College of Commercial Arbitrators and a member of the National Academy of Distinguished Neutrals. Richard is immediate past Chair of the New York City Bar's International Commercial Disputes Committee. He is a member of the CPR Institute Arbitration Committee and has been active in recent CPR arbitration rules updates, and he co-chairs the 2019 New York Arbitration Week organizing committee.

New York has hosted more international arbitrations over the last several years than ever before. What are some of the reasons for this change?

One factor contributing to this change is an increase in cross-border transactions involving middle market, American companies, as well as large multinationals and classic trading and import companies, with foreign counterparties. As a result, there has been an overall increase in international arbitrations arising out of or relating to these transactions.

Additionally, concerns about discovery in the US have, in the past, made parties wary of pursuing international arbitration proceedings here. Because many foreign parties hail from jurisdictions that do not allow any discovery, they are often appalled at the scope of permissible and anticipated discovery in US courts. (See Why have parties historically been reluctant to pursue New York as a venue for international arbitration, and how have these concerns been addressed?)

Recognizing and seeking to support these trends, in the past few years:

- The International Chamber of Commerce (ICC) established SICANA, Inc., which administers and supports a growing arbitration case load in New York.
- The London-based Chartered Institute of Arbitrators (CIArb) has established an active CIArb New York Branch.

- The New York International Arbitration Center (NYIAC) is now in its sixth year of providing independent, state-of-the-art facilities and concierge-level hearing services as well as a place for the international arbitration community to meet, train, and exchange ideas.
- NYIAC and the CIArb New York Branch have joined forces to organize the first New York Arbitration Week scheduled for November 20-22, 2019.

Of course, New York's role as a hub for international arbitration continues to stand on two long-established foundations: the role of New York law as a leading governing law of choice in financial and commercial transactions, and a deep bench of sophisticated arbitrators steeped in New York law, in cross-border transactions, and in practical experience across a broad spectrum of industries.

Why have parties historically been reluctant to pursue New York as a venue for international arbitration, and how have these concerns been addressed?

Many foreign parties have been concerned that the level of discovery contemplated by the Federal Rules of Civil Procedure would be available if their arbitration took place in the US. That concern is unfounded. The approach adopted in some judicial systems outside the US, in which each party presents the documents on which it intends to rely and nothing further, has exerted significant influence on the development of international arbitration practice in New York. In fact, there appears to be growing convergence in the pre-hearing practice from arbitral seat to arbitral seat as international arbitration practitioners from legal traditions that eschew discovery come to appreciate the merits of proportional and relatively targeted exchanges of information.

A number of guidelines published by the main arbitration providers in New York contain provisions that foreign parties would find familiar and consistent with their experience in international arbitrations seated abroad. These guidelines include:

- The International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information.
- The JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations.
- The International Institute for Conflict Prevention and Resolution (CPR) Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

These guidelines are consistent with practices that have developed in other major international arbitration centers, perhaps most notably in ICC arbitration. Similarly, the New York State Bar Association (NYSBA) issued the following two sets of guidelines on conducting discovery, which treat discovery in domestic commercial arbitration and international arbitration separately:

- Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations.
- Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations.

Like the guidelines and protocols promulgated recently by the major arbitral institutions, the NYSBA guidelines do not impose an absolute ban on discovery. They do clarify, however, that the exchange of information in international arbitration should be more restricted than in domestic US arbitration and in the more discovery-prone courts in the

US. In part because civil discovery in New York state courts has been more limited than in federal court and in some other state courts in the US, New York attorneys tend to adapt well to the need to restrict discovery in arbitration.

For an overview of the principles governing evidence in international arbitrations, see Practice Note, Evidence in International Arbitration.

Some foreign parties have questioned the desirability of New York as a seat for arbitration based on the manifest disregard of the law doctrine. Are international arbitration awards issued in New York more vulnerable to being set aside?

Some advocates of keeping international arbitration outside the US have perpetuated the myth that arbitral awards by arbitrators sitting in the US are often set aside on grounds of manifest disregard of the law, and that manifest disregard challenges, even if unsuccessful, create uncertainty.

Manifest disregard challenges of arbitral awards are very rarely successful. Courts have made clear that an arbitral tribunal's interpretation and application of the law are not subject to judicial second-guessing, observing that vacatur of an arbitral award for manifest disregard of the law "is a doctrine of last resort," reserved for "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent but where none of the provisions of the FAA apply" (*Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).

Courts in the US also have shown deference to an arbitrator's interpretation of a contract. According to the US Supreme Court, it is the arbitrator's construction of the contract that was bargained for, and the "arbitrator's construction holds, however good, bad, or ugly" (*Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013)). If the arbitration grants the tribunal the authority to render an award, the award must stand even where the tribunal misidentifies the source of its authority (see *Salus Capital Partners, LLC v. Moser*, 289 F. Supp. 3d 468, 479 (S.D.N.Y. 2018)).

A party challenging an award based on manifest disregard bears the heavy burden of showing the following:

- The arbitrator was made aware of a governing legal principle.
- The legal principle was well-defined, explicit and clearly applicable to the case.
- The arbitrator chose to ignore the law.

(*Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002).) An award may not be vacated on grounds of manifest disregard of the law if there is even a "barely colorable justification" for the outcome (*Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004); *Daesang Corp. v. NutraSweet Co.*, 85 N.Y.S.3d 6, 18-19 (1st Dep't 2018) (award must be confirmed where the arbitrators made a good-faith effort to apply the law cited by the parties to the facts); see Practical Law Arbitration Blog, New York Appellate Division, First Department, reverses Supreme Court decision vacating ICC arbitration award for "Manifest Disregard of the Law").

Moreover, the New York City Bar Report of its International Commercial Disputes Committee (ICDC) in 2012 explained that the concern about manifest disregard is purely theoretical in international arbitration.

For more information on the grounds on which enforcement of an arbitration award might be challenged, see Practice Note, Enforcing Arbitration Awards in New York: Vacating and Refusing Confirmation of Awards.

What are some of the key differences in conducting an international arbitration in New York when compared to the traditionally popular venues such as London or Paris?

The *lex arbitri* will vary to some degree from seat to seat, of course, just as institutional rules may vary, but there is considerable and growing convergence in practice. In terms of enforcement, in theory, there should be no difference. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and arbitration-related treaties and laws in sophisticated seats, international arbitration should proceed largely independent of local law and regulation with the courts willing to act in a supporting role in aid of arbitration.

There are, however, a number of factors that affect how arbitrators handle cases in practice. The most obvious factor is that New York has a deeper-than-usual bench of arbitrators and counsel who know New York and applicable US federal law and who offer a wide range of deep industry expertise.

Another potential distinction is the degree to which the arbitration providers that are most active in New York emphasize, in their arbitrator training and continuing education programs, the need to contain costs and avoid duplication. A dramatic but not atypical example of this practical culture relates to an ICDR hearing that continued in Midtown Manhattan right through Hurricane Sandy in 2012, a storm that had stranded the parties, their counsel and one arbitrator in hotels. The arbitrators agreed without hesitation to the parties' request to continue the hearing without interruption in order to save the parties the additional expense and inconvenience of another trip to New York from Europe and from the Midwest US. Many instances along these lines reflect how providers and arbitrators in New York are working to earn every day New York's reputation as a practical, cost-effective center for international arbitration.

What aspects of New York law and jurisprudence make New York an attractive venue for international arbitration?

New York has a stable, well-developed and predictable body of contract law that adheres to international commercial standards and offers a legal culture that is receptive to enforcing international treaties to which the US is a signatory.

New York law should be attractive to international commercial parties because it allows the parties maximum autonomy in negotiating the terms of their agreement and rarely imposes terms or limits as a matter of public policy. For example, New York law allows commercial parties to:

- Limit recoverable damages, including punitive damages (see Practice Note: Punitive Damages in US Arbitration: Authority of Arbitrators).
- Waive jury trials.
- Decide for themselves whether they want to shift attorneys' fees and expenses to the prevailing party in litigation or arbitration. By contrast, in England an agreement that requires a party to pay the whole or part of the costs of the arbitration, regardless of outcome, is valid only if the agreement was reached after the dispute had arisen. This approach precludes parties from contracting in the arbitration agreement that each party will pay its own costs in any event or that one party will pay the other party's costs whatever the outcome of the arbitration. (See Practice Note, Costs in arbitration under English law: Costs agreements between parties.)

New York law also affords considerable deference to the parties' selection of venue and choice of law, subject to very few limitations. Unless a foreign party has been conducting unauthorized business in New York, it must meet only minimal requirements to avoid jurisdictional and forum non conveniens challenges. Therefore, even where New York otherwise might be considered an inconvenient forum, it will provide a forum to the foreign party if:

- The amount in dispute is in excess of a statutory threshold.
- The agreement in question provides for the application of New York law and the choice of New York as the forum.
- The foreign party contractually agrees to submit to the jurisdiction of the New York courts.

(N.Y. Gen. Oblig. Law §§ 5-1401 and 5-1402.)

Conversely, where business parties choose not to take advantage of the New York courts, and instead agree to arbitrate or litigate in another forum, they can rely on New York's strong presumption in favor of enforcing these agreements (see Practice Note, Anti-Suit Injunctions and Anti-Arbitration Injunctions in the US Enjoining Foreign Proceedings). As New York courts have recognized, this approach fosters predictability, an important goal in commercial relationships.

New York courts also offer a range of provisional remedies to aid arbitration so that arbitral awards are not rendered ineffectual. (For more information on provisional remedies, see Practice Notes, Provisional Remedies in New York: Overview, Attachment in Aid of Arbitration in New York, and Interim, Provisional and Conservatory Measures in US Arbitration.)

At the conclusion of the case, New York courts routinely enforce arbitral awards (see, for example, *Kailuan (Hong Kong) Int'l Co. v. Sino E. Minerals, Ltd.*, 2016 WL 7187631 (S.D.N.Y. Dec. 9, 2016)). In one case, a New York state court granted prejudgment attachment of the defendants' New York State assets pending the court's consideration of an action to recognize a Singapore judgment (that confirmed an arbitral award) under Chapter 53 of the CPLR (*Passport Special Opportunities Master Fund, L.P. v. ARY Commc'ns, Ltd.*, 2015 WL 7511540 (Sup. Ct. Nassau Co. Nov. 17, 2015)).

Additionally, there are substantive, sometimes technical considerations that make New York law attractive to commercial parties. For example, New York's well-developed law of secured transactions can provide assurance to foreign parties, because New York law looks to the local law of the jurisdiction where the collateral is located to govern issues of perfection and the priority of a security interest in collateral.

New York also has a balanced approach to contract interpretation that generally corresponds to the expectations of commercial parties. This represents a middle ground between a formalistic, hard-and-fast prohibition against going beyond the language of an agreement, on the one hand, and freely allowing testimony on the meaning of language even when it is clear, on the other hand. As many US lawyers may recall from law school, although New York's "four corners" rule allows for parol evidence only if there is ambiguity in a written agreement, it is a recognized principle that, under New York law, "a promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed" (*Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)).

Further, New York law recognizes a duty of good faith and fair dealing in the performance of a contract, but does not impose, as some other jurisdictions do, a broad obligation of good faith on the part of commercial parties in their negotiation of an arm's length agreement.

The NYSBA released a brochure pointing out these and other advantages of choosing New York law to govern international contracts.

Since October 2013, all international arbitration cases are now assigned to a single justice within the Commercial Division of the New York Supreme Court. Has this change affected the resolution of these disputes?

Litigation related to international arbitration is limited and primarily conducted in federal court because either side can select federal court in cases governed by the New York Convention.

For those cases filed in New York State Supreme Court, New York County, the fact that all international arbitration-related matters are assigned to a single judge tends to reassure counsel that their matters will be heard by an individual judge with experience in international disputes. As a practical matter, however, the federal district court offers a deeper and broader level of experience as a by-product of the higher volume of international arbitration-related applications filed in federal court.

For information on civil practice in the Commercial Division, see Practice Note, Practicing in the Commercial Division of the New York State Supreme Court.

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