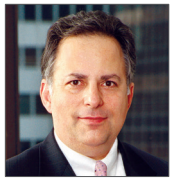
Expert Q&A on International Arbitration in New York

London and Paris traditionally have been the preeminent forums for complex international arbitration, with foreign parties routinely resisting efforts to arbitrate in the US. In recent years, however, New York has emerged as an increasingly popular venue for the resolution of cross-border disputes. Practical Law asked Richard L. Mattiaccio of Squire Patton Boggs (US) LLP to discuss this trend and the reasons behind New York's growing status as a global center for international arbitration.



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Richard has over 30 years of experience in commercial and international arbitration and litigation in the federal and state courts of New York, and over 25 years of service as chair, panel and sole arbitrator in commercial and international cases. He serves on the AAA, ICDR, ICC and CPR arbitrator panels and is a Fellow of the College of Commercial Arbitrators. Richard is a member of the Executive Committee of the NYSBA Dispute Resolution Section, the New York City Bar's International Commercial Disputes Committee and the Executive Committee of NYIAC.

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 shocked and appalled at the scope of permissible and anticipated discovery in US courts. However, updated rules from major arbitral institutions, along with protocols and

guidelines from bar associations, make clear that international arbitration is treated differently from domestic arbitration and civil litigation, particularly with regard to the scope of discovery. This has served to increase parties' willingness to entertain US jurisdictions, including New York, as potential seats for arbitrating international disputes.

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

- The International Chamber of Commerce (ICC) established SICANA, Inc., which administers and supports arbitration in New York.
- The London-based Chartered Institute of Arbitrators (CIArb) started the CIArb New York Branch.
- The New York International Arbitration Center (NYIAC) opened to provide state-of-the-art facilities for hearings, a high level of service to hearing participants and a center for the study of international arbitration.

The availability of world-class facilities at NYIAC and sophisticated arbitrators with substantial legal and industry experience have also contributed to increased interest in New York as a place for international arbitration hearings, and reflect New York's growing importance as a global hub for arbitration.

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

As mentioned above, 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. However, the approach 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 a significant influence on the development of international arbitration practice in New York.

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 (available at *icdr.org*).
- The JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations (available at *jamsadr.com*).
- The International Institute for Conflict Prevention and Resolution (CPR) Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (available at *cpradr.org*).

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 (available at *nysba.org*).
- Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations (available at *nysba.org*).

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 must be more restricted than in both domestic arbitration and civil litigation practice in some courts in the US. Because civil discovery in New York state courts typically has been limited, New York attorneys tend to adapt well to the need to restrict discovery in arbitration.

Search Evidence in International Arbitration for an overview of the principles governing evidence in international arbitrations.

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 vacated on grounds of manifest disregard of the law, and that manifest disregard challenges, even if unsuccessful, create uncertainty.

However, manifest disregard challenges mounted in domestic arbitration cases are rarely successful, and US courts have made clear that an arbitral tribunal's interpretation and application of the law are not subject to judicial second-guessing. US courts 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)*).

A party challenging an award on the basis of 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.

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, noting that it was unable to find a

single international award that was vacated on those grounds (*New York City Bar, ICDC, The "Manifest Disregard of Law" Doctrine and International Arbitration in New York, at 6-7 (Aug. 2012)*, available at *nycbar.org*).

Search Enforcing Arbitration Awards in the US for more on the grounds on which enforcement of an arbitration award might be challenged.

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?

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 related treaties and laws, international arbitration should proceed in its own autonomous realm, independent of local law and regulation.

In practice, however, there are several differences. The most obvious distinction is that New York has a deeper bench of arbitrators and counsel who know New York law and the applicable federal law. New York-based arbitrators also have a vast range of industry expertise.

Another potential distinction is the degree to which the arbitration providers that are most active in New York have emphasized the need to contain costs and avoid duplication in their arbitrator training and continuing education programs. For example, there was at least one ICDR hearing that continued in midtown Manhattan right through Hurricane Sandy in 2012, which had stranded the parties, counsel and one arbitrator in their hotels. Despite the treacherous storm, the arbitrators agreed to continue the hearing without interruption, saving the parties the additional expense and inconvenience of another trip to New York from the Midwest and Europe. Providers and arbitrators in New York are working hard to burnish New York's reputation as a practical, cost-effective international center.

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 as a matter of public policy. For example, New York law allows commercial parties to:

- Limit recoverable damages.
- Waive jury trials.
- Decide for themselves whether they want to shift attorneys' fees and expenses to the prevailing party in litigation or arbitration.

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.

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. 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. At the conclusion of the case, New York courts routinely enforce arbitral awards and foreign judgments.

Search Provisional Remedies in New York: Overview for information on the key considerations and tasks that counsel must tackle when applying for a provisional remedy in New York State court.

Additionally, there are substantive, sometimes technical considerations that make New York law attractive to commercial parties. For example, New York's well-developed law on secured transactions can provide assurance to foreign parties, because it looks to the local law of the jurisdiction where the debtor 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 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 attorneys 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, 222 N.Y. 88, 91 (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 recently released a brochure (available at *nysba.org*) 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?

As a practical matter, 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.

Nevertheless, the fact that all international arbitration-related matters are assigned to a single judge, Justice Charles E. Ramos of the Commercial Division, reassures counsel that their matters will be heard by an individual with experience in international disputes. As a result, New York has a state court judge who does not hesitate to direct parties in an appropriate case, ruling from the bench on conclusion of oral argument, to proceed to arbitration.

In other words, the key advantages of having a single Commercial Division justice designated to this category of litigation is that parties who choose New York for international arbitration can reasonably expect, if the matter ends up in federal or state court for any reason, that the judge will have knowledge and expertise in international arbitration, and that the case law will develop in a consistent and predictable manner.

Search Practicing in the Commercial Division of the New York State Supreme Court for information on civil practice in the Commercial Division.

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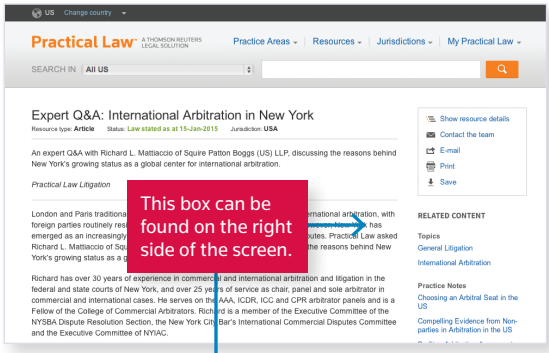

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