Legal & Practical Considerations in Choosing

A Venue for International Arbitration

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I. Legal Considerations

According to a 2010 survey of senior corporate counsel, external counsel, and academics, the most important factor considered in choosing the seat of an arbitration is the "formal legal infrastructure" at the seat, which includes the national arbitration law, the track record in enforcing agreements to arbitrate and arbitral awards, and the neutrality and impartiality of the courts in that jurisdiction. *See* 2010 International Arbitration Survey: Choices in International Arbitration, *available at* http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

A. Policy Towards Arbitration

1. Enforcement of Arbitration Clauses

a. Respect for Parties' Choice to Arbitrate

i. The United States has a "strong public policy in favor of forum selection and arbitration clauses." *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir. N.Y. 1993) (noting); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

ii. "The policy in favor of arbitration is even stronger in the context of international business. Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation. The parties may agree in advance as to how their disputes will be expeditiously and inexpensively resolved should their business relationship sour. Stability in international trading was the engine behind the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

This treaty—to which the United States is a signatory—makes it clear that the liberal federal arbitration policy applies with special force in the field of international commerce." *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir. 1991).

b. Respect for the Parties' Choice of Forum

i. "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Intercontinental Packaging Co. v. China Nat'l Cereals, Oils & Foodstuff Import & Export Corp*., 159 A.D.2d 190, 195 (1st Dep't 1990).

c. Respect for Parties' Choice of Law

i. "The parties to any contract . . . may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state." New York General Obligations Law § 5-1401.

ii. "New York law is unambiguous in the area of express choice of law provisions in a contract" and courts will enforce the parties' selection of international law to govern an arbitration. *See, e.g., International Minerals & Resources, S.A. v. Pappas*, 96 F.3d 586, 592 (2d Cir. N.Y. 1996).

d. Deference to the Authority of Arbitrators

i. Jurisdictional Issues.

(1) New York courts will enforce contractual provisions allowing arbitrators to determine the scope of arbitral issues. *See, e.g., Shaw Group Inc. v. Triplefine Intern. Corp.*, 322 F.3d 115, 121-22 (2d Cir. 2003) (suggesting that the reference to "all disputes" in the arbitration clause is sufficient to evidence the parties intent to arbitrate arbitrability); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39 (1997) (language providing for "[a]ny and all controversy" between the parties to be

settled by arbitration is sufficiently "plain and sweeping" to indicate an intent to arbitrate arbitrability).

ii. Questions of Procedure.

(1) "The purpose of the Federal Arbitration Act is to ensure that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 404 (1967). *See also, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., et al.*, 473 US 614, 628 (1985) ("A party that agrees to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.").

2. Enforcement of Arbitration Awards

a. Federal Arbitration Act

i. "The Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 et seq., provides for expedited judicial review to confirm, vacate, or modify arbitration awards." *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 578 (2008).

ii. A court "must" enter an order confirming an arbitration award except in the following circumstances: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C.S. §§ 9, 10.

iii. The doctrine of "manifest disregard for the law" is very rarely used to vacate arbitral awards. *See, e.g., Duferco Int'l Steel Trading v. T. Klaveness Shipping AIS*, 333 F.3d 383 (2d. Cir. 2003) (between 1960 and 2003 the Second Circuit only vacated some part or all of an arbitral award

for manifest disregard in four out of at least 48 cases); *Merrill Lynch, Pierce, In Matter of Arbitration between Continental Grain Company and Foremost Farms Inc*., 1998 WL 132805 (S.D.N.Y. 1998) (copy of the award and agreement certified by attorney sufficient); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc*., 126 F.3d 15, 25 (2d Cir. 1997) (an award will not be vacated based on interpretation of a contract term); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp*., 103 F.3d 9 (2d Cir. 1997) (vacatur requires an egregious impropriety on the part of the arbitrators; awards will be confirmed as long as there is a "barely colorable justification" even if the panel is wrong on the law).

b. New York Convention

i. Convention on the Recognition and Enforcement of Foreign Arbitration Awards of June 10, 1958, known as the "New York Convention." The Convention has been adopted by 144 countries, including the U.S. Chapter II of the Federal Arbitration Act implements the Convention. 9 U.S.C. §§ 201-08.

ii. "The goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts[.]" *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 520 n.15 (1974).

3. Availability of Provisional Remedies

a. Federal courts will grant injunctive relief, where appropriate, in the context of arbitrations. *See, e.g., Ortho Pharm. Corp. v. Amgen. Inc*., 882 F.2d 806, 811 (3d Cir. 1989) (joining the First, Second, Fourth, Seventh, and Ninth Circuits in holding that a district court has jurisdiction to grant injunctive relief in an arbitrable dispute); *Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co*., 749 F.2d 124, 125 (2d Cir. 1984) ("The fact that a dispute is to be arbitrated … does not absolve the court of its obligation to consider the merits of a requested preliminary injunction; the proper course is to determine whether the dispute is 'a proper case' for an injunction.").

b. "The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a

preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards." C.P.L.R. § 7502(c)).

B. Neutrality of Local Court System

1. An Independent and Experienced Judiciary That Does Not Favor the "Home" Party

a. United States courts enforce arbitration agreements and awards without regard to the nationality of the parties. *See, e.g., Gabriel Capital L.P. v. Caib Investmentbank Aktiengesellschaft*, 28 A.D. 3d 376 (1st Dep't 2006) (finding that arbitration agreement was enforceable by Austrian entity against New York entity); *R.J. Wilson & Assocs., Ltd. v. Underwriters at Lloyd's London*, 2009 WL 3055292 (E.D.N.Y. Sep. 21, 2009) (granting U.K. defendant's motion to compel arbitration against a U.S. corporation).

II. Practical Considerations

After formal legal infrastructure and the law governing the dispute, corporate counsel survey respondents considered convenience (e.g., location, industry-specific usage or prior use by an organization, established contacts with lawyers in the jurisdiction, language and culture, and efficiency of court proceedings) and general infrastructure (e.g., costs, access, and physical infrastructure) to be the most important factors in choosing an arbitration seat. *See* 2010 International Arbitration Survey: Choices in International Arbitration, *available at* http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

A. Legal Infrastructure

1. Availability of a neutral and impartial judiciary

2. Availability of specialized lawyers and experts to assist in arbitration

3. Whether the country is a party to the New York Convention and Panama Conventions

4. Whether the country's national arbitration law is based on the UNCITRAL Model Law

B. Convenience

1. Transportation

a. **Proximity to major international airports**

b. Availability of a robust public transportation system

2. Location of parties, counsel, witnesses, and arbitrators

C. Cost

1. Cost of facilities, travel, lodging, and support staff

D. Facilities

1. Hearing venue

a. Hearing space & available office space for preparation

2. Support Services

a. Translators & Interpreters

b. Court reporters

c. Internet access and access to computers, printers, copiers, and phones

E. Cultural Issues

1. Lack of language barriers

2. Prevalence of corruption

3. Safety issues