Choice of Venue in International Arbitration

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The choice of venue for an international arbitration can cause significant repercussions once a dispute arises. So parties should choose carefully, depending on their specific concerns. Claudia Salomon, Latham & Watkins partner and global Co-chair of the firm's International Arbitration Practice, offers insights from the book, *Choice of Venue in International Arbitration*, recently published by Oxford University Press, which she co-edited.

Why is the venue of an arbitration important?

**Salomon:** Venue is the seat, or the legal place, of an arbitration. The venue of an arbitration is important at every stage of an arbitral proceeding — impacting the role that local courts have in relation to the arbitration, the conduct of the arbitration itself and the enforceability of the award. Parties should carefully review a venue's local laws because the different jurisdictions vary significantly in terms of the authority of the local courts and extent of their intervention in an arbitration. As business continues to globalize, and the number of cities promoting themselves as favorable venues for arbitration continues to grow, parties should thoroughly consider where an arbitration should be venued.

At what point should parties begin to focus on venue?

**Salomon:** Early! Parties should focus on the selection of venue at the contract drafting stage and specify the venue for the arbitration in the dispute resolution clause. Then, if a dispute arises, local courts of the selected venue may assist the parties in commencing the arbitration, decide whether an arbitration clause is valid and consider petitions for provisional relief. The extent and nature of local court intervention, however, varies substantially across venues.

What role do the courts have in deciding what disputes can be arbitrated?

**Salomon:** Local courts treat challenges to the jurisdiction of the arbitral tribunal differently. While many courts adhere to the competence-competence principle that an arbitral tribunal is empowered to rule on its own jurisdiction, this doctrine is not recognized at all in China. In other countries, such as India, although the doctrine still exists on the books, a recent court decision has significantly limited its application. Similarly, some venues have unique approaches to matters that cannot be resolved by arbitration. For example, intellectual property disputes cannot be arbitrated in London and Sydney, while Dubai and Hong Kong have exceptions for certain consumer contracts.
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Arbitration is frequently described as an extra-judicial process. Does this mean that once the process has been initiated, the arbitration will be conducted beyond the influence of the local state courts?

Salomon: Not at all. State courts continue to exercise influence over the ongoing arbitral proceedings. The extent of their intervention varies by jurisdiction and it is necessary to analyze all provisions of local law that can affect the arbitration.

One of the most important considerations is the position local courts take on compelling testimony and evidence. Arbitration is governed by a contractual agreement between parties and is restricted to the signatories of the contract. Therefore, when the factual investigation requires evidence from third parties — parties not bound by the agreement — arbitral tribunals have limited power to compel evidence. To bring relevant facts to the tribunals or secure testimony, the parties may then seek assistance from local state courts. Yet, venues vary greatly in their approach to production and preservation of evidence. For example, US courts may issue production orders and impose penalties for failure to comply with them, but German courts lack the power to compel and can only draw adverse inferences from any refusal.

What role do local courts of the selected venue play after the arbitration has concluded?

Salomon: An important one! If the state where arbitration is venued is a signatory to New York Convention (which now includes 150 countries), the party can seek to confirm and enforce the arbitral award in each of the other contracting states, subject to limited grounds for challenge. It is thus important to ensure that the arbitration takes place in one of the New York Convention states. Venue, however, matters most importantly for the annulment of the award. An arbitral award can be vacated only at the seat of the arbitration, under its laws and procedures.

In addition, the parties should remember that any petition for annulment in local court is conducted in the official language of the venue. This means that all pleadings must be in the local language, and the award itself may need to be translated.

What trends are you seeing in arbitral award enforcement?

Salomon: An interesting trend has emerged recently in which some local courts have recognized and enforced an arbitral award that has been set aside at the seat of arbitration. The case law is still developing, so the impact is difficult to evaluate. While most courts of the New York Convention party states still do not recognize or enforce an annulled award, the US and France appear willing to enforce an award set aside at the venue of arbitration. If more jurisdictions take this approach, parties will have some protection from unusual interpretations of the “violation of public policy” for vacating an arbitral award in their selected venue.

Please see Choice of Venue in International Arbitration for additional detail and insights, or contact Claudia Salomon directly.