

Choosing an arbitral seat in the United States

by *Claudia Salomon and Irina Sivachenko*

Produced by Latham & Watkins LLP for [LexisPSL Arbitration](#).

Why the venue (or seat) is important

Venue is the seat, or the legal place, of the arbitration. Frequently overlooked by the parties at the time of contracting, the selection of the seat is one of the most important choices to make during contract negotiations. Indeed, the seat of the arbitration usually determines the applicable procedural law, *lex arbitri*, with important practical and legal implications, including the role of local courts in relation to the arbitration (see Practice Notes: [Arbitration seat](#) and [Choosing the seat of arbitration](#)).

Because the laws determining the authority of local courts and the extent to which they can intervene in the arbitral process vary substantially across jurisdictions, failing to consider the appropriate seat for an arbitration may slow down the proceedings and leave the parties unprepared to address the peculiarities of local law. Parties should thoughtfully select the seat and fully understand its legal and practical implications during the contract drafting stage to ensure they are in the best possible position should a dispute arise.

The role of local courts

Although arbitration is largely an extra-judicial process, the courts where the arbitration is seated can impact substantially the arbitral proceedings at every stage of the process, for example:

- o before the arbitration has been initiated, the courts may assist parties in commencing the arbitration and consider petitions for provisional relief. A party may request that a local court enforce the agreement to arbitrate when another party is resisting arbitration
- o during the arbitration, local courts may be able to assist with the production of evidence, supplementing the limited power of the arbitral tribunal to gather facts from third parties
- o after the tribunal has issued its award, parties must bring any applications to vacate or set aside the award before the court of the selected venue, and that court considers the application under its local laws and procedures

Practical considerations

As the seat frequently (although not always, as hearings can take place in another location, but the legal 'seat' will remain unchanged) serves as the actual location where the arbitral proceedings take place, parties should consider the practical implications of their choice of seat, such as convenience and ease of physical access, the pool of available and experienced arbitrators, and the official language of the seat as well as its cultural practices.

Important considerations in selecting arbitral seats in the United States

Despite the proliferation of places around the world promoting themselves as favourable arbitral seats, the United States remains one of the most popular seats of arbitration. Federal policy favouring arbitration, independent courts, a well-developed body of contract and commercial law, as well as the courts' authority to compel arbitration have all fuelled the popularity of the United States as a place for an international arbitration. Within the United States, New York, Miami and Houston have emerged as the most popular arbitral seats. While all three cities offer great infrastructure, qualified arbitrators and neutral, experienced judges, their local procedural and substantive laws vary.

State law matters

The dual legal system of state and federal laws in the United States results in two sources of relevant laws governing arbitral proceedings: the Federal Arbitration Act ([FAA](#)) and the laws of the state of the seat. When choosing a seat

in the United States, parties should consider how the FAA as well as state laws impact both applicable procedural rules and substantive matters.

Substantive law

The parties frequently select governing substantive law during negotiations. This substantive law, however, usually governs parties' rights and obligations under the contract but does not always apply to disputes about the validity and formation of the contract, disagreements about arbitrability of a particular issue, or challenges to the arbitral award. The courts frequently apply the law of the seat to resolve these questions. See Practice Note: [Applicable laws in international arbitration](#); for questions of applicable law in England and Wales, see Practice Notes: [Arbitration--substantive law of the dispute \(England and Wales\)](#), [Law of the arbitration agreement \(England and Wales\)](#) and [Law of the proceedings--curial law of lex arbitri \(England & Wales\)](#).

Under the Supremacy clause of the [US Constitution](#), federal law trumps conflicting state law. Although the FAA contains no express pre-emptive provision, the Supreme Court has held that the FAA overrides state laws that are unfavourable to arbitration. See for example, *AT&T Mobility v Concepcion* 131 S Ct 1740, 1753 (US 2011), holding that the FAA pre-empted California state law because the state law 'stands as an obstacle' to the FAA policy favouring arbitrations; and *Moses H Cone Memorial Hospital v Mercury Construction* 460 US 1, 24 (US 1983), describing the FAA as 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary'.

The FAA, however, was not intended to 'occupy the entire field of arbitration' (*Volt Information Scientists v Board of Trustees* 489 US 468, 477 (US 1989)), and without a direct conflict between federal and state law, the courts may apply both. Indeed, the interplay between the two can be very subtle--for example, while it is generally accepted that state law determines the validity of the arbitration agreement, federal law defines the scope of the agreement. Where the FAA is silent on the issue, state law will be applied to supplement the FAA and fill in the gap. For example, although the FAA requires courts to enforce a valid agreement to arbitrate, it provides no definition of what constitutes an agreement. As a result, state law will be used to determine whether the contract has been formed and whether the parties have indeed agreed to arbitrate their dispute. Generally state law also governs the interpretation and review of the contract's validity and thus might be decided differently across the seats.

Procedural law

The FAA favours party autonomy in arbitral proceedings and contains little guidance on the conduct of the arbitration procedure itself. Therefore, parties should understand the state law of the selected seat, as many states have enacted their own statutes governing arbitral proceedings; for example, Texas and Florida have adopted the UNCITRAL Model Law (see Practice note: [UNCITRAL Model Law on international commercial arbitration \(the 'Model Law'\)](#)), while New York has developed its own provisions. The FAA does not cover provisional relief, thus the availability and scope of interim measures will depend on the state law of the selected venue. Some states, such as New York, Texas and Florida, have adopted statutes specifically addressing the issue of the interim relief and the circumstances under which the application for such relief should be granted.

The state law of the selected seat can also impact the parties' ability to engage foreign lawyers as their counsel or as arbitrators. The unauthorised practice of law is a serious violation in the United States, and every state has its own procedures authorising lawyers to practice law in front of its courts. The states, however, disagree as to whether the representation in a private arbitral proceeding qualifies as practice of law and thus falls within the same lawyer registration requirements. For example, New York courts have held that foreign lawyers can appear before arbitral tribunals seated in the state because such representation does not constitute the practice of law (*Prudential Equity Group v Ajamie* 538 F Supp 2d 605, 607 (SDNY 2008); and *Williamson PA v John D Quinn Construction*, 537 F Supp 613, 616 (SDNY 1982)).

Similarly, Texas and Florida statutes generally allow foreign counsel to represent parties in the proceedings seated within their borders (see Handbook of Texas Lawyer and Judicial Ethics, Vol 48-48B (Texas Practice Series, 2013) §10:5, and Florida Disciplinary Rule of Conduct 4-5.5 (FLA BAR REG. R. 4-5.5 (2006))). In contrast, California does not allow foreign lawyers to appear before arbitral tribunals, and even requires that US out-of-state lawyers obtain special pre-approval from the tribunal and notify the California Bar in advance of their appearance (see [Out of State Attorney Arbitration Counsel on the State Bar of California](#)). California's strict restriction on the use of foreign counsel has impacted negatively on the popularity of California as an arbitral venue.

Circuit splits--varying approaches across jurisdictions

Just as state statutory law varies, federal district courts also vary in their interpretation of the federal substantive law that may impact an arbitration. For example, although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) mandates that an agreement to arbitrate must be made in writing, the courts have interpreted this requirement differently. The Fifth Circuit, which includes Texas, has ruled that under certain circumstances even an unsigned contract can satisfy the writing requirement of the New York Convention (*Todd v SS Mut Underwriting Association (Bermuda)* 601 F.3d 329, 335 n11 (5th Cir 2010); and *Sphere Drake Insurance v Marine Towing* 16 F.3d 666, 669 (5th Cir 1994), noting that if an arbitral clause was included in the contract, a signature is not required). In contrast, the Second Circuit, which includes New York, held that an arbitration clause included in a form purchase order that was signed only by one party is not enforceable and does not satisfy the necessary writing requirement (*Kahn Lucas Lancaster v Lark International* 186 F.3d 210, 216-18 (2nd Cir 1999)).

Similarly, the courts are split on the availability of pre-hearing discovery (the US equivalent of disclosure). Although the FAA contains a provision granting a tribunal general authority to compel necessary witness testimony (FAA, 9 USC § 7), federal courts have disagreed on the scope of such authority. The circuits are currently split on whether the courts' authority to compel evidence extends to pre-hearing discovery against the third parties. The Second and Third Circuits, for example, do not allow pre-hearing discovery from non-parties, whereas the Sixth and Eighth Circuits allow such pre-hearing document requests (*Life Receivables Trust v Syndicate 102 at Lloyd's of London* 549 F.3d 210 (2d Cir 2008); *Hay Group Inc v EBS Acquisition Corp.*, 360 F.3d 404 (3rd Cir 2004); *American Federation of Television and Radio Artists, AFL-CIO v WJBK-TV*, 164 F.3d 1004 (6th Cir 1999); *Re Security Life Insurance Company of America*, 228 F.3d 865 (8th Cir 2000)). Depending on the venue of arbitration, the parties may not be able to obtain much-needed documentary evidence from non-parties before the commencement of the arbitral proceedings.

The circuits are also split on the available grounds on which a party may seek to vacate an arbitral award. The Supreme Court ruled that the FAA provides an exclusive list of the available grounds to vacate an award (*Hall Street Associates v Mattel* 552 US 576, 578 (2008)), but the courts have disagreed on whether 'manifest disregard of the law', not among the FAA's enumerated grounds, can nevertheless be applied. The Second, Fourth and Ninth Circuits have held that manifest disregard of the law remains a valid ground to vacate arbitral awards (*Stolt-Nielsen SA v AnimalFeeds International* 548 F.3d 85, 93-94 (2d Cir 2008), revised on other grounds by *Stolt-Nielsen SA v AnimalFeeds International*, 130 S Ct 1758 (2010); *Wachovia Securities v Brand*, 671 F.3d 472, 480 (4th Cir 2012), confirming validity of manifest disregard of law doctrine; and *Comedy Club v Improv West Associates*, 553 F.3d 1277, 1290 (9th Cir 2009), confirming validity of manifest disregard of law doctrine). In contrast, the First, Fifth, and Eleventh Circuits have ruled that manifest disregard of the law is no longer a viable basis to vacate an arbitral award (*Ramos-Santiago v United Parcel Services*, 524 F.3d 120, 124 n3 (1st Cir 2008), noting that 'manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act'; *Citigroup Global Markets v Bacon*, 562 F.3d 349, 350 (5th Cir 2009), abandoning manifest disregard of the law doctrine as an independent ground to challenge arbitral awards; and *Frazier v CitiFinancial*, 604 F.3d 1313, 1324 (11th Cir 2010), holding that manifest disregard doctrine can no longer be used).

Popular seats in the United States

While New York, Miami and Houston are all popular venues in the United States, each offers particular advantages for specific kinds of disputes.

New York

Given New York's well-developed, stable and respected body of commercial law, many parties select New York as the substantive law governing their contract, and likewise select New York as the venue of the arbitration (although the selection of the substantive governing law need not be the same as the law of the seat). New York also offers the benefit of neutral courts that strongly favour arbitration (eg *David L Threlkeld v Metallgesellschaft (London)*, 923 F.2d 245, 248 (2d Cir 1991)), and in September 2013, New York became the third city in the world, and the first in the United States, to establish a specialised arbitration court with a dedicated arbitration judge.

New York is also the home of several respected arbitration centres, including the International Centre for Dispute Resolution and the International Institute for Conflict Prevention and Resolution. In 2013, the International Chamber of Commerce Court of Arbitration also opened an office in New York to administer cases. The recent opening

of the New York International Arbitration Center, which offers state-of-the-art facilities for arbitral hearings, further strengthens New York's popularity.

As a global centre of international commerce, New York is also a practical choice because of the ease of physical access and the pool of available lawyers experienced in international commercial arbitration.

Miami

As home to the US headquarters of many Latin American business, and host of the 2014 International Council for Commercial Arbitration Congress, Miami is building a solid reputation for arbitral proceedings involving Latin American parties. In addition, Miami recently followed New York's example, and in December 2013 announced the creation of an International Commercial Arbitration Court, staffed with specialist judges and dedicated exclusively to hearing international commercial arbitration matters.

Houston

Houston is developing as a popular choice for arbitration of disputes in the energy and construction fields. The city promotes itself as a venue on the crossroads between America and the Middle East.