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International Arbitration Report

International Arbitration Experts Discuss The Future Of Arbitration

by
Albert Bates Jr.
Troutman Pepper Hamilton Sanders LLP

Christopher Poole
JAMS

Michael P. Lennon Jr.
Mayer Brown

Alex Yanos
Alston & Bird

Alexandre de Gramont
Dechert LLP

Lisa Houssiere
McKool Smith

Peter A. Halprin
Pasich LLP

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Commentary

International Arbitration Experts Discuss The Future Of Arbitration

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what area of the world they expect to become a hot seat for future arbitration. We would like to thank the following individuals for sharing their thoughts on this important issue:

- Albert Bates Jr., Partner, Troutman Pepper Hamilton Sanders, LLP, Pittsburgh
- Christopher Poole, President and CEO, JAMS, Irvine, Calif.
- Michael P. Lennon Jr., Partner, Mayer Brown, Houston
- Alex Yanos, Partner, Alston & Bird, New York
- Alexandre de Gramont, Partner, Dechert LLP, Washington, D.C.
- Lisa Houssiere, Principal, McKool Smith, Houston
- Peter A. Halprin, Partner, Pasich LLP, New York.

Mealey's: Is there an area of the world you expect to become a hot seat for future arbitration and, if so, why?

Bates: Available empirical data suggests that the most preferred seats for international arbitration today are London, Paris, Singapore, Hong Kong, Geneva, and New York, and that these cities were also the most preferred seats in the 2010 and 2015 Queen Mary International Arbitration surveys. *See 2018 Queen Mary/White & Case International Arbitration Survey: The Evolution of International Arbitration.*

Consequently, in the short term, we do not expect the current landscape of international arbitration seats to

materially change. Instead, we believe that the common international arbitration seats, such as London, Paris, Singapore, and New York, will remain the most popular. Singapore may, in fact, further consolidate its status as the preeminent international arbitration seat in Asia given the geopolitical questions surrounding the future of Hong Kong. In addition, and as supported by the results of the 2019 Queen Mary International Arbitration Survey, <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey?pageNumber=1>, Dubai has become increasingly more popular for Middle Eastern arbitral disputes in recent years given the emergence of the Dubai International Financial Centre.

In addition, the United States, as a whole, will continue to be an important hub for international arbitration. For example, although information was not directly available on the *seat* of arbitration, the United States was the third most popular *place* of arbitration, behind France and Switzerland, and slightly ahead of the United Kingdom, according to the ICC Dispute Resolution 2018 Statistics. <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>. Within the United States, we expect that New York and Washington D.C. will remain as the most popular international arbitration seats. However, we note that Miami and Houston are becoming increasingly more common arbitral seats given their relationship to Latin America.

Poole: Arbitration has been prevalent in Europe and North America for many years, and those regions will likely continue to be attractive seats for arbitration. Events related to Brexit may cause parties to steer away from London, while arbitral institutions in Asia were gaining increasing visibility as attractive seats for arbitration before COVID-19. At the same time, cities in North America continue to position themselves

as attractive arbitral seats. California, for example, enacted legislation in 2019 to make it easier for lawyers from foreign jurisdictions to provide legal services in international commercial arbitration. New York, Atlanta, Toronto and Miami have also been promoting their unique offerings as arbitration seats.

Arbitration institutions in Singapore, Beijing, Schenzen and elsewhere in Asia will likely continue to grow, especially as and when the current pandemic ends, particularly as globalization—and the related cross-border business deals—continue. However, it bears watching whether virtual hearings become more prevalent. Most institutions' arbitration rules authorize virtual hearings. While parties have been much slower to adapt this technology for arbitration as for mediations, continued travel restrictions and backlogged courts are likely going to drive more users to online platforms, and it remains to be seen what impact this will have on the choice of seat for arbitration.

Lennon: There is little evidence to suggest that a new “hot seat” for international arbitrations is likely to emerge in the foreseeable future. The 2015 and 2018 Queen Mary/White & Case International Arbitration Surveys show that London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm retain a very strong grip on the arbitral seat market. Our experience advising transactional colleagues on arbitration clauses is consistent with these survey results.

This does not mean that seat preferences are not evolving. Singapore overtook Hong Kong as a preferred seat in the 2018 survey. Unsurprisingly, many consider Singapore the most popular seat in Asia, owing to its pro-arbitration national legislation and strength as a commercial and financial center. Singapore's market share is likely to continue to grow given the active steps being taken by the Singapore International Arbitration Centre and others to promote Singapore as a seat of arbitration.

Regional trends can also be observed from the Queen Mary survey and the comprehensive report published by the IBA in 2015 that anecdotal evidence suggests are continuing. Overall, Madrid continues to gain popularity as a seat for Latin-American and Spanish parties. Mauritius, perhaps surprisingly, has garnered attention from African parties. And Dubai continues to make inroads incrementally, particularly amongst Arabic speaking parties who prefer to arbitrate in Arabic.

Yanos: The easy answer would be Singapore. With the radical increase in cross-border investment from Asia and the diminishing importance of Hong Kong due to political turmoil, Singapore is a natural for continued growth.

That being said, Mauritius is also worth monitoring—Asian interest in Africa is at an all time high and Mauritius is poised to take advantage of many of the disputes likely to follow due to its central location and modern arbitration laws and rules. Also, the local population speaks French and English and is comfortable with both civil and common law approaches to problems.

de Gramont: This may seem counterintuitive, but because of COVID-19, New York is going to be a busier seat for international arbitration than ever before. Here's why.

First, the U.S. has been hit especially hard by COVID-19 and simultaneously by other social and political crises. Crises generate disputes and U.S. parties are eager to resolve them quickly. U.S. parties are therefore invoking arbitration clauses in existing contracts—many of which provide for a New York seat. But because the U.S. courts are moving slowly, U.S. parties are also seeking to negotiate submission agreements—to submit the dispute to arbitration even though the contract has no arbitration clause—to take advantage of expedited procedures and virtual hearings. Given that New York is often the preferred seat for U.S. parties, that in itself is leading to more cases seated there.

Second, as the world economy flounders, more financial institutions are likely to turn to arbitration to resolve their cross-border disputes. U.S. banks and financial institutions are more likely to opt for arbitration over court litigation than ever before, for the reasons stated above. On the flip side, wealthy foreign investors are looking to the U.S. to invest in distressed assets. Here, too, U.S. parties are likely to prefer a New York seat if they can get it. Where U.S. assets are involved, foreign investors may also be amenable to a New York seat.

Third, given that hearings can be held anywhere—and that many hearings are now being held virtually—the physical location of the seat is far less important than its arbitration law and court system. In times of crisis and uncertainty, there is a tendency to stay with the “tried and true.” New York courts are viewed as experienced,

sophisticated, neutral, and relatively predictable when it comes to international arbitration issues.

New York has always been a “hot” seat for arbitration. It’s going to get hotter.

Houssiere: As countries wrestle with how to rebound from the economic and political turmoil resulting from the Covid-19 pandemic, the international arbitration community will be actively watching to see how various countries emerge from the virus, leading to the end of certain arbitral seats and the concomitant rise of others. Well-respected seats for international arbitration such as London, Paris, Geneva, and New York will continue to be popular given that these are viewed as pro-arbitration and therefore “safe” seats, especially for high-stakes complex international arbitrations. The market for arbitral seats, however, is changing in recent years because there are more viable options and parties are willing to deviate from the traditionally “safe” seats of arbitration.

The current trend is the rise of regional arbitral seats — particularly for smaller commercial disputes and those involving parties from the same region. The rise of international arbitration and institutions in the Asia-Pacific region, for instance, has meant that parties in that region are increasingly selecting seats such as Hong Kong and Singapore, meaning a decrease in market share from seats in Europe and North America. Not surprisingly, this is due in part to Asia-Pacific’s strong economic position, parties’ confidence in the legal infrastructure, and modern legislation that favors arbitration. In addition, Singapore’s neutral geographic location is appealing to parties and investors in the Asia-Pacific region.

Various surveys and studies indicate that parties are increasingly attracted to “newer” seats of arbitration in their region of the world. Seats such as Sao Paulo, Mexico City, Madrid, Mauritius are gaining popularity in their respective regions because parties appreciate efficiencies in addition to the benefit of cultural understanding. Specifically, Madrid has become a highly regarded seat for Latin American cases due to its modern legal infrastructure and its close cultural and investment ties with Latin America.

A few decades ago, the options for selecting a seat of arbitration were somewhat limited. While seats in Europe and North America will continue to dominate in the immediate future for larger commercial disputes, the emerging trend is for parties to select a seat in their respective region. As certainty and confidence in the legal infrastructure grows in various regions, parties and investors will increasingly select seats on a regional basis.

Halprin: It may come as a surprise to some, particularly in light of Brexit, but I see London becoming a hot seat for future arbitration. The reason for this prediction is that many U.S. policyholders buy insurance policies from the London Market, particularly syndicates of Lloyd’s of London. Many of these policies require arbitration in London (though Bermuda and Canada are sometimes options as well). Given the explosion of COVID-related insurance litigation in the United States and around the world, it is highly likely that there will be a parallel flurry of insurance and reinsurance arbitrations in London. These arbitrations are likely to revolve around commercial property and event cancellation insurance, though COVID-related disputes in other areas of insurance and reinsurance may also see a spike in activity. ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

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