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The Pros And Cons Of ‘Alternative’ Arbitration Locales

By **Caroline Simson**

Law360, New York (September 14, 2017, 7:47 PM EDT) -- The recent rise in the number of arbitral centers in lesser-known locales means parties now have more forum choices than ever, but making the right one may involve a lengthy review of certain factors.

With new arbitral centers popping up in places like **Mumbai**, the **British Virgin Islands**, Dublin and Atlanta, international arbitration practitioners may be faced with the question of whether to choose a more well-known forum like the International Chamber of Commerce or the London Court of International Arbitration in their arbitration clauses, or to roll the dice with an up-and-coming venue.

“It's a great time right now in international arbitration from a party perspective, because you have so many choices,” said Michael McIlwrath, global chief litigation counsel for GE Oil & Gas in Florence, Italy. “When I started 20 years ago, you really had two or three institutions that people thought were really reliable. Today there are a lot of institutions that are very, very good.”

The question of which institution to place in an arbitration clause and which city to choose as a seat of arbitration can have real consequences once a dispute arises. Choosing an arbitral center without the necessary capabilities and expertise may lead to disaster, and choosing a center with a local judiciary that's unfamiliar with or unfriendly to international arbitration may result in a painful and costly loss. That's why the popular centers are so popular: Lawyers know exactly what to expect.

But with the appropriate set of factors, there are also certain advantages that can come with moving off the beaten path to a center that's actively promoting itself within the international arbitration sphere.

Here, in the second of a **two-part series** on alternative arbitral centers, Law360 takes a closer look at the advantages of choosing a less-established forum and the additional considerations necessary to make a smart choice.

Cost and Convenience

One of the most obvious advantages of choosing an alternative arbitral center is that all of the extraneous expenses — including accommodations and meals for lawyers and arbitrators, hiring fees of local counsel, and fees for legal assistance services such as transcription and translation — are all likely to be far less than they would be in a city like London, Paris or New York.

Shelby Grubbs, executive director of the Atlanta Center for Arbitration and Mediation, said that the cost factor definitely comes into play in Atlanta, particularly when you're in the city for a lengthy hearing “with counsel and arbitrators camping out for an extended period of time,” he said.

He pointed to a 2014 survey that found hotel costs in Atlanta were 47 percent of what they were in New York, 51 percent of what they were in Paris, and 52 percent of London hotel costs.

It's also true that newer centers are often in locales that are more convenient to parties who will be likely to resolve a dispute through arbitration. That's the case in Miami, which has promoted itself as a center for international arbitration, particularly for parties from Latin America.

"Miami is certainly a more convenient forum for the Latin American side than would be, say, New York, because it's close to Latin America," said Edward K. Lenci, a partner with Hinshaw & Culbertson LLP. "I think Miami also has the benefit of having a large Spanish-speaking population, which would certainly be an attraction to Latin American businesses thinking about where to arbitrate a dispute."

He noted that many Latin American businesses already have offices in Miami, making it an obvious choice for an arbitral seat.

More Personalized Attention

Popular arbitral forums like the ICC or the Singapore International Arbitration Centre may administer hundreds of cases a year, meaning that even the most well-organized secretariat at those institutions may have its attention being pulled in multiple directions at any one time.

But take a case to a forum like the British Virgin Islands International Arbitration Centre — which declared itself fully operational in January, but has not yet administered a case, and which was reportedly undamaged by Hurricane Irma — and you're likely to get the arbitral equivalent of a four-star hotel.

"Our caseload is quite small, so any arbitration we get to administer is going to be our baby," said the center's CEO, Francois Lassalle. "We are going to be 100 percent all over it."

And it's not just about the case administration. There's also a level of detail that can go into ensuring that parties to an arbitration have a comfortable work space.

David Barniville SC, vice president of Arbitration Ireland's executive committee and a proponent of the Dublin Dispute Resolution Centre, touted the center's staff for their attention to detail in this regard — right down to getting ahold of a particular bottle of wine that the arbitrators want for dinner.

"One thing Irish people are good at is hospitality," he said. "Anybody who has used the services of the center generally are extremely complimentary about the hospitality that they get."

Other Local Factors

The legal climate surrounding an arbitral center is also a key consideration.

When weighing a city or country as a seat of arbitration, lawyers must always look at whether the judiciary adopts the widely accepted principle of limited interference in arbitrations and limited scrutiny of arbitral awards, since local courts are typically the only ones that can decide whether an arbitration award can be overturned. Many choose arbitration because they're seeking finality, and judiciaries in cities like London, Paris and New York recognize this.

But locales that are actively promoting international arbitration may go even further, Grubbs said. He noted that Georgia allows foreign lawyers to appear not only in arbitrations but in court in cases related to arbitrations, and it confers judicial immunity on arbitrators.

The Atlanta International Arbitration Society notes that the U.S. Court of Appeals for the Eleventh Circuit — which would take on cases from both Georgia and Florida — has a consistent track record of applying the Federal Arbitration Act in a manner that is friendly to international arbitration. And Georgia, like Florida, has a special business court to handle matters relating to international arbitration.

But there are other local considerations that can play into how lawyers choose a particular seat of arbitration. London has long been considered an ideal venue for international arbitration not just for its arbitration-friendly judiciary, but also for its familiar legal traditions and access to Europe. With the uncertainty of Brexit, some in Ireland believe that an opportunity has presented itself for Dublin to become a competitor to London.

Dublin is an English-speaking common law jurisdiction, with courts that are sensitive to arbitration and reluctant to interfere with arbitration, according to Barniville. Ireland's legal system also deals with the issue of cost shifting, which is whether the costs must be paid by the losing party during an arbitration, in a way that's likely to be quite familiar to U.S. lawyers. This "costs follow the event" approach is used in countries like England and can be in international arbitration as well.

"To an American audience … they're used to each side bearing their own costs, and not having cost shifting," he said. "Under our Arbitration Act, parties can agree to whatever agreement they wish on cost, so that irrespective of the outcome the agreement can provide that the parties are each to bear their own costs."

The Downside (Maybe)

With all the potentially good aspects of choosing an arbitral institution in an alternative locale, it might seem like the only thing keeping attorneys from naming these forums in dispute resolution clauses is an innate aversion to change. But there's a reason why the more established centers in London and Paris are far more likely to appear in a contract than an up-and-coming center: certainty.

Experienced international arbitration attorneys are by nature a cautious bunch, relying on locales and institutions they know will have the necessary expertise and attitude toward arbitration. They'll look to use arbitrators they know are fair and knowledgeable, and if they don't recognize the names of arbitrators on a list provided by an institution they're unlikely to want to arbitrate a dispute there.

But that doesn't mean that experienced practitioners in international arbitration need to always insist on this certainty. Sometimes, considering an alternative center can be an important bargaining chip, says McIlwrath.

"I prefer to have the ICC in our contracts because we know it's predictable," he said. "But if a customer says 'We're going to do a $200 million contract … but we happen to like this [institution] here in our country, and we don't have approval to accept anything else,' a business will come to the lawyers and ask how important it is to insist on the ICC or the LCIA. Because if it's not that important, we'd really rather push back on things like price, on delivery terms, on the technical specifications."

McIlwrath explained that one of the things he looks for when considering such an alternative institution is whether it has a website that gives him the ability to ascertain who runs and is responsible for the organization. That's also a good way to see how transparent the institution is, he said.

"The more transparent they are about the process, the more comfort you have," he said.

He also checks to make sure that the institution is truly international, since many institutions that may have a strong domestic arbitration practice aren't necessarily that experienced with international disputes. If the institution is more familiar with domestic arbitration, it's more likely to appoint someone who's experienced in domestic arbitration.

And that can be an important consideration not just from a procedural perspective — such as ensuring that the arbitrators will enforce internationally accepted evidentiary rules — but also for ensuring that the relevant substantive law is properly applied. It's also helpful to consider how innovative the institution has been, such as whether it publishes the names of arbitrators acting in current proceedings.

Once those boxes are checked off, insisting on a more widely used institution may not be all that important.

"As you become familiar with these institutions and check them out, you say, really, at the end of the day, it's not what we would have chosen but it's something we can live with," he said.

--Editing by Mark Lebetkin and Kelly Duncan.