President's Message

Choosing a Seat? Ten Questions to Ask (on Setting-Aside Proceedings)

If this title strikes you as a reference to the CIArb London Centenary Principles[1], you are spot on. Think of this message as proposing an addendum to the London Centenary Principles. Comparisons of arbitration venues often focus on minute differences between the arbitration rules of the local arbitration institutions. The London Centenary Principles do not fall into that trap. Instead they fall into another trap: they list criteria that are relevant for arbitration in general but are of little if any relevance for the choice of a venue. For your convenience: these are CIArb's ten criteria:

1. Law (on international arbitration)
2. Judiciary
3. Legal Expertise (of the local legal profession)
4. Education (in arbitration)
5. Right of representation
6. Accessibility and safety
7. Facilities
8. Ethics (of counsel)
9. Enforceability (of foreign arbitral agreements and awards)
10. Immunity (of arbitrators)

Granted, these criteria are all to be considered in theory, but let's face it, in practice parties almost always choose between just a handful of plausible venues, where most of the criteria are not an issue. Take enforceability: 169 states are parties to the New York Convention, so enforceability of an award does not really depend upon the seat. Or ethics: I don't recall any discussion about whether city X or country Y is better suited as a venue for a specific contract because of local deontological rules. I leave it to you to go through the rest of the list.

Having said that, items 1 and 2 of CIArb's list are crucial, absolutely crucial, and getting even more so in today's opinionated and politicized world.

---

[1] https://www.ciarb.org/media/4357/london-centenary-principles.pdf.

And this is where my twopence worth of thoughts come in. At a CIArb-sponsored conference a while ago,[2] I proposed the following Ten Questions to Ask with regard to setting-aside proceedings before the state courts at the seat of the arbitration:

1. How many instances?
2. How many (mandatory) grounds for challenge?
3. Does a challenge stay enforcement of the award?
4. What is the duration and scope of the proceedings?
5. In what language(s) can the proceedings be conducted?
6. How high are the court costs and who pays them?
7. Is there compensation for lawyers' fees?
8. Are there any restrictions on representation?
9. Are confidential arbitration proceedings kept confidential?
10. Are the judges experienced, impartial, and restrained?

I guess the questions speak for themselves. If you just compare the laws and court practices among the most popular arbitration venues, you will realize enormous differences. They are rarely ever openly discussed – if only because none of the popular venues would receive top marks on all of these criteria. Clients deserve, however, to be educated on this in order to be able to make an informed choice. For example: confidentiality of the arbitral proceedings is of little help if setting-aside proceedings are a matter of public record. Same for the median duration of the arbitral proceedings if an award may then remain stuck in the courts for several years. Not to speak of political powers breathing down the neck of judges.

Yes, such a comparison is not easy and might require some research. But who among you would possibly shrink from a challenge?

Felix Dasser

---

[2] The conference took place in December 2017. The papers will shortly be published as Nayla Comair-Obeid & Stavros Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer 2022).

Save the Date

ASA Conference and General Assembly
16 September 2022, Bern

For more information see www.swissarbitration.org