There was a time when the crucial factor in deciding where to seat an international arbitration was whether the chosen city had good restaurants. Paris' reputation at the forefront of international arbitration, it was often (unfairly) alleged, was more closely linked to its Michelin starred eateries than to the presence of the International Chamber of Commerce (ICC).

As ever, location is very important: get the choice of seat right and the arbitration is more likely to run relatively smoothly; get it wrong and you risk delays, unnecessary expense and frustration as local courts intervene and obstruct the international arbitration process.

This article focuses on this important aspect of arbitration and, in particular, considers:
Why the choice of seat is important

Arbitration clauses are often left to the end of contract negotiations when there is a strong temptation to agree to a clause locating the arbitration in an apparently neutral country without knowing what that country's laws say about arbitration.

This can be a major mistake as the choice of seat can have significant implications. If Geneva is chosen as the seat of the arbitration, then the parties are subjecting the conduct of their arbitration to the oversight of the Swiss courts applying Swiss legislation to arbitral procedure, even if the dispute concerns a contract governed by English law and arises out of an arbitration agreement similarly governed by English law.

While the key jurisdictions for international arbitrations have a broadly similar approach to arbitration, there are differences. Some are substantive, for example whether and the extent to which local courts can intervene in arbitrations seated in their jurisdiction, and whether the parties have rights of appeal against the arbitration award. In addition, most jurisdictions have some mandatory rules that the parties cannot agree to exclude. As long as both parties understand these differences and are comfortable with them there should not be an issue. The difficulties arise when a contract negotiator makes the false assumption that all jurisdictions are the same or that they do not need to consider the local law of the proposed seat.

Most western countries have few mandatory rules and generally allow the parties to set their own procedural rules by agreement, either expressly or by incorporating institutional arbitration rules, or by empowering the tribunal to do so (see also Procedural issues in international arbitration: a cultural battleground at www.practicallaw.com/2-200-4806). Also, the choice of seat does not preclude holding some or all of the hearings in other jurisdictions. The ICC Rules (Article 14), the LCIA Rules (Article 16) and the UNCITRAL Model Law (Article 20(2)) all provide that the legal seat of the arbitration will not change if the parties decide to hold hearings elsewhere. This can be where one party is eager to choose an unsuitable jurisdiction as the seat simply because of its proximity to that party: often, reminding the other side that the arbitration hearings can be anywhere means that they will agree to seat the arbitration in a more acceptable jurisdiction.

Approaches in different jurisdictions

The key jurisdictions for international arbitrations do not differ significantly in their approach to how they support arbitrations, but there is often a difference in attitudes of arbitrators and procedures adopted (see below, Attitudes of national arbitrators). This section looks at the courts' attitude to arbitration and any mandatory provisions relating to arbitration in Belgium, Brazil, England and Wales, France, Germany, Hong Kong, Russia, Singapore, Sweden and the US.

Belgium

The courts' attitude to arbitration. The Belgian courts may intervene in the arbitration process in a number of special circumstances:

- Assisting the process. The court may, without the prior agreement of the parties, secure the attendance of witnesses, enforce the orders of a tribunal, appoint an arbitrator if a party refuses to do so and appoint a new arbitrator if one resigns or dies.

- Removal of arbitrators. A party must use any available recourse to an arbitral tribunal before invoking the court's power to remove an arbitrator. Subject to that, the court has the power to decide on a challenge to the appointment of an arbitrator.

- Jurisdiction. An arbitral tribunal may rule on its own jurisdiction and can examine the validity of the arbitration agreement. The court may hear a challenge to the arbitral tribunal's decision that it has jurisdiction only when the award has been made.

Mandatory provisions. The following mandatory provisions apply:

- Belgian public entities and government authorities have limited powers to conclude an arbitration agreement.

- All parties must have equal powers in the nomination of arbitrators.

- All parties must be given a fair trial.

- The arbitral tribunal must be composed of an uneven number of arbitrators.

- The tribunal has power to rule in respect of its own jurisdiction.

- The arbitral award must be in writing and signed by the arbitrators.

- The arbitral award must be reasoned.

- Excluded from arbitration are:
  - matters which are capable of settlement (for instance, nationality);
  - matters subject to exclusive jurisdiction (taxation, bankruptcy and so on);
  - certain employment and insurance contracts (an arbitration agreement may be entered into once the dispute has arisen, not before); and
  - distributorship and commercial agency contracts (arbitration is only possible when agreed on after the termination of the contract or when the arbitrators are obliged to apply Belgian law to the dispute).

Brazil

The courts' attitude to arbitrations. The Brazilian courts will intervene in an arbitration in a number of circumstances:

- Assisting the process. The court may, for example:
  - enforce an arbitration clause;
  - appoint an arbitrator or if one party refuses, execute the terms of reference;
Supportiveness of the local arbitration law. Many countries have enacted a code of law designed to facilitate international commercial arbitrations. Some arbitration laws are specifically intended to enhance the attractiveness of a jurisdiction as a venue for settling major disputes. Typically, these laws will address:

- the constitution of the arbitral tribunal and any grounds for challenging that tribunal;
- the entitlement of the arbitral tribunal to rule on its own jurisdiction;
- interim measures of protection;
- court assistance (if required); and
- the form and validity of the arbitration award, its finality and any right to challenge it in the courts of the place of arbitration.

Arbitration laws may also embody certain principles, for example equal treatment of the parties and the ability of the parties to agree between themselves matters of procedural detail, such as the timing and manner of service of documents.

Neutrality. A prime reason for choosing international arbitration is to avoid one party having to submit to the local courts of the other party (that is, eliminating any "home advantage"). A neutral seat emphasises the strength of arbitration as a stand-alone, independent dispute resolution mechanism. In addition, it generally avoids the need to instruct counsel to conduct the proceedings who are qualified in the jurisdiction of the seat, unlike in the case of a choice of a national court.

Mandatory rules. A further consideration will be the existence, number and nature of any mandatory rules of the law of the seat. Mandatory rules are rules of law which cannot be derogated from by contract. The arbitration laws of most western countries have few mandatory rules and allow the parties to set their own procedural rules by agreement, either expressly or by incorporating institutional arbitration rules.

Enforceability of arbitral awards. It is normally critical, when deciding whether to bring proceedings, to have a prospect of recovery at the end of the process. Enforcement will be covered in the second part of this feature.

Determine that a witness must attend a hearing; or

Enforce injunctions granted by the arbitral tribunal.

The courts can also grant injunctions directly at a party’s request, particularly before the arbitral tribunal is formed.

Removal of arbitrators. The court may remove arbitrators following a request on the grounds of lack of independence and/or impartiality.

Once the parties agree to submit disputes to arbitration, they will no longer be able to resort to the courts to resolve these disputes or modify or review the arbitral award. An arbitral award can, however, be annulled under certain limited circumstances such as: deviation, extortion or passive corruption; execution of the arbitral award after the term established by the parties; and where the arbitral award is not in accordance with the arbitration clause or agreement.

Mandatory provisions. Most provisions of English arbitration law are not mandatory and as a result may be excluded by agreement of the parties. The main exceptions are:

- The court’s obligation to enforce a valid arbitration clause.
- The court’s power to extend a time limit for starting an arbitration.
- The parties’ liability for the arbitrator’s fees.

England and Wales

The courts’ attitude to arbitration. The English courts have a very hands-off attitude to arbitrations. This is manifested in the following ways:

Assisting the process. The courts will assist when necessary, for example by appointing an arbitrator or requiring a witness to attend a hearing.

Removal of arbitrators. A party must use any available recourse to an arbitral tribunal before invoking the court’s power to remove an arbitrator. Subject to that, the court can remove an arbitrator if there are justifiable doubts as to his impartiality or if he is incapable, or has failed to conduct the proceedings properly and that has caused substantial injustice.

Jurisdiction. An arbitral tribunal may rule on its own jurisdiction unless the parties have agreed otherwise. The court’s power to rule on jurisdiction is very limited. However, the court may decide the issue during the proceedings with the agreement of all parties or of the tribunal. A party loses the right to challenge an award for lack of jurisdiction if it has participated in the proceedings without taking available steps to raise the issue at the earliest moment.

Mandatory provisions. Most provisions of English arbitration law may be excluded by agreement of the parties. The main exceptions are:

- The court’s obligation to enforce a valid arbitration clause.
- The court’s power to extend a time limit for starting an arbitration.
- The parties’ liability for the arbitrator’s fees.
An arbitrator's immunity from suit, save for actions in bad faith.

The court's power to decide on an arbitrator's jurisdiction (see above, The courts' attitude to arbitration).

The tribunal's duty to act fairly, impartially and cost-effectively.

The parties' duty to comply with the arbitrator's directions and otherwise do everything necessary for the proper and expeditious conduct of the proceedings.

The court's power to summon witnesses who are in the UK.

The tribunal's power to withhold its award if its costs are not paid.

The ability to challenge an award for lack of jurisdiction and serious irregularity. (A party may lose its right to object to irregularities if it does not make the point early on.)

The ability of a person who takes no part in the proceedings to challenge the proceedings or the award.

France

The courts' attitude to arbitration. Intervention by the French courts in the arbitration process is relatively limited and generally only occurs in the following circumstances:

Assisting the process. Unless the parties have agreed otherwise, the President of the High Court (Tribunal de Grande Instance) (President) appoints the tribunal where the parties cannot reach agreement.

Removal of arbitrators. If difficulties arise in the constitution of the arbitral tribunal, the President has jurisdiction to intervene. However, if the parties have chosen a set of rules of an arbitral institution, the challenge procedure set out by those rules must be followed and the decision of that institution is considered to be final.

Jurisdiction. An arbitral tribunal may rule on its own jurisdiction. This decision cannot be challenged before the courts until an award is given. If a dispute which is the subject of an arbitration agreement comes before a French court before the constitution of an arbitral tribunal, the court must decline jurisdiction unless the agreement to arbitrate is manifestly void.

Mandatory provisions. The French rules for international arbitration are extremely flexible. However, the following principles cannot be excluded:

Certain types of disputes which are closely connected to matters of international public policy cannot be submitted to arbitration in France (for example divorce, patent registrations, insolvency claims and certain competition matters).

In certain circumstances, state and public entities cannot settle disputes by arbitration.

The principle that an arbitration clause is severable from the rest of the contract and will survive if the contract is held to be void or avoidable.

The principle that the parties cannot waive their right to equal treatment in the appointment of arbitrators in advance of a dispute arising.

The power of the arbitral tribunal to rule on its own jurisdiction.

The right of a party to have an arbitration award reviewed on certain grounds.

Germany

The courts' attitude to arbitrations. The German courts may intervene in arbitrations in the following ways:

Challenges to arbitrators. The number of arbitrators may be stipulated by the parties. If there is no such stipulation the arbitration tribunal will consist of three arbitrators. Within two weeks of the composition of the arbitral tribunal becoming known to the parties, each party may raise written objections to it. The arbitral tribunal will then decide on these objections. If a party's arguments are not accepted, it has recourse to the court. The court has the power to remove an arbitrator if there are reasonable doubts as to his impartiality or independence, or if any additional qualifications agreed on by the parties have not been fulfilled.

Powers of the arbitral tribunal. Generally the arbitral tribunal has the power to decide all procedural matters and may rule on its own jurisdiction, and on the existence or validity of the arbitration agreement. A jurisdictional plea by the defendant may not be made after the defendant has submitted its defence. If the arbitral tribunal considers that it has jurisdiction, it normally issues a preliminary ruling. In this case, within one month of having received written notice of such a ruling, any party may request that the court decides the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Mandatory provisions. In general, the arbitration proceedings follow the rules agreed on by the parties. There are, however, some mandatory provisions which cannot be excluded by the parties:

The principle of equality of the parties.

The principle that each party has to be heard.

The principle that no party can be prevented from being represented by a lawyer.

Hong Kong

The courts' attitude to arbitration. The courts will intervene in the arbitration process in the following circumstances:

Assisting the process. The court will assist when necessary, for example by giving assistance in taking evidence.

Removal of arbitrators or revocation of their authority. The court may remove an arbitrator or revoke his authority if he fails to act without undue delay.

Jurisdiction. An arbitral tribunal may rule on its own jurisdiction. If it rules as a preliminary question that it has jurisdiction, any party to the arbitration may request the court to review its ruling.

Mandatory provisions. A number of provisions of the Hong Kong Arbitration Ordinance (Cap 341) cannot be excluded.
by the agreement of the parties. These include:

- The definition and form of the arbitration agreement.
- The tribunal's duty to act fairly, impartially and avoid unnecessary delay.
- The court's power to grant interim injunctions, direct any other interim measures to be taken or assist in taking evidence.
- The tribunal's power to dismiss a party's claim under the arbitration agreement on the ground of unreasonable delay.
- The parties' liability for the fees of the arbitral tribunal.
- The court's obligation to enforce a valid arbitration agreement.
- The competence of the arbitral tribunal to determine its own jurisdiction.
- The court's power to set aside an arbitral award.

**Russia**

The courts' attitude to arbitration. The courts are willing to intervene in the arbitral process in the following circumstances:

- **Validity of agreements.** To decide whether an arbitration agreement is valid.
- **Jurisdiction.** To review a partial award handed down by an arbitral tribunal concerning its jurisdiction to consider a case, where a party files a request within 30 days of it being notified of the award.

**Mandatory provisions.** Parties are able to form an arbitral tribunal or structure arbitral proceedings in any way they deem appropriate. Russian law does, however, regulate the form of the arbitration agreement and the arbitrariness of disputes; it also sets out basic procedural principles and the grounds of challenge and enforcement of arbitral awards. In particular:

- A valid arbitration agreement must be in writing.
- The parties cannot deviate from the rules on challenging arbitrators and certain principles of arbitral procedure such as the equal treatment of parties.

**Singapore**

The courts' attitude to arbitration. The International Arbitration Act (Cap 143A) (IAA) principally governs international arbitrations. An arbitration is treated as international if one of the parties, place of arbitration, place of performance of substantial contractual obligations or place most closely connected with the subject matter of the dispute is outside Singapore, or if the agreed subject matter of the arbitration agreement relates to more than one country.

Court intervention is minimal, although it may intervene in the following circumstances:

- **Assisting the process.** The court will assist when necessary, for example by making an order for security of costs or to secure the amount in dispute, to appoint an arbitrator, or to require a witness to attend a hearing. The Chairman of the Singapore International Arbitration Centre is the default appointing authority under the IAA.
- **Removal of arbitrators.** An arbitrator may be removed on the grounds of partiality, where there are doubts as to whether the arbitrator is able to perform his functions or where there is a failure to act without delay.
- **Referral to arbitration.** The IAA provides for a mandatory stay of court proceedings in favour of arbitration should a party in breach of an arbitration agreement commence a court action. The only instance where the stay will not be granted is when the arbitration agreement is null and void, inoperative or incapable of performance.

**Mandatory provisions.** In general, Singapore has a flexible arbitration regime and many of the provisions of Singapore arbitration law may be excluded by agreement of the parties. Some of the exceptions are:

- The requirement that the arbitration agreement has to be in writing.
- The requirement that the parties must be treated equally.
- The requirement that a party be given notice of any hearing and be sent any material supplied to the arbitral tribunal by the other party.
- The provisions regarding the enforcement and setting aside of the arbitral award.

**Sweden**

The courts' attitudes to arbitration. Intervention by the Swedish courts in arbitrations is relatively limited:

- **Assisting the process.** Arbitrators in Sweden have no power to administer oaths. However, with the consent of the arbitrators, a party who wishes a witness or expert to testify under oath may ask the court to hear the testimony.
- **Jurisdiction.** Arbitrators may rule on their own jurisdiction to settle a dispute. However, a decision by arbitrators that they are competent to hear a dispute is not binding and a party may ask a court to rule on the jurisdiction of the arbitrators. The arbitrators may continue to hear a dispute pending the determination of the court on the question of their jurisdiction.
- **Appointment of arbitrators.** Unless the parties agree otherwise, the court can appoint the arbitrators where the parties, arbitrators or any other appointing authority have failed to do so, or where any arbitrator resigns or is discharged.
- **Removal of arbitrators.** A party can challenge the appointment of an arbitrator if there is doubt as to his suitability to act. The arbitrators will hear this challenge and where it is successful there is no right of appeal. However, where the arbitrators reject a challenge or dismiss it on the grounds that it was filed out of time, the party may apply to the court to remove the arbitrator. The court also has power to remove and replace an arbitrator who is seen to be delaying the proceedings.

**Mandatory provisions.** Arbitrators cannot withhold an award pending payment of their fees.

**US**

The courts' attitudes to arbitration. The courts will intervene in the arbitration process in the following circumstances:

- **Assisting the process.** The courts can compel arbitration if they find that the parties entered into an agreement to arbitrate a particular dispute. The courts can appoint arbitrators on the application of one of the parties if the parties did not specify a procedure, or if a party fails to make use of an agreed procedure. The court can compel the appearance of witnesses in arbitrations.
Removal of arbitrators. US courts generally refuse to consider interlocutory challenges to the appointment of arbitrators. After an award is given, however, a court can set it aside on the grounds of “evident partiality or corruption of the arbitrators”.

Jurisdiction. Guidelines for the allocation of competence to determine jurisdiction of an arbitral tribunal have been established. An arbitral tribunal can make an initial determination of jurisdiction. That determination is, however, only an initial determination of jurisdiction. That determination is, however, only binding on a court if there is “clear and unmistakable” evidence that the parties intended to submit that question to the tribunal.

Stay of proceedings. Once a court has determined that a dispute is capable of being arbitrated, it must stay any related litigation pending before it.

Mandatory provisions. US law does not have mandatory provisions that must apply to arbitrations conducted in the US. Courts have generally interpreted the Federal Arbitration Act (9 USC § 1) to grant a very broad freedom to the parties to choose the arbitral procedures applicable in their proceedings. Some courts have held that arbitration procedures must conform to the minimum standards of due process contained in the US constitution but this is not universally the case.

Attitudes of national arbitrators

A skilled and experienced arbitrator is clearly one of the key elements of a fair and effective arbitration. However, it is also important to consider the different attitudes of arbitrators in different jurisdictions and how that can affect the arbitration process (see also Procedural issues in international arbitration: a cultural battleground for an analysis of the general cultural differences in approach that exist ). For example, in some jurisdictions arbitrators will actively promote settlement, an anathema to arbitrators elsewhere. Set out below is an analysis of the attitudes of local arbitrators to arbitration in the same ten key jurisdictions considered above.

Belgian arbitrators

Belgian arbitrators come from a civil law background in which disclosure of documents and cross-examination of witnesses is not usual. Legal submissions are usually in writing followed by oral argument by the counsel for the parties. However, in international arbitrations, Belgian arbitrators are ready to follow a blended type of procedure in order to accommodate the expectation of parties from common law backgrounds.

Belgian arbitrators are not accustomed to promoting settlement. In the rare cases where they do, they will indicate that their promotion of a settlement agreement must not be considered to be pre-judging the merits. Belgium has a limited but decent pool of experienced arbitrators in all disciplines, able to arbitrate in several languages and notably in English. The Belgian arbitration institution, the Belgium Centre for Arbitration or Mediation (Belgisch Centrum voor Arbitrage en Mediatie), maintains its own list.

Brazilian arbitrators

Brazilian arbitrators have a civil law background. However, the Arbitration Act allows a flexible procedure and arbitrators are free to incorporate common law features such as oral evidence with cross-examination, partial disclosure and party-appointed experts. Unless otherwise agreed by the parties, arbitrators must issue the award within a six-month period.

Arbitrators are obliged to ask the parties if they want to settle, but they do not tend to be very active in this regard. If the parties reach a settlement, arbitrators can, at the parties’ request, recognise the settlement through an arbitration award.

English and Welsh arbitrators

English arbitrators come from a common-law background in which, in the courts, disclosure of documents, cross-examination of witnesses and oral argument are usual. Partly prompted by the Arbitration Act 1996, there has been a major change in English arbitrators’ attitude so that in arbitrations they no longer follow English court procedure in the way they used to. There is a strong emphasis on quick and cost-effective procedures.

The result is that general disclosure of documents is now unusual (save perhaps in construction arbitrations). Legal submissions are mostly in writing. Arbitrators always allow cross-examination of witnesses, often subject to time limits.

English arbitrators are not accustomed to involving themselves at all in promoting a settlement of the dispute.

There is a large pool of experienced arbitrators in all disciplines. The LCIA and Chartered Institute of Arbitrators maintain their own lists as do almost all of the expert-appointing bodies.

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French arbitrators
The type of procedure adopted for an arbitration will often depend on the type of procedure with which the arbitrators, the parties and their lawyers are most familiar. As most French arbitrators are civil law-trained, the tendency will be to conduct the arbitration in the French style; that is based solely on documentary evidence with no disclosure. However, given the flexibility of French law in this regard, the type of procedure chosen can vary greatly. There are no impediments to the arbitral tribunal giving procedural directions which incorporate common law features, such as oral evidence with cross-examination, partial disclosure and party-appointed experts.

French arbitrators do not usually play an active role in promoting settlement.

Partly due to the eminence of the ICC in Paris as an international arbitration institution, there are a substantial number of highly regarded French arbitrators with a wide variety of specialisms and experience.

German arbitrators
Germany has a number of internationally experienced arbitrators who tend to have civil law backgrounds, although they will not necessarily conduct the arbitration strictly in accordance with civil law procedure. The German Institution of Arbitration maintains its own list which is published together with a short biography of each arbitrator.

Hong Kong arbitrators
Hong Kong arbitrators are not bound by the rules of evidence, and can receive any evidence that they consider relevant and give such weight to the evidence adduced as they consider appropriate. Hong Kong has a large pool of experienced arbitrators particularly in relation to commercial, construction, maritime and joint venture disputes. The Hong Kong International Arbitration Centre maintains a list of more than 260 arbitrators.

Russian arbitrators
Arbitrators are not formally bound to act as mediators or to assist the parties in reaching a settlement. If the parties wish, however, they may attempt to reach a settlement with the help of a mediator, for example under the Rules on Conciliation of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. If the parties reach a settlement during the arbitration, at the parties' request the arbitral tribunal may record the settlement in the form of an arbitration award on agreed terms.

Russia has a number of internationally-experienced arbitrators. The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry has a list of arbitrators together with a summary of their background and arbitration experience.

Singaporean arbitrators
The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. If this occurs, the tribunal is expected to follow this procedure. However, if the parties fail to agree on a procedure, the tribunal may conduct the arbitration in such a manner as it considers appropriate.

The tribunal need not follow strict rules of evidence. Singaporean arbitrators come from a common law background. However, in order to expedite the process and to cut costs, the parties are allowed to agree on “documents-only” arbitration.

There is no law or practice which requires Singaporean arbitrators to promote settlement. However, the IAA allows the arbitrators to act as conciliators if the parties agree.

The Singapore International Arbitration Centre maintains a list of accredited arbitrators which includes about 80 local and 70 foreign arbitrators.

Swedish arbitrators
Although Swedish arbitrators come from a civil law background, Swedish court procedure has many similarities with common law procedure. Accordingly, Swedish arbitrators cannot be categorised as either civil or common law lawyers. Arbitrators from Sweden may tend to be more active in cross-examining a witness than arbitrators from a common law background. Swedish arbitrators will also be more flexible than common law lawyers in their approach to evidence, for example they will usually be prepared to admit witness testimony over the telephone or by video.

Swedish arbitrators do not generally involve themselves in brokering a settlement of a dispute, at least not in international cases. However, where the parties agree a settlement, the arbitrators can record the terms of the settlement in an award, therefore making it enforceable.

There is a growing tendency to choose Sweden as the venue for international arbitrations, particularly in East-West disputes. The Arbitration Institute of the Stockholm Chamber of Commerce has a large pool of experienced arbitrators from both law and non-law backgrounds.

US arbitrators
US arbitrators come from a common law background. This has resulted in more extensive document disclosure than in other jurisdictions, although it is not generally as extensive as that allowed in litigation. In the absence of specific agreements between the parties, US arbitrators generally will not allow oral depositions.

US arbitrators generally view the promotion of settlement as being inconsistent with their role as adjudicators and so will not involve themselves in settlement negotiations.

There is a large pool of arbitrators in all disciplines for international arbitrations. The American Arbitration Association (AAA) and other domestic organisations maintain lists of arbitrators. The arbitrators on the AAA and other lists are of uneven quality. Following recent criticism, the AAA has made efforts to strengthen the quality of its lists.