

Contents

Foreword.....	01
The issues.....	03
Key findings	04
The questions asked	05
The results	06



Partner foreword

“ Given the significant increase in international arbitration in recent years, and the development of arbitration-related infrastructure across a much wider global platform, we felt that it would be useful to examine what it is that makes a party select one venue over another. ”

Nicholas Fletcher QC
Partner, Head of International Arbitration

In previous years, BLP's Arbitration Group has conducted surveys on various aspects of international arbitration: conflicts of interest (2010), delay (2012) and document production (2013). We would like to take this opportunity to thank the many international arbitration practitioners within our preferred firm network, and more widely, who responded to those surveys. The final report on each of those studies can be found on our website, www.blplaw.com.

This year we have chosen to focus on a single issue: the choice of seat or 'legal home' of an arbitration. This is, of course, a topic that is covered extensively in the leading texts on international arbitration, and it has been the subject of other studies. However, given the significant increase in international arbitration in recent years, and the development of arbitration-related infrastructure across a much wider global platform, we felt that it would be useful to examine what it is that makes a party select one venue over another.

We wanted to explore what factors are being taken into account when selecting an arbitration venue, which are considered the most and the least important, and whether there is a perception among users that certain venues are growing or reducing in popularity.

We have once again canvassed the opinions of a great many of our colleagues within our preferred firm network who specialise in international arbitration. We also extended the invitation to participate to other international arbitration practitioners and users with whom we work.

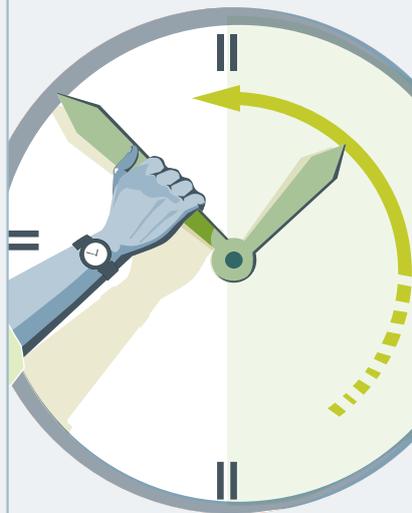
A handwritten signature in dark red ink, reading "Nicholas Fletcher".

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At a glance

Some highlighted responses from our survey are shown here

51%



of respondents regretted a choice of seat

60%



believed arbitration venues in South East Asia would become more popular

64%



said they would be more likely to choose a particular seat if local law did not contain a right of appeal against an award

42%



of respondents were more likely now than 5 years ago to select Singapore as a seat of arbitration.



4 out of 5

rating (quality of experience as a seat of arbitration)



74%

felt access to a pool of good arbitrators at the seat of arbitration to be important

30%



of respondents from Western Europe who have regretted a choice of seat said this was due to too much local court intervention



75%

felt a personal connection with the city under consideration as a seat was very/quite important

The issues

What are the legal, procedural and housekeeping factors that parties take into account when selecting a venue for arbitration?

Arbitration provides parties with a substantial degree of choice and party autonomy around the procedure to be followed in resolving a dispute. However, experienced practitioners will not lose sight of the fact that mandatory procedural requirements may be imposed by the law of the place where the arbitration is held. Local law may also be relevant in relation to such matters as interpretation and validity of the arbitration agreement, the availability of interim measures and whether there is an available basis of challenge to the award.

There are also much more mundane considerations that may enhance or detract from the perceived value of a particular city as a venue for arbitration. Does it have good arbitration hearing rooms available for hire? Good transportation links? Easy access to transcription and other support services? Costs may also play a role. If the assistance of local lawyers is needed can they be retained at reasonable cost? How expensive is hotel accommodation?

Is there a perception among users of arbitration that certain venues are growing or reducing in popularity?

For many years there has existed a widely acknowledged pool of favoured destinations for international arbitration – a disproportionate number being in Europe. There are also preferred regional centres. That picture is changing. In recent years there has been a significant world-wide expansion in the development of arbitral institutions, and the promotion of alternative arbitration centres, both at a regional level and more widely. Are those developments leading to a changing pattern of choice when it comes to selection of an arbitration seat?

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There are also much more mundane considerations that may enhance or detract from the perceived value of a particular city as a venue for arbitration. ”

Key findings

The survey results confirm that choice of seat is considered an important component in the parties' arbitration agreement. 98% of respondents felt that it was very important or quite important. Unsurprisingly, nearly all respondents (97%) felt that the choice of seat was more important in ad hoc arbitration than in institutional arbitration.

Half of all respondents said that, in their experience, parties selected a seat that was in the same jurisdiction as the selected governing law of the contract in more than 75% of cases. 21% of respondents said that this occurred in more than 90% of transactions.

A surprisingly high percentage of respondents (49%) said that, in the case of institutional arbitration, parties were more likely to select a particular seat if it is the home of the relevant institution than if it is not. Interestingly 75% of respondents felt that a personal connection with the city under consideration as seat was a either a very important factor or a quite important factor. The local law of the seat was considered important by all respondents. 85% of respondents considered it to be very important.

A large numbers of respondents (74%) considered access to a pool of good and experienced arbitrators to be an important factor. Local lawyers fared less well. Only 37% of respondents felt that the presence of good local lawyers at the seat of arbitration was an important factor in choosing a seat. However, with hindsight, 12% of respondents who had regretted a choice of seat did so because the local legal support had been poor.

Unsurprisingly, issues around a right of appeal against the award were considered to be relevant to a choice of seat by a very large number of respondents. 77% said that they would be less likely to choose a seat if the local law contained a mandatory right of appeal.

The attitude of local courts featured strongly in reasons to regret a choice of seat. 28% of respondents who regretted their choice did so because there had been too much local court intervention. 20% of respondents felt that the local courts had not provided enough support.

Traditional seats of arbitration were looked on favourably. When respondents were asked to express an opinion on a range of possible venues, each of London, Paris, Singapore, Stockholm, Vienna and Zurich was rated four or five out of five by 70% or more of respondents. In contrast, a significant number of respondents gave Beijing, Johannesburg, Moscow and Mumbai a rating of only one or

two. Interestingly, Tokyo was given a rating of three or above by 85% of respondents. Traditional seats also retained a strong position in relation to choices going forward. Between a quarter and one third of respondents said that they were more likely now to consider London, Geneva, Vienna, Stockholm and Zurich than they had been five years ago. That percentage rose to 42% in relation to Singapore which received strong positive feedback in relation to all aspects of the survey.

When asked to express an opinion on the regions in which arbitration seats would be chosen in the future, respondents gave South East Asia a resounding endorsement. 60% said that, in their opinion, arbitration venues in that region would become more popular. 52% of respondents felt the same about South America and a further 46% and 47% of respondents expressed that view about Eastern Europe and the Middle East respectively.

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The questions asked

We wanted to assess how important respondents considered a choice of seat to be and the extent to which it was a matter for negotiation between the parties, or was imposed by one party on another. We also wanted to know if the choice of a neutral venue was a key consideration and whether the choice of seat was considered more or less important in an ad hoc arbitration than in one conducted under institutional rules.

We were interested in finding out if there was a link between the choice of substantive law and the selection of venue – how frequently is an arbitration seat chosen because it is in the jurisdiction whose law governs the contract. We also wanted to know if parties who had chosen a particular institution's rules were more or less likely to select the 'home' of the institution as the venue for the arbitration.

We considered how important a role various factors played in the selection of a seat. The factors we looked at in the survey included whether the jurisdiction was a party to the New York Convention, whether there was an available pool of good lawyers and arbitrators, and the quality and cost of support services. We also looked at whether other factors made it more or less likely that a particular seat would be chosen – these factors included the existence of a right of appeal under local law and any restrictions on excluding that right, a previous bad experience in that seat and the other party's wish to select the particular seat. We also looked at the reasons why respondents regretted a choice of seat.

Lastly, we were interested in finding out whether respondents considered particular venues to be good or bad and whether they were more or less likely than five years ago to select a particular venue.

“ We wanted to assess how important respondents considered a choice of seat to be and the extent to which it was a matter for negotiation between the parties. ”

The results

The respondents

We received 53 responses to our survey. Respondents included both lawyers working in law firms, as well as corporate counsel. Respondents came from 34 different jurisdictions.

Strong arbitration focus

There was a broad range of experience among respondents. 85% per cent of respondents said that they were a regular user of international arbitration. More than two thirds of respondents said that their firm or organisation had practitioners who sat as arbitrators.

How important is the choice of seat considered to be and to what extent is it a matter for negotiation between the parties?

We wanted to assess how important respondents considered a choice of seat to be and the extent to which it was a matter for negotiation between the parties, or was imposed by one party on another.

The survey results confirm that choice of seat is considered an important component in the parties' arbitration agreement. 98% of respondents felt that it was very important or quite important. The majority of respondents said that, in their experience, the choice of seat was a matter for negotiation between the parties. Where a seat was imposed by one party on another, the majority felt that

this was because that party had a stronger bargaining position in the contract negotiations. A significant percentage of respondents (32%) said that, in their experience, where one party yielded to the other party's preferred choice of seat, this was done as part of a "trade-off" in relation to other contract terms. Only 8% of respondents had experienced a situation where the other party was indifferent to the choice of venue.

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Should the seat be in a neutral jurisdiction and does it make any difference if the arbitration is ad hoc or institutional?

We also wanted to know if the choice of a neutral venue with which neither party had a connection was a key consideration and whether the choice of seat was considered more or less important in an ad hoc arbitration than in one conducted under institutional rules.

In contrast to the majority view among lawyers that a personal connection with the seat is important, 73% of respondents felt that, in their experience, selection of a venue with which neither party had a connection was either very important or quite important to the parties to the arbitration. That percentage rose to 100% in relation to lawyers having an office in Africa, South America and the Middle East. Only 6% of respondents felt that it was not important at all. Interestingly, the percentage of respondents who felt that selection of a neutral venue was very important rose from 45% amongst respondents who were regular users of arbitration to 63% amongst those who were not. It may be that more extensive experience of arbitration in different venues is sufficient to allay fears that somehow a party's connection with the proposed venue may give that party an advantage.

Unsurprisingly, nearly all respondents (97%) felt that the choice of seat was more important in ad hoc arbitration than in arbitration governed by institutional rules.

Is there a connection between choice of seat and the law selected to govern the contract and/or the institutional rules that have been selected?

We were interested in finding out if there was a link between the choice of substantive law and the selection of venue – how frequently is an arbitration seat chosen because it is in the jurisdiction whose law governs the contract? We also wanted to know if respondents who had chosen a particular institution's rules were more or less likely to select the 'home' of the institution as the venue for the arbitration.

Half of all respondents said that, in their experience, parties selected a seat that was in the same jurisdiction as the selected governing law of the contract in more than 75% of cases. 21% of respondents said that this occurred in more than 90% of transactions.

A surprisingly high percentage of respondents (49%) said that, in their experience, in relation to institutional arbitration, parties were more likely to select a particular seat if it is the home of the relevant institution than if it is not. Again the percentage of respondents who felt this was significantly higher amongst those respondents who were not regular users of arbitration (63%) than amongst those that were (47%).

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A surprisingly high percentage of respondents (49%) said that, in their experience, in relation to institutional arbitration, parties were more likely to select a particular seat if it is the home of the relevant institution than if it is not. ”

How important a role do different factors play in the choice of seat?

Local Law and the New York Convention

We considered how important a role a number of selected factors play in the selection of a seat. The factors we considered in the survey included the local law, whether the jurisdiction was a party to the New York Convention, whether there was an available pool of good lawyers and arbitrators, the cost of local lawyers, the convenience of travel to that location, the cost of hotel accommodation and the existence of good leisure facilities. We also asked respondents to consider whether a personal connection with a particular city played any role.

Unsurprisingly, the local law of the seat was considered either very important or quite important by all respondents. 85% of respondents considered it to be very important. Interestingly, given that the seat of the arbitration is directly relevant in determining whether the award made is a “New York Convention award” for the purposes of enforcement, a smaller than expected number of respondents felt this issue to be important. In response to a question about the importance of the proposed seat

being in a jurisdiction that was a signatory to the Convention, 31% said that this was either not very important, or of no importance at all. Only 17% of respondents felt that it was very important, although the remainder regarded it as quite important. The large number of signatories to the Convention may play a role in parties perceiving this as a “non-issue” in considering a choice of seat.

Access to a pool of good arbitrators and local lawyers

A large number of respondents considered access to a pool of good and experienced arbitrators at the seat of arbitration to be an important factor. 74% of respondents felt that this was very important or quite important in considering a choice of seat. This is interesting given the large number of arbitral tribunals that are made up of arbitrators from different jurisdictions. However, the survey question drew no distinction between arbitration clauses providing for a sole arbitrator and those that made provision for a tribunal of three and this may be a factor feeding into these responses.

Local lawyers did not fare so well. Only 37% of respondents felt that good local lawyers at the seat of arbitration was an important factor in choosing a seat. Even then, they only considered this to be quite important. No-one thought that it was very important and 63% of respondents said that it was either not very important or not important at all. This is slightly surprising when contrasted with

the response about local arbitrators and bearing in mind the possibility of ancillary applications to the local court or post award challenge or appeal proceedings before those courts. It is also interesting when looked at against the relatively large number of respondents who regretted a choice of seat because of poor support from local lawyers (see below). Responses about the cost of local lawyers were pretty evenly balanced. 42% felt that it was not very important. 58% of respondents felt that this factor was important. Interestingly, this percentage rose to 76% in the case of North American lawyers.

Personal and Housekeeping Factors

75% of respondents felt that a personal connection with the city under consideration as a seat was either a very important factor or a quite important factor. The percentage of lawyers from Eastern Europe and North America who took this view was higher than the overall average (85% and 89% respectively). Only 2% of respondents felt that it was of no importance.

Responses to questions about housekeeping issues were mixed. Although 20% of respondents felt that the existence of good arbitration facilities was quite important, 80% of respondents felt that this factor was either not very important or not important at all. Only 16% of respondents considered ease of travel to be important. A question about the quality of leisure facilities in the proposed venue provoked a similar response.

What factors make it more or less likely that a particular seat will be chosen?

We also looked at whether other specified factors made it more or less likely that a particular seat would be chosen – these factors included the existence of a right of appeal under local law and any restrictions on excluding that right, a previous bad experience in the prospective seat and a desire to resist the other party's selection of seat. Unsurprisingly, issues around a right of appeal against the award were considered to be relevant to a choice of seat by a very large number of respondents. 65% of respondents said that they would be more likely to choose a particular seat if local law did not contain a right of appeal against an award. That percentage rose to 77% in respect of lawyers from Western Europe. A very large

majority of respondents (77%) also said that they would be less likely to choose a seat if the law of that jurisdiction provided for a mandatory right of appeal. In addition, a significant number of respondents (63%) said that they would be more likely to select a seat if local law recognised the right of contracting parties to exclude a right of appeal. Only a relatively small number of respondents (ranging from 12% to 17%) felt that these factors would make no difference to their decision-making.

Interestingly, 21% of respondents said that they would be less likely to select a particular seat if the other party requested it. 71% said that it would depend upon the circumstances of the dispute. 42% of respondents said that they would be less likely to select a suggested seat if they or their client had previously had a poor experience at that seat.

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What factors cause parties to regret a choice a seat?

We also looked at the reasons why respondents regretted a choice of seat.

We first asked respondents to indicate whether they had ever regretted a choice of seat. 51% of respondents said that they had. The percentage was highest among lawyers from North America (67%) and lowest amongst those from the Middle East (33%).

We then asked respondents about the reasons why they regretted their choice. Local courts featured significantly in the responses. A relatively large percentage of respondents (28%) said that there had been too much local court intervention, although this view was shared by only 17% of lawyers from Eastern Europe and North America. 30% of lawyers from Western Europe felt that there had been too much court intervention. Interestingly, 20% of respondents felt that the local courts had not provided enough support. 12% of respondents felt that local legal support had been poor. The same number felt that the local facilities or support services had not been very good. A small number (4%) said that the seat was not a nice place in which to spend time.

How often are hearings held in a venue other than the agreed seat of arbitration?

We wanted to find out what was respondents' experience around holding hearings at a venue other than the chosen seat, whether for reasons of cost and convenience, or some other factor. Although unsurprisingly, the seat appeared to operate as a default position, a relatively large number of respondents indicated experience of flexibility around choice of hearing venue. This is reassuring. Only 61% of respondents said that, in their experience, hearings were held at the seat in more than 75% cases. A significant number (15%) said that, in their experience, hearings were only held at the seat in between 50% and 75% of the time, and a further 10% said that hearings were held at the seat in less than 50% of cases.

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A relatively large percentage of respondents (28%) said that there had been too much local court intervention. ”

Respondents views on particular venues and trends for the future

Lastly, we were interested in finding out respondents' views on particular cities as a seat of arbitration, and future trends in relation to the most popular venues. Although responses to the survey are confidential, a number of respondents appeared reluctant to express an opinion on certain of these questions.

We first asked respondents to indicate whether they had experience of particular cities as a seat of arbitration. The leaders by a significant margin were London (78% of respondents had experience of using London as a seat) and Paris (55%), followed by Geneva (34%), New York (26%), Stockholm (25%), Vienna (25%), Singapore (19%), Dubai (15%), Zurich (15%), Moscow (9%) and Miami (7%). Only two respondents had experience of Beijing, and only one respondent had experience of Tokyo and Johannesburg. No-one had experience of Mumbai as a seat of arbitration.

We also wanted to explore respondents' perceptions, and quality of experience, of different cities as a seat of arbitration. We asked respondents to express an opinion about identified cities by reference to a scale of one to five ranging from "very bad" to "very good". We also asked respondents whether they were more or less

likely than five years ago to select a particular city. For many years a relatively small number of cities have been regarded as favoured destinations for international arbitration – a disproportionate number being in Europe. We wanted to find out if respondents' views on particular locations were consistent with this, and whether those views were changing.

The traditional favourites received very positive feedback from respondents who answered this question. Each of London, Paris, Singapore, Stockholm, Vienna and Zurich were rated four or five by 70% or more of respondents. Singapore, in particular, received favourable responses across all questions in this category. Geneva was close with 67%. New York and Miami were rated at three or above by 83% and 80% of respondents respectively, although these percentages dropped to 52% and 32% for the top two categories. Tokyo was given a rating of three or above by a very high 85% of respondents, although only 22% rated it at four or five.

In contrast, a significant number of respondents gave Beijing, Johannesburg, Moscow and Mumbai a rating of only one or two (65% (Beijing), 57% (Johannesburg), 52% (Moscow) and 75% (Mumbai)).

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On the question of whether respondents were more or less likely than five years ago to choose a particular venue, in relation to a number of cities the number of those less likely to do so was very often not very different from the number of respondents who took the contrary view and said that they would be more likely to select that same venue. This may reflect a “swings and roundabouts” situation where individual circumstances or external factors influence individual choices one way or the other without any discernible trend either way. However, in relation to certain cities, the responses did indicate a clear increase in willingness to consider that city as a seat of arbitration. Interestingly, these cities comprised traditional favourites. 28% of respondents were more willing to consider Geneva compared with only 3% who were less likely. Similar results were found in relation to Stockholm, Vienna and Zurich. Similarly, 33% of respondents were more likely to consider London compared with only 11% who were less likely to do so. The percentage of those more likely to choose London went up to 58% in the case of respondents from Eastern Europe. Significantly, a very large number of respondents (42%) said that they would be more likely to consider Singapore than they would have been five years ago and only 3% said that they would be less likely to consider Singapore. Responses in relation to Moscow and Mumbai indicated a trend in the other direction. 35% and 22% of respondents respectively said that

they would be less likely to consider those jurisdictions compared with 16% and 3% who said that they would be more likely to do so.

There was an interesting set of answers from North American respondents. No-one from that region said that they would be more likely than five years ago to consider choosing a seat in a range of venues including Dubai, Moscow, Paris, Stockholm and Vienna, yet a number said that they would be more likely to choose home regional venues Miami (57%) and New York (43%). Interestingly, however, 50% of North American respondents identified Singapore as being somewhere that they would be more likely now than five years ago to select as a seat.

Our final question was to ask respondents' opinion on whether arbitration venues in particular regions would in future become more or less popular as a seat for international arbitration. South East Asia (excluding China) received a resounding yes response to this question. 60% of respondents said that, in their opinion, arbitration venues in that region would become more popular as a seat of arbitration. 52% of respondents felt the same about South America. Around a third of those that took this view came from North America. 46% of respondents (principally from Eastern and Western Europe) felt that Eastern Europe would grow in popularity as a seat. 47% of respondents felt that the Middle East would become more popular as a seat. Only 34% of respondents felt that China would grow in popularity.

“ Interestingly, however, 50% of North American respondents identified Singapore as being somewhere that they would be more likely to select as a seat than five years ago. ”

BLP International Arbitration

Our experienced multi-disciplinary team of lawyers conduct arbitrations involving parties from many different jurisdictions and in a number of countries. Using arbitration raises a number of important issues and choices at various stages of the transaction and dispute process. We provide tailored and specialist advice to international businesses on the most effective course of action.

The size and depth of our team enables us to manage cases from receipt of instruction through to presentation of the case in front of the Tribunal. Where appropriate or cost-effective, we can provide support and assistance to overseas lawyers conducting arbitration proceedings in London, or in overseas arbitrations, where the chosen law of the contract is English.

Our team are experts in handling ad hoc arbitrations, those held under specific rules and various arbitral institutions including:

- London Court of International Arbitration (LCIA)
- International Chamber of Commerce (ICC)
- Arbitration Institute of Stockholm Chamber of Commerce (SCC)
- Singapore International Arbitration Centre (SIAC)

About BLP

Berwin Leighton Paisner is an award-winning, international law firm. Our clients include over 50 Global Fortune 500 or FTSE 100 companies. Our global footprint of 11 offices has delivered more than 650 major cross-border projects in recent years, involving up to 48 separate jurisdictions in a single case.

The Firm has won five Law Firm of the Year titles, is independently ranked by Chambers and the Legal 500 in over 65 legal disciplines and the FT currently ranks us in the top 10 law firm innovators in Europe.

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