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Opinion

Location, location, location … what happens when none is designated for arbitration?

Gordon P. Katz

In a nutshell, if the location of arbitration is not specified in the parties' agreement, arbitral administering authorities have virtually unfettered power to specify venue.

By Gordon P. Katz

The parties' agreement requires arbitration. But *where?*

Many, if not most, arbitration agreements identify where the parties' arbitration will be held. Identification of arbitral venue is usually found in the same provision of the agreement that identifies the administering authority (if any) of the arbitration and the rules to be employed for conducting the arbitration.

The geographic location of an arbitration may be of great importance to the parties. An arbitral location close to a party's corporate headquarters may represent both a great cost savings and an important tactical advantage. If the arbitral location is distant from the location of witnesses, or where the arbitrator lacks the effective ability to require witnesses' attendance at the evidentiary hearing, one party or the other could be effectively precluded from presenting vital evidence.

In an ideal world, the parties will have stipulated the arbitral venue in their agreement. However, in some cases, the parties may agree to resolve their disputes by arbitration *without* stating the location of the arbitration. What happens if the agreement is silent and the parties cannot agree on the arbitration's location?

In many cases, venue will be selected by the arbitration authority. If, for example, the parties designate the American Arbitration Association as the arbitral authority, the AAA will have the power to designate the arbitration's location.

Section 1 of the AAA Commercial Arbitration Rules provides that the contracting parties shall be deemed to have made all of the Commercial Arbitration Rules a part of the agreement. Under those rules, "[t]he Association has the power ... to name the site for the arbitration hearing after the parties have been given the prescribed time to act and have failed to do so." *Reed & Martin, Inc. v. Westinghouse Elec. Corp.,* 439 F.2d 1268, 14 Fed. R. Serv. 2d 1482 (2d Cir. 1971). See AAA Commercial Arbitration Rules, Rule 11.

The same rule may also hold where bodies other than the AAA are selected as the administering authority for the parties' arbitration. Thus, *In The Matter of Arbitration Between U.S. Lines, Inc. and Liverpool and London S.S. Protection and Indem. Ass'n, Ltd.,* 833 F.Supp. 350, 1994 A.M.C. 265 (S.D.N.Y., Nov 30, 1993), the court held that the parties' agreement that expressly conferred upon the English Law Society the power to name the arbitrator also gave that body the authority to resolve the parties' dispute regarding the arbitration's venue.

There is no exhaustive list of criteria that will be used by the arbitration authority in selecting venue. Two commonsense criteria appear in the few reported cases: (1) intent of the parties, and (2) convenience of the parties and, secondarily, witnesses.

In *Zim Israel Nav. Co. v. Sealanes Intern. Inc.,* 13 N.Y.2d 714, 191 N.E.2d 902, 241 N.Y.S.2d 845 (1963), the court closely examined the parties' contract to determine if they had intended a particular arbitration location. In so doing, the court found that the "contract contained significant references to New York and called for a continuing relationship with New York." This finding led to the conclusion that the agreement "manifested [the] intent of the parties to arbitrate in New York."

Prior conduct by a party may also evidence intent as to arbitration location. Thus, when one party at first suggested the consolidation in New York of a previously initiated arbitration with a new arbitrable dispute, New York was held a proper forum for the latter matter despite that party's change of heart. *Reed & Martin, Inc. v. Westinghouse Elec. Corp.,* 439 F.2d 1268, 14 Fed. R. Serv. 2d 1482 (2d Cir. 1971).

Relative convenience of the parties is a second important factor, as illustrated in *Aerojet-General Corp. v. American Arbitration Ass'n,* 478 F.2d 248 (9th Cir. 1973). Aerojet was a $30 million dispute between an Israeli company, Non-Ferrous, and Aerojet, an Ohio-based corporation. The parties' contract provided that any dispute was subject to arbitration in accordance with the rules of the AAA.

The contract was silent on arbitral venue, and the parties had decidedly different choices. Non-Ferrous requested New York; Aerojet sought Los Angeles. The AAA selected New York. Aerojet sought judicial review, arguing that, because important witnesses were located in California and the contract stipulated California as the governing law, the AAA erred in choosing New York as the arbitral venue.

The reviewing courts deferred to the AAA's decision, which favored New York, because the contract was performed in Israel and because New York was less inconvenient for Israel-based Non-Ferrous than was Los Angeles.

The *Aerojet* decision also demonstrates vividly the near finality of the arbitral authority's venue decision. The 9th Circuit in *Aerojet* flatly held that "the correctness of" an arbitral venue ruling "is not a proper concern of a reviewing court" and that "only an extreme case would warrant judicial review."

The court went on to say that "extreme cases" were limited to those "in which the choice of locale for arbitration is not made in good faith *and* where irreparable injury is inflicted on one or more of the parties."

In a nutshell, if the location of arbitration is not specified in the parties' agreement, arbitral administering authorities have virtually unfettered power to specify venue. If the parties fail to designate an arbitral administering authority, a court, of course, may be called upon to choose venue.

Section 4 of the Federal Arbitration Act, 9 U.S.C. sec. 4, for example, provides that "[t]he hearing and the proceedings ..., shall be within the district in which the petition for an order directing such arbitration is filed." In that situation, the parties may find themselves in a race to the most convenient courthouse in order to obtain an order compelling arbitration in their preferred location.

Controversy on arbitral venue, of course, can always be avoided by advance planning. All a party needs to do is bargain for the arbitration location of its choice in the underlying agreement. **MLW**

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