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The International Comparative Legal Guide to: **International Arbitration 2019**

16th Edition

A practical cross-border insight into international arbitration work

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- **Preface** by Gary Born, Chair, International Arbitration Practice Group & Charlie Caher, Partner, Wilmer Cutler Pickering Hale and Dorr LLP

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Arbitrating in New York: The NYIAC Advantage



James H. Carter



John V.H. Pierce

Wilmer Cutler Pickering Hale and Dorr LLP

New York is one of the world's leading arbitration centres. New York regularly ranks first in North America, and now third globally, among all arbitral sites for International Chamber of Commerce (ICC) arbitrations, and it is the most important venue for arbitration in the United States. New York is regarded as the site of one-third to one-half of the international commercial arbitrations taking place nationally. Countless hearings also are held in New York each year in cases sited elsewhere but for which the city is a convenient and attractive location.

New York is the home of important arbitration institutions administering thousands of cases, including the American Arbitration Association (AAA), its International Centre for Dispute Resolution (ICDR) and the International Institute for Conflict Prevention and Resolution (CPR). New York is also the base for the ICC's North American operations, conducted by Sicana, Inc. (SICANA), and the location of a large office of the dispute resolution service JAMS.

There is a thick fabric of international arbitration organisations in New York, as well. It is the home of eight law schools, each offering programmes in arbitration. Bar Associations include: the Association of the Bar of the City of New York, which sponsors committees on arbitration and international commercial dispute resolution; the New York County Lawyers' Association; the New York Branch of the Chartered Institute of Arbitrators; and leaders and active members of the international and dispute resolution sections of the New York State Bar Association, the American Bar Association and the International Bar Association. New York's International Arbitration Club, too, links practitioners with experience in the field, who meet monthly to hear presentations and exchange views on timely topics.

Importantly, New York has a comprehensive body of substantive commercial and financial law, so that answers can be found to often complex and intricate issues presented in arbitration or litigation. New York also permits lawyers from anywhere in the world to appear as counsel in arbitrations held locally. For those reasons, New York law is among the most frequently selected worldwide, and New York benefits as an arbitration venue as a result.

The New York International Arbitration Center

Central to New York's appeal as a forum for international arbitration is New York's dedicated international arbitration centre, the New York International Arbitration Center (NYIAC). NYIAC does not administer cases or promulgate a separate set of rules, but instead offers a home for arbitration hearings conducted under the rules of

any institution or on an *ad hoc* basis. NYIAC offers state-of-the-art hearing facilities located in the heart of Manhattan, at 150 E. 42nd Street, across the street from Grand Central Terminal.

Founding and Underlying Rationale for NYIAC

NYIAC opened its doors in 2013 as a New York not-for-profit corporation organised to promote and enhance New York as a leading hub for international arbitration and other forms of alternative dispute resolution. Unlike most arbitration centres, NYIAC is not the result of a governmental initiative. It was inspired by former New York State Chief Judge Judith S. Kaye, a leading proponent of arbitration, and others in the New York international arbitration community who saw the need for New York to have its own arbitration centre. NYIAC is supported financially by a consortium of private law firms and the New York State Bar Association, groups that recognise the importance of international arbitration to the legal and financial communities in the city. NYIAC enjoys total independence from any other organisation or authority.

Working with arbitral institutions, practitioners and arbitrators, the judiciary and the academic community, NYIAC facilitates discussion and offers educational programmes on international commercial and investment treaty arbitration. NYIAC also operates a world-class hearing centre that provides a neutral, private and modern space for the conduct of international arbitrations or other dispute resolution proceedings.

Prior to the opening of NYIAC, arbitration hearings in New York often took place in law firm offices or in hotel conference suites. Those sites may offer convenience cost-savings for some of the participants, but they have significant limitations. With respect to law firm offices, counsel for a party, and their client personnel, may not feel comfortable ceding "home court advantage" to an opposing party by agreeing to hold the hearing on its "turf". Splitting hearing days between two opposing firms' offices may be a solution, but it involves the expense and inconvenience of moving files and equipment back and forth. Hotel conference suites provide a neutral ground, and are available to parties whose counsel do not maintain a large New York office, but they typically are not set up with privacy or technology measures appropriate for private arbitration hearings, and they can be expensive. A purpose-built arbitration hearing facility such as NYIAC thus serves an important need for parties and counsel arbitrating in New York.

NYIAC's Mission and Activities

NYIAC's mission centres on education about international

arbitration and the promotion of New York as a site for arbitration proceedings. NYIAC and the Dispute Resolution Section of the New York State Bar Association recently published a brochure entitled “Why Choose New York for International Arbitration”, which sets out in detail the legal and practical advantages of New York as a seat for international arbitration. The brochure is available for download on NYIAC’s website.

In addition, each year NYIAC sponsors dozens of programmes about aspects of international arbitration, often in co-operation with law firms and law schools. These include book launches for key works in the field (e.g., *International Commercial Arbitration in New York* (second edition), *Evidence in International Investment Arbitration*, and *General Principles of Law and International Due Process*). The most significant of these activities is NYIAC’s annual Grand Central Forum, featuring a speaker of international prominence at its Judith S. Kaye Arbitration Lecture, most recently Director Anna Joubin-Bret of the International Trade Law Division at UNCITRAL in 2018, Secretary-General Meg Kinnear of the International Centre for Settlement of Investment Disputes (ICSID) in 2017, author and professor Gary Born of Wilmer Cutler Pickering Hale and Dorr LLP in 2016, and Mrs. Cherie Blair, CBE, QC in 2015.

Other recent programme topics include: assessing judicial support of international commercial arbitration; saving time and costs with early dismissal of claims and defences; the interpretation and application of the New York Convention; arbitrating M&A disputes and the New York advantage; the challenge of achieving diversity in international arbitration; technology to support a modern arbitration practice; fresh ideas and urgent concerns on the increasing use of artificial intelligence in international arbitration; and the application of New York law in Latin American arbitrations. NYIAC also hosts special receptions for LL.M. students and was the site of inaugural trainings for the IBA Arb40 Subcommittee’s Toolkit on Arbitral Award Writing and ArbitralWomen’s Diversity Toolkit.

NYIAC regularly hosts programmes presented by visiting representatives of other arbitral organisations which have included the German Arbitration Institute, the Brazilian Chamber of Conciliation, Mediation, and Arbitration, the Centre of Arbitration of Mexico, AmCham Costa Rica, the Lagos Court of Arbitration, the Swiss Arbitration Association, the Arbitration Court of Madrid, the Hong Kong International Arbitration Centre, the Permanent Court of Arbitration in The Hague, and the Singapore International Arbitration Centre. NYIAC has also been granted Observer status for UNCITRAL Working Group II (Dispute Settlement) and III (Investor-State Dispute Settlement Reform) at the United Nations and conducts programming during the New York sessions, including as subjects the Singapore Convention on Mediation and transparency and reform in investment treaty arbitration.

In addition to its work hosting and sponsoring arbitration-related programmes, NYIAC has created a public database of New York court decisions on international arbitration – the NYIAC Case Law Library – which showcases New York state and federal courts’ decisions involving international arbitration with descriptions and links to full text opinions. When judgments of particular note are handed down, NYIAC offers “Case Law Chronicles” providing context and featuring analysis of the decisions. Recent Chronicles have addressed topics such as the enforcement of annulled awards, the enforcement of arbitral awards against non-signatories, the recovery of fees and costs in international arbitration and the procedure for enforcing ICSID awards in federal courts.

An important part of NYIAC’s educational outreach involves the judiciary. Under the leadership of its Founding Chair, former Chief Judge Kaye, NYIAC created Bench-Bar Dialogues with New York

state and federal court judges on topics of mutual interest, including discussion of the American Law Institute’s Restatement of the U.S. Law of International Commercial Arbitration and the role of New York state courts in international commercial arbitration.

Benefits of an International Arbitration Centre

While one of the key functions of an international arbitration centre is to offer convenient facilities for hearings, such centres can provide benefits far beyond that. International arbitration practitioners form a relatively small, albeit growing, group of lawyers. This is sometimes a subject of criticism, but it can be an advantage if the members cohere as a community where knowledge is pooled and respect is shared. Attorneys may be adversaries one day, colleagues on a matter the next day and co-panelists at an arbitration colloquium the following week. Institutions that further that collaboration and respectful competition, particularly on a local level, help knit together such a community. An international arbitration centre with goals and activities such as those of NYIAC is one of the institutions, along with law schools, Bar Associations and local arbitration-administering organisations, that can create that sense of shared goals and efforts.

Having an international arbitration centre also benefits a city’s business and legal community more generally. In addition to increased revenues for hotels, restaurants, court reporters and the like, a study prepared for a task force of the New York State Bar Association found that an increase of 10%–20% in the business of dispute resolution in New York could produce approximately \$200 to \$400 million in incremental revenues annually for law firms in New York.

Challenges of Operating an International Arbitration Centre

Competition with Existing Arbitral Institutions?

But deciding to create and operate an international arbitration centre leads to many challenges. Cities around the world have announced the opening of new international arbitration centres in recent years. In some cases, the centres are intended to operate as new full-service arbitration institutions, with their own rules and administration procedures. This model places the newcomers in competition with other arbitral institutions near and far, almost all of which are better known, can offer track records of experience and have rules and administrative practices that they have refined over years and that courts already have interpreted.

Parties deciding what arbitration rules to insert in their contracts and which administering institution to choose are typically attracted to the better known over the untested alternative. There is a time lag, too, between the writing of contracts containing arbitration clauses and the maturing of disputes that arise from some of them. New institutions, therefore, may be facing years or even decades before they can expect to have a significant arbitration case-load to be administered under their new rules.

Cities or countries with a thriving existing arbitration practice may, therefore, conclude that a centre does not require the reinvention of the wheel. As in the case of NYIAC, and also for Maxwell Chambers in Singapore and Arbitration Place in Toronto, a better model has proved to be creating a facility that works with, rather than in competition against, existing arbitral institutions.

Financial Challenges

With or without an ambition to administer cases, an international arbitration centre, of course, requires a financial plan. A centre usually, though not always, will offer arbitration hearing space as one of its principal functions. But hearing revenues inevitably will not be sufficient to fund a centre, at least in its initial years. A centre provides not only space, but personnel to make reservations and attend to the care and (sometimes) the feeding of the hearing participants. Commercial rents are not likely to recover all of the costs.

In the face of these realities, some centres have found support from government funding. Singapore's Maxwell Chambers has benefitted from generous government sponsorship, and London's International Dispute Resolution Centre received initial funding from the Corporation of the City of London. Others, such as Atlanta's Center for International Arbitration and Mediation, have affiliated with another institution – in its case, the Georgia State University College of Law – that provides essentially free hearing space.

NYIAC is perhaps unique in building entirely upon the support of the local New York legal community, including its law firms and Bar Associations. The 42 founding organisations each committed to a three-year financial pledge, since renewed by additional pledges, assuring NYIAC of necessary funds. As NYIAC has prospered, revenues from hearing room rentals have reduced the need for continuing support from firms and Bar Associations.

Operational Challenges

Operating an arbitration hearing facility presents unique challenges. A hearing typically requires at least a central hearing room, separate break-out rooms for the lawyers and clients on each side and, ideally, a small break-out room for use of the arbitrators. In order for two hearings to be held simultaneously, a multiple of this configuration may be required. There also is the question of scheduling and cancellations. Counsel ordinarily book facilities well in advance of a planned hearing date, but some cases settle shortly before coming to hearing. Cancellation charges can cover some of the lost revenue for a centre, but a loss will remain; and in the meantime, the space has been blocked so that it could not be available to other users who may have desired the same dates. Sometimes parties will reserve only two or three days for hearings, which could prevent other prospective users from booking a full week during that time.

Also, all 52 weeks of a year are not the same. Hearing space demand can be expected to peak in the late spring and in the fall, with lulls during holidays and summer vacation periods. Thus, a “full” occupancy rate will always be well short of 100%.

NYIAC has addressed these facts of life by establishing working arrangements with the American Arbitration Association-International Centre for Dispute Resolution, from which NYIAC sub-leases space on East 42nd Street. The AAA-ICDR operates its own midtown conference centre, and it co-operates with NYIAC in providing overflow space when the situation permits, which creates flexibility for both institutions. NYIAC also has co-operation agreements with SICANA to make space available for ICC arbitrations in New York and with the CPR International Institute for Conflict Prevention and Resolution, as well as with the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, the Florence Chamber of Commerce – Florence International Mediation Chamber, the Hong

Kong International Arbitration Center, the Silicon Valley Arbitration & Mediation Center and the Vienna International Arbitral Centre.

Finally, no centre worth the name can function at an operational level without an electronic presence. A centre must, at a minimum, create and maintain a useful website. NYIAC's website, found at www.nyi.ac.org, features information about upcoming programmes, access to NYIAC's Case Law Chronicles and information about booking hearing rooms.

The Importance of Strong Leadership

A centre also needs leaders. Foremost among them is a chief executive or executive director who will be the face of the organisation and takes responsibility for all aspects of the centre's operations. These include overseeing hearing facility management and budgeting, as well as speaking and writing on the centre's behalf in support of its mission of education and promotion of international arbitration at the centre's site. A background of prior experience in the international arbitration world is, of course, valuable.

Finding a person with these multiple talents is not easy, and NYIAC is fortunate to have Rekha Rangachari as its Executive Director. Rekha is a member of the local Bar and served previously as Director of ADR Services for the New York Commercial Division of the AAA and Case Counsel at the ICDR. She travels and writes for scholarly publications, all in support of international arbitration.

Operating a centre is not a one-woman or -man job. A chief executive needs staff to handle day-to-day facility booking and operations, and budgets must provide for this. Interns, who generally are local law students, also can provide person power on a volunteer basis for projects linked to their studies. These may include research and publication of case reports on arbitration in the courts, for example, as they have done at NYIAC.

A centre also needs a supporting board of backers and advisers. NYIAC is fortunate to have the benefit of a board composed of a representative of each of its founding firms and organisations. NYIAC regularly co-sponsors arbitration programmes presented by individual law firms at their offices for their clients and others, often assisting in arranging speakers and publicity. NYIAC's Global Advisory Board (GAB) consists of leaders from around the world, who offer guidance and are invited to meet with NYIAC members when visiting New York.

A centre may open its doors to individual members, who pay a small fee in return for extra benefits such as publications and private breakfast meetings with visiting and local international arbitration leaders. At NYIAC, recent breakfast speakers have included independent arbitrators Chiann Bao of Arbitration Chambers in Hong Kong and Christopher Lau of 3 Veralum Buildings in Singapore, both members of the NYIAC's GAB, professor and dean Ingeborg Schwenzer of the Swiss International Law School, Patrick Green QC of Henderson Chambers and Kenyan Judge Joyce Aluoch. NYIAC's individual members also regularly have the opportunity to hear from arbitration organisation insiders on their plans and activities.

Relationship to Local Judiciary

Finally, a centre is well advised to liaise closely with the local judiciary. Judges' attitudes toward arbitration, which influence the climate in which the process occurs, are critical to the success of any venue and its international arbitration centre.

If You Build It, Will They Come?

An international arbitration centre must be built on careful planning. Hanging out a shingle and wishing for arbitration cases will not make them appear. There must be a well-developed body of local commercial law used widely in business contracts, adequate funding for a centre to survive its initial years and widespread legal, academic and judicial community support for a new organisation that will work with existing institutions.

Perhaps most important, a centre benefits from openness. NYIAC is used for hearings under the rules of the ICC, ICDR, AAA, UNCITRAL, ICSID, PCA, LCIA, CPR and occasionally others.

The parties, counsel, arbitrators and witnesses each year come from dozens of nations. Other New York organisations welcome NYIAC's co-sponsorship of joint events. NYIAC does not compete with arbitration institutions, but rather works with the entire New York legal family to provide a useful set of services and facilities.

This approach has been successful for NYIAC, with a growing number of programmes, sponsors and hearing room usage through its first six years testifying to its promise.

[James H. Carter is Chair Emeritus, and John V.H. Pierce is a member of the Executive Committee and Board of Directors, of the New York International Arbitration Center.]



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