

EDNA SUSSMAN, ESQ.



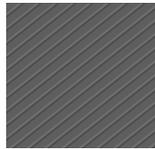
10 QUESTIONS

NEW YORK AS A LEADING ARBITRATION CENTRE

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FW speaks with Edna Sussman, an arbitrator and mediator at Sussman LLC, about the advantages of New York as a centre of arbitration.



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Edna Sussman is a full time independent arbitrator and mediator and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law in New York City. She was formerly a litigation partner at White & Case LLP. Ms Sussman is Vice-Chair of the New York International Arbitration Center and serves on the Board and Executive Committee of the American Arbitration Association and the Board and Executive Committee of the College of Commercial Arbitrators. She is a fellow of the Chartered Institute of Arbitrators and is certified by the International Mediation Institute. Ms Sussman can be contacted on +1 212 213 2173 or by email: esussman@SussmanADR.com.

FW: In your opinion, what reputation does New York hold as a centre of arbitration? How does it compare as a chosen seat of arbitration versus other locations?

Sussman: There are several excellent seats for arbitrations and I have had the pleasure of sitting as an arbitrator in a few of them. New York has long been one of the favoured and continues to be one of the most popular legal seats and locales for the actual conduct of the arbitration. Why is that? Because New York has the best of everything that users consistently list in survey after survey as the factors they look for in selecting a seat and locale for arbitration. First, the courts and the law: New York has neutral courts

which strongly support arbitration and a well-developed body of commercial law recognised and used in transactions around the world. Second, the professionals: New York offers a deep pool of lawyers and arbitrators well-schooled in the conduct of arbitrations of all sizes and related to disputes in every industry. Third, infrastructure: New York is equipped to provide support at a reasonable cost for even the most complicated arbitrations and is able to meet every item on a traveller's wish list.

FW: You mentioned the courts. What are the courts like in New York and what is their attitude towards arbitration?

Sussman: Arbitration matters in New York City are brought to judges in the US federal court or to the special commercial division of the State court in New York County, all of whom have significant experience in business disputes. The law in New York is strongly pro-arbitration. The courts recognise New York's role as a centre of financial and business transactions and realise that its role is strengthened by the dependability of its international commercial arbitration laws and its support of international arbitration. The courts repeatedly refer to the federal policy which strongly favours arbitration, a policy which is stated by the courts to be even stronger in the context of international business transactions. In New York the law requires that any doubt as to the scope of arbitration be resolved in favour of arbitration and the courts readily enforce arbitration agreements and compel arbitration. Arbitration awards are almost never vacated in New York and challenges to awards based on the narrow grounds for *vacatur* are routinely rejected. The Supreme Court of the US, in the Oxford Health Plans decision just issued in June of 2013, reaffirmed the deference that must be accorded to arbitral awards in stating "So far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.... The arbitrator's construction holds, however good, bad, or ugly."

FW: To what extent will New York assist with the arbitration process when called upon – for example, by empowering the arbitrator, ordering preliminary relief, and granting injunctions?

Sussman: New York courts frequently refer to the efficiencies realised by honouring party decisions to refer disputes to arbitration and issue rulings to support arbitration and restrict judicial review. Thus, New York courts will assist in the appointment of arbitrators, issue attachments in aid of arbitration, grant preliminary

injunctions and issue anti-suit injunctions to prevent parties from engaging in competing parallel proceedings to address the same dispute properly requiring arbitration in New York. The courts will also support arbitral orders directing preliminary relief in the form of injunctions such as prohibiting parties from transferring assets, requiring deposits of funds in escrow, preserving or gathering evidence, or other measures to preserve the status quo. The courts in New York handle such arbitration matters expeditiously so as not to slow down the arbitration process. Petitions to vacate or confirm an award are also handled promptly.

FW: What is the reputation of New York Courts when it comes to enforcing arbitral awards? Can New York Courts be considered neutral when resolving litigation arising from international arbitration agreements or proceedings?

Sussman: The courts in New York have a reputation for being fair and neutral. They follow a pro-enforcement policy regarding the enforcement of arbitration awards and construe narrowly the limited grounds for *vacatur*, which are very similar to the parallel provisions of the New York Convention to which the US is a party. In response to questions raised abroad about the doctrine of manifest disregard in New York as an additional basis for *vacatur*, a New York City Bar Association Committee recently conducted a study. It found that no court in New York had ever vacated an international arbitration award based on the doctrine of manifest disregard. The committee further found that legal review doctrines for review of arbitral awards, while called by different names and also rarely utilised, are found in the law of other principal arbitration seats, including England, Hong Kong, Switzerland and France. The courts in New York are impartial when parties from different countries appear before them and have denied challenges made by US parties to awards made in favour of foreign parties and confirmed awards against

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US parties that have concerned entities from diverse countries including China, Japan, Switzerland, Norway, Austria and the UK.

FW: We have been talking about the choice of seat for an arbitration based on the arbitration law. Does the substantive law of the jurisdiction matter?

Sussman: This is an important question. As you know, while the arbitration can be physically conducted in any locale, the choice of arbitral seat specified in the contract generally dictates the procedural law that will be applied to the arbitration, while the substantive law selected will govern the merits of the dispute. These choices can and often are made independently, but, in a recent survey, 68 percent of the respondents stated that these choices influence one another and often the choice goes together. New York law is widely preferred and is very frequently selected as the substantive law for transactions around the world, even those with no US party. This preference for New York law is well justified. New York offers one of the most sophisticated and developed bodies of contract, commercial, and business partnership law available anywhere, and New York makes it easy for participants to enjoy the benefits of New York law even if their business has little or no connection to New York. New York contract law gives great deference to the contract's terms and the courts do not substitute their judgement for the parties' business decisions. Moreover, New York is a common law jurisdiction which enables its sophisticated courts to promptly respond and develop legal principles and binding precedents as new forms of business transactions and relationships develop in the marketplace.

FW: You mentioned professionals. What advantages does New York offer in this regard as a seat and locale for arbitration proceedings?

Sussman: As a leading global financial and commercial

centre New York affords its lawyers the opportunity to engage in representations in a broad range of industries and financial matters and to practice in many areas of the law. There are many highly qualified New York lawyers who have comprehensive experience in conducting both international and domestic arbitrations. Many are multi-lingual and practice in large international law firms with access to and expertise in multiple legal systems. New York also offers a large pool of arbitrators of many nationalities who are practiced in handling commercial disputes of all sizes and in all business sectors. Arbitrators can be drawn in New York from both legal and other disciplines, from the growing body of full time independent arbitrators, from counsel and arbitrators at multi-national law firms, or from the academic rosters of New York's many leading law schools. Absent specific contractual provisions to the contrary, in accordance with the ethical code for arbitrators issued ten years ago, all US arbitrators are neutral and serve as impartial and independent decision makers. I should note that there are no restrictions on the nationality of qualifications of those who can serve as an arbitrator or counsel in an international arbitration in New York. In addition, New York has many expert mediators should such services be desired.

FW: You mentioned infrastructure. Compared to other major centres around the world, how does New York's infrastructure measure up as an arbitration centre for resolving international, cross-border disputes in particular?

Sussman: As your question recognises, a locale's infrastructure is very important. As a melting pot for diverse populations and as the home of the United Nations, New York has translators who work capably in every language. Court reporters with excellent qualifications are readily available in New York. In this digital age and expansion of telecommunication, arbitrations frequently require sophisticated technological support, all of which can be

found easily in New York. In many other locales translators, court reporters and technology have to be imported which significantly increases costs and causes inconvenience. New York offers direct flights from multiple cities and many and varied accommodation and dining choices. New York hosts the offices of four of the leading arbitral institutions, including the home office of three of them. In addition, New York offers a broad range of options for extracurricular activities. For restaurants, music, dance, art, theatre, sports and shopping, New York's offerings are unparalleled. And jogging in Central Park, bicycle riding along the Hudson River or ice skating at Rockefeller Center can be a welcome break from a difficult hearing. Whatever one's hearing needs and personal preferences, New York has it.

FW: How has New York's status as a prime arbitration seat and local been bolstered by the opening of the New York International Arbitration Centre?

Sussman: New York is pleased to offer its newly established New York International Arbitration Center (NYIAC) for the conduct of arbitrations in New York. Arbitration centres have been emerging in jurisdictions around the world, including other standalone arbitration hearing facilities. While New York has many other facilities suitable for a hearing, New York too needed a dedicated arbitration hearing space. A recent survey of what users are looking for in an arbitration hearing centre identified various qualities. NYIAC satisfies every user priority for a hearing space. NYIAC offers hearing rooms that can seat as many as 43 people or as few as 8 people at the table, a translators' booth for simultaneous translation, separate breakout rooms for each party and for the arbitrators, state-of-the-art Wi-Fi and IT, and a neutral ground in a brand-new facility with broad daylight in every room at a reasonable price with an attentive staff dedicated to addressing user needs. The facility is located at 150 East 42d Street directly across the street from Grand Central

Station, a location adjacent to many transportation options and numerous hotels and restaurants. I would like to call attention to the fact that NYIAC will not be administering arbitrations; there are many institutions in New York that already do that. But NYIAC does plan to do a great deal more than host a hearing facility and plans to coordinate with institutional providers, bar associations and other professional organisations to develop programs and materials about international arbitration in New York, the application of New York law in international arbitration, and the recognition, enforcement and implementation in New York of arbitral awards.

FW: Have any recent developments affected the arbitration process in New York?

Sussman: The entire arbitration community has been sensitised to the call by users to deliver more expeditious and cost effective arbitration and New York based arbitrators, arbitral institutions and counsel have all responded to meet that call. Numerous arbitration programs and trainings have been conducted which focus on the subject. The New York State Bar Association issued guidelines for streamlining the pre-hearing and disclosure process. The Commercial Division of the Supreme Court in New York City recently appointed a single judge to hear all matters relating to arbitration in order to assure even more expeditious resolution of arbitration issues that go to court. On the federal level, the proposed Arbitration Fairness Act bill drew criticism from the arbitration community when introduced in Congress a few years ago. That bill was amended to limit arbitration to a post dispute choice only as applied to consumers, employees and antitrust class actions, leaving the well-developed US case law relating to arbitration of commercial disputes unaffected. In any case, that bill is not likely to be law any time soon.

FW: Is there any advice you can give to firms considering

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arbitration proceedings in New York? What steps can they take to control the costs involved?

Sussman: As the practice has globalised and common and civil law traditions have been melded in arbitration, the advice for arbitration users in New York would be the same as would apply in other jurisdictions. One of the key advantages of arbitration over courts is the ability to pick the decision maker and to design the process. Both should be approached with deliberation and care. New York arbitrators are generally sensitive to the need to control the time and cost of the proceedings, and arbitrators can be chosen by the parties to meet their needs. The drafting of the contract can be tailored to meet the requirements of the parties and if time and cost

is a concern, provisions can be included in the arbitration agreement or arbitration clause to circumscribe pre-hearing exchanges of information and specify time limits for various phases of the arbitration. In addition, choosing counsel with arbitration expertise committed to containing costs and expediting the proceeding, selecting an arbitral institution that fosters expedition and cost savings, setting an abbreviated schedule for the arbitration, working cooperatively with opposing counsel and taking steps to streamline the hearing are all options that are in the hands of the parties and their counsel. Attention to these choices and seizing the opportunities that arbitration affords can significantly increase satisfaction with the arbitration process and reduce time and cost in all jurisdictions. ■