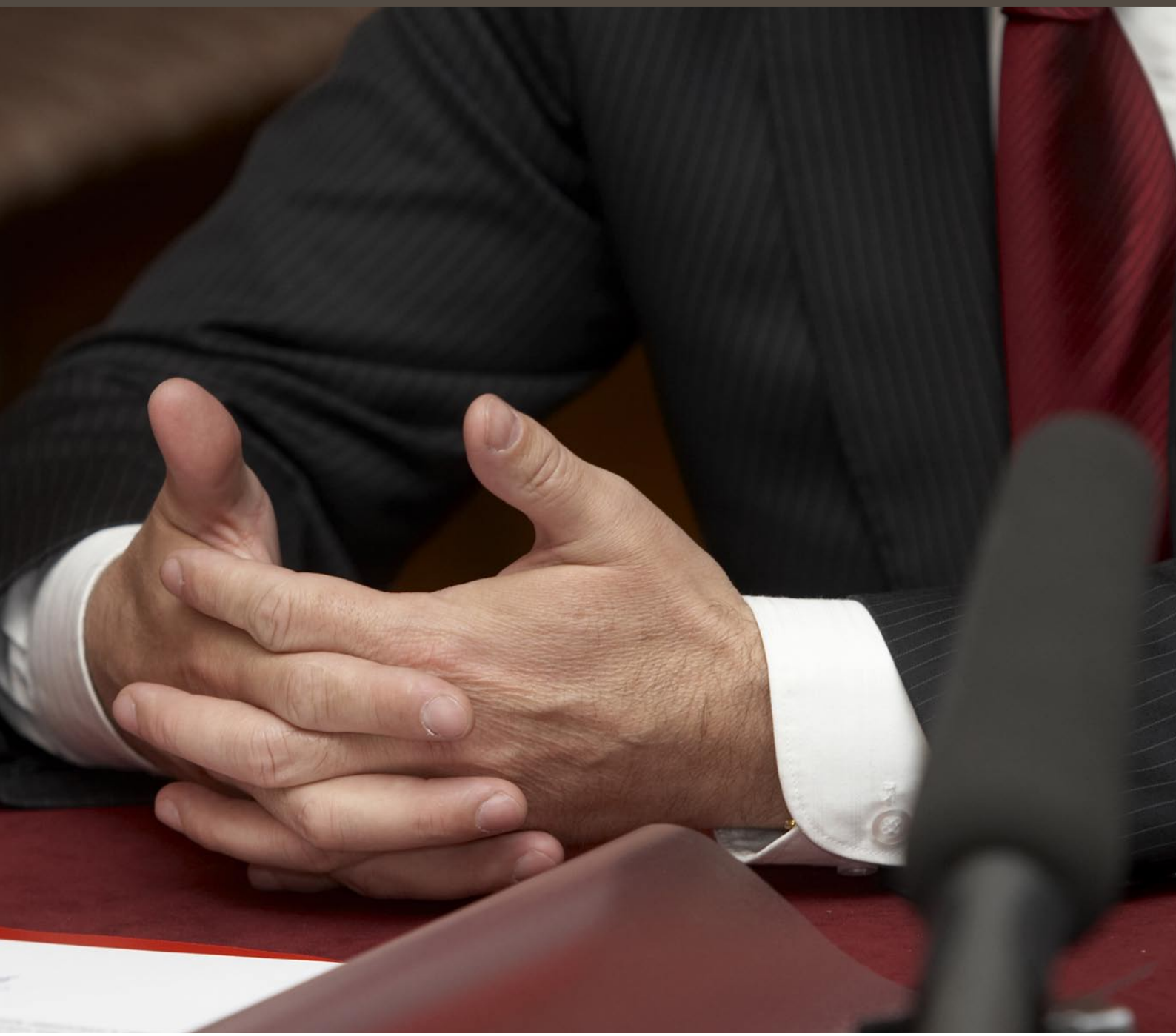
COMMERCIAL ARBITRATION

ANNUAL REVIEW **2013**



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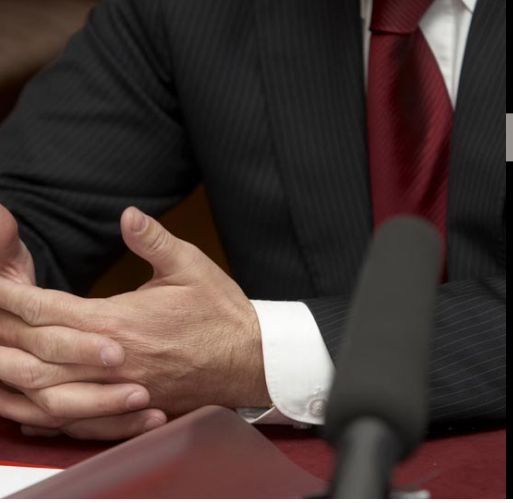
Commercial Arbitration

COMMERCIAL ARBITRATION

MARCH 2013 • ANNUAL REVIEW

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in commercial arbitration...



UNITED STATES

THOMAS G. ROHBACK
AXINN VELTROP & HARKRIDER LLP

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE UNITED STATES? WHAT RECURRING THEMES ARE YOU SEEING?

ROHBACK: One of the biggest challenges facing parties, whether in judicial litigation or in arbitration, is the extremely high cost of litigation. As a result, many valid disputes become simply too costly to litigate. At the other extreme, some of the very largest cases are often resolved without a judicial or arbitral decision precisely because the risk of an unfavourable decision is too great. Unlike the practice in the UK where the victor is typically awarded the fees and costs of the litigation, the American system provides that each party pays its own costs. There are, of course, some statutes that allow for fee shifting in the US, and arbitration provisions can also be drafted to permit – or even to require – arbitrators to award fees and costs to the prevailing party. Nevertheless, the challenge facing the legal profession is to find ways in which disputes can be adjudicated economically.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

ROHBACK: Arbitration has long been viewed as a lower cost alternative to litigation through the court system. Experience, however, has taught that this view is largely unfounded. Beyond the fact that the parties must pay arbitrators – whereas judges are paid by the government – arbitration has become as expensive as litigation in those circumstances where the parties engage in expansive pre-hearing discovery. Massive document productions and extensive pre-hearing depositions frequently cause arbitrations to lose what had so long been touted as their virtue; namely, economy. Accordingly, I would advise companies that draft arbitration provisions to provide for no discovery, or for very limited discovery in terms of the number of documents to be produced and the number of witnesses, if any, to be deposed – assuming, of course, that you are very confident that you will not be the party needing extensive discovery.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE UNITED STATES?

ROHBACK: The arbitration facilities in the US are abundant. Well established arbitration organisations such as the American Arbitration Association (AAA) or JAMS provide their own structure, process, lists of potential arbitrators, administrators, and hearing rooms. Beyond these organisations, a number of otherwise unaffiliated lawyers and former judges have set up their own arbitration practices. Many of these are well known and highly regarded. In addition, international arbitrations are often conducted through the International Chambers of Commerce (ICC). As to the process, most arbitrators are flexible in structuring the process to meet the needs of the parties and the circumstances.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

ROHBACK: Courts in the US are extremely supportive of arbitration. The judiciary's support for arbitration is firmly established by the Federal Arbitration Act and Supreme Court precedent. Courts will routinely dismiss cases brought before them if the issue is subject to an arbitration provision. Even where the question of arbitration is in doubt, courts will refer the matter to the arbitral forum to determine the issue of arbitrability. Many lawsuits brought in state courts to adjudicate state law issues have been compelled to arbitration under the pre-emption doctrine based on the Federal Arbitration Act. The judiciary's strong support of arbitration is also evidenced by the courts' ready enforcement of arbitration awards. As to appeals, the judicial standard for challenging an arbitration award is extremely high, requiring a challenger to prove evident partiality, fraud, or manifest disregard of applicable law.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN THE UNITED STATES?

ROHBACK: Not surprisingly, the biggest issue facing complex international, or multi-jurisdiction arbitrations, is the simple, logistical matter of scheduling. Mundane issues such as arranging for telephonic conferences can become more challenging when the parties and the arbitrators are separated by multiple time zones. In my experience, however, I should note that arbitrators have gone out of their way to make themselves available even when they are half way around the globe. As far as the hearings themselves, when parties and arbitrators are in remote locations, this requires advance planning so that witnesses can be at the arbitration site and prepared to testify, at the start of the arbitration, and certainly well before they are expected to testify. Arbitration panels have also been more than willing to allow witnesses to appear at hearings telephonically or by video conference.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN UNITED STATES? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

ROHBACK: There have not been any dramatic changes to the arbitration rules or process in the US in the past year. More than any specific rule, the American arbitration process is frequently characterised by its flexibility. Where the parties and the arbitrators can agree upon a process, they frequently will do so. For example, in a pending matter, my adversary has asked that we try to select arbitrators from a list by agreement without going through the process specified by the AAA rules whereby each party submits to the AAA administrator a rank order of preferred arbitrators and a list of strikes. Some of the more complicated issues of arbitrability have arisen recently in the context of class actions and rights claimed under federal law.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

ROHBACK: In fashioning arbitration provisions – assuming that the goal would be to bring any dispute between the parties into arbitration – a company should make sure that it drafts its arbitration provision with sufficient breadth to encompass a wide variety of possible claims between the parties. For example, a narrow provision might provide that any dispute for breach of the contract in which the arbitration provision is contained would be subject to arbitration. A broader arbitration clause, however, might provide that any dispute between the parties be subject to binding arbitration. Also, cost-conscious companies should consider having a single arbitrator rather than a panel of three. Likewise, arbitration provisions should provide for little or no discovery and short deadlines – assuming, of course, that the company is confident that its claim fares best without such discovery.

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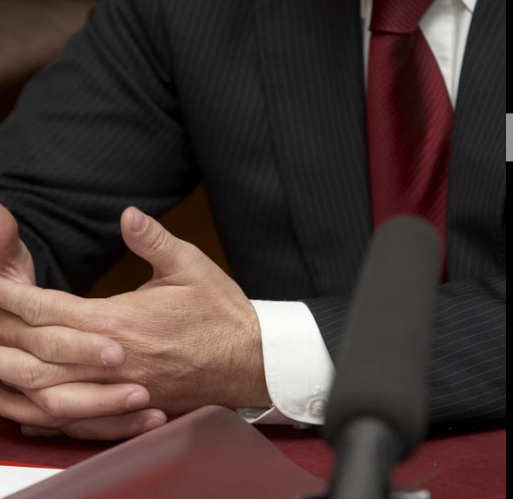
Thomas G. Rohback, a partner at Axinn, Veltrop & Harkrider LLP, is an experienced trial and appellate lawyer. He was profiled in *The National Law Journal* as one of a small group of "successful business litigators in the US who used innovative tactics to help them win major trial victories." He has been praised in Chambers as being "great at simplifying complex matters for a jury" and as having a "great reputation". Throughout the United States, his cases have involved diverse areas of the law ranging from antitrust to anti-terrorism litigation, and industries ranging from financial services to pharmaceuticals.



CANADA

ROBERT J.C. DEANE
BORDEN LADNER GERVAIS

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN CANADA? WHAT RECURRING THEMES ARE YOU SEEING?

DEANE: Commercial disputes across Canada are increasingly complex and international due to the significant number of Canadian companies active in the global market, particularly in industries such as energy, oil and gas, mining, maritime, pharmaceutical and other health-related sectors, telecommunications, and intellectual property. At the same time, corporate clients are demanding competitive and creative fee arrangements to combat the inherent costs of such disputes. Legal service-providers, therefore, are being challenged to develop cost-effective solutions for their Canadian and international clients. Canadian lawyers are well-placed to meet this challenge given that the cost of leading, high-level legal services in Canada for international matters is generally significantly lower than leading firms in the US, Europe and parts of Asia.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

DEANE: We advise our clients to address dispute resolution provisions, and thus their dispute resolution strategy, at the outset of their commercial relationships. It is trite, but true, that one size does not fit all, and therefore we recommend that an experienced disputes lawyer be involved in the drafting of dispute resolution provisions in our clients' contracts. When the commercial relationship is multi-jurisdictional, an exploration of international arbitration options is recommended, and more frequently than not, will be employed. However, other factors, including bargaining power and the country of origin of a foreign party and the perceived reliability of its courts, often play a role in the parties' negotiations in relation to which dispute resolution mechanism will finally be agreed. Sometimes the best option is for one party or the other to attorn to the jurisdiction of the other's courts.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN CANADA?

DEANE: Canada is an experienced arbitration jurisdiction familiar with virtually all forms of arbitration, and Canada's arbitration-related service providers are becoming increasingly sophisticated and versatile in facilitating arbitration proceedings. All of Canada's major urban centres have suitable hearing venues, generally at reasonable costs. Recently, Canada has increased its presence in the global market as a *bona fide* option as the seat of arbitration or venue for arbitration hearings. In Spring 2013, Vancouver Arbitration Chambers will open to provide hearing facilities and access to resident arbitrators. This follows on the launch in 2012 of Arbitration Place in Toronto, a similar and more expansive version of the pending Vancouver centre. Both Calgary, as a centre for oil and gas-related businesses, and Montreal also have strong arbitration presences and facilities readily available.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

DEANE: Canada is clearly an 'arbitration friendly' jurisdiction. Canada is a signatory to the New York Convention and Canada's provinces adopted legislation based on the 1985 UNICTRAL Model Law shortly after its inception. Since the late-1980s, Canada's courts have consistently applied the principles underlying these international instruments when addressing issues of recognition and enforcement of arbitral awards. While the arbitration legislation governing purely domestic arbitration provides limited rights of appeal, the international arbitration legislation, being based on the Model Law and the New York Convention, requires the judiciary to give a very high-level of deference to international arbitral tribunals. Like in most sophisticated international arbitration jurisdictions, there are examples of less favourable arbitration-related decisions, but they are by far the exception rather than the rule in Canada.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN CANADA?

DEANE: Canada is increasingly becoming an attractive jurisdiction for users of international arbitration. However, it is imperative that any company faced with an international arbitration obtain counsel experienced in the field. In Canada, where there has been a tradition of the 'generalist litigator' taking on any matter that lands on the desk, there remains a risk that international arbitrations may be conducted by counsel lacking specific knowledge of the intricacies, peculiarities and potential strategic advantages of international arbitration. Fortunately, the international arbitration bar is growing rapidly in Canada with the emergence of a number of arbitration specialist firms and groups within larger firms. Generally speaking, however, the practical issues in Canada are basically the same as in other 'places' of arbitration, with the added benefit that in many circumstances, arbitration proceedings can be undertaken in Canada for significantly less cost.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN CANADA? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

DEANE: Canada's Provinces adopted international arbitration legislation consistent with the New York Convention and based on the Model Law, and relatively uniform domestic arbitration legislation in the late-1980s. Canada therefore has enjoyed an enviable reputation as a leading member of the international arbitration community based on this legislative foundation. However, that legislation was not entirely uniform across the country, which has led to some divergence in the judiciary's limited participation in and supervision of arbitration proceedings. In addition, given the 2006 amendments to the Model Law, other states amending and updating their arbitration legislation and other developments in international arbitration-related law and practice, a task force has been formed, under the auspices of the Uniform Law Conference of Canada (ULCC), with a mandate to seek to enhance the harmonisation of international arbitration legislation across Canada. It is hoped that new uniform legislation will be in place within the next year or so.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

DEANE: Commercial arbitration is not simply commercial litigation in disguise, although, if the parties so choose, the former could proceed like the latter in a domestic context. However, international commercial arbitration should generally be conducted in a much different manner, particularly with respect to document production, and guided by the IBA Rules on the Taking of Evidence in International Arbitration. If these initial observations form an acceptable premise then several additional concepts should be considered at the outset of any commercial relationship where the parties elect arbitration as their preferred dispute resolution mechanism. Arbitration agreements are subject to the principle of severability – that is, an arbitration agreement is a standalone contract within a main contract and only the parties to the arbitration agreement are bound by its terms. The issue of whether a third-party can, or should likewise be bound, may require careful consideration.

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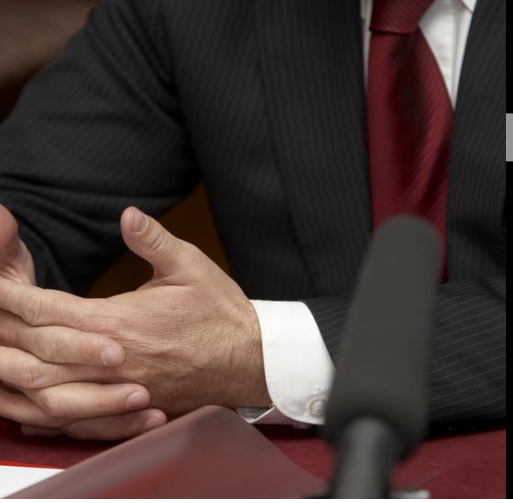
Robert J.C. Deane is a partner in the Vancouver office of Borden Ladner Gervais (BLG), and the National Leader of BLG's International Arbitration Group. He has been counsel in numerous significant international commercial arbitration proceedings in North America, Asia and Europe, under many institutional rules, as well as ad hoc arbitrations. Mr Deane is on the executive of the ICC National Arbitration Committee for Canada and is the North American Representative of the LCIA's Young International Arbitration Group. He is recognised as a leading disputes lawyer in many peer review publications, including Chambers Global; PLC Which Lawyer?; and the Canadian Legal Lexpert Directory.



BRAZIL

JAIRO SADDI
SADDI ADVOGADOS ASSOCIADOS

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN BRAZIL? WHAT RECURRING THEMES ARE YOU SEEING?

SADDI: Arbitration in Brazil is now consolidated. Reinforcing the attractiveness of international commercial arbitration in Brazil, and dealing with the mistrust of investors in award enforcement, still remain the key issues. However, Brazil is on the right track. Indeed, in 1995, there were only four procedures involving Brazilian parties among arbitrations under the ICC, but this number rose to 74 in 2010, according official numbers. Specific areas, such as the infrastructure and energy sectors, are in high demand for arbitration.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

SADDI: The advantages of arbitration are well known. As an extrajudicial alternative, arbitration remains one of the fastest, most efficient and confidential dispute resolution methods for companies that are not interested in judicial court trials lasting years.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN BRAZIL?

SADDI: Brazil was 'the last bastion of resistance' to arbitration in Latin America for many years, due to our strong Roman Law Court culture. But this has changed. At present, Brazilian arbitration legislation has been brought into line with that of legal systems that have traditionally favoured arbitration. Brazil, for instance, ratified the New York Convention in 2002. Since the 12 December 2001 decision of the Brazilian Federal Supreme Court – the Supremo Tribunal Federal, (STF) – which acknowledged the constitutionality of Brazilian law relating to arbitration, and the latest decisions STJ regarding the matter of recognition awards, Brazilian state courts have accepted arbitration as a valid mode of dispute resolution. There have been few decision changes by state and federal court, unless, of course, any major problems have arisen. Nevertheless, the Brazilian Superior Court of Justice applies the Brazilian Arbitration Act – the Brazilian arbitration act n 9.307 of 23 September 1996 – and, further, domestic law instead of the NY Convention that implies additional evidence is required for the recognition and enforcement of the prevailing party.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

SADDI: The Eleventh Congress of Arbitration, recently held in Brazil, highlighted the new culture of the country in terms of dispute resolution methods and confirmed Brazil as part of the group in the 'top league' of arbitration regarding international trade. The main example of this convergence of laws regarding foreign arbitral law is the elimination by the Brazilian Arbitration Act of the requirement under which a foreign arbitral award had to be previously recognised by a court in its country of origin, and subsequently by the Brazilian competent court (*double exequatur*).

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN BRAZIL?

SADDI: Proceedings can by simplified if recognition proceedings and the enforcement of foreign arbitral awards can take place in a single and unified procedure according to Brazilian rules, and if recognition and enforcement of foreign arbitral awards in Brazil went through a 'fast-track' process at the Superior Court of Justice (STJ).

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN BRAZIL? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

SADDI: The environment is obviously favourable to fostering arbitration clauses in commercial contracts. New investments, such as as the announcement by President Dilma Rousseff of a plan to invest in transport infrastructure, in preparation for the FIFA World Cup in June 2014 and the Olympic games in 2016, should further encourage the choice of an arbitration clause in the contracts for these competitions. Both of the concession projects currently under discussion – the high-speed rail link between Rio de Janeiro and São Paulo and the Brazilian highways project – provide for the use of arbitration in the case of litigation.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

SADDI: A major differences between the Brazilian Arbitration Act and the UNICITRAL Model Law is the remaining distinction between the arbitration clause and the submission agreement. As a result it remains easier to commence arbitration proceedings on the basis of a submission agreement than an arbitration clause, even if this assertion must be mitigated as regards recent decisions.

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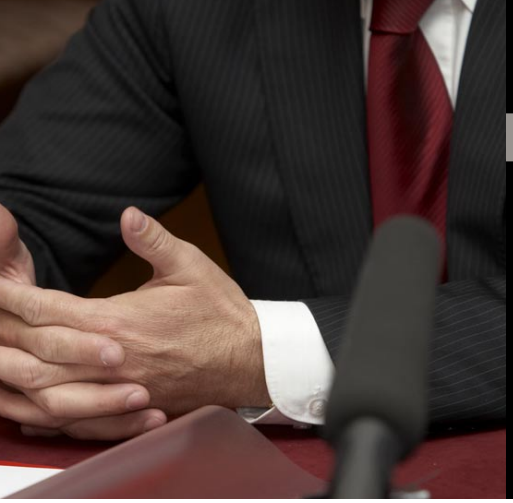
Prof. Jairo Saddi is a senior partner at Saddi Advogados Associados. He holds a Bachelor's Degree in Law from São Paulo's University School of Law as well as a Bachelor's Degree in Business Administration from Fundação Getúlio Vargas (EAESP/FGV). He holds a Doctorate Degree in Economic Law from São Paulo's University School of Law and a Post-Doctorate degree from Oxford University. Mr Saddi is chairman of the Board of Directors of Insper School of Law. He is also sits at the Board of Governors of IASP – The Law Institute of São Paulo and is Editor-in-Chief of The Banking Law and Capital Markets Review.



MEXICO

MARCO TULIO VENEGAS
VON WOBESER Y SIERRA, S.C

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN MEXICO? WHAT RECURRING THEMES ARE YOU SEEING?

VENEGAS: Over the past few years, the Mexican government has implemented a strong reform agenda aimed at attracting foreign investment. This policy includes comprehensive amendments in several sectors of the economy, such as the public sector, energy, telecommunications, and even the enactment of legal provisions regulating public-private partnerships. Accordingly, commercial disputes have increased the use of arbitration. Those disputes most commonly arbitrated in Mexico are commercial disputes arising from, among others, franchise, distribution and joint venture agreements. Additionally, due to recent legislative amendments to the Public Works Law and the Public Acquisitions Law, arbitration was included as a method of settling disputes arising from contracts executed between a private party and a state entity. With this reform, construction disputes in the administrative area have become increasingly common.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

VENEGAS: Regarding domestic arbitrations, the main advantage is that an arbitral tribunal has more time availability to solve a dispute, in contrast to the local courts which normally have an excessive work load. Regarding international arbitrations, the principal advantages are generally considered to be that both parties have the possibility of solving their dispute in a neutral forum and by a specialised tribunal with expertise in determining such cases. Local courts are, however, still used for commercial disputes as they can provide a number of advantages over arbitration. The use of local courts is potentially less expensive, because no court fees need to be paid. Their use also avoids delays in implementing interim remedies and in the judicial enforcement of awards. Also, as the amendments to the Commerce Code, in which the 2006 amendments to the Model Law were implemented, are recent, the provisions included have not yet been extensively interpreted by

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Mexican courts and there is little case law available to assist in their interpretation. In many cases it will not be possible to foresee the result of a proceeding based on the new provisions until a controversy is brought to and settled by Mexican courts.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN MEXICO?

VENEGAS: As arbitration has become one of the main dispute resolution methods in Mexico, facilities and processes have been improved and made 'friendlier' over the past few years. Mexico's arbitration legislation has incorporated the UNCITRAL Model Law into the Commerce Code and it is a party to the New York Convention, and to the Inter-American Convention on International Commercial Arbitration. Procedurally speaking, Mexico has recently amended its legislation to guarantee that the intervention of national courts in arbitration proceedings is framed as judicial assistance in support of arbitration, and not as interference. Such judicial assistance is dependent on the prior request of either party and is limited to the cases and circumstances expressly regulated by the Commerce Code.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

VENEGAS: Mexican law has a general tendency to support arbitration, both during the course of the proceedings and in the enforcement phase. Mexico is a party to the New York Convention and to the Inter-American Convention on International Commercial Arbitration, and the judiciary is generally supportive regarding the enforcement of arbitral awards. Pursuant to the Commerce Code, any arbitral award shall be deemed to be valid and binding, and shall be enforced upon written request to the judge, regardless of the country in which such award was issued. The procedure for the recognition and enforcement of awards is regulated in the Commerce Code as a special procedure with minimum requirements.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN MEXICO?

VENEGAS: There are number of relevant practical issues to be considered in complex international, multijurisdictional arbitrations. First, the interpretation of Mexican law by national courts is narrow and formally exaggerated. Courts still have a very domestic approach to cross-border litigation. In this regard, for example, even though Mexican law regulates and accepts the validity of agreements executed through electronic means, civil and commercial courts still require the parties to file contracts in writing and duly signed. Second, the rules of judicial competence applicable to litigations in Mexico focus on the respondents' domicile and there is practically no relevance of the place in which the facts giving rise to civil liability have occurred. Third, and finally, is the unwillingness of Mexican court's to comply with letters rogatory that require the implementation of foreign procedures or institutions, such as the practice of discovery that prevails in common law jurisdictions.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN MEXICO? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

VENEGAS: Recently, there have been two reforms to the provisions regulating arbitration in the Commerce Code. The first amendment was published in the Federal Official Gazette on 27 January 2011 and was aimed at regulating judicial intervention in arbitration, amongst other matters. With this amendment, a special proceeding for commercial transactions and arbitration was included, regarding challenge of arbitrators, competence of the arbitral tribunal, precautionary measures in arbitration, annulment of commercial transactions and arbitral awards, and recognition and enforcement of an award requested as a defence in a proceeding or trial. The second reform, published on 6 June 2011, introduced specific rules regarding the courts' obligation to remit the parties to arbitration if an arbitration agreement exists. Finally, the Public Works Law and the Acquisitions Law were also recently amended to include arbitration as a method of settling disputes arising from contracts executed between a private party and a state entity.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

VENEGAS: Even though the Commerce Code states that an agreement to arbitrate is valid if executed via any type of telecommunication means that properly record such agreement, due to the practical approach of courts regarding the enforcement of arbitration agreements, it is advisable to have the agreement to arbitrate duly executed in writing, signed by the parties, and for each party to keep an original counterparty. Using a standard institutional arbitration clause should also be considered for the successful conduct of future arbitration, determining only key elements in advance, such as the applicable law and the seat of the arbitration, and avoiding overregulation of the proceedings.

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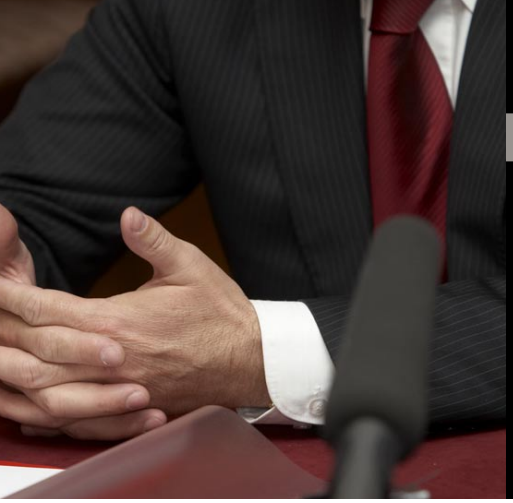
Marco Tulio Venegas is a partner at Von Wobeser y Sierra. He is the head of all Litigation matters for the firm and has solid expertise in dealing with multijurisdictional matters in Administrative, Civil, and Commercial and Constitutional law (Amparo) and Industrial & Intellectual Property Litigation. He has experience in the US and France and has worked at international law firms as well as with the International Chamber of Commerce's International Court of Arbitration in Paris. He is admitted to practice before all the Federal courts, the Supreme Court and many state courts and courts of appeals.



UNITED KINGDOM

MARIE BERARD
CLIFFORD CHANCE

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE UK? WHAT RECURRING THEMES ARE YOU SEEING?

BERARD: Regarding challenges, the changeable economic climate led to some contracts and projects running into financing difficulties. These changing conditions have caused many parties to re-examine their contracts and seek to renegotiate them on more favourable terms to better reflect the prevailing economic climate, often delaying work on the underlying project until agreement on new terms are reached. A recurrent theme is that around a third of London-seated arbitrations heard under the LCIA Rules involve, directly or indirectly, parties with Russian or CIS interests, often through Cyprus, BVI or other off-shore companies which are controlled by Russian or CIS shareholders. The type of disputes is varied, including banking, finance and investment disputes, shareholders and JV disputes, and construction disputes, including infrastructure and oil and gas.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

BERARD: The principal consideration in almost every case will be the question of enforcement, that is, is the counterparty in a jurisdiction where the decision of the court or arbitral tribunal can be enforced? If not, that decision will be effectively worthless. If the dispute is between an English party, on the one hand, and EU parties on the other, then the choice of the English courts makes perfect sense as their judgment will be more readily enforceable. When contracting with parties from more 'exotic' jurisdictions, arbitration is generally the preferred option, especially if assets against which enforcement is likely to be sought are located in New York Convention countries. The type of disputes should also be taken into consideration. Arbitration may be ill-suited for straightforward debt claims as there is no equivalent to the summary judgment procedure, whereby a claimant can recover monies from the

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defendant in an event of default without a full trial, on the basis that there is no defence to the claim. There is also no equivalent to default judgments where judgment is given if the defendant has not filed a defence. In arbitration, the arbitrator must proceed to consider all the evidence before making his award. Speed and the finality of arbitration awards may also be a factor. LCIA arbitrations have a reputation for speed.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE UK?

BERARD: Most international commercial arbitrations that take place in London are heard at the International Dispute Resolution Centre in Fleet Street. The LCIA is based in the same building. The hearing centre itself is not among the most modern or luxurious centres in the world. It can get very busy and is booked-up well in advance. But the location is very convenient, and close to many international law firms' offices and hotels.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

BERARD: London is one of the most popular seats for international arbitration due to a mature, predictable and neutral support structure that emphasises party autonomy, flexibility and judicial non-interference in the international arbitration process. Many disputes are arbitrated in England even where parties or the contract have no connection to England. The English court can make orders in support of an arbitration, including granting of injunctive relief, ordering the preservation of evidence, and compelling witnesses to give evidence. Indeed the courts will routinely issue anti-suit injunctions to prevent

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litigation being brought in violation of an agreement to arbitrate. Regarding enforcement of an award, the Arbitration Act 1996 regulates enforcement of an award rendered in, or to be enforced in, England and Wales. The Act implements the New York Convention. The English Courts favour the enforcement of awards and will only rarely refuse to enforce on public policy grounds.

Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN THE UK?

BERARD: First, parties' expectations regarding the scope of disclosure of documents which may be sought or requested varies greatly depending on the parties' legal background. This issue is often addressed by the parties agreeing to use the IBA Rules on the Taking of Evidence in International Arbitration as a guideline for document requests. Such requests will need to be narrow, specific, and limited to relevant and material documents. A second issue is parties' expectations regarding the objective independence of arbitrators. In England, it is not unusual to have members of the same barristers' chambers appear as counsel and arbitrator in the same case. Parties who are familiar with the independent status of each barrister within a chamber do not see this as a conflict of interest, nor does it raise doubts as to the arbitrator's impartiality. However, for many non-English parties, it is a harder concept to grasp.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN THE UK? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

BERARD: There have been no recent changes to the Arbitration Act 1996 or to the LCIA Rules – effective since 1998. A revision to the LCIA Rules is expected in the near future.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

BERARD: In terms of drafting, parties arbitrating in London often expressly exclude the right to refer a point of law arising in the course of the arbitration to the courts – s. 45 of the Arbitration Act – and the right of appeal on a point of law arising out of the award – s. 69 of the Arbitration Act. Under s. 45, unless excluded by agreement, a party may apply to the English Court to determine a preliminary point of law. Whilst there are limits upon this right to apply to the Court – for example, the question must be one of general importance – it may be appropriate to agree in advance that this right should be excluded in order to avoid the delay and extra costs which any application, even if unsuccessful, would cause. Exclusion of the right to appeal under s. 69 should ideally be provided in the arbitration agreement, but it may also be incorporated by reference to the rules adopted in the arbitration. The UNCITRAL Arbitration Rules do not contain an express waiver of the right to appeal so an express exclusion of rights of appeal should be included where the arbitration is subject to the UNCITRAL Rules.

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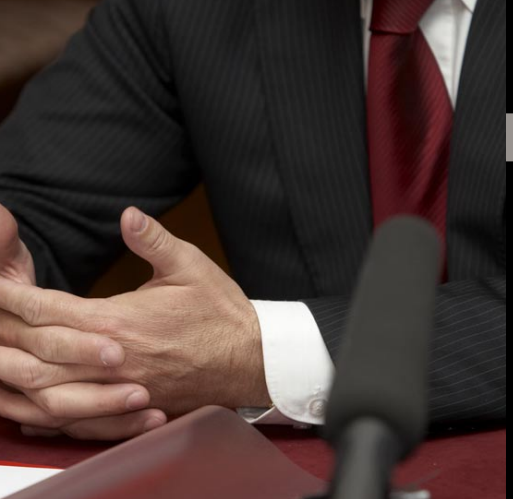
Marie Berard is trained in both English and French law. She specialises in the law and practice of international commercial arbitration. She represents multinational corporations, governments and individuals as counsel (advocate) before international arbitral tribunals. She has advised on a wide range of international arbitration proceedings, both on an *ad hoc* basis, and under the Rules of the LCIA, ICC, SCC and the ICAC (Russia). Ms Berard's work spans many economic sectors, with particular emphasis on the energy, oil & gas, construction, and telecommunications sectors.



GERMANY

BENNO A. PACKI
v. BOETTICHER HASSE LOHMANN

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN GERMANY? WHAT RECURRING THEMES ARE YOU SEEING?

PACKI: A recurring theme in the arbitration scene is the phenomenon of the so-called 'arbitration guerillas', meaning that attorneys-at-law often use extremely tough tactics, such as repeated recusals of arbitrators due to asserted impartiality. It is under discussion whether an ethical code of conduct or rather clear standards for the assumption of impartiality may help in such situations. Another recurring challenge in arbitration proceedings is to find the tailored procedural approach that helps the parties best under consideration of time and cost on the one hand vs. quality of the decision on the other hand. With respect to court proceedings, new legislation even entitles the parties to compensation in cash in case of a delay caused by the court.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

PACKI: Companies need to focus on their operational business. Typically, companies would prefer a fast and easy way of resolving disputes, including mediation or conciliation proceedings. However, depending on the importance of the dispute – in particular in the case of post-M&A disputes – clear rules and well-considered decisions may be preferable. Whether disputes should be resolved before a court or an arbitral tribunal depends on the following issues: An arbitration proceeding may be faster, but a court decision is more predictable due to the higher court's case law. On the other hand, an arbitral award may be more easily enforced worldwide. Taking evidence may also be easier in an arbitration proceeding, since written witness statements instead of, or in addition to, the oral hearing of a witness would be admissible, and the parties' managing directors could be heard as witnesses in contrast to the procedural rules of the German courts. A company would have to consider these issues in particular to decide which method of dispute resolution would fit best for the specific case or agreement.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN GERMANY?

PACKI: Arbitral institutions in Germany as well as German lawyers are very experienced in handling domestic and international arbitration proceedings. Furthermore, arbitral institutions may help the parties, in particular, in selecting suitable arbitrators, booking conference rooms, handling organisational issues, and so on. However, in Germany, there is no need to choose an arbitral institution for an arbitration proceeding. An ad hoc arbitration proceeding is more flexible and may be of benefit for both parties – for instance, if the parties would like to implement a fast-track arbitration proceeding.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

PACKI: The German courts are clearly 'arbitration friendly' and very reluctant to repeal arbitral awards or refuse their enforcement. In general, an arbitral award may only be repealed if the dispute does not fall within the arbitration clause, in case of a violation of the public policy or a violation of a party's right to be heard. Germany is a signatory of the New York Convention having it ratified as early as 1961. In particular, in the case of foreign arbitral awards, German courts do typically accept procedural practices deviating from German practices, and do not consider them to violate the German public policy.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN GERMANY?

PACKI: The practical issue in multijurisdictional dispute resolution cases is typically to reach relevant persons, such as witnesses and lawyers from other regions due to the time difference. However, communication from Central Europe with most regions during business hours is possible, helping to schedule conference calls with persons from different regions at a time convenient for all or at least for most of the participants. For instance, the difference between German and US Eastern Time is six hours; to São Paulo, three hours; to Moscow and the UAE, three hours; to India, 4.5 hours; and to China, seven hours – in general, based on Central European Standard Time.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN GERMANY? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

PACKI: The German government initiative, 'Law – Made in Germany', intends to facilitate international dispute resolution in Germany. One idea, not yet signed into law, is to enable the English language even before courts since a number of judges are experienced in handling international disputes in English – many of them worked as attorneys-at-law with international law firms prior to their appointment as a judge. Likewise, to opt for Germany as venue of an arbitration proceeding – in particular, if the parties are not connected to Germany – may be of benefit for the parties due to the very vital German arbitration scene; its internationally experienced and English speaking lawyers; its reasonable costs; and its position as an impartial place for dispute resolution between parties from different regions.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

PACKI: One of the most important issues to be addressed by the arbitration clause is the appointment of the arbitrators. While a typical arbitral tribunal has three arbitrators, each party would have the right to appoint one arbitrator. However, it may be decisive who appoints the chairman of the arbitral tribunal due to his casting vote. If the party arbitrators appoint the chairman, dependencies cannot be excluded since the party arbitrators would appoint a person they know personally, they have worked with, or who were members of the same arbitral tribunal, as one or both of the party arbitrators, in the past. To avoid such dependencies, an arbitration clause should provide for the right of the parties to appoint the chairman jointly, or at least to provide for proposal and veto rights of the parties.

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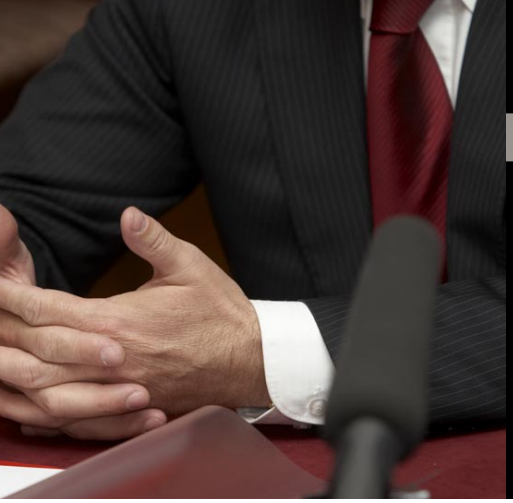
v. BOETTICHER HASSE LOHMANN

Dr Benno A. Packi's practice focuses on corporate transactions, corporate restructuring, including affiliated group law and corporate reorganisation law (merger, demerger, spin-off and conversion law), and corporate financing. He also advises mid-sized companies and entrepreneurs on corporate law, and listed stock corporations on corporate and capital markets law. Furthermore, as plaintiff's or defendant's attorney he represents clients in corporate litigation and post-M&A disputes, before courts and before arbitral tribunals.



FRANCE

CAROLINE DUCLERCQ
ALTANA LAW FIRM

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN FRANCE? WHAT RECURRING THEMES ARE YOU SEEING?

DUCLERCQ: With the financial crisis, the French economy has slowed down – but has not come to a stop. As a consequence, an increase of disputes relating to contract terminations and defaults in payment can be observed. In the meantime, contracts, and consequently disputes, relating to certain areas of industry have also increased, such as renewable energies or telecommunications, mainly due to the facts that these industries are on the rise and are less impacted by the crisis. Finally, we are starting to see more and more disputes arising out of contracts entered into with partners from emerging countries, such as India, Asia and Africa, particularly in the construction and distribution sectors, or arising out of joint-venture contracts.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

DUCLERCQ: First, be represented by counsel experienced in arbitration. Indeed, one of the main features of arbitration is its flexibility – well planned, it becomes a tailor-made procedure. However, obtaining a tailor-made procedure requires know-how. Second, it is often said that the arbitration is only as good as the arbitrator. Therefore, the choice of the arbitrator, a 'sage' who will have the time to study the cases – which is not always the case for a judicial judge – is key. This is especially important since arbitration is a 'one-shot' procedure, that is to say no appeal is possible. Thus, it is important to take time when choosing the arbitrator. Third, check the enforcement risk by analysing the possible places of enforcement of the award and the financial health of your opponents in the arbitration.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN FRANCE?

DUCLERCQ: There are a multitude of arbitration facilities and processes in France. France, and especially Paris, offers any facility or service necessary for the conduct of arbitration. Numerous hearing centres and conference rooms are available at various rates, and Paris is very easily accessible via its international airports and train stations. As regards arbitration processes, a large number of arbitration institutions are born in France, including the ICC, the Centre de médiation et d'arbitrage (CMAP) and the French Association for Arbitration (AFA). Of notice is also the existence of numerous regional or specialised arbitration centres and arbitration associations. For *ad hoc* arbitrations, France has one of the most accessible arbitration laws, offering a complete process laid out in a pedagogical and self-explanatory way.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

DUCLERCQ: France is an extremely 'arbitration friendly' jurisdiction and positions itself as the place to arbitrate. Its positive political inclination for arbitration was confirmed again recently with a new Decree n°2011-48 of 13 January 2011. First, annulment of awards may only be admitted in very limited cases. The Supreme Court has been seen to cast aside principles of international public policy to favour that of loyalty in arbitration, with the view to discourage behaviours consisting in invoking principles of international public policy in bad faith. Second, enforcement of awards is frequently admitted. An award may even receive the exequatur if set aside in another jurisdiction – see *Hilmarton*, Paris Court of Appeal, 19 December 1991; *Putraballi*, Supreme Court, 29 June 2007. Another element demonstrating French law's extensive support in upholding and enforcing awards is that recourse against an award or its enforcement order no longer suspends its enforcement – Article 1526 of the French Code of Civil Procedure (CCP).

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN FRANCE?

DUCLERCQ: Issues that might have to be dealt with are not necessarily restricted to France. Thus, should a dispute be brought before two competing jurisdictions, French courts decline jurisdiction in favour of arbitral tribunals by application of the principle of *kompetenz-kompetenz*. However, do not forget to invoke the existence of the arbitration clause before the court, failing which you will be deemed to have renounced to its benefit (Article 1448 CCP). When urgent conservative or interim measures are required, or if, in arbitrations involving more than two parties, one of the sides to an arbitration fails to agree on an arbitrator to appoint, the judge acting in support of the arbitration may implement them. Other examples include the fact that pending parallel criminal proceedings do not oblige the arbitral tribunal to stay the arbitral proceedings under French law (Sté Omenex, French Supreme Court, 25 October 2005).

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN FRANCE? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

DUCLERCQ: France has recently modernised its Arbitration Law, by Decree n°2011-48, which entered into force on 1 May 2011. Although already a leading place for arbitration, it hopes to become an even more attractive seat by rendering its legislation more transparent and pedagogic. New provisions designed to increase the efficiency of arbitration have been adopted. Particularly noteworthy innovations include the fact that arbitral tribunals seated in France may now enjoin a party in possession of an item of evidence to produce it in the arbitration and, if necessary, attach penalties to its injunction (Article 1467 CCP). Further, the judge acting in support of the arbitration may order the production of documents held by third-parties upon request of a party having obtained leave to do so from the arbitral tribunal (Article 1469 CCP). Finally, recourse against an award no longer suspends its enforcement (Article 1526 CCP).

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

DUCLERCQ: Although the arbitration clause might be concluded subsequently, it is highly recommended to insert an arbitration clause within the contract and pay particular attention to its drafting: it should not be treated as a mere 'midnight clause'. First, the scope of the potential arbitration should be determined: which parties are bound? Which types of disputes should be adjudicated? Second, other elements should be indicated in order for the clause to be fully efficient, including: the administering institution (if any); the place of arbitration; the law applicable to the dispute; the number of arbitrators; and the language of the procedure. If no administering institution is designated, it is also highly recommended to mention the law applicable to the arbitration procedure. Most arbitral institutions contain model arbitration clauses which can be directly inserted in contracts.

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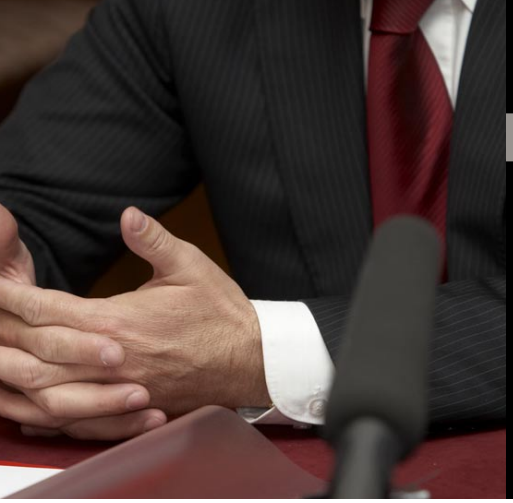

LUXEMBOURG

FABIO TREVISAN
BONN STEICHEN & PARTNERS

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN LUXEMBOURG? WHAT RECURRING THEMES ARE YOU SEEING?

TREVISAN: We have noted an increase in the complexity of the litigations submitted to us. Such complexity is due to the matters concerned, which are mostly financial and corporate disputes, in the context of the financial crisis. Indeed, investors are more frivolous and wish to protect their interests as much as possible. As Luxembourg is a premier financial place, such disputes are the heart of the litigation submitted to the Luxembourg courts. The increased complexity of the litigations is also linked to the fact that more and more disputes are multi-jurisdictional.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

TREVISAN: As a preliminary step in dealing with its dispute resolution strategy, a company may seek to submit disputes to a mediator (*médiateur*) through a contractual mechanism. Such mediation can be *ad hoc* or institutional and should be inserted as a clause of the contract. If this mediation fails, or if one does not wish to proceed with this intermediary solution, the company can submit the dispute either to state jurisdictions or to an arbitral tribunal. To determine which strategy we would advise a company to pursue, we take into consideration the following elements of the potential dispute: What is the nature of the contract? What are the technical implications and what are the stakes? Where is the contract being performed? Other questions which we would ask before inserting an arbitration clause include: Is time potentially a major factor? Is confidentiality absolutely required? And what costs is the plaintiff ready to bear in view of the stakes?

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN LUXEMBOURG?

TREVISAN: There are many resources for those engaged in arbitration. Indeed, guidelines and rules are provided in Luxembourg by the Chamber of Commerce of Luxembourg (*Chambre de commerce*). Nevertheless the UNCITRAL commission or the International Chamber of Commerce is often cited in agreements drafted under Luxembourg law. Also, Luxembourg has provided a favourable legal framework to arbitration as it is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Luxembourg has also ratified the Geneva Protocol of 24 September 1923, for some commercial matters, and the European Convention on International Commercial Arbitration (26 April 1961) and the Paris Agreement of 17 December 1962, relating to the implementation of the latter. Both domestic and foreign arbitral proceedings which take place in Luxembourg are, without any distinction, governed by articles 1224 to 1251 of the Luxembourg New Code of Civil Procedure.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

TREVISAN: Luxembourg's judiciary system is clearly 'arbitration friendly'. Indeed, costs for enforcing arbitral awards are limited to general costs for court proceedings, which are extremely low. As for the procedure for enforcement, an award is enforced by an order of the president of the District Court (*Tribunal d'arrondissement*) upon request of one of the parties, or one of the arbitrators. The president of the District Court cannot rule again on the merits of the dispute, but can only verify whether or not the award is contrary to national public policy prior to granting an enforcement order. We have never had any issue in obtaining such an enforcement order in the arbitration proceedings we have dealt with so far. In any case, the order of the

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president of the District Court refusing the enforcement of the award may also be subject to appeal. Once an order is declared enforceable by an enforcement order, a request to have it set aside may be filed. Such a request must be filed within a determined time period and on specific grounds.

Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN LUXEMBOURG?

TREVISAN: Luxembourg is often faced with complex international, multi-jurisdictional arbitrations. Our firm currently works on several multi-jurisdictional disputes. The biggest issue is to control and manage the communication process between the lawyers of the different jurisdictions concerned. Indeed, it is important for the lawyers of the different jurisdictions to have a full picture of the facts, issues and strategic developments occurring in the other jurisdictions, in order to properly advise the client and envisage the impact of these issues on the proceedings it is dealing with. On the other hand, the lawyers should not be overloaded with too much information. In such situations, the help of a coordinating leading firm is the key to success.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN LUXEMBOURG? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

TREVISAN: There has been no recent change in either the arbitration law, provided by articles 1224 to 1251 of the Luxembourg New Code of Civil Procedure, or the arbitration rules of the Arbitration Centre of the *Chambre de Commerce*. Furthermore, no legislative reform of the arbitration law provided by the Luxembourg New Code of Civil Procedure, or revision of the arbitration rules of the Arbitration Centre of the *Chambre de Commerce*, is currently pending.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

TREVISAN: To counter the possibility of future arbitration, companies should insert an arbitration clause. Indeed, if such an arbitration clause is inserted, any possible dispute should be submitted to an arbitral tribunal unless both parties agree to submit it to a state court. However, if such a clause is absent, the parties would need to agree on arbitration, and on the terms of such arbitration, otherwise the state courts would be competent for the dispute. We usually advise that the arbitration clause should provide the terms of the arbitration – that is, whether the arbitration will be *ad hoc* or institutional; the number of arbitrators and possibly the specific professional background of the arbitrators – depending on the matter of the contract; how arbitrators are chosen and by whom if it is an arbitration *ad hoc*; which rules shall be applied; the place of arbitration; and the language of arbitration. The arbitration agreement should be as clear and detailed as possible to avoid any issue, should a dispute need to be submitted to arbitration.

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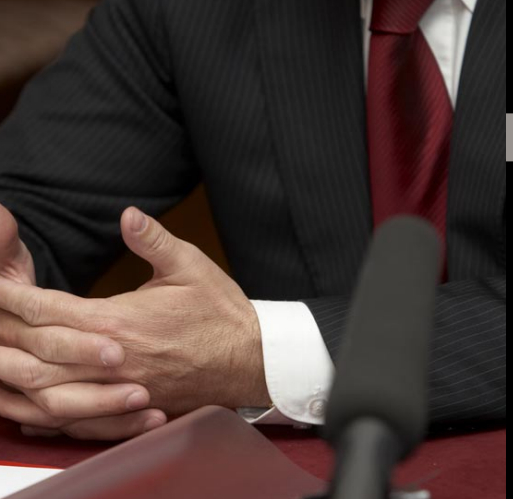
Fabio Trevisan is a partner at Bonn Steichen & Partners. His areas of expertise include dispute resolution, IP, IT, real estate, construction, employment, compensation & benefits, and insolvency & restructuring. Mr Trevisan has been involved in numerous shareholders' disputes, as well as high stakes arbitration proceedings. He is a member of the Bar Council and is fluent in English, French and Italian.



SWITZERLAND

URS WEBER-STECHER
WENGER & VIELI AG

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN SWITZERLAND? WHAT RECURRING THEMES ARE YOU SEEING?

WEBER-STECHER: As one of the original venues for arbitration, Swiss institutions have been offering institutional arbitration for commercial disputes for more than 100 years – for instance Zurich's Chamber of Commerce since 1911. One of the major challenges today is the increasingly competitive environment of international dispute settlement. Various countries such as Germany and Austria in Europe, or Singapore and Hong Kong in the Far East, continue to increase their efforts to create attractive conditions for dispute settlement. Thus, even traditional places like Switzerland face an ongoing challenge to remain one step ahead. The revision of the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (Swiss Rules) in June 2012 serves this purpose effectively.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

WEBER-STECHER: Companies engaged in international business are well advised to include an arbitration clause in their agreements with their business partners. The main reasons for choosing arbitration as a dispute settlement tool include confidentiality and privacy, flexibility, and the shorter duration of procedures, enforceability of awards, and the ability to select arbitrators. Institutional arbitration rules, like the Swiss Rules, also contain provisions dealing with joinder of third parties, and the Swiss Federal Court has developed case law extending an arbitration agreement to non-signatory third-parties. While the parties may agree on a seat of arbitration in Switzerland and choose a foreign substantive law to govern the contract, the ability to synchronise the law of the seat – *lex arbitri* – with the applicable law has substantial advantages.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN SWITZERLAND?

WEBER-STECHER: Switzerland is well known for its excellent business infrastructure and, historically, as a politically stable and neutral country. There are many hotels and other facilities offering ideal locations for the conduct of arbitration hearings. The legal environment is also ideal. With Chapter 12 of the Swiss Private International Law Act (SPILA) and also, since January 2011, the third chapter of the Swiss Code on Civil Procedure, Switzerland has a very liberal and arbitration friendly legislation. In combination with institutional arbitration under the Swiss Rules or the ICC Rules – or any other set of institutional rules allowing the conduct of arbitration hearings in Switzerland – Switzerland thus offers an ideal legal framework for arbitration.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

WEBER-STECHER: In Switzerland, the judiciary is very arbitration friendly. First, the Swiss Federal Supreme Court is the only court with the power to review awards of arbitral tribunals. Hence there is only one level of appeal admissible, and even this appeal can be waived if none of the parties is Swiss. Secondly, an award rendered by an arbitral tribunal having its seat in Switzerland may only be set aside on very limited grounds, such as severe violations of party rights or seriously deficient arbitral tribunals. Moreover, the Swiss Federal Supreme Court applies the grounds for appeal very restrictively. For the enforcement of foreign arbitral awards in Switzerland, the SPILA refers to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In this respect, the case law of the Federal Supreme Court can also be described as being prudent and arbitration friendly.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN SWITZERLAND?

WEBER-STECHER: There are no specific practical issues to be dealt with in Switzerland, which would not also apply to arbitration proceedings conducted in other countries. The arbitration friendly legislation, the political openness of Switzerland, its liberal market conditions, and its well-developed infrastructure make it an easily accessible and attractive place for any kind of arbitration. In the case of complex multi-jurisdictional disputes, the fact that witness hearings can be conducted in best-equipped facilities close to the international airports of Zurich or Geneva is paramount. Many Swiss arbitration practitioners are experienced in handling complex multi-jurisdictional cases, both as counsel and as arbitrators. Their experience not only includes a skilled legal approach but also efficient organisation of the proceedings, including organisational meetings and evidentiary hearings.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN SWITZERLAND? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

WEBER-STECHER: There have been important changes in Swiss legislation and institutional arbitration rules quite recently. As of 1 January 2011, the CCP came into force. The third Chapter of the CCP – articles 353 to 399 – contains a separate set of modern state-of-the-art arbitration rules for domestic arbitration, which may also be applied to international arbitration if the parties opt for this alternative. In June 2012, the revised Swiss Rules came into force. These are a well-established set of modern arbitration rules for institutional arbitrations that meet the highest standards. Finally, there are ongoing discussions about a revision of Chapter 12 SPILA. Although the short and clear regulation of Chapter 12 is still highly regarded in the arbitration community both within and outside of Switzerland, certain aspects may be adjusted to bring the code in line with prevailing case law of the Federal Tribunal or to keep pace with general developments in international arbitration.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

WEBER-STECHER: In addition to the parties' agreement on a seat of arbitration with a suitable *lex arbitri*, the parties may choose a set of arbitration rules for a specific institution as well as the law applicable to the merits. As in state court proceedings, it is very important that the companies define the mutual rights and obligations of the parties in their contracts in such a manner that, should a dispute arise, an arbitral tribunal will be in a position to assess the relevant facts and apply the law. Should the business be of a very specific nature, it may make sense to add specific requirements for the eligibility as arbitrator – for example, that arbitrators need technical or legal expertise and experience in a specific field. If the parties come from different cultural or legal backgrounds, they may want to agree on an arbitrator's nationality and language. However, it is not advisable to be too specific in the arbitration agreement, because this may lead to an unwanted restriction of potential candidates.

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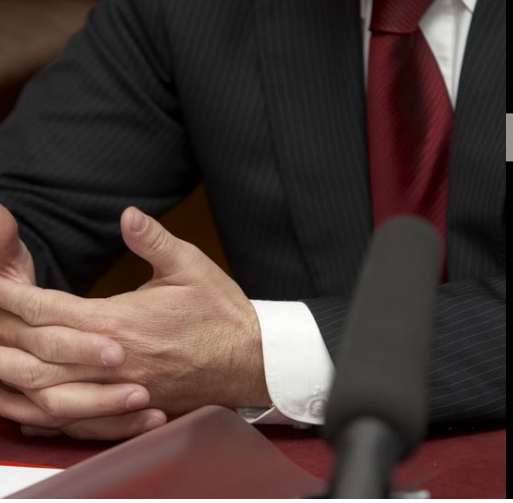
Urs Weber-Stecher is a partner at Wenger & Vieli. He practises mainly in the areas of international arbitration and cartel law. He regularly acts as arbitrator or counsel in international arbitration disputes and indeed his experience includes more than 75 cases of national and international arbitration. He has been a teaching fellow for international arbitration at the University of Zurich since 2001, is a member of the Court of Arbitration of the Swiss Chambers' Arbitration Institution and of the ICC Commission on Arbitration, and is also a director, founding member and lecturer at the Swiss Arbitration Academy.



RUSSIA

SERGEY TRESHCHEV
SQUIRE SANDERS MOSCOW LLC

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN RUSSIA? WHAT RECURRING THEMES ARE YOU SEEING?

TRESHCHEV: Notwithstanding the fact that the Highest State Commercial Court (HSCC) decrees have already hit the headlines, we do believe that they are worth mentioning once again. These decrees have recently rocked the legal boat and changed the way that deals are done. We refer to the *NLMK* and *Sony Ericsson* cases. From now on, corporate disputes – those dealing with Russian company shares – lack arbitrability and no disproportional arbitration clause can be applied. Our view is that this may require the restructure of the SPA for it to offer combined dispute resolution methods and to allow the submission of disputes arising from the nature of the agreements to litigation. In the absence of substantive court practice related to disproportional arbitration clauses, it is advisable to bring them in line with the HSCC's position.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

TRESHCHEV: The simplified and more developed procedure of disclosure and expert examination – 'hot-tubbing' – makes arbitration an ideal choice for complex matters like IP or Telecom. Litigating such disputes may lead to unreasonable judgment due to lack of flexibility and special knowledge. Yet, the parties may face certain issues with enforcing the award, making all the advantages useless. The answer cannot be univocal and a strategy should be decided on a case-by-case basis, therefore it seems crucial for parties to consult their DR resolution at the contractual stage, even before 'the fire started', so to speak.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN RUSSIA?

TRESHCHEV: Arbitration facilities and procedural rules – as well as arbitration related legislation – is no doubt fully consistent with international standards, however some improvements might be made to further the cooperation of state commercial courts and arbitration tribunals.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

TRESHCHEV: About 20 years have passed since I started practicing in the field of IDR, and for now I would say the Russian courts are slowly but steadily becoming more 'arbitration friendly'. We have recently seen the 'public policy' rule being revised, allowing recovery of not only the compensatory sums, but damages exceeding the party's actual losses – for instance in the *Stena RoRo* case – that may lead to the losing party's insolvency. The public policy exception has for years been a stumbling stone for enforcement of the arbitration awards, and now HSCC is preparing a draft guidance for lower courts on what should be treated as 'public policy' violation.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN RUSSIA?

TRESHCHEV: The distinctive feature of multijurisdictional arbitration is, unsurprisingly, location of parties, therefore, arbitrating a cross-border dispute means following service procedures under arbitration rules, or governing law of the arbitration clause. Notwithstanding that the burden of proof with respect to absence of service lies on the defendant, Russian courts seems to be very reluctant in enforcing arbitral awards in the event the claimant does not provide strong evidence of due notification. Consequently, we recommend being as accurate as one can be in serving the other party – failure to do so may be critical at the enforcement stage. Moreover, it goes without saying that in the vast majority of cases, the claimant is interested in 're-gaining control' over the disputed assets at the pre-award stage, or at least to prevent possible alienation, for example by a freezing order. In light of this, the second issue we need to address is enforceability of the measures, known as interim reliefs. It is of paramount importance to understand that the Russian courts, first and foremost, look at the nature of an arbitration tribunal order in defining its enforceability. According to the current regulation and substantive court practice no relief that lacks 'finality' – for instance, settling the dispute on the merits – can be enforced, meaning that Russian courts do not recognise interim reliefs as enforceable. Should this be treated as an impairment of the claimant's rights? This seems arguable. Does this mean that the claimant cannot secure the asset 'pendante lite'? The answer is no, as it may always seek an injunction in Russian State Commercial courts.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

TRESHCHEV: If the parties decided to submit the disputes arising from, or connected with, their contractual obligations, it is strongly advisable to follow model arbitration clauses or consult their IDR attorneys. For instance, in our practice we have dealt with clauses providing for tight terms in presenting defence, disclosure and other procedural actions. 'Undertime' is frequently used by the losing side as an argument for claiming that it was deprived from the right 'to present the case', which as we all know, makes the award unenforceable.

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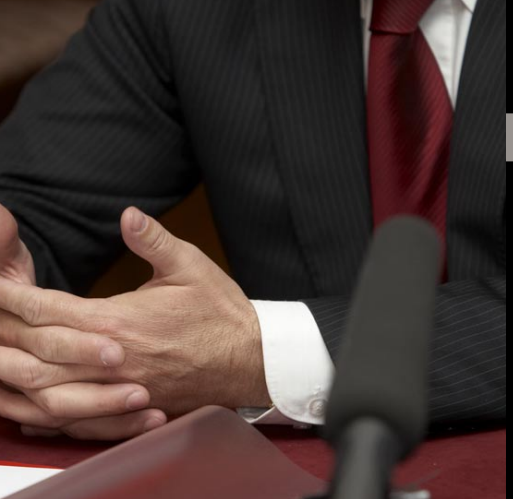
Sergey Treshchev has represented clients and provided advice in numerous disputes related to debt recovery, IP rights infringement, compliance with mining, oil & gas regulations, performance of commercial contracts, and employment conflicts. He has also represented clients in seizure of assets, confiscation of assets of debtors on the basis of enforcement orders; as well as assisted temporary management and liquidation proceedings in banks and companies. He also focuses his practice on corporate, international trade, banking and financial transactions. Mr Treshchev is listed in the 2012 edition of Russia's Best Lawyers for his corporate and energy and natural resources practice.



TURKEY

KAREN AKINCI
AKINCI LAW

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN TURKEY? WHAT RECURRING THEMES ARE YOU SEEING?

AKINCI: This is a very exciting period in Turkey. In the run up to the celebration of the centenary of the Republic in 2023, many new projects are being tendered. This has been supported by the PPP system brought into effect this year, which will see many hospitals, schools and other amenities brought to the cities and regions. Opportunities are not only to be found in the construction industry. In the area of telecommunications, internet usage is exceptionally high in Turkey giving great opportunities to software and hardware development. Renewable energy source projects are also being promoted by government incentives.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

AKINCI: Arbitration is certainly the best form of dispute resolution in the region. Legislation exists to use arbitration both internationally and domestically. Turkey's arbitration centres are extremely well run and have excellent facilities. Indeed, plans are being discussed that will see the Istanbul International Arbitration Centre open in the near future. Commercial mediation, though practiced by international companies in the region, is not well known to domestic companies. No legislation or commercial mediation centres exist to facilitate the method of resolution, and mediation exists as a purely commercial exercise within the company walls or as provided by centres in other countries. In Turkey there is no legal restriction to foreigners being a party to litigation, however the litigation process in Turkey can take a substantially long time to get to final award and can become rather expensive. Arbitration still remains the most user-friendly, fastest, and less expensive method of dispute resolution.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN TURKEY?

AKINCI: Apart from the smaller regional centres, we have two main arbitration centres in Turkey: the Istanbul Chamber of Commerce (ITO) and the Union of Chambers and Commodity Exchanges of Turkey (TOBB), based in Ankara. Both are very experienced centres for international arbitration. In addition to these we have the ICC Turkey branch which can assist in ICC cases in Turkey. Excellent facilities and secretarial support are available in both of these centres. Foreign arbitral institutions can also operate freely within Turkey as there is no legal restriction. To facilitate, Turkey is also a major conference venue centre, and the local and international hotels have business facilities to rival any other country. Suitable rooms for arbitration, business centres, services and wifi access are available in all of the larger hotels.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

AKINCI: Turkish courts are most certainly arbitration friendly. The courts appreciate both the effective nature of the process and the fact that it eases the court's workload. Arbitration, or rather the 'arbitrability' issue in Turkey is limited to matters under the control of the parties; this translates roughly to only commercial matters. Dating back to the Ottoman Empire, which had separate courts for trade, the idea that commercial disputes should be handled differently to other forms of dispute has been recognised. As such, criminal matters, family matters, administrative law issues, and so on, are not arbitrable. Turkey is a party to international bilateral agreements and conventions, which allow for recognition and enforcement of foreign arbitral awards limited only to the accepted definition of what can be arbitrated.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN TURKEY?

AKINCI: Turkey is a very open jurisdiction for running your arbitration under Turkish or foreign laws and procedural rules. However, if the Turkish International Arbitration Code is applicable to your case then it is worthwhile to remind your arbitrators, who may not all be Turkish, that unless the parties have agreed otherwise, the Turkish International Arbitration Code allows only one year for the completion of the arbitral award. If this timescale is breached the award may not be enforceable.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN TURKEY? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

AKINCI: The new procedural law that entered into force on 1 October 2011 with Law No. 6100, redefines articles 407 and 444 of the Turkish Civil Procedural Law and incorporates arbitration into the domestic scene. Though this does not have an effect on many international disputes, which are subject to the relevant foreign procedural law or the Turkish International Arbitration Code, it has brought about a more widely accepted 'arbitration culture' in the domestic commercial arena. As a rule, Turkish law allows parties to decide on their applicable laws, including the law applicable to the process of arbitration. This could be a foreign law. If Turkish law is applicable, the law looks to see if there is a foreign element – defined in the Turkish International Arbitration Code as the place of residence of one or more parties; the place of party obligations; if foreign capital was involved; or if capitol or goods are transferable under the contract to another state. Once a foreign element is established the TIAC is applied. If not, the Turkish CPL is applied.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

AKINCI: A clear intention to arbitrate any and all aspects of a dispute arising in relation to the contract is extremely important. Model clauses exist in all the major arbitration centres and these can be incorporated directly into the contract. A number of cases have arisen in Turkey where the intention to arbitrate has been questioned. Classic examples are: where the parties were unclear as to the name of the arbitration centre they had chosen or named more than one centre; where the parties had said that both arbitration and litigation was possible leading to a question on which should come first if at all; and where the parties had named a specific person as arbitrator, leading to the question of whether arbitration would have been acceptable under any other arbitrator. To avoid such confusion, a generic and internationally accepted model should be used. It is worthwhile to consider whether issues such as the language of arbitration, number of arbitrators, law applicable to the substance of the contract, or to the arbitration procedure and even the venue are important enough to both parties to incorporate into the contract at this stage.

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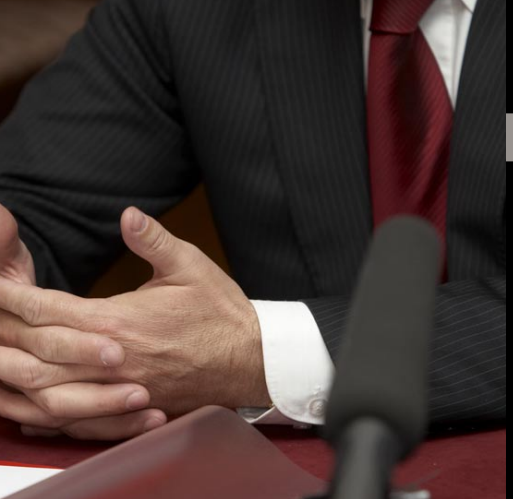
Dr Karen Akinci specialises in dispute resolution, both in the many arbitration disputes she has been involved in and also in the area of mediation that is very new in Turkey. She also acts as a legal consultant for foreigners in Turkey and can give advice on diverse areas of interest to foreigners, from international family and inheritance laws to setting up businesses in Turkey. Dr Akinci is well known for her involvement in international parental child abduction cases in Turkey under the Hague Convention.



CHINA

PETER YUEN
FANGDA PARTNERS

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN CHINA? WHAT RECURRING THEMES ARE YOU SEEING?

YUEN: In mainland China, one of the biggest challenges we saw in 2012 was the overall slowing-down of the growth of China's economy, which has led to a general decline in the profitability and liquidity of companies. This in turn has led to companies defaulting either under their contracts with third-parties or on their financial covenants or obligations owed to foreign investors. We have also seen an increased number of foreign investors becoming frustrated with the lack of options to seek effective interim relief against Chinese parties while they arbitrate offshore. This has led to new dispute resolution strategies being deployed in resolving China related disputes.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

YUEN: In China, arbitration is still the preferred dispute resolution method for most foreign investors. As between domestic and foreign arbitration institutions – foreign institutions are very often preferred by foreign investors largely due to their perceived procedural transparency. For those who seek to arbitrate offshore, they must ensure that their contracts and the disputes which arise from them, are capable of being arbitrated outside China. For those who need to arbitrate onshore, they should try to build in certain procedural safeguards in their arbitration clauses. It should be noted that for arbitration outside mainland China, interim measures granted by the tribunal would not be enforced by the Chinese court. So if your priority is to obtain interim measures against the Chinese counterparty – for example, a freezing order on assets, or putting a stop to infringing activities – then you may have to choose a domestic arbitration institution or agree to go to the local court.

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That having been said, a new strategy seems to have emerged. We have seen several cases now where the foreign investors arbitrate or enforce their rights offshore but, at the same time, these investors also manage to find an independent course of action in mainland China against the Chinese counterparties, whereby court proceedings may be commenced and interim measures by way of asset preservation orders are obtained in support of these Chinese court proceedings. The idea is that if the Chinese court proceedings can last long enough – and therefore assets remain frozen in the interim – by the time an award is rendered in the offshore arbitration, there would still be assets left in China, against which the award may be enforced. This strategy is not without its downsides, not least because it runs the risk of cutting across the offshore arbitration, and the freezing order requires fortification likely in the form of cash.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN CHINA?

YUEN: Arbitration facilities in China are, in general, improving. Hearings rooms in major Chinese arbitration centres such as CIETAC or the Beijing Arbitration Commission are being refurbished, and advanced electronic devices, such as projectors and microphones, are more frequently seen in arbitral hearing rooms. The arbitration process is also advancing as more professional arbitration practitioners are entering the scene.

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Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

YUEN: Generally speaking, Chinese courts are very arbitration-friendly in that they honour the validity of arbitration clauses whenever they can and enforce all arbitration awards, either domestic or foreign. In terms of New York Convention awards, in the past few decades, Chinese courts have been very supportive and enforced most of those brought to China for enforcement. There are of course some horrific examples of local protectionism or judicial inefficiency but I would say they are the exceptions rather than the norm.

Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN CHINA?

YUEN: Finding the right legal advisor is the key. Unlike domestic court proceedings where a rigid procedure has been set forth by the law, in complex and multi-jurisdictional arbitration, it is vital to a party to find a suitable and able legal team, having rich international arbitration experience and integrity, as well as being sensitive to the needs of the clients and the local judicial and legal environment. Finding the right arbitrators is almost as important. Arbitration in mainland China differs from offshore international arbitration in a number of important procedural aspects. While the arbitration agreement can provide for some procedural safeguards, so that the process may be made to look like a genuine international arbitration, experienced and effective arbitrators would be needed in order to properly implement these procedural safeguards, without unduly burdening the parties with unnecessary procedural complications and cost consequences.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN CHINA? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

YUEN: The 2012 CIETAC Arbitration Rules came into force on 1 May 2012. In this amended version, the parties are vested with more flexibility in designing their own arbitration procedure and the administrative process is supposedly more transparent.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

YUEN: First, it goes without saying that parties who choose to arbitrate must make sure that the arbitration clause is valid under the applicable law. Second, choosing the right seat is critical, and for China-related matters, one must ensure that the decision to arbitrate offshore is permissible under Chinese law. Third, think about the dispute resolution provision right at the start of a transaction. Often, commercial transactions are constituted by a number of agreements and it is worth spending time to think about how to structure the transaction and the dispute resolution mechanism so that disputes arising from the transactions – which may involve issues running across these related documents – can be resolved in the most efficient and effective manner. Last but not least, select the proper governing law for your contract. We have seen many cases where parties negotiate a contract on, for instance, an English law document, but before signing, switch to, say, Chinese law without considering the possible legal implication, and the gaps or difficulties that it may create.

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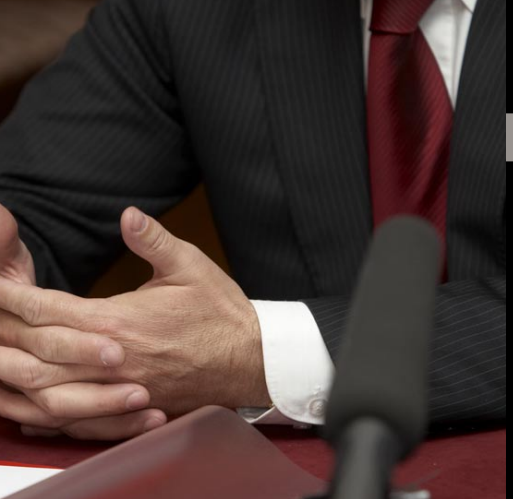
Peter Yuen qualified in Hong Kong in 1998 and became a partner of a major international firm in 2007. He joined Fangda Partners in July 2012, leading the firm's offshore dispute resolution practice. His practice focuses on China related business disputes, regulatory and corporate compliance related investigations, banking related litigation, IT/IP related disputes and international arbitrations. He has been recognised in the 'Global Arbitration Review Who's Who' since 2010. Mr Yuen is a contributing editor of the Hong Kong White Book and speaks fluent English, Cantonese and Mandarin.



HONG KONG

RUSSELL COLEMAN SC
TEMPLE CHAMBERS

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN HONG KONG? WHAT RECURRING THEMES ARE YOU SEEING?

COLEMAN: The costs of dispute resolution are always a practical issue, and a recurrent theme in Hong Kong is how best for tribunals and the parties to manage costs and ensure appropriate proportionality for the particular dispute. Experienced arbitration practitioners and arbitrators are increasingly conscious of the need to achieve a fair and just resolution of the dispute, without unnecessary expense and as soon as practicable.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

COLEMAN: Occasional disputes in commercial activities are a fact of commercial life. Hence, companies should plan for a possible dispute and consider the method of dispute resolution it thinks suits it best. With its potential for speed, expert panels, contained expense and privacy, arbitration often offers a sensible and practical method. Often the dispute resolution and jurisdiction clause is the last to be hurriedly inserted in any contract, but companies should have a standard clause which provides for a venue and process which is clear and which can be put into every first draft of a contract. Getting the arbitration clause right may save much time and expense should a dispute actually arise.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN HONG KONG?

COLEMAN: The Hong Kong International Arbitration Centre has very recently doubled its space, and after a complete refurbishment is well equipped to provide practical and material support for arbitrations in Hong Kong and the region. There are excellent hearing and meeting rooms, with varying configurations, and the Secretariat can provide specialist advice and support, whether in ad hoc or institutional arbitrations.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

COLEMAN: The Hong Kong Court has always been very supportive of the arbitration process. There is a specific Arbitration List in the Court of First Instance in the High Court, presided over by a specialist Judge versed in arbitration. As Hong Kong is a Model Law jurisdiction, the role of the court is understood to be supportive of the process, rather than obstructive or interfering. For example, under the new Arbitration Ordinance, the court is given powers to make orders for interim measures of protection whilst an arbitral tribunal is being convened, and in support of the reference. There are also powers to support arbitrations in other jurisdictions.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN HONG KONG?

COLEMAN: As soon as the issues in a dispute have been identified, it is sensible to set a timetable for further steps in the reference including setting a date for any oral hearing. Once a date for that hearing is fixed, all further steps can be viewed in the context of a requirement that they be fairly and economically completed in advance of the date. Tribunals will need to be alert to legal and cultural differences between the parties and their representatives in that process.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN HONG KONG? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

COLEMAN: Hong Kong is now a Model Law jurisdiction for both domestic and international arbitrations. The new Arbitration Ordinance came into force in June 2011. It is a user-friendly piece of legislation, setting out the adopted articles of the Model Law within the body of the statute, in the numerical order in which they appear, with all local variations clearly identified. Any international party or lawyer familiar with the Model Law will find the new law easy to navigate and understand. There are also revised HKIAC Administered Arbitration Rules coming into force shortly, and HKIAC administered references are becoming increasingly popular.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

COLEMAN: The most practical consideration is an effective dispute resolution clause, which clearly provides for an appropriate chosen tribunal and a method for appointing it, a place of dispute resolution and any applicable institutional rules or other requirements such as language, timing, and place for hearing.

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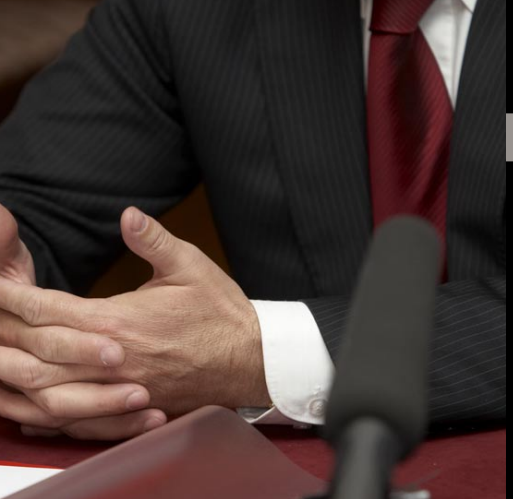
Russell Coleman SC is a barrister (Senior Counsel) and chartered arbitrator at Temple Chambers. He is frequently appointed as arbitrator, in both domestic and international arbitrations. He was President of the Hong Kong Institute of Arbitrators 2008-2009. He has sat regularly as a Deputy High Court Judge since 2010. In 2009 and 2010 he served two terms as Chairman of the Bar Council of the Hong Kong Bar Association, and is also Chairman of the Hong Kong Advocacy Training Council. He is a Council Member of the Hong Kong International Arbitration Centre (HKIAC). He has published various articles, mostly in the field of arbitration.



INDIA

S. S. NAGANAND
JUST LAW

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN INDIA? WHAT RECURRING THEMES ARE YOU SEEING?

NAGANAND: There is a slow but significant switch over to institutional arbitration from ad hoc arbitration. Many high courts in India have set up arbitration and mediation centres to encourage ADR. These centres have empanelled many former judges to arbitrate disputes. A number of construction disputes are going for arbitration, although the progress is slow as arbitrators are allowing parties to delay the proceedings. The question of the scope of interference with awards under Section 34 of the Arbitration and Conciliation Act, 1996, is somewhat settled by the Supreme Court. The Court holds that awards which are not in conformity with law can be set aside on the ground that the award would be against public policy. A further challenge is the appointment of the arbitral tribunal – parties disagreeing on the appointment has given rise to a number of disputes going before the Chief justice under Section 11.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

NAGANAND: The first precaution to be taken is to have a proper appointment procedure for the arbitral tribunal. The second important point to be borne in mind is to ensure the agreement is duly stamped under state laws. A pre-arbitration conciliation or mediation ought to be explored. Under the Civil Procedure Code, a court, where a dispute is pending, is bound to explore settlement of disputes by ADR under Section 89.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN INDIA?

NAGANAND: There are today many institutional arbitration centres, which are doing well. The procedures are well defined and the arbitrators are good. The physical infrastructure is good and costs are reasonable. Many trade associations are also offering arbitration for their members. In the case of tort claims, arbitration is rare, although there is scope to seek arbitration in such cases.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

NAGANAND: After the decision of the Supreme Court of India in *ONGC vs. Saw Pipes*, there was great concern about the expanding scope for challenges to awards. The law has now been amplified by judicial pronouncements and is quite effective and clear. The contours of interference are well defined. Courts are usually supportive of arbitrations, especially at the stage of appointing the tribunal. Even challenges to awards are considered under law. There is, however, delay in the disposal of cases before the Challenge Court and appeals arising therefrom. In a large number of matters, if disputes are arbitrable, courts usually entertain applications for interim relief under Section 9.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN INDIA?

NAGANAND: The main issue to be borne in mind is the question of applicable law. The second issue is place of arbitration. The extent of Indian courts' intervention in foreign arbitral proceeding is restricted after the recent reversal of the decision in *Bhatia International* by a Constitution Bench of the Supreme Court on 12 September 2012 in *Bharat Aluminium Vs Kaiser Aluminium*. We are also seeing a number of challenges to foreign arbitrations in Indian courts.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN INDIA? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

NAGANAND: There are no recent statutory changes in the law – though in many cases the Supreme Court has expressed the need to change and update the law. There are, however, judicial pronouncements such as *Bharat Aluminium* which benefit international arbitrations. Even for enforcement of awards, the judicial trend is to uphold enforcement.

Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

NAGANAND: It is advisable to provide for arbitration, with a wide clause which encompasses all disputes that may arise in the future, and also to opt for institutional ADR instead of *ad hoc* arbitrations. It is also advisable to confine court jurisdiction to one court.

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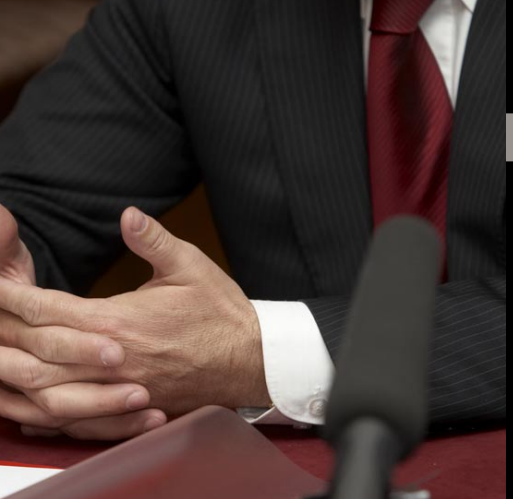

MALAYSIA

NAHENDRAN NAVARATNAM
KADIR ANDIR & PARTNERS

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN MALAYSIA? WHAT RECURRING THEMES ARE YOU SEEING?

NAVARATNAM: Current market challenges include the inability of litigants to appreciate and respond to the increasing pace at which dispute resolution is now conducted. Clients and lawyers are also finding it harder to respond and cope with the growing complexity of disputes, owing to the availability of electronic communications that make retrieval and storage of information – and thus easy disclosure of evidence – by way of discovery applications more common and also more detailed.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

NAVARATNAM: My advice would be, first, to genuinely consider whether arbitration is the best strategy for the types of dispute that the parties anticipate. Consider also whether it is desirable that the final decision should carry some precedential value – if so then litigation rather than arbitration is preferred. This is important if the parties envisage that the same or similar issues are going to come up repeatedly over the life of a contract. If arbitration is nevertheless preferred, consider whether certain types of disputes should be carved out and whether the number, qualification or identity of arbitrators, and what rules to apply, need to be expressly stipulated or not. All these matters are often overlooked in favour of standard dispute resolution clauses. These are to be avoided at all costs. All dispute resolution clauses should be customised by experienced dispute professionals. Unfortunately such things are often left to non-contentious lawyers.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN MALAYSIA?

NAVARATNAM: Arbitration facilities and processes in Malaysia are excellent. There is ample infrastructure at a variety of venues to accommodate arbitrations and a wide pool of talented and experienced arbitrators to choose from. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is also internationally recognised for promoting high standards and will soon have a new office and arbitration centre, housing modern and sophisticated infrastructure. The KLRCA is also updating and streamlining its rules, and promotes both mediation and adjudication. The KLRCA has also been designated to administer all adjudication proceedings once the Construction Industry Payment and Adjudication Act 2012 (CIPAA) comes into force.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

NAVARATNAM: Since the introduction of the Arbitration Act 2005, the legal system in Malaysia has been much more arbitration-friendly. Section 8 of the Act provides that no court shall intervene in matters governed by the Arbitration Act except as provided for under the Act. Furthermore, the Act allows the courts to support arbitration proceedings by way of interim measures such as interlocutory injunctions and orders to preserve the subject matter pending arbitration. Section 11 (2) provides that any finding of fact made by the arbitration tribunal shall be taken as binding on the courts considering any interlocutory orders. Generally, where the arbitration tribunal has been properly constituted, the subject matter of the dispute is covered under the arbitration agreement, and, where there was no fraud or corruption involved in the arbitration proceedings and no breach of the rules of natural justice throughout the process, the courts will not interfere with an award and will readily enforce it. That said, our courts have on occasion delivered some inconsistent or anomalous decisions, but it is hoped that greater awareness will eventually iron these out.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN MALAYSIA?

NAVARATNAM: Cultural differences between international arbitrators and counsel accustomed to operating in their own environments pose a great challenge. Ensuring that arbitrators and counsel are aware of and apply the proper law of the contract, instead of being overly influenced by the law they are more accustomed to in their home jurisdictions, is also a great challenge to be dealt with. Getting the right arbitrators for a dispute is also becoming increasingly perplexing given the limitations on how to effectively gauge an arbitrator's ability, other than from his CV, and the emergence of group cartels that often strive to contain arbitral appointments amongst their own numbers.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN MALAYSIA? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

NAVARATNAM: The KLRCA Arbitration Rules 2010 have been revised after taking into account KLRCA's administrative experiences, as well as feedback from relevant stakeholders, including parties to arbitration proceedings, case administrators, legal professionals and arbitrators. The revision is also timely, following provisions of the Arbitration Amendment Act 2011 that emphasise the courts' non-interventionist and pro-enforcement stance, which came into force in July 2011. Along with other important changes, the timeline for appointment of arbitrators is now reduced to 30 days. Other than that, provisions relating to the rendering of awards have been restructured to provide better clarity on the procedure for the extension of time and delivery of awards to the KLRCA, and the release of such award(s) to parties. The rules further lay down requirements for consent awards. The new KLRCA Arbitration Rules came into force on 2 July 2012.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

NAVARATNAM: The main consideration companies should make is to ensure that the arbitration clause, whether in any master agreement or *ad hoc* agreements, are clear and succinct. They should be drafted by an arbitration specialist and not by corporate counsel who are rarely sufficiently aware of arbitration principles and practice. A poorly drafted arbitration agreement can squander the potential advantages of arbitration as it may invite ambiguity and equivocation that may be capitalised upon by a party wishing to delay or defeat the arbitration. The arbitration agreement should include the scope of the dispute that can be referred to arbitration; place, composition and venue of the arbitration; and which rules are to be adopted for the arbitration process bearing in mind issues of convenience, cost and the availability of arbitrators suitable for each prospective dispute. Where these are clear, the arbitration tribunal can be efficiently and properly constituted, and there would little room for the award made to be set aside in the future.

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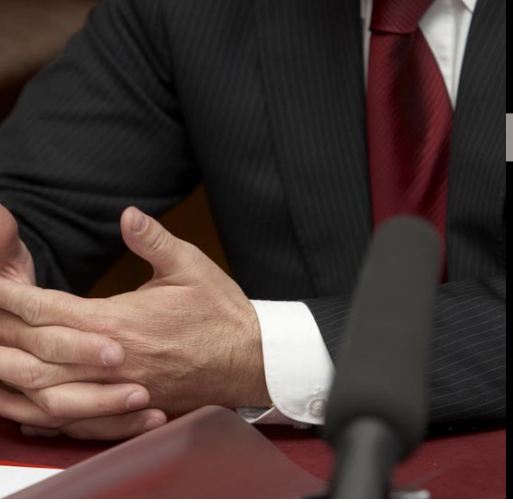
Nahendran Navaratnam is an experienced trial and appellate lawyer principally in disputes, involving commercial and company law, contract, land law, tax, financing and project disputes as well as defamation and media law. He is especially familiar with the various forms of injunctive relief, pre-emptive remedies and judicial review. Mr Navaratnam is a chartered arbitrator and is on the panel of arbitrators of the Kuala Lumpur Regional Centre for Arbitration. He has handled both domestic and international arbitrations as counsel and as party or institution appointed arbitrator or chairman of the arbitral tribunal.



SINGAPORE

KARAM S. PARMAR
TAN KOK QUAN PARTNERSHIP

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN SINGAPORE? WHAT RECURRING THEMES ARE YOU SEEING?

PARMAR: The most critical hurdle standing in the way of arbitration is its increasing cost. The arbitral forum and arbitrators' fees are not inexpensive. As the trend is to prepare for arbitrations as thoroughly as preparing for court trials, counsel charges have spiralled upwards. The demand for specialist counsel and arbitrators has also contributed to the rising costs. This is a big challenge and, if unchecked, arbitration runs the risk of pricing itself out of being a viable alternative to court litigation. Another challenge facing arbitration practitioners is the need to urgently develop new skills to handle the increasingly complex, multi-party arbitrations of a cross-border nature that are seated in Singapore. The recurring theme is always the need to source for people with the necessary skills set.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

PARMAR: There is no one strategy that fits all conflicts or disputes. If the objective is to obtain full compensation whatever the damage to the commercial relationship, litigation or arbitration would likely be the first port of call. Otherwise pre-arbitral negotiations and mediation may be a better fit. In this regard, we have observed an increasing trend towards multi-tiered dispute resolution clauses. Arbitrations are generally preferred to litigation in the national courts since it is generally easier to enforce a foreign arbitral award in the place of residence of the respondent, than to enforce a judgment of any other country. The confidentiality of arbitration is also a plus. Once arbitration is determined as the final dispute resolution process, then the most strategic consideration is to select the seat of arbitration. This is because the seat of arbitration determines the curial law and the courts which will have jurisdiction over the arbitration. Pro-arbitration courts that assist arbitrations are an important consideration.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN SINGAPORE?

PARMAR: Singapore, as an arbitration centre, is a world leader. Singapore's state of the art, integrated dispute resolution centre – Maxwell Chambers – houses first class hearing facilities and offices of top ADR institutes and dispute resolution professionals. The country has a judiciary that supports the arbitration process, and there is a constant re-examination of legislation to ensure arbitration-friendly laws and processes are in place to promote and support arbitration. No doubt, the standards of facilities and processes vary from jurisdiction to jurisdiction; however, the trend towards improvement is evident.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

PARMAR: Singapore's government and its judiciary are staunchly pro-arbitration. It has put in place the necessary facilities and processes to promote arbitration. Foreign arbitration practitioners are welcomed and the courts have clearly adopted a policy of limited, and careful curial intervention in support of arbitrations. The pro-arbitration stance can be clearly seen in a number of cases where the courts have upheld and enforced arbitral awards. Recent attempts to set aside arbitral awards in the Singapore courts have not been very successful. Where awards have been set aside by the High Court and which have then come before the Court of Appeal in the past 18 months or so, only one was upheld with the others having their awards reinstated. In one of these appeals, the Court of Appeal commented that where public policy is advanced as a ground to set aside an award, this can only be allowed when the decision of an arbitrator 'shocks the conscience of the court'. Similarly, the Singapore Courts readily allow the enforcement of foreign awards in Singapore.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN SINGAPORE?

PARMAR: Multi-jurisdictional parties in international arbitrations are inevitably heard before a panel of arbitrators who are themselves from various jurisdictions. This immediately gives rise to numerous practical issues that have to be dealt with well in advance of the hearing. The scheduling of hearing tranches remains a complex challenge for multi-jurisdictional arbitrations simply because the traveling schedules of counsel, arbitrators, and experts all have to be co-ordinated, and the complexity of the matters usually means that hearings can be relatively long. It is therefore important to ensure adequate time is set aside to avoid part-heard matters. Support for the arbitration is also critical. Where interpreters are needed, parties have to ensure appropriately qualified professionals are on hand.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN SINGAPORE? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

PARMAR: Legislative changes to arbitration have been fast in Singapore. Maybe too fast. Recent changes pursuant to the International Arbitration (Amendment) Act 2012 include the removal of the strict writing requirement for a valid arbitration agreement; giving the courts the power to review an arbitral tribunal's negative jurisdiction ruling; recognition for the emergency arbitrator; and the re-definition of the meaning of a foreign 'arbitral award'. Arbitration Rules (SIAC) have also had to change to keep abreast of the legislative changes. These changes include the reduction in timelines for the conduct of arbitrations; limiting the time for the publishing of awards; making provisions for interim relief; and provisions for the emergency arbitrator procedure. The primary objective of such changes is to improve the effectiveness and efficiency of the arbitral procedure.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

PARMAR: Standard arbitration clauses recommended by arbitral institutes for insertion into commercial contracts are, by and large, similar in content. In addition to such arbitration clauses, companies should insert provisions that enable them to seek specific relief or remedies which, although available to a litigant in court, may not ordinarily be available to a party in arbitration. An example would be a contractual right to seek pre-action relief measures from the courts – such as pre-arbitral discovery – without prejudicing the right to have the primary dispute arbitrated. While institutes are amending their rules and legislative changes are being made to afford litigants access to interim measures or remedies in some states, there remain a number of jurisdictions where the courts do not have the power under their present legal regime to fully assist parties in arbitration unless express provisions have been provided for. Self-help measures are therefore necessary and should be considered by any company contemplating future arbitration.

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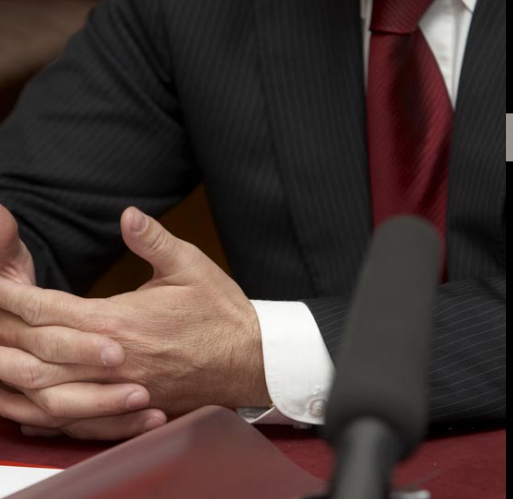
Karam S. Parmar is a senior partner of Tan Kok Quan Partnership, a Singapore law practice. He holds dual qualifications in engineering and law, and was called to the Bar of England and Wales in 1992. Mr Parmar practices in the firm's Litigation and Arbitration Practice Group and heads its building, construction and engineering disputes team. Inevitably, a large part of his contentious work involves commercial arbitration. He is also actively involved in the promotion of arbitration.



UNITED ARAB EMIRATES

PAUL TURNER
AL TAMIMI & COMPANY

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE UNITED ARAB EMIRATES? WHAT RECURRING THEMES ARE YOU SEEING?

TURNER: The biggest challenge is probably persuading local companies to choose arbitration as their preferred dispute resolution procedure when negotiating their contracts. Clients find arbitration expensive compared to the costs of litigation. They also know how the court system works, whereas for many, arbitration is still the little sister. That is not the case for international companies. For them the challenge is whether to use local arbitration centres or to stick to the better known institutions in Paris or London. Clearly, the use of local bodies and local arbitrators could be cheaper but they may perhaps be less experienced than their international counterparts. Educating clients with respect to the costs involved in arbitration proceedings remains a challenge.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF ARBITRATION VERSUS OTHER DISPUTE RESOLUTION METHODS?

TURNER: We try to avoid recommending multiple tier resolution clauses. On paper they look good and seem sensible, particularly where direct negotiations or mediation is involved. However, they often lead to preliminary jurisdictional challenges which can prove expensive and time consuming if the clauses are not followed to the letter. There is a propensity in this region for lawyers to rely on the letter of the law, rather than the spirit, and points are taken here which would never be argued in Western jurisdictions. Our advice to clients is, generally, to keep it simple and realistic. Agree arbitration in writing but if it comes to an actual problem, then explore appetites for direct negotiations or mediation at that stage on a non-mandatory basis. That approach may save a lot of hassle in the long run.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE UAE?

TURNER: Facilities and processes in the UAE are independent and robust. The UAE is now well known for being the leading area in the Middle East in promoting and practising arbitration. The ICC regularly holds conferences here, and the CIArb has a presence here as does the LCIA in the Dubai International Financial Centre. The Dubai International Arbitration Centre (DIAC) is the best known local centre with excellent facilities and a growing number of case handlers handling the day-to-day administrative needs of each case. There are also centres in Abu Dhabi and in Sharjah. Each centre tends to concentrate on the geographical needs of its catchment area.

Q HOW SUPPORTIVE ARE THE COURTS WITH RESPECT TO UPHOLDING AND ENFORCING ARBITRAL AWARDS? WOULD YOU CONSIDER THE JUDICIARY TO BE 'ARBITRATION FRIENDLY'?

TURNER: There has been a significant improvement by the local courts towards respecting arbitrations over the last two to three years in particular, such that the courts can be described as 'arbitration friendly'. We now see arbitration clauses in contracts regularly upheld and honoured by the courts so that any attempt by one party to litigate in the face of an agreement to arbitrate is usually rebuffed, as long as the agreement is raised at the first hearing before the courts. Likewise, when it comes to enforcement of international awards, the initial uncertainty on the part of the local courts to query registration of the award as a prelude to enforcement seems to be fast disappearing. The courts recognise the country's obligations under the New York Convention.

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Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI-JURISDICTIONAL ARBITRATIONS IN THE UNITED ARAB EMIRATES?

TURNER: Advising the client on the choice of the right arbitrator with the appropriate experience and gravitas, is still a challenge. Making the best nomination can lead to a saving of costs and time, as well as increased standards. Spending time on this aspect is never wasted. The last thing one wants is a tribunal which lacks an understanding of the issues or the procedures. One also needs to observe local nuances and requirements, particularly in the field of public policy. Issues such as the religion, gender and qualifications of the arbitrators can be important when it comes to enforcement in certain Middle Eastern countries, as otherwise there may be enforcement problems. Making sure that both witnesses of fact and expert witnesses are prepared to swear their testimony, rather than affirm, is crucial.

Q HAVE THERE BEEN ANY RECENT CHANGES IN ARBITRATION RULES IN THE UNITED ARAB EMIRATES? IF SO, HOW WILL THESE CHANGES AFFECT THE PROCESS, AND WHEN WILL THEY BE BROUGHT INTO FORCE?

TURNER: The Qatar International Centre for Arbitration (QICA) published new rules in 2012 which include a revised administrative structure. The rules also deal with various matters including giving the arbitrators the right to determine their own jurisdiction, arbitration timetables and directions, numbers of arbitrators, and so on. Qatar still has no independent arbitration law so the new rules are a welcome addition, providing more certainty. Similarly, Saudi Arabia introduced a new Arbitration Law in 2012 which is based on the UNCITRAL Model Law. Its aim is to introduce arbitration friendly principles and reduce the involvement of the Saudi courts, wherever possible. It recognises a greater role for the tribunal in terms of its powers, and is designed to ensure recognition and enforcement of the ultimate award. A big step forward for the region and indeed the Kingdom of Saudi Arabia (KSA) has been quicker off the mark in this respect than say, the UAE, where the promised arbitration Law is still awaited.

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Q IN YOUR EXPERIENCE, WHAT CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE ARBITRATION IN THEIR COMMERCIAL ACTIVITIES?

TURNER: It is important that companies actually sign the arbitration clauses to which they agree in a contract. Initialling the agreement may be insufficient. Equally, there have been a number of court decisions in the region which make it clear that if a company signs a contract containing an arbitration clause then the signatory may need a special Power of Attorney – depending on their position within the company – expressly authorising them not only to sign the contract, but also to agree to the reference to arbitration. This seems to be of increasing importance because otherwise a company could find itself settling for local court jurisdiction even though there is an arbitration clause in the contract. We cannot emphasise enough the need for companies to take relevant legal advice before agreeing what may appear to be simple and sensible arbitration provisions in a contract. In the long run it may save a lot of money and avoid unnecessary frustration.

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Paul Turner's arbitration experience includes joint venture disputes, international claims relating to the sale of oil and gas, metals and minerals, bill of lading and charter party disputes, transactional disputes usually arising out of oil and mineral concessions, bilateral investment treaty disputes, banking disputes, arbitration enforcement issues, defamation issues and breach of contract actions. Mr Turner has had extensive involvement in all the major arbitration Centres in London. He has also been involved in international arbitrations before the ICC in Paris. Mr Turner has worked as a litigator in the London High Court, Court of Appeal and House of Lords.

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