COMMERCIAL ARBITRATION

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Commercial arbitration

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

UNITED STATES

CAMILO CARDOZO
DLA PIPER

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

CARDOZO: A great variety of factors influence a party's decision whether to arbitrate rather than litigate its disputes, including the ability to exercise some control over choosing the individuals deciding the dispute, the nature of the dispute, the amount in controversy, and the expectation that in arbitration a dispute would be resolved quicker and cheaper than in litigation – although this is not necessarily always the case. In talking to clients we find that among these factors, and in particular in the context of international complex disputes, parties place great value in having the ability to determine who the arbitrators would be and in picking a neutral forum. In terms of the key benefits to arbitration, I would highlight the time to decision; limited; flexibility; confidentiality; and specialised arbitrators. In highly technical or industry specific disputes, parties can provide for the arbitrators to have knowledge of the relevant subject matter or industry, thereby ensuring that the arbitrators adjudicating the dispute would have the background required to understand the issues at hand.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE US? HOW DO THEY COMPARE INTERNATIONALLY?

CARDOZO: For years, New York City has had world-class facilities to accommodate arbitration hearings. This is now true more than ever with the recently-opened New York International Arbitration Center (NYIAC). NYIAC has among the best facilities we have seen to host large arbitration hearings. Without question New York ranks similarly to the other most popular international arbitration venues in the world, such as London, Paris, Geneva and Singapore. As to processes, most arbitrations in NY are subject to the arbitration rules of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR), or JAMS, all of which provide a comprehensive set of rules that provide adequate processes for conducting arbitrations.

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Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES IN THE US? IF SO, WHEN WILL THESE BE BROUGHT INTO FORCE AND HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS?

CARDOZO: In the past few months both the AAA and CPR have issued amended arbitration rules. Highlights from the AAA's amendments to its Commercial Arbitration Rules, implemented in Fall 2013, include the availability of immediate injunctive relief, the availability of dispositive motion practice, greater arbitrator control over the discovery process, and a new appellate review procedure. These amendments apply to both domestic and international arbitrations conducted under these rules. Seemingly these developments respond to a perceived need for additional relief mechanisms during the pendency of an arbitration. As a practical matter, these amendments introduce into AAA arbitrations elements that may be more familiar to those who usually litigate in US courts. Through its July 2013 amendment, CPR will, for the first time, offer case administration for domestic arbitrations. This is, no doubt, an attempt by CPR to test the waters and consider offering case administration for international arbitrations as well. We look forward to seeing how the CPR staff translates its expertise to case administration.

Q HOW SUPPORTIVE ARE COURTS IN THE US IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

CARDOZO: Courts in New York – and in the main cities in the US – are very familiar with issues relating to the recognition and enforcement of awards and are very supportive not only of enforcement but also of compelling arbitration when appropriate. The Federal Arbitration Act (FAA), which applies to all arbitrations concerning interstate commerce, is strongly pro-arbitration and there is ample case-law reinforcing the pro-arbitration spirit of the FAA. Moreover, in addition to having developed a well-established body of case law favouring arbitration, courts in New York have been very efficient in turning around cases concerning the enforcement of awards. In the Southern District of New York, for example, we have seen awards recognised in as little as a couple of months. New York courts are seen by some as the most arbitration-friendly courts in the world.

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

CARDOZO: Locating an international arbitration in New York does not pose any practical issues that would be unique to New York, except perhaps occasional difficulty in getting a US visa for some nationalities – which can usually be arranged. New York has an abundance of service providers to assist with hearings, such as translators, interpreters, and shorthand reporters. In addition, New York has a large number of state-of-the-art hearing facilities which allow for almost all evidence to be available and displayed electronically.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

CARDOZO: In almost all situations concerning cross-border transactions, we advise clients to include international arbitration clauses. When a company is involved in cross-border deals, arbitration provides an efficient dispute resolution mechanism that allows the parties to choose a neutral venue, the rules that would be best suited for the arbitration, and to keep the proceedings confidential, among other advantages. Unfortunately, when cross-border deals are being negotiated, the dispute resolution clause is often overlooked, resulting in flawed arbitration clauses. Companies should be mindful to include arbitration clauses that, at a minimum, reflect an unambiguous agreement to arbitrate all disputes and identify the rules that would govern the arbitration, the venue for the arbitration, the law governing the arbitration, as well as the numbers of arbitrators. We therefore often offer clients workshops to educate the individuals responsible for drafting deal documents about the issues that should be taken into account when drafting dispute resolution provisions.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

CARDOZO: The choice of acceptable international arbitration venues is growing as countries across the world, particularly in Asia, the Middle East and Latin America, continue to establish facilities and rules to support international arbitration. However, for high-stakes, complex international arbitrations, I expect that the main arbitration venues will continue to be New York, London, and Paris.

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Camilo Cardozo, co-chairs DLA's International Arbitration group in the US. He has over 12 years of experience handling complex international disputes and is a recognised international arbitration practitioner. Mr Cardozo has experience handling cases under all of the major arbitral rules, in various venues around the globe, and under common law and civil law. Mr Cardozo also regularly handles all aspects of litigation in relation to arbitration, including obtaining emergency relief, enforcing or opposing awards, and obtaining evidence in aid of arbitration.

CANADA

MARKO VESELY
LAWSON LUNDELL LLP

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

VESELY: The factors that influence a party's choice of arbitration over litigation in Canada are likely similar to those in other jurisdictions. First, parties can choose an arbitrator with the specific expertise or industry experience needed to adjudicate the dispute effectively. Second, arbitration ensures confidentiality of the process and the outcome. For parties with an ongoing business relationship, such as a mining joint venture, confidentiality can be a key concern. Third, arbitration offers the promise of flexibility and speed, but whether it fully delivers on this promise in any particular case depends on the willingness of counsel and the arbitrator to think creatively about the procedure. Fourth, because the UNCITRAL Convention on the Recognition and Enforcement of Arbitral Awards – the New York Convention – has been ratified or acceded to by so many countries, parties in Canada take comfort from the fact that a Canadian arbitral award will be enforceable throughout the world. Finally, arbitration often offers greater finality than the decision of a trial court in Canada, because the scope for appellate review is more limited.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN CANADA? HOW DO THEY COMPARE INTERNATIONALLY?

VESELY: Canada has recently seen the creation and expansion of dedicated arbitration and mediation facilities in its major commercial centres, including Toronto and Vancouver. These facilities feature state-of-the-art hearing and breakout rooms, videoconferencing and other technological capabilities, business centre facilities, and other amenities. Parties have the choice of using resident arbitrators and mediators or others associated with the facility. The calibre of the arbitrators and the facilities offered in the major commercial centres of Canada would compare favourably internationally.

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

VESELY: All of Canada's provinces and territories have enacted legislation based on the Model Law on International Commercial Arbitration. Since 1986, efforts have been made at the federal and provincial levels to bolster Canada's reputation as 'arbitration friendly'. In November 2013, the Canadian government ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which enables Canadian investors abroad and foreign investors in Canada to take disputes with their host countries to the International Centre for Settlement of Investment Disputes (ICSID). Legislation implementing ICSID is already in place in several of the provinces and territories within Canada.

Q HOW SUPPORTIVE ARE COURTS IN CANADA IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

VESELY: Courts in Canada have demonstrated strong support for the autonomy of parties to choose to have their disputes resolved through arbitration. Courts across Canada will readily issue a stay of court proceedings where doing so would give effect to the parties' selection of arbitration as a means of resolving their disputes. Furthermore, courts have exercised restraint when presented with opportunities to review domestic and international commercial arbitration awards, based on domestic legislation in Canada's provinces and territories implementing 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 CANADA?

VESELY: Clarity, consistency and comprehensiveness in arbitration clauses will increase predictability when it comes time to resolve a dispute. A 'boilerplate' arbitration clause should be avoided in favour of one that is tailored to address the particular disputes that are likely to arise and the circumstances under which they are likely to arise. Second, it is difficult to consolidate arbitration proceedings that potentially involve different parties but the same subject matter. Where possible, anticipate these challenges when creating contractual relationships so that the choice of arbitration always reflects the preferred mechanism of dispute resolution. Finally, research the available arbiters and seek out those who have the specific expertise required.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

VESELY: Arbitration can be a powerful mechanism for dispute resolution. It is particularly suited to commercial ventures where jurisdictional issues could be vexed, where disputes are likely to require specific expertise to resolve, where confidentiality is key, or where disputes might arise in the course of an ongoing business relationship. The court system in Canada has a well-deserved reputation for integrity and excellence, and it remains a suitable forum for resolving disputes in many cases. But for many commercial ventures, the advantages of private arbitration will be attractive.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

VESELY: As noted above, Canada and its provinces and territories have made concerted efforts since 1986 to be leaders in domestic and international arbitrations, and this trend is likely to continue. The trend is visible not only in legislative and judicial developments, but also in the efforts that are being made by those involved in the industry – including arbitrators, lawyers and those providing facilities and other support for the process – to increase Canada's profile as a seat of arbitration. Canada also boasts considerable arbitral expertise in specific industries such as mining and oil and gas.

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Marko Vesely practices civil and commercial litigation with a focus on commercial arbitrations, class actions, defamation, and intellectual property disputes. He has appeared as lead counsel at all levels of court in British Columbia and the Supreme Court of Canada and is a regular commentator on legal affairs in Canadian media. He was recognised by Lexpert magazine in 2010 as one of Canada's leading lawyers under 40, in 2011 as a lawyer to watch for cross-border litigation, and in 2013 by Best Lawyers in Canada for defamation and media law.

BRAZIL

ANA TEREZA BASILIO
BASILIO ADVOGADOS

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

BASILIO: In my opinion, there are several reasons why parties are choosing arbitration over the state court. The two main reasons, in Brazil, of course are time and confidentiality. A case at the state court here can easily take over a decade, while arbitration takes around a year. Confidentiality is another major reason, because the process at the state court is usually public, what may bring serious problems to companies, especially when we are talking about sensitive cases, with commercial secrets. Besides that, arbitration offers the opportunity for a more specialised judgment, and the option to choose as an arbitrator someone with expertise in the subject. Finally, flexibility is also a key benefit of the arbitration process, which gives parties the power to decide with the arbitrator a process that fits their problem better.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN BRAZIL? HOW DO THEY COMPARE INTERNATIONALLY?

BASILIO: Although the Brazilian Arbitration Act is only about 18 years old, in this time Brazilian arbitration experience has grown very quickly and we can put our country beside other countries such as the EU, England and France. For instance, currently, Brazil is the leading country in Latin America in terms of the number of arbitrations at the ICC, being three times ahead of second placed Mexico. In addition, Brazil is considered a reference country for arbitration in Latin America, with some of the most recognised institutions in comparison with other state members of Mercosur. We have a strong and friendly arbitration culture here. Brazil also ratified the New York Convention in 2002. We can say now that arbitration here is a reality, it is consolidated.

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

BASILIO: The Brazilian Arbitration Act might be reformed in the next few years. Right now, there is an Arbitration Modernization Act in debate at Congress. However, so far only a small change is expected, to adjust the rules to the jurisprudence created over two decades and to increase arbitration involving states and state entities. The idea is to only lightly adjust and modernise some aspects of the Act, preserving the most part of the Brazilian Arbitration Act, which is a very good law, inspired by the UNCITRAL Model Law. I believe, therefore, that arbitration in Brazil will remain strong.

Q HOW SUPPORTIVE ARE COURTS IN BRAZIL IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

BASILIO: The judiciary here is definitely arbitration friendly. The number of arbitral awards annulled by the state courts is really low. Our highest court for federal issues – the Brazilian Superior Court of Justice – is known as an 'arbitration friendly' Court, as recently recognised by Professor Albert Jan Van Den Berg, when he was giving a lecture in Brazil. For example, in 2013, almost all international arbitrations awards were fully recognised by the Brazilian Superior Court of Justice, only one case was partially recognised. This illustrates just how arbitration friendly Brazil is.

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

BASILIO: The major problem with complex international, multi-jurisdictional arbitrations is related to cultural differences. It is not rare that complex international arbitrations involve parties from different legal systems, such as common law and civil law, and this might cause conflicts. For instance, Brazil is a civil law system and sometimes in an international arbitration the other party comes from a common law system, generating conflict about the arbitration process. Discovery, for example, is not used in a civil law system, although is regularly used in common law. In that scenario, the attorneys must have skills to find a common ground between both systems and cultures, and to define an arbitration process that fits and is fair for both parties.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

BASILIO: Companies should certainly include arbitration provisions. In our office, we usually advise our clients to include arbitration clauses in their contracts, especially with infrastructure investments that Brazil has received because of the 2014 FIFA World Cup 2014 and the 2016 Olympic Games. The key consideration is the value involved. As the arbitration process may demand some relevant payments, especially in the beginning, the client must be very well informed about options and costs, to make a conscious decision. For some small claims, arbitration may not be recommended. Sometimes, the clients are not well informed and when conflict arises, they cannot afford the arbitration process, and that is a problem.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

BASILIO: Yes, I strongly believe there will be more choice in the future. I think Brazil, for instance, will be increasingly considered as a viable seat of arbitration. It is a country with solid institutions, a very good Arbitration Act and an arbitration friendly judiciary, especially in San Paolo and Rio de Janeiro. Other countries are also doing a good work in Latin America, such as Chile, especially in Santiago. That is why I believe that viable arbitration venues will increase beyond New York, London and Paris, or Stockholm and Hong Kong.

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Ana Tereza Basilio is partner and founder of Basilio Advogados, specialising in civil and commercial litigation and arbitration. From 2004 to 2006, Ms Basilio was the president of the mediation and arbitration chamber of the Brazilian Bar Association, Rio de Janeiro, where she also acted as both president of the lawyer's association committee and vice president of the arbitration committee. In addition she was elected as chief councillor of the Brazilian Bar Association for two separate three-year periods. She is also a member of the Escola da Magistratura corporate law committee, and the Rio de Janeiro state High Court.

MEXICO

MARCO TULIO VENEGAS
VON WOBESER Y SIERRA, S.C.

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

VENEGAS: Over the past few decades, arbitration has been increasingly used in Mexico to settle large commercial disputes. Factors driving parties to submit their dispute to arbitration rather than litigation include the heavy case load of Mexican courts. Furthermore, national courts have proven to take a narrower approach to the interpretation of Mexican law and judicial processes are still formally exaggerated compared to arbitration. Also, Mexican courts and the judiciary in general still have a very domestic approach to cross-border litigation. Accordingly, the key benefits of the arbitration process are are numerous. For instance, Mexico has modern arbitration legislation; it has incorporated into the Commerce Code the UNCITRAL Model Law, and it is a party to the New York Convention and the Inter-American Convention on International Commercial Arbitration.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN MEXICO? HOW DO THEY COMPARE INTERNATIONALLY?

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 into the Commerce Code the UNCITRAL Model Law and it is a party to the New York Convention and 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.

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

VENEGAS: Recently, there have been two reforms to the provisions regulating the Mexican arbitration act, which is contained 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 the 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.

Q HOW SUPPORTIVE ARE COURTS IN MEXICO IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

VENEGAS: Mexican law has a tendency to support arbitration, both during the course of the proceedings and in the enforcement phase. Since Mexico is a party to both the New York Convention, ratified in 1971, and the Inter-American Convention on International Commercial Arbitration, ratified in 1977, 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 the 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 – the party requesting the enforcement is only required to file the original award duly authenticated, as well as the original arbitration agreement, with a Spanish translation made by a certified translation expert, as the case may be.

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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 three major 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, in practice 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, Mexican courts are unwilling 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 DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

VENEGAS: Contracts involving significant commercial transactions and operations should generally include arbitration provisions. In this regard, it is important to consider that, even though the Commerce Code states that an agreement to arbitrate shall be valid if executed by any type of telecommunication means that properly records such agreement, and, 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 is also key for the successful conduct of a future arbitration, determining only crucial elements in advance, such as the applicable law and the seat of the arbitration, and avoiding overregulation of the proceedings.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

VENEGAS: While it is true that jurisdictions are improving their profile to serve as arbitration seats, the profile of a viable arbitration venue relies on many factors that develop over the years. Accordingly, preferred places for hosting international arbitration proceedings are those that offer a solid legal framework, with a special protection of party autonomy, a flexible procedural approach, supportive state courts, and arbitration friendly legislation. Along with the proper execution of investment treaties and international conventions, these factors have been proven to provide sufficient legal certainty for the parties to select the arbitration venue. Thus, while an upturn of viable arbitration venues is expected, investors and parties in general are becoming increasingly aware of the specific characteristics that a venue should provide to host their particular proceedings. Therefore, expectations regarding the characteristics of the arbitration venue have become more specialised.

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Marco Tulio Venegas leads the litigation and arbitration practice of Von Wobeser y Sierra, S.C. and is in charge of International Commercial Arbitration and Investment Arbitration cases, as well as Administrative and Intellectual Property Litigation, Civil and Commercial Litigation, and Constitutional Litigation. Mr Venegas' experience includes participating in the largest commercial arbitration in Mexican history as representative of the party which prevailed in the case. In addition, Mr Venegas has participated as counsel in five arbitrations related to construction disputes involving private parties and governmental entities. Mr Venegas is member of the Mexican Bar Association and the Young Arbitrators Forum of the Mexican Chapter of the ICC.

COLOMBIA

FELIPE PIQUERO
ESGUERRA BARRERA ARRIAGA

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

PIQUERO: The use of arbitration in commercial contractual disputes has always been very common, mainly due to the efforts of the Chambers of Commerce in drafting and recommending the use of arbitral provisions. In public contract disputes, the use of arbitration has also become relatively common over the past 20 years. This trend started when legislative amendments showed a clear preference for arbitration. Three main reasons have led to a relatively extensive use of arbitration in contract disputes. First, is the duration of the process. Recent legislative amendments have shortened the time required for regular commercial and administrative judicial proceedings – statistics have showed more than 13 years as an average for regular judicial proceedings in Colombia. Arbitration usually takes less time than regular judicial proceedings, because of the relatively slow pace of the evidence gathering activities carried out by the judges and the time needed for higher courts to issue appellate rulings. The second factor is the time devoted to evidence gathering and analysis of the case. In many cases the judge who conducts the evidence gathering activities in regular judicial proceedings is not the same who resolves the dispute. Moreover, there are many cases in which the judge does not participate at all in the evidence gathering activities. Finally, on some occasions judicial decisions show a relatively low degree of specific factual analysis, and appear to be a prefabricated set of legal arguments not precisely linked to the case in question. In contrast, arbitrators usually devote a lot of time to evidence gathering activities. The third factor is the reliability of the decisions. Arbitration has been shown to be highly reliable. On the contrary, many judicial decisions made by commercial – civil – and administrative judges are seemingly erratic and do not necessarily follow precedents established by higher courts. This situation has been aggravated due to the abuse of a constitutional remedy called *acción de tutela*, which has allowed lower rank, non-specialised judges to overturn judicial decisions made even by the Supreme Court of Justice or the *Consejo de Estado*, the highest administrative court, after years of thorough litigation.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN COLOMBIA? HOW DO THEY COMPARE INTERNATIONALLY?

PIQUERO: There are several arbitration facilities in Colombia, most of them administered by Chambers of Commerce or professional associations. The majority of those facilities have their own lists of arbitrators and procedural rules, and offer state-of-the-art services for witness depositions, videoconferences and anything else arbitral proceedings may require. Colombia has a relatively good reputation as a forum for arbitration. The legislation has always been arbitration friendly, and both its arbitration centres and arbitrators are in the position of fulfilling their obligations with the highest quality standards.

Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES IN COLOMBIA? IF SO, WHEN WILL THESE BE BROUGHT INTO FORCE AND HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS?

PIQUERO: We have a relatively new arbitration statute – Law 1563, 2012 – which comprehensively governs national arbitration, and contains specific rules for international arbitration. This statute did not make profound changes to the previous legislation. Instead, the statute fixed several difficulties which parties and arbitrators had been highlighting when applying the previous legislation. In terms of the changes introduced by the new statute, I can highlight the broader freedom of the parties to define some procedural aspects of the arbitration – save for arbitrations in which one of the parties is a public entity – and the regulation of international arbitration which basically follows the UNCITRAL Model Law on International Commercial Arbitration. Colombian law offers a very clear and friendly framework for arbitration.

Q HOW SUPPORTIVE ARE COURTS IN COLOMBIA IN UPHOLDING AND

PIQUERO: Arbitral awards in Colombia are subject to annulment only for procedural grounds established by law. The courts which issue annulment orders cannot enter into a factual or evidentiary analysis of the case. They are also subject to extraordinary review, available as a remedy only when

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ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

relevant facts are discovered after the award has been adopted, and which were somehow concealed by one of the parties, witnesses or judicial officials who participated in the litigation. Statistics show that both annulment and review only rarely lead to an arbitral award being overturned. Arbitral awards adopted in international arbitrations are only subject to possible annulment, and, when the parties are not Colombian residents, they may agree that this remedy will not be available. The judiciary plays a key role in the fields of provisional measures ordered by arbitral tribunals, evidence gathering activities and enforceability of the arbitral awards. The most serious threat for arbitration in our jurisdiction is, in my view, the ability any judge has to fully review and overturn an arbitral award by arguing it violates fundamental constitutional rights via the above mentioned constitutional remedy called *acción de tutela*. Even though this very awkward situation is relatively exceptional, the Constitutional Court has already upheld such a practice (SU 174/2007).

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

PIQUERO: In complex, long-term, public contracts, repeated disputes have been relatively common over the years. It is not very efficient to appoint different arbitrators when resolving several related disputes. In such cases, it could be beneficial to appoint the same arbitrators for the whole duration of the contract. Furthermore, consideration should be made of possibly including rules which simplify bringing the parties to the litigation and establishing the governing law. These are key factors for making these arbitrations move swiftly.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

PIQUERO: As stated, there are several reasons to use arbitration as the most appropriate way to solve contractual disputes, especially in complex, long term contracts – particularly public contracts. Arbitration offers a much more efficient and reliable forum than the regular commercial – civil – and administrative courts.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

PIQUERO: Colombia has never been a popular seat of international arbitration. Still, the state-of-the-art arbitral legislation, the quality of arbitrators and the respect of the judiciary for arbitral awards demonstrate that Colombia is an excellent choice for international arbitration. Furthermore, Colombia is a signatory of the New York Arbitration Convention.

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Since 1988, Mr Piquero has dedicated his professional practice to consulting and litigation – including arbitration – mainly in matters related to public contracts, state, domestic and international responsibility, as well as human rights law. For many years, Mr Piquero was a professor for Administrative Procedure and Public Contracts at the law school of *Universidad Javeriana*, and professor for International State Responsibility at *Universidad de los Andes*. He was also the editor of the Public Law Magazine at *Universidad de los Andes* and the director for the Administrative Law post-graduate Program at Pontificia *Universidad Javeriana*.

ENGLAND & WALES

ZACHARY SEGAL
DENTONS

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

SEGAL: Although the choice of arbitration versus litigation should always be made on a case by case basis, arguably the single biggest advantage of arbitration is the enforceability of arbitral awards. An arbitral award given in England should, in theory, be enforced without too much difficulty in the courts of the 149 signatories to the New York Convention 1958. By comparison, enforcement of an English court judgment can be problematic outside of the EU. Other benefits of the arbitration process in England include an implied duty of confidentiality, a say in the make-up of the arbitral tribunal and a degree of procedural flexibility. The finality of arbitral awards is often cited as an advantage of arbitration; whether a particular party sees finality as an advantage will depend, to some extent at least, on the role played by that party in the arbitration, for example as claimant or respondent.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN ENGLAND & WALES? HOW DO THEY COMPARE INTERNATIONALLY?

SEGAL: As befits a long established and popular choice of seat, London has excellent facilities for arbitral hearings. The LCIA's offices in London are in the same building as the International Dispute Resolution Centre (IDRC), which provides a comfortable and convenient venue for hearings. The IDRC is within walking distance of most international law firms and barristers' chambers – where many arbitrators maintain a presence. All of the support functions that one would expect to find are readily available, including transcription services and interpreters. London's facilities are, perhaps, less modern and luxurious than seen in some other arbitration centres around the world.

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Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES IN ENGLAND & WALES? IF SO, WHEN WILL THESE BE BROUGHT INTO FORCE AND HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS?

SEGAL: There have been no recent amendments to the Arbitration Act 1996, which regulates arbitral proceedings in England and Wales. There were few, if any, truly significant developments in English arbitration law in the course of 2013. Parties submitting to arbitration in England are not bound to resolve their disputes by a particular set of arbitration rules. In common with many other arbitration centres, London seated arbitrations are often conducted in accordance with the LCIA or ICC Rules. The current version of the LCIA Rules has been in force since 1998. A revised version of those rules is anticipated, although it is not known when those revised rules will be published, or what changes will be made. The current version of the ICC Rules was adopted in January 2012, and recent changes include an emergency arbitrator provision and wider powers for the consolidation of related disputes.

Q HOW SUPPORTIVE ARE COURTS IN ENGLAND & WALES IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

SEGAL: Parties to an English seated arbitration can only challenge an award on three narrow grounds, one of which – error of law – is routinely excluded by the adoption of the LCIA or ICC Rules. The English courts will rarely set aside an award on the other grounds. The Arbitration Act 1996 adopts the provisions of the New York Convention in connection to the enforcement of arbitral awards. It is unusual to see the English courts refuse to enforce an award on public policy grounds. The English judiciary is, on any view, 'arbitration friendly'. The English courts will rarely, if ever, interfere if the parties have made a clear submission to arbitration. In addition, the English courts have a variety of powers at their disposal in support of arbitration, including the granting of injunctive relief, ordering the preservation of evidence and compelling witnesses.

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

SEGAL: Parties will need to give careful consideration to document production. The adoption of the IBA Rules on the Taking of Evidence in International Arbitration is one way in which the parties can find common ground in relation to disclosure. While English arbitrators may have historically expected parties to disclose those documents on which they do not intend to rely, practitioners are now increasingly cognisant of the approach to document production typically seen in civil law jurisdictions. England still maintains a distinction between solicitors affiliated to law firms and barristers, namely self employed advocates organised in 'chambers'. It is wise to avoid having barristers from the same chambers appearing as an arbitrator and counsel for one of the parties in the same matter; enforcement of an award given in these circumstances may be problematic in other jurisdictions.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

SEGAL: Companies should be aware of the various dispute resolution mechanisms that exist. There is no 'one size fits all' solution, and parties should always take advice on the relevant clause. As a matter of general principle, arbitration will often be the most appropriate mechanism where the assets against which any award will be enforced are outside of the EU. That said, in contracts where any claim is likely to take the form of a simple debt recovery action, litigation may be a more appropriate mechanism, especially if one wishes to take advantage of the summary judgment process available under the English court rules. In cases of technical or valuation disputes, the parties may agree to expert determination, whereby a third party is nominated to apply his or her own expertise to a particular dispute. Giving early and detailed consideration to the dispute resolution clauses in a contract can result in real savings for all parties concerned.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

SEGAL: It is certainly true to say that previously unfamiliar arbitration centres have invested significant amounts of time and money in the last few years attempting to raise their profile as a seat of arbitration, and we are now seeing ultra modern facilities opening in direct competition to the long established arbitration centres. There is nothing to suggest that will stop. However, there is much to be said for London retaining its position as a pre-eminent centre for arbitration. Parties should consider England's arbitration friendly legislation and judiciary as well as the deep pool of potential arbitrators and expert witnesses, with expertise in numerous industry sectors. Given the popularity of English law as the governing law of so many contracts, and the usual convergence of substantive and procedural laws in arbitration clauses, one anticipates that London will continue to be a pre-eminent arbitration centre, although practitioners in London certainly cannot afford to be complacent.

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Zachary Segal is Counsel in Dentons' London office, specialising in international commercial arbitration and litigation before national courts in support of arbitration. Mr Segal has been involved in numerous ad hoc and institutional international arbitrations, subject to a variety of governing substantive and procedural laws. The focus of his work is dispute resolution in emerging markets, including (but not limited to) disputes arising in the CIS and CEE regions, in sectors such as real estate development, finance, commodities and life sciences.

SWITZERLAND

DIETER HOFMANN
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Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

HOFMANN: Key factors influencing the parties' choice of arbitration over litigation include the lack of trust in the counter party's home jurisdiction and, hence, avoiding having to litigate a dispute in that jurisdiction; confidentiality of the arbitral proceedings; the chance to take part in the appointment of the tribunal and, hence, the opportunity to ensure that arbitrators have the background, expertise and experience necessary to deal with the dispute at hand; speedier proceedings; and the opportunity to choose the language of the proceedings. In essence, when opting for arbitration, the parties benefit from greater influence on the proceedings, that is, they can shape the proceedings to fit the needs of the very dispute and normally also profit of more confidentiality. Moreover, the New York Convention applies on an almost global level to the enforcement of arbitral awards. Generally speaking, it is, therefore, still easier to enforce an arbitral award in another jurisdiction than state court judgments.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN SWITZERLAND? HOW DO THEY COMPARE INTERNATIONALLY?

HOFMANN: Arbitration facilities and processes are at the highest level in Switzerland. This is because arbitration enjoys a long-lasting tradition of hosting foreign and domestic arbitrations. Moreover, arbitration is recognised as a preferred way for dispute resolution in Swiss legal culture. The Swiss legal community, therefore, strives to set up an effective environment to conduct arbitrations. This has led to enacting a flexible *lex arbitri* for international arbitrations and to the Swiss Rules of International Arbitration – a set of institutional arbitration rules issued by the Swiss Chambers' Arbitration Institution. Despite their name, the Swiss Rules operate on a global level – the parties are not required to appoint Swiss nationals as arbitrators or to choose Swiss law to govern their dispute.

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

HOFMANN: The Swiss Rules have recently been amended in some aspects. For example, they now provide for emergency arbitrations in urgent matters. The Swiss *lex arbitri* for domestic arbitrations has been modified, effective as of 1 January 2013. However, it only applies to purely domestic arbitrations, that is, to arbitrations to which all parties are Swiss domiciled. The new rules, therefore, do not affect international arbitrations seated in Switzerland. The same holds true in substance, even for domestic arbitrations. The new rules mainly reflect traditional Swiss practice and the amendments are limited to modernising certain rules and to eliminating a few rules which were criticised by arbitration practitioners and scholars. The new rules, therefore, will only alter the conduct of domestic arbitrations to a very limited degree.

Q HOW SUPPORTIVE ARE COURTS IN SWITZERLAND IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

HOFMANN: The Swiss judiciary is arbitration friendly. Actually, it seems fair to say that Switzerland embraces international arbitration. First, Swiss state courts do not have unfettered powers of review of arbitral awards. They may only annul an award if one of the narrow statutory grounds is met. Set-aside actions, therefore, are hardly ever successful – the ratio of success is approximately 5 percent. Second, Swiss state courts will refer the parties to arbitration and assist the claimant in appointing the arbitral tribunal – this is if there is *prima facie* evidence of the existence of an arbitration agreement. If the seat of the arbitration is in Switzerland, the claimant need not demonstrate the jurisdiction of the arbitral tribunal in detail in order to get the arbitration started. Third, Switzerland is a signatory to the New York Convention and enforces foreign arbitral awards in line with this convention. Swiss enforcement courts, in particular, refrain from favouring domestic parties.

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

HOFMANN: Switzerland is a country where complex international, multi-jurisdictional arbitrations are conducted on a regular basis. There are no peculiar practical issues that one needs to be concerned with.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

HOFMANN: It is important to make sure that the contract provides for a clear-cut dispute resolution mechanism and that this mechanism is the result of an informed choice. In some cases, the best option may be state court litigation. However, in many others it will be arbitration. If so, the parties are well advised to opt for the rules of a specific arbitral institution – in Switzerland, the ICC Rules of Arbitration or the Swiss Rules are most commonly used – and to include this in their agreements from the very outset. The easiest and safest thing to do is to simply use the standard model clause of an arbitral institution. In practice, we often see clauses that differ from the standard text and are overly detailed. This may delay the first phase of the arbitration or, exceptionally, even render the clause invalid. In essence, ambiguity should be avoided as it may be abused in order to sabotage or delay the arbitration. By and large, dispute resolution mechanisms should be kept as simple and straight as possible.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

HOFMANN: It is a fact that the choice of viable arbitration venues has increased in the last 10 or 20 years. However, one should bear in mind that the quality of an arbitration proceeding will depend on a number of factors, for example a good pool of well qualified arbitrators as well as counsel representing the parties, arbitration friendly courts, and so on. In this regard, it is fair to say that Switzerland is still a great place for international arbitration and ticks all the boxes to remain a preferred venue. In addition, Swiss law offers various advantages over certain other laws; it is easily accessible and published in various languages.

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Dieter Hofmann heads the litigation & arbitration team of Walder Wyss Ltd. His focus is dispute resolution in complex international cases, in particular in disputes arising from shareholders' agreements, joint-ventures, M&A, international contracts, engineering and construction projects, banking, finance and (re-) insurance, directors' liability and insolvency. Mr Hofmann is, *inter alia*, chair of the Zurich Bar's litigation practice group, has presented papers at major conferences, and published on litigation and arbitration.

LUXEMBOURG

FABIO TREVISAN
BONN STEICHEN & PARTNERS

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

TREVISAN: The choice of arbitration over litigation is usually influenced by the elements of the potential dispute including the nature of the contract; any technical implications; the stakes of the dispute; the place where the contract is being performed; the fact that time may potentially be a major factor; the fact that absolute confidentiality may be required; and the costs the plaintiff is ready to bear in relation to the stakes. The main key benefits of the arbitration process for those involved, compared to litigation, are the duration of the arbitration process – typically an award is rendered by an arbitral panel within a considerably shorter time frame compared to state courts litigation; it is usually not possible to appeal an arbitral award, at least on the merits of the dispute; the confidentiality of the arbitration process; the choice of the arbitrators by the parties; that arbitrators can be experts in the particular field of the dispute; and the possibility of hearing and cross examining witnesses, which is stricter in litigation on commercial matters.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN LUXEMBOURG? HOW DO THEY COMPARE INTERNATIONALLY?

TREVISAN: In Luxembourg, guidelines and rules are provided by the Chamber of Commerce of Luxembourg (*Chambre de Commerce*). Nevertheless the UNCITRAL commission or the International Chamber of Commerce, as well as CEPANI, are often cited in agreements drafted under Luxembourg law. In addition, Luxembourg has further provided a favourable legal framework to arbitration in its capacity as 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

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matters, 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. As Luxembourg has mainly based its legal framework on the New York Convention and the Geneva Protocol, the arbitration processes and rules are very similar to the ones of the other member states who are members of the NY convention, therefore apply generally a *favor arbitrandi* rule. As for arbitration facilities, the *Chambre de Commerce* usually provides them, even for arbitrations that do not refer to the rules it provides.

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

TREVISAN: There have been no recent changes to 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. Nevertheless case law can give interesting guidance as to how courts interpret and apply the rules of the New Code of Civil Procedure together with the New York Convention. An example showed by recent case law is that an annulled arbitral award, which does not yet have the exequatur, could not be used as valid grounds to obtain a freezing order on assets held in Luxembourg.

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Q HOW SUPPORTIVE ARE COURTS IN LUXEMBOURG IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

TREVISAN: Luxembourg's judiciary system is clearly 'arbitration friendly'. Indeed, the costs for enforcing arbitral awards are limited to general costs for court proceedings, which are extremely low. As for the enforcement procedure, an award is enforced by an order of the president of the district court 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 compliant with applicable rules and with national public policy prior to granting an enforcement order. Refusal of enforcement is extremely rare and indeed exceptional. In any case, the order of the 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 with the Court of Appeals. Such 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. We are currently involved in several multi-jurisdictional disputes. The biggest issue is to coordinate the communication process between the lawyers of the different jurisdictions concerned. Indeed, it is important for all involved parties to understand clearly the implications in the various jurisdictions involved. Also, one should consider the costs of translating the award into French, as awards are usually quite lengthy and often use technical terms.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES

TREVISAN: The aforementioned factors should be taken into consideration to determine if a contract can benefit from an arbitration clause. Depending on the elements of the stakes linked to a potential dispute, parties may envisage submitting disputes to a mediator through a contractual mechanism. If such mediation fails, or if one does not wish to proceed with this intermediary solution, the party dissatisfied with

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AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

the situation can submit the dispute either to the state jurisdiction or to an arbitral tribunal. However, in material transactions or in complex situations, we generally recommend arbitration, as a quick outcome is usually sought by the parties.

Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

TREVISAN: In the context of the crisis, many contracting parties wish to avail themselves of the confidentiality and speed offered by arbitration. It seems therefore highly likely that arbitration will be more frequently used and, therefore, in turn it seems likely that the choice of viable arbitration venues will increase. Nevertheless, the contracting parties may continue to use the known arbitration venues despite the new offers, for increased certainty in the way the process is handled.

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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 and benefits, and insolvency and restructuring. Mr Trevisan has been involved in numerous shareholders' disputes, as well as high stakes arbitration proceedings.

PORTUGAL

JOSÉ CARLOS SOARES MACHADO
SRS LEGAL

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

MACHADO: In Portugal, parties usually choose arbitration because it is faster than judicial proceedings. Current judicial procedures can last several years, whereas through arbitration a decision is issued within nine to 12 months. Besides its swiftness, parties value the confidentiality of the arbitration procedure, a rule of law since 2012. Also, the ability to choose arbitrators, especially in very specific fields of business or law, is a factor that influences parties in their choice of arbitration. In international matters, especially with countries outside of the EU, the choice of arbitration is related to the fact that arbitral awards are easier to enforce in foreign jurisdiction around the world. Another factor to consider is the applicable law. If it is not Portuguese law, it is advisable that the dispute is solved through arbitration, where parties can appoint foreign experts in the applicable law.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN PORTUGAL? HOW DO THEY COMPARE INTERNATIONALLY?

MACHADO: The most well known Portuguese arbitration institution is the *Centro de Arbitragem Comercial* – the Commercial Arbitration Centre – managed by the Lisbon Commercial Association. Its headquarters is located in the center of Lisbon and it provides for well equipped hearing and conferences rooms. The Centre provides full services in arbitration, administrating the entire arbitration proceedings, including notifications and assistance of preliminary and arbitration hearings. The Centre also adopted a new set of rules that will enter into force in March 2014, updating the arbitration rules in accordance with most modern international standards. In particular, the introduction of the possibility of an emergency arbitrator should be highlighted. We can confidently argue that our arbitration facilities and processes compare very well internationally.

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Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES IN PORTUGAL? IF SO, WHEN WILL THESE BE BROUGHT INTO FORCE AND HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS?

MACHADO: Portugal adopted a new arbitration law in 2011 that entered in force in March 2012. This new Law followed the UNCITRAL Model Law in its 2006 version. Taking this into account it is not likely that a new one will be approved in the next few years. It is now time to start evaluating the new law – the first jurisprudence is being rendered, the first arbitrations to which the new law was applied are ending, there is already considerable doctrine about the new law, the first critics are being addressed to some solutions of the law. Notwithstanding this much-needed assessment, the common word between practitioners and scholars is that the new arbitration law is a great improvement on arbitration legal framework and it has been an important tool towards the development of arbitration in Portugal.

Q HOW SUPPORTIVE ARE COURTS IN PORTUGAL IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

MACHADO: We can assert that the Portuguese courts are undoubtedly friendly to arbitration. According to the law, an arbitration award can only be set aside if it breaches due process principles or public policy issues and these concepts have been very well applied by national courts. So, it is uncommon that an arbitration award is set aside – usually the arbitrations awards are enforced as they were rendered by the arbitral tribunal. Also, in other issues that need the judicial courts' assistance, as provisional measures or appointment of arbitrator in *ad hoc* arbitrations – when a party misses to appoint – the judicial courts carry out their competence with full respect for the arbitral tribunal's autonomy and authority.

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

MACHADO: There is no particular difference between practical issues in arbitrations in Portugal or other developed countries. It is of course important to have a local counsel that can understand the national arbitration law, Portuguese jurisprudence and the civil proceedings in national courts. As this is a very specific area of practice it would be advisable to look for a known law firm with specific knowledge in international arbitration. Another important issue to consider is the language of arbitration – if it is not Portuguese the party should search for lawyers with the appropiate language skills.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

MACHADO: We do believe companies should include arbitration provisions in their contract clauses more regularly. Arbitration is an alternative dispute resolution method that assures parties a speedy and fair decision. The issuing of the arbitration award is fast in arbitration because the process is flexible and avoids procedural bureaucracy that does not address a specific point of the dispute. Only the matter at hand is dealt with, making the procedure slim and adequate to the parties and to the dispute. On the other hand, arbitration is a fair procedure because the independence and impartiality of the arbitrators is assured by law; because parties can choose experts to decide their dispute; and because the expertise of the arbitrators can be in the business or in the applicable law. It is a process made for the parties, where their case and their voice are the main factors to be considered and addressed.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

MACHADO: We believe that the growth of arbitration necessarily requires the awakening of more and more countries its business possibilities. Another important factor to consider is the language – naturally the most widely spoken languages of the world have a growing need for arbitration seats where that language is the mother language. That was what happened in Portugal, for instance. The enormous economic growth of Portuguese speaking countries, in particular Brazil and Angola, made Portugal a preferential place to handle international arbitrations in Portuguese.

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José Carlos Soares Machado is head of the Litigation and Arbitration Department at SRS. He has more than 35 years of experience in civil and commercial advocacy, and is specialised in dispute resolution and corporate arbitration. Currently, Mr Machado is the president of the Portuguese Circle of Litigation Lawyers, a private association whose members are the heads of dispute resolution departments of all the major Portuguese law firms. He is also a visiting professor at the Faculty of Law of the New University of Lisbon (*Universidade Nova de Lisboa*), as well as an author of several published works on constitutional law, corporate law and real estate law.

SWEDEN

KRISTER AZELIUS
ADVOKATFIRMAN VINGE KB

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

AZELIUS: In my opinion, one of the key benefits of arbitration is the chance to influence who will settle the dispute and the ability to customise what expert knowledge you need in a tribunal. Although Swedish courts have generally shortened their handling time over the last decade, arbitral proceedings are still normally quicker than court proceedings. Swedish parties are less likely to use extensive discovery than common law parties due to the fact that the Swedish Code of Judicial Procedure provides very limited possibility to obtain disclosure of specific documents. However, these rules are not applicable in arbitration, unless otherwise expressly agreed. Swedish arbitral proceedings tend to be efficient. This fact, together with the very limited possibilities to challenge an award, often leads to lower legal costs for both parties.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN SWEDEN? HOW DO THEY COMPARE INTERNATIONALLY?

AZELIUS: The largest national institute for arbitral proceedings in Sweden is the Stockholm Chamber of Commerce (SCC). The Arbitration Institute of the SCC provides rules for arbitration and expedited arbitration as well as mediation. The Institute is not involved in controlling the award, which results in a more expeditious process. *Ad hoc* arbitral proceedings are based on the Swedish Arbitration Act. The Act is quite brief and leaves extensive scope for the exercise of party autonomy. Sweden is generally considered to be a 'neutral' choice in many east-west disputes. Approximately 50 percent of SCC cases involve at least one international party. In most cases, the facilities for arbitral proceedings are provided by the tribunal or by the parties. However, there are specific venues specialising in providing this service.

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Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES IN SWEDEN? IF SO, WHEN WILL THESE BE BROUGHT INTO FORCE AND HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS?

AZELIUS: In 2010, the SCC introduced a new set of rules for emergency arbitrators. The emergency arbitrator has the authority to order interim measures before a case is referred to an arbitral tribunal or a sole arbitrator by the secretariat. The procedure is very quick – as a main rule, the emergency arbitrator must be appointed within 24 hours and the arbitrator's decision has to be rendered no later than five days after the application was referred to the arbitrator. However, the Arbitration Act has remained unchanged since it entered into force in 1999 and there are no proposed changes thereto at this juncture.

Q HOW SUPPORTIVE ARE COURTS IN SWEDEN IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

AZELIUS: The Swedish judicial system is very arbitration friendly and Sweden has acceded to the New York Convention, with no restrictions. An award is enforceable and may only be challenged on formal grounds by a party on application to the Court of Appeal. In the last decade, only around one tenth of the challenged awards have been set aside, usually on the basis of obvious procedural irregularities. Further, the court will dismiss an action if the defendant validly objects to the court's competence by invoking an arbitration clause. In *ad hoc* proceedings, a party can apply to the court to appoint an arbitrator, for instance where the other party is obstructing the proceedings by failing to appoint an arbitrator. The Arbitration Act also includes exclusionary provisions in the event an arbitrator is obstructing the proceedings.

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

AZELIUS: I believe that the practical issues in complex arbitral proceedings in Sweden are the same as elsewhere – there are always practical difficulties in endeavouring to align the schedules of witnesses, arbitrators and counsel. The Swedish principle of orality, which means that witness statements are generally not accepted in courts, leads to Swedish lawyers being less inclined to adduce witness statements. However, the national court system often allows witnesses to testify via video link. Accordingly, modern technology and custom allow witnesses to testify via video link and by telephone. Arbitrators are almost always flexible in relation to timetables and scheduling.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

AZELIUS: I certainly take the view that more companies should include arbitration provisions in their contracts and when doing so that they ensure that the dispute resolution clause is afforded as much attention during negotiations as the remainder of the contract. The clause should be well thought through, preferably by a specialist in ADR, and be clear and precise. This leaves less scope for raising formal and jurisdictional issues at a later stage. Another key consideration is whether to include an obligation to mediate before initiating arbitral proceedings. However, the difficulty with such a clause is that it can be used by an obstructing party to delay the initiation of arbitral proceedings.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

AZELIUS: It is unlikely that Sweden, which is a relatively small country, will see an increase in the number of arbitration institutes in the near future, although smaller institutes are already present in different parts of Sweden. However, I fully believe that arbitration, especially institutional, but also *ad hoc*, will continue to increase in popularity. This will certainly lead to an increase in different conference centres which will focus on providing a full service package for arbitral proceedings.

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TURKEY

KAREN AKINCI
AKINCI LAW

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

AKINCI: Foreigners are not restricted from being a party to litigation in Turkey, however the litigation process in Turkey can take a substantially long time to get to final award and can become rather expensive. A number of appeals exist, each of which runs to months or years to completely finish. The representing lawyer has to be Turkish and a member of the Turkish Bar Association. The process of arbitration, however, is voluntary and based on party agreement. Claimants tend to favour arbitration because of its relative speed, lower costs and potential confidentiality. Respondents often favour it because of their ability to define their agreement and affect the process.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN TURKEY? HOW DO THEY COMPARE INTERNATIONALLY?

AKINCI: At the moment, in Turkey, we have two main Turkish organisations that facilitate arbitration – the Istanbul Chamber of Commerce (ITO) and the Union of Chambers and Commodity Exchanges of Turkey (TOBB) based in Ankara, as well as the smaller regional centres. Excellent facilities and secretarial support are available in both of these centres, which foreign arbitral institutions can make use of. Recently, a law to establish an International Finance Centre in Istanbul was passed, part of which will be the Istanbul International Arbitration Centre. Work is continuing with all speed towards this end and it is hoped that this centre will become a hub for the region. With the globalisation of Turkish Airlines, Istanbul is now a hub for international travel, making it an excellent venue for arbitration. Together with the raising of the standard for facilities and legal framework, Istanbul has the potential to be a global contender in arbitration.

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

AKINCI: Arbitration in Turkey was certainly more relevant for international cases, domestic cases being far more likely to be brought to the specialist domestic court. At the beginning of last year, the domestic arbitration code appeared as a separate code to the civil procedural code. 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. This new code makes domestic arbitration far less complex and accessible and has certainly increased the general 'arbitration culture' in Turkey, leading to more local arbitrators being brought into the arena.

Q HOW SUPPORTIVE ARE COURTS IN TURKEY IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

AKINCI: The judiciary in Turkey is certainly arbitration friendly. Since the incorporation of the international Arbitration Code, courts have no longer been under an obligation to review the arbitral award and they have welcomed this. Turkish courts welcome the quick process of ensuring only that the arbitral award has been rendered procedurally correctly. The issue of supporting interim awards is still open to discussion in that the court may discuss the need for the measure rather than merely enforcing the interim order depending on the circumstances. 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.

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

AKINCI: In our region, one of the more difficult practical problems is that of logistics. It is often difficult for people in our region to travel to other jurisdictions for arbitration purposes. Visas are difficult to obtain and often the hotels and living costs are expensive by the standards of our region. On a more technical note, it is often important to ensure that tribunal members who are sensitive to the complexities of our region are chosen. Therefore care needs to be taken to choose an arbitral tribunal with relevant experience. One more issue is the one year time limit for making the award. If the Turkish International Arbitration Code is applicable to your case then it is worthwhile to remind your arbitrators, who may not be Turkish, that unless the parties have agreed otherwise, arbitral award must be rendered within a year.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

AKINCI: I would say that for an international venture it is absolutely imperative that an arbitration clause should be included since the possible complications of not having access to arbitration can be severe. An arbitration agreement allows the parties to state their full intention and agreement at the outset. Without this, the parties will be limited to the jurisdictional court of either country. It may be difficult to decide which country should have jurisdiction. There may be complicated issues of conflicts of law. The relevant local court may be slow or impractical. It may even mean that access to justice is effectively denied depending on the particular jurisdiction. An arbitration agreement at the outset avoids these problems by clearly stating the mutual intent of all parties.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

AKINCI: Absolutely, I certainly expect the choice of venues to increase. I look forward to Istanbul being a viable arbitration seat as this will encourage also the local viability of the job title 'arbitrator'. The problems with the classic venues are not only limited to the many logistical issues of transport and visas, expensive hotels and lawyers but also a very much more serious issue of culture. At the moment we are seeing arbitration cases between, for example, Turkish and Lebanese companies being handled by tribunals in Geneva made up of primarily British, American and European arbitrators. This is illogical, and also time consuming since the very well meaning arbitrators are having to grapple with unfamiliar cultural concepts. In one such arbitration of ours, neither party was concerned that the lending of furniture was anything more than a good will gesture whereas the arbitral tribunal, to the confusion and consternation of both parties, considered it a clear bribe. This was purely a problem of cultural perspective and could have been avoided had the arbitrators been of the same culture as the parties.

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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.

HONG KONG

MONIKA HARRINGTON
GALL

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

HARRINGTON: Commercial parties are increasingly recognising the benefits of arbitration over litigation, including the confidentiality of the arbitration process and award, the flexibility of procedural matters, and the option for parties to agree to specific requirements for the selection of arbitrators, such as language skills and any necessary technical expertise. The enforceability of an arbitral award is a key advantage of the arbitration process, particularly for parties involved in cross-border disputes. There are now over 140 contracting states to the New York Convention that have agreed to recognise arbitral awards issued by other contracting states as binding, subject to limited grounds. The reciprocal enforcement arrangement for arbitral awards between mainland China and Hong Kong is also a significant factor in favour of arbitration where the dispute involves assets or enforcement issues in mainland China.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN HONG KONG? HOW DO THEY COMPARE INTERNATIONALLY?

HARRINGTON: Hong Kong is now an internationally renowned seat of arbitration and, particularly through the active Hong Kong International Arbitration Centre (HKIAC), it is continuously striving to improve the arbitration process and adopt international best practice standards. The consistent comment we hear from Hong Kong counsel arbitrating across multiple jurisdictions is that the recently renovated and expanded HKIAC facilities are excellent.

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

HARRINGTON: New HKIAC Rules came into force on 1 November 2013, following extensive consultation with practitioners, arbitrators and the public. The amendments adopt a 'light touch' approach and are expected to improve the efficiency and effectiveness of HKIAC arbitration. The amendments enable the tribunal to consolidate multiple parties and contracts within a single arbitration, which will avoid the unnecessary costs and delay of conducting multiple arbitrations. The new HKIAC Rules have also introduced standard terms for the appointment of arbitrators, including a cap on hourly rates. Significantly, the new rules now provide a procedure for emergency arbitrators to be appointed and grant interim relief prior to the arbitration, enabling parties to apply for interim relief on an urgent basis without seeking assistance from the court. The emergency relief provisions of Hong Kong's Arbitration Ordinance have also been updated to support these changes.

Q HOW SUPPORTIVE ARE COURTS IN HONG KONG IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

HARRINGTON: The Hong Kong judiciary is certainly arbitration friendly. Hong Kong has adopted Article 34 UNCITRAL Model Law, such that there are limited grounds on which a party can seek to set aside an arbitral award. Enforcement of both domestic and foreign awards in Hong Kong is time and cost efficient, and the courts have taken the view that their role in this process is largely procedural. To uphold the integrity of arbitral awards and assist efficient enforcement, the courts have, in many cases, awarded indemnity costs against defendants in unsuccessful applications to set aside arbitral awards or challenges to enforcement.

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

HARRINGTON: The arbitration process allows parties to set milestone dates and even substantive hearing dates at an early stage. As parties', their respective counsel and arbitrators' diaries fill up quickly, scheduling the arbitration to be heard as quickly as possible is a key practical step that can assist in managing costs and the timely resolution of the dispute. The parties will also need to ensure that their chosen tribunal is equipped to manage cultural and language differences between the parties as required.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

HARRINGTON: Commercial parties are certainly encouraged to consider their dispute resolution options at the outset and a well drafted arbitration clause in a contract will avoid many problems down the track. For an effective arbitration clause, it is essential that the parties agree at least the seat of arbitration and the procedural rules that will apply. From our experience, if an arbitration clause is not clear, parties may waste time and costs arguing about procedural and jurisdictional matters. Without an arbitration clause, the parties will need to agree to refer their dispute to arbitration, which may be difficult once parties are already hostile.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

HARRINGTON: As arbitration gains momentum as a feasible alternative to litigation, there is likely to become greater choice of arbitration venues. However, in order to enjoy the benefits of arbitration, particularly international recognition and enforcement of awards, parties are still likely to prefer well established seats of arbitration that conform to international best practice and where the arbitration process is supported by a judiciary with a policy of minimum intervention.

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Monika Harrington is an experienced litigator, specialising in complex commercial litigation and arbitration. Her principal areas of practice are contractual disputes, cross-border arbitration and litigation, banking and finance disputes, shareholder disputes, and matters involving directors' duties and contentious insolvency. Ms Harrington has extensive experience in dealing with multi-jurisdictional disputes and her work often requires cross-border applications, the enforcement of international arbitral awards, freezing applications and urgent injunctive relief in aid of both court and arbitration proceedings. She is a qualified solicitor in both Hong Kong and Australia and is the head of Gall's arbitration practice.

INDIA

H.S. CHANDHOKE
LUTHRA & LUTHRA LAW OFFICES

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

CHANDHOKE: A prime reason parties choose arbitration over litigation is because of its nature as a private mechanism that they select and control. Pendency in court cases and the rigidity of court procedures frequently influence parties in choosing arbitration. Its confidential nature also makes arbitration more desirable. For parties belonging to diverse jurisdictions, arbitration offers neutrality both of law and venue. Expertise of the decision-makers, and limited availability of grounds on which an award can be challenged are other key benefits, and generally, both domestic and international awards are easily enforceable.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN INDIA? HOW DO THEY COMPARE INTERNATIONALLY?

CHANDHOKE: Leading international arbitration institutions like the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC) now have offices in India in addition to the International Centre for Alternative Dispute Resolution (ICADR) and Indian Council of Arbitration (ICA). For proceedings in court under the arbitration legislation, adequate court-made rules exist. Though heavily underutilised, transcription services, critical for evidentiary hearings, are also now available. Arbitration as an institution is still evolving in India, and a greater effort is required to improve the infrastructure to support the conduct of arbitration across the country.

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

CHANDHOKE: In 2010, the Ministry of Law & Justice proposed amendments to the Arbitration and Conciliation Act, 1996, seeking to clear the uncertainty resulting from judicial decisions on foreign-seated arbitrations, promote institutional arbitration and provide against automatic stays on enforcement of awards. Though the amendments are yet to effected, India's Supreme Court has taken a clear pro-arbitration stance in recent decisions in *BALCO* (2012), holding that the Indian courts have no jurisdiction over foreign seated arbitrations; *Lal Mahal* (2013), considerably narrowing the 'public policy' ground to challenge enforcement of foreign award; and *Chloro Control*, recognising that arbitration agreements can apply and also be invoked by non-signatory.

Q HOW SUPPORTIVE ARE COURTS IN INDIA IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

CHANDHOKE: Arbitration laws have seen almost paradigmatic changes recently in India's top court. While *BALCO* undercut arguments that courts had been employing to frequently exercise jurisdiction in foreign seated arbitrations, *Lal Mahal* curtailed interference with enforcement proceedings. In *Antrix* (2014), the court refused to appoint an arbitrator – and thus interfere – since the proceedings had already commenced. Then, in 2014 in *World Sport Group* (2014) while lifting a stay on arbitration proceedings, the court adopted an interpretation that is indicative of its growing discontent with interference in arbitration proceedings. Clearly, the judiciary is supportive of enforcing arbitral awards and is 'arbitration friendly'.

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

CHANDHOKE: Unless the institutional mechanism is clear cut, the selection of arbitral tribunal may take considerable time, and proceedings may be affected by the non-availability of arbitrators with relevant industry expertise. These issues become more challenging in multi-jurisdictional arbitrations, where it is crucial that the tribunal is proactive and skilled in managing the process. Another matter of practical relevance is that, under *BALCO*, courts in India are not authorised to even grant interim relief in a foreign-seated arbitration if the agreement was executed after 6 September 2012. Further, busy arbitrators are not able to agree on short dates.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

CHANDHOKE: It is crucial to have a well-defined dispute resolution mechanism, and institutional arbitration ought to be preferred. While drafting the arbitration agreement itself, parties simply need to have clear language as, surprisingly, even high-stake contracts drafted by experts may not be free from ambiguity. Parties need to clarify the obvious aspects like seat, governing laws, procedural laws, appointment of independent arbitrators, formation and expertise of tribunal, the kind of arbitrable disputes, and the final and binding nature of arbitration.

Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

CHANDHOKE: The exponential growth in arbitration practice over the past couple of decades has prompted the emergence of new venues for arbitration. As the use of arbitration in resolving disputes continues to increase, we will witness more and more choices in prominent venues, in addition to the traditional ones. Jurisdictions like Singapore, Hong Kong and Dubai have, in recent times, emerged as reliable seats. With increasing institutional infrastructure, India is also fast becoming a strong venue. India' s profile as seat, however, needs a robust-regime to ensure less court intervention and faster disposal of challenges to awards.

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H.S. Chandhoke is a senior partner at Luthra & Luthra Law Offices. He has 23 years of experience in litigation and dispute resolution. Mr Chandhoke has led and instructed in several international and domestic arbitrations. He has advised and represented several leading domestic and multinational clients on a variety of subject matters. Widely known for his sharp business acumen and novelty in method, he has been voted as a leading dispute resolution lawyer by *Asia Law* consecutively since 2011. In 2014 he was profiled as a lawyer who is "technically very sound, very quick to reply and has innovative ideas".

SINGAPORE

JAMIE HARRISON
ADDLESHAW GODDARD

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

HARRISON: Generally, advocates of arbitration over litigation point to a number of key benefits of arbitration such as speed and efficiency, the ability to appoint arbitrators with sector or geographic market expertise, confidentiality of the proceedings, finality – given the limited ability to challenge awards – and the automatic enforceability of awards in New York Convention countries, without the need to begin separate enforcement proceedings. Although I think that confidentiality is a key consideration in this region – it is often thought that Asian parties are eager to save face, and therefore making a compromise behind the scenes is preferable to a lost case in a public forum – the key for parties in arbitration in this region is that awards obtained in, for example KL, Singapore or Hong Kong, will be enforceable against contractual counterparties in potentially difficult jurisdictions by virtue of the New York Convention.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN SINGAPORE? HOW DO THEY COMPARE INTERNATIONALLY?

HARRISON: The facilities we have in Singapore for the conduct and administration of arbitration are second to none. Singapore has also been committed to investing in the infrastructure that surrounds arbitration, so the Singapore arbitration rules are carefully and well drafted, as is the Arbitration Act. The support for international arbitration from the Singapore courts, if ever it is needed, is consistent and reliable, and Singapore is blessed with well educated judges, lawyers, arbitrators and administrative staff. That said, there are other areas in the region that are looking to catch up. There has been a lot of investment in Kuala Lumpur, for instance.

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

HARRISON: one of the most significant recent developments in Singapore has been the introduction of the emergency arbitrator provisions. Indeed, the Singapore International Arbitration Centre (SIAC) was the first Asian arbitral institution to introduce such provisions in its rules. Whereas previously a party in need of emergency or interim relief before the arbitration had been begun would have needed to apply to the local court, now the party may apply for such relief prior to the constitution of the tribunal, from SIAC itself. The chairman will appoint an emergency arbitrator within one business day of deciding to accept an application for emergency relief. Whilst the Singapore court has always been responsive to such requests, and is supportive of the arbitration process generally, this new procedure has allowed parties a quicker and easier solution – and has been a major factor in attracting parties to opt for SIAC administration of their disputes.

Q HOW SUPPORTIVE ARE COURTS IN SINGAPORE IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

HARRISON: Singapore is extremely 'arbitration friendly', and the courts are very supportive of the arbitration process. As a signatory to the New York Convention, arbitral awards obtained in other convention countries are automatically enforceable. There are only limited grounds of challenge to arbitral awards in Singapore – in common with most developed jurisdictions – and the Singapore court has determined only to allow such grounds of challenge sparingly.

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

HARRISON: A significant practical issue is finding reliable local law or commercial advice in relevant jurisdictions. It is often important to understand how business is done in such countries – especially how contracts are negotiated and performed – and finding advisers with the requisite experience and language skills can be difficult.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

HARRISON: In principle, yes. Unless there is some particular reason for opting for court litigation – such as legislation to that effect governing the subject matter or jurisdiction of the project at issue for example – it is hard to think of circumstances where an arbitration clause would not be appropriate. A fundamental consideration when drafting a contract is to have an eye on what happens when things go wrong and to make sure that there is a mechanism in place to ensure you get your money. This may mean for example that there needs to be an escrow account outside of the jurisdiction where the company is based, which contains enough money to satisfy any claim; a guarantee from a parent company, again outside of the company's home jurisdiction; or a letter of credit from a reputable bank. It does not matter whether a party has obtained a favourable arbitration award – if there are no assets to enforce against, the whole process was probably pointless.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

HARRISON: It is inevitable that other countries will seek to follow Singapore's lead in establishing a renowned and reliable international arbitration centre. Indeed, we have seen the recent establishment of a centre in several ASEAN countries, and the emergence of the KLRCA as a respected centre for international arbitration – principally in construction disputes, but also in Islamic Finance, following their adoption of specific rules in that area. India is also working to establish its credentials. The factor that will determine the success of these new centres is the support of the local courts for the arbitral process – parties need to be certain that if they submit themselves to arbitration in a particular jurisdiction, that the local court will be supportive.

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VIETNAM

NGUYEN TRUNG NAM
EPLEGAL

Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

NAM: First, in Vietnam, arbitration is much speedier than litigation at court. For example, one simple case usually takes more than six months – if the parties and also the court officials fully cooperate – and the same period of time at the appeal court. On the contrary, a case at institutional arbitration in Vietnam usually takes less than three months for final settlement. Arbitration is especially useful in comparison to traditional litigation in cross-border disputes for the fact that litigation involves judicial authorisation which is very time consuming. Second, the disputing parties often trust the expertise and impartiality of commercial arbitrators and doubt those qualities of the judges in traditional ligation. Last but not least, thanks to New York Convention 1958 – to which Vietnam is a signatory state – it is easier for Vietnamese claimants to apply for recognition and enforcement of Vietnamese arbitral awards in most of foreign countries.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN VIETNAM? HOW DO THEY COMPARE INTERNATIONALLY?

NAM: For the time being, there are seven arbitration centres registered in Vietnam. Among these, the Vietnam International Arbitration Centre (VIAC) is the most accredited centre, with good facilities and high profiled arbitrators. Although VIAC is less internationally recognised than regional arbitration centers such as Singapore International Arbitration Centre (SIAC-Singapore) or Kuala Lumpur Regional Centre For Arbitration (KLRCA-Malaysia), more and more arbitration agreements choosing VIAC are made in commercial transactions involving Vietnamese parties. As far as we know, VIAC usually has traditionally handled more international cases than local ones and in 2013 it processed 99 cases, which is very encouraging compared to that of SIAC or KLRCA.

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Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES IN VIETNAM? IF SO, WHEN WILL THESE BE BROUGHT INTO FORCE AND HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS?

NAM: The Ordinance on Commercial Arbitration of 2003 marked the birth of the legal framework for arbitration activities in Vietnam. The Law on Commercial Arbitration of 2010 (the New Law), replacing the Ordinance 2003, created a better legal environment for arbitration. This is mainly because the new legislation improves the power of the arbitration compared to court litigation – for example, an institutional arbitral award can be enforced as if it were a court decision without the need for registering at applicable court – and it confers a new right of ordering interim relief on the arbitral tribunal. In addition, for the first time the New Law allows foreigners to be qualified as arbitrators in local arbitration centres. These significant changes have paved the way for the development of both local and international arbitration in Vietnam as an effective alternative to court litigation, and we expect that the majority of future commercial disputes will chose arbitration as their dispute settlement method.

Q HOW SUPPORTIVE ARE COURTS IN VIETNAM IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

NAM: As of 2011, when the Law on Commercial Arbitration took effect, the percentage of arbitral awards declared null has increased significantly, mostly on the grounds of procedural issues or due to arbitrary application of lower courts. In this regard, the Supreme Court is preparing a guiding document to address the issue. It is likely that the clear explanation and guidance in this new Supreme Court resolution – now in draft – will further encourage the use of arbitration in Vietnam. Besides this, Vietnamese courts are not 'friendly' to foreign arbitral awards. Contrary to public law, or contrary to the basic principles of Vietnamese laws, as stated in our civil proceedings law is the frequent grounds that our courts use to invoke foreign arbitral awards applied for recognition in Vietnam. However, our domestic laws haven't provided

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a clear definition of what should be the 'basic principles of Vietnamese laws'. Despite this, the Vietnamese court sticks rigidly to this basis, to the extent that all substance issues settled and decided in the foreign arbitral award must not be contrary to any provisions of our domestic law.

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

NAM: Telephone conference and electronic hearings have not been utilised or regulated properly by the law, both in domestic and cross-border disputes. Besides this, high profile arbitrators and lawyers who have profound international experience in Vietnam are limited in number. This problem has become more serious as an increasing number of recent international contracts – as a result of the parties' compromise – have accepted arbitration in Vietnam but refer to English or Singapore law as the governing law, to which many Vietnamese arbitrators are not familiar. These are the main difficulties that discourage the undertaking of complex international, multi-jurisdictional arbitrations in Vietnam.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

NAM: Yes, certainly. The key considerations here are the time, costs, reliability and confidentiality. First, because arbitration in Vietnam is much faster than litigation proceedings, the party in breach will not have an incentive to sign the arbitration agreement after the dispute arises. Second, when the parties to the transaction value their images, an arbitration agreement from the outset is necessary to prevent a law suit against them going public through litigation. Finally, arbitration is regarded as a reliable method of dispute settlement with promisingly unbiased decisions by highly qualified independent arbitrators.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

NAM: Yes, the choice of viable arbitration venues will increase in accordance with the economic development of these jurisdictions and the regional trade and investment development. Vietnam is a good example of this trend, and has seen substantial renovation in legislation, and a continuing effort by local arbitration centres to improve by updating their rules, developing administrative facilities, and inviting more qualified arbitrators for international disputes accommodation. I expect that other emerging jurisdictions will see similar trends.

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Nguyen Trung Nam practices in the area of corporate services and commercial contracts with a heavy emphasis on international trade law, contract and tax planning for cross-border transactions, and offshore petroleum transactions. Prior to co-founding EPLegal, Tony worked in managerial and legal positions in the leading oil and gas operators, and contractors in Vietnam. He has legal and contracting experience through various projects related to drilling campaigns; oil and gas production operations; sales and purchasing and technical services contracts. He is the author of numerous legal articles relating to legal, contracts risks management and banking and finance.

UNITED ARAB EMIRATES

JOSEPH DURKIN
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Q WHAT FACTORS OFTEN INFLUENCE PARTIES IN THEIR CHOICE OF ARBITRATION OVER LITIGATION? COULD YOU OUTLINE SOME OF THE KEY BENEFITS OF THE ARBITRATION PROCESS FOR THOSE INVOLVED?

DURKIN: The UAE Civil Procedure Code governs arbitration in the UAE. The Civil Procedure Code does not expressly set out a duty of confidentiality in arbitration, however parties are free to incorporate a confidentiality clause within their arbitration agreements, which is normal practice. This is one of the primary influencing factors in parties choosing arbitration over conventional litigation. In addition to this, the ability of the parties to choose the arbitrators, the perceived speed at which arbitration proceedings are conducted and the fact that the UAE is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) are key influencers in parties choosing arbitration over litigation. In respect of litigation, the new Dubai Law No. 16 of 2011 provides commercial entities with the option to resolve their disputes before the Courts of the Dubai International Financial Centre (DIFC). This offers parties the opportunity to opt-in to an English language, common law forum with an experienced judiciary, the majority of the judiciary being from common law countries with many years of experience in complex commercial disputes.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE UAE? HOW DO THEY COMPARE INTERNATIONALLY?

DURKIN: In Dubai there are two primary arbitration centres, the Dubai International Arbitration Centre (DIAC) and the DIFC LCIA Arbitration Centre. Both of these centres have made a conscious effort in recent years to recruit experienced staff to ensure the practices and procedures are implemented in a way that makes the centres attractive to parties. The DIFC LCIA Arbitration Centre's Arbitration and Mediation rules are a close adaptation of the LCIA Rules, with minor changes to align them with the DIFC LCIA Arbitration Centre's needs. The DIFC LCIA

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Arbitration Centre has access to the LCIA's database of arbitrators with a wide range of professional qualifications and expertise – legal and non-legal – enabling it to appoint tribunals of a high calibre.

Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES IN THE UAE? IF SO, WHEN WILL THESE BE BROUGHT INTO FORCE AND HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS?

DURKIN: Arbitration in the UAE has received the backing of the federal government. There is a new Federal Arbitration Law due, which currently is being drafted with the Egyptian Law of 1994 as guiding legislation. The Federal Arbitration Law is also expected to incorporate similar provisions to the UNCITRAL Model Law. Their expectation is that the new law will provide a clear and modern approach to arbitration that reflects the region's growing reputation as a centre for international arbitration.

Q HOW SUPPORTIVE ARE COURTS IN THE UAE IN UPHOLDING AND ENFORCING ARBITRAL AWARDS? IS THE JUDICIARY 'ARBITRATION FRIENDLY'?

DURKIN: With the ratification by the UAE of the New York Convention in 2006, the local courts appear to have taken a pro-arbitration approach and applied the Convention literally. The courts have ruled that the validity of an arbitration clause must be assessed separately from that of the main contract and that the arbitrator has the authority not only to determine their own jurisdiction, but also the validity of the main contract.

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

DURKIN: As in all other jurisdictions, it is important to include a simple arbitration clause in the contract which refers directly to either DIAC or the DIFC LCIA Arbitration Centre being appointed as the procedural body and the arbitration being conducted in accordance with the centres' established rules. The applicable law as well as the seat and language of the arbitration should be clearly set out so as to provide certainty to the parties, and to prevent any challenge being made to the arbitration agreement at an early stage. Certainty is a key component to any international, multi-jurisdictional arbitration and is particularly relevant in the Middle East region.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

DURKIN: It is important that parties choose the proper forum for resolving disputes. Arbitration is not suitable for every type of dispute and this should be considered carefully before the parties agree to refer any dispute to arbitration. However, the ability of the parties to elect that the proceedings remain confidential is a big advantage of arbitration. The establishment of the DIFC LCIA Arbitration Centre and its mission to promote more effective resolution of international business disputes through arbitration and mediation worldwide, has made arbitration more readily accessible to multinational companies who may have previously seen the Middle East as an unattractive forum in which to conduct arbitration proceedings.

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Q CERTAIN JURISDICTIONS HAVE MADE CONCERTED EFFORTS TO IMPROVE THEIR PROFILE AS A SEAT OF ARBITRATION IN RECENT YEARS. DO YOU EXPECT THE CHOICE OF VIABLE ARBITRATION VENUES TO INCREASE GOING FORWARD?

DURKIN: It is not expected that any further institutions will establish themselves in Dubai in the near future. It is hoped that the Federal Arbitration Act will come into force this year which is expected to increase the number of arbitrations that choose Dubai and the UAE as their preferred seat. The establishment of the DIFC LCIA Arbitration Centre has opened up Dubai as a place for arbitration to multinational companies that perhaps have a base in London but a Middle East operation. The LCIA is renowned arbitration centre worldwide and this can only help to increase the profile of arbitration in the UAE. The fact that parties can also opt-in to the jurisdiction of the Dubai International Financial Centre, a common law jurisdiction, raises the profile of Dubai generally as a centre for dispute resolution.

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Joseph Durkin is the head of Davidson & Co's dispute resolution practice in Dubai and the Middle East. He has practiced law in Ireland, England and Wales, Dubai and the DIFC Courts. Mr Durkin is recognised as having "a masterful knowledge of dispute resolution and arbitration". Lauded in Legal 500 as being "highly competent" in international dispute resolution, Mr Durkin has represented a wide range of banking, real estate, engineering, energy and construction clients in the UAE, Middle East and North African region. Legal 500 UAE 2013 further stated that Mr Durkin provides "clear advice on the legal issues" and rates him for "breach of warranty claims".

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