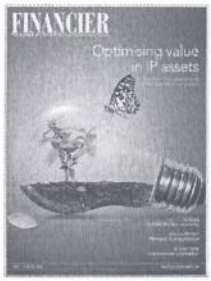
International arbitration



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Arbitration remains a popular method of resolving international and cross-border commercial disputes. Arguably, no other process offers such efficient, impartial, multicultural and business-minded solutions for complicated disputes. The benefits are myriad, but the cost of arbitration is rising, along with the stakes and the complexity of the issues put forward.

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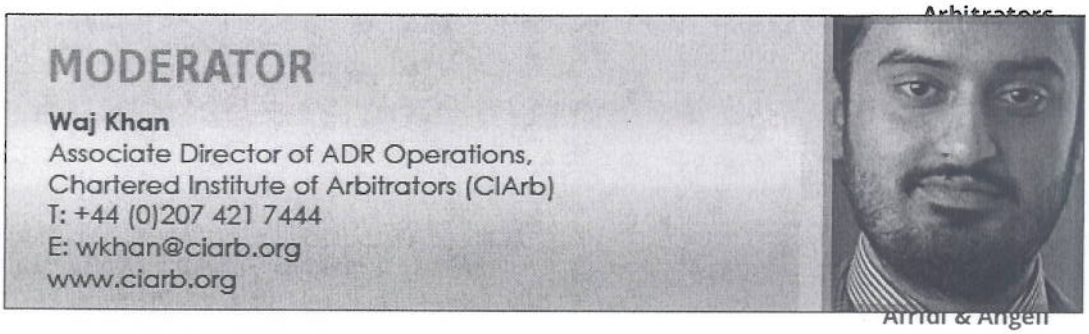

Khan: What key trends and developments have you seen in

international arbitration over the past 12-18 months? Are there any recurring themes at the core of recent cases?

Massey: Third party funding is a feature that is increasingly prevalent in some jurisdictions. While the UK introduced a code of conduct for third party funders, the industry remains unregulated in the international context. Given the continued growth and inherent risks with third party funding, more efforts should be taken on the regulatory front, particularly with regard to the duty to disclose third party funding agreements. The scope and applicability of the competence-competence principle also remains an important trend in the international context.

Tout: One of the main trends we have seen over the past year or so is the increasing use of arbitration by financial institutions. The main reason for this is the wide ranging enforcement regime under the New York Convention, together with the greater flexibility that the process allows. There are currently 149 signatories to the Convention, including many jurisdictions in which it would be impossible to enforce, for example, an English court judgement. This has been demonstrated by the increasing number of cases that the major arbitration institutions such as the LCIA and ICC are reporting in the banking and financial services sector. The demand for arbitration among the banks has also resulted in the establishment of specialist institutions such as the Panel of Recognised International Market Experts in Finance (PRIME).

Kleiman: The changes introduced in 2011 by new French legislation have presented major innovations, including allowing the provisional enforcement of awards and introducing the possibility for parties to waive setting aside proceedings at the seat. These provisions have been widely accepted by the arbitration community. The key developments in French international arbitration over the past 12-18 months relate mainly to the provisional enforcement of awards. Courts have clarified the criteria to stay or set conditions for enforcement, adopting what seems to be a restrictive view in this respect.

Bezant: We are seeing the continuation of trends rather than the establishment of new ones – a gentle shift in the centre of gravity for major cases away from the longer established centres to Asia in particular; a broadening out of the geographical origin of parties to arbitration as cross-border investment flows become more extensive and complex; the rise of arbitration boutiques; and the greater involvement of litigation funders in cases globally. From our perspective, tribunals are becoming more proactive in encouraging experts to try to narrow or resolve differences ahead of a hearing, and the use of expert conferencing or 'hot-tubbing' at the hearing itself. Opinions are divided on the merits of expert conferencing, among both experts and counsel.

Fitch: On the institutional front, I am impressed by the International Bar Association's 2013 Guidelines on Party Representation in International Arbitration. Admittedly controversial, they are an important step towards establishing specific ethical expectations for lawyers participating in international arbitrations. Also, the International Centre for Dispute

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Resolution has issued amendments to its International Dispute Resolution Procedures, effective 1 June 2014. These include the adoption of new rules for emergency measures of protection, which hopefully will stem the tide of parties seeking court intervention in pending arbitrations.

Bentham: Perhaps in light of renewed efforts to legislate against offences of bribery and corruption, there has been increasing discussion about the duty (or otherwise) of the tribunal to investigate such allegations. In my experience, allegations of corruption can sometimes go hand in hand with attempts to obfuscate legitimate issues in dispute – thereby derailing the arbitral process. I have also seen allegations of corruption being raised as a tactic aimed at evading enforcement of an award. Genuine corruption is, of course, a very serious matter requiring proper and full investigation, but unsubstantiated allegations have started to be used to manipulate the process, and that is a trend that I think we should guard against.

Litt: One interesting recent trend has been the promulgation of revised arbitration rules by many of the leading international arbitration institutions. The ICC issued new rules in 2012, kicking off what has appeared to be a wave of new arbitration rules from the AAA/ICDR, the LCIA, SIAC, HKIAC and numerous others. The revisions to these institutions' rules address a range of topics, and they are not uniform in their approach, but one issue addressed in many of the revisions is joinder of parties and consolidation of cases. The recent focus on this age-old problem of managing disputes that cover multiple parties and overlapping claims likely signifies the increasing complexity of international disputes presented to these institutions, which is consistent with the cases we are seeing in practice.

Venegas: Over the last couple of years there has been a trend toward discussing transparency in international arbitration and the conduct of party representatives in arbitration proceedings, as well as the role that international arbitration may have against fighting corruption. This has been seen with the recent publication of the IBA Rule on Party Representation and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Several cases have also dealt with the issue of transparency and corruption in international arbitration, and tribunals have faced major evidentiary problems because parties provide inadequate evidentiary support for corruption allegations.

"Over the last couple of years there has been a trend toward discussing transparency in international arbitration and the conduct of party representatives in arbitration proceedings, as well as the role

that international arbitration may have against fighting corruption."

— Marco Tulio Venegas

Khan: Have there been any recent international arbitration cases of note? What insights can we draw from their outcome and what impact might they have on other arbitrations?

Tout: The recent investment treaty disputes such as *Abaclat v Argentine Republic* in which over 60,000 Italian bondholders brought claims against Argentina, highlight the growing trend that the financial sector could benefit from the protections afforded by investment treaties. The key to this development is that tribunals in those disputes recognised that these financial instruments were 'investments' for the purpose of the treaties. While investment treaties have previously been largely overlooked by the financial services sector, these recent cases and the 2008 financial crisis, which resulted in numerous new claims being initiated against many states, highlight the importance of structuring investments so that investors can take advantage of treaty protections.

Kleiman: On 12 June 2013 the French Supreme Court upheld the validity and enforceability of a bilateral option clause that gave both parties the option to resolve their dispute either by way of arbitration or through domestic courts. Bilateral or multilateral option clauses are dispute resolution agreements that either set out a default forum, or give the parties the option to choose an alternative forum to which disputes can be referred. These option clauses are becoming more frequent in international commercial contracts and, in particular, in project financing. While this decision clarifies the French Supreme Court's position regarding bilateral option clauses, it raises concerns as to the validity of sole option clauses.

Bezant: The legal principles governing the valuation of companies and calculation of damages, and the interpretation of key terms of art, are largely well-established. The methodologies employed by valuation and damages experts are also well-established. The areas of interest tend to be the tribunal's implementation of the different methodologies in individual circumstances, such as expropriations or breaches early into the life of an investment, and where views on value can therefore legitimately differ. The task of the expert is to demystify the technical subject matter, such as a business valuation, and give the tribunal a clear framework in which to test and assess loss, based on quantitative and qualitative indicators of value.

Fitch: The United States Supreme Court recently enforced the $185m arbitration award in *BG Group v. Argentina*. The Supreme Court's decision allayed the concerns that many practitioners expressed after the DC Circuit refused to enforce the award. In *Airmech (Dubai) LLC v. Macsteel International LLC*, the Dubai Court of Cassation recently rejected an application, based on grounds beyond those enumerated in the New York

Convention, to nullify two related international arbitration awards. Given historical uncertainty regarding the enforcement of foreign arbitral awards in the UAE, the *Airmech* decision is a welcome step in the right direction.

Bentham: We continue to see the impact of the Court of Appeal decision in *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA* on the governing law of arbitration agreements. It was considered and distinguished in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) (December 2012), and applied in *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd* [2013] EWHC 4071 (Comm) (December 2013). That Sulamerica has been cited at all emphasises the importance of ensuring the law governing the arbitration agreement is expressly stated in the contract.

Litt: Disputes involving South American countries and parties have taken centre stage, and a number of them have ended up in the US courts. Most notable in the news have been cases arising out of disputes with Argentina and the dispute in various forums between Chevron and Ecuador. When the US Supreme Court issued its decision this March in the dispute between BG Group and Argentina, it ruled for the first time on the enforcement of an arbitral award in an investor-state dispute. The most important aspect of the case may have been the Supreme Court's decision to give essentially the same deference to the arbitrators' interpretation of a bilateral investment treaty that it ordinarily would give to arbitrators' interpretation of a commercial contract.

Venegas: There have been two recent relevant cases in Mexican arbitration practice, both regarding oil disputes between private companies and Mexico's public oil company. The main insight of one of the cases is the fact that the award was enforced despite the fact that it was annulled in Mexico at the arbitration seat. In this case a district judge from New York decided that the award had been unlawfully nullified in Mexico but that was not an impediment to enforce it in the US. In the other case the Mexican District Judge made two points very clear – first that the judiciary is completely independent of the government interest when settling a dispute; and second, that the Mexican judicial branch has shown it holds a very arbitration friendly position on its decisions.

Massey: Some recent decisions emanating from the highest courts in India are noteworthy in confirming India's continued move towards a pro-arbitration jurisdiction. In 2012 the Indian Supreme Court clarified the applicability of its domestic arbitration law as being confined to arbitrations seated in India. Previously, the Indian courts adopted an expansive approach with respect to the application of their domestic arbitration law in encroaching in international arbitrations which were seated outside of India. More recently, the Indian courts have confirmed their pro-arbitration stance holding that even where disputes involve an allegation of fraud, an arbitration agreement providing for foreign-seated arbitrations should be upheld.

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— Gregory A. Litt

Khan: There have been recent debates on the rising cost of arbitration. Do you think this an issue and if so how can it be addressed?

Bezant: The accepted view is that the cost of arbitration is rising, but then so are the stakes and the complexity of the issues. Arbitration is a one-shot process which can create pressure to explore the issues fully but also incentives to delay the process. Cost control against this backdrop can require more active case management by the tribunal, echoing the stance of the UK courts. For example, the CIArb protocol on the use of party-appointed experts encourages active interaction between the experts, before reports are produced, to avoid the experts addressing very different questions. One alternative is for the tribunal – or the parties – to devolve technical issues to expert determination with the tribunal then taking account of the expert determination in their award.

Fitch: In any given case, the cost of the arbitration may be more of an issue for one of the parties than the other. As too often happens in court cases, one party may engage in costly scorched earth tactics designed more to wear down the other side than to achieve a fair and expeditious outcome. But there are quite a few practical steps parties can take to control costs, such as: taking an active role with counsel in selecting the arbitrators; making sure that potential arbitrators have been vetted for their ability, and strong predisposition, to manage cases and move them along on a tight schedule; and paying attention to the rates charged by different arbitrators, which vary widely and often may reflect differences in overhead more than ability.

Bentham: I think it is generally accepted that arbitration no longer – in all circumstances – offers a cheaper and quicker option than litigation, and there is no doubt that high-value, complex arbitration involves significant costs. The issue of costs is often bound up with that of delay. Multiple extensions of time, unwieldy and wide-ranging document production, ancillary and unnecessary applications to the tribunal all contribute to delays and increased costs. But all of these issues can be controlled by a

robust tribunal who are not afraid to exercise their case management powers in the interests of a quick – though still fair – hearing and rendering of an award.

Litt: Costs are always an issue for any rational party, more or less depending on what is at stake. A well-drafted arbitration clause is key to avoiding protracted gateway disputes about the arbitration process, which can eat up lots of time and money without moving you any closer to a substantive resolution of the dispute. Arbitrator selection also can have a big impact on costs. Look for arbitrators with a proactive case management style, who have the time, confidence and commitment to move a case forward. Counsel fees are often the largest driver of costs, and parties should seek out counsel with the proper experience and sophistication to ensure that they can deliver value efficiently.

Venegas: I think the rising costs of arbitration are an issue, and I also think that there are two good ways to address it. First, the parties in drafting an arbitral clause may determine several issues which may control costs in the arbitration and establish clear expectations as to the real costs which could be incurred if arbitration is initiated. For example, by providing for institutional arbitration, the parties know in advance the fees charged by the arbitrators and by the institution for solving the dispute. Also, several institutions have guidelines to control costs in arbitration, such as the ICC Publication on Techniques for Controlling Time and Costs in Arbitration, which may be a useful guidance to any tribunal.

Massey: Rising costs in international arbitration continues to be an issue and cause for concern. Ideally, before a party embarks on arbitration, it wants a certain degree of clarity on the likely cost of the proceedings. While parties are free to specify in the arbitration agreement how costs should be allocated, they seldom do so. One of the reasons for rising costs is that international arbitration often offers a replication of traditional court proceedings. However, whereas courts in the UK and US are increasingly implementing systems and procedures to minimise administrative costs associated with litigation, the same imperatives are not being implemented in arbitral proceedings. The adoption of certain structural procedures could help – for example, the IBA rules on the taking of evidence in international arbitration. It is the implementation of these rules, however, in different jurisdictions that can lead to costs differing considerably.

Tout: It is difficult to deal with costs in arbitration with a broad brush. There are circumstances in which arbitration continues to be extremely cost-effective, certainly when compared to the equivalent proceedings in court. For example, the parties may agree on a streamlined procedure with minimal document production and a hearing on paper. The costs tend to rise when circumstances do not allow, or when the parties are not prepared to be open-minded about how they can resolve their dispute. One factor that is not always thought of when considering rising costs is the number of written submissions that are exchanged between the parties. In one of my recent arbitrations the parties exchanged no fewer

than six written submissions each.

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>
> — Jayne Bentham

Khan: What do you expect will be the impact of the recent UNCITRAL rules on transparency in treaty-based investor-state arbitration that came into effect on 1 April 2014?

Fitch: The impact of the Rules on Transparency may be modest at first, as the Rules' application is generally limited to arbitrations initiated pursuant to treaties concluded after 1 April 2014, or other instances where there has been agreement on the Rules' applicability. Once the balance tips toward a broader application, however, the Rules on Transparency will provide the basis for a major distinction between international commercial arbitration and treaty-based investor-state arbitration. A hallmark of international commercial arbitration is confidentiality; the opportunity to keep a private commercial dispute out of the public eye is important to most parties.

Bentham: The adoption of these Rules demonstrates a general trend towards transparency in investor-state arbitration. They will mean that disputing parties are subject to similar levels of publicity as parties involved in open court proceedings. There are limitations, however. The Transparency Rules will have no impact on treaties concluded before 1 April 2014, unless the parties expressly opt in. It will be interesting to see to what extent the Transparency Rules will be adopted outside the UNCITRAL Arbitration Rules. There is nothing to stop parties integrating the rules into *ad hoc* arbitration proceedings. However, in circumstances where parties often cite confidentiality as one of the advantages of arbitration, I expect that the voluntary adoption of the Transparency Rules in international commercial arbitration will be limited.

Litt: With the growth in use of investor-state arbitration mechanisms in recent years, there has been a movement in many quarters to increase both the transparency of the arbitrations and the ability of third parties to participate in them, due to the public character and significance of the disputes. The UNCITRAL rules, which were several years in the making, are a significant step in that direction. Of course, even after the effective date of the UNCITRAL rules, states entering into bilateral and multilateral investment treaties retain the right to determine whether to incorporate

these or other rules regarding arbitration transparency and third-party participation into their treaties. The impact of these rules on any given dispute will depend on which governments negotiated the underlying treaty and how committed they were to arbitration transparency.

Venegas: It is too early to know the impact and it is too early to provide an opinion on the impact. The main objective of these rules is to provide rules on transparency to take account of the public interest involved in treaty based investor-state disputes and to provide a harmonised legal framework for a fair and efficient settlement of international investment disputes, and to increase accountability and promote good governance. Therefore, the rules are a great step towards greater public access to information which may have implications for the public interest. However, this widening of transparency may detract investors from initiating a claim under UNCITRAL rules.

Massey: UNCITRAL rules on transparency in treaty-based investor-state arbitrations are a welcome boon for international arbitration, which historically was conducted outside the public spotlight. The Transparency Rules' main aim is to make proceedings transparent with particular emphasis placed on disclosure and openness. Article 2 of the Transparency Rules provide for publication of documents at the commencement of proceedings such as the names of the parties, the economic sector involved and the underlying treaty. Article 3 makes provision for the publication of documents to the public such as the notice and response, statement of claim and defence, list of exhibits, submissions by third parties and non-disputing parties to the treaty, transcripts of hearings where available and orders decisions and awards. Perhaps the most important aspect of the Transparency Rules is contained in Article 6 which concerns the openness of the hearings, providing that hearings for the presentation of evidence or for oral argument shall be in public.

Tout: The most significant impact will be the creation of an historic record of decisions and procedure which will be of jurisprudential value to future tribunals, legal practitioners and commentators. Despite this benefit, there has been speculation as to whether parties subject to the new transparency rules will be less forthcoming in their submissions or be more reluctant to produce sensitive documents. The transparency rules, while giving insight into the resolution of matters of national interest, could therefore affect the effective resolution of the dispute. This risk will clearly have to be balanced by tribunals who may consider the appropriate use of confidentiality orders.

Bezant: One of arbitration's appeals is confidentiality of the dispute and the award, but this can lead to uncertainty over due process or uneven experiences. Sunlight is the best disinfectant, and greater transparency of the process and evidence should lead to more effective conduct, including ensuring experts express coherent and consistent views and risk public censure if they do not. Better dissemination of awards, and their reasoning, could also assist in more predictable outcomes but, ultimately, if the parties prize confidentiality then this needs to be

recognised in the form of arbitration they adopt.

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>
> — Mark Bezant

Khan: What significant challenges tend to arise when disputing parties are resident in jurisdictions with dissimilar legal backgrounds? What steps can parties take to deal with these cultural issues and smooth the process?

Bentham: Classic examples of conflict arise in relation to the styles of pleading, differing approaches to disclosure, including issues of privilege, and witness preparation – which raises issues of professional conduct as well as simple arbitral procedure. It is very important that the parties agree at the outset what rules they will apply. The greatest problems come when the parties have proceeded on the basis that they all understood what was expected, only to find out after the event that different standards and approaches were being adopted. A strong tribunal with foresight of these issues can be particularly useful in ensuring expectations are aligned at the outset. Though not a panacea, the adoption of IBA guidelines can help.

Litt: One very common point of conflict between different legal cultures in international arbitration is discovery and disclosure. Many common law systems provide for relatively broad disclosure between the parties of materials and information relevant to the dispute. Civil law systems tend to be more circumspect when it comes to the exchange of pre-trial information between the parties. Another frequent point of conflict is the importance of live witness testimony and the way in which witnesses are prepared to give their testimony. Each of these issues can be addressed to some extent in a pre-dispute arbitration agreement. But whether they are or not, they certainly can be addressed at the outset of arbitration proceedings, either by adopting standards published by an organisation like the International Bar Association or by incorporating clear guidelines in an early procedural order.

Venegas: I believe that the most relevant challenges are those that arise from the legal tradition of the parties – for example, document production in common law are different from civil or continental law. Also, the common law system is inspired by an oral oriented tradition while civil or continental law is almost completely written. Another

relevant challenge between the jurisdictions are the ethics of the lawyers, because what is ethically right in some jurisdictions is wrong in others; thus, sometimes the parties behave in a way that, for them, is proper but for the counterparty is a felony or an unethical behaviour.

Massey: The nature of international arbitration means that disputants are usually located in different jurisdictions which may have dissimilar legal approaches to the litigation process. Specifically, common law and civil jurisdictions will generally adopt a different approach to procedural issues, such as discovery and witness testimony. This can cause tensions in the arbitral process. Generally, however, the international arbitration rules operate to bridge the gap between different legal cultures to ensure that any potential tensions that may arise are minimised. From a practical perspective, the arbitral tribunal should be proactive in establishing the logistical and evidential timetable at the commencement of the proceedings.

Tout: One of the main difficulties that arises is how a tribunal deals with the cultural differences between parties, especially if the parties have agreed upon a sole arbitrator. For example, an English arbitrator with a traditional judge's attitude to disclosure may expect a more exhaustive disclosure exercise and entertain significant requests for additional documentation. This would likely conflict with the attitudes of parties from civil backgrounds or those jurisdictions which do not place such emphasis on document production. The key to avoiding these issues is to appoint an arbitrator who has a more international background and appreciates the differences between jurisdictions so that they are aware of the procedural and cultural differences that may arise and can therefore ensure that any issues can be dealt with sympathetically.

Kleiman: The international arbitration procedure is specifically designed to satisfy parties which are resident in different jurisdictions and which come from different legal cultures. It is thus tailor-made for parties who come from different legal cultures. The possibility to jointly determine procedural rules together with the arbitral tribunal is therefore very useful when it comes to satisfying particular concerns that the parties or their counsel may have. Challenges may arise especially in relation to ethic rules applicable to counsel and arbitrators. Languages can also be used as a way to limit options in terms of choices of arbitrators and counsel. One should encourage lawyers from all parts of the world to join the international arbitration community. I think that it needs to be as diverse and inclusive as possible.

Bezant: The potential for misunderstanding of the process and the roles of arbitrators and experts is high, and therefore so is the potential for dissatisfaction by users of arbitration. This typically runs to expectations as to the disclosure process. Those from a US environment are often surprised or even disappointed by the limited disclosure adopted in many arbitrations, whereas those from other environments consider the same levels of disclosure as invasive. The respective duties of arbitrators, witnesses and experts, and the standards expected of them, are not always fully understood by the parties. It is very hard to transplant or

translate cultural norms. Legal counsel can help experts by reinforcing to their client the need for party-appointed experts to be independent.

Fitch: The exchange of information tends to highlight differences in legal backgrounds. Parties from the US are accustomed to broad pretrial discovery, which is not the norm in civil law and other common law jurisdictions. The ethical obligations of counsel in the exchange of information also vary by tradition. For instance, traditions even differ as to whether counsel is obliged to produce or withhold material damaging to the client's position. In addition, the appropriate means for presentation of evidence at the hearing, including the extent of witness preparation and cross-examination permitted, varies between and among civil and common law jurisdictions.

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— Jonathan W. Fitch

Khan: How is the international world developing a clear separation between the role of the judiciary and that of an arbitrator?

Litt: An arbitrator performs a subset of the roles performed by national courts, and there are some things, like the enforcement of awards, for which we still rely on the courts almost exclusively. However, there have been some efforts to empower arbitrators to take on more roles traditionally performed by judges, thereby limiting the judiciary's involvement in arbitration. Applications for emergency relief is one area that arbitration traditionally left to the courts, but current arbitration rules from many of the leading arbitration institutions establish procedures by which parties can seek emergency relief in arbitration, rather than resorting to the courts of one country or another.

Venegas: The international world is drawing a visible line between the judiciary and arbitration. This line has been sketched providing for cooperation when it is needed and also allowing each judge or arbitrator to perform its functions when it is most reasonable and cost efficient to do so. Thus, there is a general understanding under which the parties acknowledge there is an ideal dispute resolution method for their own dispute. As a result, sometimes arbitration will fulfil requirements that the judiciary does not and the other way around. Nevertheless, there have been some amends to the Mexican legal framework that are trying

to blur such lines – an example is the current discussion regarding the possibility of filing a writ of *amparo* against an arbitral award.

Massey: Most counties have adopted a pro-arbitration stance and have taken steps to enact an arbitration friendly legislative framework. The 'competence-competence' principle is an important feature of international arbitration, in that it empowers the arbitral tribunal to decide its own jurisdiction, thus ensuring the tribunal's independence. Allied to the 'competence-competence' principle is the 'doctrine of separability' which provides that an arbitration clause is 'separable' from the contract containing it and thus may survive a successful challenge to the validity of the contract itself. Together, these principles safeguard the autonomy of arbitral proceedings from undue court interference.

Tout: The international business community certainly now better understands the distinction between arbitration and litigation and the advantages that each can offer. This is demonstrated by the choices that are made by parties in their agreements. For example, the historic position taken by financial institutions is that their agreements be subject to the jurisdiction of the English courts because of the perceived reliability of the result together with the ability to obtain summary judgment. However, banks are now turning increasingly to arbitration where the borrower is in a jurisdiction which does not recognise foreign court judgments but does recognise arbitral awards. The use of unilateral election clauses are now frequently used to allow a party to retain the flexibility to choose which method it prefers once a dispute has arisen.

Bezant: The 'judicialisation' of the arbitral process has been noted by commentators, as the more informal nature of arbitration has become replaced by specialist practitioners overseeing dispute resolution processes with many of the features of court processes present – document production, interlocutory applications, extensive hearings, and detailed submissions by the parties. This is not entirely unexpected in complex international disputes where the domestic court cannot provide the comfort required by the parties – or at least that required by an external investor. Domestic judiciaries are therefore now performing a more 'regulatory' role to examine challenges to requests for arbitration or to awards on grounds of jurisdiction, impartiality, lack of due process, on public policy grounds, or enforcement.

Fitch: In the US, the Supreme Court treated the distinction between judiciary and arbitrator in its recent holding in *BG Group v. Argentina*. The Court enforced an arbitration award against the Republic of Argentina despite the fact that the arbitrator – not a judge – had decided whether a precondition to arbitration had been satisfied. Typically, substantive questions of arbitrability are delegated to the courts, and procedural threshold questions are within the arbitrator's purview. The Supreme Court found that a 'local litigation requirement' in an investment treaty between Argentina and the UK was purely procedural, and thus that the arbitrator's determination of whether that requirement had been satisfied was entitled to the Court's deference.

Bentham: The English courts continue to be supportive of the arbitral process, and mindful of the separation that is necessary to ensure its success. The recent decision of Teare J in *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm) demonstrates the judiciary's commitment to upholding awards, and highlights, once again, that a high threshold must be met in order to convince the court of a serious irregularity that has led to substantial injustice. The same case also addressed the question of bias in the context of arbitrators sitting on multiple tribunals where the same firms of solicitors acted on different cases, finding that only the most suspicious of observers might view this as indicative of bias.

Khan: What arbitration centres outside the established few do you think will flourish over the next 10 years or so? What challenges remain for parties entering arbitration in these regions?

Venegas: From my experience, the future centres of arbitration will be Mexico, Peru and Brazil in Latin America and Singapore, Hong Kong and Tokyo in Asia. The main challenge that the parties will face is the cultural clash between legal traditions and frameworks. This issue may create other challenges. For example, some Asian jurisdictions require the parties' counsels to be authorised lawyers at the seat of the arbitration. Also, the common or civil law differences may be a challenge for the parties, when requesting judicial support at the seat of arbitration.

Massey: The arbitration centres in the UAE have strong potential to grow over the next decade. The influx of international investment in the region has brought with it a need for dispute resolution machinery sophisticated enough to cater for complex commercial disputes and to provide confidence to international investors. The Dubai International Arbitration Centre (DIAC) is Dubai's leading arbitration institution. The DIAC rules are based on the UNCITRAL arbitration rules and include elements taken from the LCIA, ICC, WIPO and Stockholm arbitration rules. The DIAC, therefore, provides a modern arbitration framework and its caseload is increasing each year. The UAE is also a signatory to the New York Convention which adds to its attractiveness as an arbitration centre.

Tout: With huge increases in investment in the African economy, it is only natural that one of the African countries establishes itself as a centre for arbitration in the next decade. The most likely candidates are Mauritius, given its efforts to make itself a recognised centre, and Nigeria, given the continuing growth of its economy. The key to those countries succeeding is to have the necessary legal and administrative framework in place. Improvements in recognition and enforcement of arbitral awards, the quality of local legal services and arbitration facilities are essential to improve the standing of African arbitration centres. However, among the commonly perceived difficulties are that the local courts or arbitrators are ill-equipped to deal with complex proceedings as a result of delay, inefficiency or inexperience.

Bezant: The rate of change will be dictated by international trade and

investment flows, the specific forums identified in arbitration clauses as new agreements are made – particularly if the use of investment treaties diminishes as states withdraw – and the scale and quality of professional resources available locally to service clients' needs in the newer centres. As a global practice, we are seeing some themes develop as the newer arbitration centres and bodies develop. Currently, Singapore and Hong Kong stand out whereas Middle Eastern centres have perhaps made less forceful progress to date.

Fitch: The growth of the excellent arbitral centres of the Pacific Ring – in Singapore and Seoul, for instance – will no doubt continue. In the US, I am bullish on Boston's continued progress towards becoming a robust centre of international arbitration. The well-developed laws of its federal and state courts favour enforcement of arbitration clauses, deference to the authority of arbitrators, and the recognition of arbitral awards. The legal infrastructure in Boston – the quality and impartiality of its judiciary, the availability of specialised lawyers and experts in technology, the biosciences, engineering and finance, and its academic leadership in international arbitration – is of the highest rank.

Bentham: Outside the established few, Singapore is an increasingly important hub for Asia-related disputes, both in terms of a seat and also an institute (SIAC). Whether it overtakes Hong Kong in terms of popularity remains to be seen. For African disputes, everyone is keeping a watchful eye on Mauritius, where the LCIA and the Mauritian Government recently established the LCIA-MIAC arbitration centre, and where very recently the Mauritian Supreme Court showed a pro-arbitration stance in *Cruz City 1 Mauritius Holdings v Unitech and anor 2014 SCJ 100*. Looking at other institutions, PRIME Finance is one to watch.

Litt: It seems that every few months brings another announcement of the next great arbitration centre. They are proliferating in North America, the Middle East, Asia – really, everywhere. Which ones will succeed and flourish? That will depend on two things. First, which ones will be complemented by sufficient legislative or judicial support for arbitration to make parties confident that, years after the contract is executed, arbitration in the forum will be predictable and consistent with international norms. Second, which ones are positioned geographically to take advantage of growing trends in business transactions. Singapore was fortunate to have both of these factors work in its favour.

"The 'competence-competence' principle is an important feature of international arbitration, in that it empowers the arbitral tribunal to decide its own jurisdiction, thus ensuring the tribunal's independence."

— Andrew Massey

Khan: What hurdles do parties regularly face with regard to enforcement of awards? What other obstacles can surface and derail the international arbitration process?

Kleiman: Domestic courts may sometimes adopt an interventionist approach that can result in an in-depth review of arbitral awards, thus increasing the time and costs of enforcement proceedings. National courts may also adopt a narrow view on what constitutes 'international arbitration' or non-arbitrable matters, or broaden the reach of public policy in order to refuse the enforcement of the award. On the other hand, unhappy parties may also try to challenge arbitral awards for tactical reasons. In the same way, they can try to derail the international arbitration process by challenging arbitrators and by bringing parallel proceedings before national courts.

Massey: Generally, most countries can be viewed as becoming more and more supportive of the arbitration process thereby reducing the historical risks associated with enforcing arbitral awards. The New York Convention provides security to parties with respect to enforcement. Additionally, many countries have enacted domestic arbitration legislation incorporating the UNCITRAL Model Law which provides further security to disputants seeking to enforce arbitral awards.

Tout: The main hurdle that continues to face parties is the reluctance of the courts of certain countries to consistently apply Article V of the New York Convention. While the Convention allows for eight possible defences to enforcement, Article V.2(b), in particular, is widely and inconsistently used by some local courts to avoid enforcement on 'public policy' grounds. Unfortunately, there is not much that a party can do to mitigate the risk of a challenge under Article V.2(b), unlike the other challenges available under Article V where a diligent party can try to ensure that a compliant award is delivered.

Bezant: Parties may examine enforcement issues late in the process or post-award, whereas these considerations should be part of the initial decision to arbitrate and the related planning. This goes to assessing whether the respondent has sufficient assets to meet a claim, and the nature of the assets – can they be removed? Are they mobile assets? Are the assets high profile such that their seizure will embarrass the other party? Where the assets are located, and whether the jurisdiction will be sympathetic to enforcement actions, are clearly key. If assets are widely distributed across jurisdictions, it can be time consuming and costly to investigate the assets and then pursue enforcement. Care needs to be taken in the drafting of orders for enforcement to reflect the complexities of group structures, to avoid the order having no teeth.

Fitch: China is currently providing a case study on this point due to a split within the leading Chinese international arbitration body, CIETAC. After CIETAC issued an amendment to its arbitration rules in 2012, an

internal conflict arose and its Shanghai and Shenzhen sub-commissions withdrew from CIETAC to become autonomous arbitration commissions. The CIETAC split has resulted in an increase in the number of preliminary challenges to arbitral tribunals' jurisdiction, particularly for arbitrations conducted pursuant to arbitration clauses naming the Shanghai and Shenzhen CIETAC sub-commissions as the administering body for the arbitration.

Bentham: The most common hurdle that we come across is delay. Even though the process for enforcement under the New York Convention is streamlined, a recalcitrant award debtor can, in some jurisdictions, manipulate the court process for recognition and enforcement of awards by introducing unmeritorious appeals, requiring multiple rounds of evidence, and delaying hearings. Although this is often simply a case of delaying the inevitable, it nevertheless wastes time and costs, and can be used to pressure the holder of an award to compromise for less than its face value.

Litt: Enforcement is the final frontier for many international arbitrations. The moral victory inherent in a favourable award quickly fades if the prevailing party cannot collect its winnings. A successful enforcement effort can require in-depth knowledge of various enforcement regimes. In New York, the push in recent years for enforcement of complex international awards and judgments has led to the rapid development of the law in this area. The primary question the New York courts have been grappling with is the extent to which they can order parties to bring assets and information into New York from outside the jurisdiction to satisfy the demands of judgment creditors. The answer is still in flux.

Venegas: The main obstacles when it comes to arbitral award enforcements are the lack of subscription to the New York Convention and the misinterpretation of the Convention. The misinterpretation can consist in the enlargement of the scope of the public policy as a nullity cause. Another obstacle may be the constant intervention of the court in the proceeding and the review by the judiciary of the merits of the award. When it comes to the obstacles in the proceeding, sometimes the main obstacles are the parties themselves; sometimes they use 'guerrilla tactics' to delay the adequate conduction and conclusion of the proceeding.

"Domestic courts may sometimes adopt an interventionist approach that can result in an in-depth review of arbitral awards, thus increasing the time and costs of enforcement proceedings."

— Elie Kleiman

Khan: The goal of uniform ethics and core professional standards in international arbitration will serve to enhance an already vibrant form of dispute resolution. But how can this be achieved?

Tout: The recently adopted IBA Guidelines on Representation in International Arbitration have provided much needed principles for a uniform code of standards in international arbitration. Before their introduction, the application of such standards was very much dependent on the attitude of tribunals and the courts of the seat. The new guidelines will therefore be a useful tool for tribunals and counsel to emphasise to parties that there is a standard of behaviour expected in an arbitration. However, the guidelines apply only at the option of the parties and do not grant tribunals the enforcement powers reserved for bars or other professional bodies. Currently, tribunals can only regulate the conduct of parties through the allocation of costs.

Bezant: Development and promulgation of codes of conduct are an important component for all participants in arbitration. Some professions and organisations already have clear standards including guidance on acting as independent experts. Others have experience of litigation in jurisdictions where, again, there are protocols on professional conduct centred on the need for independence. The issue is not so much uniformity of standards or a single regulatory body, as arbitration is too diverse in application, but rather arbitrators, counsel and experts demanding high standards of themselves and their peers. The universe of senior participants is still quite small and it is up to us to set and maintain the tone as the use of arbitration extends globally.

Fitch: The international arbitration community has largely embraced the need for expression of uniform professional standards as shown, for instance, in the issuance of the International Bar Association's Guidelines on Party Representation in International Arbitration. Lawyers involved in international arbitrations come from diverse legal traditions and consequently are bound by different ethical standards. The guidelines seek to even the playing field and prevent one party from taking advantage of counsels' differing ethical duties. The guidelines are a step towards a uniform standard of professional ethics in international arbitration, particularly with respect to counsel's instructions to their clients regarding the preservation of evidence, delineating the scope of permissible *ex parte* communications with arbitrators, and the correction of false submissions to the tribunal.

Bentham: The IBA Guidelines on Party Representation in International Arbitration provide a useful reference for the conduct of counsel involved in international arbitration. National variations can lead to differing expectations of, and even unfairness in, the conduct of arbitrations involving parties and counsel of different nationalities. Against this backdrop, guidance on the standards to be adopted by legal representatives is welcome. However, we should proceed with caution. One of the key drivers underpinning arbitration's success is its flexibility. The introduction of ever-more prescriptive guidelines and rules risks

undermining that very flexibility. We should take care to ensure that the current trend of promoting the goal of uniform ethics and standards does not undermine arbitration's ability to adapt to and accommodate different traditions and standards.

Litt: Lawyers are governed by the ethics rules and professional standards of the jurisdictions where they are licensed to practice, and they are subject to the decisions of their local bar associations and disciplinary bodies. That is why we are unlikely to ever achieve uniform ethics rules and professional standards in international arbitration. But parties and counsel in international arbitration can agree to follow certain rules of conduct, and can also agree to give arbitral tribunals the power to fashion remedies for violations of those rules. This is the approach taken in the IBA Guidelines, and those guidelines and other efforts like them may help the international arbitration community move closer to a core set of common standards.

Venegas: Standards in ethics in arbitration is a desirable goal and there is a need for consistency among practitioners to guarantee an equal playing field. This is due to the fact that legal ethics vary depending on the legal framework and legal tradition of each country. A good way to move toward this goal is to encourage parties to include ethical guidelines of some institutions in their arbitration clauses or in the procedural order organising the arbitral proceeding. Also, we should be aware that a fine balance between overregulating this issue and leaving it to the tribunal´s discretion must be found.

Massey: There is no doubt that a uniform code of ethics and professional standards would be a welcome addition to the international arbitration landscape. Presently, the issue of ethics and professional standards is complicated, given the inevitable legal culture clash inherently involved in multi-party cross-border disputes. A counsel involved in an international dispute may be subject to a number of different ethical and professional rules with the result that the counsel is left in somewhat of a limbo with respect to the applicable ethical and professional standards. The development of international codes through international organisations and arbitral institutions has been mooted but as yet nothing concrete has been produced.

"The recently adopted IBA Guidelines on Representation in International Arbitration have provided much needed principles for a uniform code of standards in international arbitration."

— Liz Tout

Khan: Reflecting on the world's evolving international arbitration

landscape, what do you believe are the most pressing issues that parties and practitioners need to address?

Bezant: Arbitration engages with such a broad range of issues, from mechanisms for effective resolution of major commercial disputes to public policy considerations in investor treaty arbitrations, so it is hard to identify single issues. That said, there is a need to expand the pool of senior arbitrators to allow generational handover in due course, to encourage more active participation by arbitrators in case management, and to ensure that the proliferation of new arbitration centres results in competition leading to higher standards, including among experts, and not dilution.

Fitch: The demand for international arbitration will continue to grow and expand throughout the emerging economies of the world. The ongoing success of the process will depend upon the parties' confidence that, in any given arbitral forum, they will receive a fair and impartial hearing that results in an award that will be recognised and enforced. Unquestionably, there is work to be done in strengthening the legal infrastructure of a number of jurisdictions where international commerce is thriving and local arbitral institutions are trying to gain a foothold.

Bentham: In order for arbitration to continue to be a viable alternative to litigation, its ultimate users need to have confidence in the process. What with increasing costs, ever-lengthening timetables, and increasing difficulties in enforcing awards, it seems to me that the ultimate users would have every right to start to question whether arbitration really does present a better option than litigation. With that in mind, the arbitration community – the practitioners, the arbitrators and the institutes – need to pay heed to the observations of the users and focus attention on reigning in the costs and time, and ensuring that the practice of international arbitration better mirrors the theory behind it.

Litt: There has been a great deal of discussion in the international arbitration community about transparency in investor-state arbitration. Unfortunately, there is relatively little discussion of transparency in commercial arbitration. This is particularly important for parties when selecting arbitrators and administering institutions. Without violating parties' interest in the confidentiality of commercial arbitration proceedings, institutions could maintain and publish records of every case an arbitrator has participated in. How many cases, with what at stake? What legal issues were addressed? What sort of discovery orders were issued? Making this sort of information consistently and reliably available could help build confidence among contracting parties that international arbitration is predictable and transparent, and that they are not trusting their fortunes to a mysterious black box.

Venegas: Parties and practitioners must always evaluate if arbitration is a suitable dispute resolution method for their particular dispute. There are going to be some agreements in which providing for arbitration as the dispute resolution method is not ideal. Thus, the parties must understand that the usefulness of arbitration is limited to some types of

contract or agreement. Parties must consider all the issues of their dispute, to assess whether arbitration is going to be useful or not for them. This should be evaluated carefully when deciding to file a claim. Also, when a respondent is brought in to an arbitration in which he has disadvantages – for example, elevated costs, language constraints – they should evaluate whether a settlement of its dispute would best serve their interests.

Massey: The rising cost of international arbitration is an issue that needs to be addressed and kept under control in order to ensure that arbitration remains a viable choice for cross-border dispute resolution. More can also been done to bring developing countries' arbitration frameworks in line with international best practice. Finally, steps should be taken to introduce a uniform international code on ethics and professional standards in international arbitration.

Tout: The arbitration landscape looks increasingly green and fertile. While there remain issues such as in respect of enforcement, the global legal community is working hard to minimise those issues year by year, mainly by increasing the available jurisprudence and determinedly enforcing awards across the world. One issue that is likely to face the international arbitration community in the future is the number of active arbitrators. If arbitration continues to increase in popularity as the preferred forum for international disputes, the strain on the pool of arbitrators will increase. This will almost certainly lead to delay as the most popular arbitrators will have ever greater demands placed on their time.

Kleiman: Arbitration has recently faced credibility issues that might affect its attractiveness among commercial operators as well as its public image. The procedural hurdles faced by Argentina's creditors when enforcing awards obtained against Argentina have affected operators' confidence in arbitration. Likewise, the *Tapie* saga in France has left some marks in the local public opinion and mass media, even though most businesspeople are wary of the domestic idiosyncrasies involved in this case. Most operators understand that international arbitration remains the most efficient method for obtaining an enforceable final decision given by independent judges in a reasonable amount of time.

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