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Worlds collide

W ith growth comes complexity. And in turn, disagreements. As global investment flows continue to increase, often into unfamiliar jurisdictions, misunderstandings become more likely, and more difficult to resolve.

In a year defined by geopolitical instability, unpredictably interventionist governments, the staggered removal of sanctions, and many emerging markets’ less than rosy economic forecasts, these risks are only exacerbated. Appraisal litigation, investor-state disputes and covenant breaches are all more likely.

But while there is increasing scope for tensions between contracting parties, there are also more ways to mitigate them. And resolve them if they materialise.

New arbitration centres appear every year, judicial cooperation is on the rise, and global initiatives and international dialogue encourage the sharing of knowledge among dispute resolution professionals.

Parties putting deals together are also taking a forward-looking and pragmatic approach to their transactions, including through warranty and indemnity insurance. And litigation support and document discovery services are now flourishing industries.

There is increased scope for tensions between contracting parties, but there are also more ways to mitigate them.

Against this backdrop, IFLR’s 2015 Dispute Resolution Guide comes at a critical time. With contributions from Panama to China, Switzerland to Oman, this is a truly global publication. We tackle some of the most pressing issues in contentious law including the merits of new arbitration centres such as Singapore, the place of investor-state dispute settlement within the Transatlantic Trade and Investment Partnership, and enforcement of foreign judgments.

This year’s guide also includes Q&As with some of the area’s most prominent thought leaders. On page 4 we speak with Alexis Mourre, president of the International Chamber of Commerce’s International Court of Arbitration about changing attitudes towards the practice. We also chat with Noah Hanft, former general counsel of MasterCard and now chief of the International Institute for Conflict Prevention & Resolution, about what led him to focus entirely on alternative dispute resolution (p7). And continuing on from last year’s guide, Christophe Bernasconi of the Hague Conference on Private International Law describes the recent progress made by signatories to the Convention on Choice of Court Agreements, which takes effect this October (p10).

The 2015 edition of the Dispute Resolution Guide is a valuable addition to IFLR’s global coverage. We hope it will be of as much value to our readers.

Danielle Myles
Editor
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Expert analysis

International Court of Arbitration

Pushing the boundaries

Hague Conference on Private International Law

An inspired choice
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On July 1, Alexis Mourre became one of the most important lawyers in the world of arbitration. Upon taking up the presidency of the International Chamber of Commerce (ICC) International Court of Arbitration (ICA or Court), he took the helm of the world’s first – and according to some, still the only – truly global arbitration forum.

With a legacy dating back more than 80 years, some organisations could be caught up in the past. The ICA, however, is more dynamic than ever. Speaking with IFLR, it’s clear that Mourre is intent on not only proving, but also improving arbitration’s value. He is committed to ethics, transparency, fairness and trust in arbitration proceedings. And realises that underlying unbalances, such as the demographics of arbitrators, can have a knock-on effect.

Mourre is not only a thought leader, but also a pragmatist who is attune to the realities of dispute resolution today. Here, he shares his insights with IFLR.

**What are your top priorities during your presidency of the ICA?**

We are more conscious than ever of our users’ concerns concerning the time and costs of arbitration proceedings, and we will be ever more rigorous and demanding as to the expeditiousness of our arbitrations. Much progress has already been made in ensuring that our tribunals conduct proceedings in the most efficient manner. Save in exceptional cases, ICC awards are made between 18 to 24 months from the request for arbitration, and our teams closely monitor the progress of the case when extending the time-limit for rendering the award. We do not hesitate to press those tribunals who do not act with the desired efficiency, and this generally produces very good results. And we do not hesitate to financially sanction unacceptable delays, in the rare occurrences in which they happen. We will be very transparent with our arbitrators in making it clear that failures to produce a draft award in a reasonable time has consequences in terms of the determination of their fees. We will also seek to reduce, to the maximum extent possible, the time needed to constitute arbitral tribunals.

I will also seek to give more voice to our users by creating a platform allowing corporate counsel to interact directly with the Court’s leadership on a permanent basis. It is of the utmost importance that the voice of corporate counsel be heard and fully taken into account in our decisional practice and future strategic plans. I am very happy, in this regard, that the Court’s Governing Body is chaired by a corporate counsel.

There are many other questions on the table. A unique feature of the ICA is its global reach and transnational nature. In contrast to all other arbitral institutions, the Court is not rooted in any particular jurisdiction and is not the expression of any legal culture. We are not funded by any government and do not have links with any state. Our rules do not provide for any seat

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**Pushing the boundaries**

Alexis Mourre, president of the International Chamber of Commerce International Court of Arbitration is striving to take arbitration to the next level

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**It is an important goal for the Court…to favour whenever possible the rise of a new generation of arbitrators**
by default when the parties did not agree on the legal venue. We administer cases from three continents, thanks to the presence of our teams in Paris, New York and Hong Kong. Our secretariat is able to administer cases in more than 25 different languages, our Court is composed of 130 members from 80 different jurisdictions, and the Court avails itself of the support of its more than 90 national committees, giving it a unique global reach. We will in the months to come reinforce and expand that global reach, and to that effect we are working on the possibility of opening an office of the Court in Latin America. We will also hold our Court sessions not only in Paris, as was the case in the past, but also abroad. We will in 2016 hold plenary sessions in New York and Hong Kong. We want to make sure that the Court is at all times perceived as a truly international organisation, not as a civil law or common law institution or as a French or European organisation. From that perspective, I expect our Court members on all continents, as well of course as our 17 vice presidents, to act as ambassadors of the Court on a global basis and help us create even more proximity with our users worldwide.

We will also need to increase the diversity of the arbitration community. Arbitration is still too often seen as a club of old, male, western practitioners. It is an important goal for the Court, when appointing arbitrators, either directly or upon the proposal of a national committee, to favour whenever possible the rise of a new generation of arbitrators, including from emerging jurisdictions. Gender diversity also matters much to us, and I am proud that our bureau of vice presidents respects perfect gender equality.

Another important point is making sure that the integrity and fairness of the arbitration process is at all times beyond any doubt. We will be very demanding in making sure that conflict disclosures made by our arbitrators are transparent and provide the parties with all the relevant information needed to assess whether there is a reasonable doubt as to the arbitrator’s independence and impartiality. Equally, the Court will be as robust in rejecting frivolous and tactical challenges as it will be rigorous in sanctioning failures to comply with the arbitrators’ duty to disclose. The Court has always played a pioneering role in this respect and will continue to do so. I welcome, in this respect, that the International Bar Association’s arbitration committee has adopted in the new Conflicts Guidelines our position as to the so-called advance waivers. Our strong view is that those waivers have no effect as to the arbitrators’ ongoing duty to disclose.

Increasing the transparency of the Court’s procedures is also high on my agenda. Our rules provide that the Court shall not provide reasons for its decisions. That is an important rule, which is needed in order to avoid unnecessary delays and administrative costs. Nevertheless, we acknowledge that in certain circumstances there is a need to provide reasons to the parties if they request us to do so. In this respect, our practice has evolved in recent months. As far as arbitrations involving states or state entities are concerned, an ICC task force has recommended that reasons be provided for decisions made on challenges to arbitrators; this has been done on two occasions. We will expand this practice to all cases in which the parties request us to do so, irrespective of whether a state or state entity is a party. We are also considering extending this practice to certain categories of decisions, other than challenges. We will in the coming months seek to make our practice transparent to the parties by amending the note that is sent to them at the outset of a procedure.

For a party facing a dispute, what advantages does the ICA have over the many other arbitration centres springing up around the world? As I said, the Court is the only truly global arbitral institution. This guarantees that it is an absolutely neutral forum for the resolution of disputes, irrespective of the origin of the parties or the nature of the dispute. This neutrality is also ensured by special rules that are applied when a state or a state entity is present. For example, in such a case, the award will always be scrutinised by a plenary session of the Court, as opposed to a three-members committee. Another rule that applies when a state or a state entity is present is that arbitrators’ appointments are made directly by the Court rather than upon the proposal of a national committee.

Another advantage is of course the quality of our rules. Not only are they the best in the world, but we have more than 80 years of experience in administering cases. Experience matters, and it gives immense value to our users and the arbitral community at large. Our fees schedule also ensures that arbitration costs remain limited and predictable to the parties.

But the most important and unique feature of our arbitration is, of course, the high quality of our scrutiny process. No ICC award can be notified to the parties before it has been controlled and approved by the Court, either in a plenary session or in a three-members committee. All awards are carefully read and controlled by the secretariat, and when they come to the Court, they are subjected to an in-depth discussion. The Court provides the arbitral tribunal with observations as to the award’s form (to which the tribunal has to comply), and it can call the tribunal’s attention to questions of substance. These comments are in the overwhelming majority of cases adopted by our tribunals. This process is unique and has immense value to the parties. It does not take more than three or four weeks, and it increases the quality of our awards; not only as far as questions of form are concerned, but also the clarity and coherence of the reasoning or the calculation of damages. The award’s scrutiny lowers considerably the risk that it will be annulled at the seat of the arbitration, and increases the likelihood that it will be enforced in other jurisdictions.

For which parties, and in what types of disputes, is arbitration likely to be of most benefit? When a dispute involves parties from different jurisdictions, one of the main reasons parties choose arbitration is because they want a neutral forum. No institution can ensure, better than the ICC International Court of Arbitration, the perfect neutrality of the process. Arbitration is of course particularly suitable in large, complex disputes, in which arbitrators will need to resolve difficult technical and legal issues, as well as to deal with complicated questions of damage valuation. For all these issues, having an experienced arbitral tribunal able to devote the necessary time to cases that often involve thousands of pages of submissions as well as lengthy and complex expert reports and the hearing of numerous fact witnesses, is of course key. Finally, arbitration is more efficient in terms of time and costs than court litigation.

Is it difficult to promote arbitration in litigious societies, and in which of these countries is progress being made? The acceptance of arbitration has now become universal, and progress is being made in many jurisdictions that used to be more sceptical or less favourable to the process. Case law around the world demonstrates that some of these jurisdictions — in particular India and parts of Latin America — are becoming more favourable to arbitration. Globally, there is more judicial restraint, less reviewing of the merits of awards, and there is now widespread deference to the New York Convention. So, even though there still are regrettable decisions, I think we are overall in a positive situation.

It is essentially a question of trust in the process, and trust is of course not a given. For example, I was recently in California, where corporate counsel from large hi-tech companies told me that they are used to court litigation, because they have judges that are highly specialised and knowledgeable of the technology industry. Legitimately, they want to know what arbitration offers that their courts don’t. That is certainly a legitimate question. We are now in a world in which arbitration is not as much of a given as it was in the past, and we need to make the case that it is more efficient than court litigation. We also need to ensure that arbitration remains at all times a fair and legitimate process. Trust takes decades to be established, but it can be destroyed very quickly. What is happening at the moment in the context of investor-state arbitration is a cautionary tale.

Building on that last point, to what extent does international arbitration’s effectiveness depend on the willingness of courts to recognise and enforce awards? There is now wider acceptance of the international nature of arbitration, and the New York Convention is generally accepted and properly applied. There
There has been an anti-arbitration campaign led by some NGOs [non-governmental organisations], based on arguments that are often based on misconceptions, and at times politically biased. My concern is that this negative climate spills over to commercial arbitration. This has not happened so far, but it is even more necessary to make the case for arbitration in the context of investor-state arbitration. This has developed recently, particularly in the context of the negotiation of the TTIP [Transatlantic Trade and Investment Partnership]. There has been a pushback by some states, and the European Commission has taken a stand that is not precisely favourable to arbitration. There has been an anti-arbitration campaign led by some NGOs [non-governmental organisations], based on arguments that are often based on misconceptions, and at times politically biased. My concern is that this negative climate spills over to commercial arbitration. This has not happened so far, but it is even more necessary to make the case for arbitration and the trust that it deserves. We need to make the case, over and over, that arbitration is a fair and proper means of resolving disputes.

The second trend is a growing suspicion against arbitration in the context of investor-state arbitration. This has developed recently, particularly in the context of the negotiation of the TTIP [Transatlantic Trade and Investment Partnership]. There has been a pushback by some states, and the European Commission has taken a stand that is not precisely favourable to arbitration. There has been an anti-arbitration campaign led by some NGOs [non-governmental organisations], based on arguments that are often based on misconceptions, and at times politically biased. My concern is that this negative climate spills over to commercial arbitration. This has not happened so far, but it is even more necessary to make the case for arbitration and the trust that it deserves. We need to make the case, over and over, that arbitration is a fair and proper means of resolving disputes.

**What are the most common misconceptions about arbitration?**

The main misconception that you still see too often is that arbitration is a proxy for court litigation. Some counsel still try to import procedures that belong in litigation, but have no place in arbitration. An obvious example is document production. Some parties think there should be broad discovery, or to the contrary object as a matter of principle to any form of document production. They fail to see that arbitration has its own procedures with respect to the disclosure of documents. That said, there is now a broad awareness that arbitration is distinct from court litigation, but some parties still act in arbitration as if they were before a court.

**You’ve been practising law for more than 25 years. How have you seen attitudes towards arbitration change over that time?**

There are two important trends. First, there is fiercer competition between institutions than ever before, and that is in part due to the fact that new institutions have emerged, in particular in Asia. There is also an emerging competition between arbitration and court litigation. Some jurisdictions, such as Singapore and Dubai, have sought to create international courts with the aim of competing with arbitration. So it is a more open and competitive landscape.

**What should parties consider when drafting an arbitration clause to include in their contract?**

I will say only two things. They should adopt institutional arbitration, for it is in my view preferable to ad hoc arbitration. And if parties opt for institutional arbitration, they should adopt the clause recommended by the particular institution. Do not try to reinvent the wheel or redraft what experienced institutions have done, save in the measure of the strict necessary. In the vast majority of cases, it is advisable to include the clause recommended and proposed by the institution.

**Some believe that party-appointed arbitrators may lack the impartiality of one who is appointed by a third party. What are your thoughts on this point?**

I do not think that this is the case. In the vast majority of cases, we see party-appointed arbitrators acting properly and in an impartial manner. There is now a growing consensus in the international arbitration community that party-appointed arbitrators need to be independent and impartial, and there is a growing awareness that unethical behaviour does not advance the case of the party having appointed a biased arbitrator. In addition, arbitral institutions are more robust in replacing arbitrators who do not behave properly. In my view, the system of party appointments offers immense advantages, by giving the parties more participation in the process, and also by ensuring the diversity of the arbitral community, which would be jeopardised if appointments would exclusively depend on institutions. I also think that the parties are in the first place better placed to select the most suitable arbitrator for their case. Party appointments is the most broadly adopted method and it works well. I do not see more problems in tribunals where arbitrators have been appointed by parties as opposed to when appointed by an institution.

**Trust takes decades to be established, but it can be destroyed very quickly**

**About the contributor**

In 1996 Alexis Mourre founded Castaldi Mourre & Partners, which is now a firm of 35 lawyers specialising in arbitration and dispute resolution. In May 2015, he established his own arbitration practice. Alexis has served as counsel to a party, president of the tribunal, co-arbitrator, sole arbitrator or expert in more than 200 international arbitrations, both ad hoc and before most international arbitral institutions (including ICC, ICSID, LCIA, ICDR, SIAC, SCC, DIAC and VIAC).

He is the author of numerous books and publications in the field of international business law, private international law and arbitration law. He is founder and past editor in chief of Les Cahiers de l’Arbitrage – The Paris Journal of International Arbitration. Starting July 1 2015, Alexis is president of the ICC International Court of Arbitration; he was vice-president of the Court from 2009 to 2015. He was vice-president of the ICC Institute of World Business Law from 2011 to 2015, co-chair of the IBA Arbitration Committee from 2012 to 2013, LCIA Court member from 2012 to 2015, and council member of the Milan International Chamber of Arbitration from 2006 to 2014. He is a member of a large number of scientific and professional institutions dedicated to arbitration and private international law. He is the founder and past president of Paris Place d’Arbitrage/Pari the Home of International Arbitration. Alexis is fluent in French, English, Italian and Spanish, and has a working knowledge of Portuguese.
Noah Hanft knows a thing or two about resolving business disputes. After nearly 30 years working at MasterCard, he is well-attuned to the fact that traditional litigation is not always the answer. Now, as head of the International Institute for Conflict Prevention and Resolution (CPR), he is helping to spread the word among corporates and banks.

The message seems to be getting out. A new generation of general counsel are taking a more pragmatic approach to dispute resolution, challenging the traditional view that litigation is simply a cost of doing business. They are realising that alternative dispute resolution (ADR) makes sense economically, and that resolution via arbitration or mediation is more likely – and quicker – than a court case.

To describe this changing mindset, CPR has embraced the phrase ‘redefining winning’; success isn’t a court ruling, but managing disputes in a way that has minimal business disruption.

Here, Hanft describes why CPR is uniquely positioned to move the ADR debate forward, the misconception that ‘A’ in ADR is akin to an alternative lifestyle, and the cost savings that flow from early case assessment protocols.

If you can think about any ADR or arbitration process early on, I think it is a sign of strength

The International Institute for Conflict Prevention and Resolution is driving broader acceptance of alternative forms of dispute resolution. Its president and CEO, Noah Hanft, explains how the organisation is helping address the major misconceptions.

How does CPR differ to international arbitration centres?
CPR is different in significant ways, which give rise to many of the advantages that we have vis à vis other international arbitration alternatives. Firstly, CPR was created over 35 years ago by corporations and counsel who were looking for alternatives to traditional litigation. That in and of itself – that heritage – has led CPR to focus not only on providing services, but also on being a think tank and thought leader in the dispute resolution space.

The composition of CPR’s membership is notable. Very progressive law firms, leading corporations, in-house counsel, academics, judges, some government officials – it’s very broad, but they all share a common interest in advancing the state of dispute resolution around the globe. And I think this grounding makes it well suited to address many of the challenges that arbitration faces in the international arena. Our members’ involvement has also really driven CPR to innovate and contribute to the dispute resolution dialogue.

Can you elaborate on how CPR is well-suited to address many of the challenges faced in international arbitration?
The development of the International Administered Arbitration Rules is a prime example of how our users and practitioners have worked together to advance dispute resolution and, at the same time, realise the fruits of their innovations. A few years ago a number of our corporate members asked us to address some of the challenges that arbitration faces, such as those relating to timeframe, costs, lack of impartiality and confidentiality – matters that go to the integrity of the arbitration process. And so our arbitration committee and CPR formed a subcommittee which, working with CPR staff, came up with these new rules that are highly innovative and designed in every respect to address the challenges that arbitration faces.
Take, for example, timeframes. The CPR rules provide for a case to be completed within one year from the time the panel is constituted until the award. And this isn’t a box-ticking exercise; it’s a firm requirement, and CPR must approve scheduling orders that would result in the award being rendered more than 12 months after the constitution of the tribunal. We also wrote into the rules that all the parties, including the arbitrators and CPR, must utilise best efforts to meet that schedule. So it is a very real timeline, designed to get cases moving rapidly and address the concern that arbitration is becoming like litigation in terms of how long it takes.

A speedier process also drives down costs, as it means lower legal fees. In addition, the rules cap administrative fees. No matter how large the claim, the CPR’s administrator fee is $34,000, which I understand is much lower than the alternatives.

But the most significant innovation, and the one that has been recognised around the world, involves the selection of the panel. We have the usual options, including appointment by CPR, or each of the parties choosing a panel member and the third being appointed by CPR or the two panellists. But the most unique aspect, and we are the only organisation where you see this, is the CPR Screened Selection Process. This preserves what many users like about arbitration – in terms of playing a role in the selection of the panel – but unlike the typical process, the choice is not known to the arbitrator.

That is a unique innovation in the international arena that CPR originally developed for its domestic market, but one that is particularly appealing for international arbitrations. Not only parties but also arbitrators are excited about it. When I speak to in-house corporate counsel, there is a lot of concern about the notion of arbitrators advocating for parties. And from what I hear from arbitrators, this unique aspect of CPR’s rules takes away the psychological baggage stemming from knowing which party selected them, and then potentially coming out the other way. So I think it goes to the perception as well as the integrity of the process.

Separate from these recent innovative rules, CPR is well known for having instituted a self-administered arbitration process from its early days. This is where CPR has minimal involvement in the process, as parties are sophisticated and able to handle the arbitration on their own. Now with the new administered arbitration rules we provide the full range of options from non-administered to fully administered proceedings.

How can companies make use of CPR’s services, and does this have to be decided at the time of entering their contract?

The answer to this is twofold. We believe that the best way to address dispute resolution is to have step provisions in contracts that allow for the escalation of disputes internally, then a mediation process followed by an arbitration provision if the parties desire. Using the CPR Protocol in Disclosure of Documents and Presentation of Witnesses in commercial arbitration, they can tailor their provisions. That is a classic way, but not the only way, to deal with it in a contract. Parties can seek CPR’s assistance, whether they need a mediator or arbitration panel, so there is a whole number of different dispute resolution services we provide for all companies.

That said, being that the international administered arbitration rules just took effect in December 2014, we are excited that many companies in the US and Europe are putting the model provisions in their contracts.

Separately, I should note that corporations, individuals and law firms can be members of CPR, which provides a whole host of benefits that go beyond the services provided to any company that uses its dispute resolution services. Corporate users don’t have to be members, but those that are receive additional tools, resources, and training that focus on making them premium dispute resolvers.

One of CPR’s newest services is a flat fee mediation programme. Designed for claims up to $250,000, CPR has access to over 200 participating mediators that will mediate a claim for a daily fee of $3,500, or $2,500 for members.

What are the most common misconceptions about ADR and arbitration?

I think misconceptions are dissipating. There used to be concerns that a party appeared or could be perceived as weak if they suggested mediation. In fact, it is the opposite. If you can think about any ADR or arbitration process early on, I think it is a sign of strength. And I think sophisticated companies and thoughtful general counsel now see it the same way.

That said, there are still some common misconceptions. One is that if you believe in ADR, then you don’t believe in litigation. We at CPR recognise that some cases have to be litigated, for precedential purposes or even principle. But we also recognise that they are few and far between. Around 98% of all US federal civil cases are settled. And in terms of ADR, resolution is more of a question of when, than if. So embracing early case assessment protocols, and thinking about a holistic approach to dispute resolution as early on in the process simply makes good business sense.

Other misconceptions include the idea that arbitration is more prone to decisions not supported by law. Anyone familiar with court cases knows you get your share of bad decisions in that forum, too. Also, CPR rules require reasoned arbitration decisions and the application of the governing law of the contract.

Another misconception is that you can’t appeal. From our experience, most companies prefer finality, but for those that do want an appellate right, a long time ago we created an internal appeal process that parties can opt into.

But my favourite misconception is that the ‘A’ in ADR is somehow akin to an alternative lifestyle; that it isn’t a mainstream, common-sense process. I try to use the phrase ‘thoughtful dispute resolution’ rather than ‘ADR’ to encourage that line of thought.

Do you think the US deserves its reputation as a litigious society?

I think, in part, it continues to be a very litigious environment. But there have been some advancements, part of which is driven by costs, but also by the emergence of a more progressive, thoughtful generation of general counsel. These in-house are approaching disputes and dispute resolution in a business way, rather than taking the traditional view that litigation is a cost of doing business. And I think all those things have given rise to a less litigious mindset. I should also note that there are some jurisdictions, including Brazil and India, which can claim many – perhaps more than the US – lawsuits per person. So while the US is up there, improvements are being made.

What is the biggest hurdle to making corporate America more open to ADR?

One of the things I’m trying to do is talk about the issue not only with in-house lawyers, but also to CFOs, directors, those on the business side. This is because in many ways there is just a lack of awareness. People view litigation expense as a cost of doing business, and that creates a bit of complacency which gives rise to the acceptance of the status quo. But if you think about how much is spent on legal expense generally, in particular litigation, ADR can reduce that figure. Even if it’s by 10% to 15%, that saving can be used for more jobs, product development and innovation –
many more useful ways. Having a thoughtful, holistic approach to dispute resolution can create extraordinary savings, and the more that message can get out the better.

Also, I think that change like this within a corporation generally needs to be driven by the general counsel. It doesn’t have to be – external law firms can help as well – but the more awareness can be raised among procurement officers, financial types and others, the more successful it will be.

Change like this within a corporation generally needs to be driven by the general counsel

You have been a lawyer for more than thirty years. During that time, how have you seen attitudes change towards ADR?

In some ways it has been dramatic, and it makes me think back to my early misconceptions. As a young lawyer I was a litigator, and I saw the litigation process as one that was designed to get to the best results, and which would ultimately be resolved by a trial that generally involved a jury. Then when you experience the world as an in-house lawyer, you realise that cases invariably get settled. Rarely do they go to trial, and sometimes you get bad decisions. But when you start realising the cost of litigation – and not just financial, but also the disruption to business and adverse impact on business relations – you really start to believe that there has to be a better way. I don’t think my evolution in this sense is inconsistent with many others. Counsel often begin to embrace alternatives to litigation in a much more serious way as they progress in their career.

Also, the new generation of general counsel that I mentioned earlier includes a very significant increase in women; so you have many more women running law departments. Of course not every generalisation holds true, but I see that helping to drive the change, as some of these thoughtful, female general counsel are focussed not on the fight, but on moving on. I think that has helped change the environment.

In some jurisdictions ADR is required before commencing litigation. Do you think it should be a mandatory step in the court process?

This is a question that has caused some of the most controversy in the dispute resolution community. And I think it is because some view mediation as an entirely voluntary process.

The notion of mandatory mediation creates some concern in that compulsion is inconsistent with the whole rationale for the process. Having said that, I think encouraged mediation is successful. Some jurisdictions have required information sessions, and I see nothing wrong with that. The concern I have comes into play when mandatory mediation can give rise to liability for allegedly not negotiating in good faith. This is rare, but if parties are determined not to have negotiated in good faith, which is a subjective measure, they can be exposed to potential costs or sanctions.

So I take a moderate view on the issue. I think mediation should be encouraged so long as there are no adverse implications if a party fails to resolve a case because of the inability of the two sides to agree. It is important to encourage mediation, but making it mandatory and creating adverse implications for not negotiating in good faith – that becomes troubling to me.

In your prior role, as general counsel of MasterCard, your remit was much broader than dispute resolution. What prompted you to focus exclusively on this area?

When I was at MasterCard, over time I expanded my remit to a number of business functions – including franchise development and information security. And running business units for a company actually led me to take a more business-like approach to dispute resolution generally. So it was a combination of that, my experience with litigation, and many of MasterCard’s class actions and other serious litigation being resolved through ADR processes that created an intense interest in mediation and arbitration. And the opportunity to run an organisation whose mission is so simple and so important, to continually strive for new and more effective ways to avoid or resolve disputes, was something I could not resist.

Now, the most important message I and CPR are trying to instill in business is the importance of thinking about dispute resolution as broadly as possible. We use the phrase ‘redefining winning’. It’s about changing the mindset of companies and legal departments so that they equate winning with the ability to focus on business, resolve disputes efficiently and intelligently, and to move on. That captures what CPR is all about.

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About the author
Prior to joining the International Institute for Conflict Prevention and Resolution (CPR) Noah Hanft was general counsel and chief franchise officer for MasterCard, where he was responsible for overseeing legal and regulatory affairs, public policy and compliance. He also had responsibility for franchise development and integrity, global diversity, corporate security and information security, and was a member of the company’s executive and operating committee. After joining MasterCard in 1984, he briefly left from 1990 to 1993 to become senior vice president and assistant general counsel of AT&T Universal Card Services.

Hanft has lectured at length on the value of dispute resolution in resolving litigation, has served as an independent arbitrator and is on the mediation panel for the Southern District of New York. He serves on the boards of the Legal Aid Society and the Network for Teaching Entrepreneurship, and is a member of the Council on Foreign Relations. In 2012, he was named General Counsel of the Year at the Global Counsel Awards.

Hanft has an LLM from New York University School of Law in trade regulation, a JD from Brooklyn Law School, and a BA from American University, School of Government and Public Administration.
With the entry into force of the Convention on Choice of Court Agreements (Convention) on October 1 2015 for all EU member states (except Denmark) and Mexico, the effectiveness of forum selection clauses in international litigation is set to increase. In addition, it will be interesting to see whether there is an increase in international commercial disputes being directed to courts in jurisdictions bound by the Convention, as result of its entry into force.

As a reminder, the Convention is an international instrument which contains uniform rules on choice of court clauses, and the recognition and enforcement of judgments resulting from such clauses. The Convention is based on three interwoven rules. First, the court chosen by the parties must accept jurisdiction over the case, subject to a few exceptions (article 5). Parties can hence be assured that their expressed will of only settling disputes in a certain court or jurisdiction, as represented by a forum selection clause, will be respected at the international level. Second, any court not chosen by the parties cannot hear the matter (article 6). Parties will no longer be permitted to ex-post forum shop, nor will parties be exposed to unexpected proceedings abroad. Finally, all contracting states must recognise and enforce the judgment of the chosen court (article 8) subject to a few exceptions (article 9). Litigants will therefore have no reason to fear that judgments issued from their chosen court will be denied recognition or remain unenforced in other jurisdictions. As the number of contracting states is likely to increase, international litigation should become more predictable and efficient; parties and courts will avoid lengthy and expensive trials simply to decide what court has international jurisdiction over the matter. Instead, courts will apply the Convention, and jurisdiction will revert to the chosen court. Jurisdiction agreements can therefore gain momentum as a reliable and efficient tool to settle international disputes, especially for small and mid-sized companies.

The time has at last come for the Convention to start delivering its important benefits. Its entry into force on October 1 2015 marks an important milestone. It will only encompass the contracting states; today they number 28. Some of those states, however, host important judicial hubs for international commercial disputes, and the Convention’s application will no doubt enhance the obvious attraction for such international litigation magnets.

Others states are thinking along the same lines. Singapore, for example, signed the Convention on March 25 2015, and the US has been a signatory since 2009. It appears that the ratification process in Singapore is progressing rapidly; it may be in a position to ratify the Convention in 2016. In the US, the relevant authorities have deployed several initiatives over the past years to identify a mechanism for implementing the Convention in a way that would accommodate the interests of all stakeholders – at both the federal and state levels. The process is ongoing and, if successful, would be of great significance to the future of the Convention. Australia and New Zealand are also making progress towards implementation, and in the Peo-
People's Republic of China a feasibility study is being conducted on its ratification. Denmark is also working on ratification of the Convention so as to be in line with other EU member states. Other states which have approached the Permanent Bureau of the Hague Conference with specific queries about signing or ratifying the Convention include Andorra, Serbia and Tajikistan.

It’s hoped that the entry into force of the Choice of Court Convention among the initial 28 states will encourage others to join the instrument. There certainly is momentum surrounding the Convention’s entry into force, and many initiatives have been scheduled around that milestone. APEC [Asia-Pacific Economic Cooperation] for example recently organised an important workshop for its member economies titled ‘Effective enforcement of business contracts and efficient resolution of business disputes through the Hague Choice of Court Agreements Convention’. We are confident that this will raise awareness of and interest in the Convention within the Asia Pacific region.

The traditional prevalence of non-exclusive choice of court clauses in the banking and financial sector may have to be reconsidered

Looking further ahead, it will be interesting to monitor whether the Convention’s entry into force will lead to changes in certain sectorial business practices. For instance, the traditional prevalence of non-exclusive choice of court clauses in the banking and financial sector may have to be reconsidered; for example, the International Swaps and Derivatives Association’s master agreement. The Convention only covers exclusive choice of court clauses, and although there is a possibility for states to extend the Convention’s application to non-exclusive agreements by means of bilateral declarations, to-date no such declaration has been made. It will be interesting to see whether the banking and finance sector shifts to the use of jurisdiction clauses covered by the Convention.

In addition, the Convention does not require a substantial connection to the chosen court’s jurisdiction, nor is there a need for disputes to be governed by the law of the chosen court. This may reinforce the attractiveness of some international litigation hubs, as soon as they embrace the uniform system set up by the Convention.

More generally, the Convention aims to make international commercial litigation more predictable, more affordable, and more efficient. As more states become a party to the Convention, international dispute settlement in these states’ domestic courts will become more attractive, especially to small and medium-sized companies, including by offering a valuable alternative to international arbitration.

About the author
Christophe Bernasconi is the fourth Secretary General of the Hague Conference on Private International Law. He took office on 1 July 2013. He joined the Permanent Bureau (Secretariat) of the Hague Conference in September 1997.

As Secretary General, Bernasconi is responsible for the administration of the Hague Conference (with currently 146 connected states, and a total of 80 members from around the world) and the operation of its Permanent Bureau. He has long-standing expertise in the field of international civil procedural law, international administrative cooperation, international commercial and finance law, as well as international child protection law. He has been responsible for various meetings of Special Commissions, Experts’ and Working Groups, both in relation to normative work of the Hague Conference and post-Convention services.

He holds a law degree from Fribourg University in Switzerland (magna cum laude, bilingual German/French), an LLM degree in comparative law from McGill University in Montreal (Canada), and a doctoral degree in Private International Law from Fribourg University (summa cum laude).

Before joining the Permanent Bureau, Bernasconi lectured at the University of Fribourg, worked as legal expert at the Swiss Institute of Comparative Law in Lausanne, and as scientific collaborator at the Federal Office of Justice in Switzerland. He also advised practitioners on various private international law matters.

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"The traditional prevalence of non-exclusive choice of court clauses in the banking and financial sector may have to be reconsidered"
Asymmetric dispute resolution clauses

Ilya Komarevski and Eleonora Mateina of Tsvetkova Bebov Komarevski examine the Bulgarian approach towards unilateral dispute resolution clauses and compare it to other European courts.

The first time a Bulgarian court had the chance to adjudicate on the validity and admissibility of unilateral jurisdictional clauses in Bulgaria was on September 2 2011. It appears that at that time, this was one of the first decisions in Europe dealing with the validity and admissibility of the so-called one-sided or asymmetric dispute resolution clauses. These are clauses that allow both of the parties to a contract to refer their disputes to a court or to an arbitral tribunal, but only one of the parties with the right to choose to refer disputes, arising from or in connection with this contract to a specific jurisdiction (such as a particular state court or arbitral institution). Now, four years on, this remains the only decision in this respect rendered by a Bulgarian court. However, several decisions have been rendered in other countries and this topic is subject to intense discussion among scholars and practitioners. Some of these decisions may be relevant for Bulgaria too.

Bulgarian Supreme Court of Cassation’s decision

The disputable clause was implemented in a loan agreement. The dispute resolution clause was drafted in a way that entitled only the lender to refer its claims to one specific or any other arbitral institution in the Republic of Bulgaria. By contrast, the borrower could refer its disputes to the competent state courts, which in this case was the Sofia regional court. The law governing the loan agreement and the arbitration clause was Bulgarian law.

Unilateral dispute resolution clauses enable the fundamental contractual principles of party autonomy and freedom of contract

In its reasoning, the Bulgarian Supreme Court of Cassation stated that unilateral dispute resolution clauses are generally not permitted under Bulgarian law, since they establish rights of a potestative nature. Under Bulgarian law, a right is potestative when it allows only one of the parties to a defined legal relationship (such as a state court or arbitral institution) to decide how future disputes between them may be resolved. In Bulgaria, the principles of party autonomy and freedom of contract are explicitly established in the Bulgarian Obligation and Contracts Act. This principle is also recognised by legal doctrine as one of the cornerstones of private law. Therefore, this argument could be used when arguing that unilateral dispute resolution clauses are valid under Bulgarian law.

The bargaining power of each party should also be taken into consideration when evaluating the validity and the admissibility of unilateral dispute resolution clauses. Usually, US courts consider the unilateral litigation or arbitration clauses invalid only when one of the parties had stronger bargaining power during the negotiations of the respective contract and as a result, was able to impose clauses in its favour (California Supreme Court, Armendariz v Foundation Health Psychcare Service; Arkansas Supreme Court, E-Z Cash Advance v Harris; Montana Supreme Court, Iwen v US West Direct). In Bulgaria, the better bargaining position of parties to a contract is taken into account in limited occasions (for example in consumer contracts or as a ground for cancellation of a contract in some extreme circumstances). Nevertheless, this argument could be presented when arguing the validity and enforceability of the unilateral jurisdictional clause. One could argue that when the parties, at the time of concluding the agreement containing the unilateral dispute resolution clause, are at equal bargaining position, the clause should not be considered null and void.

Validity of the unilateral dispute resolution clauses

In our view, the validity and enforceability of unilateral dispute resolution clauses is far from being established under Bulgarian law. It will probably be subject to more detailed analysis by the courts and doctrine and by more subtle approaches. We believe that most of the arguments raised by case law and doctrine in other countries could be relevant also under Bulgarian law.

Pros

Unilateral dispute resolution clauses enable the fundamental contractual principles of party autonomy and freedom of contract. This is the argument usually used by English courts for the recognition and enforcement of unilateral dispute resolution clauses in England (for example, in Three Shipping v Harebell Shipping 2004; Pittalis v Shereffettin 1986). The argument of the courts is usually based on the idea that parties have autonomy to decide how potential future disputes between them may be resolved. In Bulgaria, the principles of party autonomy and freedom of contract are explicitly established in the Bulgarian Obligation and Contracts Act. This principle is also recognised by legal doctrine as one of the cornerstones of private law. Therefore, this argument could be used when arguing that unilateral dispute resolution clauses are valid under Bulgarian law.

The Court did not analyse whether unilateral dispute resolution clauses provide potestative rights. The court simply accepted this, without presenting any legal or even theoretical test for determining the potestative nature of the rights. Additionally, the court did not comment on the wording of the clause, the position of the parties, the type of the clause (for example, unilateral litigation or arbitration or mixed, one-step or multi-stage) and did not present any other arguments that could ground the nullity of the unilateral jurisdictional clauses.
It is important to assess the validity and enforceability of the respective unilateral dispute resolution clause from the perspective of the law applicable to it. In *Mauritius Commercial Bank v Hestia Holdings*, the High Court (England and Wales) decided that the contested unilateral dispute resolution clause is valid since under the applicable law (English law), such clauses are valid and enforceable. Therefore, if a Bulgarian court is seized to resolve a dispute, dealing with the validity and enforceability of a unilateral dispute resolution clause, if the law applicable to such clause does not consider it illegal, the clause may be valid and enforceable as it does not contradict public policy or override mandatory rules.

First, the potestative character of the right given under unilateral dispute resolution clauses [Mme X v Banque Privée Edmond de Rothschild, French Cour de Cassation; Bulgarian Supreme Court of Cassation] decision 71 of September 2011, Cour de cassation, civile, Chambre civile 1, March 25, 2015, 13-27.264], may be seen from two perspectives

In the case of a one-sided litigation clause with applicable law that prohibits contractual establishment of potestative rights (such as France, Bulgaria, and Russia) the dispute resolution clause may be considered null and void as it violates applicable law and attempts to create potestative rights.

In the case of a unilateral arbitration clause, the latter may not be enforced under article II of the New York Convention for Recognition and Enforcement of foreign arbitral awards (New York Convention), in states where the establishment of potestative rights (such as France, Bulgaria, and Russia). The argument for refusing to recognise and enforce such clauses would be in contradiction with the public policy of the state in question.

Both the refusal for recognition and enforcement and the set aside of a rendered arbitral award, grounded on a unilateral arbitration clause, are more likely to be equated to violation of the public policy of the state where recognition and enforcement is requested and where the setting aside is sought (usually before the courts of the seat of arbitration). The ground for refusal of recognition and enforcement and setting aside, based on contradiction with the respective state's public policy, may be found in article V of the New York Convention, article 34 of the Uncitral Model law and the arbitration acts of the respective state.

In Bulgaria, the contractual establishment of potestative rights is not permitted. Therefore, seen from both perspectives, the argument is more likely to be seen as a ground for nullity and invalidity of the respective asymmetric clause (if the latter is considered as clause) attempting to create rights of a potestative nature.

Second, the argument for predictability of jurisdiction, marked by the French Cour de Cassation's latest decision of March 15 2015 should also be taken into account. Generally, the main purpose when implementing choice of forum clauses is the predictability of the competent jurisdiction that would resolve future disputes between the parties. This is also one of the main purposes of the provisions allowing jurisdictional clauses. Otherwise, the determination of the competent jurisdiction could turn out to be very difficult; in particular, if in order to determine it, one should apply the conflict of law rules. Actually, this was the Cour de Cassation second argument for invalidation of the unilateral arbitration clause that it dealt with.

The first one was for the potestative character of the unilateral dispute resolution clause. Regarding the lack of predictability, the French court based its argumentation on article 23 of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as was applicable to the case. The court considered that the unilateral arbitration clause, as drafted, was too broad and led to unpredictability in terms of the jurisdiction competent to resolve disputes arising between the parties. This argument from the French Cour de Cassation could also be taken into account by Bulgarian courts.

Third, the Russian Federation Supreme Court of Arbitration (VAS – 1831/2012) considered that unilateral dispute resolution clauses are null and void, since they violate the principle of equal access to jurisdiction, as established in the European Convention for Human Rights and in the Russian Civil Procedure Code. Despite being too general, this argument could be used in to support the argument of jurisdictional predictability.

**Mitigating risks**

Unilateral dispute resolution clauses, governed by Bulgarian law or intended to be enforced in Bulgaria, that aim to establish potestative rights, imply a certain level of risk in the light of the 2011 judgment by the Bulgarian Supreme Court of Cassation that such clauses be regarded as null and void in Bulgaria. However, this judgement is not mandatory for other Bulgarian...
courts or other panels of the Supreme Court of Cassation. Other Bulgarian courts and court panels may find that such clauses do not establish potestative rights, or are valid for other reasons.

The case for the validity and enforceability of one-sided dispute resolution clauses is not closed

If the law intended by the parties to govern a unilateral dispute resolution clause is of a jurisdiction which accepts their validity (for example England), the clause’s proper structuring and drafting may help further mitigate the risk of the judgment or award rendered by the forum chosen under the clause being refused recognition or enforcement in Bulgaria. Contract drafting is never to be underestimated, regardless of a number of solid arguments that one-sided clauses cannot be invalid in and of themselves.

The case for the validity and enforceability of one-sided dispute resolution clauses is not closed. Bulgarian courts should take a case-by-case approach to these clauses and consider the majority of them as valid, depending on the wording and bargaining power of the parties.

About the author
Ilya Komarevski is a partner at Tsvetkova Bebov Komarevski. He has been with the firm for more than 10 years, and specialises in litigation and arbitration, M&A, general business law and regulations, and employment law. His professional experience includes legal advice, support in transactions and litigation work for Bulgarian and international clients. He has led a number of litigation and M&A projects within the sectors of infrastructure, utilities, tourism and leisure, IT, technology and outsourcing and pharmaceuticals. Komarevski has represented clients before courts (including the European Court of Justice) and arbitration tribunals in civil and administrative litigation. His work has been recognised by leading international legal directories, and he is a member of the Sofia Bar Association and the International Bar Association.

About the author
Eleonora Mateina is a Bulgarian qualified lawyer and member of Tsvetkova Bebov Komarevski's dispute resolution team. She specialises in commercial arbitration, litigation, private international law and competition law. She has experience in commercial and civil disputes, as well as in advising on a wide range of competition law and regulatory issues. Mateina has authored several articles dedicated to hot topics in international arbitration and litigation (such as unilateral dispute resolution clauses, heightened judicial review over arbitral awards, and admissibility of the anti-suit injunctions outside UK). She has also been actively involved as competitor, coach and arbitrator in international moot court competitions.
Breaking a jurisdictional deadlock

Chao Yang and Jingjing Chen of Hui Zhong report on the Supreme Court’s Reply that broke the deadlock on jurisdictional conflicts after the split of CIETAC

In mainland China, arbitration is the preferred means of dispute resolution for cross-border transactions. Over the last few decades, the China International Economic and Trade Arbitration Commission (CIETAC) and its sub-commissions in Shenzhen (south China), Shanghai, Chongqing and Tianjin have resolved thousands of commercial disputes in various industries, earning a reputation for being fair forums and thereby appealing to business people.

However, the unexpected split of CIETAC in 2012 created a great deal of uncertainty with regard to jurisdictional allocation and determination. In August 2012, the former Shanghai and South China (Shenzhen) sub-commissions broke away from CIETAC. These former sub-commissions subsequently changed their names to the Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Centre (SHIAC) on April 8 2013 and the South China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitration (SCIA) on October 22 2012. Both SHIAC and SCIA claimed that they were independent from CIETAC, but that they could exercise jurisdiction over disputes arising from arbitration clauses where the parties had agreed to arbitrate before CIETAC and its sub-commissions in Shanghai and Shenzhen. CIETAC fired back and denounced its authorisation to administer CIETAC cases.

The SPC Reply contains rich set of guidelines on how to deal with the after-split issues

This split and uncertainty caused serious concerns amongst users of CIETAC arbitration. It adversely affected the contracting parties’ predication and assessment on how to select the proper forum of arbitration under the CIETAC regime, and called into question the validity of arbitration agreements referring to the two former sub-commissions as well as the enforceability of the arbitral awards. Even worse, a number of lower courts adopted inconsistent approaches towards these issues, and dozens of conflicting judicial decisions on these issues created further uncertainty and confusion.

For over three years, CIETAC could not reach an amicable settlement with SHIAC and SCIA to offer the outside world a certain, practical and transparent solution package to calm the chaos on jurisdiction issues. The deadlock was eventually broken by the Supreme People’s Court (SPC) of the PRC (People’s Republic of China) by issuing a binding judicial interpretation.

The SPC Reply

On July 15 2015, the SPC issued the Notice of Reply to Questions raised by the Shanghai Municipal Higher People’s Court et al relating to the Judicial Review of Arbitral Awards involving the China International Economic and Trade Arbitration Commission and Its Former Sub-commissions (SPC Reply). The interpretation responded to requests from the Shanghai High People’s Court, the Jiangsu High People’s Court and the Guangdong High People’s Court. The SPC Reply becomes effective on July 17 2015 and all lower people’s courts should abide by it in their trial activities. In essence, it has four key points confirming the judicial position that the lower courts must take regarding the validity of arbitration agreements and potential challenges to arbitral awards in setting aside or enforcement proceedings.

The SPC Reply contains rich set of guidelines on how to deal with the after-split issues.

First, the Reply clarifies the principles of jurisdictional allocation among CIETAC, SHIAC and SCIA as follows.

If an arbitration agreement referring to the CIETAC Shanghai Sub-Commission or the South China Sub-Commission was concluded before the former CIETAC sub-commissions renamed themselves as a result of the CIETAC split, then the newly-formed SHIAC or SCIA will have jurisdiction over those disputes. The relevant dates of name change for SHIAC and SCIA are April 8 2013 and October 22 2012 respectively. Accordingly, if a party subsequently applies to court to invalidate the arbitration agreement, set aside the arbitral award or resist the enforcement of an arbitral award on the ground that SHIAC or SCIA has no jurisdiction, such application will not be supported.

If the parties have entered into an arbitration agreement referring to the CIETAC Shanghai Sub-Commission or the South China Sub-Commission on the date of or after the name change, but before July 17 2015, CIETAC will have jurisdiction over any disputes. However, if the claimant submits the disputes to SHIAC or SCIA, and the respondent does not raise any objection, the courts should not support a party’s later application to set aside or resist enforcement of an arbitral award on the ground that SCIA or SHIAC had no jurisdiction.

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Second, the SPC Reply sets out exceptional rules which deviate from article 13.2 of the SPC Interpretation on Relevant Issues in Application of the PRC Arbitration Law (2006 Interpretation).

Under the 2006 Interpretation, if a party applies to a court to determine the validity of an arbitration agreement or to set aside an arbitral award after an arbitration institution makes a decision on the arbitration agreement, the court should dismiss the application.

Under the SPC Reply, even after CIETAC, SHIAC or SCIA have confirmed the validity of the arbitration agreement and made a decision on ju-
The SPC Reply also prevents parties from making use of the split of CIETAC to set aside or resist the enforcement of an arbitral award

Fifth, the SPC Reply explains that the fundamental aim of the Reply is to take into account the historical relationship between CIETAC and its former sub-commissions, whilst also upholding parties’ intentions and promoting China as an arbitration-friendly jurisdiction. The SPC Reply not only ends uncertainty on jurisdiction issues arising from the CIETAC split, but also clearly signals that SHIAC and SCIA are arbitration bodies independent from and equal to CIETAC.

Significance of the SPC Reply
The SPC Reply has provided long-awaited and much needed clarity on issues arising from the split of CIETAC. In one way or another, it provides the business community with a higher degree of certainty, predictability and transparency, compared to the SPC’s previous notice on CIETAC’s split issue. The SPC Reply aims at resolving problems practically and pragmatically, setting the parties and the relevant arbitration bodies free from troublesome clashes, and it is bound to receive a warm welcome.

The SPC Reply also seeks to preserve the validity of arbitration agreements and enforceability of arbitral awards affected by the split. Arbitration proceedings may already have cost parties significant time and expense, and a re-trial or remission of the cases so affected would be highly undesirable or economically disastrous if the outcome were not different. The SPC Reply also prevents parties from making use of the split of CIETAC to set aside or resist the enforcement of an arbitral award. No doubt the SPC Reply should also be applauded for its efficient orientation.

The SPC Reply gives a final say to jurisdiction disputes among CIETAC, SHIAC and SCIA, with a clear-cut decision on the date of the conclusion of the arbitration agreement. It has duly regarded the parties’ autonomy and waivers, but it also emphasises not rescinding arbitral awards that had already been registered before the issuance of the Reply. The confirmation of jurisdiction in many already-concluded cases, along with the binding force of arbitral awards issued over the past three years, will greatly simplify the situation and offer CIETAC, SHIAC and SCIA peace of mind when pursuing their future plans, without being dragged behind by pointless internal quarrels.

However, the SPC Reply cannot deliver answers to all questions. For instance, it does not expressly address the legitimacy of SHIAC and SCIA as independent arbitration institutions (but one may infer from the SPC Reply that SHIAC and SCIA are lawful). The SPC Reply does not specify which arbitration body should be the proper forum if the arbitration clauses designate CIETAC Shanghai Sub-Commission (SHIAC) or CIETAC South China Sub-Commission (SCIA). Since CIETAC re-built its sub-commissions in Shanghai and Shenzhen on December 31 2014 and SHIAC and SCIA are no longer CIETAC’s sub-commissions, an expression in the arbitration clause such as the one mentioned above would lead to difficulty in judging the parties’ genuine intention of forum selection. Further, it is still uncertain whether the principles of delineating the jurisdiction of CIETAC, SHIAC and SCIA in the SPC Reply will be equally acceptable to judges in other jurisdictions if the relevant arbitral awards are sought for recognition and enforcement outside mainland China.

Recommended arbitration clauses
CIETAC, SHIAC and SCIA have published standard arbitration clauses. To avoid potential disputes over jurisdiction post CIETAC’s split, it is wise to include arbitration clauses precisely as recommended by the relevant arbitration bodies.

CIETAC’s first model arbitration clause:
Any dispute arising from or in connection with this contract shall be submitted to CIETAC___________Sub-Commission (arbitration centre) for arbitration which shall be conducted in accordance with CIETAC’s arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

CIETAC’s second model arbitration clause:
Any dispute arising from or in connection with this contract shall be submitted to CIETAC for arbitration. The arbitral award is final and binding upon both parties.

SHIAC model arbitration clause:
Any dispute arising from or in connection with this contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for Arbitration.

SHIAC model arbitration clause for Free Trade Zone:
Any dispute arising from or in connection with this contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration. The arbitration shall be held in the China (Shanghai) Pilot Free Trade Zone Court of Arbitration.

Model arbitration clause for aviation arbitration:
Any dispute arising from or in connection with this contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration. The arbitration shall be held in the Shanghai International Aviation Court of Arbitration.

SCIA’s first model arbitration clause:
Any dispute arising from or in connection with this contract shall be submitted to South China International Economic and Trade Arbitration Commission (SCIA) for arbitration.

SCIA’s second model arbitration clause:
Any dispute arising from or in connection with this contract shall be submitted to Shenzhen Court of International Arbitration (SCIA) for arbitration.
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HUI ZHONG LAW FIRM - A DISPUTE RESOLUTION BOUTIQUE

Hui Zhong Law Firm (“Hui Zhong”) is a boutique law firm specializing in domestic and international dispute resolution. Hui Zhong boasts a team of passionate, highly skilled and experienced dispute resolution specialists. The team includes both highly renowned senior partners, who were part of the first wave of Chinese lawyers carrying out international arbitration and dispute resolution work in China, as well as a number of young up-and-coming partners, who have been working at the cutting edge of litigation and arbitration over the course of the past decade or more, with experience representing clients in all of the major international arbitration institutions and courts of law at various levels.

Hui Zhong’s lawyers are graduates of the most prestigious law schools, and have considerable experience working in top-tier Chinese and international law firms. They have served as legal counsel, co-counsel, arbitrators and mediators in hundreds of significant and complex cross-border commercial disputes, and their expertise spans a wide range of areas, including energy & resources, finance, intellectual property, real estate, joint ventures, M&A, engineering and construction, sales and purchasing agreements, technology transfer, employment law, BIFs and etc.

Some of the lawyers are recognized as outstanding or leading lawyers by foreign and domestic evaluation organizations in consecutive years. One of Hui Zhong’s senior partners is a council member of Hong Kong International Arbitration Centre (HKIAC), being the first mainland lawyer ever invited to hold this position. Hui Zhong’s consultants used to work for renowned arbitration bodies, judiciaries as well as academic and research facilities for a long time, all of whom have abundant professional knowledge and practical experience. One of its senior consultants has been a member of International Council for Commercial Arbitration (ICCA) for many years, and is currently an advisory member of ICCA.

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Court competency in international arbitration

Pallavi Shroff and Siddhartha Datta of Shardul Amarchand Mangaldas examine the issue of jurisdiction in light of the rise of international commercial arbitration in India

With the introduction of the Indian Arbitration and Conciliation Act 1996 (Indian Arbitration Act) and the growth of international commercial arbitration involving Indian parties over the last decade, several issues have been thrown up. Complex questions of jurisdiction, the competency of Indian courts and the governing law of arbitration are but a few. In negotiating and framing arbitration clauses in international contracts involving Indian parties, it is necessary to keep in mind the developments in Indian arbitration jurisprudence in the context of international commercial arbitration and jurisdiction of domestic courts.

Expanding competency

One of the first questions to arise before the Supreme Court of India in the case of Bhatia International v Bulk Trading 2002 was whether a party could invoke the Indian Arbitration Act for interim relief for an arbitration conducted outside India. The Supreme Court gave considerable traction to the jurisdiction of Indian courts under the Indian Arbitration Act, unless it is 'expressly or impliedly excluded' under the arbitration clause. Thereafter, the Supreme Court extended the principle to the setting aside of foreign arbitral awards by domestic courts under the Indian Arbitration Act in Venture Global v Satyam 2008. The Supreme Court held that even in the case of a foreign award, Part I of the Indian Arbitration Act (containing mandatory provisions for arbitrations seated in India) would apply, when the award has an ‘intimate and close nexus to India’.

These decisions led to parties resorting to concurrent jurisdictions, creating substantial interference in international arbitrations

Such decisions, which expand the competency of Indian courts when the arbitration clause is silent on the governing law of arbitration, led to lengthy proceedings on the jurisdiction and competency of Indian courts in relation to foreign seated arbitrations. They also led to parties resorting to concurrent jurisdictions, creating substantial interference in international arbitrations.

Restraining competency

The ambiguity created by Bhatia International and Venture Global caused the Supreme Court of India to re-examine the competency of domestic courts for foreign-seated arbitrations.

In 2012, the Constitutional Bench of the Supreme Court in Bharat Aluminium v Kaiser (BALCO) clearly laid down that Part I of the Indian Arbitration Act, which provides for interim relief as well as setting aside of an arbitral award, applies only where the seat, or place, of arbitration is in India, irrespective of the kind of arbitration (i.e purely domestic arbitration or an international commercial arbitration held in India). However, the said judgment, rendered on September 6 2012, has only prospective operation, as directed by the Supreme Court.

The prospective operation of the judgment in BALCO makes it imperative for international arbitration lawyers to be aware that there are two arbitration law regimes operating in India at the moment: (i) Pre-BALCO, for arbitration agreements prior to September 6 2012, the competency of Indian courts is determined by the principles laid down in Bhatia International and Venture Global; (ii) post-BALCO, for arbitration agreements entered into after September 6 2012, the competency of Indian courts under Part I would be restricted to arbitrations seated in India.

Determining implied exclusion

In 2011, in the case of Videocon Industries v Union of India, the issue before the Supreme Court was whether it had the jurisdiction to award interim relief under the Indian Arbitration Act, for a foreign seated arbitration, governed by the laws of England. The venue of arbitration was to be Kuala Lumpur, Malaysia, which was later shifted to Amsterdam and then to London. The Supreme Court held that Indian courts have no jurisdiction to grant interim relief, since the arbitration agreement provided that it should be governed by the laws of England. The Supreme Court observed: ‘that necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act’. The Supreme Court held that under section 3 of the English Arbitration Act of 1996, the arbitral tribunal was entitled to change the juridical seat of arbitration, but a change in venue of the arbitration did not amount to a change in the juridical seat of arbitration.

In Reliance Industries v Union of India 2014, the Supreme Court held that since the parties had by implication excluded the application of Part I of the Indian Arbitration Act by agreeing that the seat of the arbitration was London, English law applied to the arbitration clause. Further, it maintained that English courts, and not Indian courts, had jurisdiction to supervise the arbitration, even though the proper law of the main contract was Indian law.

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The Supreme Court went on to uphold the reasoning of its previous decisions in Sumitomo Heavy Industries v ONGC 1998 and Dosco India P v Doosan Infracore 2011, that arbitrability of a dispute is to be determined in terms of the law governing an arbitration agreement and the arbitration proceedings must be conducted in accordance with the curial law (the law governing the conduct of the arbitration).

After the above analysis, the Supreme Court in Reliance Industries observed that:

in the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the ‘seat’ of the arbitration, ie, the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate.
In March 2015, the Supreme Court in *Harmony Innovation v Gupta Coal India* continued to restrict the competency of the Indian courts in relation to pre-*BALCO* arbitration agreements, by justifying the implied exclusion of the Indian Arbitration Act. Though the seat of arbitration was not specified in the arbitration agreement, the Supreme Court held that where the ‘intended effect’ of the parties by the stipulation in the arbitration agreement was to have London as the seat of arbitration, section 9 of the Indian Arbitration Act would have no applicability.

The agreement in this particular case was entered into on October 20, 2010, that is, pre-*BALCO*. The arbitration clause provided for the contract to be governed and construed according to English law. It further provided that if the dispute did not exceed $50,000, the arbitration would be conducted in accordance with the London Maritime Arbitration Association’s small claims procedure. The Supreme Court considered the ‘commercial background, the context of the contract and the circumstances of the parties’ to arrive at the conclusion that the seat of arbitration was London and concluded that the Indian Arbitration Act was by implication excluded.

*Harmony Innovation* is therefore also reflective of the factors the courts in India would look into to determine the juridical seat of the arbitration, and whether the arbitration clause was to be interpreted as a proper or substantial clause, or as a curial or procedural one. As to the wording of the arbitration clause, it was held by the Supreme Court to be a substantial one.

**Restricting concurrent jurisdiction**

The Supreme Court in the case of *Reliance Industries* followed its previous decision in *Vidwoon Industries*. It held that if the Indian Arbitration Act were to be made applicable to the present dispute, Indian and English courts would have concurrent jurisdiction, the parties would be left rushing between India and England for redressal of their grievances.

On examining various English judgments, the Supreme Court concluded that the choice of governing law being the Indian Arbitration Act implied that the juridical seat of arbitration is India. Therefore, the courts of India would have jurisdiction and not the courts of England. In other words, the Supreme Court struck down the argument that the Indian and English courts would have concurrent jurisdiction under the principle that the courts of England would have jurisdiction because the venue is London and that the courts of India would have jurisdiction since the arbitration agreement is governed by the Indian Arbitration Act.

The fact that the Supreme Court has held that there is no concurrent jurisdiction and that the Indian courts would have exclusive jurisdiction may only be respected by the courts of England on the basis of comity of courts in the domain of public international law. The point may be re-litigated in the courts of England because the English Arbitration Act would mandatorily apply in certain matters if the place of arbitration is in England and therefore, a clear conflict of the procedural law governing arbitration would arise if there is a conflict between the English and Indian Arbitration Acts.

The Indian Arbitration Act mentions that the applicability of Part I is compulsory if the place of arbitration is in India. Therefore, if any arbitration clause is governed by the Indian Arbitration Act, with the place of arbitration or the venue of arbitration outside India, then complex questions would always arise as to which parts of the Indian Arbitration Act would mandatorily apply and which parts may be derogable, if the place or venue of arbitration is outside India. Similar issues may arise if the seat of arbitration is in India and the governing law of arbitration is English law.

**Practical tips**

An analysis of the observations by the Supreme Court in the recent judgments of *BALCO*, *Reliance Industries*, *Enercon* and *Harmony Innovation* during the past three years makes it imperative that in drafting an arbitration agreement in the context of an Indian party or a transaction connected to India, regard must be had to the applicability or exclusion of laws. While drafting an arbitration agreement, the following primary aspects must be borne in mind to avoid jurisdictional complications in India: (i) the distinction between proper law of the contract, proper law of the arbitration agreement and the curial law needs to be carefully stated in the arbitration agreement; (ii) parties to the contract need to be aware of the legal repercussions of choosing different systems of law governing the arbitration agreement and the contract; and (iii) the jurisdiction clause, for competent courts, in such contracts should be mentioned in the arbitration clause itself in order to avoid exposure to concurrent or multiple jurisdictions.

It is now quite clear after the judicial pronouncements in *BALCO*, *Reliance Industries*, *Enercon* and *Harmony Innovation* that matters of complexity concerning international arbitrations are now pressing issues before the highest courts in India. Indian courts are considering global arbitration jurisprudence before deciding a matter under the Indian Arbitration Act. Ultimately, as with any trans-national legal issue, international arbitrations decided under the Indian Arbitration Act by Indian courts would also form a body of jurisprudence in global arbitration jurisprudence. However, if certain matters have not yet been decided in India in the courts, regard must be had to international arbitration jurisprudence when drafting an international arbitration clause.

In the later judgment of *Enercon (India) v Enercon GMBH 2014*, the Supreme Court examined an arbitration clause which provided for the venue of arbitration to be London and for the law governing the arbitration agreement to be the Indian Arbitration Act. In such a situation, the question that arose was whether the courts of India and England would have concurrent jurisdiction over the arbitration.

**In drafting an arbitration agreement in the context of an Indian party or a transaction connected to India, regard must be had to the applicability or exclusion of laws**

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Resolving construction disputes

Cornel B Juniarto and Ammar S Gill of Hermawan Juniarto investigate how the country’s growing number of disputes over construction agreements are being resolved

Infrastructure in Indonesia is developing at a rapid pace. In spite of the fluctuating dollar in Indonesia, Jakarta is considered a prospective city in Asia when it comes to market expansion in the construction field. Construction projects developed in Indonesia between 2012 and 2014, which ranged from small to large scale, contributed up to 10% to the gross GDP. Identified as the top Asian country for construction, Indonesia has a high demand for houses, apartments and properties, which are key investments for both foreign and domestic investors. Additionally, the public construction sector has been growing for the last five years, as evidenced by the monorail train constructions, the MRT (mass rapid transit) project, and highway, water resource and power plant projects. Coordinating with the Ministry of Public Works, investors are drawn to the cross-border investment plan to enhance infrastructure in Indonesia. Various investors from Japan, the US, Australia and Singapore have competed to invest their money in Indonesia through partnerships with the government. Therefore, in late 2014, the construction market totaled $49.2 billion, increasing from 7.07% to 13%, making it one of the most promising sectors for returned investment. It also proves that the purchasing rate increased for domestic consumption.

Statistics show that almost 90% of registered construction companies are small-scale companies whose markets are limited. Yet some of the big Indonesian cities such as Jakarta and Surabaya, where most building construction has taken place, are dominated by large foreign construction companies. Asia Construction Outlook, in their 2013 report, showed that the total spending for construction in Indonesia had reached $247 billion. It also showed that in the upcoming forecast under the Masterplan for Acceleration and Expansion of Indonesia’s Economic Development (MP3EI), an estimated $181.8 billion of infrastructure investments will compete with China. Increased cross-border investments and transactions have brought an urgent need for Indonesia to develop the rule of law with regards to construction transactions. However, in spite of the favourable investment climate, the emerging disputes from construction agreements are inevitable.

Construction regulations

The role of the private sector is increasing due to the inefficiency of publicly-owned companies in the area of project funding. Through a partnership, both private and public companies may achieve their vision of developing construction projects and gaining profit for investors. Despite this partnership trend, there is an increasing need for appropriate and updated laws and regulations. The growth of construction projects has driven the government and stakeholders to improve construction regulations through the promulgation of several construction regulations, which help the contractor and its related parties in conducting the construction services, and particularly help to prevent any violations arising from the construction agreement.

The first regulation that was promulgated was Law 18 of 1999 concerning the Construction Service (Law 18/1999). This regulation was aimed at establishing strong and diligent business activities, and at allowing construction users and providers to compete for quality construction. The prime goal of this regulation is to assure equal standing between the service user and service providers. Further, the Indonesian Government enacted several other regulations to support the implementation of construction services in Indonesia, such as: (i) Government Regulation/ Peraturan Pemerintah 28 of 2000 concerning the Role of Construction Society as amended by Government Regulation 4 of 2010 and Government Regulation 92 of 2010 (PP 92/2010); (ii) Government Regulation 29 of 2000 concerning the Implementation of Construction Service (PP 29/2000) as amended by Government Regulation 59 of 2010 (PP 59/2010); and (iii) Government Regulation 30 of 2010 concerning the Guidelines of the Implementation of Construction Service (PP 30/2010).

Under article 20 of PP 29/2000, construction contracts in Indonesia should be made separately according to the construction stages, which consist of construction works in terms of planning, and construction works in terms of execution and supervision. Such construction agreements may be distinguished based on the fee, duration, and payment terms for which each type is regulated further under PP 29/2000. A strict liability based on article 23 is also applied, which governs the law of construction agreements between both parties. Therefore, any construction agreement made within the territory of Indonesia will be governed by Indonesian law.

International instruments for construction law

Although this is a strict liability with regards to the governing law, Indonesia has adopted various international construction instruments, such as the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) General Conditions of Contract. The FIDIC General Conditions of Contract have been used as guidelines for construction service users and providers when entering into construction agreements. The guidelines are not a model law in Indonesia, although both parties are eligible to determine under which procedure and forum they will conduct the dispute settlement. In this respect, once both parties comply with Indonesian regulations, they are given the freedom to determine any forum and procedure to institute the proceeding.

Nonetheless, the promulgation of the Arbitration Law in 1999 encouraged the development of construction participants in need of certain regulations to overcome issues arising from construction agreements. As implied in article 49 of PP 29/2000, settlements outside the court may be conducted through third party settlements such as mediation, conciliation, arbitration.
Dispute factors
Investing money for infrastructure and construction projects always entails various risks. As a developing country, Indonesia holds a mix of successful projects and opportunities, but also greater risks. Such risks, however, can be minimised by thoroughly examining the credibility of the construction companies and investors, and by performing a thorough due diligence.

There are several factors, mostly at the source of the claim, which constitute risks in the construction field.

- **Technical aspects**
  - Change of scope of works
  - Diverse field condition
  - Lack of material as specified under the technical requirements
  - Shortage or limited tools
  - Inadequate master plan or technical specification

- **Duration aspects**
  - Postponement of construction project
  - Acceleration of construction project
  - Delay to finishing construction project

- **Cost aspects**
  - Additional cost in the source of projects
  - Additional cost in the loss productivity
  - Additional cost in the overhead fee and profit

Construction dispute resolution
With the lack of detailed regulations and well-established forums to settle disputes, investors and construction companies based on the principle of freedom of contract may choose the location and procedure for dispute resolution through the Indonesian courts (litigation) or alternative dispute resolution (local or foreign). In terms of investment, local counsel often advise any foreign lenders or investors to avoid Indonesian courts for litigating the dispute.

Litigation through local courts
Litigation in the Indonesian courts is not commonly chosen by parties for settling their issues, due to the lack of certainty and the secrecy within the court. Meanwhile, the advantage of choosing arbitration as the dispute resolution medium (rather than litigation) is the legal certainty provided by the arbitrators, as all arbitrators are experts in the field of construction. Despite the higher cost of arbitration compared to court litigation, the majority of participants within the construction sector prefer arbitration as the dispute resolution method because court litigation lacks transparency and experience in complex construction disputes. Not to mention, court litigation involves an extensive and time-consuming procedure from the appeals process of the first instance court (District Court) through the High Court or to the Supreme Court, which may take years longer than arbitration proceedings to provide a final and binding judgment to the disputing parties.

There is no special court or tribunal that deals with project finance transactions and construction contracts in Indonesia. In the event that one of the disputing parties is an Indonesian entity, the dispute clause within the agreement will be Indonesian law, with the freedom of choosing the forum of settlement. It is possible to litigate the issue in the counterparty’s country of origin. However, this might lead to the absence of implementation of judgment in Indonesia. Since Indonesia is not recognised in the implementation of foreign court judgments, such judgment rendered upon a case involving an Indonesian party would lead to a re-litigation process within the Indonesian courts, which is a process foreign parties generally avoid due to the lack of legal certainty. Therefore, foreign investors, lenders, and construction companies generally agree to alternative dispute resolution, particularly arbitration, to settle any potential issues.

Arbitration
There are several arbitration agencies in Indonesia which generally conduct construction dispute settlements, such as BANI [Indonesian National Arbitration Body] and BADAPSKI [Arbitration and Alternative Dispute Resolution for Construction Disputes in Indonesia], which was established by the Ministry of Public Works. However, the latest efforts of BADAPSKI in settling construction disputes have not seemed to be effective. Therefore, BANI is commonly used by both parties to institute the proceedings, due to its credibility and reputation. Moreover, the majority of disputes which are arbitrated by BANI are related to construction.

Practically speaking, it is more common to settle such disputes within the senior management of the company and, if the disputes cannot be resolved amicably, to refer them to arbitration. The disputing parties typically attempt to resolve the dispute amicably through negotiation between several management levels of their companies, and occasionally, the disputing parties may agree in the dispute resolution clause of the agreement or on an ad-hoc basis to settle the dispute by mediation prior to the arbitration proceeding.

Arbitration is still considered to be one of the preferred types of dispute resolution. In general, the mechanisms to arbitrate construction disputes are similar to other type of disputes. Both parties will refer to the dispute clause of the agreement, specifically to determine which law governs the dispute and forum of settlement. In the event that both parties choose BANI to institute the proceedings of the dispute settlement, then the BANI pro-
Any arbitral award rendered outside the territory of Indonesia will be considered an international arbitral award, which might be implemented in Indonesia subject to requirements set out under Law 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (Law 30/1999).

Enforcement of national arbitration awards

Within a few weeks of the conclusion being presented by the parties before the Arbitration Tribunal, Law 30/1999 provides a maximum of 30 days to render the award. The Arbitration Tribunal will summon the parties with its award, and within a week of this award hearing, the parties will be provided with the written award. After a 14-day period in which the parties may correct any issue related to the award, the Arbitration Tribunal will register the award with the relevant district court for the enforcement process. The maximum period allowed for settling the dispute before the Arbitration Tribunal is 180 days after the date of the appointment of the Arbitration Tribunal. However, depending on certain circumstances and the complexity of the dispute, this period could be extended by the Arbitration Tribunal.

A local arbitration award is final and binding to the parties, so no appeal should be made against the award. No later than 30 days after the issuance of the award, it will be registered at the district court. If the unsuccessful party refuses to comply with the award, the winning party may request the chairman of the relevant district court to issue an order for the enforcement of the award.

Enforcement of international arbitration awards

An international arbitration award is an award which is issued by an arbitration institution or individual arbitrator which is, according to the law of Indonesia, regarded as an international arbitration awarder. The District Court of Central Jakarta is the only court authorised with the recognition and enforcement of international arbitration awards. Several conditions must be fulfilled for an international arbitration award to be enforceable in Indonesia: (i) the international arbitration award is issued by an arbitrator or arbitration panel in a country which has a bilateral or multilateral relation with respect to the recognition and enforcement of international arbitration awards with Indonesia; (ii) the recognition and enforcement of the international arbitration award is limited to the award which, according to Indonesian law, belongs to the scope of trade or economic law; (iii) the international arbitration award can only be enforced in Indonesia as long as it does not interfere with the public order; and (iv) the international arbitration award will be enforced after securing an enforcement order (exequatur), from the chairman of the District Court of Central Jakarta.

The international arbitration award, which concerns the state of the Republic of Indonesia as a party in dispute, can only be enforced after securing an enforcement order from the Supreme Court, while its execution is to be delegated to the District Court of Central Jakarta.

Annulment of arbitration awards

The unsuccessful party may request the nullification of the award by submitting a written nullification request to the chairman of District Court. The period of nullification submission is at least 30 days after the arbitration award, and must be registered and submitted by the Arbitration Tribunal to the Court Registrar Office at the relevant district court.

An application to nullify an arbitration award may be made if the award is alleged to contain the following elements: (i) letters or documents submitted in the hearings which are admitted to be forged or are declared to be forgeries after the award has been rendered; (ii) documents are found after the award has been rendered which are decisive in nature and were deliberately concealed by the opposing party; or (iii) an award is made based on fraud committed by one of the parties to the dispute.
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Taxing times

Ahmed Barakat and Ramy Shehata of ASAR - Al Ruwayeh & Partners offer legal and practical insights into the status of income tax in Kuwait

As an oil-rich state, income regarding the precious resource is a major cause of disputes. Kuwait started to search for so-called black gold in its soil in the mid 1930s. On June 30 1946, Kuwait's first crude oil shipments were exported. This was celebrated on the same day in a grand ceremony held under the auspices of the late Sheikh Ahmed Al-Jaber Al Sabah (the then Amir of Kuwait). From this point on, international companies started to show more interest in investing in Kuwait and benefiting from its rising economy.

In view of this growth in Kuwait’s economy, it was necessary to have legislation to protect the country’s economic interests and regulate commercial work in Kuwait. Among which, Income Tax Law 3 of year 1955 was promulgated.

Law 3/1955

The Kuwait legislator has imposed income taxes on any company that conducts business in Kuwait either directly or through an agent. On the other hand, no income taxes are applied on individuals working in Kuwait regardless of their nationality.

The Ministry should be proactive in following up all tax issues and seeking out those who try to evade taxes

Although there is no explicit provision in the law that exempts Kuwaiti companies from taxes, the established practice is that Kuwaiti companies are not subject to income taxes. However, if a foreign entity is a shareholder in a Kuwaiti company, then said entity would have to pay taxes on its dividends and capital gains. Also, Kuwaiti Companies listed on the Kuwaiti Stock market pay 2.5% tax under Law 19/2000 on National Labour Support.

According to the tax law, and prior to its amendment in 2008, the tax rate was dependent on the income value. As such, different income tax rates were used and sometimes the foreign entity was exposed to 55% income tax.

Further, the agent definition for tax purposes was debatable. The Kuwaiti legislator indicated that foreign corporate entities may conduct business in Kuwait either directly or through an agent, but no definition was provided for an agent. Thereafter, on October 10 1955, a resolution was issued by the Tax Director defining an agent.

This definition was re-affirmed by the Kuwait Cabinet in its resolution 387/2006. This resolution states that even an exclusive distributor should not be considered an agent, as the distributor usually lacks the representative authority required in the above definition for an agent.

In this regard, the main question is how the controversy regarding the definition of an agent has impacted tax enforcement in Kuwait.

Foreign companies usually appoint Kuwaiti entities or individuals as agents to be able to conduct business in Kuwait. According to Kuwaiti law, the agent is viewed as the local representative of the foreign principal and may be served with notices and legal summons on the latter’s behalf. Therefore, instead of chasing foreign entities for any taxes due, the Kuwaiti Ministry of Finance has started to sue local companies in their capacity as agents of foreign entities.

In summary, the Ministry of Finance in Kuwait wanted to apply two theories: (i) most, if not all, local companies should be considered agents even if they are only distributors or exclusive distributors and (ii) the Kuwaiti party should act as a guarantor and pay taxes on behalf of the foreign principal.

Legal precedents (Law 3/1955)

On December 28 2012, the Court of Cassation, in challenge 1697/2010, upheld the appellate and first instance judgments that confirmed the Ministry’s wrong application of the law. In this case, the local company defended its position and highlighted that it had no authority to enter into
The Kuwaiti legislator has adopted a wider definition of an agent while confirming the fact that Kuwaiti merchants are not subject to Kuwaiti tax

On April 26 2015, the Cassation Court issued its judgment in the two appeals (1581 and 1600/2014) confirming that the Court had discretion to decide, upon reviewing the documents, whether or not a relationship could be considered an agency. This practical approach by the Court indicates that even if the parties referred in their contract to an agency relation, it is for the Court to investigate this issue and arrive at the proper classification of the commercial relation. As such, if the Court discovers that the local party, in practice, has no authority on behalf of the local party, the latter would not be considered an agent.

Statute of limitations

The statute of limitations rule in the tax context means that the Ministry would not be in a position to claim taxes after the lapse of a certain period of time. In other words, the Ministry is bound to proceed with its claim for taxes during a certain period starting from the date the tax becomes due.

Tax Law 3/1955 did not include any reference to such rule and its implementation. Therefore, according to Kuwaiti Law, the general rules on time (bar in the Kuwaiti Civil Law) were applied in this regard.

Under article 441 of the Kuwaiti Civil Law, the Ministry’s claim for taxes would be time-barred after five years. However, the main question is when should we start calculating the five-year period?

According to the law, the statute of limitations should start running from the date the tax payer is to submit its tax declaration, which should be no later than April 15 of the year following the fiscal year subject to tax. In other words, for taxes for 2004, the tax declaration should be submitted no later than April 15 2005. In this regard, there was a lot of debate before the courts as to cases where the tax payer does not submit its tax declaration.

The Tax Department argued that the non-submission of the tax declaration indicates that it was not aware of the foreign company’s activity in the country. Therefore, the Ministry asserted that it would be unfair to be deprived of the right to claim taxes in such circumstances.

However, in a number of cases, the Cassation Court has decided to apply the statute of limitations rules although the tax payer did not submit the tax declaration. The Court decided that the limitations statute should start running from the date the tax had become due, regardless of whether or not a declaration was submitted; the rationale being that the Ministry should be proactive in following up all tax issues and seeking out those who try to evade taxes.

However, in some other cases, the Court has investigated this issue factually, as the Ministry used to issue tax assessments arbitrarily even if no tax declaration was submitted by the tax payer. In such cases, the Court has decided to calculate the five-year period from the date the tax assessment was issued, as this constituted a proof of the Ministry’s awareness of the taxes due.

Law 2/2008

After half a century, it was essential to have a new legislation to answer the questions raised during the implementation of Law 3/1955. Therefore, a new law was enacted amending some of the articles of Law 3/1955.

Under article 1 of the new law (Law 2/2008), the legislator clarified the implementation of tax rules in Kuwait. It states that:

An annual income tax is hereby imposed on the income of everybody corporate, wherever incorporated, carrying on trade or business activity in the State of Kuwait, particularly:

• The profits realised from any contract that may be totally or partially completed in the State of Kuwait.
• The amounts collected from the sale, lease, granting franchise to use or exploit any trade mark, patent design or copyrights.
• Commissions due or resulting from representation agreements or commercial mediation.
• The profits of industrial and commercial business.
• Profits realised from disposing of assets.
• Profits resulting from purchase and sale of properties, goods, related rights and opening a permanent office in the State of Kuwait wherein sale and purchase contracts are concluded.
• Profits resulting from the lease of any properties in Kuwait.
• Profits resulting from rendering any services in Kuwait.

The profits of an incorporated entity resulting from trading operations at the Kuwait Stock Exchange shall be exempted from tax imposed under this law, whether it has been executed directly or via portfolios or investment funds.

The tax rate under the new law has been fixed at a flat rate of 15% of net taxable income. Further, the new law has touched on a number of issues that were debatable and needed clarification.

The agent

As opposed to the strict definition of an agent under the old law, the executive by-laws of the new law define an agent as:

ey every and each natural or corporate person authorised by his principal to carry out business, trade or any of the activities stipulated in the law or to enter into a binding agreement with a third party on behalf and for the account of his principal within the limits of his powers. Therefore, the profit of Kuwaiti merchants resulting from the resale of goods bought and transported for his own account shall not be taxable in this regard.

As such, the Kuwaiti legislator has adopted a wider definition of an agent while confirming the fact that Kuwaiti merchants are not subject to Kuwaiti tax in respect to products bought for their own account (not for the benefit of the foreign principal).
In this regard, it is also noteworthy that the by-laws of the new tax law suggest that the mere supply of goods to Kuwaiti merchants could give rise to income taxes on foreign suppliers. This could lead to unacceptable results as many products are imported into Kuwait from other countries and, as such, the tax net has been unreasonably extended to cover almost all types of transactions including cross-border transactions.

Retention
Based on ministerial resolutions, Kuwaiti parties that have contractual relationships with foreign entities doing business in Kuwait had to retain five percent of the value of the contract as a guarantee for paying taxes by the foreign party. However, this was not stated in the old tax law.

Confirming this retention obligation, the Executive Bylaws of Law 2/2008 state under article 37 that:

All Ministries, authorities, public bodies, companies, societies, individual firms, any natural person and others as specified by the Executive Rules and Regulations shall retain 5% of the contract price or each payment made with whom they entered into contracts, agreements or transactions.

Further, to give teeth to the obligation to retain, in case of violation of article 37, the above noted by-laws penalise a Kuwaiti party who fails to retain the five percent by making him responsible for the payment of the entire tax due from the foreign party. However, it remains to be seen how far the Tax Department will go in implementing such penalty on Kuwaiti companies who fail to retain and who are expected to resist the application of such penalty.

On paying taxes either by the foreign entity or the Kuwaiti party, a tax clearance certificate will be issued enabling the foreign entity to proceed with the recovery of any retention made by the local party.

Statute of limitations
In this regard, the new law has complied with the general rule in civil law that provides for a five-year period to consider the tax claim time barred.

According to the Civil Law, the statute of limitations may be interrupted or tolled only by filing a legal action before the court. Therefore, prior to issuance of the new tax law, the Ministry had in all cases to file its claims with the court before the expiry of the five years.

However, the new tax law under article 41 added that the statute of limitations would also be tolled by the Tax Department notifying the tax payer with the tax assessment, a request of tax payment or a decision by the Tax Appeal Committee through registered mail.

As such, starting from 2009, it has become difficult for companies to argue that tax claims are time barred. Also, it will no longer be feasible to invoke the time bar argument successfully in circumstances where the tax payer did not submit its tax declaration, unless it can prove that the Tax Department had actual knowledge of its taxable activities in Kuwait but still did not take any measures to claim the taxes due within five years of the date it had acquired such knowledge.

Legal precedents (Law 2/2008)
On June 8 2015, the Court of Appeals issued its judgment in appeal 789/2015 against the Ministry. It argued the existence of an agency relationship between a local company and a foreign entity. However, the Court indicated that the local company was purchasing the products and selling them for its own account. Therefore, it includes: a place of management; branch; an office; a factory; a workshop; a mine; and oil or gas wells.

Further, most of the treaties consider the appointment of a distributor or an agent to be insufficient to constitute a permanent residence in the country. However, if such agent was dedicating the bulk of their time and effort to advance the interests of the foreign principal, then such relationship may be deemed to constitute a permanent presence in the host country.

As such, there appears to be a number of conflicts between the tax rules set out in the double taxation treaties and those stipulated in the Kuwaiti new tax law and its implementing by-laws. According to the new tax law, such conflict should be resolved in favour of the rules set out in the above noted treaties to ensure Kuwait’s compliance with its international obligations. However, this unfortunately does not appear to be the developing practice by the Kuwaiti Courts, which have had difficulties in implementing the double taxation treaties due to their complex and technical nature and the courts’ unfamiliarity with them. Still, in some few incidents (for example in appeal 213/2014) the court has upheld the first instance judgment that rejected the tax claim submitted by the Ministry. The court relied on the treaty with Cyprus as the foreign company had its permanent residence in Cyprus and provided evidence of paying taxes, even for its Kuwaiti activities, in Cyprus.

Tax law challenges
While the new tax law and its implementing by-laws have clarified some issues and strengthened the hands of the Tax Department in claiming and collecting due taxes, the practical realities on the ground have shown that there are still many challenges that need to be tackled promptly to ensure clarity and fairness in implementing tax rules in Kuwait. Among the more pressing challenges posed by the new tax law and its implementation, are, first, the importance of clearly defining business activities giving rise to taxes in Kuwait. In this regard, it is untenable to push for taxes on foreign suppliers of goods or international lenders of funds who do not have any business presence in Kuwait.

Second, it should be clarified that foreign principals who deal with distributors, as opposed to agents, should not be subject to Kuwaiti income taxes if their agreements are classic and true distribution agreements.

Third, the courts should delve more deeply into the proper interpretation and implementation of double taxation treaties to ensure that they will not be set aside in practice. In this regard, more training and consultation with countries with more developed tax systems should be made available to Kuwaiti tax officials to develop a better understanding of the double taxation treaties and how they are applied internationally.

While one can appreciate the Tax Department’s inclination to apply the Tax Law broadly and assertively to fulfill its mandate in raising new revenues and to diversify the sources of national income, the success in carrying out this task in the long run is dependent on the fair and transparent implementation of the Tax Law. This will be guided by Kuwait’s international treaties on the avoidance of double taxes and the internationally accepted mechanics of investigation, inspection and collection of taxes.
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Shehata has a Bachelor of Laws from Cairo University, Egypt (2002). He is admitted to the Egyptian Bar, and is fluent in English and Arabic.
Expediting dispute resolution: two methods

Uzoma Azikiwe and Olukayode Dada of Udo Udoma & Belo-Osagie assess the mechanisms being put in place to deal with lengthy litigation procedures

The people of Nigeria have, in the Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution), vested the legislative, executive and judicial powers of the state in the national and state assemblies, the President and governors, and the courts respectively. No result of any dispute resolution mechanism can be lawfully enforced in Nigeria without recourse to a court of law. By the judicial powers vested in the judiciary, Nigerian courts have the final authority, inter alia, to construe commercial agreements; review the exercise by regulators of their powers; delineate by interpretation, the extent of the powers of regulators under the enabling statutes; and to generally protect investment and rights. The relevance of the court system to business relationships and investors cannot therefore, be over-emphasised. For Nigeria to achieve its economic objectives and the ‘fundamental objectives’ as set out in chapter 2 of the 1999 Constitution, stakeholders have agreed that it is necessary that the system of dispute resolution by the Nigerian courts should be efficient and cases promptly determined. An efficient court system that resolves cases speedily is capable of positively impacting levels of investment and economic activity. Foreign investors and indeed Nigerian businesses, can benefit from mechanisms for speedy and efficient resolution of their commercial disputes. An improved system of dispute resolution prevents much-needed capital for driving continuous growth from being unduly tied down by protracted litigation.

The relevance of the court system to business relationships and investors cannot be over-emphasised

As litigation becomes protracted, the Nigerian judiciary continues to devise mechanisms for the speedy resolution of commercial disputes. Such mechanisms include the court-connected multi-door courthouse ADR (alternative dispute resolution) system and the fast-track procedure, two of the most significant mechanisms that the judiciary has put in place to foster speedy and efficient resolution of (particularly commercial) disputes.

Multi-door courthouse ADR system

ADR is a generic term that describes the various methods of resolving disputes other than by the customary adversarial litigation mechanism. Major ADR methods include mediation, conciliation and arbitration. Although arbitration as an ADR method is popular in Nigeria, its effectiveness has been hampered by parties who have recourse to the courts to challenge arbitral awards and thereby protract a dispute resolution mechanism that would otherwise have been a speedy process. Besides, to enforce an arbitral award, the successful party must, as a matter of law, have recourse to the courts, which process is usually exploited by an aggrieved party to prolong the final resolution of the dispute and payment of the award. Arbitration in Nigeria may therefore be described as ‘little more than an expensive foreplay to litigation’ (William W Park).

Nigerian courts have, in response to expressed concerns over the delay in resolution of disputes, put in place rules for speedier resolution of any appropriate claim filed in court by ADR. Such rules seek to curtail the delay in the process of enforcement of an arbitral award or an ADR settlement, and to prevent resolution of a dispute from being bogged down by protracted litigation at least in the court of first instance. See, for example, in Order 3 rule 11 of the High court of Lagos State (Civil Procedure Rules) 2012 (Lagos High Court Rules) and Order 17 rule 1 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004 (FCT High Court Rules). The rules of civil procedure of the high courts enjoin parties to a suit to have recourse to ADR or the multi-door courthouse as an alternative for resolution of their disputes and then give the resultant terms of settlement a stamp of judicial authority.

The Multi-Door Courthouse (MDC) is a centre for ADR that is independently run and managed by ADR professionals, but is attached or connected to a high court. There are three MDCs in Nigeria, namely the Lagos Multi-Door Courthouse (LMDC), the Abuja Multi-Door Courthouse (AMDC) and the Kano Multi-Door Courthouse (KMD) for Lagos State, the Federal Capital Territory, Abuja and Kano State respectively. The MDC offers different mechanisms, or doors, for resolving disputes in respect of cases that may or may not already be within the court system.

The services rendered by the MDC are mediation, arbitration and early neutral evaluation. The LMDC handles cases bordering on several subjects including: banking; general commercial transactions; construction; maritime; telecommunication; energy; employment; personal injury; probate; product liability; professional malpractice or negligence; real property; securities; and shipping and transportation. The main focus of the LMDC is commercial ADR and development of sector-specific dispute resolution mechanisms for commerce and industry.

A matter comes before the MDC in three ways, namely:

- Court-referred cases: a judge or magistrate may refer to an MDC an existing case that he deems suitable for resolution by ADR. If the case is resolved, parties execute an agreement containing terms of settlement and the case file is sent back to the referring court so that the terms of settlement may be entered as consent judgment by the referring judge. For instance, Order 25 rule 2(j) of the Lagos High Court Rules provides for reference of a litigated matter to the LMDC.
- Walk-in cases: parties to a dispute may, also, apply directly to an MDC for resolution of their dispute, with or without having first commenced an action in court. Parties may specify in their commercial agreements that any disputes will be resolved by mediation or arbitration conducted by the MDC.
- Direct intervention: the MDC can, also, assist parties in the resolution of their disputes by extending an invitation to the disputing parties.

For a walk-in case, the applicant files a request form and statement of issues and serves the same on the respondent. Within seven days of filing a request form or receipt of a referral from the court, a notice of referral is
sent to the other party, along with a submission form and a copy of the applicant's statement of issues. The respondent has seven days to submit the submission form to the MDC along with four copies of a brief statement in response. Once the statement of issues and statement in response have been filed, the registrar within the MDC assigns the matter to the dispute resolution officer (DRO), who conducts a preliminary screening of the matter to determine such matters as the nature of the claim, relief sought and the most appropriate method of ADR for handling the matter. A pre-session meeting is held once the appropriate door has been determined, where the DRO explains the ADR process and procedure to the parties. A list of neutrals is also given to the parties at this stage, and it is their choice as to whom they decide to appoint as a mediator from the list. They may be guided by the DRO if necessary. Parties then sign a confirmation of attendance form and a confidentiality agreement. An ADR session is scheduled and convened as soon as a mediator or arbitrator has signed consent.

If the ADR session is successful, the DRO will write out the terms of the confidential agreement and it will be passed to an ADR judge for endorsement as consent judgment (or to the referring judge if it was a court-referred matter). (See the Practice Direction on Mediation Procedure issued in 2008 by the Chief of Lagos State under section 30 of the Lagos Multi-Door Courthouse Law, 2007)

If the ADR session is unsuccessful, the matter is either sent back to the court (if it was court-referred) or, if it was a walk-in matter, parties can then decide whether or not to commence a legal action.

For recalcitrant parties, it is important to mention that a striking characteristic of the court-connected MDC is the power given to an ADR judge to give appropriate directives to recalcitrant parties, including the power to order the claimant and defendant to file a statement of case and response within 14 days, respectively, and to dismiss the claim or enter judgment against the defendant as its consent judgment in a matter, it becomes binding and enforceable by the parties as any other judgment of court.

Once a court-referred case is resolved before an MDC, the parties execute an agreement containing their terms of settlement and the case file is sent back to the referring court in order that the terms of settlement may be entered as the consent judgment of the court.

There is a limited right of appeal from a consent judgment, rendering it more likely that parties will comply with it rather than elongate the dispute resolution process by filing an appeal to the Court of Appeal. By virtue of section 241(2)(c) of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended), a party may only appeal from a consent judgment with the leave of court. This provision has been applied by Nigerian courts in many cases. In the case of SIM v Adetunji 2009 13 NWLR (part 119) 647, the Supreme Court stated:

*It must be pointed out that it is one of the cardinal principles of our judicial system to allow parties to amicably resolve the disputes between them. By doing so, the otherwise hostile relationship between the parties would be amicably resolved and cemented. It is this amicable resolution of disputes by the parties that is called settlement. When the terms of such settlements are reduced into writing, it is now called ‘terms of settlement’. When the terms of settlement are filed in court and made judgment of the court, it is then crystallised into ‘consent judgment’. When consent judgment is given, none of the parties has the right of appeal, except with the leave of court.*

**The Fast Track Procedure**
The Fast Track Procedure (FTP) under the High Court of Lagos State (Civil Procedure) Rules, 2012 (CP Rules) offers investors and entrepreneurs another opportunity for a speedy resolution of commercial disputes.

As provided in Order 56 of the Lagos High Court Rules on the FTP, its main objective is to reduce time spent on litigation to a period not exceeding nine months from the commencement of the action until final judgment.

For a claim or suit to qualify for the FTP, the following conditions must be met: (i) the suit must be commenced by a writ of summons; (ii) an application requesting that the suit be placed on FTP must be made to the registrar of court; and (iii) the claim is for liquidated monetary claims or counterclaim in a sum not less than N100 million ($503,000) or the claim involves a mortgage transaction, charge or other securities regardless of the value of the transaction, or the claimant is suing for a liquidated monetary claim and is not a Nigerian national or resident in Nigeria and such facts are disclosed in the pleadings.

A liquidated monetary claim is a claim for a specific sum of money, which is not required to be fixed by the court upon a further investigation. In the case of Maja v Samourig 2002 FWLR (part 98) 818, the Supreme Court of Nigeria defined it as an ‘ascertained or specific amount’ meaning ‘that there is nothing more that needs further to be done to determine the quantum or extent of the defendant’s liability’.

**Distinctive features of the FTP**
There are certain FTP features which differentiate it from an ordinary procedure for determining a suit. For example, the writ of summons used to commence a suit for FTP must be served within 14 days of filing, unlike under an ordinary procedure where there is no time limited for service of the originating processes.

Under the FTP, the time provided for the claimant to file its reply to the statement of defence is within seven days, but in an ordinary procedure, a claimant has 14 days to do so. An FTP claimant has seven days within which to apply for the issuance of the case management conference (CMC) notice after the close of pleadings, as opposed to 14 days in the ordinary procedure.

The FTP rules prescribe that CMC be concluded within a period of 30 days, but may be allowed for a further period of 14 days by the CMC judge. The time prescribed for completion of CMC under an ordinary procedure is three months, which may be further extended by the judge.

Where parties are unable to reach an amicable settlement during the CMC in a suit under the FTP, upon conclusion of the CMC, the case is immediately forwarded to the chief judge for assignment to a trial judge.

An efficient court system that resolves cases speedily is capable of positively impacting levels of investment and economic activity

When a walk-in case is resolved by an MDC, parties also enter a terms of settlement which is referred to a judge known as the ADR Judge, who will enter the terms of settlement as a consent judgment of the court.

**Advantages of the MDC system?**
ADR provides a speedy resolution of disputes and flexibility. The MDC process offers an added advantage by enabling the involvement and oversight of the judiciary. The terms of settlement reached through an MDC dispute resolution process entered as a judgment of court brings finality to the result of the dispute resolution mechanism and, being a consent judgment, parties are precluded from re-litigating their dispute. When the court enters the terms of settlement as its consent judgment in a matter, it becomes binding and enforceable by the parties as any other judgment of court.
At the first appearance of parties before the court, the trial judge will issue directions for trial. Where any direction for trial is varied as a result of default by any of the parties, the judge may impose costs or default fees on the defaulting party and failure to comply with any directions will not lead to adjournment of the trial unless the circumstances of the failure are exceptional.

The rules require parties to make any application which is not included in the trial timetable in a timely manner, to minimise the need to change the timetable.

The trial of an FTP suit is required to be conducted from day to day unless the court otherwise directs. The court is mandated to regard the adjournment of trial as an order of last resort and where the court has no option but to adjourn the trial, it would do so for the shortest possible time.

The mandate of the rules is that the entire trial period including the final addresses of counsel, should not be later than 90 days from the date the trial directions were made. To ensure compliance with the 90-day rule, the periods within which parties may file and serve their final written addresses have been accordingly abridged to 14 days for each of the parties and seven days to file and serve a reply on points of law, if necessary.

The judge is mandated to deliver judgment within 60 days of the completion of trial.

Advantages of the FTP
The speed of resolution of commercial disputes is a major advantage of the FTP. In view of the clear timelines set by the rules, FTP suits are designed to be heard expeditiously and are accorded priority by the court. Although the filing fees for an FTP suit are higher than the fees for filing a suit under the ordinary procedure, the fact that FTP suits are heard expeditiously (unlike an ordinary suit, which typically lasts longer) could potentially drive down the fees, and costs of litigation.

The earlier resolution of FTP suits also offers the potential of efficiency resulting from conscious efforts to streamline the process to focus only on the critical aspects of the dispute. This minimises unproductive efforts, such as excessive and unfocused discovery and frivolous applications.

The chief judge designates a number of judges to hear and determine FTP suits. Consequently, litigants are likely to benefit from the expertise and experience the judges have acquired over time in dealing with FTP suits.

Creating an investor destination
The introduction of the MDC system as a court-connected ADR is a laudable improvement in the management of litigation and dispute resolution in Lagos and Kano States, and the Federal Capital Territory. Not only has it assisted in managing the congested dockets of the high courts in the two densely populated commercial cities of Lagos and Kano, but disputes have also been resolved with less animosity between disputants. The MDC and FTP provide unique opportunities for speedy and efficient resolution of commercial disputes.

However, these dispute resolution mechanisms are of limited availability in Nigeria. The MDC system is only available in two states (Lagos and Kano States) and the FCT, Abuja. The FTP procedure is only available in Lagos State.

The MDC process offers an added advantage by enabling the involvement and oversight of the judiciary

Under Nigerian law, for a court to be competent to adjudicate on a contractual dispute: (i) the contract must have been entered into within its territorial jurisdiction; (ii) the contract was performed or to be performed within its territorial jurisdiction; or (iii) the intended defendant resides or carries on business within its territorial jurisdiction. Although parties may, by their arbitration agreement, contract to refer their disputes to any of the MDCs whether or not the conditions for the exercise of jurisdiction are present, regarding the FTP, only matters in respect of which the High Court of Lagos State is competent to adjudicate on may be taken in Lagos State.

The other states of Nigeria should follow the example of Lagos State in reforming the litigation procedures to make the respective states and, therefore, the entire country, an investor destination.
About the author

Olukayode Dada is a senior associate and a member of the firm's litigation, arbitration and alternative dispute resolution practice. He represents clients and provides advice across the firm’s areas of specialisation including corporate, maritime, aviation, employment and energy and natural resources disputes and matters. He trained as an international commercial arbitrator with several organisations including the ICC Institute of World Business Law, the Chartered Institute of Arbitrators in the UK, Chartered Institute of Arbitration (Nigeria) and Chartered Institute of Mediation and Conciliation. He obtained a diploma in international commercial arbitration at St. Anne’s College, Oxford, UK and has benefitted from PIDA training in International Commercial Contracts and training by the Chartered Institute of Taxation of Nigeria.

Dada has authored several articles on topical aspects of law, including: On Service Marks and the Ministerial Fiat; Bringing an end to Litigation: The Doctrine of Estoppel by Record under Nigerian Law; Enforcement of Judgment against the Nigerian Government by way of Garnishee Proceedings: The Attorney-General’s Hurdle; and Standing to Sue in International Commercial Transactions.
A primer in local litigation

Mansoor Malik and Majda Al Riyami from Al Busaidy Mansoor Jamal & Co answer key questions on Omani dispute resolution procedures

Provide a brief overview of the Oman’s commercial court hierarchy, and each level’s jurisdiction.

The Judicial Authority Law enacted by Royal Decree (RD) 90/99 provides for different levels of courts as follows: the Supreme Court; appellate courts; courts of first instance; and, courts of summary jurisdiction.

There are three types of jurisdiction before the Omani court. First, international jurisdiction. In general, the commercial courts of Oman have jurisdiction in any case in which the defendant has expressly or impliedly accepted the jurisdiction of the Omani courts.

Second, value jurisdiction. If the value of a claim is less than OR70,000 ($182,000), a single judge bench of the Primary Commercial Court of First Instance will decide on the case. The judgment passed will be final. If the claim is for more than OR70,000, then a bench of three judges of the Court of First Instance will be competent to decide on such case and cases relating to insolvency, liquidation of companies, insurance claims, disputes between brokers in securities and intellectual property and patents.

Third, local jurisdiction. Generally, and unless otherwise provided for by law, the court within the precinct in which the defendant is domiciled has jurisdiction.

The Omani courts are competent to hear all civil and commercial matters, labour, tax and rent cases in addition to arbitration applications filed before them, save in respect to immovable property situated outside Oman. Specialist courts have been established for consideration of specific matters. These courts are: the Commercial Court; the Magistrates Court; the Sharia Court; and, the Administrative Court.

The Commercial Court has jurisdiction to hear all labour disputes in addition to commercial matters. Any case in which the Primary Commercial Court of First Instance has passed its judgment will be appealable within a period of 30 days from the date of service of judgment, provided the amount decreed is in excess of OR20,000 and the judgment has been passed by a panel of three judges.

The Magistrates Court deals solely with criminal offences. Proceedings are invariably initiated by the Royal Oman Police and followed through by the Public Prosecution Department, which independently decides on whether or not to refer the case to the Magistrates Court for prosecution.

While judges are at liberty to take an inquisitorial approach to cases, they seldom do so

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The judges are competent to decide on all issues of facts and law relevant to the matter brought before them in accordance with the applicable laws of the Sultanate of Oman including but not limited to laws of procedure. When adjudicating on cases brought before them, the judges must, in accordance with the Commercial Code of Oman RD 55/90 and the Civil Transactions Law RD 29/2013 (CTL) set out the rules governing the rights and obligations of contracting parties. The Primary Commercial Court, when considering any contractual disputes brought before it, will consider the contract between the disputing parties (provided that it does not conflict with any law or public policy) and also consider general principles which establish justice between litigants and lead to certainty in commercial transactions. The Primary Commercial Court considers the following matters when interpreting commercial contracts: (i) contract terms; (ii) legislative provisions; (iii) rules of custom and practice; and (iv) provisions of Sharia (Islamic) law.

Subject to possible application of the Basic Law of Oman, the provisions of Sharia law would be considered by the court only in the absence of (i), (ii) and (iii).

Under article 1 of the CTL, in the absence of applicable law, the Omani court is required to decide disputed matters brought before it in accordance with the general principles of Sharia law or else the prevailing customs. Given that the Commercial Code itself addresses the interpretation of contracts, and expressly provides for the relevant practice to be considered when interpreting contracts between merchants, in our view, the judges of the Primary Commercial Court will allow the provisions of the Commercial Code to prevail over the conflicting provisions, if any, of the CTL.

Depending on the nature of a dispute and complexity of the technical issues raised by the parties, the courts may appoint a court-registered expert. Experts are chosen from a range of professions such as accounting and engineering. The court will provide the expert with a mandate based on which he is to prepare a report. The litigants will be given an opportunity to comment on and challenge the expert’s findings and recommendations.

Whilst judges are at liberty to take an inquisitorial approach to cases, they seldom do so and leave it to the parties to present and establish their cases on the basis of their documentary evidence.
Explain the time line and procedures for court cases regarding commercial disputes.

Article 92 of the Commercial Code provides for a limitation period of 10 years, commencing from the date an obligation arose or was breached giving rise to a cause of action, within which a party may file its dispute before the Omani courts unless another applicable law provides for a shorter period.

The plaintiff will need to file a statement of claim in Arabic. Any supporting documents in a foreign language are required to be translated into Arabic by a licensed translator in accordance with article 27 of the Civil and Commercial Procedures Law RD 29/2002 (Civil Procedure Law). The plaintiff will need to provide the court with the requisite number of copies of the statement of claim and supporting documents, for service of summons on each defendant. The statement of claim must include the defendant’s location and residence if an individual, or corporate head office if a company, so that for service of the summons physically on the defendant, the court does not serve summons to postal addresses.

The Primary Commercial Court filing fee is two percent of the claim amount, with a minimum of OR30 up to a maximum of OR3000. A similar fee will be payable when appealing a judgment of the lower court before the Appeal Court. The fee for an appeal to the Supreme Court is OR50. Upon payment of the fees, the court clerk will set a date for the first hearing within three weeks of the date of filing the claim.

Court fees for registration of a case before the Primary Commercial Court and the Appeal Court as well as other fees, such as those paid to a court-appointed expert or auctioneer, and enforcement fees, will be recoverable from the unsuccessful party. Courts in Oman do not allow for recovery of lawyers’ fees in proceedings as a matter of right. The courts will uphold a contractual agreement between the parties to recover a specific sum in respect of lawyers’ and attorneys’ fees.

Although the Omani courts have confirmed their willingness to pass judgments for a foreign currency amount, claims filed before the courts must state any monetary amounts claimed in Omani rials. Where the amount to be claimed is in excess of OR5000, the claimant will need to be represented by a lawyer. As noted above, all documents and statements of claim are required to be submitted in Arabic. Unlike in other jurisdictions, court hearings are typically of short duration as cases are invariably decided on the basis of documentary evidence submitted by the parties and reports prepared by court-appointed experts. Witnesses are rarely called for examination-in-chief or cross-examination.

How extensive are the parties’ discovery and disclosure obligations both pre-trial and during proceedings?
The Law of Evidence in Civil and Commercial Transactions RD 68/2008 (Evidence Law) provides for a party’s right to seek a discovery or disclosure of documents and records relevant in the disputed matter in accordance with the procedures set out in articles 20 – 21 of the Evidence Law. These articles primarily allow a litigant to seek an order from the court directing his opponent to disclose relevant documents in the case in the following circumstances: (i) where the law expressly entitles a litigant to request the submission of the relevant documents; or (ii) where the documents are common between the parties (a document will be considered to be common if it affects the interest of both parties or if it confirms their mutual liabilities and rights); or (iii) if the opponent has relied upon the document at any stage of the proceedings.

The application for the disclosure must provide a detailed description of the document, the purpose for which the document is required, supporting evidence that it is in the possession of the opposing party and the reasons for which the document is required to be disclosed. If the court is satisfied with the application it will order release of the documents.

Have there been any other recent reforms regarding the court system or enforcement?
Whilst there have not been any recent reforms with regard to the court system in Oman, the Ministry of Justice has recently developed and established courts in additional regions of the Sultanate to facilitate the rendering of judgments more efficiently and expeditiously and to reduce pressure on the courts in larger cities.

Has the introduction of Islamic finance in 2012 had any effect on dispute resolution in Oman?
The introduction of Islamic finance in Oman has had no impact on the dispute resolution process.

How common is alternative dispute resolution, including arbitration and mediation, and must parties try resolving their dispute in one of these forums before commencing litigation?
There is no obligation under Omani law requiring disputing parties to negotiate or seek mediation in a disputed matter before commencing litigation. Parties who wish to reach an amicable settlement of a dispute may refer it to the Primary Court’s dispute settlement department but this is not a compulsory procedure.

The parties may contractually agree to have their disputes resolved through arbitration or by other means without the involvement of the Omani courts or prior to proceeding with the filing of a claim before the Omani courts. If a contract between two parties provides for dispute resolution by arbitration only, then the parties will be obliged to refer the disputed matter to arbitration and the Omani courts will not accept jurisdiction unless the parties mutually agree to waive the arbitration provision.

Do Omani courts respect foreign judgments, and are arbitration awards enforceable in the country?
Several laws govern the enforcement in Oman of foreign judgments and arbitration awards. Oman entered into a convention with the countries of
the Gulf Cooperation Council countries in 1997 whereby all judgments and arbitration awards obtained in Oman are enforceable in any other Gulf Cooperation Council (GCC) country. In 1998, Oman also ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Accordingly, any award rendered by a foreign arbitral tribunal should be directly enforceable in Oman, provided that it does not fall under any of the exceptions set out in the New York Convention.

Oman's Civil Procedure Law lays down the rules and procedure for the enforcement of a foreign judgment with regard to an Omani interest. Under the Civil Procedure Law, reciprocal treatment of judgments and orders issued by Oman's courts and tribunals is a pre-condition to the enforcement of a foreign judgment. Article 352 of the Civil Procedure Law stipulates that judgments and orders issued in a foreign country may be executed in Oman on the same terms applicable in the law of that country with regard to the execution of judgments and orders issued in Oman. Article 352 additionally states that:

The order for enforcing execution shall not be effected unless the following are all satisfied:

- the concerned judgment or order is passed by a competent judicial authority in accordance with the international jurisdiction rules applicable in the country in which the said judgment or order is passed, is final according to that law and was not grounded on deception;
- the parties to the said law suit in relation to which a foreign judgment was issued were summoned to appear and were properly represented;
- the judgment or order does not include any requests, the basis of which breaches the laws enforced in Oman;
- the judgment or order does not contradict any judgment or order previously issued by the Omani courts, and it does not include anything contravening public order or morals; and
- the country in which the judgment in question was issued, accepts execution of judgments of Omani Courts within its own territories.

In addition to these provisions of the Civil Procedure Law, the CTL also provides that parties to a contract may choose the jurisdiction of foreign courts and law, subject to certain conditions being met. These provisions of the CTL have not yet been tested so it is not possible to state with any certainty how the Omani courts will interpret the overlap between the Civil Procedure Law and the CTL.

Are judgments and arbitration awards from Oman generally enforceable overseas?

Whether or not a judgment or arbitration award rendered by an Omani court or tribunal is enforceable in an overseas jurisdiction would depend upon the rules of civil procedure applicable in that jurisdiction. An arbitration award rendered by a tribunal in Oman is prima facie enforceable in another GCC country or any country which is a party to the New York Convention. The enforcement of Oman Court judgements in foreign jurisdictions would depend on the existence of reciprocal treaties, as is the case between GCC member countries, and the existence of law in foreign countries allowing for the enforcement of Oman judgements. At the time of writing, other than the treaty between GCC member countries, there is no other bilateral treaty entered into by Oman which provides for the mutual enforcement of judgements or arbitration awards obtained in Oman necessarily exclude the jurisdiction of the Omani courts provided that a litigant is able to establish that the Court of First Instance has the jurisdiction to hear the disputed matter under the Civil Procedure Law.

Save where a document provides for resolution of disputes by arbitration, provided that one of the parties to the dispute is resident or domiciled in Oman, then in all likelihood, the Primary Commercial Court would accept jurisdiction if a matter were to be presented to it for adjudication by a party to a document governed by a foreign governing law.

Omani courts place significant reliance on court experts for assistance on technical and financial matters

If a document is expressed to be governed by non-Omani law and provides for resolution of any dispute through arbitration, the Primary Commercial Court is unlikely to accept jurisdiction unless the parties to such documents consent to the same. In such a case, arbitrators would be at liberty to apply the contractually-agreed upon law. Prior to the enactment of the CTL, if a contract provided for the jurisdiction of a foreign court with no reference to arbitration and the governing law was stated to be English law, then the Primary Commercial Court would assume jurisdiction in a dispute and, in all likelihood, apply Omani law unless the parties to the contract were able to demonstrate the existence of the foreign governing law as a matter of evidence.

Article 21 of the CTL provides that a contract will be subject to the laws of the state where the contract is concluded. However the contracting parties may expressly or impliedly agree otherwise. Therefore contracting parties will continue to be able to select the governing law of their contract.

Article 28 of the CTL provides that the provisions of a foreign law specified by its preceding articles may not be applied if such provisions are contrary to Sharia law, public order or morals in Oman. In our opinion, article 28 is intended only to apply to contracts which do not have an express choice of law and a foreign law is the applicable law solely as a result of applying the conflict of law principles set out in articles 10 to 27 of the CTL.

Articles 21 to 28 of the CTL referred to above are yet to be tried and tested before the Omani courts.

What single advice would you offer a foreign party embarking on litigation in Oman?

A foreign party seeking to litigate in Oman should bear in mind that a successful party may recover the full cost only of court fees and fees for the appointment of an expert by the court. Awards for recovery of lawyers’ fees are typically nominal and the courts do not take into consideration the actual fees paid to legal counsel, even though they are usually the main expense incurred by a party. Additionally, the Omani courts place significant reliance on court experts for assistance on technical and financial matters.
Mansoor Jamal Malik is the founder and managing partner of Al Busaidy Mansoor Jamal & Co. A UK-qualified barrister, he is regarded as a leading expert on Oman’s judicial and legislative systems. Mansoor has significant expertise in arbitration and litigation, and is a Court of Appeal panel arbitrator and is licensed to appear before the Oman Supreme Court. He advises on domestic and international arbitration disputes under ICSID and UNCITRAL rules before the ICC International Court of Arbitration and the London Court of International Arbitration (LCIA). He also handles complex construction/engineering and commercial litigation matters, and acts as an expert witness on Omani laws in proceedings in international jurisdictions. He is a door tenant of the leading London Chambers of Stephen Tromans QC and Neil Block QC at Thirty Nine Essex Street.

Majda Al Riyami is a senior Omani associate in AMJ’s litigation and arbitration practice. She has considerable experience settling, prosecuting and defending claims before the jurisdiction’s courts and tribunals up to appellate court level. Majda handles a wide range of civil, commercial, administrative and employment cases on behalf of leading national and international institutions across a broad spectrum of sectors. She has developed a niche practice advising international airlines operating in Oman on recovery and the resolution of disputes and is a member of AMJ’s dedicated cross-departmental aviation and shipping group.
Managing international dispute resolution

Mansoor Hassan Khan of Khan & Associates examines how Pakistani courts have dealt with international dispute resolution.

Pakistani law differentiates between domestic arbitration and arbitration conducted outside Pakistan and their resulting awards. Each is governed and enforced under a separate law.

Domestic arbitration and domestic arbitral awards

The Arbitration Act 1940 (Arbitration Act) governs and regulates arbitration proceedings conducted in Pakistan and the enforcement of domestic arbitral awards.

The parties are free to adopt procedures of their choice for the conduct of arbitration proceedings. The court, however, plays a pivotal role in the conduct of a domestic arbitration from the appointment to the removal of an arbitrator. The court, on the application of the arbitrator, summons the parties and witnesses to appear before the arbitrator. If the parties or witnesses fail to appear before the arbitrator and produce evidence, the arbitrator may make an award on the basis of the evidence before him or her. The court may order the preservation, interim custody or sale of any goods or property that form part of the subject matter of the arbitration.

The grant of exclusive jurisdiction to the High Court reflects Pakistan’s commitment to the regime established under the New York Convention.

The award given by an arbitrator is final and cannot be appealed on a point of law. However, appeals are permissible where there has been a procedural irregularity. The court may, on request of either party, modify or correct an award on a matter that is not part of the referral to arbitration, or where the award is imperfect in form or contains an obvious error or mistake. After the expiration of the time allowed for either party to apply for the arbitral award to be set aside, the court will proceed to pronounce judgment and issue a decree on the basis of the award.

Where a party to an arbitration agreement governed by the Arbitration Act commences legal proceedings against another party to such arbitration agreement in respect of any matter agreed to be referred to arbitration, the Arbitration Act entitles such other party to apply to the judicial authority before which the proceedings are pending to stay the legal proceedings. This can be done at any time before the filing of a written statement or before taking any other steps in the legal proceedings. The judicial authority, however, has discretion and is not bound to order a stay of legal proceedings in every case.

The New York Convention

Pakistan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Pakistan signed the New York Convention on December 30 1958 and ratified it much later on July 14 2005. Although the New York Convention was being implemented in Pakistan from 2005 through ad hoc presidential decrees (ordinances), on 15 July 2011 a permanent legislation was enacted by the parliament of Pakistan: the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (NYC Act). A high court has exclusive jurisdiction to deal with all matters related to the NYC Act. A high court is the second highest court of the country and the grant of exclusive jurisdiction to such court reflects Pakistan’s commitment to the regime established under the New York Convention.

The NYC Act applies to arbitration agreements made at any time, and to foreign arbitral awards made on or after July 14 2005. It obliges a local court seized of a matter covered by an arbitration agreement to stay the judicial proceedings pending before it upon an application filed by one of the parties and to direct the parties to refer the matter to arbitration. This will not apply if the local court finds the arbitration agreement null and void, inoperative or incapable of being performed.

Section 6 of the NYC Act obliges a local high court, upon an application filed by a party in whose favour a foreign arbitral award is issued, to recognise and enforce the foreign arbitral award in the same manner as a judgment or an order of a court in Pakistan. A foreign arbitral award that is enforceable under the NYC Act is treated as binding for all purposes on persons between whom it was made. The court is entitled to refuse recognition and enforcement of a foreign arbitral award only on grounds stated in section 7 of the NYC Act, which are the same as those laid down in article 5 of the New York Convention. After a foreign arbitral award is recognised by the court, it may be executed in the manner laid down in the Code of Civil Procedure 1908 (Code).

The ICSID Convention

Pakistan is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (Washington Convention). Pakistan signed the Washington Convention on July 6 1965 and ratified it on September 15 1966. On April 28 2011, a permanent legislation to implement the Washington Convention in Pakistan: the Arbitration (International Investment Disputes) Act 2011 (AIID Act) was enacted by the parliament of Pakistan.

Section 3 of the AIID Act entitles a person seeking recognition or enforcement of an arbitral award issued by the International Centre for Settlement of Investment Disputes (ICSID) to have the arbitral award registered in a local high court subject to proof of any matters that may be prescribed and to other provisions of the AIID Act.

An arbitral award registered under section 3 of the AIID Act is treated, with regard to the pecuniary obligations it imposes, as a judgment of a local high court and is to be executed by the high court in the manner laid down for execution of its judgments. However, enforcement of an award against the government may be refused by the court on the same grounds on which a court judgment may not be enforceable against the government.
The AIID Act bars local courts from applying the provisions of the Arbitration Act to proceedings initiated under the Washington Convention. The AIID Act empowers the Federal Government to lay down the procedure for the registration of arbitral awards issued under the Washington Convention by making rules. The Federal Government is also empowered under the law to prescribe, by rules, the matters to be proved at the time of the filing an application for registration of such arbitral awards and the manner of proof of these matters. So far, no rules have been issued by the Federal Government in this regard.

Other foreign arbitral awards
Certain foreign arbitral awards issued under an arbitration agreement covered by the Protocol on Arbitration Clauses 1923 and to which the Convention on the Execution of Foreign Arbitral Awards 1927 applies may be enforced in Pakistan in accordance with the provisions of the Arbitration (Protocol and Convention) Act, 1937.

Enforcement of foreign judgments
In the context of the enforcement of foreign judgments, Pakistani law only allows the enforcement of judgments issued by particular courts of certain specified countries. Once a foreign judgment has passed this test, the local court would then analyse whether or not the foreign judgment is a violation of any principles of Pakistani law. A foreign judgment will not be enforceable in Pakistan where: (a) it has not been pronounced by a court of competent jurisdiction; (b) it has not been given on the merits of the case; (c) it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Pakistan in cases in which such law is applicable; (d) the proceedings in which the judgment was obtained are opposed to natural justice; (e) it has been obtained by fraud; or, (f) it sustains a claim founded on a breach of any law in force in Pakistan.

Local courts are extremely reluctant to enforce foreign arbitral awards in Pakistan

The Code allows enforcement of decrees passed by courts in the United Kingdom and other reciprocating territories. Where a certified copy of a decree of any of the superior courts of the UK or any reciprocating territory is filed in a district court in Pakistan, the decree may be executed in Pakistan as if it had been passed by the district court. Reciprocating territories include the UK and other countries or territories the Federal Government may announce from time to time by notification in the Official Gazette. A superior court with reference to any such territory means such court as may be specified in the said notification.

Not all decrees and judgments from the UK or a reciprocating territory handed down by a designated superior court are enforceable in Pakistan. The only decrees which are enforceable are those where a sum of money is payable, not a sum payable in respect of taxes, fines or other penalties.

The Government of Pakistan seems to have only nominated Fiji, Singapore and certain parts of New Zealand and Australia as reciprocating territories under the Code. It is, however, possible to file a suit in Pakistan on the basis of a foreign judgment treating it as a cause of action even though the judgment may not be from one of the reciprocating territories.

Interim relief for international arbitration proceedings
Unfortunately, the legal regime established in Pakistan under the New York and ICSID Conventions does not address the issue of interim relief. Section 41 of the Arbitration Act, which only deals with domestic arbitrations, grants powers to a civil court in matters such as preservation, interim custody, sale of any goods which are the subject matter of the reference, interim injunction, and appointment of a receiver. One important issue is whether recourse may be made to the provisions of section 41 of the Arbitration Act for obtaining an injunction in aid of actual or intended arbitration proceedings before an ICSID or an ICC tribunal.

Section 47 of the Arbitration Act states that the provisions of the Arbitration Act apply to all arbitrations and to all proceedings thereunder apart from those otherwise provided for by any other law. Section 7 of the AIID Act states that the provisions of the Arbitration Act do not apply to proceedings pending under the Washington Convention. In view of this provision, it appears that a recourse may not be made to section 41 of the Arbitration Act for the grant of an interim injunction in aid of arbitration proceedings pending under the ICSID Convention.

In contrast, no provision under the NYC Act specifically ousts the applicability of the Arbitration Act to matters governed by the NYC Act. It appears that the provisions of the Arbitration Act may continue to apply as long as they are not in conflict with the NYC Act. This may include a recourse to section 41 of the Arbitration Act for the grant of an interim injunction in aid of the arbitration proceedings before an ICC or any other tribunal excluding an ICSID tribunal. One case from the Lahore High Court discussed below throws some light on this issue. Such application of the Arbitration Act to matters related to international arbitration proceedings would be unusual, as the Arbitration Act was not intended to deal with matters related to foreign arbitration agreements and foreign arbitration proceedings.

Role of local courts in international arbitration agreements
There is now enough case law in Pakistan under section 4 of the NYC Act to establish that a court has no discretion when it comes to the grant of a stay in legal proceedings brought by a party to an arbitration agreement against another party. The threshold for not granting such a stay under the domestic arbitration law is quite low; ‘sufficient reason’ is all that is required. The courts have now taken the view that under the NYC Act, no such discretion is available to the courts. This position has been followed in the Karachi High Court cases of: Travel Automation v Abacus International 2006; Metropolitan Steel Corporation v Macsteel International 2006; Far Eastern Impex v Quest International Nederland 2009; and Cummins Sales and Service v Cummins Middle East 2013.

The reality of enforcing foreign arbitral awards
Despite the fact that the procedure for the enforcement of foreign arbitral awards has been streamlined in the NYC Act, local courts are extremely reluctant to enforce foreign arbitral awards in Pakistan. The seriousness of this situation can be gauged from the fact that 10 years after the enforcement in Pakistan of the New York Convention, there is only one reported judgment of a Pakistani court (FAL Oil Company v Pakistan State Oil Company 2014) where a foreign arbitral award has been enforced in Pakistan.

There are instances in which local courts have applied very stringent requirements of the Civil Procedure Code in enforcement proceedings. For instance, the framing of issues and calling the parties to produce their oral and documentary evidence. One particular case brought before the Lahore High Court for the enforcement of a foreign arbitral award could not be decided in the 10 years in which the court had called for the production of oral and documentary evidence instead of adopting the summary procedures. Eventually, the foreign party seeking enforcement decided to withdraw its application. The Federal Government’s failure to issue the required rules under section 9 of the NYC Act, which lay down the procedures to be applied by local courts for handling these matters, is further aggravating this situation. There also appear to be capacity issues among local courts, which frequently treat enforcement proceedings in the same manner as they treat ordinary civil proceedings instead of applying the summary procedures.

In a disturbing development, the Lahore High Court has held in Taisei Corporation v AM Construction Company 2012 that an arbitral award issued
in an ICC arbitration held in Singapore between Japanese and Pakistani corporations would be considered a domestic arbitral award, as the governing law of the arbitration agreement was Pakistani law. The court held that the enforcement of this award would be governed by the Arbitration Act. The High Court based this conclusion on a judgment of the Supreme Court, commonly known as the Rupali case (Hitachi and another v Rupali Polyester 1998).

It appears that the Lahore High Court, while writing this judgment, did not consider that the Rupali case was decided under the Arbitration (Protocol and Convention) Act 1937, which was repealed upon the enactment of the NYC Act. While section 9 of the Arbitration (Protocol and Convention) Act 1937, which expressly stated that an arbitral award made outside Pakistan under an arbitration agreement governed by Pakistani law would be deemed a domestic arbitral award, the NYC Act did not contain a similar provision. Therefore, the Rupali case was not good authority in respect of matters being adjudicated under the NYC Act.

The High Court further observed that there was no provision in the NYC Act similar to sections 14 (dealing with signing and filling of award by the arbitrator), 30 (dealing with grounds for setting aside the award) and 33 (dealing with arbitration agreement or award to be contested by application) of the Arbitration Act. The High Court held that since the NYC Act had not specifically repealed the Arbitration Act, the remedies available to a person under these provisions of the Arbitration Act were still intact.

The appeal against this decision was heard by the Supreme Court. However, the Court did not give any findings on the above issues. In the meantime, it is advisable that parties to cross-border transactions expressly agree on a foreign law to be the governing law of the arbitration agreement.

Separability

The Pakistani courts have generally accepted the principle of separability of the arbitration agreement. Courts in Pakistan have held that the frustration or repudiation of the matrix contract will not affect the validity of the arbitration agreement embedded in it. In the recent case of Lakhra Power Generation v Karadeniz Powership Kaya Bay 2014, the Karachi High Court further extended the scope of this doctrine. The highest court of Pakistan, the Supreme Court, had declared void ab initio certain contracts in which were embedded certain arbitration agreements. A matter came before the Karachi High Court in which the court was to decide on the effect of such declaration by the Supreme Court on the arbitration agreements embedded in the matrix contracts. The Karachi High Court observed that the ‘Supreme Court was concerned with the main contracts and not with any arbitration clause[s] embedded therein...What was declared void ab initio and ordered to be rescinded were the main contracts… and not any arbitration agreements therein’.

Public interest litigation

In several cases, the superior courts of Pakistan have proactively exercised their constitutional power of judicial review, even in those matters covered by international arbitration agreements. The courts exercised these powers in the public interest generally to protect the public exchequer either suo moto or on the basis of petitions filed by third party pro bono publicos. It is sometime alleged that interested parties approach the local courts through fictitious pro bono publicos to enable the government and government-owned enterprises to wriggle out of their international arbitration agreements. Frequently, government and government-owned enterprises allege corruption and their own non-adherence to internal governmental procedures to convince a local court to declare void international contracts which they have entered into. In several cases, the Supreme Court of Pakistan has declared contracts which contained international arbitration agreements void ab initio.

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Top 10 litigation tips

Fernando Arias and Claudio De Castro of Arias Fábrega & Fábrega share their insights on litigating in the country and against local counterparties

Be cautious: have guaranties from your counterparty before there is a dispute
This suggestion is not only applicable when facing a Panamanian counterparty, but when facing counterparties in general. It is always advisable to hope for the best and prepare for the worst. Therefore, even when there is no dispute and when you are just entering into a transaction, it is always advisable to anticipate possible disputes between the parties. At this stage, it is important to ask oneself: is my counterparty giving me any guaranties? If so, are those guaranties sufficient?

In general, there are three types of guaranties that can be provided: (i) guaranties issued by a third party (who is solvent and has assets); (ii) guaranties over a specific asset; or (iii) personal guaranties.

The advantage of bank guaranties (for example, a standby letter of credit) or bonds issued by a third party (an insurance company) is that these guaranties are usually issued by a solid, solvent institution, who should have sufficient assets to cover the obligations of the party on behalf of whom the guaranty is issued. When dealing with this type of guaranty, one must always know under what circumstances one can call these guaranties, and be sure not to engage in any conduct that will affect the right to call these guaranties.

Another type of guaranty is an in rem guaranty or a guaranty over specific assets (such as pledges and mortgages). When facing this type of guaranty, it is important to know the value of the assets over which the guaranty is being constituted. This can be verified with the use of experts (accountants and appraisers, for example). No one wants to be in a position where the value of the asset given as collateral is only a small percentage of the debt and appraisers, for example). No one wants to be in a position where the value of the asset given as collateral is only a small percentage of the debt.

The type of guaranty that one can always ask for are personal guaranties (such as acknowledgment of debt and promissory notes). This type of guaranty is not as convenient as the two types of guaranties previously described, since: (i) there is no commitment by a solid, solvent institution; and (ii) there is no collateral. This type of guaranty also entails the risk that the entity granting the guaranty could become bankrupt or find itself having no assets.

The best type of personal guaranty in Panama are those that give its holder the right to initiate executive proceedings (such as promissory notes), which are considerably faster than ordinary proceedings.

If a personal guaranty (including a parent company's guaranty) is not one that grants its holder the right to initiate executive proceedings, then such a document will merely be considered evidence to be used in an ordinary proceeding to demonstrate the existence of the obligation.

Beware of the corporate veil
A distinctive feature of the Panamanian judicial system is the courts' respect for the doctrine of the corporate veil. Courts are very reluctant to lift the corporate veil and will only do so in very limited circumstances (for example, in specific criminal investigations such as money laundering investigations).

Before entering into an agreement with a Panamanian company, it is important to have sufficient mechanisms and guaranties to execute the credit against that particular company. The fact that a Panamanian company is part of a solid and solvent group of companies does not mean that the other companies will be liable for that specific company's debts.

Beware of bankruptcies: no bankruptcy reorganisation available
The Panamanian legal system does not allow the reorganisation of a debtor’s business affairs and assets.

Bankruptcy proceedings in Panama are basically liquidation proceedings. Once a Bankruptcy Court declares that a debtor is in a state of bankruptcy, all its pending obligations will become due, its assets will be set aside, an administrator will be appointed, communications and mail of the bankrupt party will be withheld, creditors will be requested to submit their credits to the Bankruptcy Court for review by the administrator, and a meeting of creditors will be called.

Unsecured creditors should conduct a thorough analysis before requesting the bankruptcy of any of their debtors, because in bankruptcy proceedings, unsecured creditors will likely only recover a very small percentage of their credit (if any). This is why creditors are reluctant to request the bankruptcy of a company in Panama – and sometimes courts are also reluctant to grant such a request.

Be safe: use appropriate interim measures
Interim measures are very useful tools in any type of litigation.

There are a limited number of interim measures that can be issued in favour of local judicial proceedings, all of which are decided ex parte: (i) seizing the assets of the defendant; (ii) suspension orders regarding specific assets; and (iii) suspension orders against corporate decisions. Below we will discuss all of these measures.

Attaching or seizing assets (receivables, bank accounts and real-estate properties) in Panama is a precautionary measure decided ex parte that aims to ensure the results of a judicial proceeding. When filing a complaint, or prior to doing so, a claimant can file a request to seize the assets of a defendant for the duration of the proceedings until there is a final and binding decision issued by a Panamanian court on the merits. For an attachment to be granted, a claimant does not have to provide prima facie evidence, but
only state that it is planning on filing a complaint and specify who will be
the defendant. Once the request is reviewed, Panamanian courts will request
that the petitioner post a security bond (in the form of cash, bonds of the
Republic of Panama, bank or insurance guarantees), which amount is estab-
lished at the court’s discretion – usually between 30% to 40% of the
amount requested to be seized. After posting the security bond, the court
will proceed to grant the request for seizure.

Once the request for seizing assets is granted by a court, the petitioner
has six working days to file a complaint (in the event that it has not yet done
so). If the complaint is not filed within those six working days, the order
for seizure will be lifted.

In the event that a final judgment is rendered in favour of the defendant,
the defendant can request the amount of the bond as a payment of the dam-
ages suffered as a result of the attachment. If the defendant does not claim
damages after three months following the issuance of the final and binding
decision rejecting the claim, the bond will be returned to the claimant.

Another interim measure that can be requested from a Panamanian court
is a decision ordering the defendant to stay or suspend any transaction, ne-
gotiation, innovation, transformation, operation or project in connection
with the asset relating to the complaint being filed.

No one wants to be in a position where the value of the asset given as collateral is
only a small percentage of the debt guaranteed by such asset

There are three conditions that must be fulfilled by the requesting party
for a Panamanian court to issue a suspension regarding specific assets: (i)
the claim must be an in rem claim, rather than an in personam claim; (ii)
the court must consider, at its own discretion, that the stay or suspension
will not cause irreparable damages; and (iii) the requesting party must post
a bond, the amount of which is established at the court’s discretion.

Any shareholder of a corporation limited by shares organised and existing
under the laws of the Republic of Panama (sociedad anónima) has the right
to request from the Panamanian courts a precautionary measure ordering
the stay or suspension of the effects of any corporate decisions of such cor-
poration.

There are three conditions that must be fulfilled by the requesting party
for a Panamanian court to order the suspension of a corporate decision: (i)
that the requesting party is a shareholder of the defendant company; (ii)
that the requesting party has filed its request as an accessory measure to sum-
mary proceedings requesting that the corporate decision be declared null
and void; and (iii) that the requesting party has filed its complaint within
30 calendar days from the day of the corporate decision. No bond or guar-
antee is required to be posted by the requesting party.

In addition to these interim measures (which can also be requested in
favour of arbitration proceedings) there are other measures that can only be
requested in favour of arbitration proceedings and not in favour of judicial
proceedings in Panama.

These additional interim measures issued in favour of arbitration pro-
ceedings are broader and have a more general nature. Indeed, the law pro-
vides that interim measures in favour of arbitration proceedings (issued by
either arbitrators or local courts) can be any type of measure that seeks to:
(i) maintain or restore the status quo pending determination of the dispute;
(ii) take action that would prevent, or refrain from taking action that is likely
to cause, current or imminent harm or prejudice to the arbitration proceed-
ings itself; (iii) provide a means of preserving assets out of which a subse-
quent award may be satisfied; or, (iv) preserve evidence that may be relevant
and material to the resolution of the dispute.

In contrast to interim measures issued in favour of local judicial proceed-
ings, interim measures issued in favour of arbitration proceedings do not
require the posting of a guarantee by the party requesting the measure. The
Arbitration Act provides that the arbitration tribunal ‘may’ (not will) require
the party requesting an interim measure to provide appropriate security in
connection with the measure.

However, unlike interim measures issued in favour of local judicial pro-
ceedings, interim measures issued in favour of arbitration proceedings re-
quire prima facie evidence that there is a reasonable possibility that the
requesting party will succeed on the merits of the claim. In addition, the
party requesting the measure must satisfy the tribunal that harm not ade-
quately reparable by an award of damages is likely to result if the measure is
not ordered, and such harm substantially outweighs the harm likely to affect
the party against whom the measure would be directed.

This is a very high standard in comparison with the requirements for
measures issued in favour of local judicial proceedings. The latter do not re-
quire prima facie evidence for the likelihood of success of the complaint,
but usually (depending on the type of measure) only require the party re-
questing the measure to post a security bond before the court in order to
cover any damages that could be caused to the party against whom the in-
terim measure is issued.

Finally, in contrast to measures issued in favour of judicial proceedings,
which can only be issued with regard to local proceedings, interim measures
in favour of arbitration proceedings can be issued by local courts with regard
to national and international arbitration proceedings, and in favour of ar-
bitration proceedings in Panama or abroad.

Be sure to have evidence
Panamanian procedural laws do not provide for discovery. Therefore, each
party should always prepare for an eventual litigation and document and
save all evidence before any litigation starts.

Be patient: no motions for summary judgments or motions to dismis
Panamanian procedural laws, unlike other jurisdictions, do not provide for
motions for summary judgments or motions to dismiss. There are a limited
number of defences that can be raised and that a court can decide on before
issuing the final judgment on the merits (such as res judicata, previous
judicial settlement, and previous withdrawal of the complaint with
prejudice). The rest of the defences that are raised by the defendant (such
as: statute of limitations; lack of standing of the claimant to sue; lack of
standing of the defendant to be sued; and, absence of the obligation) are
decided by the court in its final decision on the merits.

The practical effect of this is that a defendant party can find itself before
Panamanian courts for many years before a final and binding decision that
such party was wrongly sued or that the claim is time-barred.

Do your homework: seek out local counsel
This suggestion is not only applicable when dealing with litigation in
Panama, but when dealing with any litigation outside of our own
jurisdiction. When facing litigation in any jurisdiction with which you are
not familiar, it is essential to retain local counsel who is intimately familiar
with local law, courts and procedures. The counsel must understand your
needs and goals, provide an accurate assessment of what the procedure will
be like (for example, timing and chances of success), and give you all the information you require to make informed decisions in connection with the litigation (for example, deciding to settle instead of continuing litigation). This is why it is vital to take the time to select the appropriate counsel with whom you will feel comfortable working and who will bring added value to the matter.

**Be involved: develop overall strategies**

Even if you have retained local counsel, it is always advisable that you stay involved in the proceedings and that, together with your local counsel, you develop overall strategies regarding the litigation.

This involvement is also important when choosing arbitrators or experts, because this decision will have a significant impact on the outcome of the litigation.

**Do not make assumptions regarding prevailing party attorneys’ fees**

The general rule in Panama is that the court will order the defeated party to cover the attorneys’ fees of the prevailing party in the proceedings. These fees do not necessarily have to be the exact amount of attorneys’ fees actually paid, since the court decides such an amount at its own discretion. However, the court can exempt the defeated party from paying attorneys’ fees to the prevailing party, in the event that the court finds that the defeated party acted in good faith.

Moreover, any agreements that the parties may have entered into regarding attorneys’ fees prior to the start of the litigation are null and void.

**Be sure that you will be able to enforce decisions obtained abroad**

In case you have chosen a forum other than Panama (either a foreign court or arbitration tribunal) but your counterparty is a Panamanian entity or has assets in Panama, you still have to think about enforcing a foreign decision or a foreign interim measure in Panama.

Therefore, it is always advisable that before obtaining such a foreign decision or foreign interim measure, you know in advance whether or not it will be enforceable in Panama.

Foreign judgments may only be recognised and enforced by the courts of Panama provided that the Fourth Chamber of the Supreme Court of Panama validates the judgment by issuing a writ of exequatur. For a judgment to be validated through a writ of exequatur, the following requirements must be fulfilled: (i) the courts where the decision was issued must grant reciprocity to the enforcement of judgments from the courts of Panama; (ii) the party against whom the judgment was rendered must have been personally served of the proceedings that led to the issuing of the decision; (iii) the decision must arise out of a personal action against the defendant (it cannot arise out of an in rem action); (iv) the obligation in respect of which the decision was rendered must be lawful in Panama and the decision cannot contradict Panamanian public policy; (v) the decision that is filed before the Fourth Chamber of the Supreme Court of Panama must be legalised by means of diplomatic or consular officers of Panama or by means of the formalities of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the Apostille Convention); and, if the decision is in a language other than Spanish, it must be translated into Spanish by an authorised translator in Panama.

The Panamanian legal system does not have any express provisions allowing the enforcement or recognition of interim measures issued by foreign judicial tribunals. The Panamanian system only has provisions regarding the enforcement of final foreign judicial decisions deciding the merits of the matter.

Conversely, interim measures issued by foreign arbitration tribunals have been enforceable in Panama since January 2014, subject to the issuance of a writ of exequatur by the Fourth Chamber of the Supreme Court of Justice.

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Arias, Fábrega & Fábrega (ARIFA) has been at the forefront of the legal profession for more than 100 years, boasting one of the strongest litigation and dispute resolution practices in Panama. We represent leading international financiers, multinational corporations, and some of Panama’s largest companies facing their most critical litigation issues, both locally and abroad.

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Changing the rules of the game

Cosmin Vasile of Zamfirescu Racoti & Partners advises parties to a dispute to pay close attention to the varied demands of insolvency and criminal law.

Recent changes brought about by the Romanian Code of Civil Procedure have triggered a chain of uncertainties, which are pressing on the legal profession to try and identify methods of protection from the effects of those laws over disputes between the parties. It is imperative to try and anticipate all the potential causes of litigation and their effects, apart from clauses that establish alternative dispute resolution methods (such as the Dispute Adjudication Board, arbitration, and mediation).

In conclusion, one should bear in mind that the interference of insolvency and criminal laws cannot be avoided, nor the impact of those laws over disputes between the parties, as they comprise mandatory regulations. Therefore, considering that both the Insolvency Law and the Criminal Law are permanent and unavoidable, their impact on the development of a contract should be thoroughly anticipated by the parties when negotiating contractual clauses. When a contract is negotiated, each party should bear in mind that throughout the development of the contract, its partner could enter into insolvency or could be under criminal investigation. It is therefore imperative to try and identify methods of protection from the effects of such events.

The initial volition of the parties has no influence over the manner in which disputes can be solved.

There is a continuous trend between the parties to complicated contracts to try and predict all the possible situations in the development of a contract. To this end, complex mechanisms are established by the parties in order to regulate issues that could emerge, and the way in which they are resolved.

Despite the efforts diligent parties are making in trying to foresee all the possible problems that could affect the development of the project, reality shows that their expectations with respect to solving disputes are actually confused by insolvency and criminal laws. Therefore, while the economic crisis has had a big impact in terms of the increasing number of firms entering into insolvency, many more companies have been affected by the collateral effects of insolvency law.

In this respect, it is worth mentioning that when one of the parties to a contract enters into insolvency, the clauses relating to the choice of jurisdiction can no longer be applicable, and certain inequities occur. Therefore, while you may not submit a contractual arbitration claim against an insolvent debtor, the debtor may submit an arbitration claim against you. Moreover, the insolvent debtor enjoys the benefit of certain facilities, such as the payment of arbitral fees in installments. Further, the only way to recover money (debts or damages) from an insolvent debtor is by submitting a claim to a syndic judge within the deadline and observing the severe limitations stipulated under the Insolvency Law. In these circumstances, neither conventions on producing evidence are applicable; the legal regime for pieces of evidence is stipulated under the Insolvency Law.

The situation is similar when commercial disputes interfere with the Criminal Law. In such cases, commercial disputes are usually stayed (depending on their connection with the criminal case) and all the pieces of evidence are produced before the criminal investigation authorities.

However, there are mechanisms that can protect the parties, or, at least diminish the exposure of the company dealing with a partner in insolvency or under a criminal investigation. For example, the parties can establish that in the case of a dispute, the contract is suspended until the dispute is settled. This should help the parties keep their financial exposure to a minimum.

In conclusion, one should bear in mind that the interference of insolvency and criminal law cannot be avoided, nor the impact of those laws over disputes between the parties, as they comprise mandatory regulations. Therefore, considering that both the Insolvency Law and the Criminal Law are permanent and unavoidable, their impact on the development of a contract should be thoroughly anticipated by the parties when negotiating contractual clauses. When a contract is negotiated, each party should bear in mind that throughout the development of the contract, its partner could enter into insolvency or could be under criminal investigation. It is therefore imperative to try and identify methods of protection from the effects of such events.
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Cosmin Vasile is the managing partner at Zamfirescu Racoti & Partners and head of the arbitration department. He is an exceptional legal strategist and negotiator, advising clients on arbitration and litigation. He has served as counsel in complex international arbitration proceedings held under the auspices of the International Chamber of Commerce, the London Court of International Arbitration, the Vienna International Arbitration Centre, the Court of International Commercial Arbitration (Bucharest) and under the Uncitral arbitration rules in ad hoc arbitration. He is one of the most experienced experts in the Romanian market.

Vasile also provides clients with consulting services and representation in civil and commercial litigation, intellectual property, administrative and procurement, and debt collection.

Vasile has been awarded a diploma in international arbitration by the Chartered Institute of Arbitrators and is a fellow member of this institute (2012). He has a PhD in law from the University of Bucharest Faculty of Law (2011), and his thesis examined *The applicable Law in the ad-hoc Commercial Arbitration.*
Growing ambitions

Lucy Reed, Nicholas Lingard and Robert Kirkeness of Freshfields Bruckhaus Deringer consider the evolution of Singapore as an international dispute resolution hub

Singapore's status as a leading forum for legal services and international commercial dispute resolution is firmly established.

The Singapore International Arbitration Centre (SIAC) is one of the leading arbitration centres in the world. A visit to SIAC's website confirms that the number of new cases registered with SIAC more than quadrupled over the 10-year period between 2003 and 2013. In 2003, 64 new cases registered with SIAC; by 2013, the number had increased to 259 (www.siac.org.sg).

Of course, it is not just SIAC. Singapore is a popular seat for cases administered by other institutions, including the International Chamber of Commerce, where it is the fifth most popular seat globally and number one in Asia. Singapore also has concluded a Host Country Agreement with the Permanent Court of Arbitration (PCA) to host PCA-administered cases in the city-state, and the hearings in Asia-related ICSID cases are increasingly taking place in Singapore.

A key issue for Singapore’s policy-makers will be how to establish a comparable enforcement regime to the New York Convention

In November 2014, Singapore expanded its offering of ADR-services with the official launch of the Singapore International Mediation Centre (SIMC), which provides mediation services to the international business community, and is complementary to SIAC. A key innovation offered by SIMC is the so-called Arb-Med-Arb Protocol with SIAC, which allows a SIAC tribunal to recognise a settlement agreement arising out of SIMC mediation by rendering a consent award recording the terms of the parties’ settlement.

Singapore International Commercial Court – transnational justice for Asia?

The most significant development in the range of legal services offered by Singapore arguably took place at the beginning of this year.

In January 2015, Singapore launched the new Singapore International Commercial Court (SICC). The Court derives its jurisdiction from the Singapore Supreme Court Judicature Act, which provides that, with effect from January 1 2015, ‘there shall be a division of the High Court known as the Singapore International Commercial Court’ (section 18A). Cases may come before the SICC in two ways. The first is where the parties have entered into an agreement to submit to the jurisdiction of the SICC, whether by including a clause in their agreement submitting any dispute between the parties to SICC’s jurisdiction or by ad hoc agreement (section 18F). The second is where the High Court of Singapore transfers an existing action to the SICC (section 18J).

The new sections 18A-M of the Supreme Court of Judicature Act and Rules of Court relating to the SICC are a treasure trove for civil procedure enthusiasts and deserve detailed examination. It is likely that attorney generals are monitoring the SICC’s procedural innovations to determine whether some or all of those features may be desirable in their own jurisdictions. The similarities and differences with the Dubai International Financial Centre Courts are also worthy of study. For present purposes, however, we confine ourselves to commenting on several features that are particularly intriguing to international lawyers, and likely to make SICC of interest to those in the financial and business communities.

First, the SICC will function as a truly international court, subject to the Supreme Court of Judicature Act and the Rules of Court. The SICC is able to determine international commercial disputes with no connection to Singapore whatsoever that have been brought between foreign parties and are governed by foreign law. Specifically, the SICC has jurisdiction to hear and try any action that is: (i) international and commercial in nature; (ii) may be heard and tried by the High Court of Singapore in its original civil jurisdiction; and (iii) satisfies any other conditions prescribed by Singapore’s Rules of Court (section 18D).

The SICC judges are expressly not bound to apply the rules of evidence under the law of Singapore and may instead apply ‘other rules of evidence (whether such rules are found under any foreign law or otherwise)’ (section 18K). In addition, on matters of law, the SICC may order that any matter of foreign law be determined on the basis of submissions instead of proof (section 18L).

Second, the SICC will involve collaboration between Singapore judges and international judges. The Court’s panel of judges is comprised of both members of the Singapore judiciary and international judges. The SICC bench for individual cases will be appointed by the Chief Justice. At the time of writing, there are 27 SICC judges: 15 drawn from the Singapore judiciary, including its Chief Justice and Senior Judge; and 12 international judges from both common and civil law jurisdictions, several of whom are specialists in particular fields of commercial law. They are: Justices Bergin, Giles and Heydon (Australia); Justice Griss (Austria); Justice Berger (State of Delaware, United States); Justices Rix, Thorley, Eder and Ramsay (England & Wales); Justice Hascher (France); Justice Reyes (Hong Kong); Justice Taniguchi (Japan). International judges may also sit on appeal from the SICC, if designated by the Chief Justice.

This type of collaboration is likely to extend beyond the judiciary. Foreign lawyers may apply to be registered to appear and be heard by the SICC. The right of a foreign lawyer to make submissions before the SICC is limited to matters of foreign law, which means that in practice, there is likely to be an increasing need for commercial parties to instruct joined-up teams of Singapore-based and international counsel.

One of the most intriguing features of the SICC is the potential for this type of collaboration to influence the lawyers and judges involved in inter-
Singapore’s neighbours can draw confidence from the fact that Singapore’s conduct has been entirely consistent with its professed commitment to international rule of law

Third, the SICC Rules of Court incorporate a number of features from international commercial arbitration practice. For instance, the SICC has the power to make a range of orders that are designed to protect the confidentiality of the proceedings, including that the case be heard in private, the parties not disclose any information about the case, and sealing the case file. Similarly, proceedings before the SICC may involve more limited disclosure such as that adopted by tribunals in international commercial arbitration proceedings where parties’ disclosure obligations are limited to the documents upon which they rely, subject to specific requests from other parties. Although an SICC judgment may be appealed to the Court of Appeal of Singapore, parties are able to opt out of the right to appeal. These features mean that an SICC bench has significant discretion as to how to tailor its proceedings in a case before it.

What about enforcement?

An important difference remains between a SICC judgment and an award issued by an international arbitral tribunal. The arbitral award will benefit from the enforcement regime under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), whereas the SICC judgment will not.

Although an SICC judgment will be capable of enforcement in jurisdictions with which Singapore has entered into reciprocal enforcement schemes, a key issue for Singapore’s policy-makers will be how to establish a comparable enforcement regime to that afforded to arbitral awards under the New York Convention.

Singapore’s policy-makers and diplomats are taking steps to address this issue. On March 25 2015, Singapore signed the 2005 Convention on the Choice of Court Agreements, which has also been signed by Mexico, the United States and the European Union. The Convention will enter into force on October 1 2015.

Under the Convention, states parties agree to respect a decision to resolve a dispute by way of an exclusive choice of court or forum selection clause. In other words, if the parties to a dispute have selected Singapore’s courts as the exclusive forum for the resolution of their dispute, states parties to the Convention will be bound to recognise and enforce that judgment in their own courts, subject to limited grounds of appeal.

The challenge ahead for Singapore is to negotiate with other states, particularly in Asia, to ensure comparable rights to enforcement of Singapore court judgments in as many jurisdictions as possible.

It is likely to be some years before the success of the SICC can be assessed, since it will take time before parties include SICC dispute-resolution clauses in their agreements, and still more time before actual disputes emerge in serious volumes.

In our view, however, the SICC can fairly be acknowledged as a creative commercial dispute resolution option. It is extraordinary for a sovereign state to place its judiciary and the resources of its justice system at the disposal of commercial parties, regardless of their connection with that state. The challenge is now for SICC judges to produce judgments which will convince commercial parties to select the SICC as their preferred dispute resolution forum out of an increasingly diverse array of international dispute resolution options, including SIAC and SIMC.

Beyond commercial disputes

Singapore markets itself to the international business community as a safe and reliable forum for the settlement of their international commercial disputes. However, focusing on commercial disputes alone would ignore some of the more interesting features of Singapore’s evolution as a centre for international dispute settlement.

On August 31 2015, Singapore’s Ministry of Law signed a Joint Declaration with the President of the International Tribunal for the Law of the Sea (ITLOS). Under the Declaration, Singapore committed to making facilities available to a special chamber of the Tribunal or the Tribunal, if it determines that it would be appropriate to sit or exercise its functions in Singapore.

The Joint Declaration is significant because the Tribunal is an independent judicial body established under the 1982 United Nations Convention on the Law of the Sea to hear disputes concerning the interpretation or application of the Convention between sovereign states. The Joint Declaration therefore suggests that Singapore’s ambitions extend beyond establishing itself as a centre for the resolution of commercial disputes between private parties. Singapore’s Minister for Foreign Affairs and Minister of Law, K Shanmugam, said as much in comments recorded in the joint press release issued by Singapore’s Ministry of Law and the President of the Tribunal on September 1 2015. According to Minister Shanmugam, the Joint Declaration “demonstrates Singapore’s commitment to the international rule of law by facilitating access to ITLOS in order to serve the needs of the states of this region, with a view to promoting the peaceful settlement of disputes relating to the Law of the Sea”.

The Joint Declaration is a timely and practical initiative. It makes common sense to host disputes between two or more Asian states in the Asia-Pacific region, rather than in Hamburg, Germany.

Practise what you preach

The extent to which Singapore is able to cement for itself a role as the leading neutral venue in the region is likely to be aided by its voluntary submission of inter-state disputes to international arbitration and, critically, to abide by the decision.

A recent example is the joint decision by Singapore and Malaysia to submit a dispute over the alleged liability of a majority Malaysia-owned joint venture company (60% owned by Malaysia; 40% owned by Singapore) to pay Singapore development charges for three parcels of land, to international arbitration (the Railway Lands case). On October 30 2014, an ad hoc tribunal comprising Lord Phillips of Worth Matravers, the former President of the Supreme Court of England & Wales (Chairman), Bruno Simma, a former Judge of the International Court of Justice (nominated by Malaysia) and Murray Gleeson AC, the former Chief Justice of the High Court of Australia (nominated by Singapore), issued an award which held, on the question put to it by the parties, that the joint venture company would not have been liable to pay development charges.
For our purposes, the significance of that decision lies in Singapore’s response: following the release of the award, Singapore and Malaysia issued a joint statement confirming that they were satisfied with the arbitral process and that they agreed to abide by and fully implement the decision. The joint statement also affirmed that both countries ‘have demonstrated our common commitment to settling disputes in an amicable manner, in accordance with international law’. Singapore goal to become the neutral venue of choice for the resolution of disputes not just between commercial parties but also between sovereign states can only be furthered by its own compliance with the international rule of law.

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Trade finance review

Dong Heon Chae and John D Ro of Yoon & Yang review recent Supreme Court decisions on trade finance, which suggest a continuing adherence to international standards

The majority of letters of credit transactions, traditionally the most important settlement method in international trade, are governed by the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce (ICC) Publication 600 of 2007 Revision (UCP 600), established by ICC Banking Commission. Since the enforcement of the UCP 600 in 2007, no national courts have made rulings under it so far.

Under the relevant legal standards for interpreting letters of credit transactions, the Korean Supreme Court has stressed the importance of international trade practices. Employing legal interpretation standards consistent with international standards, the Korean Supreme Court has taken one step further in proposing new international standards.

Fraud
In letters of credit transactions, fraud has long been a cause of numerous legal disputes. Parties to international letters of credit and bank guarantee transactions have been continuously raising fraud issues; the legal approach to such transactions focuses on the methods of resolution.

The Korean Supreme Court has taken one step further in proposing new international standards

According to the provisions of article 4 of the UCP 600, the Principle of Independence is an essential standard applicable to the entire letters of credit transaction. The Supreme Court also ruled that ‘based upon the Principle of Independence for letters of credit transactions, a negotiating bank may request that the issuing bank repay the letters of credit amount, regardless of whether the transaction price for the relevant products has been settled’ (Supreme Court decision 2002Da2249 rendered on October 9 2003).

Similar to other national courts’ decisions, the Supreme Court’s decision serves as an important exception to the Principle of Independence. In a 1997 fraud case concerning Shinhan International that resulted in numerous law suits between Hong Kong multinational banks and Korean banks, the Supreme Court held that:

documentary credit transactions are inherently document-based and not product-based transactions. Therefore, a bank is responsible for examining with due care on the face, whether the shipping documents consistent with the terms of the letters are deemed to be a fraud. Since the letters of credit transaction served as a mere pretext for fraud, the bank can no longer be protected by the Principle of Independence. (Supreme Court Decision 96Da43713 rendered on August 29 1997)

Since the Supreme Court proclaimed its exception to the Principle of Independence, it has maintained such a stance in various cases including the 2000Da60296 decision rendered on October 11 2002.

The Supreme Court has maintained its stance in the 2008Da88337 on January 13 2011 and the 2009Da93817 on January 27, 2012. However, in the 2008Da88337 case, the Supreme Court held that ‘in a documentary credit transaction, unless the negotiating bank is aware that the relevant documents have been forged or have sufficient reasons to suspect such forgery, the issuing bank cannot be exempted from reimbursement’. Unlike its precedents, this court decision seems to enhance the status of nominated banks or negotiating banks to promote the stability of letters of credit transactions.

Following this precedent, Supreme Court decisions have demonstrated that, for the purpose of ensuring the stability of letters of credit transactions, the Court takes a very stringent position on the extent to which nominated and negotiating banks are not protected from fraudulent transactions based on the Principle of Independence. In 2008Da88337 and 2009Da93817, the Supreme Court held that ‘based solely on the evidence presented by the plaintiff (nominated bank or negotiating bank) was aware of or had sufficient reasons to suspect the fraud between the applicant and the beneficiary’. In this regard, the Supreme Court dismissed the fraud allegations by the issuing bank or the applicant. This trend in Supreme Court decisions has been followed by the lower courts.

The Supreme Court’s basic stance towards fraud that shares similar principles is revealed in its decisions on bank guarantees or demand guarantees. Particularly in the 2013Da23700 decision rendered on August 26 2014, the Supreme Court maintained its prior position regarding the significance and characteristics of the first demand bank guarantee.

In this case, the Supreme Court held that:

in a case where a bank provides a guarantee, upon presenting the demand consistent with the terms of payment and documents, which are expressly requested by a guarantee, and the bank promises that it would promptly provide the amount to the beneficiary without restrictions, the said guarantee is not a general guarantee attached to the main debt but a so-called first demand bank guarantee. Regardless of the contract or the tender of performance in which the said guarantee is based upon, the first demand bank guarantee means that the bank cannot refuse the beneficiary’s claim by claiming the causal relationship between the guarantee applicant (main debtor) and the beneficiary (creditor) and automatically assumes a payment liability upon the beneficiary’s claim. The guarantor of the first demand bank guarantee should provide the amount stated in the guarantee, regardless of the applicant’s failure to perform its obligation in its relationship with the beneficiary. In this regard, the first demand bank guarantee is subject to the so-called no causation principle, which recognises a lack of causation between a beneficiary and an applicant.
In its decision, the Supreme Court established conditions to determine a beneficiary's claim for the first demand bank guarantee as an abuse of right. The Supreme Court ruled that:

even in the case of the first demand bank guarantee, the principles of good faith or no abuse of rights are not excluded to the fullest extent. If it is clearly evident that the beneficiary, who actually lacks rights towards the applicant, abuses the no causation principle for the purpose of filing a claim for guarantee with the guarantor, such claim constitutes an abuse of right and should be disallowed. In such a case, the bank, as a guarantor, can refuse the payment of the amount upon the beneficiary's claim. However, considering the inherent characteristics of the no causation of the first demand bank guarantee, the abuse of right should not be easily acknowledged, unless it is clearly evident that the beneficiary lacks rights vis-à-vis the applicant when making the amount and that the beneficiary is undoubtedly abusing its formal legal status.

In this regard, the Supreme Court takes a similar approach as with the letters of credit fraud cases. The Supreme Court promotes the stability of demand guarantee transactions, unless it can be clearly ascertained that a beneficiary's claim to an issuing bank is unjust. This position seems to comply with recent global trade trends.

**Negotiation**

In the amendment process of the UCP 600, substantive discussions have revolved around the idea of removing the concept of negotiation itself from letters of credit transactions. However, it was concluded that instead of removal, negotiation should be defined in a more sophisticated manner to ensure more stable transactions.

In the Supreme Court decision 96Da43713 rendered on August 29 1997 regarding the UCP 500, the Court held that:

a bank authorised to negotiate documents can negotiate such documents by paying the actual price to the beneficiary by cash or through wire transfer, etc., or by assuming the liability for the payment. Here, negotiation by the latter method means that the negotiating bank unconditionally and fully assumes the liability of payment to the beneficiary on a certain date instead of prompt payment of the actual price.

This very independent and specific interpretation proposed by the Supreme Court has been maintained in recent court judgments regarding the UCP 600 negotiations.

With regards to the definition of negotiation in article 2 of the UCP 600, the Supreme Court recently ruled the same as above. In light of the negotiation provision in article 2 of the UCP 600:

a bank authorised to negotiate documents can negotiate such documents by paying the actual price to the beneficiary by cash or through wire transfer, etc., or by assuming the liability for the payment. Here, negotiation by the latter method means that the negotiating bank unconditionally and fully assumes the liability of payment to the beneficiary on a certain date instead of prompt payment of the actual price. (2009Da93817 decision rendered on January 27 2012)

In this case, Company B presented the required documents to Bank A and requested the negotiation. Bank A then deposited the fund for negotiating such letters of credit in a special account for Company B. After this amount was paid to Bank A, they agreed to offset from the fund deposited in this special account the amount of another two letters of credit, (including one previously refused) and then to allow Company B to withdraw and use its balance.

The Supreme Court ruled in this case that:

Bank A's deposit of the fund at the special account for Company B seems to represent an actual return for having negotiated the immediate payment of the amount. This agreement does not nullify the effectiveness of Bank A's immediate payment of an actual return to Company B, since it is merely a separate agreement for taking the fund in the special account as security to offset Company B's reimbursement obligations to Bank A for other letters of credit.

This Supreme Court interpretation, premised on the idea that fact-finding requires clear evidence, declares that a return on the condition of an evident transfer of rights must be paid in the negotiation of the letters of credit.

**Letters of credit terms and conditions**

According to the Supreme Court Decisions 2011Da16431, 2011Da16448 and 2011Da16455 rendered on October 31 2013:

a transaction by a letter of credit must strictly comply to the terms and conditions of the credit, because such transaction is performed with documents and not with products. However, if an issuing bank states terms and conditions inconsistent with those under the UCP or ISBP in a credit, the issuing bank must clearly specify such terms and conditions, so that the beneficiary or the negotiating bank may understand the objective meaning or intent. When the beneficiary or the negotiating bank presents documents required by the letter of credit, the issuing bank is disallowed from refusing to pay that letter of credit in the following situation: if such meaning or intent is unclear or ambiguous, and as a result the relevant letter of credit is construed as demanding the terms and conditions that do not differ much from those under UCP or ISBP, the issuing bank cannot refuse on the grounds of inconsistency between the relevant terms and conditions in the credit and the issuing bank's intentions.

Supreme Court Decision 2008Da88337 rendered on January 13 2011, elucidates the consequences of a bank issuing an irrevocable letter of credit, which substantially changes the beneficiary's rights or the requirements for exercising such rights by the instruction form, given to the nominated bank without the beneficiary's consent. The Court interpreted the meaning of article 9(d) of the UCP 500 regarding the effectiveness of that instruction:

This provision states that 'except as otherwise provided by article 48, an irrevocable credit cannot be neither amended nor canceled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary. Therefore, any changes in the terms and conditions of a credit that may affect the beneficiary's rights or requirements for exercising the beneficiary's rights set out in a credit are invalid, unless the beneficiary agrees thereto. This limitation on the amendment of the terms and conditions applies when an issuing bank substantially changes the beneficiary's rights or the requirements for exercising the beneficiary's rights, even by the form of instruction to the nominated bank, eg negotiating bank. Unless the beneficiary agrees to the instruction, the instruction is ineffective. If such instruction by the issuing bank is ineffective only with regard to the beneficiary, but still effective regarding the negotiating bank, the negotiating bank must comply with the issuing bank's instructions. Moreover, the beneficiary cannot actually exercise its own rights, while the issuing bank may arbitrarily amend the terms and conditions of the credit by providing instructions to the negotiating bank without the beneficiary's consent. Therefore, in such a case, the issuing bank cannot argue the validity of such instruction, not only against the beneficiary but also the negotiating bank.
Similarly, when the issuing bank notifies the negotiating bank that it will delete additional terms and conditions, and the beneficiary does not accept the deletion request, the Supreme Court ruled that the issuing bank’s instruction is invalid. This is because the beneficiary rejected the deletion request, which constitutes a change of terms and conditions under a letter of credit.

This ruling is deemed to adhere closely to the fundamental principles of letters of credit transactions that ensure the stability of cross-border price settlements.

Examination of documents

Recent Supreme Court decisions, such as 2008Da88337 rendered on January 13 2011, regarding the strict compliance rule and its exceptions, deal with document contents and evaluation of document compliance under the terms and conditions of credit. In 2008Da8837, the Supreme Court held that:

the strict compliance of the accompanying document(s) with the terms and conditions of a credit does not necessarily mean that each wording of the document should correspond exactly to the terms and conditions of a credit. Indeed, the notion of strict compliance exists to the extent that it is facially evident that a slight difference in the wording does not necessarily alter the meaning, or that it merely supplements and specifies the product description set forth in the credit, without damaging the terms and conditions of a credit. In these specific circumstances, strict compliance exists depending on whether such difference is an acceptable one in international standard banking practice.

The Supreme Court maintains the pre-existing strict compliance rule.

In this case, whereas the particulars of the cargo of each credit states ‘KL’, the commercial invoice states ‘KLS’. As KL or KLS corresponds to Arabic numerals and the preposition ‘of’ indicates the volume of kerosene or gasoil, it is evident that both represent a metric unit for product weight excluded from the product description. Also, considering that the relevant cargo is crude oil, KL or KLS is certainly construed to be a unit of a kilolitre. The Supreme Court further held that

its original decision stating that the terms and conditions under the credit and the commercial invoice is lawfully consistent because it was evident that the inconsistency in the units resulted from the mere mingling of two different expressions for the same unit and did not damage the terms and conditions of the credit.

The recent Supreme Court decision 2012Da113438 rendered on May 29 2014 ruled that:

if a letter of credit demands the presentation of a clean on board ocean bill of lading as one of the shipping documents, though ‘clean’ is not explicitly stated in the presented bill of lading, the bill of lading may still meet the ‘clean on board’ requirement when the presented bill of lading lacks provisions or supplementary notes that expressly declare the status of defect(s) in goods or packaging and indicates that the goods are placed on board. However, if a letter of credit does not demand or permit the presentation of a charter party bill of lading, the presentation of the charter party bill of lading represents a direct violation of article 20(a)(vi) of the UCP 600. When the issuing bank states in its refusal of payment to the presenter, ‘a charter party bill of lading was presented’ without supplementary notes, this statement constitutes a refusal according to article 16(c) of the UCP 600.

Supreme Court decision 2011Da16431, 2011Da16448 and 2011Da16455 rendered on October 31 2013 regarding article 14 (a) and (d) of the UCP 600 held that:

if the terms and conditions of a credit require the bill of lading signed by the carrier as one of the shipping documents, the issuing bank must only accept the documents that fulfill the requirements under article 20(a)(i) of the UCP 600 and article 94 of the ISBP as those in compliance with such terms and conditions of a credit. Additionally, whether the bill of lading satisfies the requirements above, the issuing bank must refer not to the details of other credit-related documents, but to the relevant text of the bill of lading itself, with formal strict complying presentation standards (see Supreme Court Decisions 2001Da49302 dated November 28 2003; 2005Da57691 dated May 10 2007).

Further, in the aforementioned decision, the Court held that:

it is rather difficult for the issuing bank to conclude that a principal occupies a shipper’s position, if the bill of lading is presented as one of the required documents under the terms and conditions of a credit and states the name of the shipper or the principal, and the representative signs the bill of lading on behalf of the principal, but does not expressly state that the principal is in the shipper’s position. This is because the issuing bank does not refer to the description set forth in other credit-related documents and renders decisions in a strictly formal manner based on the text of the relevant bill of lading. Therefore, a bill of lading lacking such information is deemed to hardly comply in a strictly formal manner with the signature requirements of article 20(a)(i) of the UCP 600 and article 94 of the ISBP.
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Yoon & Yang LLC is one of the leading full-service law firms in Korea with more than 360 attorneys and other professionals. Committed to excellence and integrity, our professionals respond to the needs and challenges of our clients with creative and practical solutions, drawing upon our expertise and experience in a broad array of industries and legal practices.

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- White Collar Criminal Defense
Embracing ADR

Shanaka Gunasekara and Avinda Rodrigo of FJ & G de Saram set out the salient characteristics of dispute resolution in Sri Lanka, where ADR methods have been statutorily embedded in the system.

Jurisdiction of a court over a dispute is ordinarily determined by the place of the residence of the defendant, where the land in dispute situates, where the cause of action arises or where the contract sought to be enforced is made.

However, the power to hear and determine certain causes of action may specifically be vested with a court by an act of the parliament and such power may also be subject to other limitations such as pecuniary limitations imposed by law.

Accordingly, the jurisdiction of a court over a particular dispute is mostly not under the control of the parties. Being partly a common law jurisdiction, the doctrine of stare decisis (doctrine of judicial precedent) is applicable in Sri Lanka.

Commercial, IP and company law litigation

The High Court of the Provinces (Special Provisions) Act (10 of 1996) resulted in the establishment of the Commercial High Court of Colombo (CHC). It bestows on the CHC exclusive jurisdiction over all actions where the cause of action arises from commercial transactions including: causes of action relating to banking; export or import of merchandise; services affreightment; insurance; mercantile agency; mercantile usage; and, the construction of any mercantile document in which the debt, damage or demand is for a sum exceeding LKR 5 million ($76,000).

The jurisdiction of a court over a particular dispute is mostly not under the control of the parties

With the view of introducing speedy solutions to commercial disputes between parties (local and foreign), the number of appeals available against an interlocutory or final order made by the CHC is limited to one. Further, the appeal should be lodged with the apex court of the country (the Supreme Court of Sri Lanka).

All applications and proceedings under the provisions of the Companies Act 07 of 2007, the Intellectual Property Act 36 of 2003 and the Arbitration Act 11 of 1995 should also be instituted in the CHC.

It takes an average of two to three years for the CHC to pronounce its verdict on a dispute arising from a commercial transaction governed by the ordinary procedure or on a typical dispute over intellectual property. Matters such as those arising from bills of exchange, applications under the Companies Act such as minority suits, derivative actions, and shareholder actions governed by shortened forms of special procedure may take up to one year to conclude.

It has been customary for parties, whether local or foreign, to prefer an appeal against verdicts given by the CHC to the Supreme Court.

While leave should be first obtained from the Supreme Court for an appeal lodged against an interlocutory order to proceed to the stage of argument, an appeal lodged against a final order is usually subject to a formal argument.

An investor who engages in a business such as banking, finance, import or export that is regulated by a statutory authority and is affected by an illegal and unreasonable act or decision by the authority, may invoke the writ jurisdiction of the Court of Appeal to have prerogative writs such as certiorari, mandamus and prohibition issued against such authority.

Admiralty jurisdiction (over all ships, local or foreign owned, within the jurisdiction of Sri Lanka) pertaining to actions in rem and in personam should be instituted before the High Court of Colombo. An ex parte warrant of arrest may be obtained against any ship within the jurisdiction of Sri Lanka upon showing a valid cause.

A party who invokes the jurisdiction of a court can seek interim relief pending the determination of the dispute. A party may also obtain ex parte interim relief enjoining or restraining the other from doing or performing any act. Such ex parte orders may be vacated on the application of the aggrieved party on showing sound and valid reasons to the court.

Sri Lanka does not recognise or permit class-action-style litigation. As an initiative, a special committee has been appointed by the Bar Association of Sri Lanka to suggest amendments to the civil procedure of Sri Lanka. One such proposed amendment made by the committee is the introduction of class-action-style litigation to Sri Lanka.

The practice of forum shopping common to western jurisdictions, which allows parties to file or transfer an action to the court which is most likely to grant the desired result, is neither recognised nor permitted in Sri Lanka.

Every party to an action is required, no less than 15 days before the date fixed for the trial of an action, to file in court (after notice to the opposite party) a list of witnesses to be called by such party at the trial. Additionally, a list of the documents relied on by such party and to be produced at the trial must be also filed within such time limit.

Parties are allowed to present interrogatories to clarify facts and help to determine in advance what facts will be presented at the trial. This procedure is used to obtain admissions of facts from the party interrogated, which is necessary for the party interrogating, to prove and establish their case.

Any party may, at any time before the hearing and with leave of the court obtained ex parte, deliver interrogatories in writing for the examination of the opposing party, with a footnote stating which of such interrogatories each person is required to answer. However, no defendant is permitted to deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered his answer.

The jurisdiction of a court over a particular dispute is mostly not under the control of the parties

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A party may apply also to court to compel the other party, by way of an affidavit, to declare all documents in their possession which are relevant to the matter in dispute.

A party may also obtain an order from court, ex parte to compel the opposing party to produce any documents referred to in their pleadings, or affidavits for inspection of the party making such application and to obtain copies of such documents.

Being a small market, there are no litigation support services that can be distinctively identified. However, there are certain local and international litigation support technology vendors who are available in the market to provide case law precedent database services to attorneys.

**Alternative dispute resolution**

The alternative dispute resolution (ADR) mechanisms in Sri Lanka have been embraced and accepted by disputants in Sri Lanka as ways to avoid litigation.

Accordingly, initiatives have been taken towards institutionalisation of conciliation, mediation and arbitration.

In Sri Lanka, both mediation and arbitration mechanisms have been statutorily recognised under the Mediation Boards Act 72 of 1998 (MBA) and Arbitration Act 11 of 1995 (Arbitration Act) respectively.

This recognition has now allowed the parties to enter into contracts, such as commercial contracts including clauses stipulating that any dispute arising out of such contract should be settled by less conventional and more efficient mechanisms such as mediation and arbitration.

Whilst mediation and conciliation are more settlement-oriented ADR mechanisms, arbitration is an effective and expeditious method of ADR capable of producing legally enforceable awards.

"Arbitration is an effective and expeditious method of ADR capable of producing legally enforceable awards"

In terms of the Arbitration Act, if a party to an arbitration agreement institutes legal proceedings in court against another party to such agreement, the court will have no jurisdiction to hear and determine such matters if the other party objects to the court exercising such jurisdiction. However, parties can mutually agree to resolve disputes by way of litigation, despite having such a clause in the contract.

Under the Arbitration Act, the parties are free to determine the procedure of arbitration and the appointments of arbitrators. Where the arbitration agreement is silent on such matters, the Act provides for the same.

Sri Lanka, as a signatory to the New York Convention on the recognition of foreign arbitral awards, enacted the Arbitration Act among other things to give effect to the New York Convention. Accordingly, the Arbitration Act provides for the enforcement of both foreign (defined in the Act to mean an arbitration conducted outside Sri Lanka) and local (arbitrations conducted in Sri Lanka) arbitral awards.

A party to an arbitration award made in Sri Lanka may apply to the CHC within 60 days of the receipt of the award, to have it set aside on the limited grounds set out in the Arbitration Act. Such grounds include incapacity of a party, the award being contrary to public policy, and the award dealing with a subject matter outside the scope of the arbitration agreement.

A party who obtains an arbitration award (foreign or local) who wishes to have it enforced in Sri Lanka should make an application to the CHC, within one year of the expiry of 14 days of making the award.

Where the court sees no cause to refuse recognition and enforcement of the arbitral award under the Arbitration Act, the court will enter a judgment accordingly. After the judgment is entered, the decree will be entered. An appeal may be lodged to the Supreme Court only on questions of law and with the prior leave of the Supreme Court. The parties may also agree in writing to exclude any such right to appeal, thereby making the judgment of the CHC enforcing the arbitral award final between the parties.

The recognition and enforcement of a foreign arbitral award under the Arbitration Act may be refused on certain limited grounds including: where a party to the arbitration agreement was under some incapacity; the agreement is not valid under the law to which the parties have subjected it; the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding or was otherwise unable to present his case; the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or, recognition or enforcement of the award is contrary to the public policy of Sri Lanka.

It has been held that the court has limited jurisdiction to grant interim relief. This may be sought, ex parte, to a party to an arbitration agreement pending the constitution of the arbitral panel, where such party proves to the satisfaction of the court that they would suffer irreparable and irretrievable loss if the other party were not restrained until the tribunal is constituted and appropriate application is made to the tribunal.

Former chief justice of Sri Lanka, in his court ruling in *Ceylon Petroleum v Ocean Spirit Maritime*, set an important precedent both in relation to arbitration and maritime law. A dispute between the parties arose in relation to a carriage of goods by sea contract, where the respondent alleged a short payment of freight in respect of the goods shipped to the appellant.

In addition to the charter party, the parties entered into a separate arbitration agreement. However, the appellant refused to participate in the arbitration proceedings on the basis that it was not bound by the arbitration agreement as the main contract of the charter party was defective.

The court, having had recourse to the doctrine of separability, arrived at the conclusion that the arbitration agreement in any event survived the main contract, irrespective of whether the main contract was defective or not.

Moreover, considering the evidence produced before the court, it was held that even though the contract was not signed, it created rights and liabilities on the respective parties as the attendant circumstances inferred the intentions of the parties to be bound by such terms. It further established that grounds to set aside an arbitral award under the Arbitration Act, should be operative at the time of enforcement of the award.

In Sri Lanka, there is no system of sealed court records. Therefore, the disputants (particularly multinational companies) may opt for arbitration as the most preferable method to maintain the confidentiality of the proceedings.

In recent years, several arbitration centres, such as the Sri Lanka National Arbitration Centre, ICLP and Colombo International Arbitration Centre have emerged in Sri Lanka to facilitate and accommodate arbitration tribunals.
Where both parties reside within the boundaries of the country, in order to minimise costs, it is best to choose a centre which is located in Sri Lanka.

The Institute for the Development of Commercial Law and Practice (ICLP Arbitration Centre) is one of the most effective arbitration centres in the country. ICLP has the full range of facilities, including conference, multimedia, recording, transcribing, and catering facilities. A list of qualified arbitrators who have registered with ICLP is available, who are at all times subject to the rules of the ICLP Code of Ethics.

The government of Sri Lanka also recently set up an arbitration centre, providing all necessary facilities, to attract international arbitrations.

However, South East Asia’s Singapore International Arbitration Centre (SIAC) has over the years emerged as the premier arbitration centre in the region.

Foreign corporations, especially Fortune 500 companies and other multinational giants, often opt for SIAC for their arbitration agreements with local entities, including the government of Sri Lanka (such as in Citihank v Sri Lanka).

Not only does SIAC have a comprehensive set of rules to conduct arbitrations, but the centre arguably provides the best facilities to conduct international arbitrations in the region.

**ADR: clarity is key**

The parties may customise and refine the basic ADR procedures to better suit their demands, keeping in line with the existing laws that may govern the particular mechanism. It is imperative that the clause is clear as to the scope of the resolution and the types of disputes which may be covered, tailoring them to the contract at hand.

In an arbitration clause, it is best to always prescribe the number of arbitrators, the arbitration institute, the rules that will govern the process and the language in which it will be conducted to avoid any future conflict. The following clause has been recommended by ICLP which is widely used in Sri Lanka:

*Any doubt, difference, dispute, controversy or claim arising from, out of or in connection with this contract, or on the interpretation thereof or on the rights, duties, obligation, or liabilities of any parties thereto or on the operation, breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Centre of the Institute for the Development of Commercial Law and Practice.*

Although the law provides for seeking interim relief pending the constitution of the arbitral panel under limited circumstances, it is advisable to state so with clarity in the arbitration agreement itself.

**Sovereign immunity**

There is no domestic legislation specifically dealing with the question of state or sovereign immunity in Sri Lanka. It is necessary to refer to guidance from customary international law or other jurisdictions whenever a plea of immunity is raised.

However, under the Constitution of Sri Lanka, the President of Sri Lanka enjoys immunity from suits for anything done or omitted in the President’s official or private capacity. Public corporations in Sri Lanka have no state immunity in relation to the commercial transactions they enter into.

However, decrees cannot be executed by courts against the property and assets belonging to the state.

Sri Lanka has, over the years, signed a number of bilateral investment treaties (Bits) with a number of countries. The majority of Bits provide for arbitration as the final dispute resolution mechanism.

Sri Lanka is also a signatory to the ICSID Convention.

There have not been many international arbitrations involving the state of Sri Lanka. In AAPL v Sri Lanka, Sri Lanka complied with the arbitration award made against it.

**Enforcement of foreign judgments**

The Foreign Judgments Ordinance 04 of 1937 is in place for the enforcement of judgments given in certain countries. The Ordinance was enacted during the colonial era to cause reciprocal enforcement judgments given under Her Majesty’s dominion. The application of the Ordinance is therefore limited.

Judgments given in countries such as the UK, Northern Ireland, Hong Kong, Mauritius, New South Wales, Tanganyika, Uganda, Victoria, the Federation of Malaya, the Australian Capital Territory, the Northern Territory of Australia, New Zealand and the Trust Territory of Western Samoa, Queensland, Western Australia, South Australia and Tasmania are recognised and can be enforced in Sri Lanka.

Sri Lanka does not recognise or permit class-action-style litigation

A person, as a judgment-creditor under a judgment to which the Ordinance applies, may apply to the District Court of Colombo at any time within six years of the date of the judgment (or after the date of the last judgment given in those proceedings) to have the judgment registered.

Registration of the judgement may be set aside on certain grounds, including: where the court is of the view that the enforcement of the judgment would be contrary to public policy in Sri Lanka; if the court that delivered the judgment is deemed to have no jurisdiction; and, if the defendant did not receive notice in time to appear and defend the proceedings.

The main consideration for an investor choosing a foreign court is to ascertain whether such court’s judgments are recognised under the Ordinance. Judgments by courts that are not recognised, including any other proposed court systems such as the European Commission’s global investment court, will have little or no value when it comes to enforceability in Sri Lanka.

However, investors are free to select any international arbitration forum to arbitrate their disputes as the foreign arbitral awards are recognised and enforced under the Arbitration Act.
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Founded in 1841, F. J. & G. de Saram is the oldest and one of the largest law firms in Sri Lanka. We practice in all areas of corporate and commercial law including Banking and Finance, Capital Markets, M&A, Investments, Employment, Real Property, Intellectual Property, Litigation and Dispute Resolution.

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Enforcing foreign judgments and awards

Urs Feller and Marcel Frey of Prager Dreifuss describe what to expect when foreign parties start knocking at the doors of Swiss enforcement authorities with a judgment in hand

Securing a court victory is a significant step in obtaining what one is owed. Parties frequently realise though that winning in court is by no means the end of the road, but rather the beginning of another journey called enforcement. Enforcing a decision in another country can be fraught with additional practical difficulties, technical challenges and may entail time-consuming proceedings.

Switzerland, with its central location in Europe, its traditional role as a safe haven for assets and attractive business environment for multinational corporations, is frequently the showground for cross-border enforcement proceedings. Swiss courts have a wealth of practical experience, and legislation and jurisprudence is sound and stable. The court practice of locating assets of a foreign debtor held with a Swiss bank at the branch in Switzerland further increases the attractiveness of Switzerland as a place of enforcement.

Enforcing a decision in another country can be fraught with additional practical difficulties

The growing interlinkage between Switzerland and its neighbouring countries, and throughout the world through multinational trade, has given rise to multinational agreements facilitating simpler recognition and enforcement of foreign judgments and awards.

Foreign decisions

In this article, foreign decisions will include both state court judgments and awards by privately convened arbitral tribunals. Although both types of decisions are, in principle, enforced similarly and by the same authorities in Switzerland, whether a decision originates from a state judicial institution or from an arbitrator determines the legal basis on which enforcement may be requested. Further, the geographic region from which a decision emanates has an influence on the applicable set of rules governing its enforcement.

Switzerland, though not a member of the European Union, is a signatory party to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded between the European Community, Denmark, Iceland and Norway and Switzerland in Lugano in 2007 (Lugano Convention). Its aim is to facilitate the recognition of judgments between these states without cross-border enforcement proceedings. Swiss courts have a wealth of practical experience, and legislation and jurisprudence is sound and stable. The court practice of locating assets of a foreign debtor held with a Swiss bank at the branch in Switzerland further increases the attractiveness of Switzerland as a place of enforcement.

International arbitral awards are enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, ratified in New York in 1965 (New York Convention). According to the PILA, all international arbitration awards are recognised and enforced under the New York Convention, regardless of whether the state at the seat of arbitration is a signatory member of the New York Convention or not.

Enforcement of monetary and non-monetary decisions

In Switzerland, the method of enforcement will depend on whether the foreign decision grants its beneficiary a financial reward or some other type of relief. Under Swiss law, monetary decisions are enforced under the rules of the Federal Debt Enforcement and Bankruptcy Act (DEBA) whilst non-pecuniary decisions (decisions changing the status of a matter, ordering a rectification in a register, or requiring a party to perform or refrain from certain actions) are enforced according to the similar, though separate, provisions of the Federal Civil Procedure Code (CPC).

Debt enforcement in Switzerland

Debt enforcement proceedings under the DEBA are reasonably simple to get started. A creditor, domestic or foreign, may, at any time and without any evidence, request the debt enforcement office to issue a payment summons against a Swiss-based debtor or at the place where assets have been attached.

Once the payment summons has been served, the debtor can either pay or raise an objection which they must affix to the payment summons. The debt enforcement office then notifies the creditor of the objection. The creditor must then commence setting aside proceedings in court to have the objection removed, enabling him to apply for the continuation of the proceedings. If the debtor’s objection is set aside, the creditor can request the seizure and liquidation of assets, or the declaration of bankruptcy in the case of legal entities.

Types of enforceable decisions

Foreign decisions, both by state courts and by international arbitration tribunals, may take different forms and contain various remedies. Some may require certain actions to be performed or payments to be made, while others may only be declaratory in nature. Decisions may have been rendered by default or in ex parte proceedings. Others may contain provisional measures safeguarding a present situation. In principle, all these types of measures are enforceable in Switzerland. Note however the following.

In the case of a default judgment rendered by a court in a member state of the Lugano-Convention, such decision will only be recognised in Switzerland.
land, where the defendant has been properly served notice at the beginning of the proceedings abroad.

Similarly, in the case of non-Lugano-Convention state judgments, default judgments will only be declared enforceable where a defendant was duly summoned in the prescribed form and early enough to have had an opportunity to have made his case heard. Therefore, an ex part judgment rendered outside the Lugano-Convention realm is, despite some scholarly debate, not enforceable in Switzerland.

Note further, that mere declaratory decisions cannot be enforced in Switzerland (for lack of action), but may be formally recognised.

Arbitral awards that have been rendered by default must demonstrate that the defending party had adequate opportunity to take part in the proceedings.

Note, that foreign bankruptcy orders are only enforceable in Switzerland if the country of origin reciprocates in its own territory in instances where a Swiss bankruptcy decision is presented for enforcement.

Exequatur or direct enforcement with incidental recognition

Where an applicant has secured a judgment or an award abroad, which they intend to enforce in Switzerland, they have two options. First, they can commence recognition proceedings and obtain a separate judgment declaring their foreign judgment enforceable in Switzerland. With this judgment, they can then commence debt enforcement proceedings against the creditor and present the enforceable decision in the setting aside proceedings.

The other option is for the applicant to commence debt enforcement proceedings directly against the debtor, and only request recognition of their decision during the ensuing setting aside proceedings in court as an incidental question. The court then adjudges the question of enforceability as a preliminary question.

Switzerland is frequently the showground for cross-border enforcement proceedings

In addition, the fact that a creditor has a decision in hand allows them to request the attachment of assets of a debtor before commencing actual debt enforcement actions, which ensue after the attachment has been secured.

Recogntion of a foreign judgment

On applying for recognition of a foreign judgment, the jurisdiction of the court that rendered the original decision may not be reviewed by the Swiss enforcement court where a judgment was originally issued by a Lugano Convention state. An exception applies for certain compulsory areas of law (concerning insurance litigation and consumer contracts). Further, in cases of exclusive jurisdiction according to the Lugano Convention (concerning real estate, corporate actions or registry disputes), a decision rendered outside that venue is not acceptable.

Non-Lugano Convention judgments, which must comply with the provisions of the PILA, must satisfy the condition that they were rendered at the correct place of jurisdiction under the rules of the PILA (at the place of residency of the defendant or other prescribed fora).

Proper notice of the judgment is a precondition for recognition both under the Lugano Convention as well as under the PILA.

As noted earlier, Lugano Convention decisions may be preliminary in nature and still enforceable, while other state judgments must be final for their effect to be recognised in Switzerland. Also, the foreign judgment may not stand in conflict with a prior decision. In Lugano-Convention recognition proceedings, this challenge can only be brought at the appeals stage due to the one party nature of the application proceedings for such judgments.

The objection that a claim has become unenforceable due to the lapsing of the applicable limitation period has to be brought before the foreign court deciding the merits of the case.

If the limitation period has expired in the time period after the rendering of the judgment but before the court has rendered a verdict, an objection regarding the limitation period can be raised.

Switzerland will not recognise a foreign decision that is not compatible with its understanding of public policy. This is the case both under the Lugano Convention as well as under the PILA. Public policy exceptions come into play in certain family law matters and – inter alia –in cases concerning judgments awarding punitive damages, but also in cases of judgments with an excessive restriction of a party’s personality.

Enforcement procedure for foreign judgments

Court fees are reasonable for DEBA proceedings. They depend on the claim amount in question and may reach a couple thousand Swiss francs.

In non-monetary proceedings, the court fees are also calculated on the estimate of the value of the claim. They may reach several thousand Swiss francs, depending on the cantonal tariff applicable.

In Switzerland, the court located at the venue of residence or registered office of the defending party or at the place where the measures are to be enforced has jurisdiction to decide the application for enforceability.

An applicant with a Lugano Convention state judgment can apply for enforcement in ex parte proceedings. The defending party only receives an opportunity to defend its position in the ensuing appeals proceedings. Recognition proceedings for judgments from other states are adversarial in nature.

Both applicant and defendant may challenge a first instance decision regarding enforceability.

In order to prove the enforceability of the foreign decision, an applicant under the Lugano Convention must submit an authenticated copy of the judgment and an enforceability certificate as per the standard form in annex v of the Lugano Convention.

Under the PILA, the applicant must produce a certified copy of the decision in addition to a confirmation that no ordinary judicial remedy is available against it, or a statement confirming that the decision has in the meantime become final. Where a default judgment is concerned, the applicant must further evidence that the defendant was duly summoned.

Where the foreign judgment is in a language other than one of the official Swiss languages (German, French or Italian), the court may request a translation into one of the official Swiss languages at the place of the enforcement proceedings. Frequently though, English decisions need not be translated, since most Swiss courts are proficient enough in English to be able to understand the extent of the foreign judgment.

Requirements for international arbitration awards

The applicant must demonstrate that the award was duly served on the defendant.

The applicant must prove that the award is final by demonstrating that
no appeal was lodged, or the appeal does not have suspensive effect or that the suspensive effect has been lifted by the appeal court.

The argument that a claim has lapsed must be brought during the arbitration proceedings. Once adjudged by an arbitral tribunal, a claim lapses only after 10 years under Swiss law.

During the enforcement proceedings, the defendant may challenge the enforceability if the claim has been paid, deferred or has become time-barred since the award has been rendered.

Further, the New York Convention contains a set of refusal grounds hindering enforcement. These deal with procedural aspects such as the inability of the parties to legally conclude an arbitration agreement or the violation of due process. The defendant may also claim that the subject matter of the dispute adjudicated by the arbitral tribunal was not covered by the scope of the arbitration agreement or that the composition of the arbitration tribunal was wrong. Where an arbitration award was later set aside or suspended by a competent authority, the defendant may also raise this defence.

In addition, the Swiss court charged with the enforcement application must, of its own accord, consider two other refusal grounds. First, it must decide whether the award concerns a matter that is excluded from settlement by arbitration under its own laws. Further, it must decide whether enforcement of the award would violate Swiss public policy.

**Enforcement procedure for international awards**

As for foreign state court judgments, the court fees are calculated according to the federal or the various cantonal tariffs, depending on the nature of the award.

The court at the place where the award will be enforced is competent to hear the enforcement application. Further, the courts at the place of residency or at the registered office of the defendant residing in Switzerland have alternative jurisdiction.

International awards are recognised and enforced in adversarial proceedings following an application by the applicant. The application is dealt with in summary proceedings by a single judge court in the district court. The defendant is granted an opportunity to make a submission on the question of enforceability.

The enforcement decision by the single judge can be brought before the cantonal high court for review. As a last resort, the second instance judgment may be appealed to the Federal Tribunal.

An applicant seeking enforcement of an international award must submit with his application an original of the award or a certified copy together with proof of service of the award to the defendant. The application must also be accompanied by the original agreement containing the arbitration clause or a certified copy of the agreement instead. A confirmation of enforcement by the arbitral tribunal must also accompany the application.

An international award not held in English or in one of the national languages of Switzerland (German, French or Italian) must be translated into one such language. The Swiss enforcement court may dispense with the requirement of translation for an international award drafted in English if it feels it has sufficient grasp of the necessary content.

**Careful preparation a must**

Securing a court victory is often only a part of the battle won. Enforcing a decision against a recalcitrant defendant may lead to a time-consuming and sometimes frustrating process. Doing so in a different jurisdiction invariably complicates the process. A good knowledge of debtor assets and careful preparation can smooth out many of these challenges and enhance the chances of success of finally receiving what one is due.

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**About the author**

Urs Feller is head of Prager Dreifuss’s litigation and arbitration group. He acts for international and domestic clients in a variety of disputes before courts and administrative authorities in Switzerland as well as before international arbitration tribunals. He has vast experience in all forms of dispute resolution, including mediation. Other areas of expertise include insolvency, restructuring and asset recovery. He is a member of the executive committee of the International Bar Association’s litigation section.

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Collecting the evidence

Pelin Baysal and Ilgaz Önder of Gün + Partners consider whether Turkish courts are efficiently enforcing the collection of evidence in dispute proceedings

A n effective and fair judicial system is indispensable for a developed country welcoming foreign investors. The Turkish judicial system, however, has not yet achieved this. This is mainly due to the lack of efficient tools for collecting evidence which would help parties to provide sufficient information in a dispute to prepare themselves and the court at the outset of a civil proceeding. Without such preparations, the proceedings become long and complex, leading both national and foreign investors to doubt the accuracy of court judgments and efficiency of the Turkish courts. That is why foreign investors particularly tend to prefer arbitration or choose foreign jurisdictions to settle their disputes with Turkish parties.

Unlike in criminal proceedings, parties to a civil law dispute are responsible for the determination of the facts and collection of evidence. It means that a party making a claim must also provide the court with sufficient evidence to prove its claim. Yet, although it is the plaintiff who bears the burden of proof, it does not possess the necessary power to collect all evidence to this purpose. It is mainly the court that can collect evidence upon the request of the plaintiff, particularly for evidence held by the counterparty. Therefore, the plaintiff is merely expected to set out the importance and relevance of the evidence not in their possession.

The extent of the disclosure obligation towards a counterparty’s lawyer bears special importance

Under Turkish law, the parties of a civil case should list and submit all their evidence or at least information on evidence that is not in their possession during the exchange of petitions. After the completion of exchange of petitions, there is a preparatory phase called preliminary examination where the court and the parties seek clarification regarding the factual basis of the case. This enhanced involvement of the court helps to determine, locate and collect the evidence. However, even if the civil law judge is involved in the collection of evidence, it does not necessarily ensure the collection of evidence in full, as there is no comprehensive disclosure duty.

Although the Code of Civil Procedure (6100) dated October 1 2011 (CCP) explicitly imposes an obligation of honesty on the parties and their lawyers, it has had little impact on the submission of documents to the court by the counterparty. As also understood from the preamble of the CCP, the obligation of honesty merely ensures that the parties and their lawyers tell the truth when submitting a claim and explanation. In other words, this obligation should not be subject to a broad interpretation which forces a party to reveal all the documents at hand and hampers its chance of success. Under the CCP, the parties are not expected to submit unfavourable evidence under their control; it primarily foresees that the parties will only disclose favourable evidence while remaining silent with respect to unfavourable evidence under the duty of honesty.

However, it should be noted that there are remedies introduced under Turkish law forcing the counterparty to disclose and to submit the information and evidence in their possession in order to unveil the disputed facts.

To expedite proceedings, article 2 paragraph III of the Attorney’s Act (1136) April 7 1969 was amended in 2001 to improve a lawyer’s role in collecting evidence. With this amendment, lawyers are provided with the power to gather information and evidence from public and private bodies that may be either a counterparty or a third party in the disputed matter.

The motivation behind the amendment to the Attorney’s Act, which constitutes an example of the convergence between common law and civil law models, is to provide a concentrated evidentiary hearing by means of effective preparation at the beginning of a proceeding. The parties’ efforts in gathering evidence will improve both the speed and cost of the proceedings.

Collection of evidence under the Code of Civil Procedure

Under Turkish law as well as other civil law jurisdictions, there is no discovery and disclosure procedure as in the common law system. Instead, the collection of evidence is monitored and executed by the court during examination by its own motion or the request of the parties.

As a notable development in this respect, the newly-enacted CCP introduces a preparatory stage in order to achieve a well-founded examination. As a result, judges can proceed with the examination related to the merits only if all documentary evidence regarding the disputed matter is collected. According to this procedural structure, the court, at the preparatory stage, will invite the parties to deliver all the evidence enumerated in the pleadings and to make necessary explanations regarding the evidence requested by the court.

Regardless of whether the collection of evidence is ordered at the request of a party or on the court’s own motion, the counterparty is principally obliged to disclose all of the requested documents to the court. For their convenience, the CCP provides that parties may submit just relevant parts of large documents used on a daily basis, such as commercial books.

Other than this, if the documents are not eligible to be physically brought to the court, the judge may examine the evidence on site or may appoint an expert panel to do so. If the respondent tries to avoid such examination, the court is entitled to execute the proceeding by force and sentence the respondent to an administrative fine in addition to compensation to cover court expenses.

However, if the court order is not for an examination on site, but only for submission of the documents, execution of this order by force is not possible. In this case (if the respondent does not submit the documents in due time granted by the court) then the court exercises its discretionary power as to the sanction to be applied. Accordingly, the court is entitled to accept the allegation of the other party as undisputed fact so that the respondent who did not obey the court order is no longer allowed to bring any other evidence.
Despite the court’s power granted during the preparatory stage and following trial stage, it has not yet yielded the intended effect in terms of collecting evidence in the hands of the counterparty. In most cases, due to their workload, the judge has been unable to chase the counterparty for documents when they have not been submitted properly or on time. Moreover, the sanctions do not appear to affect the course of the case in material aspects, but only cause the court further expense, to be borne by the party who does comply with the court order to submit evidence. Meanwhile, judges, unable to collect and examine the evidence in detail, still tend to appoint several hearings with long interludes in between. After the evidence is finally all collected, it is common practice to conduct an expert examination, even if it does not require any technical knowledge.

A clear indication of the lack of proper preparation and examination of the evidence is this standard phrase still uttered by the Court of Appeals when reversing the decisions of local courts: ‘decision rendered with inadequate examination is unlawful thus it needs to be reversed’.

Right to collect evidence under Attorney’s Act
Article 2 of the Attorney’s Act, as amended in 2001, provides a tool for lawyers to bring before the court evidence which would otherwise be collected by the court at a later stage. Accordingly, judicial bodies, security directorates, other public bodies and institutions (including public economic enterprises, private and public banks, public notaries, insurance companies and foundations) are obliged to provide assistance to lawyers in the line of duty. Save for exceptions provided under law, these institutions and bodies should submit the required information and documents for review by the lawyer. Lawyers who obtain power of attorney for a client are entitled to a copy of these documents.

Under this provision, public entities and other bodies face an obligation based on public law, constituting a significant right for lawyers to be exercised against the counterparty or third party before or during a proceeding. The law provides no other regulations, so the scope of the practice is untried. The issue is left to be evaluated by scholars and court precedent on a case-by-case basis.

As the civil law model leaves applicants helpless, criminal investigation appears to be the best option

Considering that there can be cases where the entities or bodies enumerated under article 2 of the Attorney’s Act are party to a dispute, the extent of the disclosure obligation towards a counterparty’s lawyer bears special importance. In comparison with a case where the respondent entities or bodies are mere third party to the dispute, the protection for those who are party to the dispute is weak. In this respect, these entities or bodies can avoid disclosing the requested documents only if the documents contain their trade secrets. It is also worth noting that, according to the Council of State, the lawyer’s right to review and produce documents cannot be entirely denied by relying on the fact that the requested documents contain trade secrets. As a matter of fact, the scope of trade secrets should be understood to only cover trade secrets which contain the scientific data, financial condition and marketing techniques of an entity. Any other interpretation means a violation of the right to legal remedies.

On the other hand, the protection granted to the entities or bodies who are a third party to the dispute is broader. These can avoid disclosing information not only if the requested documents contain trade secrets, but also if the disclosure could cause a risk of investigation on them or loss of reputation.

Another point to be considered is the lack of any sanctions to apply in case the respondent does not comply with its duty to disclose. In this case, the requesting party has no choice, but to file a law suit to force, by court order, the party holding the evidence to submit the requested documents to the court.

In this case, even though there is no practice, the courts are entitled to issue a pre-trial writ of execution before commencing the preliminary examination ordering the respondent to submit the requested documents to the court. For this purpose, the court can also authorise the requesting party to obtain this evidence and submit it to the court. To obtain such an order, the plaintiff must convince the court by explaining the relevance of the requested documents to the merits of the dispute and describing the content of the documents. Even so, non-compliance with the court’s pre-trial writ has no sanction affecting the course of the proceeding, such as changing the side of the burden of proof. Instead, the court can charge the respondent with court expenses and attorney fees which are accrued because of the procrastination. Another sanction which has no practice is to sentence the respondent to an administrative fine as regulated under the Misdemeanour Law (5326) of March 30 2005; however, the amount of the fine is far from being a deterrent.

In the absence of any concrete regulation regarding practice and sanctions, a lawyer’s right to access documents under the possession of a counterparty as well as any third party as provided under article 2 of the Attorney’s Act, has not yielded the intended effect until now. Due to the nature of the civil law system and therefore the established practice of a court oriented proceeding, this effect can only be realised during a trial with the exercise of the court’s imperative power supplemented by applicable sanctions.

Bill to perpetuate evidence
It is also possible to initiate a precautionary measure called perpetuation (determination) of evidence, by which parties can achieve a result similar to that of a pre-trial disclosure under the common law systems. In particular, having resorted to this measure, it is possible to preserve evidence which may deteriorate either over time or because of the counterparty’s activities, before the court starts to examine the evidence at the main proceeding.

The pleading submitted to initiate this proceeding should contain sufficient explanation stating that the evidence in question concerns a law suit where the court has not yet started to examine this evidence, or a law suit which will be filed by the applicant. Another condition that the court should be satisfied with is the urgency of the proceeding. The applicant should clearly indicate that the evidence will be otherwise unreliable or inaccessible.

The court, after determining that the conditions are satisfied, should notify the counterparty on the method (such as a witness statement, site investigation or expert examination), date and place of the execution. However, the court can decide to conduct the examination without notification if such notification would hamper the benefit expected from the examination. If notified, the counterparty may be present at the specified place and follow up the proceeding.

This distinctive protective measure is mostly applied in disputes arising out of tortuous acts, lease agreements, construction agreements, trade mark and unjust competition matters. Under this measure, the courts prefer to appoint experts to observe the status and scope of the loss of a tort or contractual breach, to examine the commercial books of the counterparty and take testimonies from their executives if necessary.

Investigation based on criminal law principles
The remedies for the collection of evidence provided under Turkish civil law are not satisfactory, due to the lack of comprehensive provisions and deterrent sanctions. Besides, the conditions required for the court’s involvement in the discovery, especially if it is before any law suit is filed, hinder the accessibility of this power. Particularly, the court may not be
convinced about the urgency of the discovery and therefore may require detailed information on the whereabouts and context of the evidence in question.

Problems arise when even the requesting party does not have access to such information before a proper discovery proceeding is exercised. As the civil law model leaves applicants helpless in such cases, criminal investigation appears to be the best option. Civil law disputes that also cause criminal liability such as unfair competition, white collar crimes or tortuous liability (such as car accidents) also concern public interest. Therefore, the public prosecutor is likely to see itself responsible for initiating an investigation on its own motion or by a complaint filed by the applicant.

Due to the public interest element of criminal investigations, the principle of ex officio examination prevails over individual-oriented civil law principles. Therefore, the public prosecutor must take the initiative to investigate and discover the evidence through the police force and in cooperation with governmental authorities such as the Financial Crimes Investigation Board.

The evidence discovered through the criminal investigation is used to establish the foundation of civil law suits, as civil courts are bound by the material facts determined by the criminal courts. Based on this and also in line with the precedents of the Court of Appeals, if there is a pending criminal investigation along with a civil law suit, the civil law judge will adjourn the proceeding until the criminal case is finalised. This practice is criticised by some scholars for giving rise to halting and long proceedings, emphasising that civil courts are not bound by the decisions of the criminal court, but only with the material facts determined by the criminal proceeding. For this reason, scholars concerned with the balance between accurate decisions and timely proceedings, are of the opinion that the civil courts should not adjourn the hearing until the finalisation of the criminal proceeding but only until the criminal court collects enough evidence so that the civil court is able to reach a conclusion regarding the civil liability of the parties.

Compromising rights

The discovery and collection of evidence is one of the most controversial issues in Turkish civil law. The matter remains to be resolved by the contribution of criminal courts and prosecutors as well as the efforts of the parties to a civil law dispute and their lawyers. Endeavours in Turkish Law to enhance the lawyers’ contribution in this respect have been unsatisfactory until now, as the related provisions remain mere principles and fail to provide concrete regulations. Therefore, parties inevitably resorting to criminal investigation have had to sacrifice their right to a hearing within a reasonable time for the cause of a fair decision based on material facts.

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Tools to improve international arbitration

Iain Sheridan of Big Ben Chambers shares his top three tools for facilitating the smooth-running of international arbitration

Recurrent challenges facing international arbitration are the cost and delay of arbitral processes compared to alternative ways to solve disputes. There are, however, three innovative tools that deserve widespread use: mind map diagrams; simplified evidence charts; and, cause and effect diagrams. These tools should lower costs, and increase both the efficiency and qualitative aspects of preparing, delivering and concluding international arbitrations. It is argued that these three techniques would benefit both arbitrators and represent counsel across the entire process of international arbitration. In the medium to long term, all three tools may become as established in their application by the international arbitration community as writing notes, typing summaries and sending emails.

Mind map diagrams summarise a case in a non-linear way, replicating how the human brain often analyses knowledge and problems. This tool potentially benefits both arbitrators and representing counsel throughout all key procedural events. Complex, voluminous facts can be summarised with links to other types of documents, such as party requests and responses, and expert spreadsheets.

Simplified evidence charts can set out with succinct clarity either side’s arguments alongside supporting evidence and accepted generalisations. Well-drafted simplified evidence charts benefit representing counsel in preparing for and delivering their oral arguments. They also aid arbitrator decision making.

Cause and effect diagrams help to structure the retrospective dissection of a case at its conclusion for the benefit of arbitrators or representing counsel or both. This is an established quality control technique used to improve the human brain often analyses knowledge and problems. This tool potentially benefits both arbitrators and representing counsel throughout all key procedural events. Complex, voluminous facts can be summarised with links to other types of documents, such as party requests and responses, and expert spreadsheets.

What do mind map diagrams bring to international arbitration?

Mind maps are a way of organising information and aiding decision-making. Their structure follows more closely the non-linear, pattern-forming, networked functioning of the brain. Humans digest knowledge and then apply it to decisions in a non-linear way. Mind map diagrams are also non-linear and replicate the way we think. The precise original source of mind map diagrams is unclear, but it’s believed to have been used by Leonardo da Vinci and his peers in the 15th century. However, since the 1970s, Tony Buzan has relentlessly promoted their value and globally spread their acceptance.

Some arbitrators and representing counsel may judge that mind map diagrams are incongruent with international arbitration. However, it’s worth pointing out that their professional use is already widely established in a diverse collection of private and public organisations. IBM, Intel, Microsoft, NASA and Oxford University are all established users of mind map software. Further, the medical profession in both Europe and the US has already applied mind maps with a high degree of professionalism. Throughout the process of complex, voluminous arbitrations with thousands of pages of evidence documents, mind maps would be a potentially significant contribution to case management. First, while traditional notes supported by transcript print-outs are reliable ways of recording hearing arguments and evidence, mind maps facilitate understanding through the direct linking of pieces of knowledge digested over many weeks of planning and preparation. If even a fraction of the costs and delays of international arbitration are partly or significantly about parties recording and recalling often voluminous

Thoughtful medium-term implementation of these three techniques, may significantly improve international arbitrations

Simplified evidence charts can set out with succinct clarity either side’s arguments alongside supporting evidence and accepted generalisations. Well-drafted simplified evidence charts benefit representing counsel in preparing for and delivering their oral arguments. They also aid arbitrator decision making.

In the context of making the arbitral process not only fairer and more efficient, any innovative tool that potentially lowers costs in an era of increased financial scrutiny is a positive bonus. Such innovative tools do not, in the immediate future, assist arbitrators and representing counsel who are preparing for an arbitral hearing – no live case can reasonably form part of an experiment. However, in the same spirit as creative destruction is applied to commercial markets, thoughtful medium-term implementation of these three techniques, may significantly improve international arbitrations, whether ad hoc or under the auspices of institutions.

Arguably, the most longstanding contributor to highlighting the critical role innovation plays in capitalist economies is the Austrian-born economist Joseph Schumpeter. His concept of creative destruction captures the evolutionary nature of free-markets where established ways of doing things are replaced by new ones. In essence, new entrants to existing markets tend to succeed when introducing significant improvements.

Leading practitioners equally see international arbitration as work-in-progress. At a recent Vienna International Arbitral Centre (VIAC) conference, Peter Rees QC pointed out that “speed, price and quality cannot all be delivered now”, because we are too early in the evolution of international arbitration. That seems realistic, but it provokes the search for practical, universal ways to lower costs, improve quality and increase speed.

Innovation lies at the centre of modern capitalism. Even when a product or service reaches a high level of refinement, it is often replaced, unexpectedly, with new offerings that cost less, are quicker and are often of higher quality.
conflicting information, mind maps are pre-eminent tools at making the process of absorbing and analysing information more memorable.

Second, mind map diagrams allow the complex layers of a case to be presented on often just one fully visible master mind map. To the sceptic this may seem unlikely, given the complexity and volume of many construction, energy or financial cases. But modern software-based mind maps allow the dragging and dropping of attachments, such as detailed word processing documents, spreadsheets and PDFs. During arbitral hearings notes can be added to the relevant mind map branches. In sum, the modern mind map is both innovatively and visually an efficient tool, where the clicking on documents will bring them back and forth from a front page position as required.

Naturally, the first time note-taking is abandoned for a mind map structure, there is, to use a nautical metaphor, an uneasy sense of leaving sight of a familiar shore. Mind maps start with a key centre word or words. In this arbitral context the key centre words are the names of the applicant and respondent. From these central words, lines branch out with themes in a clockwise direction listing the type of case, a chronology of events, real evidence, testimony and so forth.

The nature of simplified evidence charts
The second type of innovative tool is that of simplified evidence charts. Evidence charts were originally developed by John Henry Wigmore. The foregoing simplified chart is my attempt at a practical application or version of it. Evidence charts aim to capture the main arguments relied upon by a party in a dispute, along with the evidence or generalisations that support the arguments put forward. For arbitrators there is the option of recording the applicant’s case or the respondent’s case or both.

Chart 1, and its accompanying arguments and evidence key list, sets out extracts from for the simplified evidential chart drafted by a fictional applicant’s counsel supporting a breach of a loan agreement application under the auspices of an international arbitration body. In this scenario, the applicant is an Austria-incorporated subsidiary of an oil and gas equipment group whose parent company is incorporated in Iran (the applicant). The respondent is a banking and financial services group incorporated in Germany (the respondent).

IBM, Intel, Microsoft, NASA and Oxford University are all established users of mind map software

is both innovatively and visually an efficient tool, where the clicking on documents will bring them back and forth from a front page position as required.

Further, from the view point of arbitrators, mind maps have the added benefit of allowing a presiding arbitrator to share their draft summary of the case in a quickly digestible way.

The applicant has been granted a patent in Austria for an energy-saving pump jack. Its chief executive believes this novel pump jack can replace the ubiquitous, traditional nodding donkey style pump jack. The research and
development was carried out predominantly in Austria by the applicant. So, given the bulk of the costs were in euros, there was commercial sense in taking out a euro-denominated loan to pay for this R&D. Consequently the applicant entered into a loan contract with the respondent.

The contract between the parties stated that after 90 days, provided the random testing results of 10 novel pumps matched the historical 80% reliability statistics supplied by the applicant, the respondent would make available €50 million ($56 million).

After 90 days, the respondent had received all the random test results. The final results confirmed eight out of 10 novel pumps performed well. In fact earlier, just 60 days into the test period, the respondent had emailed the applicant to communicate that from the test results already available, it was able and willing to lend €50 million.

Yet, to the surprise of applicant, when three months elapsed the respondent sent an email to the applicant’s chief executive indicating it did not intend to lend €50 million, citing force majeure over the previous 30 days based on exceptional market conditions. The force majeure clause in the signed contract included exceptional economic conditions as a circumstance beyond the control of contracting parties. In addition, the respondent argued that even before the end of the three month test period the novel test pumps failed to perform consistently.

The applicant’s chief executive stated in his witness statement that the random novel pump test data matched that of historic performance statistics – both recorded 80% reliability. However, he had also stated in an email sent to the respondent many months before the contract was signed that the novel pumps were 100% reliable. The arbitral tribunal appointed an expert engineer from Oslo University. She confirmed that there was no difference between the applicant’s historic performance results compared with the random test results.

The Chart 1 record of decisions, seen at points 1 and 2, reflects the desired outcome of the representing counsel for the applicant. For the sake of brevity as an illustration of how evidence charts work, their case is split into only two arguments. There is the left hand argument, centred on point 7, that the tested novel pump jacks did perform well enough to negate the respondent’s argument that unreliability justified rescission of the contract. Second, there is the right hand argument, centred on point 10, that conditional upon satisfactory performance under random test conditions, the respondent was obligated to transfer a loan of €50 million after 90 days.

Chart 1 is truly a simplified evidence chart, because it applies only five shapes and symbols – diamond, oblong, circle, positive symbol and minus symbol. Given the projected increase in international trade and investment activity across Asia, it represents a viable future international code which is understood quickly and can be altered by both Asian and western arbitration colleagues cooperating in the process of resolving international disputes.

The first attempt at any new technique can be a frustrating trial and error process. However, this initial effort and time investment is outweighed by two significant benefits. First, simplified evidence charts allow you to set out the key arguments alongside supporting and negating arguments of a party’s case. Second, all arguments are mapped with the supporting or negating types of evidence or generalisations.

The use of cause and effect diagrams
The third type of innovative tool is that of cause and effect diagrams. Often when leading engineering companies make a product to a very high quality standard, they invest time in sitting down to analyse what can be done better. Putting the spotlight on every variable, from start to finish, these quality control teams ask themselves: where did things fall below perfection?

In a systematic way, all relevant participants sit down to discuss and record the weaknesses in the methods used to produce the goods, the people involved, the technology employed, the materials used and the costs incurred. By conducting this focused retrospective dissection and recording in detail what was planned versus what actually occurred, the team leader and all members have a very valuable record on how to deploy fewer, more or different resources in the future. Given international arbitration competes as an alternative to some well managed national courts, it would be sensible to also apply cause and effect diagrams as a tool to facilitate continuous improvement.

As shown in Diagram 1, the arbitral tribunal and representing counsel have the opportunity to apply this same post mortem technique at the conclusion of their respective roles. The post mortem can logically commence with a focus on the ‘appointments’ of arbitrators, depending on the details of the arbitration agreement. Thinking, discussing and recording conclusions would reap dividends in future cases. A second example is that of ‘law and interventions’. In the context of improving arbitrator performance a relevant question to answer would be whether the sole arbitrator or tribunal made adequate interventions.

When discussing ‘evidence used’ at either the arbitrators or at a representing party’s post mortem, this could logically include applying the IBA Rules on the Taking of Evidence to evaluate how evidence was communicated to all other relevant actors. For instance, both arbitrators and representing counsel would benefit from assessing if throughout the arbitral process all requested documents met the standards of relevance and materiality.

To illustrate in detail how a cause and effect diagram works, under the Diagram 1 topic ‘Methods and tactics’, representing counsel would sit down, and

These three innovative tools have great potential to sustain and improve the quality of arbitral outcomes

Diagram 1: Cause and effect diagram adapted for international arbitration
regardless of the success of the result or their own belief in their performance, and collectively discuss and record answers to many questions including:

- How was time used precisely compared with its planned use?
- Were the documents produced excessive, insufficient or sufficient?
- Were cross-examinations excessive, insufficient or sufficient?

**Three tools for success**

Change is rarely welcomed by most experienced professionals. Insightful thinkers from Thomas Kuhn to Daniel Kahneman have commented on this reality. Further, there are always, at least in the short term, some negative experiences, such as investing time in not only learning new ways, but also discarding entrenched modes of operating. Whether adopting the discipline of mind mapping diagrams, simplified evidence charts or cause and effect diagrams, there will inevitably be a learning curve with any software programs.

The key threats for arbitrators, arbitral institutions and representing counsel practising international arbitration, whether their motives are private or public in nature, are cost, quality and speed. In essence, all three of these innovative tools are likely to generate more critical analysis of the preparation, management and execution of an international arbitration, from the selection of arbitrators to the rendering of a final award.

Competence, integrity, judgment, professional experience, logic and specific sector knowledge, among other things, all play a part in determining the quality of each arbitrator and representing counsel. These three innovative tools have great potential to sustain and improve the quality of arbitral outcomes. In so doing, they contribute to keeping the end users from both the private and public sectors satisfied with their continued choice of international arbitration. Joseph Schumpeter would approve.

**About the author**

Iain Sheridan practises as an English law barrister, and is also licensed to practice as an EU lawyer by the Vienna Bar. He is the founder of Big Ben Chambers, London, and is an associate tenant in the Chambers of Craig Sephton QC, Deans Court, Manchester. His practice is focused on international arbitration, international taxation and intellectual property. Client instructions are predominantly from the banking and financial services and technology sectors.

Sheridan is a former general counsel of a global investment bank. He has 10 years’ in-house experience in London covering both buy-side and sell-side risks, and acting as legal counsel on three trading floors. Over this 10-year period, he has acted for, against or alongside ABN AMRO, Bank of America Merrill Lynch, BNP Paribas, Deutsche Bank, Fidelity Investments, Fox-Pitt, Goldman Sachs, HSBC, JC Flowers & Co, JP Morgan Chase, Santander Group and Société Générale.
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Maximising investment treaty protection

Marney Cheek and Catherine Gibson of Covington & Burling examine investor-state dispute settlement, and ask whether it is the key to the TTIP’s investment package

Investment treaties have a long history of laying down core principles of fairness and equal treatment for foreign investors, and enforcing these principles through arbitration between investors and states. Although investment treaties were historically used to protect foreign investment in countries with a weak commitment to the rule of law, the use of these treaties has evolved and expanded in the modern era. Today, the investment-treaty framework provides an architecture that ensures fair treatment of foreign investors in countries of any size, in any region, and at any stage of development. Moreover, there is an increasing expectation among governments that protections offered across various investment treaties will involve similar levels of protection by all countries, and that these protections will be enforceable in similar ways. The recently concluded Canada-EU Comprehensive Economic Trade Agreement includes these important protections, as does the North American Free Trade Agreement (NAFTA) between Canada, the United States, and Mexico. And the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations will inevitably inform the negotiations that the US and the EU are engaged in with China regarding their respective bilateral investment treaties. Should the US and the EU change course with the TTIP, China may demand that these bilateral treaties follow a similar path.

Even though arbitration is a last resort, knowing that the commitments in the investment treaty are enforceable is meaningful in itself

In recent years, investor-state arbitration, commonly referred to as investor-state dispute settlement, or ISDS, has attracted increased attention as investors have sought to enforce the protections they are guaranteed in investment treaties. The number of these investor-state arbitration cases filed, however, pales in comparison to foreign investment flows. While there are billions of dollars in cross-border investments in place today, only a few hundred investment disputes have been filed by investors who have sought compensation for breaches of investment protections. Investor-state disputes are the exception rather than the rule. Businesses typically seek to establish long-term relationships when investing abroad, and often have more than one investment in the country. In light of these long-term commitments to their foreign investments, businesses view arbitration as a last resort when disputes arise regarding their investments abroad. Still, even though arbitration is a last resort, knowing that the commitments in the investment treaty are enforceable is meaningful in itself – the obligations to treat foreign investment fairly and provide market access are more likely to be respected if the host government knows that it can be held accountable if it fails to respect its international commitments.

Both the US and the EU have signaled that they will include investment protections in the TTIP, and this treaty is intended to be, as its name states, an investment partnership. Given the TTIP’s ambition to create a holistic architecture to promote trade and investment flows across the Atlantic, it is logical that the agreement includes both investment protections and investor-state arbitration to enforce these protections. In this regard, the TTIP would simply expand protections that already exist between many of the countries concerned (albeit to the EU member states with the largest investment flows with the US). The US already has bilateral investment treaties with nine EU member states – Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, and Slovakia. All of these agreements, like the planned TTIP, include typical investment protections, which can be enforced with investor-state arbitration.

Core principles of investment protections

Investment treaties, including those treaties already in existence between potential TTIP parties, typically provide a standard set of protections to foreign investors. The most basic of these is the protection against expropriation by the host government without adequate and effective compensation. By committing to this protection, a host government promises that it will pay foreign investors for their investments, if the government takes that investment after it has been made. This most basic protection assures investors that the amounts they spend developing an asset in a foreign country will not be entirely lost if the local government decides to nationalise the industry in which they have invested. This protection encourages investments by offering a degree of security against the most severe adverse government action.

Investment treaties also protect businesses more generally against arbitrary or discriminatory treatment by host governments. These protections guarantee equal treatment and ensure that investors from abroad are permitted to compete on an even playing field with domestic businesses and third-country competitors. These protections are particularly important in sectors that were previously dominated by large domestic businesses, as they ensure that these sectors will truly be open to foreign investment after the host government has concluded an investment treaty with the foreign investor’s home government.

In addition, these treaties typically eliminate government-imposed restrictions on access to foreign markets. These restrictions frequently take the form of export quotas, local-content requirements, or technology localisation requirements, and such restrictions – unless prohibited by treaty – can discourage businesses from even attempting to enter a foreign market. Finally, these treaties permit foreign investors to freely transfer investment-related funds in and out of the host state. These investment-related funds may include royalties, profits, or contract payments, and permitting foreign investors to freely transfer these funds allows businesses to structure their global operations in a manner that maximizes efficiency.

The protections offered in investment treaties are guaranteed through the enforcement mechanism of investor-state arbitration. In investor-state arbitration, disputes are typically resolved by panels of three arbitrators who
are chosen for each particular dispute. After an arbitration has been filed, the investor and the government will each appoint one arbitrator, and a third arbitrator is selected to serve as chair. (The chair might be selected by agreement of the parties, by agreement of the two party-appointed arbitrators, or by the arbitral institution.) Those frequently chosen as arbitrators in these disputes include international human rights scholars as well as former government officials, and arbitrators deciding cases at one leading arbitral institution, the World Bank International Centre for the Settlement of Investment Disputes, have hailed from more than 40 different countries. Some arbitral institutions maintain standing rosters of qualified arbitrators, although neither investors nor governments are required to appoint from any particular list. Some recent investment treaties – including recent US treaties as well as the recent agreement between Canada and the EU – require arbitrators to have expertise in international law or international economic law, in certain cases, and all arbitrators are encouraged to follow ethical guidelines developed particularly for the investor-state arbitration context.

“Investor-state arbitration offers a non-political method of resolving disputes

Decisions of investor-state arbitral tribunals have long been publicly available for free, and in recent years, there has been a significant trend towards promotion of transparency in investor-state arbitration. In 2014, the United Nations Commission on International Trade Law adopted transparency rules for international arbitration, and both the US and the EU have bolstered the transparency provisions of their recent investment treaties. As a result of this transparency movement, third parties such as non-governmental organisations may participate in investor-state arbitrations by filing amicus briefs on issues of particular interest or expertise. In addition, tribunals now increasingly require parties to make their legal briefs, expert opinions, and other filings available for public scrutiny. Finally, tribunals increasingly publish the transcripts of proceedings held before them. This transparency movement has directly responded to earlier criticisms that the system operated behind closed doors.

Recent cases demonstrate the effectiveness of protections offered in investment treaties, when combined with these treaties' enforcement mechanism of investor-state arbitration. In the NAFTA case of AbitibiBowater v Canada, for example, a US investor filed an arbitral claim against Canada after a Canadian provincial government effectively cancelled all the leases, licences, and grants that it had previously granted to that investor, and the provincial government nationalised the investor's assets. The cancellation was described by provincial authorities at the time as a decision to 'reappraise' rights related to Canada's national resources in response to AbitibiBowater announcing the need to close the last of several facilities in that province. Before the case had progressed to a substantive phase, however, the parties reached a settlement and the investor received about a quarter of the damages it had initially sought in the arbitral case. This case demonstrates that the mere filing of an investor-state arbitration claim can help resolve a dispute between an investor and a host government, without a decision by the tribunal or even substantive written arguments by the parties. Sometimes the mere existence of the enforcement mechanism helps move the parties towards an amicable resolution.

Not all cases settle, however, and arbitral tribunals have shown courage in addressing wrongful conduct of host states when called upon to do so. A number of arbitral proceedings were filed after the Russian Federation essentially nationalised Yukos Oil Company through a series of tax measures, asset freezes, refusals to provide payment plans for amounts allegedly owed, and eventual bankruptcy. In all of the cases decided to date, arbitral tribunals have ordered the Russian Federation to pay foreign investors in Yukos for the amounts that they lost as a result of the Russian Federation's wrongful conduct. A guarantee of this type of protection, and the ability to enforce it with a claim before a neutral panel of arbitrators, serves to facilitate investment in environments that might otherwise be seen as too risky. It also provides a neutral forum in circumstances when the local courts may be viewed as less than objective, particularly if a dispute has been highly politicised.

Investor-state dispute settlement is not without criticism, however. Some critics argue that this enforcement mechanism might discourage governments from passing public health or environmental regulations that would affect foreign investors because such regulations might be seen as violations of investment-treaty protections. Other critics argue that investment treaties may create a race to the bottom that encourages governments to decrease environmental and labour protections in order to attract foreign investment.

These concerns are not new, however, and despite the alarmist rhetoric are not borne out by the cases. Further, modern investment treaties – and one would expect TTIP to follow this model – include explicit provisions that protect governments' ability to enact environmental regulations and other public health regulations. The most recent US investment treaties also expressly forbid governments from reducing environmental or labour protections in order to attract foreign investment.

Finally, one important note about investor-state arbitration: investor-state arbitration does not force a country to change its laws. Arbitral tribunals do not have that power and investment treaties do not even purport to grant it to them. An arbitral tribunal may decide only the arbitral case before it, and in that individual case, the tribunal is limited to determining whether the host government has violated the protections guaranteed in the investment agreement, and if so, what amount of monetary compensation the host government should pay the investor because of that violation. Host governments maintain full control of domestic legislative, executive, and judicial functions.

Benefits of the system

Investment treaties with investor-state dispute settlement offer a number of benefits to both investors and host states, beyond the investment protections themselves. First, these treaties promote openness to investment and facilitate new investments, particularly in sectors that have been previously closed to foreign investment or dominated by large local players. After investments are made, these treaties offer a stable environment for investments so that businesses may confidently make long-term commitments when investing abroad without fear of expropriation or discriminatory treatment.

Investor-state arbitration also offers a non-political method of resolving disputes. Although using investor-state dispute resolution will remain a last resort, disputes will inevitably arise, and without investor-state arbitration, an investor who was unable to negotiate a solution with a host government would be required to rely on its home government to resolve its dispute through political channels, or subject itself to the local courts. Attempts to resolve investment disputes at the government level has proven complicated, time-consuming, and often fruitless because the investor's home government will balance an investor's interests with all other issues on the political agenda that it may have with the host government. Investor-state arbitration benefits investors by permitting a direct and efficient route to resolving disputes with host states, should the usual efforts at negotiating a solution or settlement fail.

Investor-state arbitration also benefits host governments. Host governments may likewise avoid addressing an individual investor's dispute with the complicated backdrop of a broader diplomatic agenda. Investor-state arbitration permits host states to present their arguments to a neutral panel of arbitrators, who will decide whether a violation of the treaty has occurred.
**Twofold enforcement**

Investment treaties provide important protection to foreign investors, but these protections are meaningful only if accompanied by an enforcement mechanism of investor-state arbitration. For a comprehensive agreement like TTIP, investor-state dispute settlement is an essential part of achieving the type of stability that investors from all countries are seeking. The typical investment-treaty protections, when coupled with investor-state dispute settlement, provide core principles of law plus a non-political method of resolving disputes. As both the US and the EU negotiate bilateral treaties with China, it is important for both countries to demonstrate that they are willing to live up to the same standard that they expect China to use.

**About the author**

Marney Cheek is co-chair of the firm’s international arbitration practice. She arbitrates international disputes before tribunals in complex commercial and investment treaty cases and litigates international disputes in US courts. Her practice spans a range of jurisdictions and industries, including oil and gas, mining, and life sciences.

Marney also advises clients on international trade and investment matters in foreign markets around the world. Her advisory practice draws upon her trade, investment, and public international law expertise, as well as her experience as associate general counsel at the Office of the US Trade Representative. Marney routinely counsels clients on a range of World Trade Organization dispute resolution and trade policy issues, including intellectual property, financial services, standards, trade preferences, non-tariff trade barriers, and environment. She is vice-chair of the firm’s trade and international policy practice.

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<td>HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW</td>
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