LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

ANNUAL REVIEW **2013**

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Litigation & Alternative Dispute Resolution

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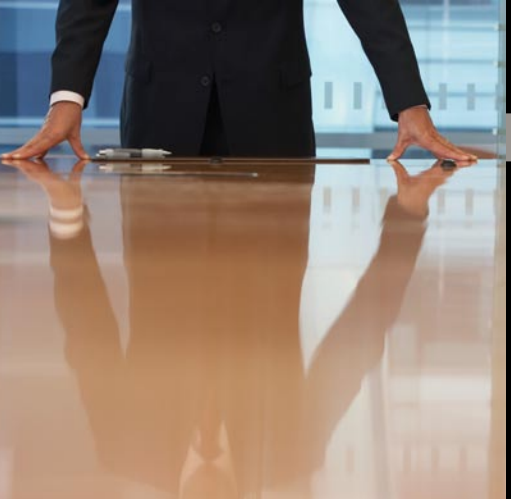
Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in litigation & alternative dispute resolution.



UNITED STATES

STEPHEN P. YOUNGER
PATTERSON BELKNAP WEBB & TYLER LLP

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN THE US? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

YOUNGER: More and more disputes are going to arbitration, particularly in the international arena. With greater frequency, techniques used in the court setting, such as dispositive motions and broad discovery, are being transported into the arbitration arena. We are particularly seeing more commercial disputes in the fields of telecommunications and energy, which are fairly hot business sectors.

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

YOUNGER: I regularly advise clients to pursue mediation, regardless of whether the case is in arbitration, in the courts or has yet to be filed. Mediation provides a business-oriented solution to a dispute and it frequently can save significant costs as compared to full-blown litigation. Whether to pursue arbitration as opposed to litigation of a particular dispute involves a variety of factors. First, in the international regime, arbitration is the standard due to the enforcement mechanisms available under the New York Convention and various treaties. Arbitration also has the advantage of providing expertise of specialised neutrals, confidentiality and potentially speed. On the other hand, if the case can be resolved on a dispositive motion, it may be resolved more expeditiously in the court system.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN THE US MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

YOUNGER: I am increasingly seeing clients pursue non-binding ADR options such as mediation before resorting to litigation. Most large companies will try to resolve their disputes before pursuing them in formal binding processes. Typically, the biggest barriers to a successful ADR process are a lack of trust and a divide in the appraisal of the merits of the case. These factors must be taken into account when planning an ADR process.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

YOUNGER: Arbitration is becoming increasingly popular in the New York region. We are seeing more and more contracts that call for arbitration. In addition, the newly formed New York International Arbitration Center has provided a best-in-class arbitration facility in which to hold arbitral hearings.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

YOUNGER: At the outset of a dispute, clients should make an early assessment of the likely merits of their case as well as an analysis of their business goals in the matter. This will allow clients to determine early on if there can be a favourable resolution short of full-scale litigation. In my experience, dispute resolution clauses are often drafted by non-litigators and could use more attention from someone with a litigation background. Otherwise, it is often too difficult to negotiate changes in the procedure after a dispute has arisen.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

YOUNGER: Most often disputes arise due to misunderstandings which are not well contractually documented in the parties' agreements and lack of diligence in the contracting process, typically in regard to the selection of the business partner. Very often, when there is stress in the business relationship, parties who probably should not have formed a relationship to begin with resort to litigation. On the other hand, a well-structured contractual relationship with a party who is honourable can typically yield not only a satisfactory business relationship but an amicable resolution of disputes short of litigation. We are even seeing ADR processes used throughout a relationship, such as in the construction field, where disputes are often postponed until after construction is complete.

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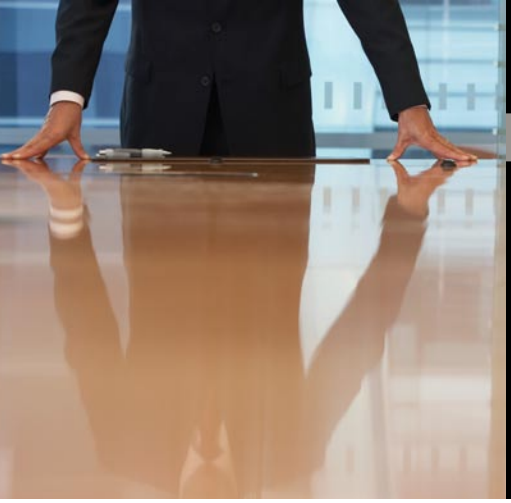
Patterson Belknap Webb & Tyler LLP

Stephen Younger, past president of the New York State Bar Association, is a leading commercial litigator who is also well-known for his alternative dispute resolution work. Having been with Patterson Belknap since 1985, Mr Younger has more than 25 years of experience as a commercial litigator. As a seasoned trial lawyer, he has tried many cases in federal and state court, and before arbitration panels. He also frequently argues appeals, particularly in the appellate courts of New York. Based on his significant ADR experience, he is often called on to serve as an arbitrator or mediator in high-stake matters.



CANADA

STEPHEN ANTLE
BORDEN LADNER GERVAIS LLP

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN CANADA? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

ANTLE: In Canada we are seeing increases in regulatory activism, particularly in the investor and securities fields. Landmark court decisions are also pending on anti-trust claims by indirect purchasers, which will have significant implications for consumer class actions. Companies are also often drawn into litigation and administrative proceedings between governments and First Nations about development, land claim and treaty issues. Companies are increasingly cost sensitive and litigation averse, and press to resolve commercial disputes quickly and at minimal cost. Arbitration is becoming more common, in both domestic and international disputes, because of its relative procedural flexibility, efficiency and confidentiality. Litigators are increasingly involved in companies' internal investigations and compliance issues, including white collar crime and corruption issues.

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

ANTLE: Companies need to get specialised dispute strategist expertise at the outset of a new relationship or transaction. They need the expertise of counsel who really understand how the different dispute resolution mechanisms work and which are appropriate for which kinds of situations. Companies also need to take a good hard look at their situation, determine what kinds of disputes are likely to arise and agree with the other parties on a mechanism for resolving them if necessary. It's so much easier to do that at the beginning, when there's goodwill all around, than after a dispute has come up, when everyone has a vested interest in the situation. It's crucial to agree on a dispute resolution mechanism that will provide finality, and that will actually resolve disputes. There are really only two options for that: arbitration and litigation. The parties need to agree on one of them. When disputes do come up, companies should virtually always be willing to apologise,

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to try to reconcile, and try to negotiate a resolution, with the assistance of a mediator if necessary. Those consensual mechanisms are usually infinitely preferable to adversarial processes like arbitration or litigation. But incorporating them in a 'tiered' dispute resolution process, making it mandatory for the parties to use them in every dispute, whether they want to or not, and whether it's appropriate or not, is usually a recipe for delay, expense and often litigation about how the tiered process should work.

Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN CANADA MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

ANTLE: Yes, more Canadian companies are exploring alternative dispute resolution. Litigation has a host of serious disadvantages. It was probably never generally the best commercial dispute resolution option. It has become much less so in the age of e-discovery and social media. All else aside, litigation is usually extremely distracting from business, time consuming and expensive. There is usually a better option. There are no serious legal or procedural obstacles to successful ADR processes in Canada. The main obstacle is practical: companies' reluctance to use the necessary dispute strategist expertise at the outset to design and implement effective ADR processes. Arbitration, in particular, has significant advantages over litigation in most cases. But they are potential advantages – they are only realised by using the necessary expertise to design and implement an arbitration process appropriate to the kinds of dispute likely to actually arise. Companies' failure to do that often results in a process which is called arbitration but which is really just private litigation. That is usually just as distracting from business and time consuming as ordinary litigation, and often more expensive.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

ANTLE: Canadian arbitration facilities and processes are excellent. All the Canadian provinces have adopted the UNCITRAL Model Law and Canada has been a New York Convention signatory for many years. Experienced arbitrators and arbitration counsel are available in Canada's major centres. The Canadian courts are arbitration-friendly. There are competent arbitral institutions such as the ADR institute of Canada nationally and the BC International Commercial Arbitration Centre in Vancouver. Those institutions have solid procedural rules, particularly with the pending amendments to the ADR Institute of Canada's National Arbitration Rules. Arbitration is already the dominant Canadian method of resolving international business disputes. That is largely due to the ease of enforcement of international arbitral awards around the world, compared to foreign judgements.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

ANTLE: In my experience companies usually don't pay enough attention to dispute resolution provisions in commercial agreements. Too often they're just copied and pasted in from some precedent at the last minute, without taking the care, or using the expertise, necessary to determine what kinds of disputes are likely to actually arise under the agreement and to design the dispute resolution mechanism best suited to resolving them. This often results, at the front end of a dispute, in expensive and time-consuming preliminary litigation about how the chosen dispute resolution mechanism should work, and, at the back end, in challenges to its process and appeals of its result.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

ANTLE: To a very great extent. The most effective and efficient dispute resolution is, of course, preventing disputes arising in the first place. The best way to do that is purely practical: do the necessary due diligence on potential business partners so that you really understand who you're proposing to go into business with. With the rise of the business use of social media such as LinkedIn, Facebook and Twitter, there is a gold mine of due diligence information available on the Internet, and no excuse for not searching for it as a standard part of any business due diligence exercise.

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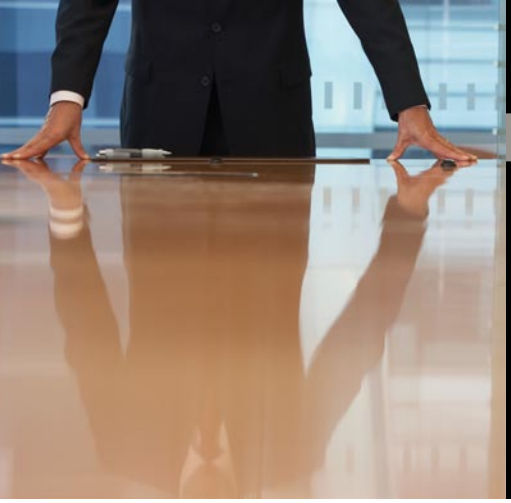
Stephen Antle is a dispute strategist. He is a senior partner in Borden Ladner Gervais LLP and a chartered arbitrator. Mr Antle is an expert in preventing and managing all kinds of commercial disputes and, if necessary, resolving them through negotiation, mediation, arbitration, administrative proceedings or litigation. He has a broad range of experience, emphasising strategic corporate governance advice (including shareholder disputes), domestic and international commercial arbitration, contract trouble shooting and international dispute resolution issues. He has appeared as counsel before mediators, domestic and international arbitration tribunals, administrative tribunals, all levels of court in British Columbia and the Supreme Court of Canada.



CAYMAN ISLANDS

IAN HUSKISSON
TRAVERS THORP ALBERGA

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN THE CAYMAN ISLANDS? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

HUSKISSON: As a major financial centre, the Cayman Islands have seen their fair share of disputes involving investment funds. A recurring theme has been investors seeking to place funds into liquidation where, for example, redemptions have been suspended or where the fund is in soft wind down. The Cayman Islands courts have, in general, been sympathetic to investor claims, finding that liquidation is an appropriate remedy where a fund is no longer viable. This position may change following a judgment of the Court of Appeal which is expected shortly. Another recurring theme that is common to many offshore jurisdictions is commercial confidentiality. Cayman Islands legislation imposes criminal sanctions on the usage of confidential information, even in the context of legal proceedings.

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

HUSKISSON: My number one tip would be to ensure that all staff understand and adhere to a strict document management policy. In the Cayman Islands, as with many jurisdictions, parties to litigation are required to give very extensive discovery of documents, including unhelpful ones. Many cases are won or lost on the strength or otherwise of the documentary evidence. An effective document management policy involves the use of technology to collect and marshal electronic documents at an early stage of a dispute or, better, before a dispute even arises. Having this material available early in a searchable form provides an enormous tactical advantage at comparatively little cost.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN THE CAYMAN ISLANDS MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

HUSKISSON: ADR seems to be used much less often in offshore rather than onshore jurisdictions, particularly in Europe where ADR may be compulsory. ADR is not compulsory in the Cayman Islands. My experience with ADR however is overwhelmingly positive and I would always encourage clients to consider it, no matter how entrenched the parties may appear. I generally like to consider early neutral evaluation as an alternative to mediation or other more traditional forms of ADR. Early neutral evaluation involves obtaining an independent and non-binding opinion on the merits of a claim. The opinion is addressed to both parties and is often obtained from a retired judge or senior counsel. The opinion will remain confidential to the parties but often serves to burst the bubble of misplaced confidence that can frequently be a bar to early settlement.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

HUSKISSON: The Cayman Islands have excellent facilities and are ideally placed geographically to act as a neutral venue for hearing disputes involving parties based in the Americas or elsewhere. The Cayman Islands have recently enacted a modern arbitration law loosely based on Uncitral. The Cayman Islands are party to the New York Convention, making reciprocal enforcement of awards in most jurisdictions relatively easy. Whilst court proceedings are undoubtedly more common in the Cayman Islands, arbitration does seem to be catching up in terms of popularity and the Cayman Islands are well placed to exploit that trend.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

HUSKISSON: Whilst commercial parties are understandably more focused at the contracting stage on getting the deal done than what might happen if it falls apart, there is clearly much that can be done early on by way of potential damage limitation. In the Cayman Islands for example, it is possible to create a contractually binding obligation not to serve a winding up or liquidation petition. Including such a restriction in a fund or joint venture structure could remove the most potent weapon in a potential litigant's arsenal. There is also considerable scope for tailoring dispute resolution clauses to suit one party's needs. Aside from the obvious choice of law and jurisdiction issues, there are numerous options when it comes to the procedure to be used to resolve disputes. A party with limited resources for example might be better off with a rapid and binding expert determination clause than a traditional court based dispute resolution clause. This should prevent a party with greater resources from engaging in lengthy and costly court proceedings the less well off party cannot afford.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

HUSKISSON: There is always a tension between the need to get a deal done and the desirability of managing risk. When doing business in offshore jurisdictions such as the Cayman Islands, there is simply no substitute for taking good local advice early.

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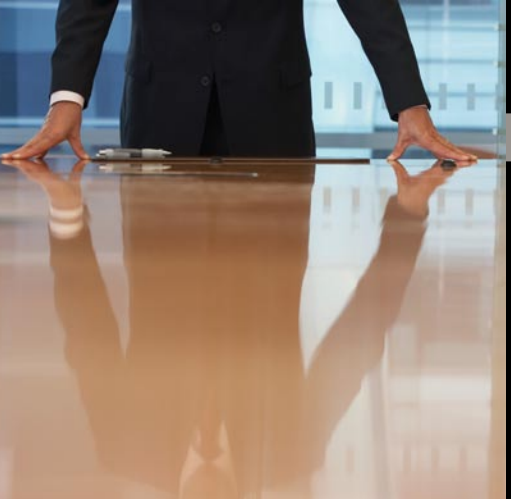
Ian Huskisson is a commercial litigator with over 15 years experience. He moved to the Cayman Islands from the London office of a major international firm. Recent engagements include acting at trial and on appeal in a ground breaking dispute over the enforceability of debenture security, leading asset recovery proceedings following a major fraud, and acting as an expert witness on insolvency law.



BRAZIL

PAULO DÓRON REHDER DE ARAUJO
SABZ ADVOGADOS

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN BRAZIL? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

ARAUJO: Brazil is a country known for having a high amount of law suits filed every year and commercial disputes are no exception to this rule. Moreover, as Brazil was chosen to host two of the major world events of this decade – the 2014 FIFA World Cup and the 2016 Olympic Games – a great number of considerable infrastructure projects were put in place, resulting in many disputes between construction, service and insurance companies, and local governments. These conflicts mainly involve contract and civil liability matters. Although the culture of arbitration is not as well established as in other countries, the number of both domestic and international arbitration processes increased considerably, allowing a good number of companies to try this alternative way of solving conflicts. In the last five years, arbitration has gained importance in Brazil, mostly because of infrastructure and construction disputes.

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

ARAUJO: In the recent past, legal professionals that were asked about how to effectively conduct litigations and commercial disputes in Brazil would answer that anything would be better than going to a Brazilian court, especially because of the long time lawsuits usually take to be judged. This question is not so simple anymore. Brazilian authorities are making a huge effort to change this by taking the judicial system into the digital era. In fact, totally digital lawsuits are present in many State and Federal Courts over the country. This digitalisation has drastically reduced the time of disputes – for example a lawsuit that used to take four or five years now ends in less than one year, including appeals. Of course mediation and pre-dispute methods are still recommended, but these solutions may not be enough. Nowadays, choosing between going

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to arbitration or going to court is more complex. Time is not the only issue to consider. The amount involved, the matter under discussion, and the position of the party may point to a court lawsuit rather than an arbitration procedure in some cases, giving foreign investors and international players a 'new traditional option' for solving their disputes in Brazil.

Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN BRAZIL MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

ARAUJO: Everything started to change when the 1997 law gave referees elected by the litigating parties the same status as a judge. This was a decisive step in the culture of alternative dispute resolution methods gaining force and popularity in the Brazilian markets. Today, after 15 years, it is safe to say that arbitration is finally a reality in Brazil and it is hard to find medium or large firms that are not writing arbitration clauses into their contracts. However, there is still much to be done. Other alternative solutions are consolidating themselves as co-operative dispute resolution methods. Although some companies have already incorporated pre-litigation culture, the lack of a law ruling mediation, for example, makes things harder than they should be. In sum, it is right to say that arbitration is here to stay and is opening the door to other forms of dispute resolution.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

ARAUJO: Brazil has a good number of well prepared, well structured and fully apparelled arbitration institutions that conduct processes in a very similar way to the major international organisations. The procedural rules of each of these institutions, however, have some particularities, though they are inspired by the rules proposed and accepted internationally as best practice in the field. Furthermore, the Brazilian judicial system is well known for its respect for, and its non-intervention in, arbitration. As a matter of fact, the number of arbitration sentences overruled by Brazilian courts decreases every year. Considering this favourable scenario, it is possible to say that arbitration, in future, will become the main method of solving international disputes in Brazil, as long as these disputes are related to corporate or commercial matters.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

ARAUJO: It is all about contract design. Writing clear, objective and as simple clauses as possible is, of course, the first step to having better results in disputes arising from contracts. Taking care of technical concepts, defining words and being very specific about obligations, performance and completion is also good advice. Nevertheless, this is not enough. Special care must be taken when considering the dispute resolution clause, known as 'the midnight clause'. Besides all the general advice about writing this clause, in Brazil we see a good number of disputes due to incomplete arbitration clauses. The most common situations are not electing a court to enforce orders from the arbitration panel, or not establishing the hypothesis when security for costs is necessary. Brazilian arbitration law has its peculiarities and it is important to know them in order to write good and effective dispute resolution clauses.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

ARAUJO: There is a clear difference between what companies generally write in their contracts and the way they actually behave during the commercial relationship ruled by that same contract. The further the party's actions are from the text written in the contract, the higher the chance of an unsuccessful dispute. Reality is as important as the text established by the parties in their contract. So, companies must act and document their actions in order to prove these actions in an eventual dispute. The problem is that, generally, the legal department is not responsible for the execution of the contract. It is therefore important to clarify to everyone involved with that contract how strategically important an email or a meeting minute may be, and how relevant it is to clarify to both parties the eventual adaptations of the settlement made necessary by new circumstances unknown when the contract was signed.

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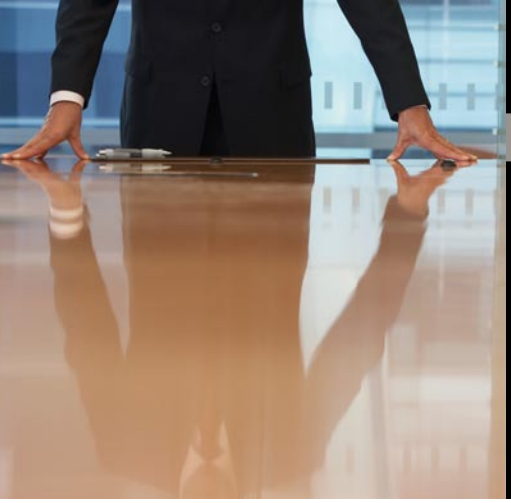
Paulo Araujo is a partner at SABZ Advogados where he responsible for strategic litigation. He specialises in private law and civil procedure. Mr Araujo graduated from the University of São Paulo Law School, and holds a Doctorate degree in civil law from the same institution. He is a Professor of postgraduate courses in business law, business contracts, real estate and infrastructure law at the School of Law of FGV-SP. Mr Araujo is a former prosecutor for the city of Guarulhos and a member of the Brazilian arbitration committee. He speaks English, French and Italian.



MEXICO

MARCO TULIO VENEGAS
VON WOBESER Y SIERRA

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN MEXICO? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

VENEGAS: The most recurring themes are commercial disputes arising from distribution, franchise and joint venture agreements, both international and domestic. Due to the recent enactment by the Mexican government of a reform agenda to several sectors of the economy, the use of arbitration has increased significantly in various industries. Thus, the implementation of the policy included legal amendments in the public sector, energy and telecommunications, as well as the enactment of legal provisions regulating public-private partnerships. Additionally, due to recent legislative amendments to the Public Works Law and the Public Acquisitions Law, arbitration was included as a method of settling disputes arising from contracts executed between a private party and a state entity. With this reform, construction disputes in the administrative area are becoming increasingly common.

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

VENEGAS: Regarding domestic arbitrations, the main advantage is that an arbitral tribunal has more time to solve a dispute, in contrast to the local courts which normally have an excessive work load. Regarding international arbitrations, the principal advantages are generally considered to be that both parties have the possibility of solving their dispute in a neutral forum and by a specialised tribunal with expertise in determining such cases. Local courts are still, however, used for commercial disputes as they can provide a number of advantages over arbitration, including being potentially less expense as no court fees apply; the avoidance of delay in implementing interim remedies; and the avoidance of delays in the judicial enforcement of awards. Also, as the amendments to the Commerce Code, in which the 2006 amendments to the Model Law were implemented, are recent, the provisions included have not yet been extensively interpreted by Mexican courts and there is little case law available to assist in their interpretation.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN MEXICO MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

VENEGAS: Aside from arbitration, which has become the most commonly use alternative dispute resolution method in Mexico to settle commercial disputes – especially in the construction and financial sectors – other ADR methods are still developing. Other alternative dispute resolution methods, such as private mediation and conciliation, are not regulated expressly by the relevant laws, namely the Commerce Code, the Federal Civil Procedure Code and the State Civil Procedure Codes, and have not been particularly encouraged by Mexican judges. However, institutions and arbitration centres based in Mexico, such as the Arbitration and Mediation Commission of the Mexico City Chamber of Commerce (CANACO) provide the opportunity for parties to resolve their disputes through mediation, and are certainly contributing to increasing the forum for other ADR options. To the extent that the Mexican judiciary system has shown to have an excessive work load, and since commercial disputes taken to court usually take years to be finally settled, companies seem to be increasingly willing to explore ADR methods.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

VENEGAS: Today, arbitration is one of the main dispute resolution methods used in Mexico, thus, over the past few years facilities, processes, as well as the judiciary in general, have been improved and made 'friendlier', as the Mexican state has implemented a pro-arbitration policy. For instance, Mexican arbitration law was amended in 2011 to incorporate the UNCITRAL Model into the Commerce Code. Mexico is also a party to the New York Convention and to the Inter-American Convention on International Commercial Arbitration. Procedurally speaking, Mexico has recently amended its legislation to guarantee that the intervention of national courts in arbitration proceedings is framed as judicial assistance in support of arbitration, and not as interference. Such judicial assistance is dependent on factors including the prior

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request of either party and is limited to the cases and circumstances expressly regulated by the Commerce Code; remission to arbitration upon the existence of an arbitration agreement and prior request of either party; appointment of arbitrators; the production of evidence in arbitration; consultation on arbitrator's fees; the recognition and enforcement of provisional relief ordered by the arbitral tribunal; and the competence of the arbitral tribunal.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

VENEGAS: Although the provisions of the Commerce Code on Arbitration have been recently updated to include the regulation of the UNCITRAL Model Law, and now recognise the validity of an agreement to arbitrate if executed in any type of telecommunication means – provided that the agreement is properly recorded – the approach of national courts regarding the enforcement of arbitration agreements is still practical. Thus, it is advisable to have the agreement to arbitrate duly executed in writing, signed by the parties and for each party to keep an original counterparty. The use of a standard institutional arbitration clause should also be considered for the successful conduct of future arbitration, determining only key elements in advance, such as the applicable law and the seat of the arbitration, and avoiding an overregulation of the proceedings. Over the past few years, both companies and corporate lawyers have been more aware of the importance of including effective dispute resolution clauses in their commercial agreements. More importantly, they have become increasingly familiar with institutional arbitration clauses, and are now more aware of the types of agreements and transactions that should include an arbitration clause rather than a jurisdictional clause.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

VENEGAS: The parties to any commercial relationship should be specifically aware of the laws, regulations and general legal regime applicable to the potential transaction. Regarding executed contracts, it is indispensable for the parties to be reactive upon any modifications or amendments to such regime, as this could be the basis of new conflicts. It is essential also to be very careful in the pre-contractual negotiations and to document, in a very clear manner, the binding or non-binding nature of each document. As the approach of Mexican courts is still practical, it is recommended that companies duly execute and file the documents that contain the terms and conditions of the transaction in which they are involved. The use of effective ADR clauses in their contractual instruments should also be considered.

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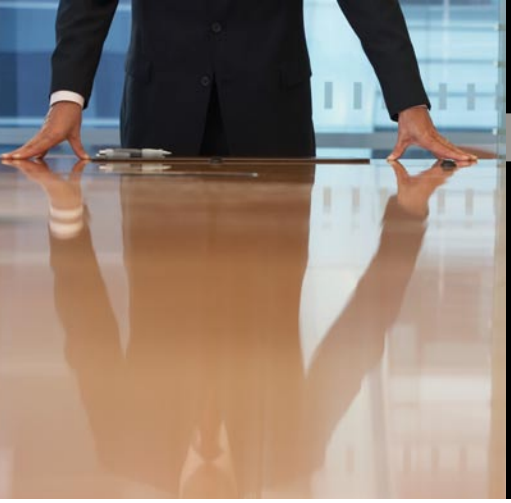

CHILE

GONZALO CORDERO
MORALES & BESA

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN CHILE? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

CORDERO: The main recurring themes are consumer protection and disputes deriving from construction contracts. Regarding the former, what is particularly significant is the favour that class actions have obtained following a recent modification which eliminated certain admissibility criteria and made the applicable procedure faster. At the same time recent ordinary court rulings in relation to the fines applicable on suppliers have resulted in an increase in this type of action. The financial services sector has been the most recent target of this type of action. The importance has been such that, following a highly publicised ruling against one of Chile's largest retail players, the Superintendency of Banks and Financial Institutions modified some of its rules to align them with consumer protection law. On the other hand, the construction sector has been hard hit by the increase in litigation. In particular, the number of disputes between principals and contractors has seen a sharp increase, for example, in relation to increased construction costs, imposition of fines for delay, breach of construction specifications, to name but a few. In fact, the Santiago Chamber of Commerce – one of the most important arbitration centres in Chile – has indicated that around 44 percent of all arbitrations relate to construction works.

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

CORDERO: From among the options to resolve highly complex disputes, arbitration is the most adequate in Chile. Notwithstanding that it is the most expensive, this mechanism provides greater speed in coming to a definitive ruling, favours specialisation in relation to the matter in dispute, and offers the best safeguards in respect of privacy. On the other hand, while the ordinary courts are a valid and impartial option, their high workload results in delays which slow down the resolution of any conflict. Finally, while there are specialist mediation centres, this mechanism of conflict resolution has yet to be positioned as a real alternative to arbitration in commercial matters.

Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN CHILE MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

CORDERO: While Chile has a long tradition of arbitration, and there are no obstacles in choosing this form of dispute resolution – nor to enforcing the decisions obtained – it is undeniable that lately companies are more willing to look to an arbitrator than to the ordinary courts of justice. This tendency can be explained in the main by the agility of these procedures versus those in the ordinary courts. In effect, arbitration enables the parties to obtain a decision in a considerably faster timeframe and, as they waive most of the recourses that ordinarily can be filed against the award, the decision can also be enforced more quickly.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

CORDERO: Institutional arbitration has replaced *ad hoc* arbitration, for which the Mediation and Arbitration Centre of the Santiago Chamber of Commerce is one of the most important centres nationally. In addition, the rise in arbitration has resulted in the creation of new arbitration centres which represent alternatives to the more traditional options, with different procedural rules and ways of dealing with arbitration. For example, the National Arbitration Centre has a number of renowned arbitrators and a growing number of arbitrations. At the same time, institutional arbitration stands out as it provides arbitrators and litigants with installations and facilities that facilitate proceedings, including the technology needed to carry out arbitration today. The aforementioned, added to the prestige of Chile's arbitration centres, has meant that arbitration has positioned itself as the most adequate solution in resolving disputes, be they domestic or international.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

CORDERO: It is increasingly important to pay attention to the drafting of arbitration clauses, in order to avoid conflicts in relation to the competence of an arbitrator or, even, the relevance of their intervention in resolving a dispute that arises between the parties of a set contract. Only with this due care can problems be avoided in the constitution of arbitration or in discussions in relation to the powers of arbitrators. Consequently, it is vital that arbitration clauses are reviewed by specialists and that they are analysed in the context of the contract in which they are found, and in light of the relationship between the parties as a result of the same.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

CORDERO: Once a dispute arises, the first thing that is scrutinised is the drafting of the dispute resolution clause. In this way, in order to avoid additional disputes, it is essential that diligence be taken at the drafting stage. On the other hand, and in order to avoid future conflicts, the parties should take care, from the moment they first start negotiating until the moment they sign the contract, to be clear and precise in setting out their interests and objections. In other words, the parties should always take care to avoid generating false expectations in their counterparties which later could generate conflict in interpreting the text of the contract and, consequently, avoidable disputes.

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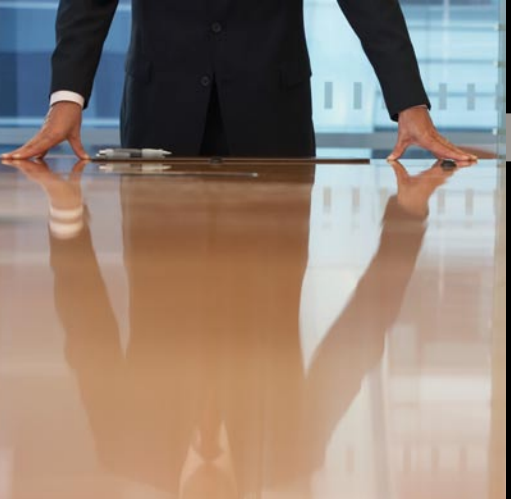
Gonzalo Cordero leads Morales & Besa's dispute resolution team. He specialises in arbitration, domestic and international, antitrust and trade work. Prior to joining Morales & Besa, he was a legal advisor to the Ministry of National Land and Property (1997-1999), and between 2003 and 2005 he worked with the International Arbitration and Trade Law groups at White & Case LLP in Washington D.C. Mr Cordero has been published extensively in Chilean, and foreign law journals, including Revista Chilena de Derecho, Anuario de Filosofía Jurídica, Latin American Finance and Capital Markets, Latin American Law and Business Report, and Latin American Finance and Capital Markets.



ARGENTINA

ALBERTO MOLINARIO
MARVAL, O'FARRELL & MAIRAL

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN ARGENTINA? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

MOLINARIO: Commercial litigation is mainly driven by three factors: first, the general uncertainty about the law; second, inflation – a rate over 25 percent yearly is attractive for debtors to delay payment as much as possible; and third, the tight exchange control that was established by the Central Bank in October 2011. The banking and insurance industries are among those most regularly sued. Notwithstanding this, we observe that the number of cases filed in the commercial courts is not growing significantly; this may be attributed to the reduced level of private commercial activity and to the use of ADR.

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

MOLINARIO: It depends on the nature of the dispute and the position of the client in each particular case. Law 24573, passed by Congress in 1995, established that a mediation proceeding is mandatory prior to filing civil or commercial litigation. This law was amended twice, and in 2010 Law 26589 was passed. Mediation has proved a very effective way to settle disputes and avoid ordinary litigation. The success of mediation in the city of Buenos Aires led to the adoption of mandatory mediation in some provinces and is extending to the federal courts sitting in the interior of the country. Mediation has also been mandatory before filing a suit before labour courts in Buenos Aires since the early 1990s and, in this field, the mandatory mediation proved to be a very successful tool to avoid litigation. Arbitration, specifically institutional arbitration is highly recommended in cases involving large amounts of money where both parties have a real interest in solving the issues at stake in a quick and efficient way, and are solvent enough to comply with the award. Litigation before state courts is more costly and time consuming.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN ARGENTINA MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

MOLINARIO: Yes, companies are more willing to explore ADR options. In the case of arbitration it is very important to have the arbitration clause duly drafted and incorporated into the agreement from the outset because experience shows that, in the absence of such a clause, the parties are reluctant to sign an arbitration clause after the dispute arises. In the past 10 years, the state has acquired a more relevant role in the economy, both as a regulator, and as a buyer and supplier of goods and services. The state has always preferred to litigate before the state courts and has always distrusted arbitration.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

MOLINARIO: There are several institutions that provide facilities and processes for institutional arbitration. The lack of an arbitration law and the fact that the state – directly or indirectly – is very much involved in litigation are a hindrance against arbitration becoming more regularly used to resolve international disputes.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

MOLINARIO: There is little that companies can do to avoid inflation or to develop a more certain legal environment. The intervention of the state in the economy can disturb the 'playing field' for parties following the agreement. The companies can therefore dedicate more time to analysing possible scenarios of conflict and drafting adequate arbitration clauses. Also, the diligence and willingness of both parties to act early in those matters where incipient disputes arise is crucial to avoid a deterioration of the relationship that leads directly to litigation.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

MOLINARIO: Our experience shows that once a commercial understanding has been reached between the managers, the parties – especially the more unsophisticated contractors – do not dedicate enough time and resources to allow their lawyers to draft adequate contractual instruments. Lawyers of both parties, either in-house or external, must be told about the nature of the contemplated transaction and be allowed to participate in the negotiation since the very beginning. In addition, the drafting of the legal terms of agreement must be simultaneous to the negotiation.

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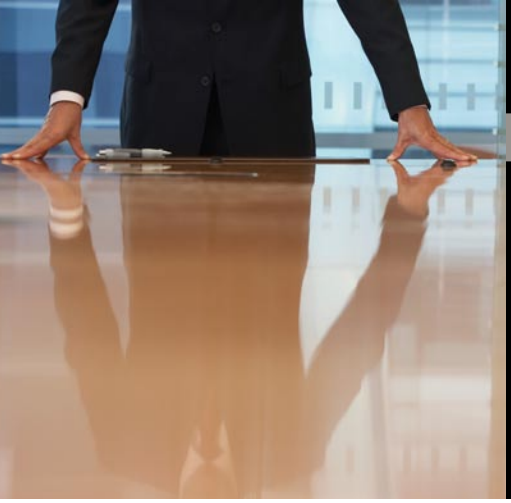
Alberto Molinario heads Marval's Dispute Resolution Department. He has wide experience in complex litigation and arbitration, with particular expertise in product liability cases. Mr Molinario holds a Masters in Comparative Jurisprudence from the New York University School of Law, where he also completed a course on international arbitration and litigation. He took part in the Milbank Tweed, Hadley & McCloy training program for foreign lawyers, having graduated from the Universidad de Buenos Aires. He is a member of several national and international law organisations.



UNITED KINGDOM

JANE COLSTON
STEWARTS LAW LLP

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN THE UK? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

COLSTON: We are seeing increasing business demand for third party funding of commercial litigation. Often the driver is to spread the cost-risk and secure predictable costs. We have seen significant new amendments to the civil procedure rules this year; with emphasis on reducing litigation costs – London litigation is often perceived as expensive; and rebalancing costs liabilities between the parties by amendments to the claimable costs of litigation funding, the introduction of contingency fees for general litigation, and adjusted costs liabilities when suitable settlement offers are made. We are seeing the popularity of London as a venue for dispute resolution and experiencing a significant number of disputes involving Eastern Europe. These cases tend to be large, hard fought, and likely to involve an appeal. Inevitably, we have seen a lot of fall-out from business restructuring which often means wrong doing or corruption is discovered; provokes a shareholder's dispute; or results in a party seeking to get out of unfavourable contracts.

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

COLSTON: I advise firms to think about alternative dispute resolution early and ideally agree a mechanism before any dispute has arisen – preferably, it should include non-binding mediation. The surprising reality is that it is only at a late stage that disputing parties focus on what they want and on what they are prepared to compromise. By this time the parties are entrenched. The enlightened and those who don't have an unlimited legal budget therefore realise that promptly 'grasping the nettle' by taking a hard look at the dispute and how it could be resolved saves costs and time. It also means that they keep control of the outcome rather than having a decision or a public 'judgment' imposed. It does strike me that in-house training for companies is

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important. There is sometimes a degree of cynicism about mediation in the form of "we refuse to pay a penny so therefore why should we meet?" Understanding the process is critical so informed judgments can be made. Key advantages of mediation and arbitration relative to court proceedings include privacy; avoidance of local court process and potentially delay or bias; and ease of enforcement. A party may, however, need to litigate because the other party will not engage, for example if dishonest defendants have absconded or if a party has insufficient information to assess merits or quantum or if a legal precedent is needed.

Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN THE UK MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

COLSTON: The answer is yes and this is being driven not only by businesses' needs for prompt and cost effective dispute resolution, but by the courts. The Court of Appeal recently delivered a clear message to litigants that they must constructively consider mediation. To refuse unreasonably to mediate or to ignore an invitation to do so can lead to the imposition of significant cost sanctions. This recent decision is part of the court's policy drive to encourage litigants to resolve their disputes or at least narrow the disputed issues. The Court of Appeal's own pilot scheme demonstrates mediation's effectiveness with its current success rate being about 50 percent.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

COLSTON: Arbitration in London continues to grow. We see increasing numbers of Russian and Indian parties opting to arbitrate as well as litigate in London because it is a trusted seat, the time-scale of proceedings is relatively short, and the quality of London-based arbitration practitioners is high. Arbitration ranks alongside litigation as a preferred choice for corporate clients – most will match their forum to the particular circumstances of the contract to establish whether arbitration or litigation is the better option.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

COLSTON: Dispute resolution lawyers often refer to the dispute resolution clauses in commercial contracts as the 'midnight clauses' – they are rarely given significant attention and, particularly where the parties are negotiating terms which include an agreement to arbitrate, issues such as governing law, choice of institutional rules, and choice of seat and number of arbitrators are often selected without detailed thought being given to the likely types of claim which may arise, or the most effective method for their resolution. If parties are contemplating a choice between litigation and arbitration then the factors which should be taken into account are likely to include timescale for resolution of the dispute; availability of the remedies which may be sought by either party; ease of enforcement; and, if third parties are to be involved, whether their evidence can be secured. This is a particular problem in arbitration as the involvement of non-parties is extremely limited.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

COLSTON: We see many disputes caused by disjointed and confusing contracts. Getting the drafting right is a first essential. Keep it clear and concise. Delete irrelevant boiler plates. Consider the following – will the business likely be the suing party or sued? It will affect the contract drafting. Be alert, the manner in which a potential business partner negotiates may speak volumes about how they will act post contract. English Law is often seen as commercially acceptable and therefore used as the choice of law in contracts for foreign based entities. However, obtain good local legal advice to know – rather than assume – what works best overseas. As for diligence with business partners, this obviously makes sense. Ensure the business has a process which is followed, without fail, which risk assesses new clients and ensures that the right documentation is sent out to the right people, at the right time, so that your chosen contract governs the business relationship and any dispute.

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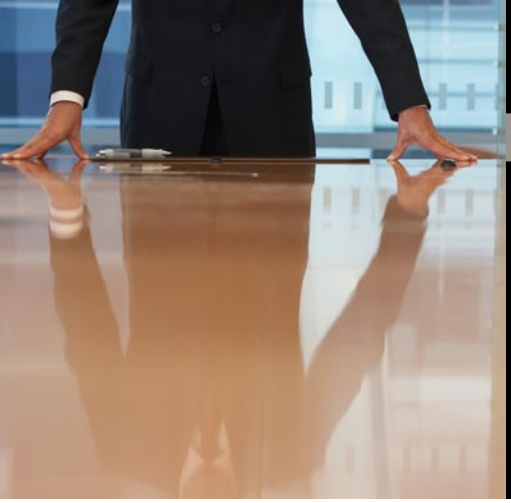
Jane Colston has a wide breadth of experience in domestic and international litigation and ADR. She also acts as a court appointed supervising solicitor in regard to search orders. The leading legal directories describe Jane as "excellent", "tenacious and analytical", and a "very experienced and competent litigator" who "works tirelessly for her clients". Who's Who Legal 2012 and 2013 names Ms Colston as one of the leading practitioners in the field of asset recovery lawyers. She was also selected for inclusion in the 2013 Thomson Reuters' London Super Lawyers List.



IRELAND

LIAM KENNEDY
A&L GOODBODY

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN IRELAND? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

KENNEDY: There is still a strong pipeline of litigation related to the 2008-2009 economic crisis. In addition, a great deal of the litigation we are seeing relates to the financial services sector. This includes litigation between the parties to unsuccessful property and other investment developments, claims against professionals such as solicitors, auditors and funds service providers, large scale recovery actions by banks against former customers such as developers, and regulatory enforcement actions. There has also been an increase in pensions related disputes involving employers, members, trustees and scheme administrators, primarily arising out of the significant deficits in a number of pension schemes with resolutions being found in negotiation, mediation and litigation. There has also been plenty of significant litigation which is independent of the financial crisis, such as Madoff litigation, M&A litigation and product liability litigation. Other sectors such as the pharmaceutical and the technology sector also continue to generate significant litigation issues. While larger, strategic, claims tend to proceed, smaller less strategic disputes are frequently resolved relatively early and are less likely to give rise to major litigation.

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

KENNEDY: We encourage clients to put in place an appropriate legal framework when entering into significant contracts and to include a suitable dispute resolution clause. We also encourage clients to make sure that their standard terms likewise deal with dispute resolution procedures. We encourage clients to consider the most appropriate options for them given the nature of their business and of their commercial relationships. Typically we discuss options such as hierarchical dispute resolution clauses – so called 'step clauses' – providing for negotiation, expert determination, mediation and conciliation, arbitration and litigation.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN IRELAND MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

KENNEDY: In our experience companies are increasingly receptive to alternate dispute resolution options such as negotiation and mediation before engaging in litigation. We would not see major legal or procedural obstacles to a successful ADR process. The courts are receptive and facilitative to such processes. The most important determinant of success is the willingness of both sides to engage in good faith in such processes at an early stage of the process.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

KENNEDY: Ireland has a very supportive environment for arbitration processes. Irish legislation – which became part of Irish arbitration law in 2010, effectively merging domestic and international arbitration law – mirrors the UN model law and is designed to prevent vexatious Court applications interrupting or derailing the arbitration process. In addition, the Irish judiciary understand and are committed to upholding commercial parties' choice to resolve disputes by arbitration. Arbitration clauses are increasingly common in significant contracts and arbitration is a key method of resolving international disputes. In most cases referrals to arbitration are on the basis of a pre-existing arbitration clause. Although it is possible to agree to arbitrate after a dispute has arisen, this occurs infrequently in practice. Ireland has suitable arbitration facilities and hotel accommodation available, including the recently opened Dublin Dispute Resolution Centre, and such facilities, coupled with the supportive legislative regime, Dublin's location and transport links, and the legal resources available locally if required makes the city a suitable venue for international arbitration.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

KENNEDY: In the past, many commercial entities were frequently reluctant to give much consideration to dispute resolution provisions. Often the focus was on the commercial aspects of an agreement. We have certainly seen cases in the past where dispute resolution clauses were not properly considered. In some cases different dispute resolution clauses were crudely amalgamated leading to an impractical and an unworkable clause which can itself generate disputes. Over recent years there has been a greater awareness of the strategic importance of the dispute resolution provisions. We recommend that, early in commercial negotiations, the parties should agree a fair and appropriate procedure to resolve any disputes. This might for example involve good faith negotiations between the principles, followed by mediation or conciliation. If these steps failed then the matter could be elevated to be resolved by expert determination, arbitration, or litigation. The choice of an ultimate forum would vary depending on the nature of the parties and the issues.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

KENNEDY: Companies can and should reduce their legal risk by conducting appropriate diligence before engaging with potential business partners. Diligence before entering into a commercial transaction is almost always preferable to subsequently litigation. Such diligence would extend to a range of issues including creditworthiness, competence, integrity, track record, regulatory compliance and insurance cover, and would vary depending on the nature and value of the particular commercial relationship, and its strategic and reputational significance to both parties. The outcome of such diligence may affect the parties' willingness to engage with each other or may influence the terms upon which it is appropriate for them to engage. However, such diligence is likely to reduce rather than eliminate the potential for future disputes.

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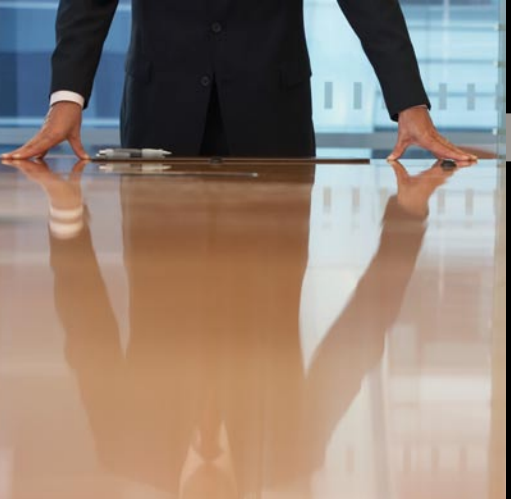
Liam Kennedy is dispute resolution partner at A&L Goodbody and co-chair of the Litigation Committee of the International Bar Association. He specialises in international and domestic commercial disputes including constitutional and regulatory litigation, public law, and M&A disputes. Recent cases include representing one of Europe's leading beef processors in the recent horsemeat controversy and advising Elan Pharmaceuticals in litigation undertaken as part of its successful defence of a hostile takeover. Mr Kennedy regularly advises auditors and other professionals in professional indemnity matters. He also advises banks, insurers and other financial service providers and advises commercial clients in respect of investigations by regulatory bodies.



SWITZERLAND

DIETER HOFMANN
WALDER WYSS

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN SWITZERLAND? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

HOFMANN: There are a number of recurring themes that we are seeing, in particular joint-venture and shareholders disputes, post M&A disputes, construction disputes, but also a number of debt and pledge enforcement in real estate transactions. We are also seeing an increasing number of cases involving interim relief. These matters stem from a wide variety of industries and sectors.

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

HOFMANN: The most crucial factor at the outset of a conflict is to involve someone who has the expertise to handle the case. This can be an in-house counsel experienced with disputes, but most often a lot of time and costs could be saved if a true litigator is involved at the very outset – behind the scenes or openly, depending on the case. It is in the first phase of a conflict where seemingly small things can make a great difference, where one can achieve a lot with very little time and cost, where one can still limit the risk and, if the dispute cannot be avoided, make sure that one has obtained the best position possible. The strategy depends on a concrete case and the specific circumstances. There is normally no 'one size fits all' approach that would do. A specific strategy may make perfect sense for one matter, but might be suicidal for another. It also makes sense to periodically review one's dispute resolution clauses. Again, for certain types of contracts and counterparties litigation may be the best option, for others it would be arbitration.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN SWITZERLAND MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

HOFMANN: ADR is a tool in the box. We are seeing more clients asking questions about ADR. There are cases where mediation is an option that one should explore. By and large, it seems fair to say that mediation has not really taken off in Switzerland with regard to commercial disputes. This is probably because Switzerland has a long standing tradition of facilitating amicable settlements. For example, there is, in many cases, the Justice of Peace as a first step in bringing legal proceedings, who will try to achieve a settlement. More importantly, the Zurich Commercial Court normally calls for a settlement hearing after the parties have exchanged their first written briefs. In this settlement hearing, the court reviews the matter based on the briefs and exhibits filed so far, and renders a preliminary, non-binding assessment of the case, on which basis the parties often conclude a settlement. If a settlement can be made, the parties have a binding solution to the dispute, normally some six to nine months from the filing of the statement of claim, and without having had to fully plead and prove their case, which saves a lot of time and cost.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

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

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

HOFMANN: There is obviously no such thing as the 'perfect contract', but it is still surprising how many issues could have been avoided by are more thorough drafting. With regard to large scale contracts, we are seeing more clients asking for a 'litigator check' which reviews the draft from a devil's advocate point of view. By and large, more attention should be paid to dispute resolution clauses to make sure that the dispute resolution mechanism chosen is the best for a possible dispute arising out of a specific contract.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

HOFMANN: Doing business always involves some risk. It is always worthwhile to do one's homework properly and check the counter-party, and to thoroughly negotiate and draft the agreement. However, by and large, we believe most clients do their work in this regard. It is rather in the very first phase of a dispute, when it becomes likely that there may be a dispute, where parties make a lot of mistakes, for example by making admissions and concessions that are very difficult to make good later on.

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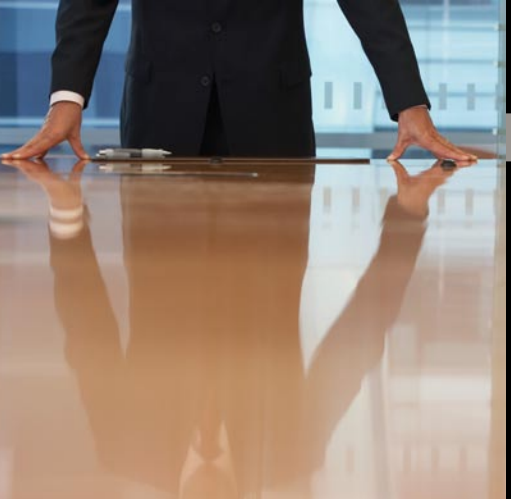
Dieter Hofmann heads the Litigation and Arbitration team. His primary focus is dispute resolution in complex, mainly international cases, ranging from pre-litigation advice, representation of clients in court and in arbitration proceedings, coordination in cases involving multiple jurisdictions, enforcement of foreign judgments and arbitral awards, and international legal assistance. He also sits as arbitrator in international arbitrations. He has considerable experience in complex disputes arising from directors' liability, shareholders' agreements, international contracts, banking, finance and insurance, and insolvency among others. He is chair of the Zurich Bar's Litigation Practice Group and has presented papers at major international conferences and is published in Switzerland and abroad.



RUSSIA

ARTEM KUKIN
YUST LAW FIRM

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN RUSSIA? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

KUKIN: There is no doubt that court cases and commercial disputes of the most diverse types keep occurring. It is quite difficult to point out any unique or exceedingly rare types of disputes. Traditionally, disputes are related to non-performance or undue performance by the parties of civil relations under certain contractual obligations. The validity of transactions is a common subject for proceedings. Such disputes can occur when one party breaches a contractual obligation and attempts to avoid liability by alleging the absence of the very obligation. It should be noted that such disputes should decrease in number due to the enactment of amendments to the Civil Code of the Russian Federation (CCRF). The amendments fix the general rule of the contestability of transactions that do not comply with legal requirements and thus limit the number of persons entitled to contesting such transactions. Certainly, a lot of disputes arise in construction, commerce, industrial supplies, and in the spheres of credit and insurance.

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

KUKIN: The application of particular dispute settlement procedures depends on many factors and should be determined in each case in consideration of all the circumstances of the dispute. The stage of the dispute and the character of the parties' relationship are of essence. For example, when there is a minor breach of an obligation, which the counterpart acknowledges and is happy to discuss, the claim procedure of dispute settlement would be useful. Possibly, the terms of a certain agreement need to be clarified, the sanctions should be limited to presenting small items for exaction. When a material or continuing breach occurs, the extrajudicial procedure of allowing the parties to settle matters themselves without any third parties, as a rule, produces no results, and relations between the parties deteriorate and mutual trust is lost.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN RUSSIA MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

KUKIN: The large majority of civil law claims are currently examined and resolved by public courts. Companies often come to courts not only in connection with serious disputes involving claims to recover large monetary amounts, on rights to certain valuable property, but also in connection with the most insignificant matters. It should also be noted that the most general rules fixed by the APCRF stipulate the consideration disputes in the region of over 300,000 roubles for companies and over 100,000 roubles for individual entrepreneurs. The APCRF only stipulates simplified consideration for disputes below that amount. It should also be noted Russian legislation contains no obstacles to successful extrajudicial settlement. The parties to civil relations are empowered to independently define the means to settle certain disputes within the framework of the liberty of agreement principle fixed by the CCRF. Obviously, the respective provisions of the agreement must comply with the general principles of honesty and rationality and abide by the terms of current legislation.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

KUKIN: According to the information published at the official website of the Court of Arbitrazh of the city of Moscow, almost 150 various private arbitration courts are currently active in Moscow. Still, one has to acknowledge that private arbitration courts cannot compare to public courts by popularity with the parties to civil relations and, respectively, by the number of considered cases. Specific arbitration proceedings may differ, to some extent, with the regulations of private arbitration courts, and are generally largely similar to the judicial proceedings in public courts. The advantage of arbitration against the public courts is the possibility for interested parties to independently nominate the individuals who will settle it, and the speedy consideration of the case or at least the guarantee of consideration by persons, who are authorities on the law or experts in their field.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

KUKIN: Prior to the initiation of a joint activity, the parties should be advised to thoroughly study the information on their potential counterpart – including information on the amount and the composition of their assets, on their non-performed obligations, on the number of lawsuits moved against them, and so on. If the decision to begin the joint activity is taken, the procedure of extrajudicial consideration and settlement of possible disputes should be examined in detail. In particular, the following terms should be included in the agreement: prompt and detailed notice on mutual claims; creation of joint commissions to study claims and disputes and the respective proceedings; and property sanctions for the evasion of extrajudicial procedure of dispute settlement, or other measures against the party that breaches such procedure. However, in consideration of the above, one must take into account that the efficiency of the described provisions largely depends on the honest actions of the civil relations participants.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

KUKIN: As discussed, the study of the potential counterparty is of great importance. Today, large pieces of such information are being used by parties to civil law relations or by authorised public authorities in connection with certain legal requirements. For example, a large number of such court cases from the official website of the Higher Court of Arbitrazh are open to public access. This enables parties to study the amount of claims against the potential counterparty, their nature, and the procedural conduct of the potential counterparty during the deliberations. Companies which are open joint-stock companies obligatorily disclose the information on their activity on the Internet each quarter, including accountability, yearly activity reports, data on affiliated entities and so on. Information concerning the status and activity of the company may also be received as excerpts from the Unified State Register of Legal Entities kept by the tax authority, or be requested from other organisations that supply official public information on the activity of legal entities.

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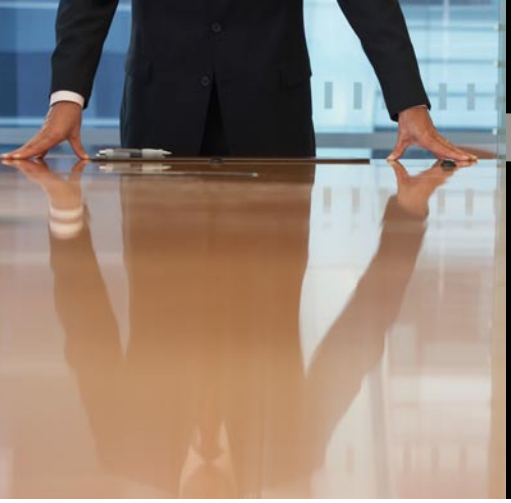
Artem Kukin has over 18 years experience of professional legal practice. He successfully manages projects related to litigation in commercial courts and common law courts of all instances, including international cases. Most of his projects involve virtually all areas of law. Mr Kukin is a member of the Crisis Management and Bad Debts Committee of the Chamber of Commerce and Industry of the Russian Federation. He is a member of the Public Supervisory Council of the Non-Commercial Partnership (Autonomous Organisation of Trustee Managers 'Mercury'). He is a regular speaker at forums, conferences and other special events as an expert on the legal protection of business.



SWEDEN

KRISTER AZELIUS
ADVOKATFIRMAN VINGE KB

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN SWEDEN? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

AZELIUS: The number of commercial disputes is increasing following what I would say is an international trend. Swedish companies nowadays consider disputes to be a normal part of conducting business and have developed a more modern view on this by trying to deal with the dispute separately from normal business relations with the counterparty. This trend is true for more or less all industries and sectors. However, we have seen a growing number of disputes concerning auditors, lawyers and other consultants, where the claimant alleges that the consultant has been reckless in giving advice. This is also the case for board members.

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

AZELIUS: Companies should generally include an arbitration clause in their contracts. Arbitration is always quicker and often cheaper than litigation. This is because the award cannot be challenged – other than on formal grounds. Proceedings in one instance are not only quicker but normally also cheaper, even taking the costs for the arbitrators into consideration. Additionally, companies could include a mediation clause. A successful mediation is the quickest and cheapest form of dispute resolution, although you should make sure that the mediation clause cannot be used to prevent a party from taking legal measures. Often, it is better to decide on mediation once the dispute is a fact.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN SWEDEN MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

AZELIUS: Typically, the companies are not more likely to explore the ADR alternatives – at least not yet – but the legal system as such has changed in this respect. The mediation system in the courts has improved over the last few years. The opportunity to have an independent judge as a mediator is taken frequently nowadays. The Stockholm Chamber of Commerce (SCC) has – in addition to its well reputed Arbitration Institute – a Mediation Institute that has developed a structured model for mediation. An agreement reached through mediation can, if the parties agree, be rendered enforceable by the court. The effect of those changes will probably be that mediation in the near future will be considered as a more viable alternative and perhaps move ADR from a lawyer-to-lawyer discussion into structured mediation proceedings.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

AZELIUS: Arbitration, without doubt, is the dominant method of resolving international as well as domestic disputes. In *ad hoc* arbitrations the arbitration panel has the full responsibility for administrating the proceedings, which makes the facilities and processes rather individual. However, the SCC provides – via its Arbitration Institute – the whole administration for the proceedings. Normally the arbitration panel or the parties provide premises and the requisite technology for a hearing, but there is also an international hearing centre in Stockholm – the SIHC – that can provide everything required for a hearing.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

AZELIUS: First of all, it is very important that the possibility of a dispute is recognised by the parties when entering into an agreement. The dispute resolution clause should not be viewed as a boiler plate provision. On the contrary, it should be negotiated and agreed between the parties. This certainly must be the case when there are elements of multi-party or 'final and binding' valuations involved. In the long run, none of the parties are helped by a dispute resolution clause that provides scope for formality battles. Such battles only give rise to consumption of costs and time. More time must be spent on those matters in the future. Litigation lawyers must educate the transaction and corporate lawyers in this respect.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

AZELIUS: The point is normally not the dealings, as such, with potential business partners. Of course, there should be a degree of common sense involved and one should avoid doing business with partners that can not be expected to act in a professional manner. However, it is worth remembering that disputes also regularly occur between large and well reputed companies. The most important thing is to be careful and clear in the negotiations of a transaction and the drafting of a contract. This includes the effort to find a well-drafted dispute resolution clause which takes the possibilities of executing the award into consideration. Also the execution question militates in favour of an arbitration clause in view of the applicability and reach of the New York Convention.

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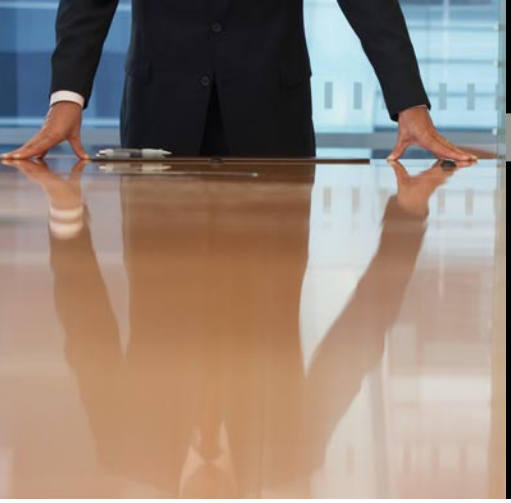
Krister Azelius has been a partner of Vinge since 1996 and heads the firm's litigation and arbitration team in Southern Sweden. He has extensive experience of international and national arbitration, as well as national litigation. He heads the team in several ongoing arbitral proceedings including an ongoing MUSD 120 insurance dispute. Furthermore, he has lead the firm's team in several widely publicised multi-party cases in the Swedish courts of general jurisdiction including a multi-party action on behalf of 160 private investors against two insurance companies, as well as a dispute involving many well-known rock bands. He regularly publishes papers on dispute resolution issues in English and Swedish.



FINLAND

MIKKO LEPPÄ
HAMMARSTRÖM PUHAKKA PARTNERS

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN FINLAND? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

LEPPÄ: It can be stated that the current global – and local – financial situation is reflected in the number and type of commercial disputes. First, it seems that the threshold to bring disputes before public courts or arbitral tribunals has decreased. Secondly, the uncertain financial circumstances have also affected the substance of the disputes, as we seem to be facing a rising trend of insolvency related disputes – recovery of assets to bankruptcy estate, management liability and so on. Generally, it can be stated that disputes relating to larger projects such as construction and infrastructure projects are common. Also, as a result of the active role of the Finnish competition authorities, we are currently facing a number of disputes concerning cartels and related damages.

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

LEPPÄ: First, in our experience, it is not very common among Finnish companies to implement a specific dispute resolution strategy, but rather to deal with these issues as a part of the companies' general risk management policies. It is our advice to companies to pay attention to a thorough preparation of processes and policies supporting effective dispute resolution – including and particularly preparing concrete model templates for various contractual situations as well as guidelines for 'do's and dont's' in contracts, also taking into consideration different dispute scenarios under different contract types. Second, it is important to note that by far the most used structured dispute resolution methods in Finland are arbitration and litigation. ADR methods – such as conciliation run by public courts – are not widely used or very developed, and the number of experienced mediators and conciliators is limited. Therefore, consenting to any ADR method should be carefully considered.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN FINLAND MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

LEPPÄ: The general tendency is that companies wish to avoid engaging in litigation and arbitration. Especially where long-term contracts are concerned, companies' business strategies are carefully weighed against the risks relating to litigation or arbitration. As stated, structured ADR processes are still in the developing phase in Finland, and they are not yet very commonly used. Unstructured methods of solving disputes – negotiating an amicable settlement – without or with the assistance of a lawyer, are common. Such negotiations often involve the preparation of legal analyses by both sides, giving some basis to the – often rather commercial – negotiations. Such negotiations are the most widely used ADR methods, if they so can be categorised. There are barely any legal obstacles to a successful ADR process: all disputes which can be settled by agreement between the parties – without mandatory involvement of a court or other public authority – may be referred to an ADR process. A common procedural obstacle to a successful ADR process is the fact that no ADR clause was included in the initial commercial contract, and agreeing thereupon afterwards is often practically impossible as it provides a mutual agreement by the parties. This might be very challenging to reach in a phase where a dispute has already arisen.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

LEPPÄ: In Finland, arbitration procedures are basically organised under the Arbitration Rules of the Finland Chamber of Commerce or by an *ad hoc* arbitral tribunal on the basis of the Finnish Arbitration Act. In both alternatives, the meetings, conferences and hearings are usually held in a law firm's facilities. As arbitration has become a fairly common method for solving commercial disputes, more and more lawyers and individuals with academic backgrounds have gained experience in acting as an arbitrator. Therefore, the procedures have basically become effective, professional and well managed. Specifically in major construction, infrastructure, M&A and other economically significant projects, arbitration is widely used in Finland. In international agreements, it even seems to have become the dominant method of dispute resolution.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

LEPPÄ: Dispute resolution clauses do not get enough attention when commercial agreements are drafted. As stated above, it is, in our experience, critical for companies to pay attention to a thorough preparation of processes and policies supporting effective dispute resolution. When drafting agreements and dispute resolution clauses, the specific nature of each individual agreement should be taken into consideration and then proportional the methods of dispute resolution to these circumstances. Training should be provided within companies to assist the persons negotiating the contracts to use the templates in the best possible way and to choose the most appropriate dispute resolution clauses to each individual case.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

LEPPÄ: As a basic rule, more attention should be paid to a *structured* dealing from the outset: it is important that the parties document the negotiations – preferably signing a letter of intent or the like – and enter into a non-disclosure agreement in order to keep the negotiations confidential. Also, it is recommended to involve an in-house counsel or an outside lawyer in contract negotiations already at an early stage.

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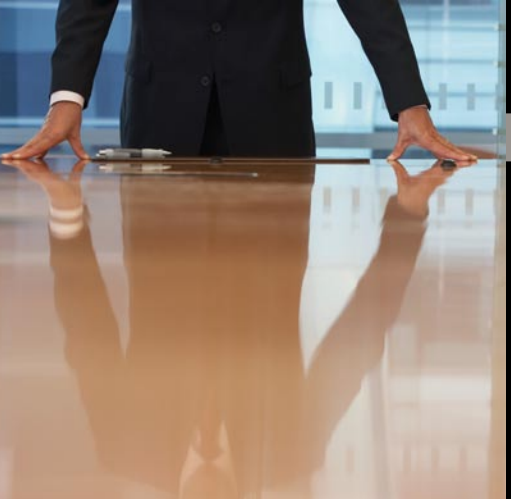
Mikko Leppä specialises in dispute resolution. He has over 10 years of experience representing domestic and foreign clients in court and arbitration proceedings relating to commercial disputes. In addition, he assists domestic and foreign companies in drafting and negotiating commercial agreements. Mr Leppä lectures regularly on themes related to dispute resolution and contract law. Before joining HPP, he worked at another leading Finnish law firm. He has also acquired international work experience at a leading German law firm. Mr Leppä has also worked as a legal counsel for an eminent Finnish company specialised in large international infrastructure projects.



CHINA & HONG KONG

NICK GALL
GALL

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN CHINA & HONG KONG? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

GALL: We continue to see the usual broad range of commercial and financial disputes, both from SMEs and MNEs. The past 18 months have also seen a significant upswing in disputes between PRC-based entities, largely involving oil, gas and energy infrastructure. We have also seen an increase in shareholder, directors' and joint venture disputes, including disputes involving family-controlled companies in the South-East Asia region. These matters have tended to proceed to litigation quickly – often to restrain assets under dispute – before considering other dispute resolution options. We are also seeing increasing use of arbitration to resolve disputes, particularly for matters involving highly technical issues upon which the courts may not be well-placed to adjudicate. In the context of large national projects involving state-owned entities, arbitration can also provide a neutral adjudicator free of political pressures. Hong Kong remains an excellent venue from that perspective.

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

GALL: From a commercial standpoint, disputes can be enormously costly. The direct costs, such as accounting and legal fees, as well as the indirect costs including management time and opportunity costs, can create significant commercial risks. An effective risk management strategy will balance the necessary preventative overhead against the costs of a dispute. A bespoke litigation strategy for each dispute is recommended as it will need to take into account factors such as the merits of the case, the reputational risks, and whether to pursue mediation, arbitration, and litigation consecutively or concurrently. The most basic risk management strategy is to keep proper documentation of every important transaction and, ideally, to store those documents

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in a way that can be forensically verified later. Emails, texts, instant messages and phone call records may also be relevant and should be captured wherever possible. Contemporaneous notes created before a dispute arises will always carry more weight than oral statements made later.

Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN CHINA & HONG KONG MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

GALL: Since the enactment of the Civil Justice Reforms, Hong Kong solicitors are obliged to promote settlement outcomes, even after litigation has been commenced. Mediation is encouraged by the courts, which often stay litigation whilst parties attempt mediation. Arbitration is also increasingly seen as being a real alternative to litigation, partially due to procedural flexibility and the confidentiality arbitration affords. Obstacles include unenforceable arbitration clauses as well as poorly drafted or insufficiently detailed arbitration agreements. Unless there is a mechanism to resolve interlocutory disputes such as the seat of arbitration, the rules to be applied in the arbitration, and the number and identity of the arbitrators to be appointed, arbitration can be delayed. On the other hand, valid arbitration clauses can be frustrated by changes to the arbitration institutions themselves, as was recently demonstrated when the China International Economic and Trade Arbitration Commission (CIETAC) split into CIETAC Beijing and CIETAC Shanghai.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

GALL: The consistent comment we hear from Hong Kong counsel arbitrating across multiple jurisdictions is that the recently renovated and expanded HKIAC facilities are excellent. The Hong Kong Arbitration Ordinance has undergone several key amendments in 2013, which now provide a statutory basis for Hong Kong courts to enforce interim relief granted by emergency arbitrators, a procedure for arbitration costs to be scrutinised by the courts, and various reciprocal enforcement amendments. The HKIAC Rules have also seen significant changes in 2013, following extensive consultation with practitioners, arbitrators and the public. The amendments adopt international best practices, and a 'light touch' approach allowing the parties autonomy to agree on procedural and substantive issues where possible. Recent amendments also include an ability to consolidate multiple parties and contracts into a single arbitration, a procedure for emergency arbitrators to be appointed and grant interim relief prior to the arbitration, and changes to the standard terms upon which arbitrators are appointed – including a cap on hourly rates.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

GALL: As a firm which specialises in dispute resolution, one consistent theme we see is that parties to disputes generally do not have a litigation risk management strategy aimed at avoiding or minimising the prospect of future disputes. Often, the parties have initially started a business venture on good terms and in good faith, and have proceeded on that basis. Informal agreements are reached, often orally, which are then not adequately recorded. When the relationship breaks down between the parties, disputes arise about what was said and what was meant. Properly documented communications and agreements between the parties are crucial to avoiding such disputes and minimising the risk that disputes will evolve into litigation. Agreeing a protocol to depersonalise disputes – for example by escalation to senior management or through a formal arbitration or mediation clause in a contract –is an excellent procedure for managing disputes. However, great care should be taken to ensure that mandatory mediation or arbitration clauses are enforceable.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

GALL: It almost goes without saying that due diligence in relation to potential business ventures as well as your potential business partners and counterparties can significantly reduce litigation risk. In relation to the other parties to the transaction, it is always recommended to conduct background checks – including litigation checks. Their past transactions and how any disputes arising from those transactions were pursued, may provide valuable insight into whether a transaction calls for increased litigation risk management at an early stage. Finally, where there is a significant risk, addressing specific risks and concerns in warranty and indemnity clauses can help avoid disputes, or at least reduce the scope of dispute. We also recommend obtaining enforceable securities, such as mortgages, from high risk partners.

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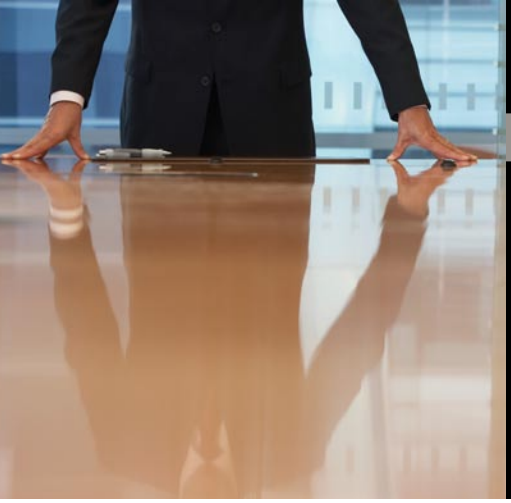
Nick Gall is a highly experienced litigator, specialising in complex commercial litigation and disputes. His principal areas of practice are commercial litigation, fraud and asset tracing and insolvency. Mr Gall has extensive experience in dealing with multi-jurisdictional disputes and his work often requires cross-border applications, freezing applications and urgent injunctive relief. He also has extensive experience in forcing banks and financial institutions to provide information to assist in tracing and recovery of funds, and fending off vulture funds in respect of international sovereign debt recoveries. Mr Gall qualified as a solicitor in Hong Kong in 2000.



INDIA

S. S. NAGANAND
JUST LAW

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN INDIA? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

NAGANAND: A significant number of construction related disputes are being referred for arbitration. Infrastructure projects like electricity, metro and highways are the areas where we are seeing a number of disputes.

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

NAGANAND: Mediation is turning out to be a good alternative with court assisted mediation taking off in a big way. The formal settings of the Bangalore Mediation Centre, set up by the Karnataka High Court, are conducive to settlements. Institutional arbitration is also encouraged by the High Court which has set up an alternate dispute resolution centre with modern infrastructure and facilities. The scale of fees is very reasonable and is far below the costs incurred in ad hoc arbitrations. Companies are today exploring ADR before launching litigation.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN INDIA MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

NAGANAND: Many corporate bodies are taking recourse to ADR. In some cases, ad hoc mediation is also being encouraged. Various options for ADR are well known and procedures have been streamlined. Even after the commencement of litigation, ADR is being resorted to at the insistence of the court, due to a new provision in the Code of Civil Procedure.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

NAGANAND: With the establishment of an ADR facility by the Karnataka High Court for arbitration, which provides a secretariat, arbitrators and physical infrastructure, many commercial disputes are being resolved. However, due to an enormous delay in the disposal of challenges to arbitral awards by the Civil Courts, there is a resistance to arbitration in the case of domestic disputes. However, in international contracts, arbitration is still the preferred mode of dispute resolution. Although some institutional arbitral mechanisms have been set up by Delhi & Bangalore High Courts, it may take some more time for the international business community to accept these institutions. The non-enforceability of arbitral awards expeditiously is a cause for grave concern in India.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

NAGANAND: The first step is to have a good arbitration clause in the contract. It should be clear, precise and unambiguous as regards the method of appointment of arbitral tribunal. The second step is to ensure that the arbitral process is commenced quickly. Lawyers practicing in the field of arbitration in India are litigation lawyers who are usually busy in courts. Therefore, there is a constant juggling to arrange the sitting of the arbitral tribunal. Busy arbitrators also find it difficult to take up and complete the arbitration on a day-to-day basis. In most commercial contracts, great care is taken in drafting the dispute resolution clause.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

NAGANAND: Invariably, disputes with business partners arise on account of differences in perception. In some cases, it arises due to a lack of candour and fair dealing by one of the parties. In complicated construction projects, many of which end up in arbitration, the nature of the contract and the problems that surface during the execution of the work gives rise to disputes. Diligence is required from all parties to the contract. Often, the law itself allows a recalcitrant defendant to delay the resolution of the dispute by prolonging arbitration proceedings. Many government-owned companies would prefer the arbitration route, rather than attempting to resolve the dispute amicably by mediation, discussion and negotiations. This is a peculiar feature in India where governmental agencies and bureaucrats would prefer an independent arbitral award for resolving the dispute rather than agreeing for mediation or conciliation. By this process, they do not have to take the responsibility of deciding matters, and can avoid exposing themselves to allegations of corruption, nepotism and favouritism.

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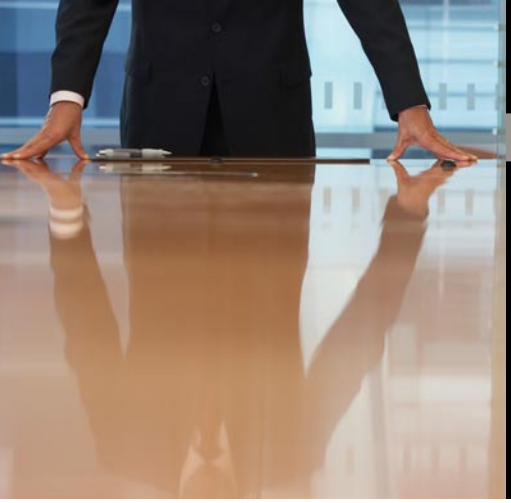

SINGAPORE

JAMIE HARRISON
ADDLESHAW GODDARD LLP

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN SINGAPORE? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

HARRISON: Although we tend to view Singapore as a market in its own right, it is also the centre of South East Asia, or the ASEAN region. The overriding theme in the region is a reliance on international arbitration to resolve commercial disputes and Singapore is the major centre for doing so. In this region, Singapore is the pre-eminent centre and increasingly challenges Hong Kong as the centre in Asia itself. The use of international arbitration to resolve disputes is a recurring theme. Singapore is the place to do it and there is an increasing reliance on Singapore law as a respectable and safe option. Singapore covers pretty much all bases in terms of sector-specific disputes. There are many general commercial trade and contract disputes, and an increasing number of construction disputes resolved here. There are also many energy and mining disputes as well as, traditionally, shipping and marine insurance disputes.

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

HARRISON: We run through all options with clients – conciliation, mediation and arbitration, as well as litigation. The situation in Singapore is slightly unusual because foreign lawyers are unable to advise on matters of Singapore law and procedure. Advising clients about what happens if you go to court here is therefore strictly outside of our remit, but the general principle about whether or not a client is better off going to arbitration or through the courts is central to what we do. In this region, as in any that has a diverse commercial market, we are clear in our advice that, when dealing in countries where the home legal system is uncertain, it is advisable to lift disputes out of the ambit of the local court and to have those disputes heard in a jurisdiction like

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Singapore which is accepted to be neutral, offers good lawyers, and where parties will obtain an award that is easily enforceable around the world. Our advice would always be to use an international arbitration forum, in a neutral venue, where the local court is supportive of arbitration, where you have sophisticated arbitrators and lawyers who can deal with disputes, and where your ultimate award is enforceable around the world. Singapore offers all these attributes.

Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN SINGAPORE MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

HARRISON: Traditionally, there has been a presumption that Asian parties are eager to save face, and therefore making a compromise behind the scenes is preferable to a lost case in a public forum. I think that's the advantage of arbitration in this region. It is a confidential process so the experience won't be broadcast across the world. That is quite attractive for Asian clients. That said, I think they would probably rather take the opportunity to compromise disputes before they come to a head in any type of proceedings. Particularly in America, parties want their day in court – I'm not entirely sure that is true of Asian clients.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

HARRISON: The physical facilities we have for arbitration in Singapore are second to none and other venues in other jurisdictions can only seek to replicate them. Also, Singapore has been committed to investing in the infrastructure that surrounds arbitration, so the Singapore arbitration rules are carefully and well drafted. The support for international arbitration from the Singapore courts, if ever it is needed, is certain and reliable, and Singapore is blessed with well educated judges, lawyers, arbitrators and administrative staff. That said, there are other areas in the region that are looking to catch up. There has been a lot of investment in Kuala Lumpar, for instance. Other countries in the ASEAN region are making strides, but Singapore has been able to set itself apart via its local court structure, which is very supportive of arbitration. Parties can be certain that, if they need the support of a local court they can get it.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

HARRISON: One of the fundamental considerations when drafting a contract is to have an eye on what happens when things go wrong and to make sure that there is a mechanism in place to ensure you get your money. This may mean there needs to be an escrow account outside of the jurisdiction where the contractual counterparty is based, which contains enough money to satisfy any claim; a guarantee from a parent company; or a letter of credit from a credible international bank. It does not matter whether a party has obtained an arbitration award that says it has won – if a company is owed $50m and there are no assets there, the whole process was probably pointless. My approach is always to draft a dispute resolution mechanism on the assumption that it will need to be deployed, and to make sure that if it is deployed, there are assets available to enforce an award.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

HARRISON: Due diligence of potential business partners is key. A focus on how you get your money out in the end is the best advice of all. You avoid a lot of heartache if you have made sure there are assets available to you should you need to enforce against them. Even with the best will in the world, and despite taking all necessary precautions, it does not guarantee that dispute will not arise for unforeseeable reasons. It is impossible for firms to know exactly what practices their business partners rely on in the field. Firms are always at the mercy of third-parties, and all they can do is do as much due diligence as possible on the people and entities with whom they sign contracts.

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