COMMERCIAL ARBITRATION

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COMMERCIAL ARBITRATION

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

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INTRODUCTION

Commercial arbitration is on the rise. Efficient, discreet and flexible, it provides the key to resolving complex commercial disputes.

With the increase in foreign direct investment and the growing intricacies of global trade, international arbitration is now leading the way as the preferred method for resolving disputes involving investors, businesses and states.

Major corporations across various industries including construction, energy and financial services increasingly recognise the benefits of using a bespoke procedure whereby neutral decision-makers can be appointed in line with specialist experience.

Critics have, however, highlighted concerns across the evolving international arbitration landscape. For instance, the accumulation of inconsequential challenges to arbitrators present an obstacle to the efficacy of the process, while the rise in associated costs deter from its potential. Moreover, the need for timely, transparent and consistent awards is a contentious issue to be addressed for the sake of due process.

The past year has seen some important developments internationally. Arbitral institutions and ADR organisations have refined their rules and policies in order to cater to the expectations of users, and the heightened complexity of the disputes they are seeing. CIArb launched its 'London Centenary Principles', promoting efficient, effective and ethical resolution of international commercial disputes through arbitration. Further afield, reform prevailed in India and Myanmar, while the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards also gained three new accessions.

A new light also shines within the EU in the form of the European Commission's new online dispute resolution (ODR) platform. The mechanism will see consumer disputes settled online as of this year.

Looking ahead, it will be interesting to see how the alternative dispute resolution community strengthens its position on the world stage. Academics, practitioners, institutions and other professional bodies will undoubtedly continue to promote the value of seeking redress through commercial arbitration, which should, in turn, pave the way for further innovation.

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evolving to resolve

CANADA

J. KENNETH MCEWAN
HUNTER LITIGATION CHAMBERS LAW CORPORATION

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

MCEWAN: While cost is often cited as an advantage that can quickly become illusory depending on the size of the panel, the willingness of both parties to restrict pre-arbitration procedure, and the willingness of the arbitrator to enforce such limits, are factors which may lead parties to choose arbitration over litigation. Other factors include controlling the venue and decision-maker, the relative privacy of the process and limited appellate intervention.

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

MCEWAN: The major Canadian centres are well-equipped to handle international arbitration in terms of accessibility and facilities. As a multicultural nation, Canada is well-placed to address disputes that arise out of different legal traditions. As to processes, for example, Vancouver, British Columbia, is the location of the British Columbia International Commercial Arbitration Centre, which has rules, both international and domestic, that are commonly incorporated in arbitration clauses using that jurisdiction to seat the arbitration.

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

MCEWAN: There are no real recent changes of note in rules and processes. Recent case law has limited the scope of appellate review, however. In *Sattva Capital Corp vs. Creston Moly Corp.*, the Supreme Court of Canada determined that except in rare circumstances the interpretation of a commercial contract was a question of mixed fact and law, rather than resolving itself to a question of law. As a result, where the scope of appellate review is limited to legal error, a narrower class of cases will be open to appellate review. From a review of further cases going to the Court in the coming months, it appears that this question may be revisited, or subject to further refinement.

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

MCEWAN: The *Sattva* case is reflective of the wider deference to arbitral decisions. Further, the Court held that where appellate review of arbitration awards is restricted to questions of law, the standard of review is one of reasonableness except in exceptional circumstances such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the arbitrator's expertise. Only in such circumstances is the standard correctness. The significance of all of this is that the Court has imposed further restrictions of the courts' role in review of arbitral decisions. While Canada is a federal state, its provinces and territories have based their international arbitral legislation on the Model Law, and New York Convention on Recognition and Enforcement of Foreign Arbitral Awards to which Canada acceded in 1986. As a result, and although there is the need to identify the correct jurisdiction for enforcement, and some nuanced differences, there is a relative consistency of approach and a legislative regime that in general terms will be familiar to practitioners.

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

MCEWAN: There are no particular issues of significance, which would not arise in any jurisdiction. As a country whose arbitral legislation is based on the Model Law and New York convention, substantively the multijurisdictional nature of international arbitration is facilitated in a similar way as other signatory nations.

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

MCEWAN: More companies should give careful thought to including arbitration provisions, or not including arbitration provisions, and to what they say. This includes not only companies that don't include arbitration provisions, but those that do. Too often, when arbitration arises under a commercial agreement, the arbitration clause is ill-suited to the nature of the parties or the dispute. Should the qualifications of the tribunal be agreed in advance? Has the applicable law been chosen with care? Should the arbitration be under the auspices of an existing institution or *ad hoc*? What procedural rules are to be applicable and what can be agreed? Should all disputes or only disputes of certain kinds be submitted? What should be the appointing authority if the parties cannot agree on an arbitrator? All these issues and many more should be considered, rather than simply inserting an arbitration clause that is taken from another commercial context. Once a dispute arises, there is often one party that isn't interested in cooperating to get to resolution, and an ill-drafted arbitration clause can create, rather than solve problems.

"An ill-drafted arbitration clause can create, rather than solve problems."

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

MCEWAN: There are sufficient advantages to becoming a seat of arbitration that the competition is likely to increase, and if parties address the seat in advance, and with a degree of sophistication, as globalisation increases, there is likely to be growth in the choice of viable arbitration venues.

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MEXICO

GERARDO RAMÍREZ ORNELAS
RAMÍREZ ORNELAS, S.C.

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

RAMÍREZ ORNELAS: Often, the specialisation of the arbitrators attending complex commercial disputes is a decisive factor that the parties take into consideration when submitting their dispute to arbitration. Parties also prefer the more secure environment arbitration offers, as well as the hope that an impartial and just decision will be rendered. Arbitration offers key advantages for cases where the parties to a contract are from different nationalities and the commercial transactions documented in the contract exceed national jurisdictions, as it provides an impartial forum that reconciles conflicts that derive from multiple jurisdictions. This is more evident nowadays, where more complex commercial transactions in the fields of infrastructure, technology and energy are entered every day, for which the need of international arbitration becomes more evident. Finally, parties often opt for arbitration because it provides the possibility of being heard more directly by the arbitrators, and offers the chance to present complex and specialised evidence with fewer restrictions. Nevertheless, arbitration can become a slow process, which sometimes deters parties from choosing arbitration.

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

RAMÍREZ ORNELAS: Mexico is a nation that is transforming with the adoption of the UNCITRAL Model Law to our legislation and through other legislative reforms. Over the last 10 years, these reforms have allowed Mexico to become a country that is open to international arbitration. Indeed, a product of the 22 July 1993 reforms, our Commerce Code adopted, with some minor changes, the dispositions of the UNCITRAL Model Law on International Commercial Arbitration. Furthermore, judicial precedents in Mexico have recognised the constitutionality of arbitration awards, the binding nature of arbitration agreements and the validity of its processes. Finally, since 14 April 1971, Mexico has been a signatory to the New York Convention on Recognition and Enforcement of Arbitral Awards, which is the international legal authority recognised worldwide for enforcing awards.

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

RAMÍREZ ORNELAS: There have been many positive recent changes in our internal legislation regarding arbitration rules. One change that is very important to point out is the 27 January 2011 reform to the Commerce Code, in which a special judicial process for arbitration was created. All matters concerning recognition, enforcement and nullity of arbitration awards must now be resolved by this special process. The fact that a special procedure was created is very significant in our legislation, because it means that only one constitutional recourse, the *amparo directo*, before a Collegiate Court can be filed, against the decision rendered by a judge in that process, contributing greatly to clarifying and speeding the process of enforcing arbitration awards in Mexico. This was confirmed by the new Amparo Law published on 2 April 2013, and from recent binding judicial precedents, in which it is reaffirmed that the recourse that can be filed against a decision enforcing an award is the *amparo directo*. Another positive recent change of the 2011 reform would be the clarification of the rules in order to obtain judicial cooperation in an arbitration proceeding, and the expansion of the powers of Mexican Courts and arbitrators to grant interim measures previously or during arbitration.

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

RAMÍREZ ORNELAS: Traditionally, Mexican courts have approached the issue of enforcing arbitration awards with trepidation. We do not really have strong domestic arbitration institutions, and the judiciary in Mexico is still sometimes unfriendly and unaccustomed to arbitration institutions and processes. However, we are very confident that the latest reforms and the new judicial precedents that have been rendered by our highest courts will serve as a means of giving efficiency and speed to the enforcement of arbitral awards in Mexico. Indeed, our legislation is clearly inclined toward enforcing arbitration awards, only foreclosing its enforcement under the most extreme and exceptional circumstances. Some judicial decisions rendered by our highest courts in recent years confirm this tendency. This is good news and signals positive changes in the future.

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

RAMÍREZ ORNELAS: Modern international arbitration in Mexico is relatively new. It was not until the 1993 reforms to the Commerce Code that we adopted modern international standards to our legislation. Because of this relatively new practice, some practical issues remain unresolved in the region, especially in the presence of a complex multijurisdictional arbitration. For instance, courts are not accustomed to applying laws from different jurisdictions, and normally approach these cases with caution, complicating judicial intervention to assist an arbitration procedure of this nature. Another problem is that the region lacks strong and efficient arbitration institutions that can handle complex international cases, which forces arbitration to be administered by international institutions such as ICC, LCIA, AAA, CIAC and so on. While considerable efforts have been made to create strong arbitration institutions in the region, some work still needs to be done in this respect.

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

RAMÍREZ ORNELAS: In my opinion, the essence and efficiency of arbitration is presented when it is used to solve complex international disputes which involve parties from different jurisdictions and the commercial transactions exceed national boundaries, or for solving massive complex and technical disputes that need the specialisation of an arbitrator. Domestic arbitration, as a general rule, is not as efficient as litigation, and many times it is costlier and slower than submitting the dispute to national courts. Therefore, parties should act with caution when inserting arbitration clauses into a domestic commercial contract. Another thing for companies to consider is the decision of designating an efficient arbitral institution to administer the arbitration and the drafting of an efficient and impartial process for designating arbitrators. The process for designating arbitrators is essential and it should be made in a specialised way, and not be left to the rules of the arbitral institution that administers the arbitration. Also, parties should choose carefully the proper law applicable to the contract, and the seat of the arbitration, which are important factors that contribute to the final results of the arbitration.

"While considerable efforts have been made to create strong arbitration institutions in the region, some work still needs to be done in this respect."

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

RAMÍREZ ORNELAS: Mexico has made concerted efforts to change its internal legislation to incorporate modern international arbitration standards. Mexico's 1993 and 2011 reforms to the Commerce Code are a very good example of this. I believe this is a natural trend derived from the fact that commerce barriers in the region of North America, with relatively small exceptions, have been lifted, commerce has risen significantly and commercial transactions have become more complex and multinational in the region. This reality has translated into a need for increasing viable arbitration venues supported by arbitration friendly legislation. Because of this reality, I am convinced that the emergence of strong new arbitration venues in the region will keep going forward, as something natural to this trend and necessary to keep up with the emergence of international commerce in the region. The important thing is to strengthen arbitration as quickly as possible in order to keep up with this trend.

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ARGENTINA

RICARDO A. OSTROWER
MARVAL O'FARRELL & MAIRAL

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

OSTROWER: There are several key factors that would typically encourage parties to choose arbitration over litigation as their dispute resolution method. First, arbitration allows parties to have some control over the constitution of the tribunal that will settle their conflict. Therefore, the parties are able to select arbitrators with the relevant expertise in relation to each case. Another benefit of arbitration over litigation is that it can provide a neutral ground among parties from different countries, enabling them to avoid litigating in the local courts of their adversary. Additionally, arbitration tends to be more open to the use of technology in the conduct of the proceedings. Ultimately, this will facilitate a quick and cost-efficient resolution of the case. Other advantages of arbitration over litigation include greater procedural flexibility and speed of the process when the arbitral proceedings are tightly managed.

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

OSTROWER: Buenos Aires is undoubtedly one of the top arbitration centres in Latin America. The city offers a wide array of world-class facilities, including state-of-the-art technology and enhanced quality hotels. Additionally, a large workforce of first-class multilingual professionals and service providers, including attorneys, experts and translators, can deliver a high quality and dedicated service. The cost of an arbitral process in Buenos Aires is considerably lower than other traditional arbitration centres. All these features make Buenos Aires an excellent choice to support both domestic and international arbitration of any size, including complex and multi-party proceedings.

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

OSTROWER: In August 2015, a new National Civil and Commercial Code came in force in Argentina. The new Code replaces and unifies both the existing civil and commercial laws that were traditionally regulated in different corpus that had been in force for over a century. Among its numerous innovations, the new Code includes a specific chapter dedicated to arbitration agreement. Until now, arbitration in Argentina – a federal country – was only legislated by the local procedural codes of each province and by the Federal Code of Civil and Commercial Procedure. Thus, by this long-awaited reform, Argentina has taken a huge step by passing national regulations on arbitration, after several frustrated initiatives to enact an autonomous arbitration law. The new Code recognises several pro-arbitration arbitration principles, such as the principle of *kompetenz-kompetenz* or the tribunal's power to grant interim measures. However, it also contains certain provisions whose interpretation may be challenging for the receptiveness to arbitration, such as those related to the judicial review of awards and the non-arbitrability of the disputes involving public policy.

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

OSTROWER: During recent years, the local courts had been generally supportive of both domestic and international arbitration. Now the Civil and Commercial Code – in force as of August 2015 – has brought new regulations on arbitration. It will be interesting to see how the courts will react to these provisions, particularly in terms of state court intervention in arbitration proceedings and judicial review of awards. Before the new Code, the remedy of annulment provided in the local procedural codes was restrictive. The new Code contains certain sections that have been deemed to expand the recourses against an award. This interpretation could present a challenge to the development of arbitration in Argentina. In this context, the courts should play a key role in construing these provisions in favour of arbitration.

Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTIJURISDICTIONAL ARBITRATIONS IN ARGENTINA?

OSTROWER: Argentina often deals with complex international arbitrations. Though there are no official statistics currently available, it is well known that the city of Buenos Aires currently serves as the seat of several multi-jurisdictional proceedings. As result, there are very few practical issues to deal with in our jurisdiction. However, cross-border disputes always present challenges that demand a strategic and tailor-made approach. These types of procedures usually comprise parties from different cultures with diverse arbitral practices, such as Common Law and Civil Law legal systems. Both arbitrators and parties should be able to find a common ground between both systems and traditions to move through an efficient arbitral process. Lastly, there are also certain logistical issues that should not be neglected, such as scheduling teleconferences over different time zones and coordinating the travel schedules of the different professionals that intervene in the arbitration.

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

OSTROWER: The selection of the dispute resolution method is an essential part of every transaction and thus it should be addressed at the outset of the commercial venture. The decision whether to use ADR – such as arbitration – traditional litigation before state courts or a multi-tier clause that combines both mechanisms, should take into consideration the particularities of the underlying transaction. In principle, arbitration appears to be the most suitable method when it comes to sophisticated agreements or between parties from different jurisdictions. On the contrary, arbitrating petty disputes in Argentina does not seem to be cost-effective. In any case, it is crucial that the arbitral clause is tailored to the specific needs of the parties with the input of the litigation or arbitration lawyers of the relevant jurisdiction.

"Cross-border disputes always present challenges that demand a strategic and tailor-made approach."

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

OSTROWER: In the context of a globalised world, cross-border transactions are in continued and strong growth. As arbitration remains the preferred dispute resolution method in these types of agreements, I strongly believe that this development will be accompanied by an increase in the number of viable arbitration venues around the world. In particular, those located in emerging markets such as Latin America and Asia. However, it is expected that traditional cities like London, New York or Paris remain the most chosen arbitral seats as they have proven to offer sufficient legal certainty to the parties.

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Ricardo Ariel Ostrower joined Marval, O'Farrell & Mairal in 1993 and has been a partner since 1999. He is an experienced litigator, particularly focused on complex civil and commercial litigation and arbitration. He has represented several of the largest companies operating in the region. He graduated with honours from the Universidad de Buenos Aires with a degree in Law. He received the Federal Supreme Court Award for being the top graduate in 1992. He is the author of several articles related to his area of specialisation. He regularly participates in conferences and seminars in his field of practice.

UNITED KINGDOM

ASHKHAN CANDEY
CANDEY

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

CANDEY: The primary reason for choosing arbitration is that many countries will not recognise a judgment of a national court but nearly every country in the world will recognise an arbitral 'award', or judgment, as they are signatories to the New York Convention. Thus an arbitral award can be enforced before the local court in the People's Republic of China and Iran, whereas neither will enforce a High Court judgment obtained in London. The second reason is that arbitrations are held in private and are confidential, whereas trials are held in open court. The downside is that whilst the court system provides judges on payment of comparatively modest fees, the parties to a dispute have to jointly bear the costs of arbitrators and the arbitral institution. Finally, arbitrations are usually speedier than the court process.

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

CANDEY: It is important to make three key distinctions here between the question of applicable law, the procedural rules which are to apply and the 'seat' or place of arbitration. For example, you could have an arbitration where the parties have agreed that English law governs any dispute, under the rules of the ICC, to take place in Hong Kong. The facilities in London – in terms of different buildings that will host arbitrations – are pretty good, but where London excels is the number of available arbitrators who are specialists in English law, seen internationally as arguably the fairest law available to international disputes.

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

CANDEY: The English Privy Council – the Supreme Court sitting as the final appeal Court for the British Virgin Islands – decision of *Anzen Limited and others vs. Hermes One Limited* clarified, in January 2016, that shareholders can have their disputes between each other dealt with by arbitration. This has to be the top tip for any shareholder joint venture partners who would otherwise have to pursue minority shareholder disputes in the seat of incorporation where the judicial process may be ill equipped to deal with such disputes. That having been said, in this case the Commercial Court of the British Virgin Islands is an exception to many of the island jurisdictions, and has a sophisticated judicial system having been brought into the 21st century by Justice Bannister.

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

CANDEY: The Commercial Court in London is the place to have your arbitral award recognised as an English judgment and applications are readily and swiftly granted on paper – pursuant to the English Civil Procedure Rules. The London judiciary is typically pro-arbitration. In a recent speech, the Lord Chief Justice stated that the systems of arbitration and litigation should be seen as coordinated, not as rivals. Some changes to legislation are currently being contemplated which would enable an easier cross over – for example, applications on points of law. This would combine the benefits of the considerable experience and gravitas of the London judiciary with the confidentiality and enforceability of an arbitral award. It should also be noted that, where the seat of arbitration is in England, the parties have a 'safety net' in that it is possible to appeal an arbitral award to a judge of the Commercial Court in London. The right of appeal is limited to cases involving serious procedural irregularity, obviously incorrect decisions or questions of public importance. Where an appeal is successful, the court will remit the award to the original tribunal for reconsideration or the court may vary the award or set it aside in whole or in part.

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

CANDEY: Prior to any dispute arising, a decent lawyer should advise you on which applicable law to select in your agreement and which arbitration rules should apply. By agreeing that the seat of arbitration should be London – with the arbitral body being, say, the London Court of International Arbitration – and with English law to apply, you should have plenty of decent arbitrators to choose from and are more likely to get a fair and quick shot at justice. Once a dispute has kicked off, then your only real consideration is which law firm should represent you. If you have decent lawyers acting for you, they should take care of all the practical issues.

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

CANDEY: An arbitration provision could be a very wise move if you are dealing with entities based in different countries where enforcement will be difficult, or if you do not wish the dispute to become public, or if you are a shareholder of a company incorporated in a country which does not have a sophisticated court system to deal with shareholder disputes, or if the court system of the country which would otherwise be selected is slow.

"An arbitration provision could be a very wise move if you are dealing with entities based in different countries where enforcement will be difficult."

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

CANDEY: Initially the choice of viable venues will increase, but there may be a contraction as countries build lovely arbitration centres but lose out to the key legal capitals where clients, arbitrators and lawyers are already based or prefer to travel.

CANDEY

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Ashkhan Candey leads the team of 15 lawyers at leading litigation boutique CANDEY. The firm is a key player in the international litigation and arbitration market primarily acting for entrepreneurs. The firm is one of very few London firms to prefer, where possible, to link its fees to success.

FRANCE

ELIE KLEIMAN
FRESHFIELDS BRUCKHAUS DERINGER LLP

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

KLEIMAN: Avoiding lengthy and public proceedings before domestic courts is a main concern for parties to international business transactions. To overcome these hurdles and to be able to reach a neutral forum, arbitration has become the standard method for the resolution of international commercial disputes. Contrary to litigation, commercial arbitration provides business operators with a means to resolve their disputes according to a bespoke procedure. In international commercial arbitration, parties are allowed to reach a neutral forum, choose their own judges and hence avoid the risk of being sued before their counterparty's domestic courts. They can choose the law applicable to their proceedings, including the rules applicable to evidentiary issues. They can choose highly specialised arbitrators for the purposes of their specific dispute, as well as ensure that confidentiality of the proceedings is observed. In addition, they can obtain an award that will be more easily enforceable abroad than domestic judgements, on the basis of the New York Convention of 1958.

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

KLEIMAN: Paris is a renowned and reliable seat of arbitration and has been one of the most popular seats of arbitration for decades. Paris offers numerous hearing facilities and hosts the ICC. London and Geneva are also credible seats of arbitration. It is noteworthy that almost 70 percent of ICC arbitrations are seated in Europe, with Paris, London and Geneva being the most chosen seats. France possesses a very liberal arbitration regime and is very arbitration friendly. French domestic courts are very supportive of arbitration proceedings and ensure that the process goes forward. This is particularly the case in situations where the proceedings are obstructed by a party. A specialised judge, the *juge d'appui*, is dedicated to the settlement of issues occurring throughout the arbitration process.

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

KLEIMAN: Arbitration is the only method of dispute resolution that allows the parties to have access to a genuinely suitable forum to settle their international disputes. And France is very arbitration friendly. As a consequence, choosing France as a seat of arbitration is per se a guarantee that the arbitration process will go forward and lead to the issuance of an enforceable award. However, incidents may occur during the proceedings which may delay the arbitration process and require extra costs to be incurred by the parties. There are steps parties can take to ensure that the arbitration process is cost and time effective. Be careful to draft unambiguously the arbitration agreement but without being over-specific. Choose arbitrators by undertaking comprehensive due diligence; arbitrators must be suitable for the requirements of the particular dispute, independent and impartial from both parties and their counsel, and have sufficient availability. Use an arbitral institution, or 'assisted ad hoc' arbitration. Retain counsel specialised in arbitration and have them involved from the drafting of the arbitration agreement. Finally, if possible from the outset, identify potential countries where the award would be enforced and check whether the award will be enforceable there.

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

KLEIMAN: More companies should include arbitration provisions in their contracts at the outset of a commercial venture. In international disputes, where courts in different fora may be seized by the parties, resulting in parallel proceedings and eventually leading to contradictory decisions being rendered, arbitration should be strongly considered. It allows the parties to reach a neutral and business-oriented forum to settle their dispute and to obtain a decision which is easily enforceable abroad. When choosing arbitration, parties must consider carefully what the seat of their arbitration proceedings will be, as its laws will constitute the default applicable procedural law and will condition the recourses against the award.

"There are steps parties can take to ensure that the arbitration process is cost and time effective."

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

KLEIMAN: Even if the ICC, the LCIA and the SCC remain the most attractive arbitration centres, there has been a continued growth in the number and spread of arbitration centres over recent decades. The HKIAC in Hong Kong, the SIAC in Singapore or the DIAC in Dubai have emerged as credible centres. Promising centres have recently opened, such as the Russian Arbitration Association in April 2013, which uses the UNCITRAL Rules, and the Casablanca International Mediation & Arbitration Centre in November 2014. Potential challenges may be related to local regulations governing these centres' activities and to their capacity to deal with high scale disputes. In choosing an arbitral institution, parties should consider the adequacy of the institution's rules to the dispute, the availability, proactiveness and reputation of the institution, the type of services rendered by the institution such as administrative services, prima facie control of arbitral jurisdiction and review of awards, as well as the fees of the institution and service costs such as hearing rooms and translation equipment.

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SWITZERLAND

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

HOFMANN: For many cases, arbitration is clearly the preferred choice for resolving commercial disputes on an international level. A number of key factors influence the parties' choice of arbitration over litigation. These include the lack of trust in the counterparty's home jurisdiction and, hence, avoiding having to litigate a dispute in that jurisdiction. They further include the confidentiality of arbitral proceedings, as well as the chance to take part in the appointment of the tribunal and hence to ensure that arbitrators have the background, expertise and experience necessary to deal with the dispute at hand. Other factors include speedier proceedings and the opportunity to choose the language of those proceedings. In essence, when opting for arbitration, the parties benefit from greater influence on the proceedings; they can shape the proceedings to fit the needs of the dispute and normally also benefit from greater confidentiality. Moreover, the New York Convention applies on an almost global level to the enforcement of arbitral awards. Generally speaking, it is, therefore, still easier to enforce an arbitral award in another jurisdiction than state court judgments. In certain cases, mediation may also bring good results, whilst in other cases it eventually delays matter because it adds a further layer on the dispute resolution mechanism. It should thus be carefully considered whether mediation should be tried or not, depending on the specific case.

"Parties often underestimate the impact the place of arbitration may have on the arbitration and its outcome."

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

HOFMANN: Today there is indeed some choice with regard to viable arbitration venues, and there may be a shift of workload from certain venues to others. However, Switzerland is and will remain a top venue, and this is the case for a number of reasons. In our experience, parties often underestimate the impact the place of arbitration may have on the arbitration and its outcome. The place of the arbitration determines which *lex arbitri* applies, and this may in turn have quite some impact on the arbitration and its outcome, depending on the specific case at hand. Moreover, the place of arbitration normally has some impact on the composition of the panel. We clearly recommend taking these issues into account at the outset, when entering into a contract and agreeing on a particular place of arbitration.

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Dieter Hofmann heads the litigation & arbitration team at Walder Wyss Ltd, one of Switzerland's leading law firms, with offices in Zurich, Geneva, Basel, Berne, Lausanne and Lugano. His focus is dispute resolution in complex international cases, in particular in disputes arising from shareholders' agreements, joint ventures, M&A, international contracts, engineering and construction projects, banking, finance and (re-)insurance, directors' liability and insolvency. He also sits as an arbitrator in international arbitrations. Mr Hofmann is, inter alia, chair of the Zurich Bar's litigation practice group and has presented papers at major conferences and published on litigation and arbitration.

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