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

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INTRODUCTION

There are a several options available to parties that find themselves embroiled in a commercial dispute. Firms will need to consider whether they want to use alternative dispute resolution (ADR) mechanisms or pursue more traditional litigation. The popularity of ADR has grown steadily over the years, but litigation, arbitration and various types of ADR all have their pros and cons. Irrespective of the choice, a poorly managed dispute can lead to lengthy delays and rising costs.

The method of resolving a dispute will be heavily influenced by the particular circumstances of the case and the relationship between the parties. A multi-stage approach, beginning with mediation and ending in litigation, may be advisable. Of course, most disputes can be resolved with some level of compromise and a willingness to seek early settlement, assuming common ground can be found.

Litigation is often considered the finale phase for parties in dispute, but sometimes it is prudent to skip directly to a court setting. In many key markets, litigation is seen as the cheaper and more expeditious route for resolving a dispute – particularly as the cost of arbitration continues to rise. That said, there is still a strong appetite for arbitration – especially for certain types of dispute. Cities with established arbitration infrastructure, modern arbitration rules, an experienced governing institution and a supportive court system, will continue to benefit from demand.
UNITED STATES

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YANOS: In the United States, there are four major arbitration centres: New York, Washington, DC, Miami and Houston. There is additional arbitration activity in Los Angeles, San Francisco and Atlanta. The major challenge for arbitration in the United States is that the original concept that arbitration allows parties to resolve their dispute in a faster and less expensive way no longer applies. The market now generally recognises that arbitration is frequently a slower and more expensive alternative to litigation. However, with respect to commercial disputes, arbitration offers several significant advantages. First, the possibility of selecting a neutral forum. Second, the preservation of the confidentiality of the parties’ dispute. And third, a multi-jurisdictional enforcement of the arbitral award because court judgments are less portable by and large than arbitral awards. A recurring theme in the United States is the continued controversy about mass claims and class actions in arbitration. The United States Supreme Court has weighed on this issue on several occasions, and, most recently, in the AT&T Mobility v. Concepcion decision of 2011, where it held that class-wide arbitration is authorised depending on the wording of the underlying arbitration agreement.

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE US? ARE YOU SEEING ANY RECURRING THEMES?

YANOS: All but a very small number of disputes should settle. Settlement is the most efficient method of resolving disputes. Therefore, our best advice is for parties to focus harder on finding a way to arrive at negotiated settlements. That said, settlement sometimes can prove difficult or impossible because one of the parties continues to harbour irrational expectations. In that case, mediation can be an effective method of getting the parties together and forcing decision-makers to hear the other side’s position. It also allows the mediator to push the

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND
irrational party to see that the other side’s position is stronger than the irrational party may have originally been willing to admit. In terms of the choice between litigation and arbitration, one size does not fit all. Parties should examine the specifics of their relationship with the other side and the location of any attachable assets before choosing between litigation and arbitration clauses in their transaction. Oftentimes, in the context of international commercial transactions, arbitration is a more desirable means of dispute resolution because, pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards may be enforced in more than 144 countries. There is no analogous instrument for the enforcement of foreign judgments. This can be particularly important in transactions involving parties with assets located in jurisdictions that are not sympathetic to US court judgments. However, if assets are located in the United States, and it is anticipated that the issues will be straightforward, such as in a loan agreement, litigation is clearly a superior form of dispute resolution as it likely will be faster and less expensive.

YANOS: In recent years, multi-tiered arbitration clauses including some form of mediation have proven to be widely popular. Furthermore, more than ever before, courts seem prone to direct parties to engage in mediation. Nevertheless, it is our view that mediation is still underutilised in the market. In fact, in most cases parties would be well served giving mediation a chance before embarking on a very expensive litigation or arbitration of their dispute.
“The best dispute resolution clauses are simple and straightforward.”

YANOS: The US continues to be one of the most arbitration-friendly jurisdictions in the world. In particular, New York, Washington, DC, Miami and Houston are all arbitration centres located in states with superior courts and experienced bar associations. In addition, recent concern over the DC Circuit’s decision in an arbitration between BG Group and Argentina has been allayed by a resounding decision in the United States Supreme Court, which confirmed the courts’ acceptance of the right of arbitral tribunals to decide their own jurisdiction.

YANOS: Coordination of multi-jurisdictional disputes is always complex when the parties’ agreement does not provide for a specifically agreed-upon mechanism vesting a court or tribunal with the authority to decide the issues in dispute. However, in the United States, courts may exercise a number of judicial powers to ensure some form of order in multi-jurisdictional disputes. First, courts are strongly in favour of arbitration and, where appropriate, will stay court proceedings and compel arbitration in accordance with the parties’ agreement regardless of whether the arbitration is foreign or domestic. Second, courts have the authority to issue anti-suit injunctions when vexatious litigation is being pursued and a lawsuit is undertaken in violation of the parties’ agreement. Finally, in Commisa v Pemex, the Southern District of New York took the unusual step of recognising and enforcing an award that had been vacated in its country of origin. In 2012, the Second Circuit affirmed the District Court’s ability to recognise and enforce an award that has been annulled in its country of origin, in Thai-Lao Lignite Co. v. Gov’t of the Lao People’s Democratic Republic.
YANOS: The best dispute resolution clauses are simple and straightforward. The more parties tinker with model arbitration clauses and prepare creative forum selection clauses, the more time they are likely to spend litigating about their litigation. The most important advice for companies planning for future dispute resolution is to avoid the temptation of engaging in creative revisions to the agreed upon arbitration clauses issued by most of the major arbitration institutions. In addition, ad hoc arbitrations are not necessarily cheaper than institutional arbitrations because even though they do not require administrative fees, the lack of an intermediary between the parties and the tribunal, which allows for the resolution of substantive issues such as arbitrator fees, and the lack of a definite structure for arbitration proceedings, leads to higher arbitrator fees, increased attorneys’ fees and wasted time. Finally, parties would do well to consider structures like ‘baseball arbitration’ for the resolution of their dispute. This seemingly draconian arbitration process, where the arbitrator is bound to choose only one of two outcomes for the resolution of the parties’ dispute, is actually designed to push parties to a quick resolution and settlement.

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Alexander Yanos joined Hughes Hubbard’s Treaty Arbitration practice as partner in the firm’s New York office, and co-chairs the practice with Washington, DC-based partner John Townsend. Mr Yanos has been an integral member of teams achieving successful results in numerous high-profile investment treaty and commercial disputes against, among others, Argentina, Bolivia, Ecuador, the Dominican Republic, PDVSA, PetroEcuador, Sonatrach, Venezuela and Vietnam for various energy and natural resource companies. In addition, Mr Yanos also has been an integral member of teams achieving successful results for States in ICSID arbitrations involving Latvia, Lithuania and Pakistan.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN CANADA? ARE YOU SEEING ANY RECURRING THEMES?

SHEA: In certain sectors, such as the energy sector, there are often limited options with respect to supply and logistical companies. This mandates the preservation of business relationships and the efficient resolution of disputes. Operating environments such as this facilitate the continued trend from litigation to alternative dispute resolution. There is a general view that courts and available litigation processes do not reflect commercial reality and are an unacceptable method of dispute resolution for any number of reasons, including timeliness, selection of arbiter and privacy issues. Given this reality, businesses are seeking to control the dispute resolution process to the greatest extent possible. Courts have attempted to respond to this shift through the adoption of alternative dispute resolution processes, however the trend away from litigation continues.

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?

SHEA: In our existing commercial environment, we advise clients that mediation or arbitration is preferable to litigation in effectively resolving disputes. Unlike litigation, dispute resolution offers contracting parties commercial adaptability, timeliness, flexibility and privacy, as well as the prospect for preservation of existing business relationships. These processes can be predictable with foresight and considered drafting of a dispute resolution clause.
Q TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

SHEA: With limited exception, Canadian companies will always explore alternative dispute resolution options before engaging in litigation. ADR has in fact become ‘DR’, in that it is no longer alternative and is the preferred method of resolving disputes. This is reflected in the significant diminution of commercial litigation dockets around the country. Arbitration and mediation are now the primary vehicles for resolving commercial disputes in Canada.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

SHEA: In Canada, arbitration facilities and processes are well developed and accessible. Courts are supportive of the process, which is evidenced by deference to and enforcement of dispute resolution clauses in contracts.
**Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN CANADA ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?**

**SHEA:** In advising commercial clients on contractual arrangements under which disputes may be referred to the International Chamber of Commerce or International Court of Arbitration, there are certain issues that should be addressed in the drafting of a dispute resolution clause, such as venue and procedural matters. From a process and procedural point of view, these cases are generally not problematic. For example, all provinces in Canada have legislation to address these situations, such as the *International Commercial Arbitration Act* in Newfoundland and Labrador.

**Q WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?**

**SHEA:** A well drafted dispute resolution clause that reflects commercial reality between contracting parties often proves to be invaluable. Drafting considerations are many, including specifying the trigger which activates the process. For instance, businesses in the oil and gas industry, given multi-layered logistical concerns, need to resolve disputes that arise as quickly and effectively as possible. In most cases, a tiered dispute resolution clause that allows for escalation of the process can offer maximum effectiveness. For example, the dispute can initially be referred to senior managers of the parties to the contract for discussion and resolution, failing which the matter can be referred to mediation, failing which the matter can be arbitrated. Such a tiered process gives parties flexibility and timely options for resolving disputes. For certainty, parties should also specify the applicable rules and procedural code that will apply to the process. Parties should also acknowledge the maintenance of rights under the contract, notwithstanding the agreement to mediate or arbitrate, and the continuation of commercial activity pending the outcome of the process. Process options should also be considered in drafting, including the manner of appointment of a mediator, arbitrator or arbitration board. Designating the place of mediation or arbitration may assist with
controlling costs, and mandated scheduling for the filing of materials, hearing, and in the case of arbitration the rendering of a decision will assist with procedural certainty. Payment of expenses can be stipulated based on outcome, and limitation on recourse or reference to courts following the conclusion of the process will also allow parties greater control with ensuing commercial certainty. Consideration of these issues and implementation of a resolution mechanism before a dispute arises is key.

“A well drafted dispute resolution clause that reflects commercial reality between contracting parties often proves to be invaluable.”

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A partner in Cox & Palmer’s St. John’s, Newfoundland & Labrador office, Peter Shea carries on a varied litigation, dispute resolution and risk management practice. Mr Shea has formal training in alternative dispute resolution, and is a rostered arbitrator for the Canadian Insurance Claims Managers Association. Cox & Palmer is a full-service, top ranked Canadian law firm with offices throughout Atlantic Canada.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE CAYMAN ISLANDS? ARE YOU SEEING ANY RECURRING THEMES?

HOUGHTON: The Cayman Islands is unusual in that very few significant commercial disputes that are resolved here arise within the jurisdiction. The bulk of such commercial disputes arise in many and varied global destinations because of a feature of our companies’ legislation, which permits ‘exempted companies’ to be incorporated and registered here, but prohibits such companies from carrying on business here. This is particularly so in the financial services sector; often disputes arise when the solvency of a exempted company is in doubt, in which case insolvency proceedings are generally commenced in the Financial Services Division of the Grand Court. A second significant stream of disputes concerning exempted companies is claims against directors, officers and service providers to investment vehicles, often brought by the liquidators of these entities. Recently, we have also seen a number of restructuring proceedings concerning commercial entities whose assets are based in the PRC.

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?

HOUGHTON: In the light of the nature of offshore commercial business, dispute resolution strategy is often decided in the jurisdiction of the place of business of one or other of the parties to a commercial contract and the dispute resolution terms will not name the Cayman Islands as the principal forum for resolution of contractual disputes. The Cayman Islands does, however, have a wide range of professionals who are able to offer mediation and arbitration services – including acting as mediators and arbitrators – and the superior court of record, the Grand Court, is well respected. We are now asked more frequently to assist in drafting mediation and arbitration clauses using the Cayman Islands as the location and chosen law of the process, but it is still quite rare. The introduction of a new Arbitration Law in 2012, based on the UNCITRAL rules, may well have a positive effect.
HOUGHTON: It is very difficult to say. Clearly, if exempted companies operate in ADR friendly or compulsory jurisdictions, they will participate but it is quite unusual for that process to take place in the Cayman Islands. However, there is a growing trend for commercial litigation practitioners to be very proactive towards ADR. The Grand Court does not have the power to coerce parties to mediate, but is willing to stay proceedings in order to permit them to do so if they consent.

HOUGHTON: The Cayman Islands does not have a dedicated arbitration centre at present, although there are many venues available which can support arbitration proceedings. The recent introduction of the Arbitration Law 2012, based on the UNCITRAL rules, has updated the law applicable to arbitration proceedings to recognised international standards. There are a number of well-qualified arbitrators available, including Fellows and Members of the Chartered Institute of Arbitrators and of the AAA, and, subject to satisfying relevant immigration procedures by obtaining a temporary work permit, offshore arbitrators may constitute a tribunal here either with or without a local participant on the panel. The judges of the Grand Court and the Court of Appeal are familiar with and respect the arbitration process and frequently assist in the enforcement of domestic and international arbitration awards, in relation to which we have specific legislation – the Foreign Arbitral Awards Enforcement Law – which governs the enforcement of awards from New York Convention states in accordance with the international norms.
Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN THE CAYMAN ISLANDS? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

Houghton: The Cayman Islands is a leading centre for the resolution of complex international multi-jurisdictional disputes, and there are very few practical difficulties, the most common ones being time differences between jurisdictions, and, sometimes, language issues. Travelling to the Cayman Islands for legal proceedings is relatively easy, although some members of the team, such as foreign attorneys, may need to obtain a temporary work permit or a Business Traveller’s visa, through their local law firm or other client contact. The other main practical issue can be the availability of court time, although the Financial Services Division of the Grand Court, where most of these disputes are tried, is very flexible, and is familiar with the use of hearings by, for example, videolink and Skype.

Q WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

Houghton: From the perspective of a dispute resolution attorney in a jurisdiction where most of the commercial disputes concern business carried out outside jurisdiction because of the nature of the exempted companies’ regime, parties who wish to have their disputes resolved in the Cayman Islands should consider including in their contracts an express choice of law clause nominating Cayman Islands Law as the governing law, and an exclusive jurisdiction clause naming the courts of the Cayman Islands. If any of the parties is not domiciled or resident in the Islands, it is worth considering the irrevocable appointment of an agent within the Islands to accept service of proceedings in order to avoid the requirement to obtain leave to serve proceedings issued in the Grand Court on offshore entities. The new Arbitration Law contains a model arbitration clause which can be used or adapted for use in commercial contracts, and, if arbitration is to be used as the forum for resolution of some or all disputes, the Cayman Islands’ Association
“The new Arbitration Law contains a model arbitration clause which can be used or adapted for use in commercial contracts.”

of Mediators and Arbitrators (CIAMA) can, if desired, be named as a nominating body for panellists. Mediation clauses should be simple, contain time limits beyond which a party has the right to file proceedings or serve notice of arbitration and, perhaps, make specific reference to the manner in which the costs of the mediation should be borne. Again, CIAMA is willing to be the nominating body for mediators.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE UK? ARE YOU SEEING ANY RECURRING THEMES?

KAKKAD: London continues to be an attractive and popular centre for international dispute resolution, whether through litigation or arbitration. However, many foreign jurisdictions are modernising particularly their arbitration laws to attract global users, and they are succeeding in creating competition. Costs and delay in arbitration – in London and elsewhere – continue to generate much negative commentary. It is often said that parties themselves should more actively participate in controlling the process, but I believe the primary obligation rests firmly with counsel, upon whom the parties heavily rely, and the tribunal to ensure efficiency is implemented; and that the lack of prescriptive rules, which is a key attribute of arbitration, is not unreasonably and negatively exploited to disrupt the process. English courts take a proactive approach in managing cases and costs, and in my view, arbitral tribunals should do likewise. A robust approach may help discourage bad behaviour, particularly by the parties’ counsel, and restore the confidence of users.

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?

KAKKAD: There is no one size fits all approach. Every commercial transaction needs to be assessed at the outset to determine what is the most appropriate means for resolving disputes that may arise. Think about who the counterparty is, where it is domiciled and what are the most likely issues that might give rise to a dispute. Then try to tailor the dispute resolution process, including consideration of whether to select the courts of a particular jurisdiction or arbitration, and whether to include some kind of tiered process that could incorporate management meetings or other ADR before commencement, with a view to avoiding lengthy and costly formal disputes resolution processes. Issues such as privacy, confidentiality, neutrality, speed, flexibility and enforcement are just some of the key considerations in selecting the most appropriate
dispute resolution process, recognising, however, that only rarely will one party be able to dictate its preferred method.

KAKKAD: Through possible costs sanctions and general case management by the courts, parties involved in litigation in England must very actively consider ADR prior to or even after the commencement of litigation. Litigation is encouraged to be viewed as a last resort. ADR can lead to early resolution of disputes, but it can also add another layer of costs with parties ‘going through the motions’ because they feel compelled, for example, to mediate. To succeed, the parties must be willing to compromise. The inclusion of dispute escalation clauses within commercial contracts is becoming more prevalent, but disputes are commonly arising concerning compliance with such procedures and their being used to delay or obstruct the progress of claims. Arbitration is no longer seriously viewed within the definition of ‘ADR’, not least because it is failing to deliver on the supposed key advantages of lower costs and speed.

KAKKAD: London retains its position as one of the premier centres for international arbitration. This is founded on its reputation for neutrality, the large pool of highly experienced arbitrators and a court system that is very supportive of arbitration. The courts have demonstrated an approach that holds parties to arbitration agreements, interpreting such agreements widely and, where permissible, granting anti-suit injunctions to prevent parties commencing other proceedings in breach of agreements to arbitrate. There is also a strong infrastructure to support arbitration, with readily available and modern facilities to

Q TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

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accommodate the requirements of complex international dispute resolution. One of the most commonly used institutions, the LCIA, has just adopted its new Rules, effective from 1 October 2014, which introduce a number of new features to bring the Rules in line with modern practice. Uniquely, these new Rules incorporate mandatory guidelines for the conduct of legal representatives and sanctions for non-compliance.

KAKKAD: Getting the process started may involve complexities and delay if, for example, it is necessary to serve court proceedings out of the jurisdiction, particularly in accordance with international treaties or domestic legislation. With arbitration, proceedings administered by an institution – as opposed to ad hoc arbitration – can progress more easily, even if a respondent refuses to participate, through the application of default Rules. If a foreign defendant or respondent does not engage in the process, consideration needs to be given to how best to ensure that any judgment that is ultimately obtained can be enforced in the defendant’s home jurisdiction or elsewhere. For example, some foreign jurisdictions will not recognise or permit enforcement of default judgments. Other considerations include whether evidence will need to be secured in foreign jurisdictions, and whether relevant foreign courts will enforce interim orders, including injunctions. All such issues usually can be successfully navigated, but early attention and planning is critical.
KAKKAD: Careful thought during the drafting of any commercial contract as to how to resolve disputes is vitally important, as unappealing as it might be to contemplate a falling out. Boilerplate dispute resolution clauses are often included with no proper consideration of how they might apply. That may cause serious problems over and above the substantive dispute. For example, I have regularly seen suites of agreements within the context of a single complex transaction with different agreements containing completely different dispute resolution mechanisms. This can lead to several related disputes running in parallel, causing costs to escalate substantially and resulting in conflicting outcomes or irreconcilable decisions. Alternatively, clauses are sometimes unclear as to what the parties intended. A properly drafted clause should, at a minimum, provide for an exclusive or non-exclusive jurisdiction and forum choice – meaning the court or arbitration – and the scope of disputes it should cover. If arbitration is selected, there are many additional points to consider. In short, involve your disputes lawyers early.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN IRELAND? ARE YOU SEEING ANY RECURRING THEMES?

O’RIORDAN: Firstly to address the issue of the recurring themes, over the past number of years as a result of the economic crisis there has been a significant increase in the volume of financial services litigation in Ireland. In particular, we have acted in a large number of mis-selling cases and we expect this theme to continue into the future. More recently, we are seeing considerably more bank related litigation in circumstances where financial institutions are taking action against borrowers in relation to outstanding loan obligations. Following on from this trend, a key market challenge is the ability of a successful party in an action to recover from the unsuccessful party. This is particularly the case in circumstances where, due to the economic crisis, there has been a large drop in property values throughout Ireland. The knock on effect of this is that any party who is considering legal action needs to consider, even if they are successful and obtain a judgment from the court, whether or not they can enforce this in light of the current market value of the other side’s underlying assets.

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?

O’RIORDAN: As a starting point, our advice to any client is that knowledge is key and in order to implement an effective dispute resolution strategy, it is vitally important that companies are aware of the options that are out there to deal with disputes as they arise, including the advantages and disadvantages of each of those options, so that a fully informed decision can be made as to which method of dispute resolution is most appropriate in any given circumstance. My advice therefore is that companies should not always accept that a traditional court route is necessarily the best or only option available to resolve a dispute, and that they should keep an open mind to tailor the various options available to them to the dispute at hand.
O’RIORDAN: Traditionally the vast majority of disputes, if not all disputes, were resolved via the traditional court process. Over the past number of years there has been a significant change in focus and attitude in Ireland and companies are now increasingly exploring alternative options rather than engaging in traditional court litigation. From my experience, our clients have become increasingly better informed about the options available to them and often highlight a preferred method of ADR to us at the initial consultation phase without any need for us to set out the options available to them and the pros and cons associated with each of those options.

O’RIORDAN: In Ireland over the past number of years there has been a big focus on promoting arbitration as a means of resolving disputes. The Arbitration Act, 2010 has merged domestic and international law in Ireland and sets out clear guidelines for parties to follow in arbitration. In addition, Arbitration Ireland, the Irish Arbitration Association, has been established to actively promote Ireland as a venue of international arbitration. The Irish courts are also very supportive of the arbitration process and as a result of the Arbitration Act, 2010 the courts are only entitled to interfere in the arbitration process on very limited grounds.
O’RIORDAN: Traditionally, complex international, multi-jurisdictional disputes in Ireland were heard by the Irish High Court. Often, due to the nature, size and complexity, the court had difficulty in advancing the proceedings, and delays inevitably arose. This led to the establishment of the Irish Commercial Court with the purpose of dealing with high value, complex litigation in a cost effective and speedy manner. The Commercial Court achieves this by actively managing all cases which come before it. As part of that case management process, the court imposes strict deadlines for the exchange of pleadings, discovery and witness statements. The introduction of the Commercial Court has resulted in a significant reduction in the level of time that complex disputes take to conclude and it is generally accepted that the court has been a very successful addition to the Irish courts system.

Q WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

O’RIORDAN: The first legal and contractual issue which a company should consider in relation to the possibility of future disputes is to ensure that they have a jurisdiction and choice of law clause in the agreement. Companies should carefully consider the pros and cons of litigating a dispute in a particular jurisdiction including consideration of their knowledge of the jurisdiction, their ability to access legal representation, practical logistical considerations and also the cost of litigating in that jurisdiction. In terms of an effective dispute resolution clause, a key factor is to ensure that all of the options that are available in that jurisdiction have been considered and evaluated. One particularly useful option is the use of a ‘step clause’ which sets out a number of steps or options that the parties agree to use as a method of resolving their dispute. Clearly the appropriate steps must be considered in light of the potential dispute which could arise and should be drafted on a case by case basis.
“The introduction of the Commercial Court has resulted in a significant reduction in the level of time that complex disputes take to conclude and it is generally accepted that the court has been a very successful addition to the Irish courts system.”

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Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN FRANCE? ARE YOU SEEING ANY RECURRING THEMES?

AKYUREK: Nowadays, it is easier in the European Union to resolve a cross-border dispute. Issues of enforcement of judgments between Member States are governed by EU regulations which provide fast enforcement proceedings. Judgments which fall into the scope of the Brussels I Regulation – 22 December 2000, EC No. 44/2001 – are recognised ipso jure in other Member States through a less burdensome procedure, so as to obtain a declaration of enforceability. However, there are still recurring challenges which are pointed out by parties involved in court litigation. Mainly, parties complain about the length of legal proceedings even if the French judicial system has made substantial progress. Another recurring theme is the cost of commercial disputes, which is linked to the length of 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?

AKYUREK: Mediation is a binding dispute resolution option. The parties agree to enter into discussions with a mediator, a neutral third party whose duty is to find an agreement in accordance with the parties’ respective interests. The main advantage is that discussions are confidential but the drawback stands in the fact that mediation needs every party’s consent to settle a dispute out of court. If the mediation procedure were to be successful, it would end up with an agreement signed by the parties, which has the status of res judicata. In the event that mediation is unsuccessful, parties should opt for arbitration or judicial litigation. The main advantage of arbitration comes from the fact that parties are entitled to choose every feature of the proceedings: the arbitrators, the seat of arbitration, the applicable law, the language of the hearings or the confidentiality of discussions. Therefore, arbitration
may appear as a flexible dispute resolution process. Court litigation offers a complete legal framework which may appear comforting for parties since the case will be handled by a national court, handing down a ruling that would be immediately enforceable.

**AKYUREK:** Mediation or conciliation may result from a contractual clause, compelling the parties to start discussions before filing a claim with a court. This kind of clause has become widely popular and may be found in many agreements, especially among companies. It also may result from a judicial decision: the court may consider that there is a chance for the parties to find an amicable solution and decide to wait for the outcome of the ADR before handing down its ruling. ADR should always be encouraged as it is an amicable way to settle a dispute. The Paris Commercial Court has started this ADR process by identifying upstream the disputes that could be possibly settled through ADR. This procedure is not binding and parties can freely decide to stop the conciliation whenever they want. In addition, ADR proceedings remain confidential, even if the conciliation phase fails.
Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

AKYUREK: France is known as an arbitration-friendly jurisdiction mainly for providing the most advanced and liberal legislation. This was particularly outlined by the Hilmarton and Putrabali cases, where French courts agreed to enforce an award that had been cancelled in the country of the seat of arbitration, on the ground of the New York Convention. Moreover, France is one of very few jurisdictions which recognises the competence-competence principle, meaning that the arbitral tribunal can decide on its own competence. French law also highly protects the principles of independence and impartiality of arbitrators.

Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN FRANCE? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

AKYUREK: Facing complex international disputes may raise different issues. For example, hurdles may arise when a party is seeking enforcement of a judgment or an arbitral award in a foreign country where no bilateral treaty – dealing with the reciprocal recognition and enforcement of foreign decisions – has been signed. Under these circumstances, enforcement may be denied, especially in the case of non-compliance with public policy. In this case, a party seeking enforcement of a judgment or an arbitral award which has been declared unenforceable by a court can challenge this decision. For example, under French law the plaintiff may lodge an appeal against the court decision denying the enforcement before the President of the Tribunal de Grande Instance, a Regional Court, pursuant to Article 509-7 of the French Civil Procedure Code. However, in most cases, appeal courts rarely quash judgments of first instance, particularly where the first instance court considered that the foreign judgment or the arbitral award was in breach of the French Public Order Policy.
AKYUREK: With respect to arbitration, companies need to set carefully the terms of arbitration proceedings, including the place of arbitration or of litigation, the applicable law, the language, the number of arbitrators and if the country where they want to enforce the arbitral award is arbitration-friendly. When it comes to litigation, parties need to pay great attention to the governing law clause and the choice of forum clause depending on the country where the damage occurred and the country where the judgment will be enforced. A dispute resolution clause must set a specific alternative dispute resolution procedure: conciliation or mediation, for example. Moreover, the wording of the clause must be precise enough to cover the proper merits of the dispute that may arise and must set forth a clear procedure to be followed by the parties without any intervention of a national court.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN SWITZERLAND? ARE YOU SEEING ANY RECURRING THEMES?

FELLER: We are still seeing a lot of bankruptcy related litigation. Owing to the fact that Switzerland is a country of choice for many international holding companies as well as the location of subsidiaries of large conglomerates, insolvencies in other countries inevitably have repercussions in Switzerland. Where several jurisdictions are involved, international bankruptcies can lead to contentious legal issues regarding jurisdictional authority. Just recently, the Swiss Supreme Court had to decide whether the decision of a foreign court can be recognised in Swiss bankruptcy proceedings. Although the effects of bankruptcy law are in general limited to its own jurisdiction, further developments toward a more international approach are not excluded. Other recurring market challenges are the hurdles faced by potential litigants wishing to recover kick-backs from banks. Frequently, claimants are financially not in a position to exhaust procedural means to obtain a final verdict despite their cases being good. A new proposal by the federal government to improve legal instruments for collective redress may alleviate this unsatisfactory situation.

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?

FELLER: We believe that putting measures in place ensuring that one can obtain a neutral yet sophisticated venue for a potential future dispute is a good start. Switzerland satisfies both of these prerequisites. Including a jurisdiction clause in agreements making Switzerland the forum for a dispute in an international setting is often a helpful step. Combined with a sound choice of law clause, such as Swiss or English law which are well established and have transparent and set jurisprudence, companies are well prepared for the event of a dispute. We tend to advise corporates to trust the local Swiss courts unless there are specific reasons to choose arbitration which, although being confidential and flexible, is invariably more expensive and often less
predictable. Mediation is gaining in popularity as a first step but is not always suited to international commercial disputes.

Q TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

FELLER: Alternative dispute resolution mechanisms are regularly sought by big commercial entities in international disputes. Arbitration is still the preferred method in such instances. But suing before state courts is a viable option in Switzerland, with courts having a sound understanding of commercial issues and with four cantons having specialised commercial courts that have reasonably quick proceedings. ADR is also slowly gaining ground. This might also be because of the longstanding tradition of settlements by the courts. Judges try to settle most cases at an early stage. Some courts boast very high settlement rates, such as the Commercial Court of the Canton of Zurich that manages to settle an impressive 70 percent of cases within six months of filing. The prevalence of ADR is difficult to gauge since parties usually agree to keep proceedings confidential. However, mediations administered by the ICC International Centre for ADR pursuant to the ICC Mediation Rules seem to be on the increase by the ICC’s own account.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

FELLER: Switzerland can pride itself on outstanding arbitration facilities. The country looks back over a long tradition of arbitration. The Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich have established the Swiss Chambers’ Arbitration Institution that offers highly specialised arbitration services and has its own arbitration rules in 13 languages – the Swiss Rules. Furthermore, Switzerland’s pool of legal professionals is internationally renowned in the field of arbitration and offers many experienced
Switzerland is a first choice for arbitration. Swiss court support for arbitration is well known, with courts respecting arbitration agreements and enforcing awards.

FELLER: I believe the challenges are no different here in Switzerland than they are in other parts of the world – perhaps with the difference that Switzerland and Swiss courts in particular are not new to the complexities that such cases may bring. The language proficiency of participants may pose an obstacle, although most Swiss counsel in large commercially oriented law firms these days are fluent in English. Challenges may arise in connection with evidence, in particular with regard to the location and retrieveability of such evidence. Privilege with regard to certain documents may play a role, since Switzerland has strong laws on the protection of correspondence with legal counsel or materials covered by business secrets. Obtaining witness testimony may prove difficult where such witnesses are resident overseas, since as a rule Swiss courts do not accept written testimony which is not the case in arbitration. Mechanisms that can ease the process can range from retaining English speaking counsel and, where arbitration is sought, English speaking arbitrators which limits the logistical obstacles with regard to communication. In addition, good recordkeeping and clear communication before a dispute erupts is beneficial for later proceedings.
FELLER: Good contracts make for good cooperation. Nevertheless, disputes cannot always be avoided and not all eventualities can or should be considered in an agreement. However, including an unambiguous clause on the procedure regarding dispute resolution is helpful. This should include where the dispute resolution shall take place and which material law shall apply. If arbitration is preferred, it is recommended to settle how the procedure is to be commenced, who may appoint arbitrators and how many, who shall chose the chairman and reasons to oppose the choice and by which procedural rules the process shall be governed. Addressing these issues in advance can limit the trouble when a problem is encountered and enables parties to focus their energy on resolving the actual matter at stake.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN GERMANY? ARE YOU SEEING ANY RECURRING THEMES?

SCHÄFER: In Germany, disputes resulting from business combinations remain prevalent. They are typically resolved by arbitration. In addition, there is an uptick in banking litigation work, in particular relating to claims against financial institutions regarding the sale of financial products to end-customers. Specifically, in the wake of the financial crisis a number of open-ended real estate funds had difficulties paying out the large amounts withdrawn by institutional investors. As a consequence, the funds were closed. A number of those funds will not be able to re-open and are therefore required to sell their assets to make payouts to the investors. Such payouts are likely to be lower than the investment, let alone the expected returns. As such, a number of investors have turned to their banks and the funds, claiming that they were not properly informed about the risk of fund closure.

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?

SCHÄFER: The first step in the right direction is to gain awareness of the various types of dispute resolution available. Litigation and arbitration provide for a binding decision, and typically come into play when the parties have exhausted their negotiation efforts. However, in between negotiation and litigation, there is the layer of mediation and other forms of ADR. When using these methods, a third party assists the parties in solving the dispute among themselves. In appropriate cases, mediation effectively prevents an unnecessary escalation of the dispute. This approach saves substantial time and costs, if successful. If unsuccessful, not much has been spent but the disputed issues have at least become clear to all involved. This in turn will help to focus any subsequent litigation or arbitration proceedings. In general, if a
company is able to solve disputes at an early stage, it will do better than those companies that let things drag on. Some industries are notorious for disputes, such as the construction industry. Here, companies have devised methods and approaches to tackle disputes early on, such as dispute review boards.

**SCHÄFER:** Mediation and other ADR techniques are still not widely used in Germany. Actually, those offering mediation services tend to have little practical experience, given the low number of cases and large number of mediators competing for work. Companies that are regularly exposed to disputes are typically more open to mediation than those that face a dispute only once in a while. If a company proposes mediation there is still a sentiment that the company shows signs of weakness: if it had a good case, it would either have been able to convey this in negotiations or will take on the opposing party in court. In order to solve this psychological issue, agreeing on mediation in a contract makes sense as the party requesting the procedure will not be seen as showing a sign of weakness but merely complying with contractual stipulations. The downside of this approach is that the parties might feel the need to go through the motions when in fact their specific dispute might not be suitable for mediation.
“In Germany, there is very good arbitration infrastructure comprising a modern arbitration law, supportive courts and an experienced arbitration institution.”

**SCHÄFER:** In Germany, there is very good arbitration infrastructure comprising a modern arbitration law, supportive courts and an experienced arbitration institution, the German Institution of Arbitration (DIS). In 1998, Germany adopted the UNCITRAL Model Law on International Commercial Arbitration with only minor changes and additions. As such, if a foreign user is familiar with the Model Law, there will not be any difficulties in navigating the German arbitration law. There are also commentaries in the English language available on the German arbitration law, which makes access to legal practice easier. While there are no restrictions on foreign attorneys pleading in arbitration proceedings in Germany, I would still recommend using a co-counsel to fully understand the applicable legal framework. Judges support arbitration and the level of control is light.

**Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN GERMANY? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?**

**SCHÄFER:** Multi-jurisdictional disputes always provide challenges and require a careful strategic approach. For instance, if one deals with a regulatory investigation that has an extra-territorial reach, there is typically a need to synchronise approaches and bridge different legal traditions. A US regulator, supported by US courts, might request access to certain information which is protected by data protection rules in Europe. This is a conflict of rules which is often difficult to resolve to the satisfaction of all involved. Similarly, there might be competing investigations in various countries.
SCHÄFER: Companies aware that poorly-handled disputes can result in a cost and time nightmare are well prepared to weather the storm. They will seek to spot disputes early on and prevent them from escalating. Most often, communication issues are at the root of disputes. I recommend investing in expert in-house counsel familiar with dispute resolution, such as contract and claim managers, who get involved in parallel with the execution of projects. This might need some cultural adaptation, as project managers typically do not like to have a lawyer looking over their shoulder – whose costs are possibly even added to the project budget – but once a project runs into arbitration, the project margin is quickly expended to cover the cost of fighting in court.

Q WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

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DENMARK

PETER SKAU-ANDERSEN
SKAU REIPURTH & PARTNERS

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN DENMARK? ARE YOU SEEING ANY RECURRING THEMES?

SKAU-ANDERSEN: Commercial disputes in Denmark are currently undergoing a change to some extent, in the sense that parties’ interest in reaching a settlement is increasing. A few years ago – when the economy was far worse – many companies fought long and hard to pursue their claims, simply because they had to. Today, with an improving economy, companies seem more reluctant to spend that much time on disputes. Thus, a more commercial, long-term, strategic approach to disputes has returned. This is favourable for all parties involved and provides legal advisers with the option of seeking an amicable solution instead of preparing for trial or arbitration from the beginning, which is often more valued.

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?

SKAU-ANDERSEN: The most important thing is to actively consider and incorporate an effective strategy as early as possible in any given contract. Often, resolving disputes through arbitration will be the initial choice due to its effectiveness, the knowledge of arbitrators, confidentiality, and so on. However, it may be relevant to seek a different type of venue for a dispute from the beginning. This is always an individual consideration but it is obvious that certain agreements would benefit from having an alternative dispute resolution clause, such as mediation, as a requirement. This will provide an obligation for the parties to discuss the matter less belligerently, in the spirit of an ongoing relationship. It cannot overstated how important it is to consider these issues at the drafting stage.
SKAU-ANDERSEN: Many companies avoid trials and arbitration due to the fact that costs admitted by the courts are very low compared to the time spent by the parties’ legal advisers – thus with additional costs incurred by the company even in the event of a win. Consequently, there is a certain willingness to seek alternative solutions. In Denmark, there is the possibility of a court-based mediation where the parties are able to mediate through the participation of a court-appointed mediator. The trial will be postponed during these efforts, and both parties are at all times free to close down the negotiations and proceed with the trial. Especially in commercial disputes – where money typically is the key issue – this can be successful. It allows the parties to speak freely without formalities and forces the parties to communicate. The Danish courts encourage this and a rising number of companies realise the advantages.

SKAU-ANDERSEN: Arbitration as an institution is well established in Denmark. Arbitrators are effective and highly competent. The process is relatively easy-going and there are no issues or controversy between Danish courts and the courts of arbitration. In recent years, the popularity of arbitration has had the ironic consequence of compromising the speed of the process simply because of the number of cases. In other words, one of the traditional advantages of arbitration can no longer be guaranteed. However, more resources have been allocated and the problem is being dealt with. Thus, there continues to be many advantages to take into consideration when choosing arbitration as the dispute resolution venue.
**Q** WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN DENMARK? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

**SKAU-ANDERSEN:** The complexity of international disputes is often based on incoherence in the contractual work done between the parties involved. Certainly, governing law, venue and principles of interpretation are topics that tend to prolong initial discussions, if not stated in contracts. It is very important for the legal advisers to foresee and clarify these issues between the parties – before the dispute arises – when working internationally. Language is seldom a problem in Denmark. It is normal to agree on English as the relevant language before arbitration or in a contract, and even in the Danish Courts the parties can agree that translation is not necessary, provided the Court accepts this. With a recent change in the Administration of Justice Act, Scandinavian countries can even present evidence before court in the original language, unless this will be protested.

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**Q** WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

**SKAU-ANDERSEN:** In general, there should be awareness from the beginning that a dispute might actually occur. This seems obvious but many companies do not want to discuss problems or disputes when a collaboration is just starting and everyone is focusing on future synergies. An unprepared dispute is not only a dispute, but a more expensive and more difficult dispute. Thus, dispute resolution clauses should always be considered from the beginning. The more thorough the clause is, the better. Place of venue, governing law and of course the judicial choice itself – arbitration, litigation, mediation, and so on – should be clearly stated. If possible, even timeframes, methods of communication and third-party experts can be outlined in the clause. A well drafted dispute resolution clause will always provide efficiency and clarification and thereby a less complex way to find a solution.
“Many companies do not want to discuss problems or disputes when a collaboration is just starting and everyone is focusing on future synergies.”
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN HUNGARY? ARE YOU SEEING ANY RECURRING THEMES?

RÓNAY-CSORDÁS: In June 2014, a specific judicial consolidation law was introduced that put an end to a series of legal disputes underway since 2010 between commercial banks on one hand and consumer debtors on the other. These legal disputes concerned the legal fairness of contract provisions that allowed banks to unilaterally change interest rates and fees under foreign currency based loan agreements. The law enacted the points of interpretation of legal fairness as they have been developed by the judiciary since 1993 and transposed from EU law in 2004, the time of Hungary’s accession to the EU, and in 2009 when consumer protection regulations were fine-tuned. The law established a legal assumption that the right to make such unilateral changes was unfair and provided a 30-day preclusive deadline for commercial banks and leasing companies to challenge the legal assumption. Since mid-August 2014, commercial banks submitted 79 petitions to this end. The first instance court decisions can be appealed and reviewed in accordance with the standard rules of civil procedure. Furthermore, 2014 saw the first legal disputes in which claims could be based on the opinion of a body of forensic experts for the certification of contract performance, an expert organisation established by law to issue prior-to-procedure forensic opinions with the value of official evidence in civil procedures. The purpose of establishing this body was to support the resolution of legal disputes in construction and real estate development.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION MECHANISM?

RÓNAY-CSORDÁS: Hungarian civil procedure law expects disputing parties to inform the other party about all of the details of their claims so that the other party is able to perform voluntarily, without a court decision. Otherwise, the claimant cannot seek to recover its legal costs even if he has won on the merits of the claim. As a consequence, I
would advise clients to engage in preliminary negotiations with their counterpart on the full scale of the claim, because in many cases claims can be enforced through a settlement. If the negotiations fail, I would prefer litigation before state courts because of the option of appeal or, in the case of a definite breach of law by the court decision, of a review by the Supreme Court. The reason for this strategy is that despite Hungary’s long record of judgements under fairly consistent civil law since 1959, when the Hungarian Civil Code was introduced, the sweeping changes that have occurred due to the introduction of a market economy starting in around 1990 and EU accession in 2004 appeared in the case law through developing opinions. Thus, in most of the cases it is worth testing previous court precedents by new arguments.

RÓNAY-CSORDÁS: Unfortunately, mediation and alternative dispute resolution are not widely accepted methods that companies turn to if they have commercial legal disputes, and the only exceptions from this are the single dispute adjudicators appointed under FIDIC contracts. The reason for this is a lower level of business confidence and cooperation that perceptibly prevails in the Hungarian economy in comparison to more developed market economies. It is not in the legal culture of Hungarian business entities to seek alternative dispute resolution despite their cost-sparing character, because companies insist up front on turning to state courts for an enforceable decision. As a consequence, sadly, Hungary lacks bodies of legal professionals for mediation in business cases even though a number of Hungarian legal professionals have more than adequate experience in business law to perform such a function.

Q TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?
Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN HUNGARY? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

RÓNAY-CSORDÁS: Hungary is a signatory of the New York Convention on the admission and enforcement of arbitration awards, and Hungarian state courts enforce them in line with national enforcement law. National civil law and civil procedure law allow parties to submit legal disputes to arbitration, both in the form of single arbitrators and arbitration panels, however mandatory law forbids the stipulation of arbitration in cases in which state or local governments’ properties are concerned. The Hungarian Chamber of Commerce and Industry (MKK) operates a permanent court of arbitration for commercial legal disputes with a list of respected arbitrators. The permanent arbitration court of the MKK has exclusive competence in international legal disputes if the place of arbitration is Hungary. In addition, local chambers of commerce and industry – which exist in each county – established conciliation bodies for the settlement of both commercial and consumer legal disputes. The decisions of these conciliation bodies, however, cannot be enforced in court, and thus the parties have to start legal action if they wish to have an enforceable decision in their cases.

RÓNAY-CSORDÁS: To date, Hungary has adopted a number of legal institutions that are able to facilitate the settlement of contractual disputes in a flexible manner. Hungarian law accepts the stipulation of foreign law as governing law of contracts, and Hungarian state courts, in line with the relevant EU regulations, apply foreign law in their decisions. In such a procedure, state courts request opinions on foreign law directly from justice ministries in the relevant foreign jurisdiction but must also examine opinions submitted by the parties as pieces of evidence. Also, decisions of foreign state courts in commercial and pecuniary cases are admissible and enforceable in Hungary. Despite these legal facilities, it is advisable to approach a complex array of contracts that usually cover international business transactions as one legal unit from the perspective of enforceability: preferably, all legal arrangements should stipulate the same national law as governing law and submit legal disputes arising from them to the competence of the same legal forum.
“To date, Hungary has adopted a number of legal institutions that are able to facilitate the settlement of contractual disputes in a flexible manner.”

RÓNAY-CSORDÁS: There are step-by-step questions in connection with this issue that contracting parties should answer when they enter into a contract. Do they stipulate a governing law or rely on the underlying provisions of international private law and the relevant international treaties that set out governing laws for most of the typical commercial or civil law contracts? In both cases, what are the imperative rules of such governing laws that will not allow deviations in contracts? Are elements available in the contract that can serve as the basis for invoking conflict of laws rules and a renvoi process? In which country will the final decision most probably have to be enforced? Does that country admit arbitration decisions or decisions of foreign state courts? In addition, the harmonisation of the governing law with the authorised legal forum should be performed.
RUSSIA

ARTEM KUKIN
INFRALEX

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN RUSSIA? ARE YOU SEEING ANY RECURRING THEMES?

KUKIN: Over a number of years, one of the most common causes of commercial disputes in Russia was, and remains, a party’s failure to properly perform its obligations under an agreement. Such violations are the recurring grounds for lawsuits. The courts competent to consider such lawsuits are called the Arbitrazh (Commercial) courts. These lawsuits may be classified based on a type of contract that gave rise to a claim, as well as based on the types of asserted claims. According to the judicial statistics, usually the following contracts cause claims: energy supply agreements, supply agreements, leases, design-build contracts, corporate disputes, insurance and services agreements. Depending on the contract terms and the type of breach, the claimants file claims for recovery of debts, penalty, interest on using other’s money and damages, as well as for specific performance and other demands. Such claims constitute the majority of cases heard in the Commercial courts.

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: In order to resolve a dispute, companies in Russia can either litigate or exercise alternative means of dispute resolution, such as arbitration proceedings and mediation. Litigation has advantages over arbitration proceedings and mediation, without their defects. Compared to mediation, litigation has the power of levy. One of the advantages of arbitration proceedings is that the arbitration tribunal specialises in the resolution of particular disputes, which enhances the efficiency of the proceedings. However, commonly arbitration tribunals are directly or indirectly created by large companies – thus, when a hearing involves the participation of such companies, it leads to lack of trust in such arbitration tribunals. Litigation features accurate procedural rules and low court fees, as opposed to arbitration and mediation. My advice
to companies in the case of a dispute is to litigate. Choosing other means of dispute resolution depends on the particular circumstances and agreement between the parties.

KUKIN: Notwithstanding the mediation law adopted in Russia in 2010, companies do not commonly choose mediation either before or after litigation. Opening the door to disputes settlement in some commercial courts has not increased the popularity of mediation. According to the judicial statistics, mediation in commercial courts was exercised only 15 times between January and October 2013. The reason for the slow uptake of mediation could be a high level of conflict between parties which precludes them from negotiating, a lack of negotiating skills, or an established tendency to only pursue litigation. Due to low court fees and precise procedural rules, it is easier for a party to litigate than to make an effort to resolve a conflict. At the same time, resolution through mediation is spreading in social spheres, including family disputes.

KUKIN: In order for a dispute to be considered in an arbitration tribunal, the parties have to enter into an arbitration agreement. This agreement represents the consent of the parties that, in the event of a dispute between them in the future, it shall be resolved in an arbitration tribunal. A dispute may also be forwarded to an arbitration tribunal after initiating proceedings by a commercial court if the parties enter into an arbitration agreement. The arbitration agreement is valid and in force when it contains the name of the arbitration tribunal and the
types of disputes subject to its consideration. The commercial court will leave the suit without consideration if there is an arbitration agreement between the parties. The parties may agree that the arbitration tribunal award shall be final, thus not subject to appeal in a commercial court. The decision of the arbitration court is enforceable.

**Q** WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN RUSSIA? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

**KUKIN:** Disputes with an international element are the most complicated disputes for Russian courts. In the event that such disputes arise, the first issue that needs to be resolved by the court is to determine the competent court that has the right to consider this dispute. The parties to a contract with an international element may agree which court will resolve their disputes, if any. If the parties fail to do so, the terms and conditions of international agreements meaning the rules of international private law – shall apply. The second issue is the *lex societatis*, or personal law, of a foreign legal entity, which will determine its legal capacity. The third issue is to determine the applicable law of the international contract between the parties in dispute. The parties may agree on this issue in the contract. Absent an applicable law clause, this question will be subject to dispute. If foreign law applies, the court may decide to involve a specialist in such foreign law, which will complicate the legal proceedings. In order to ease the process of international disputes resolution, it is worth defining applicable law and the competent court in the contract between the parties.

**Q** WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY

**KUKIN:** In certain cases the law or the terms of the agreement may provide for a compulsory complaint procedure. If the claimant files a lawsuit having disregarded a compulsory complaint procedure, the court will leave the suit without consideration. Under the law, the claimant must send a claim to the counterparty before filing the lawsuit if such claims involve amendment or termination of a contract, claims to a
carrier, forwarding agent and certain other claims. If a party has claims other than those subject to a compulsory complaint procedure as provided in the law or contract, he may file a lawsuit disregarding the compulsory complaint procedure. The parties may agree the complaint procedure in the agreement between them and such procedure shall become binding. In order for the compulsory complaint procedure clause to be effective, it must contain terms regarding the order, time limits of submissions and consideration of a claim. The absence of any of these terms means the compulsory complaint procedure clause will not be agreed. Since in most of the cases lawsuits are filed at the principle place of business of the defendant, it is worth defining the competent court that shall consider the dispute.

Artem Kukin began his career as a trial lawyer, participating in large cases on bankruptcy and corporate disputes. Some of his most successful cases include resolving corporate disputes among shareholders of large oil and gas entities in Russia. He now works on creating business-restructuring models for transferring offshore groups into Russia, as well as mergers and acquisitions, including agreements with government organisations for foreign investment in strategic enterprises. He assists in tendering private contracts within public-private partnership (PPP) projects.

Artem Kukin began his career as a trial lawyer, participating in large cases on bankruptcy and corporate disputes. Some of his most successful cases include resolving corporate disputes among shareholders of large oil and gas entities in Russia. He now works on creating business-restructuring models for transferring offshore groups into Russia, as well as mergers and acquisitions, including agreements with government organisations for foreign investment in strategic enterprises. He assists in tendering private contracts within public-private partnership (PPP) projects.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN AUSTRALIA? ARE YOU SEEING ANY RECURRING THEMES?

JONES: Commercial disputes commonly derive from deficient or improperly drafted contracts. Where a contract is ambiguous or silent on an aspect of the parties’ commercial dealings, the parties will often have no choice but to resort to the general law to resolve a dispute. Such a contest will involve arguments as to the intention of the parties, which must be ascertained from the terms of the contract. This is particularly difficult for a judge or an arbitrator to resolve where each party takes an entrenched adversarial stance. This problem is not only common in the Asia-Pacific region but across the globe. One specific context in which deficient contracts often give rise to hotly contested disputes is where a lump-sum construction contract is unclear on the scope of works encompassed by the payment. Meticulous contract drafting minimises the number of disputes that arise over the course of parties’ commercial dealings.

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?

JONES: Companies tend to avoid litigation as it is expensive, inefficient and inflexible. This has led to a greater use of ADR processes to resolve disputes. Mediation is both quicker and cheaper than litigation and arbitration, and where successful, it produces a final and binding outcome that is mutually agreed upon by the parties. It can be a crucial tool for managing business relationships from their inception. However, an effective resolution will only be achieved if parties cooperate to reach an agreement. In the absence of an agreement, mediation will not produce a binding outcome. Arbitration on the other hand, involves the adjudication of a dispute by an arbitrator who will render a final and binding award upon hearing the submissions of the parties. Arbitration allows for greater procedural flexibility and this may facilitate a more expedited outcome than would be achieved in litigation. The process is uniquely private and confidential and this serves to protect the reputation of companies involved in a dispute. However, arbitration has been criticised for having the potential to mirror the high costs and
delay which infest litigation. In light of these pros and cons, companies may wish to implement a number of ADR methods by adopting a multi-tiered dispute resolution clause. This can increase the chances of reaching an early settlement whilst also guaranteeing a final outcome if settlement fails.

**JONES:** ADR processes have found acceptance in the Asia-Pacific region and occupy an important space within the commercial world. Companies genuinely consider the use of ADR processes such as arbitration and mediation, at both the domestic and international levels. Prominent companies in the region regularly refer multimillion dollar disputes to arbitration for hearing and determination. Arbitration as an ADR process is an attractive option to companies for a number of reasons. Characteristics which contribute to its popularity include its flexibility in procedure, thereby minimising the duration and cost of proceedings, and the confidentiality of arbitral proceedings, which can serve to protect a company’s reputation. Arbitration is therefore able to bestow benefits upon companies which litigation does not. As a result there has been a proliferation in the number of arbitrations in the region, centred particularly around regional arbitration hubs such as Singapore and Hong Kong.

**Q** TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

**Q** HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

**JONES:** Arbitration institutions across the Asia-Pacific region offer exceptional facilities and processes. Prominent institutions include the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre and the Australian Centre for International Commercial Arbitration (ACICA). ACICA has implemented its own institutional arbitration rules, known as the ACICA Arbitration Rules which provide an advanced, efficient and flexible framework for the conduct of arbitrations.
Australian courts have a strong history of supporting the independence and enforceability of the arbitral process. Where there is a valid arbitration agreement, a court will give effect to it by staying proceedings pursuant to section 7 of the International Arbitration Act 1974 (Cth). Further, the courts will enforce an arbitral award delivered in any country which is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Australian courts are increasingly supportive of Australia’s position as a desirable arbitral seat.

**JONES:** The exorbitant expense and time spent resolving disputes has been a longstanding and universal issue faced by parties to multi-jurisdictional commercial disputes. Dispute resolution institutions, national legal systems and courts are constantly adopting new measures and reforms, seeking to combat this problem. In particular, dispute resolution processes and rules have been internationally streamlined both in the Asia-Pacific region and across the rest of the world, yielding an increased efficiency in resolving trans-jurisdictional disputes. Although these measures provide some relief, they do not adequately address the problem. Over time, the lengthy and costly nature of dispute resolution has come to be perceived as an unavoidable commercial reality. It may therefore be prudent to refocus efforts towards dispute avoidance and preventative measures as opposed to traditional dispute resolution. The construction industry has demonstrated particular innovation in this regard, with the development and adoption of Dispute Review Boards and Alliance Contracting. These measures address conflicts at the contract drafting stage and as they arise, prevent their culmination into legal disputes and thereby avoid the vast expense involved in dispute resolution.

**JONES:** It is vital that parties exercise utmost care to properly draft the relevant dispute resolution clause, as an improperly drafted clause will have no legal effect. For example, judicial consideration by courts in both
India and the United Kingdom has made it clear that an arbitration clause must manifest an unambiguous intention by both parties to submit to arbitration in the event of a dispute, in order for the clause to be effective. In Christian Kruppa v Alessandro Benedetti and Bertrand des Pallières [2014] EWHC 1887, the parties’ dispute resolution clause stated that the parties would “endeavour first to resolve the matter through Swiss arbitration”. The clause was unenforceable as it did not manifest a clear intention by the parties to submit to and be bound by arbitration. Parties who wish to be bound by a dispute resolution process should therefore use words which clearly indicate their mutual intention to be so bound. Model dispute resolution clauses have been formulated by various international bodies including the International Chamber of Commerce and the United Nations Commission on International Trade Law. The adoption of a model clause may be a prudent measure for parties to take at the contract drafting stage, to ensure that a dispute resolution clause is effective.

Professor Doug Jones AO is a partner in the Major Projects and Construction Group and the head of the International Commercial Arbitration Practice Group at Clayton Utz. He practices as an international arbitrator based in London, Sydney and Toronto. Mr Jones has advised extensively on project structuring and financing, contract drafting, project implementation and dispute resolution for major infrastructure matters, including Department of Defence facilities and equipment acquisitions, airports, ports, roads and rail projects throughout Australia, as well as projects abroad in New Zealand, Europe, Asia, the Middle East and the US. He has extensive experience in PPP and PFI projects.
CHINA & HONG KONG

NICK GALL
GALL

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN CHINA & HONG KONG? ARE YOU SEEING ANY RECURRING THEMES?

GALL: Legal costs, direct as well as indirect, remain a significant challenge for companies from a commercial standpoint. Procedural delays and inability of the courts to deal with technical issues are some of the other unavoidable market challenges inherent in court-based litigation. Increasingly, alternative dispute resolution (ADR) has been seen as an expedient alternate process in appropriate cases. ADR is simpler, quicker and cheaper and can offer the involved parties a chance to get a more detailed settlement than would occur in a courtroom. 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.

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: Commercial parties should recognise that there is no ‘one size fits all’ approach that can be adopted while implementing an effective dispute resolution strategy. A combination of general and specific strategies must be considered while negotiating through dispute resolution clauses in the contracts. Money and time constraints are likely to compel the parties to view boilerplate dispute resolution clauses as default, status quo terms. Lawyers should, however, counter this tendency by exploring their clients’ full range of interests and examining all the possible solution sets carefully.
GALL: Since the enactment of the Civil Justice Reforms, Hong Kong solicitors are obliged to promote settlement outcomes, even after litigation has been commenced. Practice Direction 31 (Mediation) issued by the Hong Kong Judiciary encourages parties to consider mediation as an alternative dispute resolution. Due to its informality and flexibility and the fact that it can be conducted in any convenient location, mediation is often less expensive and speedier than other techniques. In arbitration, on the other hand, cost remains an ongoing matter of concern. Whilst it is often assumed that arbitration is less expensive than litigation, that may not always be the case.

GALL: Hong Kong serves as an ideal neutral place for international commercial arbitration owing to its user-friendly legislative framework. The framework is clear, certain and accessible. Hong Kong has earned international recognition by providing excellent arbitration facilities and processes, particularly through the Hong Kong International Arbitration Centre (HKIAC) which has emerged as the focal point of arbitration in Hong Kong. The Hong Kong courts are supportive of arbitration and certainly recognise the importance of non interference in the arbitration process. The parties can seek to set aside an arbitral award only on limited grounds, like most developed countries. Enforcement of both domestic and foreign awards in Hong Kong is time and cost efficient. To uphold the integrity of arbitral awards and assist in efficient enforcement, the courts have in many cases awarded indemnity costs against defendants in unsuccessful applications to set aside arbitral awards or challenges to enforcement.
GALL: Trans-border litigation of private commercial disputes adds difficulties, complexities and inefficiencies to the process. Further, cultural differences present additional barriers to resolving such disputes. An effective multi-jurisdictional dispute management includes helping lawyers understand business as well as legal issues, coordinating local counsels across jurisdictions and managing differences in the legal systems. ADR procedures, to an extent, have overcome and reduced the differences among procedures, languages and laws in cross-border cases. As far as Hong Kong is concerned, it is seemingly becoming the preferred seat of arbitration given that it conforms to international best practices and the arbitration mechanism is supported by a judiciary with a policy of minimum intervention.

GALL: Businesses should understand that it is absolutely essential to have an effective dispute management plan in place at the outset. A well drafted arbitration clause in a contract, for example, will avoid many problems down the track. For an effective arbitration clause, it is essential that the parties agree to at least the seat of arbitration and the procedural rules that will apply. From our experience, if an arbitration clause is not clear, parties may waste time and costs arguing about procedural and jurisdictional matters. Great care should be taken to ensure that mandatory mediation or arbitration clauses are enforceable. Lastly, communications and agreements between the parties should be properly documented. These are crucial to avoiding disputes and minimising the risk that disputes will evolve into litigation.
“An effective multi-jurisdictional dispute management includes helping lawyers understand business as well as legal issues, coordinating local counsels across jurisdictions and managing differences in the legal systems.”

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 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.
Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE REPUBLIC OF KOREA? ARE YOU SEEING ANY RECURRING THEMES?

LEE: Multiparty disputes have emerged in greater scope and frequency in Korea. The growth of multiparty disputes has been triggered by regional developments, including a rise in the number of cross-border transactions and related commercial contracts between several parties. This development has led to key challenges. First, multiparty disputes have led to multijurisdictional issues that transcend traditionally fixed boundaries of governing law and jurisdiction in a contract. An example of this dynamic can be found in cross-border multiparty disputes, where the governing law and jurisdiction may be of one country, yet the assets, evidence and domicile of a party are in another country. The implications of these circumstances are significant as it has become necessary for parties to take a step further and consider the extent to which important procedural mechanisms in one jurisdiction, such as document requests and judgment enforcement, will be implemented in another jurisdiction. Second, multiparty disputes have involved separate claims being made by different parties in a given case, resulting in differing and sometimes conflicting interpretations of facts and laws by claimants.

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,

LEE: A preemptive dispute resolution strategy is advisable. This would consist of early factual investigation and claim analysis. As cases are often won or lost based on the facts, there is a need to devote sufficient resources to prepare prior to a dispute. In early factual investigation, a selective focus is key, where it is necessary to investigate key points thoroughly while surveying other areas broadly. Claim analysis would entail an objective evaluation of a dispute’s strengths and weaknesses, and risks of a particular course of action. In favourably resolving disputes, circumstances often unfold based on the degree of advance preparation,
ARBITRATION, LITIGATION AND OTHER METHODS?

and rarely do events occur in a vacuum. A preemptive dispute resolution strategy will lead to a clearer path toward the preferred method of dispute resolution. Where the facts show that preliminary relief is desired, the risks may outweigh the benefit of a court dispute, and mediation or arbitration may be more feasible than litigation. Where the facts show that a decision on a critical legal issue has important precedential value, litigation may be the preferred method.

Q TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

LEE: Companies in this region readily explore ADR options for their disputes. They have consistently sought to find amicable out-of-court solutions to commercial disputes, and the ADR system in Korea has adapted to meet such needs. In deciding whether to seek ADR options, companies often look at factors such as expediency, due process, confidentiality and enforceability of a judgment. Accessibility to comprehensive ADR options has also facilitated use of ADR. The Korean arbitration system is the ADR system most frequently used, and Korea is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where international arbitration is facilitated under the Korean Arbitration Act. Mediation has also been a viable option. In addition to arbitration, the Korean Commercial Arbitration Board has a comprehensive mediation service consistently hearing a large number of mediations annually. Specialised mediation services are also available. For IP matters, the Copyright Dispute Mediation Committee deals with copyright matters, while the Intellectual Property Disputes Mediation Committee mediates disputes involving patents, utility models, designs and trademarks.
“The arbitration facilities in the region are generally supportive of the arbitration process, prompted by international treaty obligations and domestic law.”

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

LEE: The arbitration facilities in the region are generally supportive of the arbitration process, prompted by international treaty obligations and domestic law, as well as the increasing number of international arbitrations occurring in the region. Korea has adopted the 1985 UNCITRAL Model Law of Arbitration and has established various domestic laws and facilities to be consistent with international arbitration standards. With respect to facilities, the Seoul International Dispute Resolution Center is an international arbitration hearing centre equipped to hold arbitral hearings, and hosts arbitrations held under the rules of major arbitral institutions such as the International Chamber of Commerce and the Singapore International Arbitration Centre. Local courts are also known to be supportive of the arbitration process. With respect to the enforcement of international arbitral awards, in the absence of major substantive or procedural issues, courts in Korea have been known to expediently enforce international arbitral awards.

Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN THE REPUBLIC OF KOREA? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

LEE: Parties should carefully consider the extent to which an order in one jurisdiction will be complied with in another jurisdiction. One major area where this issue is recurring is in the area of evidence collection. Production of a certain document or set of documents may be ordered by a court outside of Korea, where the party from whom the documents are requested is domiciled in Korea. In such case, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters will apply, where Letters of Request should be made to the relevant court administrative authority handling document production requests. However, broadly drafted requests for the purpose of obtaining pre-trial discovery of documents may be returned or unenforced. Thus, as a mechanism to ease the process, it would be advisable for a party to make a request for evidence as specific as possible. In the case of documents, a description of a specific document known to exist would be useful.
Q: WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

LEE: Companies should take special care to ensure that contractual provisions relevant to a potential dispute are drafted to facilitate expedient recovery of damages. Ambiguous or vague language in the damages provision of a contract can make damage recovery difficult, and a faulty dispute resolution clause is likely to result in procedural and substantive delays. As a basic framework, the dispute resolution clause should include the governing law, jurisdiction, location, and the language of the proceedings. Companies should also ask the critical question of who will preside over a dispute. A court panel of judges with a proven track record of judiciously handling cases with similar facts and arbitrators with expertise in the type of issues involved will make a significant difference in the case outcome. Thus, to the extent practicable, it would be useful for a dispute resolution clause to specify the particular court which will hear the case, or in the case of arbitration to specify qualifications for the arbitrator to be selected for the case.

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Lance Lee is head of the Litigation and Arbitration Department at Lee International IP & Law Group. Mr Lee has extensive experience in representing clients in litigations and arbitrations in a wide range of business areas. His arbitration practice experience includes representing clients in many of the major international arbitration centres, including the ICC, ICDR, SIAC, HKIAC, LMAA, LCIA and the KCAB. As a partner and chair of litigation and arbitration matters, Mr Lee overseas dispute cases at Lee International, including cross-border litigations.
INDIA

S.S. NAGANAND
JUSTLAW

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN INDIA? ARE YOU SEEING ANY RECURRING THEMES?

NAGANAND: The current market challenges centre around huge engineering disputes. Of late, we have also seen quite a number of disputes relating to foreign collaboration units. We also see a number of disputes relating to the effect of tax laws on commercial contracts. In a few cases, we are seeing a tendency on the part of the government to negotiate and settle sovereign claims. Many trade bodies are also encouraging their members to take recourse to alternative dispute resolution (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?

NAGANAND: An effective dispute resolution strategy starts with an arbitration clause, which tries to cover all aspects right up to the stage of appointing the Arbitral Tribunal. In the case of disagreements, we can expect delays in taking recourse to legal remedy under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitral tribunal. Mediation is also contemplated in many contracts. However, my experience is that government agencies and government owned companies are not particularly enthusiastic about mediation. We are also seeing an increase in the number of institutional arbitrations, which seems to be a healthy sign.
NAGANAND: ADR is a serious consideration today. By law, arbitration has become statutory in the case of disputes arising in the electricity sector between generating companies, distributing companies and transmission companies. Recourse to normal courts has also been restricted by providing appellate fora. Many state-owned entities are participating in training programs for their executives to familiarise them with ADR. The legal community is sensitised to ADR. Court promoted arbitration centres have been set up in many cities. This has encouraged institutional arbitration, which is quick and cost effective.

NAGANAND: Arbitration facilities in the region are quite good. Many institutional arbitration facilities have gained popularity. The Arbitration Bar, however, is somewhat small with legal practitioners juggling between courts and arbitration. Also, due to a series of decisions of the Supreme Court of India, interference in the arbitral process is limited. Courts are supportive of the arbitral process and are also willing to assist by granting interim orders under Section 9 of the Arbitration and Conciliation Act. A recent decision of the Supreme Court has cleared some doubts as to the power of the court to examine the allegation of fraud in arbitral proceedings. That decision was in the 2014 case of Word Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) Pte. Ltd., which laid down that in the case of the New York Convention, for awards where the arbitration is held outside India, Indian courts cannot interfere with them on the ground of fraud.
Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN INDIA? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

NAGANAND: A number of practical issues arise in international, multi-jurisdictional disputes. Issues relating to the choice of arbitration law and reciprocity for the enforcement of awards are major considerations. These issues are problematic and when they reach courts of law in India, there is a severe delay in enforcement. Most of the international arbitrations in India are ad hoc arbitrations. It would be good to see institutional arbitrations. Many procedural issues delay the conclusion of arbitral proceedings.

Q WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

NAGANAND: In the case of international commercial contracts, the choice of law needs to be addressed. In the case of other commercial contracts, such as construction contracts, engineering contracts, consultancy contracts, and so on, the complexity of various tax laws in India needs to be considered. These laws provide for the levy of income tax, service tax, excise duty, customs duty, sales tax at the federal level and entry tax, value added tax, and municipal tax at the state level. Contracts must also provide for the effect of changes in tax legislation. If this is done, future disputes may be reduced. For an effective dispute resolution clause, a good mediation provision with strict time limits with the assistance of an institutional mediation mechanism will help to resolve many disputes without progressing to litigation. Failing mediation, a clear and precise provision for the appointment of an arbitral tribunal stipulating the governing law, the substantive law, the procedural law, the place of the arbitration and the court having jurisdiction would enable an effective dispute resolution, if the matter ultimately goes to arbitration.
“For an effective dispute resolution clause, a good mediation provision with strict time limits with the assistance of an institutional mediation mechanism will help to resolve many disputes without progressing to litigation.”
JOSEPH DURKIN
DAVIDSON & CO

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE UAE? ARE YOU SEEING ANY RECURRING THEMES?

DURKIN: The primary concern of claimants in a commercial dispute is to be in a position for the enforcement of an award to ultimately recover monies owed on an award. Arbitration is still a preferred mechanism for dispute resolution given the familiarity of the process to international parties. A recurring theme is the increasing willingness of parties to adopt arbitration as a mechanism for dispute resolution.

The UAE Civil Procedure Code governs arbitration in the UAE. The Code does not expressly set out a duty of confidentiality in arbitration, however parties are free to incorporate a confidentiality clause within their arbitration agreements, which is normal practice. This is one of the primary influencing factors in parties choosing arbitration over conventional litigation. In addition to this, the ability of the parties to choose the arbitrators, the perceived speed at which arbitration proceedings are conducted and the fact that the UAE is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards are key influencers in parties choosing arbitration over litigation.
DURKIN: We advise our clients to fully consider the nature of the dispute and value in dispute. This will often lead to a decision of whether to opt for a dispute resolution clause applying Dubai Courts; to elect for the jurisdiction of the Dubai International Financial Centre (DIFC) Courts or to adopt an arbitration clause in the contract. In large contracts of an international nature, it is common to select an arbitration clause from an internationally renowned body such as the London Court of International Arbitration (DIFC-LCIA). This provides for a methodical and progressive approach of resolving any future disputes. The establishment of the DIFC-LCIA Arbitration Centre has opened up Dubai as a place for arbitration to multinational companies that perhaps have a base in London but a Middle East operation. The LCIA is a renowned arbitration centre worldwide and this can only help to increase the profile of arbitration in the UAE.

Q TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

DURKIN: Arbitration is widely used within the UAE with a number of international and local forums available to choose from. Unlike in England and Wales, where mediation and other alternative dispute resolution methods became an integral part of the pre-trial process as a result of the Civil Procedure Rules (CPR), historically in the UAE, parties in dispute would struggle to recognise the positive aspects of such methods. Mediation in particular is often seen as a time-wasting exercise as old and misconceived perceptions are prevalent among those who are in the position to use the process, or even indeed advise on it. Although this attitude is slowly changing, without a compulsory pre-trial process similar to the one introduced by the CPR, parties will likely continue to favour litigation over ADR.
DURKIN: In Dubai there are two primary arbitration centres, the Dubai International Arbitration Centre (DIAC) and the DIFC-LCIA Arbitration Centre. Both of these centres have made a conscious effort in recent years to recruit experienced staff to ensure the practices and procedures are implemented in a way that makes the centres attractive to parties. The DIFC-LCIA Arbitration Centre’s Arbitration and Mediation rules are a close adaptation of the LCIA Rules, with minor changes to align them with the DIFC-LCIA Arbitration Centre’s needs. The DIFC-LCIA Arbitration Centre has access to the LCIA’s database of arbitrators with a wide range of professional qualifications and legal and non-legal expertise, enabling it to appoint tribunals of a high calibre. With the ratification by the UAE of the New York Convention in 2006, the local courts appear to have taken a pro-arbitration approach and applied the Convention literally. The courts have ruled that the validity of an arbitration clause must be assessed separately from that of the main contract and that the arbitrator has the authority not only to determine their own jurisdiction, but also the validity of the main contract.

DURKIN: It is important that parties choose the proper forum for resolving disputes, whether it be the local courts or arbitration. The local courts are the default jurisdiction for cases to be heard if an alternative forum is not chosen. Arbitration is not suitable for every type of dispute and this should be considered carefully before the parties agree to refer any dispute to arbitration. However, the ability of the parties to elect that the proceedings remain confidential is a big advantage of arbitration. The establishment of the DIFC-LCIA Arbitration Centre and its mission to promote more effective resolution of international business disputes through arbitration and mediation worldwide, has made arbitration more readily accessible to multinational companies which may have previously seen the Middle East as an unattractive forum in which to conduct arbitration proceedings.
“Certainty is a key component to any international, multi-jurisdictional arbitration and is particularly relevant in the Middle East region.”

Q WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

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

Joe Durkin was trained and qualified in Ireland and has worked for both leading financial services companies and international law firms. Mr. Durkin is a commercial litigation lawyer based in the Dubai office of Davidson & Co since 2008. He is qualified to practice in three jurisdictions and acts regularly for banks and companies in a wide range of both contentious and non-contentious matters including corporate, energy, private equity, aviation and international transactions. Prior to joining Davidson & Co, Mr Durkin was an associate with the international law firm Maples and Calder.
SAUDI ARABIA

ZIAD EL-KHOURY
EL-KHOURY & PARTNERS LEGAL COUNSEL

Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN SAUDI ARABIA? ARE YOU SEEING ANY RECURRING THEMES?

EL-KHOURY: The recognition and enforcement of foreign awards has been a recurring issue of concern in alternative dispute resolution (ADR) in the region. Courts in many local jurisdictions enjoy wide authority to nullify foreign arbitration awards as well as to interfere in local arbitration upon the request of one of the disputants. This is despite the fact that most Arab countries are members of the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. In addition, there are multiple regional treaties supporting the *res judicata* principle and mutual recognition of foreign awards; most notably the 1983 Convention on Judicial Co-operation between the States of the Arab League, known as the Riyadh Convention, and the 1995 Protocol between the GCC countries called the Amman Convention on Commercial Arbitration. The weak transposition of international arbitration standards such as the UNCITRAL Model Law into local legislation as well as the conservative interpretation of international agreements by local courts have essentially contributed to the current problem.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND

EL-KHOURY: Pre-empting litigation is a key element in any dispute resolution strategy. This begins with drafting transaction documents which anticipate any future points of pressure and potential conflict between the parties. Dispute resolution clauses must be given careful consideration, particularly in relation to cross-border transactions. Another issue to consider is cost efficiency which entails more than the direct costs of lawyers and fees. For example, where the conflict concerns high-volume transactions, the disputants may prefer the
more expensive arbitration to avoid the higher embedded or indirect cost of late enforcement. With that in mind, parties may save time and money if the arbitration is set in a regional forum, which could allow for a quicker execution of the award. The ability to enforce the credit decision where the assets of the debtor are located is an indispensable factor in a successful strategy.

**Q: TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?**

**EL-KHOURY: **Middle Eastern companies have become accustomed to referring disputes to arbitration, in order to avoid courts and because of the favourable options evident in ADR. Our Middle Eastern clients are becoming more selective and sophisticated and consequently more willing to refer disputes to ADR outside of their borders. The increased exposure to western business culture has raised awareness among local and regional business owners on the benefits of ADR. As a result, they expect lawyers to play a key role in illustrating the pros and cons of each available option and assist them in reaching an informed and efficient decision on resolving legal disputes. When a dispute is referred to outside the region, the most likely option would be the International Chamber of Commerce and the International London Arbitration Court.
“Arbitration is usually the best method for dealing with large complex commercial cases.”

**Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?**

**EL-KHOURY:** The Dubai International Financial Centre (DIFC) stands out among other arbitration centres in the region due to the application of flexible paperless procedures, its choice of international arbitration rules, and its ease of access to foreign parties. A new Enforcement Department was recently created to facilitate the enforcement of decisions issued by the DIFC and abroad. Another important regional forum is the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which handles all types of commercial dispute resolution, with a majority of cases being media, entertainment and telecom related. Other popular regional ADR forums are the Abu Dhabi Commercial Conciliation and Arbitration Centre and the Qatar International Centre for Arbitration. The International Chamber of Commerce also plays a role in solving local disputes – for example, the Amman Chamber of Commerce is a favourable forum for resolving contracting disputes, as well as the ICC Bahrain.

**Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN SAUDI ARABIA? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?**

**EL-KHOURY:** Arbitration is usually the best method for dealing with large complex commercial cases. Traditional litigation problems such as procrastination are magnified in complex cases. Courts might also lack the adequate expertise to handle specific areas of law, while under an international arbitration the parties may select arbitrators who understand the jargon and intricacies of their transaction. Courts might also not have adequate resources to satisfactorily apply a foreign legal system such as the laws of England and Wales which govern many international transactions with the Middle East. Local courts would rely heavily on expert opinion on the interpretation of the law, which can be less than satisfactory to the parties.
El-Khoury: Companies should most definitely include a dispute resolution clause to govern any transaction which they enter into. A clear and enforceable disputes resolution clause will allow an entity to fully understand its options in proceeding with a dispute resolution. The dispute resolution clause should first identify the method of dispute resolution, such as the courts of a specific jurisdiction, arbitration, or mediation. Additionally, the clause should include the location for dispute resolution, the governing law and applicable rules of procedure, and the language which shall be used throughout the proceedings. The parties or their lawyers should also carefully review the selected rules of procedure and opt out of any undesirable clauses, or add flexibility or additional powers to the forum. For example, the parties in many jurisdictions may agree to allow the arbitrators to issue interim and provisional decisions. The parties could also identify the court with jurisdiction to resolve a contested arbitration outcome.

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Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN NIGERIA? ARE YOU SEEING ANY RECURRING THEMES?

AKPAN: Certainly, the Nigerian economy is viable. However, cash flow is a major challenge; inaccessibility to funds causes a trickling flow regarding the ability of entrepreneurs to meet their financial obligations. Consequently, small and medium businesses are unable to raise funds to carry on business and to expand. These challenges should be surmounted to encourage domestic and foreign investors to direct their grievances in a more flexible manner, without unnecessary publicity. Business operators cannot be undervalued in the economy because they thrive in enabling economic environments. Costs are at the core of commercial disputes resolution challenges. Often, parties are unable to pay costs and fees for disputes resolution. Also, there is a problem in the extent to which courts interfere in arbitration beyond the provisions of Section 34 of the Nigerian Arbitration Act, 2004 permitting judicial intervention. These hindrances stall the process, causing an inordinate delay which contrasts with the expedited process for which arbitration and ADR mechanisms are preferred to 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?

AKPAN: I advise that companies adopt wise business structures by embracing mechanisms for resolving disputes, for example, arbitration. Doubtless, various dispute resolution processes, including litigation, present advantages and disadvantages. The problem for most companies is managing the dynamics of business relations and the challenges of meeting obligations. It is logical to recommend a dispute design system within an organisation’s internal structure – a tiered approach with litigation as the last resort. Some companies now have an ADR pledge policy. The legal departments of these companies are required under the policy to enforce the pledge by drafting agreements accordingly. Arbitration and alternative dispute resolution clauses should be included in agreements to ensure an effective dispute resolution strategy.
AKPAN: So far as companies regard other dispute resolution options aside from litigation as efficacious, viable, impartial, and with assurances on integrity of the process, it is likely that these mechanisms will be preferred. A sizeable number of companies in Nigeria are yet to, and seem reluctant to, take the ADR initiative. This is not pragmatic for the practice, although I can estimate that 4 out of 10 companies have made concerted efforts toward ADR. Increased awareness by ADR practitioners is essential. Some companies do not engage the services of professionals, for instance lawyers. Negotiations and contracts entered into without professional advice often result in preventable, intractable conflicts. Viable dispute resolution options most suitable to the economic status of the parties and dependent on issues to be resolved should be explored. By way of illustration, it is imprudent to adopt complex alternative dispute resolution techniques when resolving small claims.

AKPAN: Some states in Nigeria have instituted court annexed Multi-Door Court Houses for alternative dispute resolution. To an extent, the courts support the process. The courts have also by their rules and procedures elaborately provided for ADR. ADR training and re-training for judges should be emphasised, noting that the courts are to interfere in these processes circumspectly. It is entirely worrisome that some arbitrators, lawyers, contract negotiators and parties’ representatives participate in arbitration without requisite knowledge of the practice. Recalcitrance by disputants and an inability of the panel to exercise control over the process can be counterproductive. A qualitative dispute determination cannot ensue in these circumstances. Remarkably, across Nigeria there are arbitral institutions which provide facilities for the process, such as the Nigeria Branch of the Chartered Institute of
Arbitrators (United Kingdom) and the Regional Centre for International Commercial Arbitration, among others. Facilities for ad hoc arbitration abound, depending on the choice of parties.

**AKPAN:** Complexities that affect multi-jurisdictional disputes include the identification of proper parties and determining applicable laws and rules, especially where conflict of law rules may be applied if parties fail to agree on applicable law. Others are the seat of the dispute resolution process and the qualifications of the dispute resolution panel. Realistically, we are yet to build confidence in our local manpower. Government establishments are yet to fully embrace alternative dispute resolution mechanisms. Really, arbitration is the most effective alternative dispute mechanism for resolving international commercial disputes. Recognition and enforcement of foreign arbitral awards, requisite expertise in transnational transactions and duplication of proceedings in multiple claims are other hurdles that undermine the efficacy of international, multi-jurisdictional dispute resolution. With the upsurge of investments in Nigeria, the legal framework, including the 1999 Constitution and the Nigerian Investment Promotion Commission (NIPC) Act, 2004, provide for the promotion and protection of local and foreign investors and investments.
AKPAN: Proactive companies should insert ADR clauses into their agreements. Although in arbitration submission agreements after disputes have arisen between parties are possible, it is safer to initiate a clause, such as an arbitration clause, initially in an agreement to forestall problems when a dispute does arise. Generally, all disputes arising out of the contract are addressed in such agreements but it should be noted that some disputes may not be amenable to arbitration or other ADR mechanisms. Cautious drafting in the likelihood of common clauses for sub-contracts is also recommended. An effective dispute resolution clause should be specific, mentioning any method, or methods, the parties opt to embrace, the appointment of an authority if desired, the governing law, the venue, and any necessary qualifications of the dispute resolvers. The directive by the Federal Government of Nigeria issued in circular No. SGF/90P/1/S.3/V 329 dated 10 March 2004, that all international and domestic contracts involving ministries, parastatals and extra-ministerial agencies must contain an arbitration clause, is commendable.

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