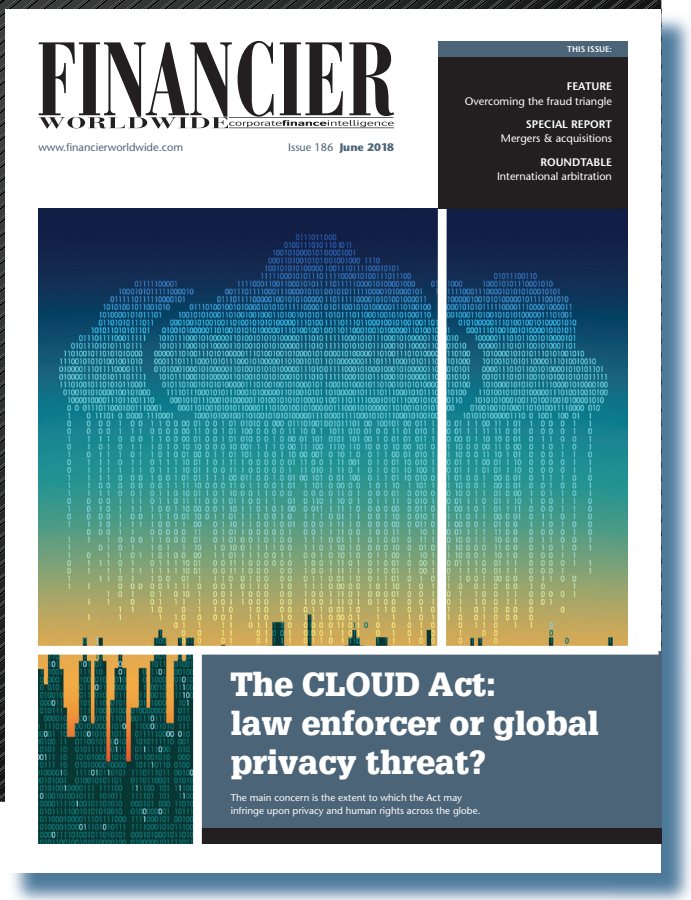
ROUNDTABLE

International arbitration



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ROUNDTABLE:

INTERNATIONAL ARBITRATION

International arbitration has been a hive of activity in recent times, with the number and value of disputes referred to arbitration continuing to grow. Concurrently, the arbitration community has observed a number of fresh trends and developments, including demands for greater transparency in how arbitration is administered, support for third-party funding across major arbitration jurisdictions and an uptick in arbitration involving sovereign states. An increasingly important tool for international businesses, arbitration, for many, is evolving into the preferred method for dispute resolution across the globe. ■

MODERATOR

Eric P. Tuchmann
General Counsel and Corporate Secretary, American Arbitration Association
T: +1 (212) 716 3937
E: tuchmanne@adr.org
www.adr.org

Eric P. Tuchmann is general counsel and corporate secretary of the American Arbitration Association. As the Association's chief legal officer, Mr Tuchmann is responsible for managing the legal affairs of the organisation, including litigation related matters involving the Association and its arbitrators, and drafting amicus curiae briefs submitted on behalf of the Association. Mr Tuchmann also analyses state and federal legislation impacting alternative dispute resolution, the unauthorised practice of law and attorneys' professional rules of responsibility.

THE PANELLISTS

Melis Acuner
Special Counsel, Cadwalader, Wickersham & Taft LLP
T: +44 (0)20 7170 8575
E: melis.acuner@cwt.com
www.cadwalader.com

Melis Acuner has more than 15 years of experience advising clients in high-profile cross-border disputes, complex cross-border proceedings, criminal and civil investigations and regulatory matters. She has experience defending government inquiries and conducting internal investigations related to anti-corruption, money laundering and fraud. Ms Acuner has acted for corporations, individuals and governments across a range of industry sectors including oil and gas, energy, telecommunications, consumer goods, media, construction, banking and finance, insurance and pharmaceuticals.

Serge Gravel
Partner, FLV & Associés
T: +33 (0)1 58 36 20 00
E: s.gravel@flv-associes.com
www.flv-associes.com

Serge Gravel, a member of the Paris and Québec Bars, is a partner with FLV & Associés in France. His areas of expertise include international arbitration, mergers & acquisitions and real estate transactions. In connection with international arbitration, he has acted since 1975 alternatively as counsel, arbitrator and legal expert for both commercial and investments disputes (BIT cases). He has also served as a member of the ICC International Court of Arbitration.

Damian Honey
Head of International Arbitration, HFW
T: +44 (0)20 7264 8354
E: damian.honey@hfw.com
www.hfw.com

Damian Honey joined HFW in 1997. Following a period working on secondment for the commodities legal team at Enron in 2000, he returned to HFW and has focused on a commodities practice in the energy and natural resources sector since then. He advises commodity traders, producers, financiers and insurers on all aspects of their business, including physical and financial sale and purchase, finance and transportation.

Elie Kleiman
Partner, Jones Day
T: +33 (0) 1 56 59 39 59
E: ekleiman@jonesday.com
www.jonesday.com

Elie Kleiman has more than 30 years of experience in international commercial arbitration and civil law disputes. He has intervened in disputes involving investment, trade, joint ventures, long-term contracts, representation and warranties, licensing, distribution and construction, particularly in the energy and natural resources, chemicals, life sciences, banking, infrastructure and transport, telecommunications, media and technology sectors.

Cameron Ford
Corporate Counsel, Rio Tinto
T: +65 6679 9187
E: cameron.ford@riotinto.com
www.riotinto.com

Cameron Ford is corporate counsel at Rio Tinto in Singapore and is currently undertaking a PhD in security for costs in international arbitration. Previously, he was a disputes resolution partner in a law firm and a barrister at the independent Bar in Australia, head of dispute resolution for four States at National Australia Bank and acting head of legal for Rio Tinto in Mongolia. He is on the arbitrator panels of the Singapore International Arbitration Centre, the Asian International Arbitration Centre and the Beijing Arbitration Commission.

Marco Tulio Venegas
Partner, Von Wobeser y Sierra
T: +52 (55) 5258 1034
E: mtvenegas@vwys.com.mx
www.vwys.com

Marco Tulio Venegas is a partner with 21 years of international experience, on both a professional and educational level. He is the youngest partner ever promoted by the firm. He has saved his clients billions of dollars and has protected and resolved several of the most complex and consequential litigation and arbitration matters for both multinational clients and governments around the world. His expertise includes two of the largest commercial arbitrations in Mexican history.

Tuchmann: In your opinion, what key trends and developments have dominated the international arbitration space over the past 12 months or so?

Gravel: The jurisdiction of arbitral tribunals is often challenged by litigants. Indeed, the validity of the arbitration agreement or its scope is frequently questioned. The jurisdiction issue may be raised either during, including at the very beginning, the arbitration proceedings or when the arbitration award is being challenged in court. Challenging jurisdiction is nothing new, but it seems to be increasingly resorted to in all types of arbitration proceedings, including investment disputes. Many interesting and complex problems may arise, including which law the arbitrators should apply, especially when one seeks to extend an arbitration clause to a non-signatory of the underlying business agreement. There is a general tendency to try and import common law techniques into the international arbitration process. There are pros and cons to this. It is submitted that one should be prudent, selective and respectful of the parties involved.

Kleiman: Investor-state dispute settlement (ISDS) by arbitration is still a subject of heated debate. Against that backdrop, enforcing arbitral awards against foreign sovereign assets in France has become more difficult for at least two reasons. First, the Paris Court of Appeal seems to take a tougher stance on the review of investment treaty awards. As a consequence, there has recently been a relatively high annulment rate in relation to investor-state arbitral awards. Second, in December 2016, a statute known as 'Loi Sapin II' came into effect providing that arbitral awards rendered against states can only be enforced with the prior authorisation of a judge and, save for very particular assets, an express waiver by the state of its immunity of enforcement is now required; diplomatic and consular assets require the waiver to be not only express but also specific.

Ford: Arbitral institutes continue to refine their processes to make them more attractive and to compete with court processes. We have seen institutes introduce rules and protocols for joinder of parties and proceedings, mediation combined with arbitration, emergency and summary procedures, and proposals permitting the cross-institution consolidation of arbitral proceedings subject to different institutional arbitration rules. The creation of international commercial courts such as the Singapore International Commercial Court (SIAC) has given impetus to arbitral institutes to refine their procedures as far as possible to remain attractive.

Venegas: There have been several recent trends impacting the practice of arbitration that will shape the way it is used and visualised in the future. First, there has been an increased demand to have much more transparency in the way arbitration is handled, not only at the investor-state level, but also in commercial arbitrations. This demand for transparency has led important international institutions, such as the International Chamber of Commerce (ICC), to start publishing the names of the arbitrators appointed in the ICC cases, as well as their role, nationality and so on. There has also been a push to disclose the reasons behind the appointment, as well as the confirmation, challenge or replacement of arbitrators. This trend has also impacted the London Court of International Arbitration (LCIA) and Stockholm Chamber of Commerce (SCC) in terms of disclosing information related to costs, duration and so on. There are, however, concerns about the disclosure of limited information in commercial arbitrations since it may distort the view or opinion that the parties or their representatives may have of a certain arbitrator or institution. Assessing the performance or success of arbitration or arbitrators based on limited information may be counterproductive and in the long run may produce more damage than benefits. For this reason, experts in the field should be very careful to put public information in context and complement it with their own experience.

Honey: The number and value of the disputes referred to arbitration continues to grow. In 2016, the ICC received its highest ever number of referrals. Within the arbitration community there is a growing acceptance that arbitral tribunals should have more robust case management powers, not least to ensure that one party cannot frustrate the progress of an arbitration. There has also been a focus on the consolidation of arbitral proceedings. At present, institutional rules do not allow for the consolidation of multiple proceedings governed by different institutional rules. The SIAC has proposed that this issue should be addressed in amendments to institutional rules, which, if implemented, would create cost savings and avoid inconsistent awards on similar, if not identical, issues. There has also been increased support for third-party funding in arbitration across the major arbitration jurisdictions.

Tuchmann: Have any recent arbitration cases gained your attention in particular? What can they tell us about the current international arbitration environment, and what impact could they have on future cases?

Kleiman: Several decisions rendered recently show that the Paris Court of Appeal is adopting a stricter and more interventionist stance on the review of investment treaty awards, especially when allegations as to the existence of corruption or money laundering are raised by a party. On 21 February 2017, the Paris Court of Appeal annulled an investment treaty award on the ground that its enforcement would violate French international public policy in a "manifest, effective, and concrete" manner. After having conducted an extensive review of the facts of the case, the Court found that "serious, specific and concurring clues" pointed to money laundering and denied enforcement on the rationale that enforcing the award would have allowed the award-creditor to pocket ill-gotten gains.

Ford: In the 2018 Singapore decision *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited*, justice Quentin Loh J resolved a long-

debated issue as to when a preliminary ruling on jurisdiction must be challenged in the supervisory court. His honour said that the application to the supervisory court must be made within 30 days of the preliminary ruling, otherwise the right to challenge is lost. He said both section 10 of the Singapore International Arbitration Act and article 16(3) of the Model Law clearly provide that if the arbitral tribunal rules that it has jurisdiction as a preliminary issue then any party may apply, within 30 days after having received notice of that ruling, to the supervisory court at the seat to determine the matter. While this interpretation was favoured by the text, the approach is a welcome one of not allowing parties to abuse the arbitral process by exploiting technicalities and delaying ultimate resolution.

Venegas: A recent setting-aside proceeding ruling by Mexico's Supreme Court of Justice set an important precedent for the interpretation of public policy in governmental contracts. The case involved a government utilities company and a private contractor, and involved, among other issues, the supply to be provided to a plant to produce electric energy. Due to the subject matter of the dispute and the implications in the supply of energy, the government utilities company alleged that the award involved decisions related to public policies which could not be subject to arbitration. The Supreme Court ruled that arbitral tribunals do have the power to rule on public contracts, even if they may have implications or ramifications that could extend to public policy objectives. This is a huge step forward in recognising arbitral awards in public contracts that will surely give certainty about arbitration to private investors in the Mexican energy sector in the coming years.

Acuner: The most recent ruling of the Court of Justice of the European Union (CJEU) in *Slovak Republic v Achmea* found that investor-state arbitration provisions in the Slovak Republic–Netherlands Bilateral Investment Treaty (BIT) are incompatible with EU law, and consequently invalid. On its face, the decision has significant repercussions for investor protection under other intra-EU BITs, and ongoing and future intra-EU BITs cases. The impact of *Achmea* on certain multilateral treaties including the Energy Charter Treaty is also unknown, prompting fear of a scenario where investors are without investment treaty protection within the EU – ironically, in sectors where the safeguarding of investments is critical, particularly sustainable energy. The obvious consequence of *Achmea* is to reduce confidence in EU member states – the local courts of which are bound to respect the decisions of the CJEU – as potential seats for arbitration. As the UK prepares to leave the EU, however, it remains to be seen whether London arbitration will benefit from *Achmea's* after effects.

Honey: Recent English commercial court cases illustrate how few commercial arbitration cases come before the courts and therefore into the public domain. Between 2015 and 2017, only one out of 112 section 68 applications were successful, and only five out of 162 section 69 applications were successful. These statistics show how difficult it is to appeal or challenge an English arbitration award. The statistics help to dispel the suggestion that you still sometimes hear that English Courts are interventionist. This does, of course, then lead to the counter point, which is that arbitration is stifling the development of English common law, but that is another topic. A recent case to mention is *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd*, in which the English courts rejected the challenge to the enforcement of a China International Economic and Trade Arbitration Commission (CIETAC) arbitration award, a case which illustrates the benefit of the New York Convention.

Gravel: In France, the fight against corruption is clearly a major priority, including in French courts. In a decision issued on 13 September 2017, the French Supreme Court refused to enforce an international arbitral award based on the grounds that its enforcement was contrary to international public policy rules because it would give effect to an agreement obtained through corruption. This may imply more generally that the recognition and enforcement of an international arbitral award may be denied by French courts if the result is that a party benefits from an act of corruption. The above decision is particularly interesting for many reasons. Firstly, the Supreme Court confirmed that it was not bound by a party's procedural behaviour in its analysis of the conformity of an award with

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>
> MARCO TULIO VENEGAS
> Von Wobeser y Sierra

international public policy. Secondly, this judicial decision shows that French courts have raised their standards of review when faced with allegations of effective and tangible breach of the French concept of international or transnational public policy.

Tuchmann: To what extent have the perceived benefits of arbitration changed – for better or worse – compared to, say, 10 or 15 years ago?

Ford: My perception is that many corporate counsel are becoming more sophisticated in their approach to dispute resolution and are looking sceptically at arbitration, or at least not accepting it unquestioningly. Arbitration is perceived by many as having strayed from its roots and now become slow, expensive and uncertain. About half of corporate counsel I deal with have experienced or heard horror stories and resist arbitration as the dispute resolution preference. Enforcement of arbitral awards is being considered less of a determinative factor than it once was in the choice of dispute resolution mechanism. Confidentiality of arbitral proceedings is recognised as having its limits, particularly with public corporations. Domestic commercial courts have refined their procedures to provide speedier results, including the possibility of default judgment and summary judgment. International commercial courts have developed with sterling reputations for integrity, speed and reliability.

Venegas: The reputation of arbitration being a quick proceeding has taken a hit, since the complexity of the disputes subjected to arbitration has necessarily led to an increase in the average duration of proceedings. On the other hand, the use of arbitration has increased due to its reputation as a trusted method for resolving complex disputes by experienced professionals in fields or areas in which the national courts are unable to properly assess cases, such as complex infrastructure, energy and oil, and complex corporate disputes. The cost of arbitration has also increased substantially, leading to amendments to institutional arbitration rules aimed to implement shorter and cheaper arbitrations when the circumstances of the cases allow them to do so. At the same time, the use of technology and strategies to reduce time and costs in arbitration have put it at the forefront of innovation for dispute resolution.

> IN OPTING FOR INSTITUTIONAL ARBITRATION, THE PARTIES ADOPT CLEAR AND TESTED PROCEDURAL RULES AND ACCEPT PLACING THEMSELVES UNDER THE SUPERVISION OF THE INSTITUTION DURING THE ARBITRAL PROCEEDINGS.
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> ELIE KLEIMAN
> Jones Day

Gravel: As a result of the emergence of new arbitration centres, competition is taking place between arbitration centres. In order to be more attractive, most of them renewed their rules between 2010 and 2013. They took into account recurrent issues faced by the parties and provided new rules in particular regarding third-party intervention, consolidation of proceedings and emergency proceedings. This evolution shows that the international arbitration community is perfectly able to adapt itself to meet the needs of international business.

Acuner: The popularity of arbitration has expanded over the last 10 to 15 years. With this expansion, the volume of cases and decisions has increased, which is positive and necessary for its future recognition and acknowledgment. The success of arbitration has not been without the incidence of difficulties however, which practitioners in the field of arbitration must tackle. To name a few, there is the extension of the length of time that arbitrations take, the intensification of the volume and rate at which correspondence and pleadings are proliferated, and the corresponding increasing complexity of cases from a document management perspective, including in terms of the legal and factual issues – hence, the importance of deploying integrated teams between the client and counsel to manage the process effectively, especially from a cost perspective.

Honey: The idea that arbitration is quicker and more efficient than litigation has been dispelled; in fact, arbitration is usually more expensive and takes longer to reach a first conclusion than an experienced commercial court. Persuading courts to give up jurisdiction over disputes in favour of arbitral proceedings has proved more difficult in some jurisdictions than was initially anticipated. This has hindered the development of arbitral institutions in many developing countries, such as OHADA law countries. Finally, the benefit of confidentiality for some users over time has been limited, particularly when the user is usually a claimant who wants the publicity benefit of an open court.

Kleiman: The most significant change in perception concerning international arbitration is related to ISDS. Over the past few years, ISDS has attracted widespread criticism from several pressure groups, which resulted in a backlash from

European governments and institutions against the traditional ISDS arbitration framework. In order to reach an agreement on the Canada-EU free trade agreement (CETA), at the European Parliament's request, the European Commission and Canada had to renegotiate the relevant provisions of the treaty to establish a new permanent investment court system, relinquishing the traditional arbitration framework that was initially contemplated. In the wake of the CETA's adoption, a similar investment court system has been included in the EU-Singapore investment protection agreement and in the agreement in principle concerning the EU-Mexico modernised global agreement.

Tuchmann: Given the complexities of international arbitration proceedings, in your opinion, could the processes and protocols involved be streamlined to further assist understanding and efficiency for the parties involved?

Venegas: The most important arbitral institutions such as the ICC, LCIA and SCC, among others, have been very active in creating specific task forces to establish guidelines and best practices for saving money and time in arbitration. This has led to guidelines and recommendations in construction arbitrations, in low-cost arbitrations, in the management of arbitrations and in discovery proceedings.

Honey: There should be greater transparency about the process through which institutions appoint arbitrators when called upon to do so. It might be helpful for institutions to consult with the parties before appointing arbitrators to ensure that their appointments are suitable. Disclosure has become a major source of expense in large commercial arbitration. Some institutions need to tighten up their rules to ensure that the scope of disclosure is proportionate and necessary. Tribunals should take a more robust approach to limiting the length of the parties' pleadings and witness statements to ensure that these documents focus only on the issues that are truly relevant to the dispute. Tribunals could learn from the courts in some jurisdictions where judges impose page limits on these documents. Some institutions are already taking steps to achieve this. For example, the March 2018, German Arbitration Institute (DIS) rules require the parties to submit case summaries at the case management stage which are intended to narrow the issues in dispute and allow the tribunal to impose limits on pleadings and facilitate settlement negotiations. The new DIS rules also impose stricter time limits for case management.

Acuner: In my experience, the general processes, guidelines and protocols under which international arbitration is conducted – for instance the LCIA Arbitration Rules or the International Bar Association (IBA) Rules on the Taking of Evidence – represent user-friendly and streamlined standards that provide both tribunals and parties with the tools to conduct an efficient, fair and effective arbitration. Problems typically arise where one or both parties seek to abuse the inherent flexibility and party-driven nature of the arbitral process under the guise of procedural fairness, raising the spectre of annulment on due process grounds once the award is rendered. Sound management of the procedural course, and maintaining a constructive dialogue between the parties, are ways of maintaining the process within proper bounds.

Kleiman: Several initiatives have been promoted recently, aimed at improving the efficiency of the arbitral process. Last year, the ICC revised its arbitration rules to include a fast-track procedure for small claims, which are defined as claims worth less than $2m. The ICC also announced that it will be instituting financial consequences against arbitrators where they are responsible for unjustified delays in submitted draft arbitration awards to the ICC Court. Investor-state arbitration is also aiming for greater efficiency. Accordingly, the International Centre for Settlement of Investor Disputes (ICSID) initiated an amendment process concerning its rules and regulations, having identified 16 areas of potential progress, from the appointment of arbitrators to third-party funding and the annulment of awards.

Gravel: It is always possible to streamline procedures but it will be done at the expense of an accurate study of the case. That is why I would advise choosing a simplified arbitration procedure only if the amounts at stake in the case are rather low. For example, in March 2017, the ICC introduced 'expedited procedure

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> DAMIAN HONEY
> HFW

provisions', which allow parties to resolve their claims under $2m in a speedy and cost-effective manner. The ICC may order that the case be decided by a sole arbitrator who will render a final award within six months. Moreover, the arbitrator can adopt any procedural measure that it considers necessary to guarantee the efficiency of the procedure. They are allowed to limit the length and scope of parties' written submissions or to refuse their requests for document production. The arbitrator may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, without holding any hearing or examining witnesses.

> MY EXPERIENCE IS THAT ARBITRAL INSTITUTES SMOOTH THE WHOLE PROCESS, PROVIDE A USEFUL BUFFER BETWEEN THE PARTIES AND CAN RESOLVE STICKING POINTS.
>
> CAMERON FORD
> Rio Tinto

Ford: One of the paradoxes is that as greater flexibility and utility is sought, rules become more complex and protocols proliferate. It seems to have been inevitable that, as arbitration grew over the decades, procedures and practices grew apace to deal with the myriad situations that arose. Some of those were borrowed from litigation and others were created for arbitration. Situations demand solutions, and it is unrealistic to expect every development to be dealt with simplistically given the amounts at stake and the parties and lawyers involved. It cannot be expected that processes and protocols would be streamlined much further given the amounts involved in many arbitrations. Parties and their lawyers would not accept oversimplification to the point they did not feel they had a fair hearing and an understandable result.

Tuchmann: What advice would you give to parties in terms of whether or not to have their arbitration administered by an institution? If this path is taken, what factors should they consider when choosing an institution?

Kleiman: I would advise parties to place their arbitration within the framework of an arbitral institution. In opting for institutional arbitration, the parties adopt clear and tested procedural rules and accept placing themselves under the supervision of the institution during the arbitral proceedings. Such supervision can bring important benefits at certain critical phases of the arbitration. At the outset of the proceedings, the institution usually facilitates the constitution of the arbitral tribunal and, at a later stage, may assist the parties with respect to potential challenges against arbitrators. In choosing an arbitral institution, depending on their particular needs, the parties may consider the global or regional notoriety of the institution, the scope of the services rendered, the existence of emergency arbitration, the existence of a fast-track procedure for small claims, institutional fees and costs and sectoral expertise.

Gravel: An arbitration administered by a reputable institution is a guarantee of security on many issues. In the event of disagreement, in particular at the stage of appointment of the arbitrators, the framework of an institution provides solutions to resolve any deadlock, such as appointment of arbitrator, request for removal and management of provisions on fees, among others. Furthermore, the risk of paralysis of an *ad hoc* procedure that is poorly or insufficiently supervised may ultimately affect parties. Moreover, at the stage of its execution or possible challenge, an award made under the supervision of or in the context of an arbitration institution is considered more 'secure' because an institution would have carried out a minimal control of an award, limiting, in principle, the risks of recourse to cancellation.

Ford: My experience is that arbitral institutes smooth the whole process, provide a useful buffer between the parties and can resolve sticking points that can prevent parties even appointing a tribunal and getting to a hearing. The independence of the institute is helpful in rising above any antagonism between the parties, and their familiarity with their own rules assists in clarifying differing interpretations and applying the procedure. Even the apparently simplest of disputes can throw up issues of procedure. It is very helpful both to the tribunal and parties to have an independent body available that is not only familiar with its own rules, but with the overall arbitral process and has decades of experience to draw from. Institutes are also valuable at the enforcement stage when awards have been checked carefully before being made; courts are more ready to recognise awards from institutes with a reputation for administering proceedings reliably and thoroughly.

Honey: If a key concern is enforceability, then a well-known institution should be selected, as it will provide credibility to an award which an *ad hoc* arbitration does

not have. If the parties are concerned about the arbitrators who might be selected by their counterparty in any dispute, then institutional arbitration is appropriate, as the institution will make the selection of the arbitrator, and also provide for rules about how to resolve a challenge that is made to any appointed arbitrator. However, if cost, delay and rigidity in procedure are a concern, or if there is a desire for a less legalistic approach to arbitration, then *ad hoc* arbitration is to be preferred to institutional arbitration, as it provides for greater flexibility as to how the arbitration is to be conducted.

Acuner: Institutions can be very helpful at managing the arbitral process, in particular in circumstances where one of the parties may not be cooperating or participating fully in the proceedings. Some institutions can also help speed up the production of an arbitration award for the parties. As to the choice of institution, there are many factors at play, including the type and overall value of dispute likely to arise, the choice of applicable law, and where geographically the commercial interests of the parties are centred. The parties may also be guided by the relative weight they afford to certain facets of arbitration procedure, for example confidentiality, procedures for expedited arbitration or the emergency appointment of arbitrators, and the power of the tribunal to issue provisional measures or interim relief. Depending on each of these considerations, a different matrix will arise for each contractual arrangement, and a suitable institution can be selected accordingly.

Venegas: We would recommend using administered arbitration over *ad hoc* arbitration. In a worst-case scenario, it is always better to have an established institution at the beginning of the arbitration help in the constitution of the arbitral tribunal and monitor the first steps of the arbitration proceeding. When choosing an arbitral institution, the parties must consider, among other factors, the applicable substantive law, the amount and relevance of the contract to identify the potential amount in dispute, the place or places in which the obligations of the contracts will be performed and the language of the arbitration. Depending on the combination of these factors, a national or international institution may be the best alternative for a certain dispute. Once this alternative is defined, then the second step would be to verify the experience of the institution in handling arbitrations in the country or region, as well as the amount of administrative fees and expenses. The best fit would obviously depend on the best mixture of experience and costs.

Tuchmann: What steps can be taken to harmonise the views of parties to an arbitration from jurisdictions with little synergy? How might parties go about overcoming potential cultural difficulties, for example?

Honey: This is a challenge for arbitration as a format for dispute resolution. There are a number of solutions. A tribunal comprised of arbitrators from different jurisdictions could be appointed, so that all parties feel that all arbitrators are neutral. A more controversial approach would be that where an arbitral tribunal consists of party-appointed arbitrators and a chairman, the parties may agree to allow the party-appointed arbitrators to perform a special role in assisting the party that appointed them to understand its obligations under the arbitration procedure and properly present its case. Language can often be a significant cultural barrier, so careful thought should be given to the language of the arbitration proceedings. Finally, and importantly, a neutral seat for the arbitration should be chosen where both parties will feel comfortable.

Acuner: At the outset of a dispute, an opportunity should be embedded in the process for the parties to agree on the procedural rules of the game, to minimise the opportunities for delay tactics, and to avoid mismatched expectations and understandings. The parties, for instance, might seek to come to a landing on the rules for disclosure, expectations regarding which can differ greatly among common law and civil law jurisdictions.

Ford: It is in the nature of international arbitration for parties to be from jurisdictions with little synergy that are culturally different. Arbitration is chosen internationally primarily because the parties are not comfortable with each other's courts and for the perceived ability to enforce. Inherent in these issues are differences between jurisdictions, which usually means a difference in culture. My

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> SERGE GRAVEL
> FLV & Associés

reason for emphasising this point is that these differences should be nothing new. They are almost the very reason arbitration was developed and remains popular with some. Responsibility lies squarely with institutes which promote and benefit from arbitration, and with arbitration practitioners. Institutes must ensure their rules, processes, staff and outlook have a diverse and inclusive attitude to legal systems and to cultures. They need to look to all legal systems and adopt the most appropriate procedures from each, ensuring that the practitioners from those systems are and feel included.

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> MELIS ACUNER
> Cadwalader, Wickersham & Taft LLP

Gravel: By definition, international arbitration proceedings involve parties with diverse backgrounds, notably in terms of language, legal system and business usage. Any arbitration proceedings involving French parties or proceedings conducted in France are likely to raise issues relating to procedural rules, discovery, compulsory document production, rules on the taking of evidence, or on the burden of proof. The French legal system, in those respects, is quite different from the common law system, and it is highly advisable that such differences be addressed and resolved early in the process. The well-known IBA rules on the taking of evidence in international arbitration may sometimes prove useful to reconcile the civil law and common law expectations and traditions. In French courts, evidence is usually adduced by each party through document production, including written statements – the equivalent of affidavits.

Venegas: There are no secret or instant remedies to harmonise the views of parties in arbitrations from different jurisdictions. In fact, it is not necessarily a negative for cultural differences to arise in arbitration. It has become a successful method of resolving disputes worldwide precisely because of its adaptability to different legal frameworks. The slow but steady creation of an international jurisprudence has been the result of the rich amalgam of different legal systems. The only potentially negative scenario which could arise could see an inexperienced party, from a country in which arbitration is not commonly used, attempt to sabotage the proceeding. In this scenario, however, the best remedy is that the arbitral tribunal takes a very active role in preserving the integrity of the arbitration, while at the same time, and without breaching due process and impartiality, 'educates' the inexperienced party and demonstrates the benefits of a clean proceeding.

Kleiman: International arbitration is specifically designed to satisfy parties in different jurisdictions and which come from different legal cultures. In particular, the possibility of jointly determining procedural rules, together with the arbitral tribunal, is very useful when it comes to satisfying particular concerns that the parties or their counsel may have. In order to overcome potential cultural difficulties with respect to the procedure, it has become standard practice for the parties to opt for the rules of a global institution and to rely on the soft-law promoted by the IBA, such as the guidelines on conflicts of interest in international arbitration, the guidelines on party representation in international arbitration, and the rules on the taking of evidence in international arbitration.

Tuchmann: With the rising cost of arbitration an ongoing concern, what can parties do to manage expenditures while still maximising the quality of the process?

Acuner: There are a number of strategies that parties can adopt to reduce the costs burden. One such strategy is to maintain a strict focus on the true issues in dispute between the parties. Another is to use small, focused teams. Close management of what evidence – in particular expert evidence – is deemed strictly necessary, and avoiding pleading or putting in evidence on issues that are not relevant or material to the dispute is particularly important. Well-considered expedition of the timetable, or the bifurcation of issues, can also be helpful in circumstances where the dispute is amenable to this.

Ford: Parties need to be actively involved in managing their external lawyers and not to abrogate their role as owners of the proceedings. Too often parties complain of time and cost running away from them but they do not have anyone controlling the arbitration. Large disputes should be run as a corporation would run an investment project, for that is what it is. The project, like any project, should be divorced from emotion and guided by clear investment-like guidelines of cost, return on investment, measurement of success and so on. There should be a project team who are separate from those involved in the dispute

to ensure objectivity and adherence to the project guidelines. This team should have a disputes lawyer who is able to instruct external lawyers meaningfully, understand their suggestions and interpret their advice to management. Smaller disputes can have smaller project management teams, with at least a lawyer familiar with disputes who can be the knowledgeable interface between the business and counsel.

Gravel: Resorting to common law techniques can be a major source of unanticipated costs for parties unused to such techniques. The arbitration process is in and of itself an expensive exercise, so parties should be careful not to increase unduly those costs by accepting techniques with which they are not familiar, and which in any event will put them at a disadvantage vis-à-vis common law parties.

Venegas: The best strategy is to avoid losing focus on accidental or irrelevant substantive or procedural issues. In addition, cooperation with the other party and the arbitral tribunal to have a very streamlined process is the best way to save costs and maximise the benefits of arbitration.

Kleiman: Since arbitration is inherently flexible and the parties can adopt bespoke procedural rules, excessive costs can be avoided. The parties and the tribunal must therefore make early decisions on procedural issues. For instance, they can agree to limit the number of written submissions exchanged by agreeing not to submit post-hearing briefs, limit the number of expert or fact witnesses involved, provide for a monolingual arbitration or reduce the scope of the document production phase. The parties may seek guidance from the ICC guide on effective management of arbitration and in the ICC report on techniques for controlling time and costs in arbitration, which provides for useful case management techniques.

Honey: The most common complaint from users of arbitration is about cost. There are four ways in which cost, at least in commercial arbitration, can be managed. First, ensure that there is limited scope for delay by ensuring that the appointed arbitrators will be able to hold a hearing within nine months of the start of the arbitration, as delay can be the main contributor to an increase in costs. Second, be aware of the different cost structures of arbitration institutions compared with *ad hoc* arbitration, and make an informed choice as to what form of arbitration is most appropriate for the contract at the time of contracting. Third, where possible, agree with the arbitrators to limit the amount of disclosure. Finally, agree with the arbitrators on only expert evidence that is essential for the resolution of the dispute.

Tuchmann: Although known as binding and enforceable, how robust is arbitral award enforcement in practice, especially when pertaining to enforcement in a jurisdiction different from the venue of the arbitration?

Gravel: In France, there is a general framework designed to facilitate and encourage, to the greatest extent possible, arbitration proceedings conducted in France. These rules – embodied in the French Code of Civil Procedure – have been revised, refined and modernised over the years on a regular basis. The last reform was enacted in 2011. French courts have been favourable to, and protective of, arbitration in international business. Contrary to other national courts, French courts have always been reluctant to interfere with arbitration proceedings, or to act as a quasi-appeal jurisdiction reviewing the merits of arbitral awards. There are five reasons why French jurisdictions may not enforce an arbitral award. First, the arbitral tribunal's jurisdiction was wrongly upheld or declined. Second, the arbitral tribunal was not properly constituted. Third, the arbitral tribunal ruled without complying with the mandate conferred upon it. Fourth, due process was violated. Finally, recognition or enforcement of the award is contrary to international public policy rules. But of course there are countries where courts may be less friendly vis-à-vis international arbitration awards rendered abroad.

Kleiman: The New York Convention of 10 June 1958 makes enforcing arbitral awards very effective worldwide. Pursuant to Article III of the convention, Member States must recognise arbitral awards rendered in other contracting states and they may only refuse to enforce such awards on very limited grounds, such as invalidity of the arbitration agreement, breach of due process, ultra *petita* ruling by the tribunal, improper constitution of the tribunal, suspension or annulment of the award at the seat, inarbitrability of the dispute, according to the law of the country of enforcement, or infringement of its public policy. These limited grounds and the absence of substantive review of the awards greatly contribute to the success of international arbitration worldwide.

Venegas: Generally, the international system designed by the New York Convention and the UNCITRAL Model Law has worked very well in ensuring the enforcement of international arbitration awards. Of course, as in any other type of dispute resolution proceeding, it is always important to conduct due diligence on the countries in which the award may be potentially enforced. This should include a complete understanding of the way the local courts have enforced awards in the past to understand the risks and costs. A local attorney should always be involved in this due diligence.

Acuner: Whether or not an arbitration award is enforcement-proof will depend in large part on the nature and identity of the counterparty and the jurisdiction where enforcement will take place. This includes how supportive and arbitration friendly that jurisdiction is, taking account of its national arbitration law, policy and the stance of the local courts vis-à-vis international arbitration. A careful strategy ought to be crafted by the client and its legal team based on these factors.

Honey: Theoretically, an arbitral award should be directly enforceable in any Member State that is a signatory to the New York Convention. However, the reality can, in some countries, be somewhat different. Issues which crop up include the need to obtain multiple original copies of the award, which may then need to be notarised, legalised and apostilled, or delay being encountered in the enforcement of any award by the continued adjournment of hearings. However, my experience is that the situation is improving, and with perseverance it is possible to enforce arbitration awards in most parts of the world.

Ford: Enforcement of arbitral awards is one of the main selling points of arbitration, with the perception being that nothing yet comes close to the New York Convention to enforce court judgments. The Hague Convention on Choice of Court Agreements will assist when adopted by more countries but for the time being it is in its infancy. For now, the mere uttering of the incantation 'enforceability' tends to quell any rebellious stirrings of interest in litigation. Yet those who have attempted to enforce awards, particularly in developing countries, know that the promises of the New York Convention can be illusory. This is particularly so if enforcement is broken down into its three constituent elements of recognition, execution and recovery. Even where courts readily recognise awards, patchy execution by local authorities can render the exercise pointless.

Tuchmann: What challenges and issues exist for parties undertaking arbitration in developing regions and institutions?

Venegas: The main challenges relate to the attitude assumed by the judiciary. Normally, in countries in which arbitration is relatively new, there are a lot of divergent criteria from the courts as to the way arbitration should be implemented and awards recognised and enforced.

Gravel: One of the challenges that lies ahead will be to ensure consistency among the various organisations in the management of international cases. Clearly, the world of arbitration has reached a certain maturity, and well-known and reputable institutions, such as the LCIA and the ICC International Court of Arbitration, have set quality standards that are likely to have a lasting impact. One should observe that competition among arbitration institutions for low-cost proceedings may ultimately generate problems of quality. Parties should be suspicious of institutions offering cheap arrangements for the administration of cases. The main source of cost in arbitration proceedings is the process itself, which is where savings may be achieved, including discovery, document production, testimonies, examination, cross-examination, taking of evidence and translations. While the fees charged by arbitration institutions to administer cases are predictable and their financial impact is usually manageable, this is clearly not where substantial savings may be achieved.

Honey: The primary challenge is a lack of appropriately qualified or independent arbitrators, as well as limited numbers of private practice lawyers experienced in arbitration. Courts may not be willing to acknowledge the jurisdiction of the arbitral tribunal or enforce its awards. This is particularly the case in states where there is a strong constitutional right for a citizen to have a dispute resolved in the courts. This has been a particular problem for arbitration in OHADA law jurisdictions. The arbitrators may be less confident about taking an active role in case management, which leads to delays.

Ford: I tend to think that there will not be too many new arbitral institutes being established, with the current ones pretty well covering the field. Some in developing countries might see opportunities to have a home-grown institute and this might work well for domestic arbitrations. Arbitration in developing regions and institutions raises issues of local lawyers having expertise in arbitration and international commercial law, the institutions having sufficient experience in administering arbitrations and understanding the needs of the international business community for increasing speed and reducing costs. There is also the question of courts in developing countries being the seat of the arbitration if they have not had a great deal of exposure to the Model Law and arbitration issues.

Acuner: While it is exciting and encouraging that we have begun to see a shake-up in the number and spread of arbitral institutions beyond the established seats – there are inevitably teething and cultural issues to be ironed out during an institution's first few cases. The main challenge for parties is the loss of predictability and reliability of the institution's processes while in its infancy. The local region or jurisdiction's attitude toward international arbitration will also play an important role in this regard. As the institution gradually matures, so will its understanding and acceptance of international arbitration norms and standards, and with this the quality of its process can be expected to improve.

Kleiman: The past few years have confirmed the continued growth in the number and spread of arbitration centres, which had started over the last few decades. Asia, in particular, has become increasingly popular with arbitration users. Demonstrating such success, the ICC opened a new case management office in Singapore this year and new arbitration centres have also emerged as credible in this area, such as the Hong Kong International Arbitration Centre (HKIAC), the SIAC and the Dubai International Arbitration Centre (DIAC). A number of other promising centres have also recently opened, such as the Russian Arbitration Association in 2013, which uses UNCITRAL rules, the Casablanca International Mediation & Arbitration Centre, which opened in 2014 and the OHADAC Caribbean Centre for Arbitration and Conciliation, which opened in 2015. Potential challenges for the parties undertaking arbitration in developing markets may be related to local regulations governing the activities of these arbitration centres and their capacity to deal with high scale disputes.

Tuchmann: Would you say companies are now more inclined to include international arbitration provisions in their commercial agreements? What factors should they consider when doing so?

Honey: Companies are now more inclined to include arbitration provisions, although the position should not be taken for granted, and in my experience there is an increasing frustration with the cost and expense of arbitration, with the consequence that some companies are now not including international arbitration agreements in their commercial agreements. Key issues to consider are ensuring that the parties can appoint their own arbitrators, and the seat and language of the arbitration. Other factors could include a requirement that the parties engage in mediation at a certain point of time in the dispute, limited disclosure, time limit on the arbitrators to produce the award, limits on the rounds of submissions, the size of witness statements and expert reports, no tribunal secretaries and the exclusion of the right of any appeal.

Acuner: Arbitration clauses in commercial agreements are still widely used. In my experience, parties still appear to value the control over the process that arbitration affords relative to litigation, including on issues of confidentiality and the power to appoint technically experienced arbitrators of their own choice, while at the same time benefitting from an independent and neutral decision-making process which ultimately results in an effective arbitration award. The decision to include a reference to arbitration provision is often informed by the nature of any potential disputes that may arise between the parties, whether there would be a need for industry-specialised judges, the location of the parties and their respective commercial interests, the sorts of remedies that may need to be sought, and any need for confidentiality.

Ford: There is a perceptible movement among a solid segment of transactional corporate counsel to remove arbitration clauses from agreements. This is partly due to some having experienced or heard horror stories about arbitrations gone awry or awards taking years to enforce, or ultimately not being able to enforce. Enforcement is not seen as the great determiner it once was when it drove parties automatically to arbitration. At the same time, domestic and international commercial courts have developed or improved their processes so that they can be quicker and cheaper than arbitration.

Kleiman: It is undeniable that arbitration has now become the standard mechanism for the resolution of international commercial disputes. International commercial arbitration, as opposed to court litigation, provides its users with a confidential means of resolving their disputes, according to a bespoke procedure, including on evidentiary matters and in a neutral forum, avoiding the potential bias of their counterparty's domestic courts. In addition, by virtue of the New York Convention of 1958, arbitral awards are, in most cases, more easily enforceable abroad than domestic judgements. When choosing to refer their disputes to arbitration, the parties must carefully choose the seat of their arbitration proceedings. Indeed, the law of the seat will constitute the default applicable procedural law and will also provide the available recourses against the award.

Gravel: Experience shows that the inclusion of an arbitration clause may contribute to gaining time when litigation emerges in a contractual relationship, in particular because the jurisdiction of an arbitral tribunal cannot be easily challenged. To that end, it is vital that arbitration clauses be as simple and straightforward as possible. Parties should shy away from complex clauses which try to anticipate the details of future arbitration proceedings. Arbitration rules promulgated by the prominent arbitration organisations provide all of the requisite rules for the efficient conduct of arbitration proceedings. An arbitration clause inserted in a business agreement should set out the following in simple terms. First, the parties' decision to settle a dispute through arbitration, with no appeal allowed. Second, the choice of applicable arbitration rules. Third, the number of arbitrators to be appointed. Fourth, the law applicable to the dispute and the agreement. Fifth, the language of the arbitration, which may or may not be different from the language of the agreement. And finally, the place where the arbitration is to be conducted. Nothing more is needed.

Venegas: Cross-border or multinational businesses are usually more inclined to include arbitration clauses in their agreements. However, the use of arbitration between local or national companies depends greatly on the size and complexity of the operation, as well the recommendation of their attorneys. The main factors that should be considered when agreeing to arbitration are the subject matter of the underlying contract, the amounts of the potential dispute, the guarantees in place in the event of breach, and a fair assessment of the pros and cons of the arbitration with regard to judicial proceedings.

Tuchmann: Looking ahead, how do you envisage the international arbitration landscape developing over the coming months and years? What trends are on the horizon?

Ford: Institutes will continue to introduce new rules and procedures. They will attempt to capitalise on the Chinese 'One Belt, One Road' initiative. I hope governments and courts will closely examine their attitude to enforcement of foreign awards and improve their processes. Governments need to understand the real effect that unenforceability of awards and judgments has on their economy. Less business is done, lower profits are made and the transactional costs of business are higher where there are questions over enforceability of awards. The Asian Business Law Institute in Singapore was established to aid in harmonising business laws in Asia, with enforcement of judgments and awards being the first topic examined. One hopes that this indicates

a trend to focus on harmonisation of enforcement regimes in the Asian region.

Kleiman: Looking ahead, the most important changes in the international arbitration landscape will relate to arbitration involving sovereign states. Following the trend initiated with the adoption of CETA, and more recently the EU-Singapore investment protection agreement and the agreement in principle concerning the EU-Mexico modernised global agreement, I think that the EU will systematically promote permanent investment court systems in its future investment protection treaties and free-trade agreements with non-European countries. These investment courts will contrast radically with investor-state arbitral tribunals: they are inherently public, the judges will be appointed by the states only, and there will be a possibility of appeal. I think, therefore, that a new investment protection and dispute resolution regime is about to emerge and developments should be followed closely.

Gravel: It is difficult to anticipate whether or not new international arbitration venues will continue to emerge in the coming years. But there clearly exists a trend in this regard, which shows that international arbitration is increasingly important for international business.

Acuner: The international arbitration landscape is evolving to be more diverse and inclusive, including the identity of the arbitrators themselves. We can expect the introduction of more measures aimed at overcoming barriers to new entrants in this regard, and – also accompanying the increased prevalence of third-party funders – the further development of tools or databases for the screening of arbitrators based on suitability, technical expertise and qualifications.

Venegas: The expansion of arbitration was tied to the increased globalisation resulting from free trade agreements and the liberalisation of national economies. This process, however, is facing several challenges as the largest economies in the world have started to pursue protectionist strategies. In this context, arbitration is being questioned, not only in the investment-arbitration system, but also in the traditional commercial landscape. Arbitration and all the global professionals supporting it are up to the challenge. We believe that arbitration will evolve into the preferred dispute resolution method by diversifying its modalities and increasing its benefits through the implementation of best practice and nurturing technological innovation, such as artificial intelligence, e-discovery and so on.

Honey: The 'One Belt, One Road' initiative is set to lead to China spending around a trillion dollars on projects in 71 jurisdictions. China has set up its own 'OBOR courts' for resolving disputes that arise out of these projects, but it seems probable that many counterparties will prefer to resolve disputes in neutral jurisdictions and it seems likely that a substantial number of disputes will end up being resolved through commercial arbitration. There is likely to be enhanced case management powers for tribunals, in particular enhanced ability summarily to dispose of weak arguments. I also foresee greater use of third-party funding in arbitrations, as more jurisdictions accept it as a method to finance the costs of resolving a dispute. As national courts become more familiar with arbitrations and more supportive, I anticipate that more courts will be willing to grant stays where proceedings are commenced in breach of arbitration agreements. Increased competitiveness is also likely to continue between the major arbitration jurisdictions, in particular London, Hong Kong and Singapore. ■