The Global Counsel
Top 10

Arbitration specialists

This month our series on lawyers regarded as leaders in their field focuses on experts in international arbitration. Lina LARAKI speaks to them about preferred arbitration institutions and what they consider to be the most significant recent developments in practice.

When asked to consider which arbitration body they prefer using, the majority of the Global Counsel Top 10 Arbitration experts recommend the Paris-based ICC (International Chamber of Commerce) and the LCIA (London Court of International Arbitration).

Pierre Karrer praises the ICC for achieving its main goal, which is to "produce enforceable awards of a consistently high quality at acceptable costs." Unlike the Washington-based ICSID (International Centre for the Settlement of Investment Disputes) and the LCIA, which both have the advantage of operating on a "pay as you arbitrate basis" (deposits are requested from the parties in instalments as the proceedings progress), the ICC requires deposits upfront. Nonetheless Charles Brower insists on its advantages as the "granddaddy" institution in international arbitration, and believes that "the scrutiny of awards it performs and its reputation acquired around the world over nearly 80 years encourage compliance and, where necessary, successful enforcement." Gary Born focuses on the secretariat's administrative support and the fact that the ICC is further along than most others in terms of internationalising its staff. Others insist on its consistent practice of appointing arbitrators of neutral nationality vis-à-vis the parties.

Other consistently recommended institutions are the ICSID, for its "capable and efficient staff", the Stockholm Institute for its case-work, the AAA (American Arbitration Association) and the Zurich Chamber of Commerce. The HKIAC (Hong Kong Institute of Arbitrators), the Vienna Arbitral Center and the DIS in Germany were also mentioned. Johnny Veeder usually prefers ad hoc arbitrations (i.e. arbitrations without any institutional framework) under the UNCITRAL Arbitration Rules, with the PCA (Permanent Court of Arbitration) as appointing authority, while Jan Paulsson warns against the use of ad hoc arbitration, suggesting that "contract drafters should stay away from it unless they are very well advised".
Richard Kreindler lists four criteria to distinguish one arbitral institution from another:

- The organisational and co-ordinating strengths, particularly at the early stage of a dispute.
- The advances on costs and other fees.
- The procedural savvy and efficiency of the supervisory body in monitoring the composition of the tribunal.
- The transparency of its decision-making in selecting arbitrators in the absence of party agreements.

He adds, however, that "sometimes the institution or rules are less important than the goodwill and degree of knowledge of the counsel", and that "the difference in time, cost and result may be more dependent on the cooperation between the parties and their counsel" than on the nature of the dispute.

**Significant trends**

Almost everyone agrees that the most significant development in the area of international arbitration is the continuing trend towards investment claims based on the application of BITs (bilateral investment treaties) and regional treaties (such as NAFTA) resulting in an increased use of the ICSID. The automatic application of these treaties to initiate arbitral proceedings against a party that has not signed an arbitration agreement offers a powerful tool to private investors, allowing them to challenge a state directly and to bring into question its national legislation. This possibility, combined with the large number of existing BITs, represents a major overhaul of global arbitra-
tion and is expected to raise significant legal issues related to the inclusion of international law in domestic legal systems.

According to Paulsson, if properly applied, these investor claims "may be a great contribution to international law, but if mishandled they could also create an unfortunate backlash." For many states, foreign investment is a primary driver behind an increased interest and adoption of the ICSID treaty.

Another current trend is towards the increasing recourse to packaged procedural rules and arbitration clauses offered by institutions such as the ICC and AAA, and GCC. Similarly, the reformation of national arbitration rules to simplify procedures and broaden their user appeal, and the adoption by many states of the 1985 UNCITRAL Model Law in their domestic systems is leading to the harmonisation of international standards.

The interplay between arbitral tribunals and national judicial systems is also noteworthy. Although most national courts refrain from interfering in the arbitral process and with arbitral decisions, in practice difficulties remain, particularly where there is a parallel dispute on the same matter and when domestic courts apply the concept of public policy to oppose enforcement.

Emmanuel Gaillard sees the ICC pre-arbitral referee procedure (for interim and conservatory measures) as a most promising development. Although it was adopted in 1990, the procedure was only very recently applied for the first time, and proved to be "very satisfactory not only for its speed, but also for the sophisticated manner in which the disputed issues are provisionally decided".

In which areas and industries is arbitration mostly used? The traditional sectors are insurance, construction, infrastructure, energy and maritime law, as well as, though to a lesser extent, sporting disputes and claims involving military technology. Investment disputes, environmental and shareholders arbitrations are developing, the latter following the parallel trend in the area of litigation. The most compelling evolution highlighted by a number of practitioners is the fact that pure public international law rules are now tested in a commercial environment, with, for example, purely financial banking type instruments now also having arbitration clauses. Marc Blessing observes that privatisations in Western and Eastern Europe generate competition and market entrance disputes, especially in the areas of telecoms and pharmaceuticals.

Litigation or arbitration?
On the often-held perception that arbitration is usually faster and cheaper than traditional litigation, the lawyers featured in the Global Counsel Top 10 have differing opinions.

Veeder believes that litigation is probably quicker and cheaper in many countries, including the UK. Born, Yves Fortier, Gaillard and Albert Jan Van den Berg take

Emmanuel Gaillard
Shearman & Sterling
International arbitration specialist, sitting mainly as counsel in large oil and gas, construction, post-M&A and environmental disputes.
Most highly regarded counsel: Jan Paulsson
Most highly regarded arbitrator: Bernard Hanotiau

Pierre A Karrer
Pestalozzi Lachenal
A leading international commercial arbitrator. President of the Swiss Arbitration Association.
Most highly regarded counsel: Jan Paulsson
Most highly regarded arbitrator: Claude Reymond

Richard Kreindler
Shearman & Sterling
Excellent reputation, with extensive experience in commercial, construction and infrastructure arbitration before leading international arbitral institutions. Also involved in ad hoc arbitrations.
Most highly regarded counsel/arbitrator: Jan Paulsson, John Beechey, Donald Donovan and Peter Heckel
the view that a dispute is likely to be dealt with faster and cheaper in arbitration than in proceedings in a national court, partly because it is not possible to appeal arbitral awards.

Others consider that time saving, which is one of the most advantageous features of arbitration, is undermined by the parties' efforts to have the award set aside and that arbitral proceedings therefore often concentrate more on the question of competent jurisdiction or other formal aspects than on the merits. Many comment that the perception of arbitration as faster has changed following court reforms in various jurisdictions, significantly reducing delays by the innovative use of technology in courts. Similarly, the "cult of arbitrators" that has arisen results in the leading names being extremely busy, which may not fit with the tight schedules commonly associated with arbitral proceedings.

Kreindler explains that the option in certain countries to charge out time by the hour or to charge on the basis of a statutory fee schedule as a function of the amount named in dispute may dramatically affect the comparison. He also thinks that "time and expense will depend on the conduct of the parties and their lawyers and the conscientiousness of the arbitral tribunal."

Blessing agrees: "the arbitral tribunal can exercise a strong influence by an efficient structuring of the procedure and by taking a pro-active role." He adds that abandoning the system of isolated witness examinations in favour of entirely novel techniques with all the witnesses or experts testifying on a particular matter being present and being examined in open debates, effectively moderated by the chairman of the tribunal, allows the hearings to be much more instructive and efficient, and has proved to be extremely satisfactory for all concerned.

Karrer observes that "it would be misleading to disregard the party representation costs and the internal costs of a party which both far outweigh arbitration costs proper", and that "one must look at the entire process, from the outbreak of a dispute to the enforcement of an award, not just the proceedings before one particular forum."

The majority of the Top 10 considered that there is no real debate: the main incentive to opt for arbitration is neither speed nor cost, but the fact that arbitration is an efficient way of resolving cross-border disputes. "Apart from London and New York," explains Veeder, "there are too few national courts as accommodating to foreigners as international commercial arbitration in a neutral forum". In such cases, he adds "arbitration is the only game in town."

Arbitral awards enjoy much greater recognition worldwide than judgements of national courts, and the New York and ICSID Conventions consider awards as binding and enforceable as final judgements of a domestic court. The fact that parties can appoint an arbitrator with technical expertise and avoid the inadequacies of
local legal systems by choosing the most friendly and adequate forum make arbitration more adapted to the business community. In addition, the outcome of arbitration is more predictable in countries where the court system is not transparent and gives more consideration to the economic interests of respective parties. Arbitration is also a way to depoliticise disputes, especially for those involving a state and investors protection. Finally, many are of the opinion that as a result of the fact that arbitration requires a dialogue between the parties, every second dispute is settled before the award is rendered.

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