

GLOBAL REFERENCE GUIDE



# litigation & dispute resolution

with global advisor directory

**FINANCIER**  
WORLDWIDE corporate finance intelligence

**2012**

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GLOBAL REFERENCE GUIDE

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**litigation & dispute resolution  
2012**

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First edition

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**Global Reference Guide**  
**Litigation & Dispute Resolution 2012**

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## NORTH AMERICA

**When worlds collide – the impact of a Chapter 11 bankruptcy on the receivership estate**

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*by Hamid Rafatjoo, Keith Owens and Jennifer Nassiri | Venable LLP*

WHEN FACED WITH a court-appointed receiver, borrowers often seek protection under Chapter 11 of the US Bankruptcy Code to displace the receiver and regain control over their property and business affairs. Because the appointment of a receiver is an extraordinary remedy, the secured creditor has a heavy burden of demonstrating that the property securing the underlying obligation is in danger of being lost, removed, materially injured, or is at risk of a material diminution in value.

With certain exceptions, the appointment of a receiver is a creature of state law in the US. Typically, a secured creditor seeks the appointment of a receiver to take possession of real and personal property of a borrower, and assume control of the use, operation, construction, repair, maintenance, marketing and leasing, to conduct business thereupon and engage in any and all conduct otherwise authorised by the underlying loan documents and the receivership order. Among other things, a secured creditor's right to appoint a receiver typically arises under its loan documents. Receivers act in accordance with the terms of the receivership order under which they are appointed. The receivership order specifically outlines the receiver's duties such as their ability to operate, lease, manage and control the property, including the collection of rents to pay expenses, even those of the secured creditor.

In response to the filing of an application seeking the appointment of a receiver or the entry of a court order appointing the receiver, borrowers may seek protection under the US Bankruptcy Code by filing a Chapter 11 petition. Since a receivership order divests the borrower of control over its property, a bankruptcy is virtually the only way for the borrower to regain possession of the property and stay any foreclosure sale. Specifically, Section 543 of the Bankruptcy Code provides that once the receiver has knowledge of the bankruptcy case, the receiver cannot take any action regarding the administration of the debtor's property and must deliver and account for all of the debtor's property, including the proceeds, product, offspring, rents or profits of such property.

Some borrowers may be surprised to know, however, that in certain circumstances, the bankruptcy court is empowered to excuse the receiver from turning over property and to allow him to retain his legal authority over the assets of the debtor post-petition. The continued retention of

a receiver after a bankruptcy filing may be extremely beneficial to secured creditors who may no longer trust the debtor to preserve the secured creditor's collateral. Keeping a neutral third-party in place to run the debtor's business along with bankruptcy court supervision may be an optimal circumstance for all creditors especially if the debtor has a history of mismanagement, bad acts or fraud.

If the bankruptcy court makes a determination that the receiver should be excused from his turnover obligations under the Bankruptcy Code, some important issues need to be addressed to define the receiver's role in managing the affairs of the debtor, since the receiver is neither a debtor-in-possession nor a Chapter 11 Trustee. For example, if the receiver is operating the debtor's business, it is really the receiver who is using the secured creditor's collateral, thus, the receiver should be obligated to file a motion for the use of cash collateral. Additionally, if the receiver remains in place for an extended period of time, does the receiver take charge of preparing and filing a disclosure statement and plan of reorganisation on behalf of the debtor? Unless the debtor is granted access to its premises, books, records and other property, it may be extremely difficult for the debtor to obtain the critical information needed to prepare the plan. If the receiver remains in place throughout the course of a bankruptcy case, it is unclear whether the receiver is entitled to retain professionals who will be paid with estate assets.

A secured creditor who has incurred the expense of obtaining the appointment of a receiver should consider filing a motion in the bankruptcy court to excuse the receiver from turning over property of the estate. If the specific facts of the case were sufficient to convince one judge to appoint a receiver, the same facts may be sufficient to convince the bankruptcy judge to allow the receiver to remain in possession. However, while the retention of a receiver post-petition may be in the interest of all creditors, it is important to decide, prior to filing a motion to excuse turnover under Section 543, how the issues discussed in this article should be addressed. An experienced bankruptcy professional should be consulted to navigate these difficult issues when dealing with a receiver in bankruptcy. ■

## NORTH AMERICA

**Protecting privilege over pre-litigation audits and litigation risk assessments**

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*by Juan C. Enjamio and Anna Lazarus | Hunton & Williams LLP*

WHEN A COMPANY has a reasonable concern that litigation is possible, it may conduct a risk assessment. How it conducts that analysis will impact whether it can assert privilege to maintain confidentiality. Potential privileges include the attorney-client privilege, work product, and the self-critical analysis privilege. Conducting the investigation without regard for privilege could mean having to provide the assessment to the adversary (whether a private party or a regulator) in the discovery phase of litigation.

**Attorney client privilege**

The attorney-client privilege applies to communications where legal advice is sought from a professional legal advisor in his capacity as such, and the communications relating to that purpose, made in confidence by or to the client. Privilege is generally waived if the communications are shared beyond those who need to know to implement legal advice. Communications between a corporate client and its outside counsel are presumed to be made to obtain legal advice. If communications are made for mixed purposes, they may still be protected if the primary purpose was to generate legal advice. Even if a document addresses predominantly business matters, a party may still assert privilege over isolated sentences or paragraphs. However, if a document is prepared for simultaneous review by legal and non-legal personnel, privilege will be waived.

Confidential communications passing through agents of counsel are sometimes privileged. The privilege generally covers documents prepared by a third party at an attorney's request for the purpose of advising the client, as long as the documents are based on, and would tend to reveal, the client's confidential communications. However, the attorney-client privilege will only extend to a third party consultant where the consultant is necessary for the lawyer to render legal advice: where the consultant essentially acts as a translator to put data into language the lawyer can understand and use to render legal (not business) advice.

To ensure application of the attorney-client privilege during a risk assessment investigation, companies should involve counsel and should not disseminate such communications beyond those who need to know the information to implement legal advice.



## **Work product**

The work product doctrine protects from discovery documents prepared by a party or its representative in anticipation of litigation. The Federal Rules of Civil Procedure define work product as “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.” Documents prepared by a party’s employee in anticipation of litigation are also protected unless they were prepared in the ordinary course of business.

A document is protected if it was created in light of the prospect of litigation, not in the ordinary course of business. Although some courts have defined ‘anticipation of litigation’ as those documents prepared because of the ‘pendency’ or ‘imminence’ of litigation, commencement of a lawsuit is not required. However, there must be some possibility of litigation, even though no specific claim has arisen. To meet this standard, a party must have a subjective belief that litigation is a real possibility.

Asserting work product protection may trigger an obligation to preserve relevant evidence. The duty to preserve evidence begins when a party reasonably should know that the evidence may be relevant to anticipated litigation. A general concern over litigation usually does not trigger the duty to preserve evidence; litigation must be probable, or a potential claim must be identified.

## **Self-critical analysis privilege**

The self-critical analysis privilege is far less accepted than the attorney-client privilege or work product, and may not afford protection in many jurisdictions. Where accepted, this privilege applies if: (i) the information results from a critical self-analysis undertaken by the party seeking protection; (ii) the public has a strong interest in preserving the free flow of the type of information sought; (iii) the information is of the type whose flow would be curtailed if discovery were allowed; (iv) the documents were prepared with the expectation that they would be kept confidential; and (v) the documents have been kept confidential.

When a company faces litigation and elects to conduct a risk assessment, attention to the potential privileges that may apply can make the difference between keeping a report confidential and having to produce it to an adversary in discovery. ■

## NORTH AMERICA

**Settlement reasonableness from negotiations to coverage disputes**

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*by David Tabak | NERA*

AN IMPORTANT DECISION in litigation – one no doubt informed by an understanding of the evidence and relevant legal issues – is how to evaluate the settlement value of a case. This decision typically becomes more prominent when a party considers making a settlement offer or is deciding whether to accept an offer from an opposing party. There may also be additional instances in which the size of a settlement will be considered, such as when a potential acquirer evaluates the purchase of a company with outstanding legal issues, or if the size of a proposed settlement leads to a coverage dispute between the insured and its carriers. Consequently, many parties have a desire for a methodology for estimating settlement values that is both accurate and convincing.

Approaches to estimating and evaluating settlements, or settlement offers, can range from subjective to objective. At one extreme is the purely subjective analysis that may be conducted by an experienced professional, such as a lawyer, judge or mediator. At the other is the objective quantitative analysis performed by a statistician or econometrician. There are benefits and drawbacks to both approaches that can vary depending on the circumstances in which they are used.

**Subjective approaches**

A subjective analysis may involve an experienced professional reviewing the key documents in a case and evaluating the case based on that information. One clear benefit from this approach is that the professional can incorporate information that does not lend itself to quantification or information that is unique to the case at hand. Because this type of evaluation relies heavily on the competence and fairness of the professional, it will be most useful in internal analyses by a party that knows and trusts that professional.

Subjective analysis will be less useful in areas where one may wish to convince the opposing party, who can have their own professional presenting an honest but different valuation of the case. Similarly, in a coverage dispute related to whether a settlement was reasonable, while professionals can use their expertise to highlight relevant features of a case that should push the value of a settlement up or down, there may be little basis for them to convincingly argue that they have quantified either the baseline value of the case before those features, or the effect of those features on the settlement value.

## Objective approaches

At the other extreme are objective measures of settlement size that are based on statistical analyses of similar cases that have settled. Certain benefits of these analyses are generally obvious: they rely on ‘hard’ data that may allow them to pass a Daubert analysis, whether that is formally necessary or just shorthand for some of the characteristics of an analysis that tends to make it more convincing. Among the drawbacks are that the statistical results necessarily depend only on the information used in the analysis, and that any ‘soft’ evidence that is not quantifiable will be excluded.

An objective measure can provide not just a statement about the settlement value of a case but also data to allow for a meaningful comparison of any proposed or disputed settlement with the statistical prediction. For example, we have developed a predicted settlement model (based on a number of quantifiable variables) that illustrates the relationship between actual and predicted settlement amounts for approximately 1000 securities class actions settled since 1996. This model can provide not just an estimate of the likely settlement amount, but also estimates of how close the settlement is likely to be to that prediction. Using this information, one can determine how unusually strong a case would have to be to explain the size of the settlement. And while it may be difficult to assess how unusual a case is in terms of the factors not in the model, the statistical benchmark establishes a baseline to which one can apply those subjective assessments.

## Conclusion

Determining whether a settlement value is reasonable for a case often involves both subjective and objective factors. Each type of method has its benefits and pitfalls, and the two can be combined in many instances. More interesting is the fact that these benefits and pitfalls affect the usefulness of the methods in different circumstances, with the more subjective analyses having a comparative advantage in cases involving highly idiosyncratic features and when a party is simply trying to make an internal valuation, and objective analyses having a comparative advantage in cases that are generally similar to others and when trying to convince another party. ■

## CENTRAL &amp; SOUTH AMERICA

**The FIFA World Cup, the Olympics and arbitration in Brazil**

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*by Rogério Carmona Bianco and Rodolfo da Costa Manso Real Amadeo | Lilla, Huck, Otranto Camargo*

OVER THE PAST 15 years, arbitration has grown considerably in Brazil. After a long dormant period, arbitration started to increase in 1996, largely because of the passing of the new Brazilian Arbitration Act (Law n. 9.307/1996) and the ratification of the Inter-American Convention on International Arbitration – the Panama Convention. Its growth was consolidated in the early 2000s, when Brazil's Federal Supreme Court (STF) recognised the constitutionality of Law n. 9.307/1996 (2001) and Brazil ratified the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards – the New York Convention (2002).

The following years saw the expansion of both domestic and international arbitration in Brazil. The Brazilian Arbitration Act proved to be a modern law that provided parties with a great amount of freedom of choice. Under the Brazilian law parties can choose whether local or foreign substantive law is applied by the arbitrator. They can choose, with the tribunal, the procedural rules to guide their arbitration or adopt the rules of domestic or international institutions (such as the ICC, LCIA or AAA). There is also no obstacle to parties choosing foreign arbitrators to judge their cases. Moreover, the Brazilian Arbitration Act established that Brazilian courts must enforce arbitration clauses and cannot review the merits of the arbitrator's award. In fact, under the Brazilian Law, the arbitrator's award is as enforceable as a judicial one.

The international events that will take place in Brazil in the next few years – the FIFA World Cup in 2014 and the Olympic games in 2016 – will certainly put Brazilian arbitration to the test.

Large investments, long term and specialised contracts, complex and specific legislation, interaction between domestic and foreign companies, and between companies and the Brazilian government – all these elements combined, along with the need for quick and specialised solutions for the disputes that will arise from each event's contracts, are tailor made for arbitration resolution. The question is, will Brazilian arbitration be up to the task when the moment comes?

The answer seems to be affirmative. Over the past few years, Brazil has consolidated its arbitration practice. Within the country, competent arbitral institutions have been created and have expanded, including the Arbitration and Mediation Center of the Chamber of Commerce Brazil-Canada, the American Chamber Arbitration Center and the Mediation and Arbitration Chamber of São Paulo (CIESP/FIESP). A large body of active arbitrators has been formed and has already

acted in many large commercial arbitrations. Moreover, Brazil has passed many laws that have allowed arbitration in contracts to which the Brazilian government is a party, such as the Public Private Partnership Act (Law n. 11.709/2004).

Concerning international arbitration, Brazil has one of the top positions in ICC arbitrations. Furthermore, many Brazilians have been appointed to serve as arbitrators in ICC administrated arbitrations. The same trend can be seen in other international arbitration institutes, such as the London Court of International Arbitration (LCIA), the International Center for the Settlement of Investment Disputes (ICSID) and the International Center for Dispute Resolution (ICDR).

Also, in the last few years, the Brazilian Bar Association has formed commissions to orient arbitration practice lawyers in many of its regional offices, such as São Paulo, Rio de Janeiro, Minas Gerais, Rio Grande do Sul and Paraná. A great number of Brazilian law firms developed arbitration practice groups, Brazilian scholars have produced consistent literature on arbitration, and Brazilian Law Schools have included arbitration in their graduation and post-graduation programs. In addition, the Brazilian Arbitration Committee (CBAr) has started to publish its own journal and Brazil has hosted many international arbitration events. It can be said that Brazil has a solid arbitration culture, which will only grow in coming years.

The Brazilian courts in general, and the Superior Court of Justice (STJ) – which is responsible for the recognition of foreign arbitral awards – have demonstrated a mature jurisprudence on arbitration, aligned with the most modern legal regimes of the developed world. In conclusion, it can be said that Brazilian arbitration will be ready to perform its part when conflicts arise from the FIFA World Cup's and the Olympics' contracts. ■

## CENTRAL &amp; SOUTH AMERICA

**Litigating with Brazilian parties – key issues**

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by *Fabiano Deffenti \ Carvalho, Machado, Timm & Deffenti Advogados*

WITH BRAZIL BECOMING one of the key destinations for foreign investment, the number of international litigation matters involving Brazilian parties has increased substantially. Unfortunately, international companies (especially those from common law jurisdictions) are often unaware of the peculiarities of litigating with Brazilian parties, whether the matter is being litigated in Brazil or abroad.

**Service of process**

As is the case in most civil law jurisdictions, service of process in Brazil is not undertaken by private parties but by public servants employed by the courts. Where service relates to a court action filed in a foreign court, service must be effected by letter rogatory. Letters rogatory are letters of request issued by the foreign court (where proceedings are filed) addressed to the Brazilian court requesting that service be effected.

Rogatory letters sent to Brazil must be addressed to the Superior Court of Justice (STJ). Once received, the letter will receive a file number and will be dealt with just like a court case.

There are a number of intricate procedural steps to be taken and invariably the Brazilian party will challenge service. On average, it takes between nine and 18 months for service of process to be completed. Importantly, if service is not effected by letter rogatory, and the Brazilian party decides not to participate in the foreign litigation, the ensuing judgement will not be capable of being registered or enforced in Brazil.

**Forum non conveniens and anti-suit injunctions**

The doctrine of *forum non conveniens* is not part of Brazilian law. Therefore, no matter how well connected a particular case is with a foreign court, if Brazilian courts have jurisdiction over the dispute it will continue to be handled by courts in Brazil. What often follows is a ‘race to the end’ and an applications/motions battle.

The STJ has decided that if the foreign court issues its final decision prior to the Brazilian court doing the same, and the foreign party is able to register the judgment in Brazil prior to the Brazilian proceedings coming to an end, the foreign judgement will be recognised and enforceable against the Brazilian party. However, if the Brazilian proceedings are finalised prior to registration of the foreign

judgement, then the Brazilian decision will prevail over the foreign judgement.

In light of the above, the number of anti-suit injunctions sought both in Brazil and abroad relating to disputes involving Brazilian parties has increased. In a recent and still ongoing case a Brazilian party sought, and was granted, an anti-suit injunction against English reinsurers before a Brazilian court, while the opposite happened in England. This is especially interesting because of the evolving nature of the tests used for granting anti-suit injunctions – both in Brazil and abroad.

### **Disclosure/discovery and production of documents**

As a civil law jurisdiction, Brazilian parties are not bound to make disclosure. Therefore, as a general proposition, foreign parties (especially those used to US-style discovery) cannot rely on broad-based discovery to obtain documents for foreign proceedings.

However, a foreign party may be able to request the Brazilian courts to issue an order for the Brazilian party to produce a specific document. This can be made through a letter rogatory or via local proceedings. Depending on the complexity of the request, it can take years until the document is produced.

### **Evidence taking**

Brazilian law does not provide for pre-trial depositions and witnesses are not examined directly by lawyers. Instead, this is done by the trial judge, with lawyers being allowed to ask the judge to put certain questions to witnesses. As the judge will phrase the question as he or she wishes, lawyers are more restricted as to how they use their skills to manage the evidence taking process.

Where the evidence is to be used for foreign proceedings, requests may also be made through a letter rogatory for witnesses to be examined. The examination will be undertaken by a judge and foreign lawyers are not allowed to participate in the proceedings (but may watch it if they so wish).

### **Recognition and enforcement of foreign judgments**

Foreign judgments will be recognised in Brazil if the foreign court had jurisdiction over the dispute, the parties were properly served, if the case can no longer be appealed, all formalities of the law of the forum have been complied with, and its recognition is not against public policy. Additionally, the foreign judgment will need to be stamped (legalised) by Brazil's consular authorities abroad and translated into Portuguese by a certified translator.

The recognition process operates somewhat like letters rogatory, also before the STJ. After the foreign judgment is recognised by the STJ, the judgment will be deemed equivalent to a Brazilian judgment. Only then may the party seeking enforcement commence enforcement proceedings against the party located in Brazil. ■

## CENTRAL &amp; SOUTH AMERICA

**Recent developments of the Brazilian civil procedure laws and the positive effects for the judicial claims course of action***by Daniela Sigliano and Livia Balbino | Mitico & Sigliano*

IN RECENT YEARS there have been several improvements to the Brazilian Civil Procedure Legislation aimed at improving the effectiveness of judicial decisions.

One of the enhancements focused on highlighting the consolidation between ordinary proceedings and collection proceedings. The power of enforcement achieved by judicial sentences as well as the progress of the procedure of expropriation of debtors' assets are considered effective tools offering more strength to coercive judicial measures issued with the purpose of recovering capital invested by creditors.

Another milestone was achieved with an amendment to the Brazilian Constitution establishing the principle of procedural promptness, which determines mandatory terms of reasonable duration for the development of the judicial processes. From now on, if a debtor fails to voluntarily pay his debt it will be possible to expeditiously file a civil collection proceeding before the Brazilian courts.

These recent improvements have led to an important evolution in the jurisprudence of the Superior Court of Justice (STJ), increasing the effectiveness of its implementation of civil collection proceedings.

Several of these developments brought more authority to the Brazilian Judiciary to enforce decisions and to obtain consistent results through the filing of civil collection proceedings. The opportunity to seize a debtor's property, regardless of the property's location is one of them.

Another example of the efficiency of the Brazilian Civil Procedure Legislation in protecting the creditor as a plaintiff is the right to request a certificate enabling them to apply for registration before the Real Estate Record Officer, constraining the debtor's assets.

Such developments of Brazilian Civil Procedure legislation directly influence the jurisprudence of the Brazilian Superior Courts, with a shifting of the traditional understanding of the civil collection proceedings. Currently the measure is considered a mechanism in favour of enforcement of the creditors' interests. This is in contrast to former principles where civil collection proceedings were filed in the least burdensome way to the debtor.

**Diligent decisions on tax matters questioned before Superior Courts**

*Repercussão Geral* (General Repercussion) is an efficient tool utilised specifically by ministers of



the Supreme Court to improve the consistency of their decisions. In fact, when an extraordinary appeal is filed before the Supreme Court a request for the recognition of ‘General Repercussion’ is an alternative legally admitted with regards to certain matters *sub judice*, as a condition preceding the examination of the merits of the claim by the Supreme Court.

The General Repercussion will be examined by the Plenary of the Supreme Court, using a computerised system with electronic voting, and may be recognised by the Supreme Court in cases where acknowledgment social, economic, political and legal perspective of the issue surpasses the individual interest of the parties.

As soon as the General Repercussion is established, the Supreme Court may analyse the merits of the Extraordinary Appeal and grant a decision considered as a precedent or a guideline for use by lower courts in similar lawsuits.

It is important to highlight that, in view of the recognition of a matter of General Repercussion it is possible to grant a ‘Binding Precedent’ to be enforced by the Supreme Court.

The Binding Precedent, has a binding effect on the decision granted, committing lower judicial courts and public governmental authorities to enforce the decision exactly on the terms provided by the Supreme Court.

Although the General Repercussion and the Binding Precedent may be considered effective tools enabling the improvement of Brazilian jurisdictional protection, adverse effects may occur derived from their enforcement. This is why the lawsuits submitted to the Supreme Court with similar arguments may trigger a decision issued by the Court based on a single argument and prevent the hearing of any other arguments which may be as important as the previous one.

There is also the risk of granting decisions based on General Repercussion and Binding Precedent in cases that are not related to the matters of discussion, causing serious damages to litigants.

In order to avoid negative effects it is necessary to organise a preventive monitoring of litigations with more effective performance of responsible lawyers. Those lawyers have a duty to be more combative and attentive to the judicial measures which may cause an adverse impact on their clients’ rights during the judicial claims.

It is possible to conclude that Brazilian Civil Procedure Law is undergoing important change, which will lead to judicial claims being processed more promptly, more effectively, and towards the creditor’s best interests. ■

## CENTRAL &amp; SOUTH AMERICA

**The use of dispute boards in Brazil: developments and perspectives**

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*by Gilberto José Vaz and Pedro Augusto Gravatá Nicoli | Gilberto José Vaz Advogados*

ALTERNATIVE DISPUTE RESOLUTION methods are a growing reality in Brazil, with undeniably positive perspectives. Although they have a fairly recent history in the country, due, among other factors, to a tradition of prioritising the official jurisdiction of the state when it comes to legal matters, they are progressively becoming an actual choice, considering the time and costs of disputes within the Judiciary Power. This, of course, applies to dispute boards, a method that is especially new for the Brazilian reality, showing a large potential of becoming a good option for dispute avoidance and resolution in certain fields.

As it is internationally known, the conception and development of the dispute boards are intimately connected to construction contracts, as a result of multiple aspects. The fact that these contracts generally have a long-term nature, with execution periods especially extended, makes these contracts a *locus* for the emergence of controversies. If one allies this to the complexity and multiplicity of technical expertise involved in construction work, besides the inexorable influence of several natural factors with almost ever-problematic predictability, the result could be no other than the recurrent appearance of disputes.

In this context, a dispute board is, in a simplified description, a board of capable and impartial professionals formed at the beginning of a contract to follow its progress and resolve disputes that eventually arise throughout its execution. This board issues recommendations and/or decisions in the face of disputes that are submitted to it, presenting, according to each model of dispute board adopted, a different equation of obligation to the parties.

One of the most relevant advantages of the method, connected with its origins, is the fact that board members are usually experts in the field of the contract, with a technically oriented approach and also a mentality for dispute avoidance, based on experience and a deep knowledge of the matter under scrutiny. Boards are usually formed by senior engineers and/or lawyers with experience in the field, who are familiar with the contractual terms, constantly visit the worksite, and have enough background and input to diagnose potential controversies. As a result of this, the atmosphere becomes less adversarial and the solution of latent or actual disputes ends up being far more expedient, setting the method apart from others, such as arbitration (which is becoming more complex, procedural, expensive and time consuming).

In this scenario, the employment of dispute boards as a method for solving contractual controversies in Brazil is currently passing through its first stages of development. The dispute board method has received public attention since it was included in a clause for the first time in three administrative contracts, signed in 2003, with the purpose of expanding the subway system in the city of São Paulo. This can be certainly considered a breakthrough in terms of the repercussions and propagation of the new system.

Other contracts probably have similar clauses, especially due to the fact that several projects in the country count on financial support from international banks and institutions – such as the World Bank –which demand the inclusion of dispute board clauses in corresponding contracts.

Hence, the perspectives for the country seem promising, especially when considering the infrastructure sector, which is perfectly fit for dispute boards. During the last few years, the construction market was stimulated with a program released by the federal government for the acceleration of the country's growth for the present and for the next years, called Program for Growth Acceleration (*Programa de Aceleração do Crescimento (PAC)*), foreseeing massive investments in different areas, especially the infrastructure sector. In its second edition, the total investment with the program is of about R\$955bn (almost US\$500bn) until 2014. Major events such as the World Cup and the Olympics also contribute to this portrait of developments.

Following the rhythm of the construction industry, in the last few years panels regarding dispute boards were included in the main events about resolution of contractual controversies, especially in the infrastructure field. In addition, the main arbitration chambers of the country are working on rules for dispute boards, signaling the spread of the method in the reality of contractual controversies.

In such a portrait, with possibilities of growth in the construction field, the dispute boards find solid grounds for development in the country, as a method with many advantages for the sector. This perspective is realistic both for private and public contracts, in the infrastructure and heavy construction sectors, in which efficient mechanisms of dispute avoidance and resolution will always be necessary and welcome. ■

## EUROPE

**Roving receivers: *Masri* and the extra-territorial adventures of the English High Court**

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by Nicholas Tse and Roger Kennell \ Brown Rudnick

THE ENGLISH COURTS are not renowned for shyness when making orders affecting persons abroad, but orders against foreign property are more novel. On 28 July 2006, following trial, the English High Court held that the Consolidated Contractors Company (CCC) group of companies was liable to pay Mr Munib Masri, a Palestinian businessman, US\$37.5m plus interest under a 1992 agreement (*Masri v CCIC* [2006] EWHC 1931). *Masri* has given rise to some groundbreaking decisions affecting foreign assets and persons, and the long arm of the English equitable receivership jurisdiction may yet overshadow the reach of the worldwide *Mareva*.

*The Masri receivership orders.* In December 2007 the trial judge granted a receivership order over the proceeds of the defendant's oil entitlements. This was upheld by the Court of Appeal. This order targeted debts situated abroad but proved ineffective. Three years later in December 2010, the judge was persuaded to extend the order to empower the receiver to "receive, take possession of, sell, deal with or otherwise dispose of" and exercise all rights in the name of and on behalf of Consolidated Contractors (oil and gas) (CCOG) in relation to the actual oil in the ground in Yemen.

*Assets abroad.* While, where the judgment debtor will not pay, the appointment of a receiver by the court is not remarkable, the English court has often emphasised that it has no sovereignty over assets or persons situated abroad. It is worth noting the judicial *legerdemain* by which this principle is side-stepped in relation to equitable receivers.

Equitable execution by appointing a receiver is a three-step process. First a receiver is appointed to collect in the property and the recalcitrant debtor enjoined from receiving it. Second, the receiver actually collects the property and either holds it pending a court order or pays it into court. Third, the creditor obtains an order for payment. The courts have held that although the first stage order appointing the receiver *relates* to foreign property, it has no proprietary effect, just *in personam* effect against the debtor, who will *ex hypothesi* be subject to the court's jurisdiction. The order supposedly only has proprietary effect at the third stage. However, in stage three the property will no longer be situated abroad but will be in the jurisdiction, either in the hands of the

receiver or in court, *ergo*: no violation of the sovereignty principle. So, by a three-stage process of circumvention, the court seeks to achieve what it cannot in one fell swoop.

*Persons abroad.* However, the extended *Masri* receivership order had little regard for principles of comity under international law, nor to the fact that the companies that were the subject of the receivership order were foreign companies subject to judicial administration. This order is remarkable because of its extra-territorial effect. The target company's officers had been replaced by judicial administrators appointed and supervised by the Lebanese court. The Lebanese court had ordered the judicial administrators not to pay the judgment debt, or in any way act to the company's detriment without its permission, because Mr Masri had not obtained *exequatur* of his 2006 judgment in Lebanon, the seat of the judgment debtor companies. Yet the English court made the order, attaching a penal notice naming the officers of a foreign court and threatening personal liability for contempt of court should they breach the English order.

Unsurprisingly, the judicial administrators appealed. The Court of Appeal concluded that "the order of the judge is an unjustified interference with the process of the Lebanese courts in relation to the administration of the Lebanese companies and offends against the principle of comity. [We]... would therefore allow the appeal and set aside the receivership order made by the judge". The extended receivership order had offended the principles of comity in attempting to bind the judicial administrators appointed by the Lebanese court. The Court of Appeal accepted that the "ultimate organ of government of CCOG is that court" and removed the judicial administrators from the penal notice, but refrained from setting the whole receivership order aside (*Masri v CCIC* [2011] EWCA Civ 746, *per* Toulson LJ).

*Agreements with third parties.* Perhaps exorbitantly, the court also decided to appropriate the rights of the company under an operating agreement with a third party (the JOA) containing an arbitration clause. The court purported to empower the receiver to commence arbitration proceedings in the company's name against the operator. By the same order, the court gagged the company, ordering it not to interfere with or otherwise obstruct the arbitration proceedings upon pain of contempt of court and criminal sanction. The company, which was party to the arbitration agreement and the JOA, was therefore excluded from a Swiss seat arbitration and had no knowledge about the status of the arbitration proceedings, or the actions taken by the receiver in its own name.

The *Masri* litigation has now been settled. What remains to be seen is whether the appetite of the English court, for forays abroad, abates. ■

## EUROPE

**EU competition: leniency applications, damages and disclosure**

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by *Kiran S. Desai* | *Mayer Brown*

THERE ARE A number of competition authority decisions and court judgments dealing with the extent to which information provided by a leniency applicant to the EU's competition authority (DG COMP) should be made available to those who are suing in domestic courts for damages. Most notably, the *Pfleiderer* case of the European Court of Justice (June 2011) identified that there was no reason under EU law why the leniency documents should not be disclosed, but that the issue was for national courts to decide while ensuring the application of Articles 101 and 102 TFEU is not jeopardised. Accordingly, the German court in Bonn ruled in January 2012 that the leniency application was not to be disclosed. However, the English High Court in *National Grid Electricity Transmission v. ABB* (April 2012) ruled that limited extracts from the leniency application documents should be disclosed. With EU domestic courts granting limited disclosure, it is foreseeable that US courts will also order disclosure. While jurisprudence is evolving, there seems to be a potential risk that in time leniency application documents will become subject to disclosure. What may this possibility mean in practice for leniency applicants?

A potential problem for a company at the time of a dawn raid, although a very distant one, is the exposure to civil actions for damages. Instead, the question of whether or not the company should apply for leniency is front of mind. If it does apply, the issue of private actions for damages should be factored in when considering what information should be included in the leniency application. Failure to consider this point could result in delivering important information to damages litigants if, in the future, leniency applications are subject to material disclosure.

The focus of damages litigation is cartel cases where the litigant, typically the immediate buyer of the products, will allege it has suffered economic loss. Proving to the sufficient standard of proof that the buyer has suffered economic loss is complex, not least because the buyer will need to have evidence that the seller was selling products at a price above that which would have existed absent the cartel (the 'counterfactual'), and that the seller was doing so because of the cartel. In practice, a buyer would most unlikely be able to determine the actual value of the damage it has suffered with absolute precision. Consequently, the buyer will likely

seek to use a generally accepted model or method to calculate damages, and then populate it with information. Documents held by the seller could contain information vital to the buyer to enable it to have sufficient evidence to build its case, and this includes the leniency application documents.

To apply for leniency requires, in principle, to admit culpability. Details of the culpability, notably the product, the geographic scope and the duration of the cartel, are important elements of the leniency application. The totality of information constituting the leniency application is referred to as the 'corporate statement'.

Information that is directly relevant to the claim is likely to be evident, and so easily omitted from a leniency application. Furthermore, it is likely unnecessary for the leniency application to be successful (that is, it does not relate to culpability and scope, as identified above). However, to underline the point, it would be preferable for the leniency applicant not to identify immediate customers, or if doing so, not to identify the extent to which the immediate customer was charged a price that was higher than would have been the case absent the cartel. In other words, culpability can be expressed generically and this would be sufficient for DG COMP purposes. It is also not necessary in the leniency application to identify, describe or quantify the price (or other) effects the cartel had or may have had.

Care and attention needs to be taken in relation to indirect information. The leniency applicant might inadvertently provide information that does identify, even if indirectly, facts relevant to the counterfactual. For example, the leniency application should not include data from sources that relate to the same product market but a different geographic market than the scope of the cartel, or *vice versa*, or relate to the same product and geographic scope of the cartel but to a different time period. To do so could provide information relevant to a comparator-based model for damages calculations.

Given the objective of a leniency application and the nature of corporate statements in this context, the leniency applicant should avoid including evident information to damages claimants. However, on the assumption that corporate statements will largely become subject to disclosure, the checklist of things to do, and not to do, during the very pressured period between the dawn raid and the submission of the leniency application, should include the reminder to exclude from the leniency application information that is extraneous to achieving a successful leniency application and that may be of unintended help to a damages litigant. ■

## EUROPE

**The emotionally intelligent mediator – working with strong emotions to transform relationships**

*by David Liddle | The TCM Group*

THE LEADERS OF any organisation going through a period of crisis and change have to make some tough decisions – potentially closing down sites, making employees redundant, reconfiguring business processes, and slashing spending on advertising, marketing and R&D. Such high pressure situations can, of course, impact upon working relationships. Conflicts can emerge, even when relationships have been previously strong and resilient. Destructive conflict can undermine the strongest business relationships. So how can mediation help?

For many parties to a dispute, when they experience conflict they are driven by an unconscious sense of loss: loss of control, of esteem, of face, of safety, of trust, of hope and so on. The feelings that emerge from the loss drive powerful emotional and behavioural changes such as sadness, powerlessness, frustration and anger. Commonly known as ‘fight or flight’, these factors influence our actions, our reactions and our subsequent interactions. As a result, our behaviours become more irrational and are often described using terms such as aggressive, dogmatic, unprofessional, harmful, destructive and hostile, among others.

For mediators, when working with such conflict, it is vital that we understand the root cause of the conflict – the loss. The most effective mediators use emotional intelligence tools and skills to encourage parties to explore their feelings and to describe their loss, and in doing so to understand their own values, interests and needs. These core mediation skills include securing a commitment to the resolution process, developing coherent and safe boundaries, actively listening, being curious and not judgmental, being empathic and encouraging empathy between the parties, encouraging collaborative thinking, reframing negative language and promoting a ‘can do’ attitude during mediation.

One model of mediation that can be employed is called the FAIR Mediation Model – ‘Facilitate’, ‘Appreciate’, ‘Innovate’ and ‘Resolve’. At the heart of the FAIR model is the term ‘appreciation’. For the emotionally intelligent mediator, the development of empathic relationships is key to the transformation of broken relationships. To understand what the other party is saying, to put ourselves into their shoes without judging or defending and to then make decisions about the future based on a sense of understanding and common purpose rather than on blame and retribution.

During mediation, all parties should be encouraged to explore the history of their relation-



ship – both the good and the tough times. Emotionally intelligent mediators can help each party to describe the situation to one another without pointing fingers or shouting but by calmly and considerately explaining the impact of the conflict and the sense of loss that they are both experiencing. The mediator can validate the parties’ feelings and draw several commonalities between their experiences.

By reframing any negative language and summarising progress made, the mediator can take the dialogue to the next level and ask the parties to describe the insights and the learning that they secured during the conflict, giving them permission to talk about the conflict as a source of learning rather than something to be avoided or embarrassed about. Giving the parties a voice and encouraging them to share their narrative – this is the point in mediation that is typically known as the ‘tipping point’. This approach empowers the parties to think about a common future based on their shared interests and mutual needs. It also allows the parties to explore any areas of divergence and to synthesise strategies which will ensure that their differences are managed constructively in the future.

Having created a sense of a shared problem, the mediator can then encourage and facilitate empathic dialogue between the parties so that the learning is embedded, explanations are provided, apologies offered and innovative solutions identified. This mutual understanding then becomes a driver for behavioural and attitudinal change. This is the point where the parties are able to develop and agree outcomes which transform the conflict from destructive to constructive.

In any business dispute, be it internally within the board room, with customers, within offices, or with suppliers, there will always be a level of emotional content caused by a sense of loss of the parties. We are all human after all. The emotionally intelligent mediator allows these to be explored and the mediator then harnesses the power of emotions to secure lasting solutions to complex problems. ■

## EUROPE

**The world is their oyster? The globalisation of investigations**

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*by Chris Colbridge, Rajinder Bassi and Harkiran Hotbi | Kirkland & Ellis*

AS COMPANIES TAKE on an increasingly international approach to business, prosecutors are responding by taking a comprehensive cross-border approach to the investigation and prosecution of corporate crime. This globalisation of investigations can raise a whole host of issues, quite separate to any potential liability for the alleged violations of law. This article discusses some common issues that arise in the context of cross-border investigations.

**Differences in the approach of prosecuting authorities**

Cross-border investigations often give rise to the competing jurisdiction of a number of prosecuting authorities. The approach these authorities take once an investigation is underway varies and this can significantly impact the investigation and its resolution. One of the most important issues is whether the authorities will recognise a lead jurisdiction to pursue or lead the investigation. This will largely be dependent on whether there are any formal/informal memoranda of understanding between the authorities in question, any past experience of working together, or other political factors. It is rare for authorities from different jurisdictions to collaborate to jointly investigate and prosecute corporate crime. However, recent bribery and corruption prosecutions such as Siemens and Innospec have shown that it can be done.

There remain, however, significant differences in the approaches taken by prosecuting authorities. Some authorities, such as the US Department of Justice (DOJ), leverage the results of internal investigations conducted by external legal advisers, on the basis that voluntary disclosure and cooperation will lead to a faster resolution for both sides. Others do not recognise voluntary cooperation. Such authorities are more accustomed to the adversarial approach, still relying on dawn raids, as well as conducting the bulk of the investigation with agency/governmental resources.

There are also likely to be differences in the enforcement powers of the various authorities, such as the ability to criminally prosecute corporations or enter into plea negotiations. Crucially, there is a question as to whether the jurisdictions in question recognise the concept of international double jeopardy. The UK does, but the US does not. This can leave a client in a very precarious position if, for example, a prosecution is brought in the UK before it is brought in the US. If the US has concurrent jurisdiction, there is a risk that the client can still be prosecuted in the US for



the same conduct.

### **Privilege**

The concept of privilege varies from jurisdiction to jurisdiction. In the UK, privilege is the right of the client, whereas in some jurisdictions it is viewed as a professional duty – the focus is on the protection of documents in the hands of lawyers. There are also differences between prosecuting authorities with regard to the expectation of the waiver of privilege over the investigation materials. Previously, the DOJ gave credit for cooperation for the waiver of privilege. However, the revised DOJ Principles of Federal Prosecution of Business Organisations (2008) changed the position so that prosecutors are now prohibited from requesting privileged material. Conversely, the SFO indicated in *R v Mabey & Johnson* that it considers the waiver of privilege as “meriting specific commendation” and where privileged material is not disclosed it will not “regard the cooperation as a model of corporate transparency.” Although this position has not been tested in court, the SFO clearly has an expectation that full cooperation will include the waiver of privilege over the investigation materials.

Whilst it may not be possible to avoid such issues, it is important to consider privilege at the outset. Questions should be asked as to what privilege regimes may apply to the investigation, who will be in the core group of people at the client who will effectively form the ‘client’ for the purposes of the investigation and what the role of in-house counsel will be.

### **Data protection**

Cross-border investigations usually require the collection of data from multiple jurisdictions, each with their own laws on the protection of data. Any data collected must be collected in accordance with the laws of the jurisdiction in which the data resides. Certain jurisdictions, such as France or Switzerland, have blocking statutes in place that make it difficult to collect or produce documents once there is a criminal investigation ongoing in another jurisdiction, without going through official mutual legal assistance channels. Given that the basis of the investigation will be the evidence that is collected, consideration of data protection laws is key.

The globalisation of investigations looks set to continue; particularly in light of the extra-territorial approach anti-bribery legislation around the world is currently taking, such as the UK Bribery Act 2010. Consequently, it is important to remain alert to the possibility that more than one prosecuting authority may have jurisdiction. In order to defend an investigation successfully, it is essential to involve experienced external legal counsel as soon as an issue is discovered to ensure that an informed and careful strategy is employed from the outset. ■

## EUROPE

**The rising need for forensic technology in large and complex disputes**

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*by Michael Hammes | PricewaterhouseCoopers*

TODAY INDIVIDUALS AND companies produce huge amounts of data when conducting their daily private or business affairs. Sophisticated Enterprise Resource Planning (ERP) systems and web applications create increasingly complex IT landscapes. With data storage capacities being available at rather low cost we have left the stage of megabytes or gigabytes of data and entered into the terabyte age.

It is, thus, not surprising that large and complex disputes usually involve huge volumes of data. This is particularly true for regulatory driven litigation which is generally accompanied by large and thorough investigations conducted by regulators or other authorities. However, we see a similar tendency in commercial litigation and arbitration cases depending on the specific background and circumstances of the dispute.

Imagine an agency agreement where the agent conducts the accounting for a consumer products group. The parent company sells products to sales subsidiaries which themselves sell products and related services to the customer. Payments received from customers are collected by the agent and distributed to the group. After a certain time the parent company goes insolvent. The receiver and the agent enter into a new agreement which provides for payment to the extent the customers paid their invoices. A dispute arises later on how this payment rule should be interpreted.

This case involves the gathering and analysis of huge volumes of unstructured data – email and other correspondence, meeting minutes, contracts including annexes, presentations, and so on – and of structured data comprising hundreds of thousands of sales accounting entries in the agent's ERP system. The objective is to process this data in a way that supports the investigation of the parties' intentions when adopting the payment clause in the new agreement and to provide a reproducible calculation of a payment distribution that can easily be adjusted by applying different assumptions which may depend on the facts discovered from the unstructured data and their legal interpretation.

Out of the huge volume of information that is generally available to address the objectives, only a rather small subset may be finally decisive for the particular case. Vast amounts of paper documents and huge volumes of electronic data from different sources must be reviewed and analysed, whether they are relevant, and whether they support or defend the claim. However, to find this

subset of responsive data via conducting a manual review of the available information by going through every piece of paper or set of data is either impossible or will require a lot of time and significant personnel resources.

In order to save time and resources, and therefore costs, forensic technology may help. As a first step a forensic technology solution must identify the potential data sources and different IT systems that may contain relevant data. The data gathered through these sources needs then to be transferred to a technical platform which facilitates the consolidation and pre-processing of the data (for example, transferring paper documents into electronic files, extracting annexes from emails, removing duplicate information) and allows analysis of the data. As a further step, data analysis and data mining techniques will be applied. These techniques may comprise simple key word-searches followed by consecutive levels of manual reviews, pattern matching or self learning systems to generate unknown correlations. The assessment of the obtained results may lead to an adjustment of the analytic process employed in order to produce even better or more focused results. With regard to the technical platform, different scalable systems are available which can be used depending on the volume and complexity of the data and the particular objectives of the analysis.

If properly set up, the application of forensic technology should: (i) secure and consolidate data relevant to the case from different sources with structured and unstructured data; (ii) significantly reduce the relevant data volume and, at the same time, provide a strong enhancement of the factual basis; (iii) help visualise results, particularly if transactional mass data is involved; (iv) provide a reliable and confidential database with simultaneous and flexible (time, location, content) access through secure web hosting to the parties, their counsels, advisors and experts; (v) reduce time and costs for fact gathering, identification, review and analysis; and (vi) help counsel to focus on the review and evaluation of the relevant facts and data.

As a consequence of globalisation and the further regulation of businesses, companies will face more disputes involving increasingly large volumes of data to be evaluated. An efficient and flexible process of gathering, consolidating and analysing data is a key factor in managing the risks to pursue a claim or to defend it. How forensic technology solutions are best utilised, and the extent to which statistical methods and technical tools may be applicable in order to filter responsive data, needs to be closely discussed with the legal counsel directing the case. ■

## ASIA PACIFIC

**Pre-action discovery: recent developments in Singapore**


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by *Eddee Ng and Ho Xin Ling \ Tan Kok Quan Partnership*

RECENT DEVELOPMENTS IN Singapore case-law have significantly reduced the circumstances under which pre-action discovery will be ordered. This article discusses these developments and the possible underlying policy reasons.

The *locus classicus* in Singapore on pre-action discovery is *Kuab Kok Kim & Ors v Ernst v Young (a firm) (Kuab)*. Here the Singapore Court of Appeal stated the purpose of pre-action discovery was that “in the nature of pre-action discovery, the plaintiff does not yet know whether he has a viable claim against the defendant, and pre-action discovery is there to assist him in his search for the answer.”

The appellants in *Kuab* had a potential cause of action against the respondent for breach of contract or negligence in relation to the defendant’s valuation of certain shares. The appellants applied for pre-action discovery of documents and working papers which the respondent had used in determining its valuation.

The Singapore Court of Appeal held that it was precisely because the appellants felt that they had a claim that they sought pre-action discovery to determine whether the documents would ground their cause of action. Such documents were relevant to the contemplated claim, and were necessary for disposing fairly of the matter. On this basis, pre-action discovery was granted.

The holding in *Kuab* is in line with the position in the UK, where, in *Dunning v. Board of Governor of United Liverpool Hospitals*, Lord Denning stated that one of the objects of pre-action discovery is to enable a plaintiff to find out, before he starts proceedings, whether he has a good cause of action.

However, recent developments in Singapore case law have seen the scope for pre-action discovery in Singapore reduced to the extent that it has departed from its original stated purpose. The key motivation behind these developments has been a concern that the procedure could be subject to abuse by applicants. In the UK, in *Black v. Sumitomo* the courts have also expressed concern about pre-action discovery becoming expensive satellite litigation.

Starting with the case of *Bayerische Hypo- und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd and other applications (Bayerische)*, the Singapore courts began emphasising on the *necessity* of the pre-action discovery sought. In *Bayerische*, three banks including Bayerische (the Banks) had

extended loans purportedly to the appellant, Asia Pacific Breweries (Singapore) Pte Ltd (APBS). APBS' finance manager (Chia) had deceived the Banks into extending the loans by forging the signatures of APBS's directors on various resolutions. The Banks were of the view that they had various causes of action against APBS, and applied for pre-action discovery of documents to determine the scope of Chia's authority at APBS, and the extent of APBS's knowledge of Chia's activities.

In *Bayerische*, the Singapore High Court refused to grant pre-action discovery. It found that since the Banks had already formed the view that they had a cause of action, the case was unlike an applicant who was unable to plead a case as he did not yet know whether he had a viable claim against the opponents, and needed pre-action discovery to fill the void or gaps in his knowledge. On the facts of *Bayerische*, the court's finding was correct. The rationale behind the decision was perfectly understandable: an applicant should not be allowed to use pre-action discovery to usurp the position of general discovery and to advance his position against his opponent before the commencement of proceedings.

Later cases following *Bayerische* have, however, relied on it to cut down the scope of pre-action discovery even further. In recent cases decided in 2011 and 2012 – *Ching Mun Fong v. Standard Chartered Bank* and *Whang Tar Liang v. Standard Chartered Bank* – statements made by the Singapore High Court suggest that pre-action discovery is now only available to allow an applicant to determine *what* cause of action he has as opposed to *whether* he has a cause of action. Therefore, a litigant who is well aware of his potential cause of action – this would commonly be breach of contract or negligence – but is unable to ascertain whether he indeed has a cause of action, would be denied pre-action discovery. This appears contrary to pronouncements in *Kuab* which had set out the stated purpose of the procedure.

*Kuab* remains the only decision by the Singapore Court of Appeal on pre-action discovery. It remains to be seen if the Singapore Court of Appeal will adhere to the procurements in *Kuab* or will endorse these later developments in case law. ■

## ASIA PACIFIC

**Contractual advice – inserting dispute resolution clauses into business agreements**

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*by Peng Shen | Baker & McKenzie*

DISPUTE RESOLUTION CLAUSES form an essential element of a business agreement. In the event of a dispute, the validity, enforceability and meaning of each article of the agreement rests upon the court or arbitration body appointed by the dispute resolution clause. Careful consideration should therefore be given to the dispute resolution clause when drafting an agreement. This article focuses on China-related agreements and discusses special considerations when drafting dispute resolution clauses and the impact of recent developments in Chinese civil procedure law.

**Special considerations when drafting dispute resolution clauses of a China-related agreement**

First, consider the benefits and limitations of selecting arbitration as a mechanism for resolving disputes.

Our observation is that when entering into an agreement with a PRC company, most foreign companies prefer to select overseas arbitration for resolving their disputes. This preference could be due to the non-transparency of the PRC court system, the potential political influence and regional protectionism, all of which are reasonable concerns. However, overseas arbitration has its limitations in solving a problem inside China. For example, if an overseas arbitration is chosen, it is impossible for a party under the agreement to lodge any legal action, or seek any injunction prior to completion of the overseas arbitration proceedings. Assuming the overseas arbitration takes one year or even longer to run, this means the injured party will have no access to any immediate or timely judicial remedies.

Accordingly, Chinese arbitration bodies, including China International Economic and Trade (CIETAC) might be an alternative, because PRC courts can enforce an interim arbitration order issued by the domestic arbitration body. That is, a party can request a property preservation award from the arbitral panel immediately after the case is filed, and then request the court to enforce the interim award. However, in practice, we note that the courts are reluctant to enforce such intermediate orders issued by CIETAC.

Second, it is important to decide whether the dispute resolution clause should cover all disputes that may arise in connection with the agreement or only certain types of dispute.



In most agreements, we have seen parties using formal language to set out the arbitration clause, for example, “Any controversy or claim arising out of or relating to this contract, or the breach therefore shall be settled by arbitration...”. Considering the issue discussed above, it may be advisable to split disputes into two categories, some for arbitration and the rest for the court litigation. This allows us to exclude from the arbitration all potential disputes which may be better to leave to local courts. Suggested wording includes the phrase “without prejudice to the arbitration, the parties agree to submit the following issues to the competent court...”. Such a clause, which includes both arbitration and litigation methodology, is called a ‘mixed clause’.

In addition, to avoid any doubt, it is suggested that adding a phrase like “regardless of the nature of the disputes” ensures that the opposing party will not use ‘tort’ as a claim to avoid the arbitration. In some cases, we note that PRC courts have allowed the PRC company’s claims based on tort law, even though the parties had agreed to resolve the disputes by arbitration.

### **Impact of developments in PRC Civil Procedure Law**

The Draft Amendments of PRC Civil Procedure Law (Amendments) were published on 31 October 2011 and have yet to be finally confirmed by the National People Congress. The Amendments will have a significant impact on China-related disputes, including the application of the dispute resolution clause.

Amongst other things, after the Amendments become effective, pre-arbitration injunctions will be available under the PRC regime. This means that even if there is an arbitration clause, parties will be able to seek urgent judicial remedies before the arbitration commences unless the parties expressly waive their rights in the dispute resolution clause. This amendment is well recognised as arbitration-friendly progress, allowing the potential applicant in arbitration proceedings to enjoy pre-action judicial remedies similar to a plaintiff under a court litigation procedure. The right to a pre-arbitration injunction, however, only applies to domestic arbitrations, not foreign arbitrations.

### **Practical tips**

First, it is advisable to consider using a ‘mixed clause’ to gain the advantage of timely juridical remedies.

Second, it is important to clearly stipulate the arbitration institution and place in the dispute resolution clause. Otherwise, the court may determine that the clause is not valid because of the uncertainty of the contents of the clause.

Third, if selecting PRC courts, select courts in the developed areas, like Beijing, Shanghai, Zhejiang and Guangdong. It is best to avoid selecting a court in the northwest or northeast areas. ■

## ASIA PACIFIC

**Early dispute resolution and risk management techniques**

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by Frances Kao | FPHK LLC

ADVERSARIAL DISPUTE RESOLUTION processes, especially litigation, are costly, time consuming, and the bane of every business. However, businesses frequently do not employ the full range of techniques to assess risk and drive towards a proactive, cost-effective resolution. Irrespective of whether the disputes come from external sources (such as contracting parties) or internal sources (such as employees), techniques such as early neutral evaluation, standing neutral process, and peer review panels are each ways to manage risk and to encourage collaboration.

*Early neutral evaluation (ENE).* ENE is a process in which a neutral, usually a retired judge or regulatory official, depending on the type of dispute, is retained to assess the strengths and weaknesses of a party's case. The ENE process can be undertaken as a risk management measurement or it can be part of a dispute resolution process in which both sides participate.

Where potential disputes revolve around a regulatory issue, ENE is especially helpful. An experienced neutral can give both the range of resolutions on the regulatory issue at hand, and provide insight into how regulators look at the issue and how courts receive the regulators' arguments. Using ENE as a risk management device can provide the most unvarnished look at a case in a manner that helps executives decide how to resolve the dispute for their companies.

ENE can be equally effective when both parties to a dispute participate in the process. In this scenario, the neutral is jointly engaged by the parties to provide feedback on the merits of each side's case and helps find areas of agreement on which a resolution can be based. The process is informal and is designed to help each side take a fresh look at its case and to understand how the case may be decided in court by judge or jury.

*Facilitated negotiation or standing neutral.* Where long-term contractual obligations are present and maintenance of the relationship is a key consideration, a standing neutral process should be considered. A standing neutral is an independent third party who is trusted and selected by both sides to guide them in resolving disputes that arise during the life of the contract. Although considered a dispute resolution device, the standing neutral arrangement is in fact intended to prevent areas of contention from developing into full adversarial disputes.

For the standing neutral arrangement to be effective, both sides must operate with the mindset that the central focus of the exercise is to resolve the problem that has arisen. The neutral works to facilitate the discussion or recommend courses of action when the parties cannot resolve discrete differences of opinion. This process keeps within the parties' control both the discussions and the responsibility for continued maintenance of their business relationship.

*Peer review.* Employment disputes can devolve into some of the most time consuming problems faced by a business, and even-handed internal procedures for resolving employee complaints are a pathway to early resolution of employee grievances. Although most businesses have multi-step internal grievance procedures, one of the most effective is the peer review panel (PRP). A PRP is made up of employees (both managers and non-managers) who hear the dispute and determine the outcome. Proper training of employees who wish to serve on a PRP is critical to effective functioning – the complainant must have confidence that fellow employees understand the seriousness of the role and can be counted on to act fairly.

Businesses interested in making full use of early dispute resolution techniques must keep a few considerations in mind.

First, for these techniques to be successful, resolution must be the goal; if early information gathering or contract gamesmanship is the objective, these processes are not for you.

Second, selection of the neutral is a critical gateway task. The neutral must have experience in the relevant field, the intellectual capability to focus on strengths and weaknesses of a case, and the ability to discern how a real life fact-finder, be it judge or jury, would view the case.

Third, any form of ENE or standing neutral process can only be successful if the party fairly and accurately presents its own and its counterparty's cases to the neutral. There is sometimes a temptation to create a straw-man case for the other party while inflating the best aspects of one's own case. Though perhaps emotionally satisfying, this is not helpful for a genuine assessment of risk.

Fourth, where possible, the executives in charge of the early resolution processes should be different than the ones heading up litigation. This way, the resolution and litigation processes can proceed on parallel tracks and it provides the counterparty with the confidence that the people they are dealing with are focused on the goal of amicable resolution.

Seeking early resolution does not show weakness. It is a wise business judgment to focus energy on doing business rather than engaging in protracted arbitration or litigation. Done properly, early resolution can substantially decrease the time and money directed towards resolving contentious business disputes. ■

## MIDDLE EAST &amp; AFRICA

**Turning an award into cash – the challenge of enforcing arbitral awards**

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*by Michelle Nelson and Anita Hormis | Pinsent Masons*

A PARTY INITIATING arbitration will want to know how easy it is to turn a favourable award into money if the losing party refuses to pay. The purpose of this article is to provide an overview of enforcement of arbitration awards with particular reference to the United Arab Emirates (UAE).

**Enforcement under the New York Convention**

The New York Convention has been described as “one of the key instruments in international arbitration”. The philosophy behind the Convention is that enforcement of arbitral awards between jurisdictions is consistent and almost automatic, subject only to a number of limited defences, which are essentially of a procedural nature. Therefore, the court requested to enforce an arbitral award is not allowed to review and open up the substance of the award and/or consider the merits of the dispute. It is, however, fair to say that the approach adopted by individual courts does and can vary. As such, the attitude of the local courts is therefore of important consideration when a party is choosing the seat, or ‘home’ of the arbitration.

**Enforcement of arbitral awards in the UAE**

Over the last few years, Dubai has attracted considerable interest in terms of its desirability as an arbitration centre/location for the resolution of disputes and has certainly received mixed press. In fact, respondents to a recent survey on international arbitration disclosed a negative perception of the Dubai International Arbitration Centre (DIAC) as an arbitration institution.

One reason for the negative press is the fact that the UAE does not have its own independent arbitration law and instead relies upon a number of provisions in its Civil Procedure Law to govern arbitration proceedings including the ratification and enforcement of an arbitration award. Under those provisions, a party wishing to enforce an arbitral award may have to embark upon a rather lengthy process to ratify and enforce an arbitral award before the local courts, which takes an average of six months but can take significantly longer. In terms of enforcement of foreign arbitration awards, whilst the UAE is now a signatory to the New York Convention, this only occurred in 2006. Prior to that date the court was required to follow the same process for ratification

and enforcement of domestic arbitration awards.

Arguably, the low point of Dubai's history in relation to enforcement of arbitration awards was the case of *Bechtel v Department of Civil Aviation of the Government of Dubai*. In this case, the Dubai Court of Cassation set aside an arbitral award on the ground that the witnesses had not given evidence under an oath administered in the correct manner. The decision of the Court of Cassation attracted much criticism from the international arbitration community because some believed that the UAE courts had actively sought to avoid enforcing an award against the Dubai government. Dubai has since recognised that if it is to attract and retain foreign investors, it must reassure them that it has the legal infrastructure in place to support successful arbitration. To this end, it has introduced a number of changes which demonstrate its commitment to arbitration. These developments include the introduction of a new federal arbitration law (albeit still in draft form at the time of writing), the establishment of a new international arbitration centre, and signing up to the New York Convention.

In 2008, the DIFC, a financial free zone in which the civil and commercial laws of mainland Dubai do not apply, partnered with the London Court of International Arbitration (LCIA) to create the DIFC-LCIA Arbitration Centre. To support the centre, the DIFC has also enacted a new comprehensive arbitration law, the DIFC Arbitration Law 2008, based on the UNCITRAL Model Law. The appeal of seating arbitration in the DIFC is twofold in terms of enforcement. First, a party can apply for ratification of the award in the DIFC courts where the proceedings can be conducted in English, without the need for separate representation by local lawyers, and in a court with a system of legal precedent which makes the process more predictable. Secondly, once the award is ratified by the DIFC courts, it can be sent directly to the mainland Dubai Court of Execution which is required to enforce the award without reviewing the detail.

## Conclusions

Although enforcement is a crucial issue for any claimant, the good news is that, at an international level, enforcement does not become an issue in the majority of cases. An unsuccessful respondent will often comply with an award of their own volition, for several reasons. First, arbitral tribunals generally take care to render awards in compliance with procedural requirements. Secondly, arbitral awards are not subject to appeal and cannot therefore be examined on the merits. Lastly, the courts may impose a costs sanction on a party which resists enforcement in order to delay payment and interest on an arbitral award often runs at a substantial rate from the date of the award. ■

## MIDDLE EAST &amp; AFRICA

**Dispute resolution in the Middle East**

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*by Neil Hargreaves, Zane Hedge and Jacqui Record | Deloitte*

FROM THE CALIPHS of Islam in the Seventh Century to modern arbitrators of today, the Middle East has a long history of using independent and trusted third parties to resolve disputes. Whether in a traditional majlis, a courtroom or an arbitration centre, each method of dispute resolution comes with a level of risk. This article will comment on some of the key considerations before embarking on a dispute resolution process in this region.

Once you have reached the stage of formal dispute resolution, one of the first challenges may well be agreeing the correct forum and jurisdiction. While this is often specified within the contract, there are many cases where this is not the case. This can cause delay, additional cost and may ultimately lead you into a process that you are not familiar with and may not trust.

You will want to know that the other party has the funds to meet any award and perhaps where the assets are held. But relying on public information can be difficult – there are no reliable online public records in the Middle East that many Western jurisdictions take for granted. Corporate registrations, land registry data, court records, and other sources of online public access simply do not exist here. Company listings are available through various business portals and local chambers of commerce but there is no compulsion for companies to list shareholders or beneficial owners, and financial information on private companies is limited at best. Local business intelligence experts who know how to access Arabic hard copy and online information, and who have a network of contacts to provide additional information, can be invaluable at this stage.

Many governmental or quasi-governmental organisations exclude the option of arbitration in their contracts, requiring litigation through the normal court process. The UAE courts use the codified laws of the region and do not rely on judicial precedent. They operate what is basically an inquisitorial system with the judges running the proceedings and appointing their own experts. Although improving in capability, many local courts lack the specific technical knowledge to deal with complex disputes and rely extensively on these court appointed experts. The entire process will likely be in Arabic so local lawyers acting as translators are essential. The local courts' timetables are notoriously fluid, made more challenging due to the accepted religious commitments of Ramadan and the Eid celebrations, which can add two or three months to a process. In short – if you are an international joint venture partner, investor, supplier or contractor, then the



use of local courts may be the most challenging form of dispute resolution within the region.

So for a party seeking some level of certainty regarding the process, what is there to do? There is light at the end of the tunnel, and one of the more interesting recent developments in the region has come from the extension of the DIFC court's jurisdiction. This extension now permits commercial entities to have their disputes resolved by common law judges who rely on the advocates to present their cases, with the process and hearing generally taking place in English. There remain some inherent risks even with this process, but if you are an international organisation from a common law jurisdiction, this is likely to be as close as you will get to a court process similar to the High Court in England & Wales.

Arbitration continues to be a popular method of dispute resolution in the Middle East. In the construction industry for example, the FIDIC form of contracts have been used extensively for many years, and in their un-amended form require settlement of unresolved disputes by arbitration. Within Dubai there are two alternatives – the Dubai International Arbitration Centre (DIAC) under the umbrella of the Dubai Chamber of Commerce; and the DIFC/LCIA Arbitration Centre, which is a joint venture between the DIFC and the London Centre for International Arbitration. Both have a broad remit, allowing the parties to choose location, arbitrators and language. There are a number of procedural differences that can be challenging, such as DIAC, for instance, mandating that sole arbitrator arbitrations be completed within six months from receipt of the file. However, the main differences will relate to the system of law used and the different supervisory court, should appeal be necessary. Both the local and DIFC courts are very open to arbitration and are likely to support any arbitration process. The choice, if you have one, will often be down to personal preference and familiarity with the individual systems.

At the end of all this hard work, and even if you get an award in your favour, your arduous journey may not be over. The challenges around enforcement of arbitral awards in the Middle East is a topic in itself. An amicable solution remains the best form of dispute resolution but if this is not an option then do take advice on the risks when selecting the best path to follow. ■

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