



# Staying Ahead of the Curve

Implementing effective arbitration agreements

Virtual Round Table Series  
Disputes Working Group 2018

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## Implementing effective arbitration agreements

An examination of most commercial contracts governing international agreements will reveal a clause dealing with alternative dispute resolution, specifically arbitrations.

The oft-quoted advantages of arbitration, as opposed to litigation, usually revolve around control; in terms of privacy, timing, flexibility and cost.

Arbitrations are conducted in private, as opposed to litigation which is open to public scrutiny. Parties to an arbitration can also control the timing of the arbitration process, since they have chosen and employed the arbitrators conducting the process. There is also the benefit of avoiding trial by jury. As a result of this control, arbitrations are routinely used to resolve international disputes.

A very important consideration is the choice of forum to hear the arbitration, both jurisdiction and institution. Most parties will want the arbitration to take place in their home jurisdiction, but in an international agreement this might not be possible. In such a case, a third party jurisdiction satisfactory

to both parties may be chosen and agreed before a dispute occurs.

Countries that have adopted the New York Convention on arbitration are preferable, however if that is not possible a country with a stable court system and a proven set of procedural rules around the arbitration process must be chosen.

In terms of choosing an institution to hear an arbitration, the established institutional bodies such as the International Chamber of Commerce's Court of Arbitration (ICC) or the American Arbitration Association (AAA) are attractive because of their sophistication and experienced professional staff. They can also be very expensive, so a cost-benefit analysis of the dispute should be undertaken before a choice is made. Ad-hoc arbitrations are possible; using the rules of an institution, without the administration costs.

It is also important to ensure that the arbitration award can be enforced by the prevailing party once handed down. This entails ensuring that assets due to be sequestered to satisfy the claim are located in an accessible jurisdiction.

The development of the arbitration clause within a contract is crucial to ensuring all of the above elements can be enforced correctly in the event of a dispute. Many commercial contracts neglect to include a properly tailored arbitration clause, designed specifically for the parties involved, because its importance is underestimated.

If time is taken to get this right, it will include provisions such as fee-shifting designations around the number and type of arbitrators to be used, plus specified forums and institutions. It might also specify the use of mandatory mediation prior to arbitration.

The following discussion between 10 arbitration experts from across the world, is a comprehensive analysis of the use of arbitration in international commercial agreements. Our experts address all the points raised above and detail interesting specifics about their home jurisdictions, using case examples to highlight their points. Enjoy.



## The View from IR

### Ross Nicholls Business Development Director

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.



U.S. - FLORIDA

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Gary Davidson is a high-stakes international litigator and arbitrator with noted successes in state and federal courts and before the American Arbitration Association, the ICDR, ICC and other institutional arbitral bodies. He is a frequent speaker and author on international law.

Gary currently sits on the Executive Council of the Florida Bar's International Law Section and is a former adjunct professor of law at Nova Southeastern University School of Law. He was also a visiting Lecturer in International and Comparative Law at the University of Tartu, Estonia, and Comenius University, Slovakia. He is a former liaison to Slovakia for the American Bar Association Central and Eastern European Law Initiative, providing advice and assistance to various Slovak governmental and judicial organs at independence.



HONG KONG

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Eric is a dispute resolution lawyer specialising in both wet and dry shipping matters, including charter parties, shipbuilding, shipping casualties, sale and purchase of vessels, ship arrest and release, international sale of goods, ship financing, cargo claims, bills of lading, letters of credit, marine insurance and other cross-border transport disputes.

He is also experienced in international arbitration and civil and commercial litigation including contractual and tortious claims, commercial disputes, defamation, employment, shareholder and insolvency disputes. Prior to joining ONC Lawyers, Eric has worked for several reputable international law firms. Eric covers the litigation, investigation and compliance aspects of competition law in relation to shipping and logistics industry and has given presentations to financial institutions and listed companies on competition law.



AUSTRIA

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Klaus Oblin specialises in commercial and civil law-related disputes. He also acts as counsel and arbitrator in arbitrations under the rules of bodies such as the International Chamber of Commerce (ICC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Swiss Rules and UNCITRAL.

He regularly provides advice with regard to various matters of commercial, contract and construction law and the establishment of businesses.

Klaus established Oblin Melichar in 2004 and before that he worked for Freshfields Bruckhaus Deringer and Vienna McDougal Love Eckis Smith & Boehmer.

He is a member of the ICC, International Centre for Dispute Resolution (ICDR) Austrian Arbitration Association (ArbAut), German Institution of Arbitration (DIS) and the International Bar Association (IBA).



U.S. - ARIZONA

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Matthew is the founding member of Harrison Law and has been practicing law for over 20 years. Prior to forming Harrison Law, Mr. Harrison was an attorney with a nationally recognised surety, construction, and fidelity law firm in Phoenix, Arizona, where his practice focused on complex civil litigation.

Previously, Matthew was a Deputy County Attorney with the Maricopa County Attorney's Office for over seven years where he held leadership positions and mentored less-experienced attorneys. He has combined these experiences into a law firm that has established itself both locally and nationally as a highly-regarded law firm.

Matthew has extensive experience in both civil and criminal law. He also has significant trial court and arbitration experience, which includes being lead counsel in over 35 jury trials. He is rated as an AV© Preeminent™ Attorney by Martindale Hubbell and is a Sustaining Member of Arizona's Finest Lawyers™.



TURKS & CAICOS ISLANDS

## Stephen Wilson, QC

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Stephen heads the Litigation & Dispute Resolution practice group in the Turks and Caicos Islands (TCI) office. He has appeared in many of the TCI's recent headline cases involving disputes in the tourism and hospitality, banking, real estate, insurance and construction/building sectors.

In addition to litigation and dispute resolution, Stephen works on admiralty and shipping, banking and finance, corporate and commercial, intellectual property, employment and labour and property and development matters with members of his office and with attorneys at the firm's other offices.

Stephen is sought after in TCI for his expertise with complex corporate and commercial disputes. He has worked on multi-jurisdictional claims, multi-party actions, contract breaches, and insolvencies and liquidations involving local and international parties. He has many years of experience with debt recovery, enforcement of security and judgments, taxation of costs, and receivership appointments. He has assisted clients with shareholder disputes, board room power struggles, and corporate reorganisations and restructurings.



ITALY

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Ruggero Rubino Sammartano is partner of LawFed BRSA, a mid-size commercial firm with more than 50 years of experience in trans-border transactions and litigations. He has a wealth of experience thanks to time spent working at inter-national law firms in London, New York, Paris and Munich.

His practice is focused on corporate and company law mainly for foreign clients, by supporting their business in Italy. With his team he advises them in the day-to-day operations, as well as in extraordinary transactions, such as M&A, or purchase and sale of businesses.

He builds strong ties with his clients lasting over the years, which makes him an important interface for the foreign shareholders.

Ruggero speaks in English, French, German and Spanish in addition to Italian. This helps him to quickly dive into the different cultures that he regularly works with.

He had lectured at legal conferences and written extensively in the field of arbitration and mediation.



GERMANY

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Founded as a spin-off of the international law firm Freshfields Bruckhaus Deringer LLP in 2010, METIS has grown to one of the leading business boutique law firms in Germany. The firm provides high-end legal advice to its domestic and inter-national clients with a strong focus on Corporate law/M&A, Employment law and Dispute Resolution.

Florian specialises in domestic and international litigation and arbitration with an emphasis on disputes in financial, capital markets and corporate matters, post-M&A as well as general commercial disputes. He also has extensive experience with respect to the handling of complex claims and liability cases under insurance law (particularly in the area of D&O and other indemnity insurances) and acts for insured companies and directors & officers.

Among others, the 2016 to 2018 ranking lists published by leading German business newspaper Handelsblatt and US publisher Best Lawyers rank Florian as one of the 'Best Lawyers in Germany' for litigation, just recently also for arbitration. According to Legal 500 Germany 2018, Florian "is being described as an 'excellent and assertive lawyer and litigation strategist'".



DOMINICAN REPUBLIC

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González Tapia is managing partner at Gonzalez Tapia Abogados in the Dominican Republic.

He began his practice at the firm Messina & Messina (later Biaggi & Messina), as Associate Attorney. Later in his career he became partner of the firm. In 2009, he decided, along with a team of prepared and recognised professionals, to fund the firm González & Coiscou. With the interest to focus his knowledge, experiences and skills into bringing more attention to his diverse clientele, he decided to spin-off Gonzalez & Coiscou in 2014, opening his own law firm - Gonzalez Tapia Abogados.

He has more than 25 years of experience in the practice of Litigation and Corporate and Business Law, representing several clients in major court and arbitration cases as well as in international negotiations.

González took joint responsibility for the negotiation team in the privatisation of five international airports in the Dominican Republic and was the lead attorney in the multimillionaire litigation of a Swiss corporation, well-known in the Dominican Republic and other foreign jurisdictions as Spain, Panama and the United States.



ARGENTINA

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Alfredo is the founder partner of Estudio ROVIRA. He served for more than 20 years as Managing Partner of Brons & Salas, one of the most distinguished law firms in Buenos Aires, where he was senior partner and co-chair of the corporate department for more than 30 years. He founded and chaired the arbitration group for more than 10 years.

Alfredo's current practice focuses on Corporate and M&A, complex contract drafting, negotiations and litigation, antitrust, Insolvency, arbitration and dispute resolution including complex mediations, also acting as expert witness on Argentine laws in international litigations and arbitrations.

Alfredo also dedicates time to his role as part-time professor in Business Law at the School of Law at the National University of Buenos Aires, on top of teaching as visiting professor at other private universities.

He has been recognised by Who's Who Legal as an expert in the fields of mergers & acquisitions and corporate governance, arbitration, restructuring and insolvencies.



SWITZERLAND

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Peter Ruggle has worked in the Zurich legal sector, since 1988. He acted as legal secretary to the Chairman of the Arbitration Board, Substitute Judge at District Court Meilen, between 1994-1998, before passing the bar exam of the Canton of Zurich in 1998.

His specialist practice areas include corporate and commercial law, corporate finance, banking and financial market law, mergers and acquisitions, litigation and arbitration and mediation.

He has contributed to a number of publications, including the Basel Commentary on the Swiss Code of Civil Procedure, Basel 2013, and the IBA e-book of Mediation Techniques, London 2010 (Patricia Barclay, ed.), Confidentiality in Mediation - the Civil Law Tradition.

Other contributions include the titles Cash Management under Swiss Law, French Association of Cash Managers (AFTE) 2003, and A Technical Guide on Centralized Cash Management in Europe, published by the European Association of Corporate Treasurers (EACT) (Co-Author), Paris September 2004.

He is a member of the Zurich Bar Association, the Swiss Bar Association and the Swiss Arbitration Association (ASA). He speaks German, English and French.

# What factors influence your choice of arbitration forum when a dispute arises?

**Arizona – Matthew Harrison (MH)** The three main areas I initially look at when it comes to arbitration and arbitration clauses or even whether or not to include an arbitration clause in a contract are:

- What does the actual dispute involve, and what is the monetary amount?
- What is the area of law that needs to be addressed?
- Where are the parties based, that are involved with this arbitration issue or potential contract?

When it comes to the value of a dispute, my main focus is to examine whether or not the cost benefit is present to use arbitration, in whatever forum or form it may be in. I've found through practical experience that we want to avoid arbitration for those types of disputes that simply don't have the right cost benefit.

I find arbitration is usually best for disputes of a higher monetary value. I will examine what is the financial exposure of the dispute and also I look at the law that will be involved.

When it involves a simple contract dispute between two parties and the dispute doesn't really involve a lot of nuanced legal or factual issues, I'm less likely to advocate for an arbitration clause or the arbitration process. I think arbitration is better used in a situation when it involves legal or factual issues that have distinct and unique values associated with them. I see these as issues that a local court would not be able to effectively adjudicate.

For example, when I represent disputes and issues involving surety, I find that local courts often don't possess experience in this area of law. In fact, a specific judicial officer might be assigned a surety case just three or four times in his or her entire career. Those specialty areas of the law, such as a surety or intel-

lectual property issues, are very unique areas that local courts will not really review on a regular basis.

In those circumstances an attorney can often spend as much time, effort, and resources educating a court to get up to speed on a specialty matter, as would be saved if the parties could find an arbitrator who already possessed expertise in the required field.

The ability to utilise an arbitration system and find arbitrators such as judges, attorneys or other professionals that have encountered and addressed these issues on a consistent basis, is invaluable. It usually leads to a more effective arbitration and a more effective outcome for a client.

Arbitration is significantly more effective when you have parties spread across the country or across international border lines. It is in situations such as this where I think that an arbitration clause becomes the most effective tool for a client to utilise.

When a dispute involves either small clients or an issue that is not expensive, the ultimate goal is to consider what the arbitration clause in any written agreement says.

For smaller clients or smaller disputes, I usually advocate that the cost benefit of an arbitration clause is not present. The client would often be spending more money, resources, and attorney fees on arbitration than they would have by adjudicating the dispute to a local court.

In these lower-value cases, I usually recommend a mediation clause, obligating the parties to conduct mandatory mediation prior to litigation. If there is an arbitration clause present in a contract that has been presented to a client, it can be valuable to communicate with the opposing side to see if the arbitration

clause can be replaced with mandatory mediation instead.

**Argentina – Alfredo Rovira (AR)** I would like to share with you my experience not only from an Argentine standpoint, but also across Latin America.

As Matt has mentioned, the number one issue to be analysed is the nature of the dispute and the cost involved, because arbitration only makes sense under certain circumstances, particularly when you are going to be disputing complex issues of sizable value.

It is also useful when you are involved in international transactions, because when you are negotiating a contract with somebody who is not residing in the country where your client is, they are often hesitant to submit jurisdiction to the courts of the place where your client is. If this is the case, a reasonable solution is to agree upon an alternative dispute resolution mechanism.

Arbitration is ideal in these instances, because it offers the possibility of selecting a venue which is neutral to the parties and also permits guarantees of neutrality and independence in rendering the award.

Ordinarily, in domestic transactions, high value disputes will resort to arbitration, because, to file a judicial litigation claim in Argentina, you need to pay a court fee. This is determined as a percentage of the amount of the claim, generally, at the rate of 3 per cent. If the claim is going to be sizable, the high cost may become a material difficulty or inconvenience for the plaintiff to invest a sizeable amount of money in order to start litigation.

Arbitration may resolve this issue, particularly because there are certain institutions in Argentina that have permanent panels, with relatively low administration costs, such as the Buenos Aires Stock Exchange Permanent Panel of

Arbitrators. This is composed of attorneys with high reputation, (most of them) being retired judges, making arbitration much more palatable for the parties.

The other consideration to be taken into account, is whether technical issues are going to be disputed. In the case of construction contracts, judges are not always well prepared to judge and resolve disputes involving very highly sophisticated technical issues, even though the court would select expert witnesses to assist them.

As far as smaller clients are concerned, if the parties involved do not have relatively sizable amounts of money in dispute, it really doesn't make sense to go into the details and expense of selecting and putting in place an arbitration procedure.

One of the particularities of Latin America, is a common culture and language across the whole continent that permits the selection of venues in other countries, as well as recognised arbitrators that have sufficient legal background. This is because all the countries in Latin America have their legal systems sourced in the civil law system, which offers counterparts the benefit of a broad spectrum of potential arbitrators with sufficient legal background to understand conflicts.

The applicable law has most of the same common basic principles, with the advantage being that arbitrators who do not practice in the jurisdictions where the parties in conflict reside or operate, provide a higher percentage of neutrality. The parties also feel comfortable that the culture under which the issue at stake will be resolved is acceptable and understandable.

On July 26, 2018, Argentina passed its General International Commercial Arbitration Law, mostly inspired by the UNCITRAL model law, making Argentina an attractive venue for international arbitration. Argentina is also a member to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (New York Convention) which ensures such awards are recognised, and generally capable, of enforcement in the jurisdictions of those

member countries in the same way as domestic awards.

**Turks and Caicos Islands – Stephen Wilson (SW)** The Arbitration Ordinance of the Turks and Caicos Islands is about as sparse in its provisions as the Arbitration Act 1889 in England & Wales. We are not even a signatory to the New York Convention. So, as things currently stand, I would not be recommending that any client make Turks and Caicos Islands the seat of an arbitration.

That is not to say that we don't have arbitrations in the Turks and Caicos Islands. I've been involved in a number of domestic arbitrations in the Turks and Caicos Islands as well as international arbitrations elsewhere. My firm is the largest and oldest firm in the Bahamas. I've appeared in a number of international arbitrations in the Bahamas.

One of the most recent cases that I've been dealing with raises all the issues that the other gentlemen have raised. Last year, the Turks and Caicos Islands, in common with a large part of the Caribbean, was hit by two major hurricanes, one of which was the strongest Atlantic hurricane on record. There have been a number of insurance claims as a result of this and a client of mine recently came to me with an insurance claim arising out of a very poorly drafted insurance policy, which contained an arbitration clause.

There are very few trained arbitrators practising in the Turks and Caicos Islands and finding any that are neutral is almost impossible, because they're all generally lawyers attached to firms who are acting for the respective parties. Although the arbitration agreement in this particular case provided for party appointed arbitrators, there was still a need to get a neutral umpire.

The costs of bringing people in from overseas and housing them in one of the most expensive jurisdictions for hotel accommodation, was such that when compared with the costs of litigating the matter, the cost-benefit analysis pointed towards court. Unbelievably, the insurance company agreed to waive the arbitration clause and to deal with the matter by litigation instead, even though the

amount at stake was up to five million dollars.

As part of the cost benefit analysis, we had to seriously consider whether our Chief Justice (who hears the majority of civil and commercial claims) is somebody we felt confident was able to deal with a case that was going to involve construction and insurance issues. We decided that she was. As others have said, arbitration can have major advantages in disputes involving complicated or technical specialist issues. If the cost-benefit analysis had been slightly different, the preference would have been to use qualified and experienced construction and insurance arbitrators from overseas.

**Dominican Republic – Pablo Gonzalez Tapia (PGT)** We don't have many options in the Dominican Republic, but we did pass a law in 2008 adopting commercial arbitration.

We always usually go to institutional arbitration using Chamber of Commerce Arbitration Forums. In the Dominican Republic, every province has a chamber of commerce but only a few have established an alternative dispute resolution centre with significant powers of alternate dispute resolution. The centres can administer arbitration and enforce awards.

We only have five centres in the Dominican Republic operating right now. The capital city of Santo Domingo is where most business is done and is the centre that receives the most arbitration throughout the year. After Santo Domingo, I would say that the next most elected arbitration centre would be Santiago, while the remaining three would be selected on a very limited basis.

The centres charge a percentage of the amount in dispute, and the percentage can go from almost 1 per cent of the amount to 0.01 per cent, depending on the size of the dispute. If there is no amount involved, then the board of the centre will establish the arbitration fees and administrative costs.



We've been pushing for the centres to expedite cases, in terms of rendering awards, because that's what takes most time. Once the award is rendered, the centre reviews it and takes time to make sure that the award conforms with the legislation and rules of the Dominican courts, to avoid challenges to the awards.

The centre sends both parties a list of arbitrators, and if you don't agree on the arbitrator, they pick the arbitrators for you. Once the arbitrator is appointed, a meeting with the parties is arranged for them to discuss the scope of the arbitration and the issues that will be decided within the Mission Act. Once the Mission Act is decided, they don't allow you to include anything outside its scope, unless both parties agree.

**Austria – Klaus Oblin (KO)** Very often, you do not get to choose the forum because there is usually one party commanding the provisions. If the dispute is more equal and balanced between the parties, there can be a real negotiation about the forum. Typically, in such a case, both parties agree that it should be on neutral ground.

It's important to consider the possible legal consequences of choosing the place of arbitration. The main issue is to consider the procedural laws applicable at the seat of the arbitration. Typically, they are incorporated in the respective civil procedural code.

There are usually various sections on arbitration proceedings, and some jurisdictions have separate laws, dealing only with the procedural aspects of arbitration. That's very important to distinguish.

There is the applicable statutory law on one hand and also the procedural ramifications around how to carry out the arbitration proceedings, which must be distinguished from the applicable institutional rules.

Most major arbitrations are administrated by institutions, such as International Chamber of Commerce (ICC), American Arbitration Association (AAA), London Court of International Arbitration (LCIA), Vienna International Arbitration Centre (VIAC) etc. The combination of procedural law at the place of arbitration and

the applicable institutional rules, constitute the regulations to which the parties have to adhere.

When it comes to choosing the Forum, I tend to look into the local arbitration law (lex arbitri) first, to check whether or not the UNCITRAL model law as adopted by the UN commission in the 1980s is incorporated. Many countries now use that template to be the basis for their arbitration procedural rules.

It's not binding, so the individual states need to adopt this model law, and many jurisdictions have done so. This gives some security to international counsel, since issues such as the choice of arbitrators, what constitutes a tribunal, or even how to draft the award and what needs to be the minimum content of the award are governed by UNCITRAL model law.

Enforcement of awards is a different story though, because here you look into the particular civil procedural and enforcement laws of the place you are going to enforce the award in. The place of arbitration has no impact on whether or not the award can be enforced - with one exception.

If the award itself goes against the rules of arbitration law in the place of arbitration, then you can raise that at the enforcement level as well.

In summary, you should diligently look into the procedural rules at the place of arbitration, because it might influence a range of decisions, such as selection of arbitrators, content of the award, or document production, i.e. whether or not counsel get to prepare the witness or are prohibited to do so.

**Germany – Florian Wettner (FW)** I have one point to add to that summary from Klaus, concerning his point that the seat of arbitration has no consequence for enforcement.

One aspect to consider is the New York Convention. It could be helpful to seek a seat of arbitration in a country which is a member of the New York convention, because it is then much easier to get an award enforced in another member state. In most cases, this is a given because a majority of relevant states are part of the

New York Convention, but it could be a consideration.

**U.S., Florida – Gary Davidson (GD)**

Arbitration is a creature of contract and typically arises based upon contractual arrangements between parties. The parties to a dispute are always free post-contract (if no clause is present) to agree to arbitration, but, generally speaking, 99.9 per cent of the time, arbitration clauses emerge from an existing contract.

In the international community, arbitration is typically the preferred method of alternative dispute resolution (ADR) and there are a number of different factors that go into that.

The clients typically drive the selection of the forum. This is influenced by where they are based, what ADR they have experienced in the past, and whether they have a particular preference for arbitration or litigation.

The first thing is to get both parties to agree to arbitration. Once that is done, the question among the lawyers becomes where and under what jurisdiction.

It's important to arbitrate in a country that is a member of the New York Convention, for purposes of enforcement. You also want to be in a forum where the rules are neutral and do not favour the other side.

Another consideration is where you are most likely to draw arbitrators from and how willing they are to travel to the country chosen. Let's say you have a contract between a European entity and an Asian one. A few Asian countries are known for unstable courts, political unrest, violence and security issues. That's a red flag for arbitrators with concerns about personal safety and a different setting might be considered.

The other part of the equation is that the law of the country chosen is going to drive the rules of procedure for arbitration (with some exceptions). For example, if you came to Florida, you could proceed in two different ways. You could agree that US federal law will apply to procedural issues, but Florida also has its own act that regulates international arbitration, so you have the option to use

state law rather than federal law, under appropriate circumstances.

With regard to which institution to arbitrate with, cost is always part of the discussion. The International Chamber of Commerce's Court of Arbitration (ICC) is a favourite of international clients, but is extraordinarily expensive compared to other entities. The process of choosing arbitrators needs to be built into the contract and addressed with the clients when they sign the contract, otherwise it will default to the procedures of the arbitral institution.

One thing to say, is that transactional lawyers often do a poor job of educating their clients on the importance of the arbitration clause, specific to a particular transaction. There is no cookie cutter that fits all situations and you shouldn't borrow language from a previous deal. Transactional lawyers often see ADR as the last thing to be decided upon by the parties. This is they should be turning to their ADR colleagues inside or outside their firm for consultation.

**Switzerland – Peter Ruggie (PR)** The selection by the parties of the place in which their international commercial arbitration is to take place will have a fundamental impact on the determination of those rights. The place of the arbitration is the legal location of the proceeding, which determines the legal setting, and the legislative and judicial framework, for the arbitration.

I highly value the ability of being able to choose the arbitrator over having a judge imposed by the court. I also prefer to conduct the proceedings myself; in case of any issues I appreciate if there is a supervising authority to get the procedure done or moved forward.

The parties' choice of forum for the arbitration may also inform the determination of the substantive law, sometimes called the 'proper law', that governs the contract.

**Hong Kong – Eric Woo (EW)** The following factors would influence my choice of arbitration forum.

Firstly, whether the arbitral awards made in that arbitration forum can be recognised and enforced in other countries (in

particular, New York Convention countries), secondly, the convenience with which the parties can arbitrate in that forum.

Then there is also the availability of professional arbitrators in that arbitration forum to consider and also whether the courts of that arbitration forum offer protective or interim measures in aid of arbitration proceedings.

**Italy – Ruggero Rubino Sammartano (RRS)** Arbitration is the expression of agreement amongst parties. Counsel shall involve the parties in making the decision whether to choose state courts, use an arbitration clause or opt for other alternative dispute resolution mechanisms.

When it comes to arbitration there is no one sole solution. Ad-hoc arbitration versus administered arbitration, or different arbitral institutions with very different rules and solutions regarding rendering awards, cost of the proceedings, taking evidence, administrative support, confidentiality and so on.

While domestic disputes are subject to specific requirements and needs, depending on local provisions (for instance the length of court proceedings), international disputes are approached differently. The main focus is to obtain a neutral tribunal. Often the parties have the fear that a state judge may be inclined to help the local party; which in many jurisdictions, Italy included, may indeed happen. This is particularly true, when it comes to Italian public or important private entities.

In the event of arbitration, state courts play a role in support of arbitration (depending on the seat of arbitration and therefore the related jurisdiction). Judges may be invited to compel witnesses, order interlocutory injunctions, appoint/dismiss arbitrators, order document production and so on.

This is even more relevant when it comes to challenging an award. In certain countries it is possible to provide for appellate arbitral proceedings, as it is in the European Court of Arbitration [www.cour-europe-arbitrage.org](http://www.cour-europe-arbitrage.org). At the same time, it is important to understand the scope of the

challenge of the award for nullity before state courts.

In arbitrations with their seat in Italy, it is essential to add in the arbitration agreement that the award be subject to a review for breach of rules of law in order not to be prevented afterwards.

The choice of the seat is therefore very important and requires understanding and deep experience of arbitration law.

In my experience, the value at stake is a driver to enable parties to choose the correct institution. There are fast tracks arbitrations (AAA), expedited rules (ICC), or costs and time effective administered proceeding (European Court of Arbitration).

What counts in our view is that the parties be aware of the different options available and give the right importance to such a choice.

The dispute resolution clause should not be a last minute choice (not by chance often called midnight clause). A wrong choice of dispute resolution mechanism may lead to denial of justice (for instance the choice of an institution that requires a significant advance payment, that the submitting party cannot afford) or to very expensive proceedings that the parties would have never chosen, if aware from the beginning.

If the party leaves it to counsel to make such a decision, the latter must have experience in the field and must know the needs and expectations of the client.

## How do you go about securing an advantageous jurisdiction or legal code for post-arbitral enforcement proceedings, if not specified in an existing contract?

**Austria – KO** You do not get to choose anything for the post-proceedings phase in Austria. I can only think of possibly challenging the award. That's the only thing which follows the actual arbitrary proceedings and it depends on where the losing party's assets are. This is the only aspect I would consider.

**Germany – FW** You could challenge the award in the country where the seat of arbitration takes place, or you could challenge the award within the framework of advancement or actions against enforcement proceedings in the state where it shall be enforced.

That would probably be the main difference, meaning there could be two different states where you have a basis or starting point for challenging the award. It's hardly something you could choose before, or take into consideration prior to the arbitration proceedings.

**Switzerland – PR** When it comes to post-arbitral enforcement proceedings, I like to ensure agreement in advance and employ interim reliefs if necessary.

**Arizona – MH** Typically, the majority of arbitration enforcement provisions that I have encountered are addressed in the specific contractual agreement. For those that are not addressed in the contract, the enforcement location will be agreed upon between the parties at the beginning of arbitration.

A written arbitration agreement might actually stipulate, where both parties agree that the enforcement of any arbitration award will occur in a specific jurisdiction in the United States (typically a state or a handful of states are agreed upon.)

Usually the state or states that are picked directly relate with where the parties are located. This is a bit more advantageous,

because, to enforce the award, you simply go to the court building down the street from your firm, rather than to another state.

In the United States, most of the individual states have very similar arbitration enforcement statutes. These are based on the Uniform Arbitration Act (UAA), which is basically arbitration statutory language that's been developed over the last 60 years. Most of the individual states in the United States have adopted at least some form of the Act.

If there is no specific agreement between the parties, then statutes in the individual states will allow enforcement for any party who has a principal place of business in that state. The individual states have set procedures in place to enforce Provisions as well.

Because of the consistency of the UAA, no party is going to receive an advantageous enforcement, or a defence to enforcement, from one state to the other for the most part. There are exceptions to that rule, but they're not as prevalent.

What is more relevant is the convenience and cost factors. These factors are the reasons why I always lean towards allowing the parties to essentially select a state or states where the judgment award can be enforced.

Usually, if a client receives an arbitration award, or a party is on the losing end of an arbitration award, all of the parties will generally confer and agree upon payment for a certain amount, rather than spend additional time and expenses trying to enforce the judgment in whatever state is listed in the contract. All parties will come to some kind of negotiated resolution, without initiating the enforcement process at all.

**Italy – RRS** The choice of the seat of arbitration, as previously mentioned, is usually to be made upfront. Submission is possible once a dispute has already arisen, but not easy to agree upon, simply because the parties are no longer at the same starting point. While creditors may have an interest in speeding up a decision on a claim, debtors normally have the opposite goal.

Enforcement proceedings must be viewed from a different perspective. Once a party has secured a final and binding award, then it may request enforcement in whatever state it wishes. If such state has ratified the 1958 New York Convention this will certainly be much easier.

There might be language in contract and/or in additional agreements and during the arbitration that may help in this direction.

What is important to understand is that, in any event, arbitrators shall be supported by the parties to conduct the proceedings in the proper way and render a lawful award. Any deviation from this will allow the losing party, that is likely to be interested in opposing the award at the enforcement stage, to raise objections that will slow down the outcome of the award.

Italy is an enforcement friendly jurisdiction, where foreign awards are usually prima facie recognised, unless they breach public policy rules or Italian mandatory provisions.

**Argentina – AR** Whenever you go into arbitration you need to make an analysis of soft and hard laws, in order to select the proper arbitration tribunal, as well as a venue.



Ruggero Rubino Sammartano pictured at the 2017 IR Annual Conference in Berlin

During the past 20 or 30 years there has been a wide and in-depth elaboration of guidelines standards and codes of best practices for the conduct of proceedings, issued by several groups such as the International Bar Association (IBA), the International Chamber of Commerce's Court of Arbitration (ICC) or the American Arbitration Association (AAA). These have often been called the soft law of arbitration procedure.

in Argentina all these institutional arbitrations are very well known and there have been a number of cases where Argentine litigants have submitted arbitrations to these institutions. In addition, in Argentina, there is a very well-known and reputable arbitration panel handled by the Buenos Aires Stock Exchange and the American Chamber of Commerce (ACC), of which I am the chairman.

It's also necessary to consider the national norms as well as international treaties governing arbitration, which have been called the hard law of arbitration procedure. Only last month, Argentina adopted the UNCITRAL model law for Commercial International arbitration.

This is an important advance in terms of the hard law applicable in Argentina, because we have adopted a very widely brought global procedure for arbitration.

Ad-hoc arbitration may be recommended when the size of the arbitration doesn't pay for the eventual cost of results from a body such as AAA or ICC, which normally deemed to be more applicable and recommendable when the size of the dispute is significant.

I normally make sure that the UNCITRAL parameters are respected and do pay a lot of attention in drafting an arbitral agreement which ensures that the arbitration procedure is fairly conducted.

Forum selection depends on the hard law of the venue, because, at the time the award is to be enforced, we want a country that adheres to the New York Convention and will facilitate the enforcement procedure. Another issue to be taken into account is the legal culture of every creation page, even though the parties may have selected applicable governing law and procedural laws.

It is important to ensure that the arbitration agreements around substance and procedure do not invalidate pre-dispute agreements to allocate arbitration costs in advance of the dispute.

It is a general rule that the arbitration agreement should consider the power vested in the arbitration tribunal, to establish the burden of cost, mainly following the rules on who won and who lost the case, to avoid inconsistency and problems at the time of enforcement.

**Turks & Caicos Islands – SW** It very much depends on what you mean by advantageous jurisdiction.

If you're the winner of an arbitration, you want a jurisdiction that restricts the ability to challenge the award and, in that respect, because of the inadequacies of our legislation, the Turks and Caicos Islands is an advantageous jurisdiction.

On the other hand, if you're looking to enforce an award, you principally want to be able to take advantage of the New York Convention, or at least you want to enforce in a jurisdiction that recognises arbitration awards as if they are local



Gary Davidson and Alfredo Rovira pictured at the 2017 IR Annual Conference in Berlin

court judgments and makes it easy to enforce.

Ordinarily, of course, you're going to be looking to enforce in jurisdictions where the defendant has its assets.

**Dominican Republic – PGT** The enforcement of an award is different if we are dealing with an international award, rather than a local one.

If we are dealing with an international award, then it has to be domesticated and obtain the exequatur under the New York Convention. The process for the exequatur of an international award, must be filed and conducted before the national district court that sits in the capital, Santo Domingo.

The Dominican Republic became a signatory to the New York Convention in 2002 after some pressure on congress to ratify the convention at the time and I had the opportunity to file one of the very first cases then under the new statute.

If we are dealing with a local award, then you can enforce a decision anywhere in the country. A claimant must take the decision about whether they wish to waive any rights to an appeal or challenge of the arbitration award, before it is enforced. In some cases, it is worth doing this, because it will expedite the enforcement, but that will take an anal-

ysis in advance on the procedural position of a client, in case of a future dispute. It may be that, under the terms of the contract, the client would have a higher tendency to seek remedies.

**Hong Kong – EW** I would choose to enforce arbitral awards in the jurisdiction which the opponent party has assets and in which the court would readily recognise and enforce arbitral awards.

Hong Kong would be an attractive jurisdiction to enforce arbitral awards, because the Hong Kong Courts would recognise and enforce arbitral awards, and there is rarely any case in Hong Kong in which arbitral awards are refused.

**U.S., Florida – GD** There is never going to be an agreement in advance, however the most important thing for a client in considering post-award enforcement, would be where the other side is located. If they are in a country that recognises the NY Convention, we can take the award no matter where rendered and enforce it.

If they are not, we must look at the difficulty of enforcing an award, and this has to be thought through before agreeing to the arbitration clause.

You may still want to agree to arbitration with an entity from a country that is not a NY Convention member, however if you

did proceed to arbitration, you would only want to do that with an entity that has moveable assets worldwide that can be grabbed in order to satisfy a judgment.

The advantage of doing arbitration in Florida is that we allow lawyers from anywhere in the world to come here and arbitrate, you don't have to be licensed in Florida. If you want to have a local presence, that can be arranged and you can hire local counsel to arbitrate with you. Lawyers and clients from all over the world come to Florida to do arbitrations.

California has been to the contrary, and that really hurt their attractiveness as a locale for arbitration. They have just changed their law.

There are no disadvantages to doing arbitration in Florida. We have a very experienced federal judicial branch that hears lots of arbitration issues, and we also have a dedicated judge in the state system, who is responsible for hearing disputes on the enforcement of arbitration clauses.

SESSION THREE - ARBITRATION CLAUSES

# What is your best practice approach for ensuring arbitration clauses are to the real advantage of your client?

**U.S., Florida – GD** Florida law generally permits enforcement of written contracts that have fee-shifting provisions in them in the event of a dispute.

That can be in litigation or arbitration, however it has to be in the contract as an explicit agreement.

Costs in Europe generally mean attorney's fees, while in the USA it refers to hard costs, such as court filings, court reporters and the like.

Designating the forum in the contract brings with it a lot of considerations. It is really specific to that particular party, and there is no right or wrong answer. Let's say you have a party coming from Latin America and one from Canada. Very often the parties agree to have the dispute heard in a third party venue such as the US, because nobody likes to feel they are in the other person's home town.

Third party designated venues are very common, and forum rules will apply so you have to be very careful how you select the jurisdiction.

When it comes to mandatory mediation clauses, I am generally opposed to including them in a contract for arbitration. I love mediation, but typically it is used as a condition to commencing arbitration. If the parties must first go to mediation, it can create a big problem because the other side can play games to avoid arbitration by delaying mediation. This will hinder the ability to get the arbitration started and may jeopardise things like statute of limitations for filing.

**Argentina – AR** One of the most important issues to take in to account when drafting an arbitration clause, is that arbitration is generally considered as an alternative to the general judicial jurisdiction. This is a clause that operates by exception, and it needs to be very clear and precise in terms of making sure that

all facets that the contract represents are subject to alternative dispute resolution (ADR).

If they are not, you run the risk of entering into an endless dispute in court, where the other party wants to resist any arbitration procedures.

You need to provide clearly, which is the subjective and procedural law, the language used, the seat of arbitration and how to deal with the costs. Confidentiality is important, since one reason to go to arbitration, is to avoid a case being open to the public.

We are generally resistant to mediation, but we do favour the fostering of amicable negotiations in a very short and clear timeframe before the arbitration. Giving the parties a chance to present their case, is a mechanism to avoid litigation.

**Italy – RRS** Exchange of information, understanding and advice.

Having said that, in the best interest of clients, there are interesting variables that are not often taken into account.

It is, for instance possible to provide an alternate clause, by which the parties agree that the first one to submit a dispute may decide between court proceedings and arbitration. The parties will be free until the very last moment to select their warpath. *Electa una via, altera non datur.*

Another option, for instance, is to set a threshold related to the claim, below which State Courts will be competent and beyond which arbitration will be initiated.

As mentioned earlier, arbitration is based on the common intent of the parties.

**Hong Kong – EW** My best practice approach, is to insist upon ad-hoc arbitration (which saves costs for my client)

and also to ensure the seat of arbitration is the same jurisdiction as my client's place of incorporation or place of business. If the opponent refuses to agree on the seat of arbitration, I would suggest the seat of arbitration be closer to my client, which would be more convenient to conduct arbitration.

**U.S., Arizona – MH** Properly developing the arbitration clause in a contract is half the battle in its success, when one goes to arbitration. What I attempt to do, is look at a potential dispute and what the parties have actually entered into a contract to accomplish. Then I advocate for specific jurisdictions where the law of the case would be the most beneficial.

It also depends on the issues that might be involved, as to where an arbitration would be most advantageous. For example, if I have a client in a banking or commercial transaction, it is more than likely that I will advocate that New York law should apply, because that jurisdiction has decades of case law involving these specific financial areas.

Or, if it is in the insurance or surety industry, I might advocate for a jurisdiction in the Midwest, such as Illinois or Michigan. This location is where the insurance industry is based and usually originated, hence they have vast amounts of case law available to assist in adjudication.

If a dispute between parties involves intellectual property (IP), I might suggest that the laws of California be utilised, because that jurisdiction has substantial case law on matters relating to IP. These are some of the details that I look for as part of the arbitration process.

When it involves the actual arbitration, I try to find a location that is convenient for my client. It is also necessary to be able to draw from a pool of arbitrators with experience in the legal field needed.

I always prefer that the physical arbitration take place in the state in which my client is located, but often we have to find common ground and travel becomes a necessity.

Arbitration clauses usually include a fee arrangement, ensuring the prevailing party is entitled to its costs and expenses. This fee arrangement is an incentive for clients and allows the parties to take pause before they commence the arbitration process, to ask whether their case is strong enough to give them favourable odds.

Another key provision I try to include in an arbitration clause, is an agreement that the prevailing party is entitled to damages as a result of the contract, but not to extraordinary or punitive damages. This limitation eliminates the threat or allegation of fraud or conversion as a way of a party to claim extra damages. In these matters the contract in dispute is a commercial transaction and should be treated accordingly.

When it comes to locating appropriate arbitrators, my main goal in locating a beneficial arbitrator is experience. I do not mind using an arbitrator who is neither an attorney nor a judge. A designer or engineering expert with a practical viewpoint can be a positive arbitrator for the right type of dispute.

I am also becoming a greater advocate for mandatory mediation clauses, which can provide a better result than arbitration. I'm not sure if this approach is appropriate for larger complex cases, where both parties believe they are due large sums, but these mandatory mediation clauses are often effective if the amount in play is smaller.

**Turks & Caicos Islands – SW** Our experience is that arbitration agreements generally tend to include insufficient detail.

In addition to the choice of law considerations that Matthew outlined, one of the things that avoids constant referral to the local courts to supervise the arbitration is some reference to procedural rules. There are very few rules in the TCI Arbitration Ordinance, as applied to domestic and international arbitrations. So, unless you incorporate some form

of procedural rules, by reference to institutional rules or local rules of court, you can spend an inordinate amount of time, and therefore cost, dealing with procedural issues, meaning you may have been better off choosing litigation rather than arbitration.

Properly drafting the arbitration clause is half the battle. All too often I have seen insufficient thought put in to that, with clauses that simply say: "any disputes in connection with or arising out of this agreement shall be resolved by arbitration." In this regard I agree entirely with what Gary says about the need for transactional lawyers to include dispute resolution lawyers in the drafting of the arbitration or other ADR agreement.

Anybody who has a commercial transaction practice knows that the parties, at the initial stage, just want the deal to get done. The best time to reach agreement on how to resolve any dispute is when the parties are about to do a deal. Trying to reach agreement once the parties are fiercely in dispute, is not the time to deal with procedural issues or agreements on resolving a dispute, particularly if one party is taking an antagonistic position.

**Dominican Republic – PGT** I usually try to understand the context of the negotiation and the type of contract that we are entering into, because that determines the type of arbitration clause I want to draft. In order to do this, you need to understand not only the complexities of the deal at hand, but also the nature of the parties. For instance, multinational companies subject, as most are, to codes of conduct are keen to comply with contracts, while individuals, or sole owners can be mavericks and often try to litigate on every minutia.

Also, in preparing to do the drafting, one has to consider which party has a higher bargaining power. If my client is entering into a contract with an equal, and we are not necessarily the ones controlling the contract, then we have to draft and tailor the arbitration clause to favour both parties. In those cases, I often try to convince the other party to create mechanisms or means of mediation for quick, amicable settlement procedures designed to deal with

specific issues in the contract that are not worthy of arbitration.

For instance, the agreement may have to deal with some technical questions. I would persuade the opposing counsel to create alternative disputes resolution, i.e., expert determination or mediation, where the parties may agree to settle instead of arbitrating. My reasoning is that typically the parties wouldn't want the contract to be in danger of surviving because of a technical issue that they can set aside its determination and/or solution without hampering the remaining clauses of the contract, by means of a cost-efficient, quick resolution to the conflict.

Also, if my client would like to have expedient resolution to any arbitration and would like to enforce any judgment quickly, I would design a simple arbitration clause aiming towards flexible and quicker approaches, for example having one sole arbitrator, limiting the number of hearings and waiving any rights to appeal or challenge, so that we can go in and enforce it quickly.

If, otherwise, in dealing with the clause drafting, I feel that by the nature of my opposing party, and/or the type of contract my client is signing, the other side may have a higher tendency to litigate and sue my client, then I will draft a more complex agreement. This will include very formal and comprehensive provisions, such as a requirement to deal with three arbitrators, a more detailed procedure, possibilities to maintain the contract while arbitration is in place, possible recovery of damages, or obligations to pay lawyers' fees. This has the purpose of making it more expensive and costly to the losing party. The goal would be to discourage the other party from pursuing a frivolous arbitration.

**Germany - FW** One important aspect is the language of proceedings, which has to be determined before.

In international proceedings, its mainly English, but in national arbitrations, we will choose the common language of the parties.



Dr. Alfredo L. Rovira pictured at the 2017 IR Dealmakers conference in Lisbon

We have already talked about the applicable law to the arbitration and, as such, the seat of arbitration has to be taken into consideration.

With regard to the number of arbitrators, for most cases, a three-member arbitrary tribunal is probably the best choice. You then have to distinguish between which arbitration institution you want to use.

**Austria – KO** I agree that the choice of institution is a very important aspect. That's one of the questions you want to consider first hand, including whether or not you're going to go ad-hoc or use an institution to administer the proceedings.

On some occasions, if arbitrators are called on to administer themselves, they may ask for spectacular hourly rates. However, overall, ad-hoc tends to be less costly. When it comes to institutions, very often the cost aspect is important to clients, so you may choose one of the smaller forums as opposed to ICC or LCIA.

It's very easy nowadays to check out the applicable fees consisting of the administrative fees of the institution plus the arbitrator's fees. You simply type the amount in dispute into the cost calculator and the overall envisaged procedural costs are displayed.

With regard to the quality of administration, the well-established ones can be relied on, because they have very experienced and hardworking counsel. They are of great assistance to arbitrators

and counsel when it comes to procedural issues.

They remain in regular contact and make sure there is no misunderstanding, no traps or loopholes.

Less experienced institutions are cheaper, but not as professional, reliable or responsive.

As far as clauses are concerned, in 95 per cent of matters, I use institutional clauses rather than draft them on my own in favour of the client. Drafting would be the exception from the rule.

There are standard template clauses available with each institution, and you just go with those. If parties want to add additional regulations to the clauses, they must be very careful because they take the risk of making this an issue later on.

Poorly drafted arbitration clauses create a dispute of their own and you can go over jurisdictional questions for months. Sometimes a jurisdictional hearing is required to clarify and decide whether or not a tribunal is competent to hear the matter.

**Germany – FW** we just jumped into the discussion on the basis that we want to go to arbitration, but the main question here is whether parties could better deal with the dispute via litigation ahead of arbitration.

This depends on a variety of aspects; for example, if one of the parties has secrecy issues, then arbitration might be the better choice.

**Austria – KO** I fully agree with Florian, except for one aspect - appeal. You do not get to appeal an arbitration decision.

**Germany – FW** I was about to mention that. It could be good or bad, depending on the circumstances of the party involved.

**Austria – KO** Fee-shifting provisions are usually not included, but it certainly makes sense to do so if required. That's one of the aspects you can add without the risk of making the contract inoperable.

It is mainly about whether the prevailing party should be reimbursed, which is common in European disputes as opposed to the UK or US, where arbitrators frequently rule that both parties bear their own costs independent of the outcome.





Florian Wettner pictured at the 2016 IR Annual conference in Amsterdam

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