ROUNDTABLE

International arbitration

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THE PANELLISTS

Anthony Theau-Laurent
Partner, Accuracy
T: +44 (0)203 861 4652
E: anthony.theau-laurent@accuracy.com
www.accuracy.com

Anthony Theau-Laurent is a partner at Accuracy based in London. He provides advice and independent expertise on business, valuation and accounting matters in the context of disputes, transactions and multijurisdictional frauds. He has particular expertise in the assessment of damages and has been appointed as expert witness in commercial and investment treaty arbitrations, as well as in English High Court proceedings.

Robert J.C. Deane
Partner, Borden Ladner Gervais LLP
T : +1 (604) 640 4250
E: rdeane@blg.com
www.blg.com

Robert Deane is the head of Borden Ladner Gervais LLP's International Trade and Arbitration Group, and a member of the Partnership Board, the firm's governing body. Mr Deane practises international and domestic commercial arbitration, commercial litigation, intellectual property litigation and competition law. He is ranked nationally and internationally as a leading lawyer in these areas, and has been counsel in many significant arbitration proceedings throughout the world, under most institutional set of rules.

Dr James Dimech-DeBono
Director, CEG
T: +44 (0)203 908 7017
E: jdebono@ceg-europe.com
www.ceg-global.com

Dr James Dimech-DeBono is a director at CEG and leads the firm's quantitative finance practice in Europe. He has over 26 years' advisory experience and his clients include financial institutions and law firms. He has a strong academic background in quantitative finance and expertise in the areas of banking, investment management, complex valuation and risk. He has been appointed as a testifying expert on numerous occasions.

Mike Filla
Senior Counsel, Conoco Phillips
T: +1 (281) 293 1000
E: mike.j.filla@conocophillips.com
www.conocophillips.com

Mike Filla is senior counsel with the Commercial Litigation and Arbitration group at ConocoPhillps. His background includes extensive expertise handling a broad range of commercial litigation and arbitration. Over 20 years, both in private practice and as in-house counsel, he has guided clients from numerous industries through numerous issues surrounding international disputes, risk management, governmental investigations, employee issues, contract formation and interpretation, and responding to catastrophic events.

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

Serge Gravel is a partner at FLV & Associés, based in Paris, France. His areas of expertise include: international arbitration (both commercial and BIT cases), mergers & acquisitions and real estate transactions and financing. He has served as a member of the International Court of Arbitration of the ICC for a number of years. He is a member of the Paris and Québec Bars, and a graduate of Harvard Law School.

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

Cameron Ford is corporate counsel at Rio Tinto in Singapore, practising in disputes and commercial law. Mr Ford is a Fellow of the Chartered Institute of Arbitrators, the Singapore Institute of Arbitrators, the Australian Centre for International Commercial Arbitration and Fellow (Master) of the Association of Forensic and Advanced Valuation Executives. He also sits on the arbitration panels of the SIAC, SIArb, KLRCA, HKIAC and the Beijing Arbitration Commission and has conducted a number of arbitrations.

Melis Acuner
European Counsel, Skadden, Arps, Slate, Meagher & Flom LLP
T: +44 (20) 7519 7164
E: melis.acuner@skadden.com
www.skadden.com

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

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

Marco Tulio Venegas is a partner at Von Wobeser y Sierra with 18 years' international experience both on a professional and educational level. The youngest partner ever promoted by the firm, he has saved his clients billions of US dollars and has protected and resolved several of the most complex and consequential litigation and arbitration matters for both multinational clients and governments around the world.

Wilford: Could you provide a brief overview of the key trends and developments you have observed in the international arbitration space over the past 12 months?

Venegas: During the past 12 months, we have seen an increase in disputes related to the energy sector in Mexico. The disputes range from disagreements between a main contractor and its subcontractors to large infrastructure with state owned companies – for example, in the oil sector, the disagreement between PEMEX and the utilities company of the Mexican government, Comisión Federal de Electricidad (CFE). In addition, we have seen a curious increase in disputes regarding failed joint ventures between large corporations in the consumer goods sector.

Deane: Most of Canada's provinces are in the process of adopting new international arbitration legislation, with the Province of Ontario having completed the process. Vancouver and Toronto continue to work on marketing themselves as excellent options for arbitration venues or seats. Indeed, Vancouver mounted a bid for the 2020 ICCA Congress, which was won by Edinburgh, and will be bidding for the 2022 ICCA Congress at the next event in Sydney, Australia in the spring of 2018. Canadian companies are becoming more comfortable with international arbitration as the preferred forum for international dispute resolution, which is being reflected in the number of significant cases around the world involving Canadian companies, including in the investor-state sphere.

Dimech-DeBono: Over the past year or so we have seen a number of changes in the international arbitration landscape. The publication of the International Chamber of Commerce (ICC) Commission Report on financial institutions and international arbitration is a step in the right direction as traditionally financial institutions have relied on national courts to settle disputes. More and more financial institutions are realising that there is an alternative. One of the key benefits of international arbitration is the flexibility it gives parties to tailor the arbitral procedure to their needs.

Filla: Prominent trends seen over the last year have continued to focus on familiar debates. Nations, companies, institutions and the legal industry continue to make progress addressing hot button issues that highlight calls to reshape integral aspects of the international arbitration framework. Balancing the call for more transparency against traditional principles of confidentiality remain at or near the top of the list, with several arbitral institutions recently amending their rules and practices to address these issues. Other important trends seen have been the continued calls for greater diversity in arbitrator appointments, the disclosure of third-party funding – and its bearing on security for costs – and how all the players involved in the arbitration industry can do their part to reduce the expense and length of the typical international arbitration proceeding.

Ford: We have seen the continued 'litigationising' of arbitration. This has been going on for a few years, with practices and procedures from litigation being adopted in arbitration. Over the last year or so, there has been a noticeable trend for institutes to amend their rules to provide faster and simpler processes which are traditionally part of litigation, and to allow for joinder of parties who are not party to the arbitration agreement. Institutes have created provisions for emergency arbitrators, expedited arbitrations, summary judgment, default judgment and for joinder of third parties. These could all be seen as efforts by arbitration to compete with litigation, where those features already exist and which parties generally find attractive. It is also a function of institutes competing with each other to produce efficient arbitral processes.

Gravel: The jurisdiction of arbitral tribunals is often challenged by litigants. Indeed, the validity of the arbitration agreement or its scope is frequently questioned. The jurisdiction issue may be raised either during, including at the very beginning, the arbitration proceedings or when the arbitration award is being challenged in court. Challenging jurisdiction is nothing new, but it would seem to be increasingly resorted to in all types of arbitration proceedings, including investments disputes. Many interesting and complex problems may arise, including which law the arbitrators should apply, especially when one seeks to extend an arbitration clause to a non-signatory of the underlying business agreement. There is a general tendency to try and import common law techniques into the international arbitration process. There are pros and cons to this. It is submitted that one should be prudent, selective and respectful of the parties involved. Common law techniques which are not properly understood and applied may generate unexpected and unnecessary costs and delays.

Theau-Laurent: The past 12 months have confirmed a number of trends seen in previous years, in particular, the growing complexity and variety of cases and the increasing recourse to third-party funding. The growth in complexity has been illustrated by the proportion of cases failing to settle, and an increase in the sizes of claims, the number of issues in dispute, the corresponding volume of data disclosed and the number of technical expert witnesses involved, for example, in cases relating to large scale infrastructure projects. There has also been a greater variety of cases, both in terms of jurisdictions, with a significant proportion of new investor-state disputes involving African nations, and sectors. Finally, there has been increasing recourse to third-party funding, regardless of parties' size and wealth, matched by calls for increased monitoring of this area.

Wilford: What, in your opinion, are the most pressing issues facing participants in today's rapidly evolving and increasingly complex international arbitration landscape?

Deane: Internationally, there has been a lot of talk lately around issues such as legitimacy and transparency, particularly in the investor-state arena, costs and international standards regarding issues

like privilege and ethics and third-party funding. Responses to some of these issues have included some institutions publishing certain decisions and taking steps to increase transparency, including the ICC providing the names of arbitrators appointed in its cases. As well, other databases on arbitrators are being developed and shared. The International Bar Association (IBA) and the international arbitration community as a whole are actively discussing and debating the benefits and drawbacks of potential uniform standards on privilege and ethics. A number of jurisdictions, such as Hong Kong and Singapore, have specifically addressed the legitimacy of third-party funding. All of these are attempts to address concerns identified by users and others.

Dimech-DeBono: There are a number of pressing issues. For example, these include the costs and speed of tribunal decisions associated with international arbitration, the uncertainty of outcomes through lack of transparency and unclear written rules. It is reassuring that these issues are being addressed by established seats. It is also worth mentioning that the ICC arbitration rules that came into effect on 1 March 2017 introduced the expedited procedure rules, which apply to any arbitration in which the amount in dispute is less than $2m. On a different note, issues relating to the uncertainty created by the political landscape such as Brexit and the election of Donald Trump are arising.

Acuner: Ensuring that the arbitral process is fashioned to cater for client needs and the characteristics of the dispute is perhaps the most pressing concern for all participants in an international arbitration. Other imperative matters are fairness and justice, and the reliability and predictability of the process, which can be promoted through careful and efficient case management by both the tribunal and legal counsel. Arbitrator expertise and the speed and cost effectiveness of the process are also of high importance, as well as the finality of the outcome, and the receipt of and ability to enforce a monetary award. Strategic and commercially minded legal advisers who understand the politics and nuances of what the client is trying to achieve, can help navigate complex disputes through the international arbitration landscape.

Filla: How to combat the perception that international arbitration, particularly investor-state proceedings, is a largely hidden process conducted before tribunals without accountability is a great concern within the investment arbitration community. Greater public access and transparency is seen as the answer, and several institutions have enacted new rules, policies and data collection and publication procedures that will, over time, significantly increase visibility. Parties to a particular arbitration do not always embrace transparency for a variety of legitimate reasons, having chosen arbitration specifically for the confidentiality features it can provide. We will all be required to adapt to the risks and benefits of the coming increased transparency. Secondly, it will be interesting to see how the EU's drive for a multilateral investment court impacts others outside the region.

Ford: The management of cost and time remain the most pressing issues in arbitration. These factors have developed a reputation where a sizable proportion of corporate counsel avoid arbitration as their preferred method of dispute resolution. The blend of civil and commercial law procedures is another issue, but it is more of a boon than something to be overcome. Tribunals and parties can theoretically craft the most suitable process from the entire civil and common law procedure manual.

Gravel: In connection with international commercial arbitration cases, the assessment of quantum is central, which implies that the role of experts, notably financial experts, is increasingly important. Arbitration is clearly a means of ensuring that proper and adequate indemnification will be granted, in particular when compared to French courts which seldom award damages that are effectively commensurate with the losses actually suffered by those seeking relief. Moreover, in international arbitration proceedings, it is possible to request that issues of quantum be addressed separately and dealt with in separate interim or partial awards. This technique, known as 'bifurcation', is becoming more popular and, in practice, helps arbitral tribunals better determine quantum. One should note that in February 2017, a Swiss Arbitration Association (ASA) Conference held in Geneva was dedicated to 'Shaping Arbitral Proceedings to Best Examine Quantum'. With respect to international arbitration proceedings involving sovereign states, the central preoccupation is the enforcement of arbitral awards. The immunity enjoyed by sovereign states under public international law, has always been and remains the main problem faced by litigants. Unfortunately, practical solutions are not readily available in many situations. International treaties, including bilateral and multilateral investment treaties, do not provide adequate guarantees for private investors seeking to enforce international arbitration awards. Moreover, the public international law principles governing sovereign immunity are not applied consistently by all jurisdictions worldwide.

Theau-Laurent: Cost and timing issues, including the frequency of slippage in procedural timetables, seem to remain at the forefront of participants' minds. These issues have been further impacted by the trend for the growing complexity of cases but could be potentially addressed through more active case management by tribunals, amendments to arbitral clauses and the early involvement of financial experts. Parties to simpler or lower value disputes could also make use of expedited processes. The trend for third-party funding in arbitration brings with it new concerns about the transparency of such agreements with regards to potential conflicts of interest and costs and, following the *Essar Oilfield Services v. Norscot Rig Management* case, their recoverability. Finally, the debate over how to level the playing field between parties from different jurisdictions remains.

Venegas: The most urgent need is to maintain efficiency in arbitration. As arbitration has popularised, it has attracted attorneys that are used to litigating before state courts. They bring their baggage and practices to arbitration, which sometimes leads to delays and all manner of objections into proceedings. Although experienced arbitrators are good at dealing with this type of behaviour from counsel, on average, it provokes delays and increases costs. The other pressing need is to have more young practitioners involved in arbitration, to set the basis for them to become the arbitrators of the future. Currently, it appears that the good arbitrators are either too old or too busy to participate in the ever-growing number of cases.

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> Von Wobeser y Sierra

Wilford: Have any arbitration cases caught your attention in particular? What do their outcomes tell us about the current international arbitration environment, and how might they impact cases in future?

Dimech-DeBono: With the debate around third-party funding remaining at the fore for a number of reasons, a case that has attracted attention was *Essar Oilfields Services Ltd. v Norscot Rig Management*. In September 2016, the High Court upheld the decision of an arbitrator to allow the recovery of the cost of securing third-party funding. This was hailed as a landmark decision. In this case, due to obvious financial pressure put on Norscot by Essar, leading to Norscot being left with the only option to obtain third-party funding, it was judged that under both section 59(1)(c) of the Arbitration Act 1996 and article 31(1) of the ICC Rules, those costs were recoverable.

Theau-Laurent: With the emergence of third-party funding, the decision in *Essar Oilfield Services v. Norscot Rig Management* was made on the grounds that Essar did not have the financial means to otherwise bring its claim and that the costs were reflective of market rates. The implications for parties who use third-party funding, despite having the means to self-fund, are unclear. Given that most third-party funding agreements are contingent upon a certain outcome, with the fee uplifted to reflect the perceived risk of achieving the desired result, and that tribunals rarely find unilaterally or unconditionally in favour of either party, it will be interesting to see the precedent this award sets.

Acuner: The most recent outcome before the High Court in Delhi in the longstanding dispute between the Japanese telecommunication company NTT DoCoMo and Indian conglomerate Tata Sons has attracted attention on the topic of the enforcement of international arbitration awards. On 28 April 2017, the High Court in Delhi ruled that the June 2016 LCIA award in DoCoMo's favour – of approximately $1.2bn in damages – can be enforced in India, and approved consent terms between DoCoMo and Tata to that effect. Significantly, the court rejected the Reserve Bank of India's application to intervene in the proceedings on grounds of Indian foreign exchange regulations and the public interest, the effect of which if successful would have been to undermine Tata's payment of damages in terms of the award. The case demonstrates encouraging support for the enforcement of international arbitration awards in India, and has potential, depending on the future treatment of the decision, to become a landmark case boosting investor confidence in India's legal system.

Venegas: The COMMISA case has finally been settled. The fact this case led to recognition by US courts of an award previously nullified in Mexico is having an impact in the arbitration clauses agreed by the Mexican state-owned entities. Although there is an understandable distrust in Mexico as a seat of arbitration, it is necessary to put in context the characteristics of the COMMISA case. This case consisted of an unusual set of circumstances that would be practically impossible to repeat. Therefore, it is important to avoid the mistake of considering this exceptional case as the rule. In any event, the evolution of legislation regulating state-owned entities worldwide must contain an awareness of the need to be certain as to the limits of the power that said entities have in their contractual relationships with private companies, and the impact these limits may have on the arbitrability of disputes.

Gravel: The UNCITRAL Energy Charter Treaty arbitration proceedings involving Yukos Universal Limited and the Russian Federation are noteworthy in many respects. The final award issued on 18 July 2014 provided for a record-breaking indemnity in excess of $50bn. An interim

award on jurisdiction had been issued on 30 November 2009. That $50bn award, which was cancelled on 20 April 2016 by the Hague District Court, has generated a substantial number of enforcement court cases in several jurisdictions, thereby raising complex issues of immunity. The 2009 award on jurisdiction, which was cancelled along with the final award on the merits, also raises interesting and complex legal issues. Considering the amounts at stake, this case and its worldwide judicial ramifications are likely to remain active for many years to come, and may very well generate new precedents and shape in part the future of international arbitration.

Ford: A remarkable decision was given in the Singapore High Court in *KVC Rive Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* and another suit in February 2017. In this case, it was held that, by contractual interpretation and implied terms or in the exercise of its inherent jurisdiction, the court would be prepared to step in to directly appoint an arbitrator on a bare arbitration clause which said: "The seller and the buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Singapore Contract Rules". This is a strong indication of the support courts will give to arbitration and an example of the general pragmatism and flexibility of the courts generally over the last few years. Far from seeing arbitration as their competitor, courts now view it as one of the ways they can be relieved of their pressure and to free up limited resources for cases which cannot be dealt with otherwise, such as criminal trials. For the future, this attitude will encourage parties to use arbitration as they know the courts will support it, and it will give arbitrators confidence to deal more robustly with issues in the arbitration.

Filla: A decision worth watching is the International Centre for Settlement of Investment Disputes (ICSID) annulment committee's decision to reduce the underlying tribunal's award to an Exxon affiliate by $1.4bn. There are, of course, only a few grounds that warrant annulment, and whether one of those grounds really existed here is highly debatable. Looking forward, it will be interesting to see the future impact of this decision on the industry as a whole, on the players involved and how each reacts to the event.

Deane: Due to the confidentiality surrounding commercial arbitration cases, the highest-profile international arbitration cases tend to arise in the investor-state arena. While the awards themselves are of interest, and one sees the continued development of a comprehensive body of law, it is also important to recall that obtaining the award is often only the first step, as compliance or enforcement must then be sought. In Canada, and partly in an attempt to deal with state immunity, we have seen a series of cases in which successful claimants have sought to enforce their awards against shares in commercial enterprises owned by state-affiliated actors. The most recent attempt, which has been unsuccessful to date, is *Belokon v. Kyrgyz Republic* (2016), in which the claimant sought to enforce its award against shares in Centerra Gold owned by a state-affiliated company. However, this is just the latest of several such attempts in Canada, and it will be an interesting trend to watch.

Wilford: With the costs associated with arbitration being an ongoing concern, what, in your opinion, should be done to tackle this particular aspect of the process?

Acuner: There are a number of strategies that parties can adopt to reduce the costs burden. One such strategy is to maintain a strict focus on the true issues in the dispute between the parties. Another is to use small, focused teams. Proper management of the procedural course that the dispute shall take is another important way of controlling costs. This involves, among other things, convening procedural hearings of the tribunal, targeted requests for document production, careful consideration of what evidence – including in particular expert evidence – is strictly necessary, as well as close management of putting together all other evidence which is deemed necessary.

Theau-Laurent: Parties have a growing tendency to request fixed or capped fee proposals from experts, as opposed to hourly rates, both for individual phases of work and the overall process. Such approaches are often not the best way to control costs as they are done 'blind', before the full facts of the case or a number of issues in dispute are known, experts either build in significant contingencies

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or subject the cap to many caveats. Arguably, the most effective approach to control and reduce costs is to seek to narrow the number of issues in dispute as early as possible in the process, to the extent possible. This requires the early involvement of both the tribunal and party-appointed experts, so that the latter have consistent instructions and timely access to the necessary information.

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> CAMERON FORD
> Rio Tinto

Ford: Costs are the responsibility of three sets of participants – the parties, the lawyers and the arbitrators. None of them can abrogate their responsibility to keep costs reasonable, and all have an interest in doing so. Costs are already perceived to be higher in arbitration than litigation by many corporate counsel and commercial people. This prompts them to opt for litigation rather than arbitration, or to embrace other forms of dispute resolution such as mediation or neutral determination. We have already seen a growth in multi-tier dispute resolution clauses with the express purpose of resolving disputes before they reach arbitration or litigation. It is in the interests of all those involved in arbitration to manage costs so further work is not lost to other forms and the advantages of arbitration are not overwhelmed by its expense. There comes a point at which confidentiality, flexibility and even the potential necessity of enforcement are not worth the seemingly limitless cost of arbitration.

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

Filla: Costs are a concern, and certainly much of that is tied up in the processing time and delays sometimes seen in complex international arbitrations. Institutions are implementing new rules designed to streamline the process and arrive at a resolution expeditiously. But counsel, parties and arbitrators play a large role also. We can all do our part to minimise delays and maximise efficiencies. Also, expanding the pool of qualified and appointed arbitrators may result in fewer scheduling delays and the length of time taken to receive a decision or award, as the now oft-used arbitrators would not be quite so overwhelmed by multiple appointments. As more law firms enter the field, competition is lowering costs. Companies are becoming more open to, and appreciative of, law firms taking the initiative to offer options beyond the billable hour model. These creative partnership models should result in law firms working more efficiently and ultimately lowering the cost of their services. While cost can be a deciding factor, work is often awarded based on relevant and demonstrated experience, as well as an accurate case strategy plan clearly explained and detailed upfront.

Deane: Clients are increasingly concerned about the costs of arbitration, particularly the costs associated with document disclosure and, often, a rising number of expert reports. Experienced international arbitration counsel, in front of experienced international arbitrators that are all acting reasonably, provide a good framework for running an efficient and cost-effective process. However, it is essential for both counsel and the tribunal to maintain a focus on the key issues, and resist the inclination to deal with all collateral issues, most of which are not likely to be material to the outcome. In significant matters, of course, this discipline is easier to articulate than to exercise.

Venegas: The education and training of young practitioners is key. Once you have experienced counsels involved, the costs will automatically reduce. In addition, taking advantage of new software and electronic communications will help reduce costs, not only in the preparation of cases, but in the way hearings are carried out.

Dimech-DeBono: The costs associated with arbitration remain a concern; however, there are a number of measures that have been implemented, or that are in the process of being implemented, which will alleviate these concerns. Measures such as the standardising of arbitration clauses within contracts could help clarify the process and reduce the level of uncertainty. Stricter rules on timings for decisions and award enforcement, rather than "in a timely manner", would certainly provide additional clarity. Rules relating to the appointment of emergency arbitrators and early dismissal of matters mean less time involved and, as a result, lesser costs. Increased transparency into past

cases should enable disputes to reach an agreement faster, and at a lower cost. The new ICC rules, which came into force on 1 March 2017, applying to disputes up to $2m, are a step in the right direction.

Wilford: In your opinion, what has been the impact of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration?

Filla: The United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency are a step in the right direction to improve transparency in investor-state proceedings, as they undo the presumptions of confidentiality and replace them with a foundation based on an open and transparent process. We have now seen other arbitral institutions similarly following suit and updating their rules, bringing them in line with current thinking regarding transparency and good governance. The ICC is posting information about arbitrators on its website and, for better or worse, ICSID has begun live streaming certain arbitration hearings and says it will consider publishing decisions and orders.

Deane: There have been a number of efforts to increase transparency in investor-state arbitration. It is too early to tell what impact this will have in the long-term but currently these measures appear to be well-received. In a North American Free Trade Agreement (NAFTA) case, the Permanent Court of Arbitration (PCA) recently issued a "Notification to Non-Disputing Parties and potential Amici Curiae", consistent with recent moves towards transparency by the three state parties, demonstrating that not all transparency efforts are new.

Dimech-DeBono: The rules were intended to address concerns raised – principally by non-governmental organisations – regarding the lack of transparency in treaty-based arbitration proceedings involving states. The rules relate to resolving the disputes between investors and a nation in international investment treaty. They establish a system of dispute resolution, allowing one contracting party to submit a claim against another party for the violation of treaty obligation to international arbitration. The rules are consistent with a trend toward greater transparency in investor-state arbitration, which has already seen developments toward transparency made by the ICSID, the PCA and NAFTA. All in all, these rules make a contribution in this respect.

Venegas: The UNCITRAL rules on transparency have been very positive in investor-state arbitrations. I would say they are a game-changer in terms of providing certainty to the states involved in these types of dispute. It is worth mentioning that due to the specific characteristics of these disputes, states are closely scrutinised, so the transparency standards set by the UNCITRAL rules have been of great help to them.

Acuner: The 2014 Rules on Transparency were adopted by UNCITRAL with the object of increasing transparency and public accessibility in treaty-based investor-state arbitration. In contrast to traditional arbitration practice, the rules provide for the publication of documents relevant to the arbitration, and also for the hearing of evidence and oral argument in public. The empirical effect of the rules, as well as their interpretation and application, and general reception of the rules by the users of arbitration – especially as regards the desire for confidentiality and potential costs implications – is yet to be vigorously tested and understood. We can see, however, some recent examples of these rules being applied. In the ICSID case of *BSG vs. Guinea*, the parties voluntarily adopted the rules, and indeed extended the publishing requirement to exhibits to expert reports, as well as agreeing to broadcast hearings via video link on the ICSID website. Furthermore, the Mauritius Convention will come into force this October, meaning that the rules will apply to disputes under a potentially far wider class of investment treaties predating 2014.

Wilford: What steps can be taken to smooth an arbitration process involving parties from jurisdictions with little synergy? How should parties go about increasing integration and overcoming potential cultural difficulties?

Ford: Arbitrations of any complexity, including a lack of synergy, should be conducted by parties and arbitrators together as a project. Rather than simply having fairly short procedural hearings resulting in orders or directions, the process should be viewed more collaboratively as a project with the common goal of overcoming all barriers, including cultural differences. A project

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> SERGE GRAVEL
> FLV & Associés

atmosphere and architecture allows those differences to be revealed and explored, rather than the more combative atmosphere of the usual adversarial interlocutory process.

Venegas: The best antidote is to have a good arbitral tribunal that is aware of the differences. The best way to integrate would be to have at least one common law arbitrator and a civil law arbitrator. Once you have this in place, the second step is to take the time to achieve an agreed procedural schedule, detailing all the relevant activities required from the parties and the arbitral tribunal. If you can achieve this and the tribunal leads the parties in understanding the benefits of following the agreed procedural rules, then difficulties will disappear.

> "THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) RULES ON TRANSPARENCY ARE A STEP IN THE RIGHT DIRECTION TO IMPROVE TRANSPARENCY IN INVESTOR-STATE PROCEEDINGS."
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> MIKE FILLA
> Conoco Phillips

Gravel: By definition, international arbitration proceedings involve parties with diverse backgrounds, in terms of languages, legal systems and business usages. Any arbitration proceedings involving French parties or proceedings conducted in France are likely to raise issues relating to procedure rules, to discovery and compulsory document production, or rules on the taking of evidence and the burden of proof. The French legal system in those respects is quite different from the common law system, and it is highly advisable that such differences be addressed and resolved early in the process. The well-known International Bar Association 'Rules on the Taking of Evidence in International Arbitration' (2010) are useful for reconciling civil law and common law expectations and traditions and, at the very least, constitute a concrete and reasonable basis to facilitate discussions.

Dimech-DeBono: Typically, procedural issues are more frequent in the situations just described. These result from cultural issues relating to both legal and language factors. Tensions are even higher when dealing with parties from developed markets and others from emerging markets. For example, when parties come from different jurisdictions, disputes often arise over what is or is not privileged. This can be further complicated as to which jurisdiction's rules of privilege apply. It is important to recognise, however, that arbitration remains the only dispute resolution method that allows business parties from different jurisdictions to access a suitable forum to achieve such a resolution.

Theau-Laurent: Arbitral institutions, as a priority, should ensure a level playing field between parties coming from different jurisdictions, with potentially different rules on specific matters, such as disclosure, privilege, witness preparation and the role and duty to the tribunal of experts. In the short term this would require tribunals potentially taking a more active role in case management, for example, by ensuring consistent instructions are given to financial experts, but in the longer term, arbitral institutions could contemplate developing new codes of conduct to speed up the process. In any event, cultural changes are likely to take some time before they become common practice.

Deane: Parties from jurisdictions with little synergy would be well-served to appoint experienced international arbitration counsel and experienced arbitrators. Such people, individually and collectively, are likely to have experience in dealing with parties from different legal traditions and cultures, and which likely have different procedural expectations. Having counsel and arbitrators that recognise these issues is a first step in developing a procedure that respects such issues. To do so, issues of differing cultural expectations should be addressed early in the process in an effort to limit any potential impact. Canadian parties are becoming more and more familiar with some of the differing cultural attitudes and expectations of their counterparts thus reducing the potential impacts of such differences.

Acuner: At the outset of a dispute, an opportunity should be embedded into the process for parties to agree on the procedural rules of the game, to minimise opportunities for guerrilla or delay tactics, and to avoid mismatched expectations and misunderstandings. The parties, for instance, might seek to come to a landing on the rules for disclosure, expectations regarding which can differ greatly in common law and civil law jurisdictions. We have also found that agreeing on the possibility for meetings of joint experts can bring the parties closer together at least on certain specific issues. Selection of a strong and patient tribunal panel willing to intervene when the parties still cannot agree can be critical. The culture of the law firms acting for the parties

may serve to increase integration and overcome difficulties. Ultimately, there is no substitute for direct communication between parties and attempts to find consensus.

Filla: The practice, regulation and use of international arbitration is becoming truly global. Users from cultures around the world are confronted with not only the prospect of synergy deficits between parties, but also between each member of the tribunal and the arbitral process itself. Institutions and developed country stakeholders must continue to understand, integrate and adapt to global users that may apply and expect a different set of traditions and ethics in the arbitration proceeding. We can expedite integration and overcome cultural issues by acknowledging the evolving demands of the players, and remaining flexible in the ability to respond to those demands.

Wilford: How is the international world establishing demarcation between the role of the judiciary and the arbitration processes? What challenges does this pose?

Dimech-DeBono: Historically these processes have been set for a different set of reasons. International arbitration is about fair and independent resolution of disputes by expert tribunals. Parties have the ability to appoint arbitrators of their own choice. This in itself highlights a major difference from a judiciary process and is something that the international business world understands. A further benefit that is well-understood is that an arbitral award is portable under the New York Convention, unlike a court judgement. Talks to potentially introduce an appeal mechanism within arbitration processes may not only diminish any demarcation but make international arbitration the only dispute mechanism of choice.

Venegas: The demarcation between the judiciary and the arbitration process is theoretically set by the adoption of the UNCITRAL Model Law and the New York Convention by most countries. However, in practice, there are specific particularities that have led to less or more intervention of the judiciary depending on the specific forum. For instance, there has been a trend toward strengthening the powers of the judiciary to assist arbitrators in granting provisional relief. This power has made more effective the arbitration and, at the same time, has showed how a good interaction between both the judiciary and the arbitral tribunal may result in a fruitful collaboration. On the other hand, there are still questions about the arbitrability of some aspects of disputes that may arise between wholly owned or controlled public entities and private companies. Discussion about the scope and extent of what must be considered a public policy matter is constantly evolving, and has proved to be one of the more uncertain aspects of arbitration with public bodies. Thus, it is necessary that a precise definition is made by the national legal statutes, mainly in connection with energy and infrastructure disputes, to avoid the proliferation of parallel litigation and nullification of awards.

Filla: In some respects, international arbitration has become a primary adjudicatory process for the resolution of complex commercial disputes, replacing the role of the court system in that regard. Once, it was generally the case that such disputes were determined in either the applicable national courts or via arbitration. Today, it is not uncommon for the parties to a dispute to utilise both means. Cost is a factor, as the parties may be required to not only manage multiple proceedings before different decision-makers, but these proceedings may run in parallel.

Deane: In Canada, the courts have steadfastly upheld the demarcation between the role of the judiciary and the arbitral process. Canadian courts consistently provide excellent supervisory support for the arbitral process, including by deferring to the tribunals as much as possible. International arbitral awards are enforced almost without exception and courts maintain a hands-off approach to the arbitral process internationally. The judiciary's supervisory role in domestic arbitration is more involved but remains highly deferential and respectful of the arbitral process.

Ford: Courts in developed jurisdictions are frequently supporting arbitration by making a sharper demarcation between it and litigation. More often than not, courts are declining to be involved in an arbitration when one party complains of some defect in the process. Of course, support for arbitration also means courts

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> DR JAMES DIMECH-DEBONO
> CEG

becoming involved when an arbitration truly is defective, but courts are erecting stronger barriers between them and arbitration as a general rule.

Wilford: Are we likely to see a shakeup in the number and spread of arbitration centres beyond the established seats? If so, what are the likely challenges and issues such centres will face as they seek to gain a foothold as credible institutions?

Theau-Laurent: One area where there is likely to be growth is in the number and spread of arbitration centres in the Middle East and North Africa (MENA) region. The UAE's amendments to Article 257 of its Penal Code – which could result in criminal investigations and the incarceration of experts deemed to have acted contrary to their duty of integrity and objectivity – may create opportunities for dispute resolution centres in other MENA countries perceived as less draconian. The key challenge for new arbitration centres in establishing their credibility is to be seen as a 'safe seat', free of local bias. An example of a relatively young arbitration centre in the MENA region that has gained a foothold is the Bahrain Chamber for Dispute Resolution (BCDR), which seeks to preserve its independence through the appointment of senior American Arbitration Association (AAA) members to its board of trustees.

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

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> Borden Ladner Gervais LLP

Deane: We have already seen a number of new arbitration centres arise globally, with Hong Kong and Singapore becoming formidably established to join the likes of Paris and London. It remains to be seen whether some of the more peripheral efforts will bear fruit. Canada is increasingly becoming an attractive venue for arbitrations and Vancouver and Toronto both aspire to increase the number of international arbitrations taking place in Canada. Calgary and Montreal also have the capability to attract arbitration hearings. Canadian substantive and arbitral law are very well-established, Canada's judiciary is independent, Canada is internationally well-regarded as a country to travel to and its cities have excellent infrastructure. With all these benefits, and some marketing efforts, Canada has the potential to become a meaningful seat, as well as venue for hearings, for international arbitration proceedings.

Acuner: Arbitration is a burgeoning industry and we have already begun to see a shakeup in the number and spread of arbitration centres beyond the established seats. For example, the Istanbul Arbitration Centre opened its doors in late 2015, pitching itself as a well-positioned, neutral venue location for parties across the Middle East, Europe and Asia. In late 2016, we saw the birth of the Mumbai Centre for International Arbitration, gauged at international arbitration attuned to the Indian market. Russia is also currently undergoing arbitral reform which may have a significant impact on the arbitration landscape. Such institutions will face marked competition as they seek to gain a foothold as credible institutions but we expect them to continue to make inroads in this area.

Filla: Regional centres for international arbitration have increased in number substantially recently. While long-time traditional seats like London and Paris are still favoured, institutions such as the Singapore International Arbitration Centre

(SIAC), the Hong Kong International Arbitration Centre (HKAC) and the Dubai International Financial Centre (DIFC) have certainly grown. Brexit may have an impact on London, but we will have to wait and see if alternatives like Germany benefit. Some users may want the perceived predictability of European centres and the governing law of jurisdictions still in the European Union.

Venegas: As arbitration grows the natural trend to create national arbitration centres will continue. However, in countries in which arbitration is already an established and growing method of alternative dispute resolution (ADR), the new centres are always greeted with scepticism. The main challenge for these new centres is always to prove that they are capable and cost-effective at the same time. Of course, a stable group of professionals within said centres is the basic premise to achieve said objectives. However, in my experience, it may take eight to 20 years for a centre to start gaining respectability and traction, at least at the national level.

Ford: There will be a slow growth rather than a shakeup in the number and spread of arbitral institutes. Some countries such as India may see more institutes in a shorter space of time given the government's recent emphasis on arbitration and the number of disputes in the courts there. Other countries will see slower development given the reputation and reach of the established institutes such as SIAC and HKIAC. Some institutes are being reenergised such as the KCAB in South Korea. This is more likely than a shakeup in institutes – existing institutes will conduct more marketing and will refine their rules and processes in competition with each other and the courts. Arbitral institutes are like ice cream shops. It is said that demand for ice cream increases with supply, so that a second shop opening near an existing store will double demand instead of sharing in the existing demand. Arbitration is similar, to an extent. The proliferation in institutes and their marketing makes parties more aware of arbitration, increases competition between institutes who then refine rules and procedures accordingly, making arbitration more attractive. New institutes will have to assure parties that their administrative fees are not too high, that they monitor the progress of the arbitration, that they have competent arbitrators on their panels and that they do not delay in vetting awards. Firmly run institutes are appreciated by all apart from those wanting to use the process for delay.

Dimech-DeBono: According to the 2015 Queen Mary International Arbitration Survey, the five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva. As we have seen over the past few years, the number of available arbitration centres has increased. Whether this is a step in the right direction is questionable. Credibility is certainly not something that is gained overnight and it will take time for parties involved in arbitration to select newly-established seats as their choice, as opposed to well-established ones.

Wilford: In terms of enforcing arbitration awards, what particular hurdles do parties face and what recourse do they have if arbitration orders are not appropriately followed?

Gravel: Parties may anticipate the enforcement phase of the arbitration proceedings by initiating, early in the process, conservatory measures such as attachment orders. Those measures may or may not require the authorisation of the arbitral tribunal depending on the law applicable to the arbitration.

Venegas: The main hurdle may well be the preservation of assets that guarantees the enforcement of the award against the losing party, as well as the duration of any enforcement proceeding. Although in several European jurisdictions the process may be relatively quick and smooth, the harsh reality is that enforcing arbitral awards may take at least one year, if not more, in most countries. The challenge continues to be the same: to have a strong and skilled judiciary capable of enforcing awards in a quick manner while, at the same time, guaranteeing due process.

Filla: Receiving an arbitration award is often only the beginning of another complex process toward resolution. Obtaining recognition of the award as a court judgment is an initial step in the enforcement procedure if the award debtor refuses to comply with the award. Hurdles may include jurisdictional statutory requirements, such as proving personal or subject matter jurisdiction. When the award debtor is a sovereign state, additional challenges arise. With

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>
> ANTHONY THEAU-LAURENT
> Accuracy

ICSID, the award debtor may request the arbitral institution annul the award and that enforcement be stayed, pending the conclusion of the annulment process. This annulment process may take approximately two years in some instances, which is about the time it takes to complete a standard arbitration.

Ford: Although widely used, the word enforcement can be misleading and needs to be broken down into its constituent parts. It is comprised of recognition in the foreign country and then execution as a judgment of that country. Both of those parts – recognition and execution – are dependent on the courts of the enforcing country. As courts develop and become more familiar with arbitration, so too does the first step, recognition. It is improving in a number of countries such as China and India, to an extent, but is still subject to delays and other obstructions in others. Execution is highly dependent on the internal execution process of each country and of course on the assets of the judgment debtor. This is more problematic than recognition and can make the whole enforcement process pointless.

Dimech-DeBono: Winning an arbitral award is one aspect, but having it enforced may prove somewhat difficult and can take time. However, according to the Queen Mary 2015 Survey, "enforceability of awards" is seen as arbitration's most valuable characteristic. When considering the merits of whether to get into an arbitration dispute, the enforcement of an award is a key factor to consider. The reason for doing so is to identify and, if possible, secure assets. From a practical perspective, a party that fails to comply with the decision may suffer commercial and reputational ramifications. More often than not, international arbitration is the only forum for dispute settlement involving investors and a state. Not complying with an arbitral award decision can be damaging for a state and may impact its ability to attract foreign investment. Arbitral awards benefit from a number of international treaties, providing effective and robust methods of enforcement.

Deane: Canadian courts pay a high degree of deference to international arbitral awards and fully respect the nature and intent of the New York Convention. As long as an international award debtor has assets in Canada, an award creditor has significant opportunities to realise on its award and limited procedural hurdles.

Wilford: What additions would you like to see made to international arbitration agreements? To what extent have you observed a trend toward 'standardising' arbitral clauses as part of commercial contracts?

Filla: A well drafted arbitration provision can vastly improve the efficiency and cost of the process. Likewise, poorly drafted clauses can defeat the main purposes of having affirmatively selected arbitration by overly complicating the process, or by having conflicting language within the provision. Each contract is different, of course. By thinking ahead about the likely disputes under the contract, we can draft a clause better suited to the issues most likely to be encountered later. For example, inserting a requirement for an early-stage mediation may be attractive. And despite recent calls for more transparency in general, your particular contract may call for greater confidentiality or limited discovery.

Dimech-DeBono: Standardisation is a great help as issues emanating from different jurisdictions can be decided upfront and will pose no problems at a later stage. In a way, the approach that should be taken is to consider 'a worst case scenario' to ensure that the right clauses and provisions are put in place. Such provisions should be standardised to reduce the level of uncertainty, to provide clarity and a cost effective path to international dispute resolution. This is an area that needs addressing further and despite the fact that we have seen complaints around costs and related issues, there is room for further improvement.

Ford: I am a firm believer in the utility of mediation and would like to see arb-med-arb as the standard arbitration clause. There is definitely a trend towards standardising arbitration clauses with the increasing prominence of arbitral institutes and their sample clauses. There are still many amended or bespoke clauses which cause questions and problems.

Venegas: There is always the temptation to try to enhance or tailormake an arbitration clause. However, it is always better to use the well-known standard model clauses of arbitral institutions. These have proven to be bullet-proof across the globe and, due to their success, should always be adopted.

Deane: Almost all institutions have 'standard' arbitration agreements. For the most part, these simple provisions can give parties all they need in their international commercial agreements. At a minimum, they provide an excellent starting point by identifying for parties the essential information that needs to be included in an arbitration agreement. Unfortunately, too often bespoke party-drafted arbitration agreements are very detailed, sometimes with pages and pages of 'procedures' which the parties intended to specify and therefore simplify the process, but which have the opposite effect and result in unnecessary pre-arbitral or procedural wrangling.

Theau-Laurent: From an economic perspective, the addition of valuation standard clauses would help both the financial experts and tribunals, by ensuring the consistency and comparability of contentious valuations. Another area where further clarification and standardisation could be useful is on the scope of damages. For example, by defining what heads of loss, whether direct losses, loss of profits or consequential losses, can be included in the quantum of damages. Such additions would come at a relatively low cost at the contract preparation stage, but could have a significant impact on timing and costs in the event of a dispute. I would also expect to see the addition of language to deal with the increased adoption of third-party funding.

Gravel: Experience shows it is vital that arbitration clauses be as simple and straightforward as possible. Parties should shy away from complex clauses which try to anticipate in detail the conduct of future arbitration proceedings. The arbitration rules promulgated by the prominent arbitration organisations provide all of the requisite rules for the efficient conduct of arbitration proceedings. An arbitration clause inserted in a business agreement should set out the following in simple terms. First, the parties' decision to settle a dispute through arbitration, with no appeal allowed. Second, the choice of the applicable arbitration rules. Third, the number of arbitrators to be appointed. Fourth, the law applicable to the dispute and the agreement. Fifth, the language of the arbitration, which may or may not be different from the language of the agreement. And finally, the place where the arbitration is to be conducted. Nothing more is needed.

Wilford: In light of the uncertain business landscape across the globe, how do you expect international arbitration to unfold over the coming months and years? What issues remain the most pressing as the process continues to evolve?

Deane: The current global business landscape likely bolsters the attractiveness of international arbitration to many users. The New York Convention is one of the most successful international conventions and provides parties with more certainty with respect to enforcement than most, if not all, domestic court-enforcement mechanisms for international awards. Efforts at making international arbitration proceedings as efficient and cost-effective as possible should continue to be made, and the international arbitration community should continue to discuss the main issues in a constructive and progressive manner. Global education of the domestic judiciary faced with international arbitral proceedings and decisions, as supervisory or reviewing courts, can assist with improving the viability and legitimacy of international arbitration as the most effective international dispute resolution mechanism and forum.

Ford: Arbitration will be further litigationised and hopefully develop further innovations to reduce cost and time. The elasticity of arbitration is one of the more pressing issues, not least because that is also one of its positive features and a distinguishing mark from litigation. The arbitration community will have to determine the optimum balance between party autonomy and the elasticity it produces on the one hand, and with more non-party control – by arbitrators, institutes and rules – and the firmness it creates. My suggestion is that project managing arbitrations will help find the right balance in each arbitration.

Theau-Laurent: One could expect to see the launch of more expedited arbitral centres for smaller claims, run by experienced associates from leading law firms, as there is clear demand for efficient and cost-controlled arbitration processes. There could also be continued reluctance of both arbitrators and experts to work on cases seated in the UAE until Article 257 is repealed or further clarified. Finally, it is difficult to predict what the ramifications, if any, of Brexit on the UK's status as an international arbitration hub will be. Nonetheless, the quantity and quality of law firms and experts operating in the UK are not going to disappear overnight, and there is every reason to believe that the UK will remain attractive to parties looking for world-leading dispute resolution.

Venegas: Globalisation has reached its peak and there is now a trend toward recovering a perceived loss of sovereignty that is igniting countries to strengthen their national governments and limit free trade. In this context, the priority is to keep arbitration evolving as a successful ADR and avoid the temptation of broadening the scope of public policy, as well as limiting the arbitrability of disputes. In addition, there is a need to incorporate and treat arbitration as a method of dispute resolution which supports the state and not as a rival of the judiciary. Moreover, some countries, such as Mexico, have explicitly characterised arbitration as a manifestation of the fundamental right of freedom. If arbitration can be understood as such globally, then it would naturally evolve into one of the purest manifestations of the civil power of the population.

Dimech-DeBono: We expect the demand for arbitration to grow further as processes and procedures become further streamlined and sophisticated. Despite the uncertain business landscape, international arbitration remains the only forum for the resolution of international business disputes. More challenges will be created as a result. Certain industry sectors, such as energy, will continue to grow, while we expect a rise in demand for financial services arbitration over the coming years as there have been specific developments aimed directly at financial institutions, to use arbitration as a means to resolve disputes. Overall, the issue of transparency will be addressed further and we can expect a move toward multilateral agreements rather than bilateral, as pressed by the European Union, to ensure a single framework of procedure.

Filla: Arbitration provisions within multinational trade agreements may evolve as new world leaders consider renegotiating or redrafting them. But most do not believe nations will truly seek to do away with arbitration as a means of resolving these disputes entirely. And while countries like Venezuela, Ecuador and Bolivia have moved to reduce exposure to investor claims by withdrawing from the ICSID Convention, they are still parties to other treaties that provide investors alternative vehicles by which to bring claims – such as UNCITRAL, which is incorporated into some trade and investment agreements – and many of these treaties have long sunset clauses. ■