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LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in Litigation & ADR.





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Respondents



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Rob Palmer is managing partner of Ashurst's Singapore office and a partner in its dispute resolution practice. He has been based in Southeast Asia since 2003 and has a particular focus on dispute resolution in international energy, construction and infrastructure projects. His longstanding presence in – and understanding of – the region, and the repeat mandates he receives from blue-chip clients set him apart from others in the market. He is consistently praised by clients and in legal directories for his advocacy skills and the quality of his legal advice, including the strategic, commercial way in which it is delivered.



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Megumi Yamamoto is an associate in Ashurst's dispute resolution practice in Singapore. She specialises in international dispute resolution, with a particular focus on international arbitration. She has considerable experience in the energy, resources, construction and infrastructure sectors, with cross-jurisdictional experience advising on matters in Singapore, Australia and the UK.

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Q. Over the last 12-18 months, what key trends have you seen in arbitration in Singapore? Do any particular industries or sectors seem to be playing host to a significant number of disputes?

A. Arbitration in Singapore has enjoyed something of a ‘bumper harvest’ over the last 12-18 months, with record numbers of new cases being referred to arbitration. Notably, applications for processes involving accelerated decision making, such as the appointment of emergency arbitrators and the use of the Singapore International Arbitration Centre’s (SIAC’s) expedited procedure and early dismissal, have been on the rise. This could, in part, reflect a greater consciousness among arbitration practitioners of the time and cost savings to be gained by their use. There has been a rise in the number of awards and orders issued by emergency arbitrators for urgent interim relief, perhaps reflective of the fast-changing contractual landscape associated with the COVID-19 pandemic. Trade disputes continue to dominate the use of arbitration, and the construction and engineering and maritime and shipping

industries consistently play host to a significant number of disputes.

Q. Drilling down, how has the alternative dispute resolution (ADR) space responded to the coronavirus (COVID-19) pandemic? How have processes changed and what innovative methods have been embraced?

A. The alternative dispute resolution (ADR) space has responded well to the pandemic, demonstrating its adaptability and resilience in these challenging times. Like many other sectors, the shift to online platforms has been key, with virtual hearings becoming the norm. Although videoconferencing technology is nothing new, online tools have increasingly permeated other aspects of the ADR space. For example, the most widely used source of information for arbitrator appointments was, traditionally, word of mouth. Platforms which collect information on arbitrators’ decision making on issues such as case management and document production, have increasingly been used by parties seeking to appoint arbitrators. Software applications have been developed that assist with document

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collection, review and production. The continued development of these artificial intelligence (AI) and machine learning (ML) technologies will no doubt add value to the ADR space, contributing to cost and time efficiencies, and ultimately improving access to legal relief.

Q. What is your advice to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of mediation, arbitration, litigation and other methods?

A. There is no ‘one size fits all’ dispute resolution strategy which will be effective across all companies in all industries. Instead, a dispute resolution strategy that is tailored to the context of the contract and the needs of the parties is the most likely to be effective. Companies should carefully consider the types of disputes that are likely to arise under a particular contract, as certain types of disputes are better dealt with by particular methods of resolution. For example, arbitration can be a useful option where disputes are likely to be multijurisdictional and involve overseas enforcement action because the New York Convention provides for recognition of

foreign arbitral awards. Litigation may be a good option where the dispute is domestic and the local courts are both independent and efficient. Mediation as part of a tiered dispute resolution clause has become an increasingly popular option, particularly in transactions where parties have longstanding relationships. However, where the contract is for a one-off transaction, mediation may act as another obstacle to effective relief. Expert determination can offer speedy and effective relief where specifically identified technical issues are likely to cause conflict. Implementing an effective dispute resolution strategy should first involve carefully considering the types of disputes likely to arise under the specific contract.

Q. What are some of the key issues for in-house counsel to consider when dealing with situations likely to give rise to commercial conflicts?

A. Every in-house counsel, when faced with a potential conflict, should consider the importance of maintaining accurate records. Internal document retention processes should be set up to prevent key documents from being lost or deleted.



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Preserving privilege over any relevant material is also crucial in protecting and promoting the company's interests as a dispute develops. When potential problems and disputes arise on a project or transaction, in-house counsel should carry out a risk assessment and make management aware as early as possible so that they can intervene if required to avoid the problem escalating. A dispassionate review of the merits of the dispute can be invaluable in assessing whether to escalate the dispute and ensuring that the costs of pursuing legal action do not end up outweighing the potential returns.

Q. In your experience, what steps should companies take at the outset of a commercial agreement to manage disputes that may arise in the future? Is enough attention paid to dispute resolution clauses in commercial agreements, for example?

A. The dispute resolution clause is the key mechanism by which companies can ensure that their contractual rights are recognised and affirmed, and that the obligations contained in their commercial agreements can be enforced. Parties should



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therefore think very carefully during contract negotiations about the types of disputes to which the agreement may give rise, and how those disputes might best be resolved. Seeking professional advice early on in drafting the clause will help prevent any unnecessary financial and reputational exposure if a dispute arises. The clause should be tailored to the specific context of the contract and should set out the dispute resolution process in clear and unambiguous language.

Q. To what extent can companies avoid disputes by being more diligent in their dealings with business partners?

A. Disputes frequently arise between commercial parties where they have failed to clearly set out their respective expectations from a transaction or have failed to account for the possibility of a given turn of events. Proper due diligence of potential business partners prior to contracting is also key in avoiding unhappy relationships. Ensuring that there is a legally enforceable contract in place, and that the contract language does not have conflicting clauses or ambiguous language can also help parties settle their disputes

more easily. Keeping communication channels open throughout the course of the contract term, particularly when things start to go wrong, will help prevent minor disagreements escalating into more complex disputes. A counterparty that is willing to negotiate is always a good sign. Keeping personalities and emotions out of a dispute is strongly recommended to help prevent it from escalating.

Q. What is the outlook for arbitration in Singapore? What issues and challenges do you expect to see in the months ahead?

A. Singapore is developing into a leading seat for international arbitration, both regionally and globally. With 1080 new case filings in 2020, the SIAC's caseload crossed the symbolic 1000 case threshold for the first time in its history with a total sum of US\$8.49bn in dispute. Moreover, 94 percent of the new cases were international in nature, up from around 87 percent in 2019, with parties from 60 jurisdictions. This is testament to Singapore's reach as an arbitration venue and this trend is likely to continue. Following a public consultation in 2019, Singapore amended its international



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arbitration legislation in December 2020 by way of the International Arbitration (Amendment) Act 2020. The new legislation introduced a default procedure for appointing arbitrators in multi-party arbitrations, reducing uncertainty and potential delays in the tribunal appointment process. The legislation also provided express recognition that an arbitral tribunal and the Singapore High Court has the power to enforce any applicable obligations of confidentiality. By strengthening the parties' ability to enforce existing obligations, Singapore has further cemented itself as a leading arbitral seat. While these developments are encouraging, arbitration in Singapore has not escaped the effects of the COVID-19 pandemic. Although quick to adapt to the use of online platforms, tribunals have experienced delays in progressing arbitrations because of the ongoing restrictions on in-person meetings and international travel. □

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ASHURST LLP has an international network of offices in 16 countries, allowing the firm to provide help and advice to clients across Asia, Australia, Europe, the Middle East and North America. With more than 1600 partners and lawyers working across 10 different time zones, the firm is able to respond to its clients wherever and whenever they are.

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