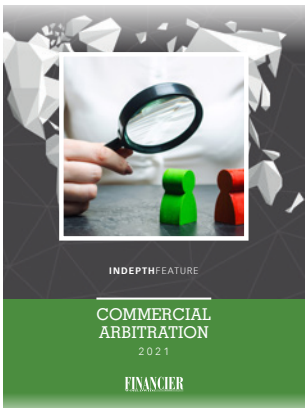

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INDEPTH FEATURE Reprint March 2021

COMMERCIAL ARBITRATION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in commercial arbitration.

SINGAPORE

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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. 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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Michael Weatherley is a senior associate in Ashurst's dispute resolution practice in Singapore. He specialises in international dispute resolution, with a particular focus on international arbitration in the energy, resources, construction and infrastructure sectors. Throughout his time in Ashurst's Brisbane, London and Singapore offices, he has assisted clients with arbitrations in many of the major seats of arbitration and under all of the major rules.

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Q. Could you outline some of the current market challenges at the centre of commercial disputes in Singapore?

A: While South East Asia has been relatively successful in managing the impacts of coronavirus (COVID-19), ongoing travel bans and associated economic uncertainty have disrupted the progress of commercial disputes in the region. Parties contemplating, or engaged in, commercial disputes are less likely to be able to meet in person to amicably resolve their grievances, and national lockdowns have, in some countries, led to court backlogs and to arbitrations being put on hold. Levels of acceptance of virtual hearings vary across the region. As restrictions on movement continue into 2021, parties will continue to face challenges in resolving cross-border disputes effectively while these limitations are in place.

Q. What general advice can you offer 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: In our experience, an effective dispute resolution strategy is one that is tailored to the particular needs of the transaction or project concerned. Companies should consider, on a case-by-case basis, the types of disputes that are likely to arise under each particular contract. Certain types of disputes lend themselves more easily to particular methods of resolution. For instance, cross-border disputes involving enforcement action overseas may be suited to arbitration because of the relative ease of enforcement of foreign awards under the New York Convention. Where the dispute is purely domestic and the local courts are independent and efficient, litigation is likely to be a good option. Mediation might be considered as part of a tiered dispute resolution clause where a long-term relationship is involved but, where the contract relates to a one-off transaction, mediation may become a further roadblock to effective relief. Where specifically identified technical issues are likely to cause conflict, expert determination can offer speedy and effective relief.

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Q. To what extent are companies in Singapore likely to explore alternative dispute resolution (ADR) options before engaging in litigation?

A: Companies in the region, especially in well-established financial markets such as Hong Kong and Singapore, are increasingly likely to explore alternative dispute resolution (ADR) options before engaging in litigation. Mediation has seen increasing institutionalisation in Singapore, in particular. The Singapore Convention on Mediation, which aims to give businesses increased confidence in opting for mediation to resolve disputes, came into force in September 2020. While parties are more likely to explore ADR options, there are still downsides to bear in mind, particularly where these are pre-mandated as part of a tiered dispute resolution clause. Our experience has been that, if parties are incentivised to settle a dispute, they will reach settlement irrespective of prescribed ADR steps. Where there is no willingness to settle at a particular time, a requirement to go through the contractually-prescribed ADR steps can hinder, rather than help, eventual resolution.

Q. How would you describe arbitration facilities and processes in Singapore? Are local courts supportive of the process?

A: The arbitration facilities in Singapore are first rate, with parties having access to state-of-the-art arbitration hearing rooms, as well as leading interpretation, transcription and e-hearing facilities. Singapore arguably leads the world in ensuring its arbitration processes and frameworks stay responsive to users' evolving needs. As recently as December 2020, Singapore amended its arbitration legislation to provide a default procedure for the appointment of arbitrators in multi-party arbitrations, and to expressly recognise that a Singapore-seated tribunal and the Singapore High Court have the power to enforce applicable obligations of confidentiality. Further, the Singapore judiciary has been consistent in creating an environment friendly to arbitration. Singapore's general policy has been to take a non-interventionist approach to awards, consistent with the aims of the New York Convention. The courts take the view that, where parties have chosen to resolve their disputes using arbitration, this choice

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should be respected through a policy of limited curial intervention.

Q. What kinds of situations or circumstances might lead companies to pursue litigation instead of arbitration?

A: Litigation, conducted through the courts, becomes part of the public record. While the anonymity of arbitration proceedings is often seen as an advantage, litigation offers the opportunity for public vindication; the opportunity to 'set the record straight' can be invaluable to companies in repairing possible reputational damage. Litigation can be useful where the counterparty is uncooperative, with court-mandated deadlines and strong powers to dispose of unmeritorious disputes summarily. Parties may opt for litigation due to a perception of better case management in comparison with arbitration. While arbitration may allow for easier cross-border enforcement, litigation can be more appropriate where there is no requirement to enforce the judgment overseas, and the relevant court is both independent and highly efficient, like the courts in Singapore. In such countries, litigation may provide a route

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for speedier resolution of disputes than would be the case in arbitration.

Q. What practical issues need to be dealt with when undertaking complex international, multijurisdictional arbitrations in Singapore?

A: When undertaking complex international, multijurisdictional arbitrations in Singapore, parties should be conscious of the wide variety of procedural approaches that may be involved. As a global hub, Singapore attracts parties, practitioners and arbitrators from all over the world. With so many different legal backgrounds, there are often very stark differences of opinion in how procedural matters should be approached. To prevent surprises and enable clear planning for the remainder of the arbitration, we suggest seeking agreement with a counterparty and the tribunal on as much of the arbitral procedure as possible, as early as possible. More recently, given the strict travel restrictions in the region, virtual hearings have been the norm, and these have not been without their challenges. The technology utilised may not be adequate in all cases, witness evidence may have shortcomings in an online setting, and security and confidentiality concerns may arise.

Q. What considerations should companies make when drafting a dispute resolution clause in their commercial contracts to address the possibility of future disputes?

A: The dispute resolution clause is one of the most important clauses in a contract as it provides the means of enforcing rights and obligations, without which the contract may be rendered useless. The clause should therefore be given careful attention early on, and professional advice should be sought in its drafting. Parties should consider carefully what types of disputes are likely to arise in respect of the particular contract and ensure that the dispute resolution clause is tailored to the specific context of the contract, considering the pros and cons of the various dispute resolution methods available. The dispute resolution clause should contain clear and unambiguous language, setting out the process in unmistakable terms. As a general comment, parties would do well not to 'over-do' these clauses, keeping them short

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and simple by reference to model clauses of arbitral institutions, for example, which are carefully thought out and incorporate by reference very comprehensive procedural rules. ❑

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