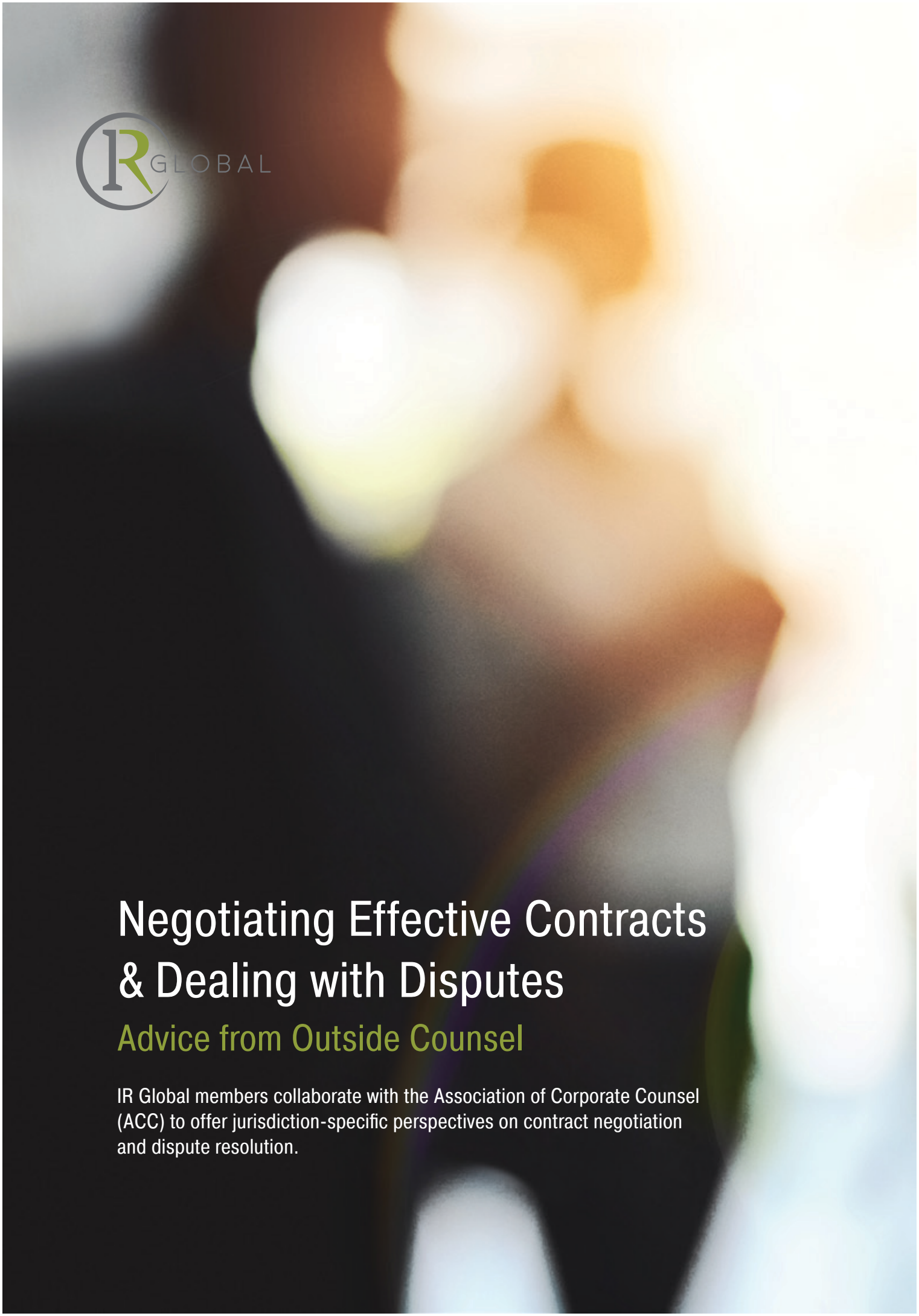

Negotiating Effective Contracts & Dealing with Disputes

Advice from Outside Counsel

IR Global members collaborate with the Association of Corporate Counsel (ACC) to offer jurisdiction-specific perspectives on contract negotiation and dispute resolution.

IR Global - The Future of Professional Services

IR Global was founded in 2010 and has grown to become the largest practice area exclusive network of advisors in the world, in just a few years. This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, recommended by Legal 500 and featured in publications such as The Financial Times, Lawyer 360 and Practical Law amongst many others.

The group's founding philosophy was based on bringing the best of the advisory community into a sharing economy; a system which is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost-effective and flexible.

Our Founding Philosophies

MULTI-DISCIPLINARY

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

NICHE EXPERTISE

In today's marketplace, both local knowledge and specific practice area / sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

VETTING PROCESS

Criteria is based on both quality of the firm and the character of the individuals within. It's key that all of our members share a common vision towards mutual success.

PERSONAL CONTACT

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

CO-OPERATIVE LEADERSHIP

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups who focus on network development, quality controls and increasing client value.

ETHICAL APPROACH

It is our responsibility to utilise our business network and influence to instigate positive social change. IR founded Sinchi a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities / tribes around the world.

STRATEGIC PARTNERS

Strength comes via our extended network, if we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR or someone else.

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Contributors

FOREWORD BY EDITOR, NICK YATES

Negotiating Effective Contracts and Dealing with Disputes

Multi-national corporations will always have a wide range of different contracts in place at any one time, be they with contractors, suppliers, vendors, clients or intellectual property licensors, among other parties.

Drawing up and negotiating those contracts effectively will, inevitably involve in-house counsel, particularly the more complex contracts requiring bespoke wording and specific clauses.

Many experts within commercial contract law recommend the five Ws approach (what, where, when, who and why), as a method to help clarify and crystallise aims and objectives before a contract negotiation begins.

This makes sense, however, the sheer variety of agreements in play will often make this approach difficult to implement, even before adding in cultural and regulatory differences. Most multinational operations will be dealing with entities in a number of different countries and negotiating around a range of different legislative frameworks.

Sometimes the way forward will be clear, while at other times specialist skills will be required. This could be due to the uniqueness of the contract, or perhaps some peculiarity of culture or law that might affect negotiations.

This brochure is aimed specifically at helping in-house counsel to address these issues, by providing jurisdiction-specific insight and guidance from commercial and dispute lawyers in locations across the world.

Highlighting negotiation as an example, it is clear that culture plays an important role in the methods that prove most effective. In Anglo Saxon countries, showing an emotion, such as anger, can be a useful strategy to force a counterparty to concede ground, while in Latin countries it is likely to be less effective.

In negotiation with Chinese counterparties, it is useful to know that delay is a standard negotiating tactic. The thinking being, that the closer the other party gets to deadline, the more likely they will be to compromise.

With regard to legislation, it is impossible for in-house counsel to remain abreast of revised contract law in all the jurisdictions in which their corporation has a presence. This is particularly true if the contract in question involves a highly specialised area, such as environmental law.

Taking California for example, a recent ruling changed the circumstances under which legal fees may be recovered in a contract dispute. The language used in an agreement must now be drafted carefully if the parties intend that the successful party is to recover the money spent in litigation, even where the successful party is defending itself in a lawsuit.

Regardless of the apparent success of contract negotiations, there is a reasonable chance that some form of dispute might occur between the parties involved. It is the responsibility of in-house lawyers to ensure that their company is adequately protected in the event of a dispute.

This involves ensuring the presence of an effective dispute resolution clause within the contract, that stipulates crucial things like location of enforcement proceedings and the use of arbitration and mediation.

A clear recommendation is to identify a recognised arbitral institution with transparent and internationally understood rules. One such body, The International Chamber of Commerce (ICC), set new records for arbitration in 2017, with 512 awards approved, 1,488 arbitrators appointed and parties from 142 countries registering dispute cases.

Consulting outside disputes counsel early in the course of the negotiations in important, particularly when undertaking international transactions. If in-house counsel is contemplating using another country's laws to interpret the deal terms, or considering the pros and cons of arbitration or litigation in one or more countries, it is important to engage local counsel in those countries to determine the legal and strategic risks to be borne by agreeing to particular terms.

As an example, counterparties will often seek to gain an advantage during a dispute through pre-emptive filing in a jurisdiction with unfavourable laws, that they know will burden their opposition. If there is no enforceable forum selection or mandatory dispute resolution clause in the contract, then all bets are off with respect to who gets to file first and where.

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TRF TRACHTENBERG RODES & FRIEDBERG LLP

NWB LLC

GT GrahamThompson Attorneys

NORTH AMERICA

LATIN AMERICA (LATAM)

MIDDLE EAST & NORTH AFRICA(MENA)

ASIA/PACIFIC

Legem Attorneys at Law

CGM Chaves, Gelman, Machado, Gilberto e Barbosa

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LEXCOUNSEL LAW OFFICES

ADVOKATFIRMAN nova

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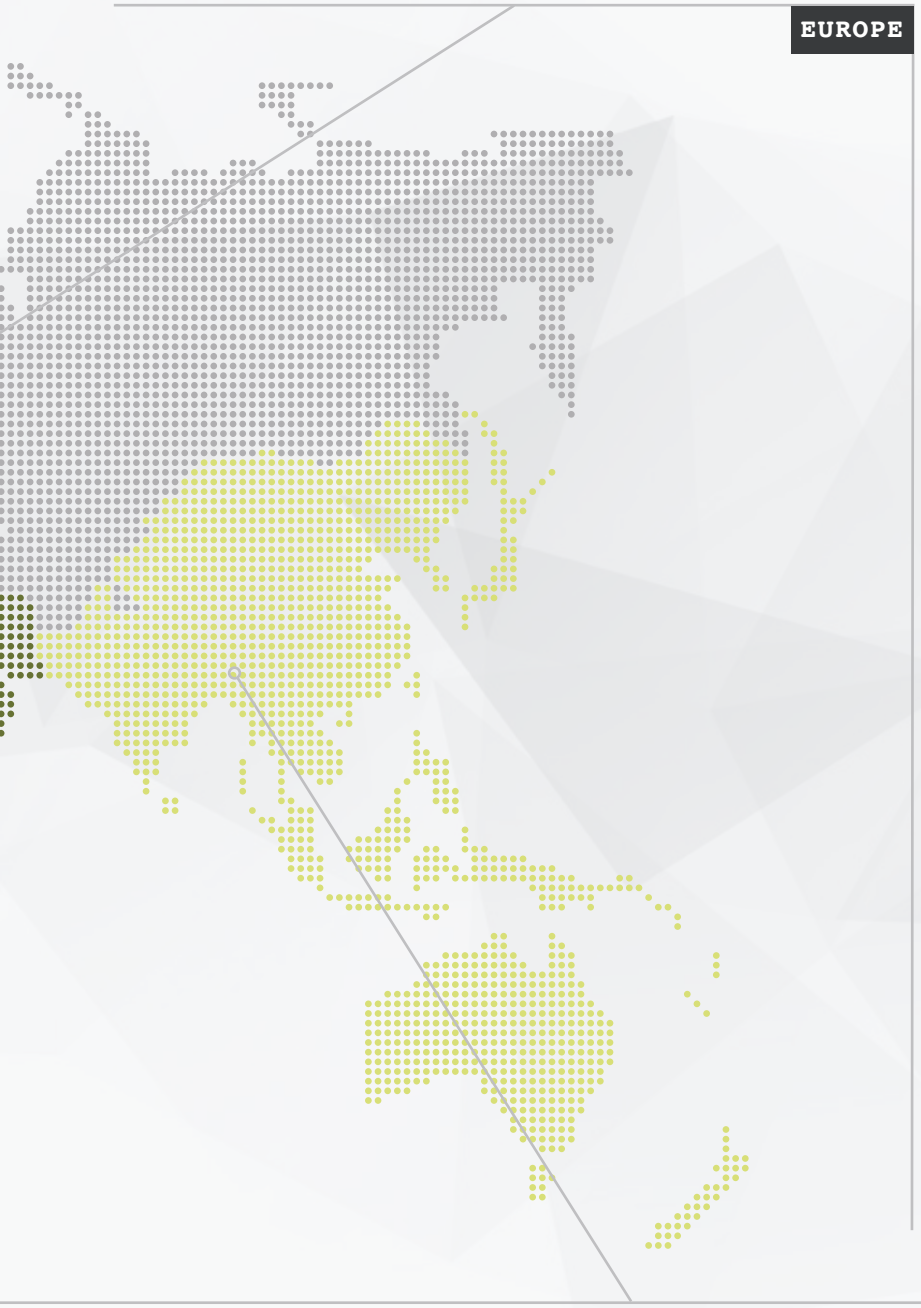
AQUAN RECHTSANWÄLTE



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CHARLTONS 易周律师行

Within these pages, you will find expert advice on the contract negotiation and dispute resolution processes, from lawyers in a variety of jurisdictions. All members of IR Global, they provide a powerful network of ‘on-the-ground’ expertise for in-house counsel tackling complex cross-border contractual arrangements.

We hope you find it useful, good luck with your upcoming negotiations!

SOUTH KOREA (COMMERCIAL)

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Mark is a Consultant to Ahnse Law Offices. He is a solicitor (non-practising) and began his career in the City of London with Abrahams Dresden Solicitors becoming a partner there before moving to rhw Solicitors. He has lived and worked in Asia since 2007.

Mark has consulted with Ahnse since 2013, working with the firm's foreign clients – inbound and outbound.

In his free time, Mark enjoys ultra-distance sports and reading.

Ahnse is a Seoul-based firm with both Korean and internationally-qualified lawyers. The firm acts for major corporate and institutional clients on a wide variety of corporate and commercial work.

Ahnse works closely with its clients to identify their needs and provide solutions by formulating a coherent 'transaction strategy' which looks not just to the deal itself but also to the future. The firm also advises clients on both commercial and legal risk; since one tends to impinge on the other.

Accordingly, Ahnse feels that the provision of legal advice alone can be an incomplete component of a proper and full service. When we have a better appreciation of what our clients are trying to achieve, we can provide better solutions.

TOP TIPS FOR

Successful negotiations

Do your due diligence. This really is a truism. The sine qua non of any negotiation is to be fully prepared. There are no short cuts.

Define your role. When I was a trainee, my principal said that it is the lawyer's role to advise on and document what has been commercially agreed between the parties. As I have aged, I think it should be more than this. We are often provided our mandate after the commercial terms have largely been agreed, however, I think we should still be able to provide value. In most cases, the earlier we become involved in the transaction, the better the service we can provide to our clients.

Everyone has a weak spot. Know and understand what makes people tick. What will make them break!

Don't be transactional. In the Brothers Karamazov, Dostoevsky posited that we are all guilty for each other. One interpretation of this is that we should not just seek short-term benefit; but rather consider the bigger picture. Obviously, we have to act in our clients' best interests, but equally we need to set this against whether there are actually greater benefits in the long run for both our clients and ourselves by trying to look beyond the deal.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

The aphorism that the business culture is different but the same commercial considerations always apply would be relevant. Like many cultures, Korea is a relationship-based society. This is reflected to a certain extent in attitudes to contracts.

One explanation for this is that Korea's main crop is rice. In the pre-mechanised era, it took a lot of cooperation to successfully produce a crop. By contrast, the production of wheat, the western staple, is a much more individualistic pursuit.

While this may be somewhat apocryphal, there is always an element of truth in there somewhere and this is arguably manifested to a certain extent in the attitude towards contracts. In western cultures, parties who did not know each other often entered into lengthy and detailed contracts.

In Korea, the relationship was the first step. The contract was perhaps less important. Contracts tended to be much shorter and perhaps less detailed. This situation has changed somewhat with Korea's economic development and increasing globalisation, but there is certainly a delta where east meets west and it is often not the most comfortable one for a western hemisphere lawyer.

There are certain obvious prophylactic actions you can take when the attitude to contracts is perceived to be less important. Two obvious ones spring immediately to mind. The first is that you should do your due diligence and make sure you strike a good commercial deal – mitigate commercial risk. The other is to pay a lot of attention to managing the contract well.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

I think it is helpful to look at Korea through an historical lens. Depending on how far you go back, Korea's legal system can probably be traced back to Roman law, upon which the Napoleonic Code was based. Boney was rather successful in disseminating his brand across Europe and it made its way across the Germanic states.

A little later, the Emperor Meiji of Japan was looking to update and improve his country's legal system. He sent envoys across the world to benchmark various legal systems, and it was determined that the Prussian system was the best - this was broadly adopted in Japan. Japan subsequently occupied Korea from 1910 to 1945 and imposed various of its institutions on the country including its legal system.

Korea is a civil law jurisdiction and its contract laws are enshrined in the Civil Code. The system itself is excellent and has been translated into English, which makes it accessible to foreigners. The main provisions affecting commercial law are contained in the Civil Act and Commercial Act. While the legal system has its roots in Europe, it has also been influenced on a number of different levels by the USA.

Korea was partitioned in 1945 and was decimated by the war from 1950-3. It was then one of the poorest countries in the world; now it is one of the most technologically advanced and the 11th richest by GDP. This is known as the Miracle on the Han, the river which bisects Seoul.

Korea's growth was characterised initially by large family-owned conglomerates known as chaebol initially in heavy industries but later more broadly in technology, automobiles etc. The Korean economy is characterised by these relatively small number of companies, which have a large degree of horizontal and vertical integration. These companies – Samsung, LG, Hyundai etc. dominate the Korean economy; they are also household names across the world.

It is hard to point with conviction to specific legislative changes within the context of this small piece. If I point to one, there will be others left out. I think therefore that it is better to look at Korea on a more structural level.

Korea is also a Confucian society which means, among other things, that its workplaces tend to be very hierarchical. It does have a highly educated and technologically savvy workforce, though there are frequent accusations (sometimes misplaced) of a lack of creativity. On many levels, it is international in its outlook and is keen to become a significant hub for business and commerce in East Asia.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

I failed in the previous question to do much justice to Korea's recent history. However, I think it is helpful to put things in their historical context. Korea effectively became a true liberal democracy in 1987. It has been going through the growing pains since.

On one level, the country has sought inward investment. In order to do this, it has taken significant steps to educate its workforce and make them English friendly. It once used to be called the Hermit Kingdom, but now it is much more outward looking.

On another level, it has sought, over a period of time, to root out the evils of the previous military dictatorships and the nexus of the political and economic elites. Unfortunately, each of the three previous presidents have been in trouble for various levels of corruption. One jumped off a cliff, another has just been released from gaol, and the last incumbent is serving out a lengthy jail term.

The country's population is, however, engaged and will no longer stand for endemic corruption. Several months of demonstrations led to the ouster of the previous incumbent. It is also reflected in the fairly recent 'Kim Young Ran' law which seeks to crack down on corruption.

Of course, it is essential for a country to be seen as open and fair, while not favouring local companies, vis-a-vis foreign ones. In this regard it is significant to note that the Korea Commercial Arbitration Board is going to great lengths to position itself as a hub for arbitration in East Asia. This is perhaps a bellwether of how far the country has come.

GERMANY (COMMERCIAL)

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Urs is managing partner at AQUAN Rechtsanwälte. He formed the business recently after 15 years of legal practice in Düsseldorf.

He has more than a decade of experience working on complex M&A transactions, and, due to his dual qualification as a German lawyer (Rechtsanwalt) and English Solicitor, he is specialised in cross-border deals. He also has considerable expertise in company and group restructurings, and their tax consequences, as well as in insolvency matters.

Among his domestic and international clients are family-owned businesses, private equity firms, and family offices. He also advises foreign companies on inbound investments into Germany.

AQUAN is a new concept of legal practice committed to the delivery of legal advice at the highest level, helping our clients achieve their goals. It goes without saying that we embrace and adhere to the principles of honesty, integrity and professional ethics.

Our team of commercial lawyers is specialised in all areas of corporate/M&A, commercial and employment law. In addition, we have expertise in restructuring and insolvency law and advising on inbound/outbound investments. Whatever we do, the solutions will be effective, creative, and tailored to your specific situation. We can do that because we will have taken the time to understand you and your business, your motivation, your ethics and your ultimate vision.

TOP TIPS FOR

Successful negotiations

Do your homework. Some negotiators say that to get to the root of the issue, you must ask yourself five different 'why' questions. You don't have to know everything, but you do have to understand what everybody wants and why. What are their needs? What pressures do they feel? What options do they have? You can't make accurate decisions without understanding the other side's situation. The more information you have about the people with whom you are negotiating, the stronger you will be. People who consistently leave money on the table probably fail to do their homework.

Shut up and listen. Ask your question and the other negotiator tells you everything you need to know – all you have to do is listen. Many conflicts can be resolved easily if we learn how to listen.

Always make an agenda. It's amazing how often people forget to define clearly what people want to agree on at an appointment and what the goal is. Always define this exactly before the negotiation and stick to it.

Meet face-to-face. Phone and video conferencing, chats and email are great tools. But not when it's important. Then you have to meet in person. With a face-to-face meeting you avoid misunderstandings, while giving the other side respect.

Don't take the other person's behaviour personally. All too often negotiations fail because one or both of the parties get side-tracked by personal issues unrelated to the deal at hand. Successful negotiators focus on how they can conclude an agreement that respects the needs of both parties. Obsessing over the other negotiator's personality, or over issues that are not directly pertinent to making a deal, can sabotage a negotiation. If someone is rude or difficult to deal with, try to understand their behaviour and don't take it personally.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

It is important to be well informed before the first meeting, especially regarding cultural differences. A lack of information here will be a deal-breaker and will guarantee misunderstandings. You should also be prepared and have an agreed agenda, so everyone's expectations are the same.

Focus is crucial, as is being specific about what you want from a negotiation. Ask yourself what is the purpose of the negotiation? What do you actually want? What is the affordable price for you? Be firm and stick to it.

Communication in international negotiations is also key. Speak clearly and precisely with easy words. One should not confuse others. Playing with words is one of the biggest threats to negotiation, especially if one or both don't speak in their mother tongue. Don't use derogatory or lewd remarks against anyone.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

In Germany, as in many other countries, the parties to commercial contracts cannot always agree on everything and a lot of regulations are in national legislation and implied by law. As a result, the contracts tend to be shorter than those drafted in Anglo-American systems.

The law on the sale of goods in section 437 of the German Civil Code - Bürgerliches Gesetzbuch (BGB) - specifies the rights to which the purchaser or ordering party is entitled in contracts where a defect exists. The law on contracts for work in section 634 of the BGB, does the same.

The purchaser or ordering party in principle only has the right to supplementary performance (sections 439 and 635 BGB). Only if the seller or contractor has failed to comply with the request for supplementary performance within the (reasonable) time limit set out does the purchaser or ordering party have other rights, such as right of rescission or entitlement to damages. Claims based on defects become statute-barred in most cases two years after the delivery of the purchased item or acceptance of the work.

Exclusion of warranty is possible in German law only to a very limited extent because the lists of clauses contained in sections 308-309 BGB have, according to the BGB, a statutory model character and, therefore, apply to general terms and conditions in B2B transactions as well. For example, exclusion of liability for damages is invalid in the event of personal injury or death, or gross negligence (section 309 (7) BGB). Exclusion of liability in the case of negligent violation of material contractual obligations is also invalid. In the case of contracts for deliveries of newly manufactured items and for work, a limitation of the customer's rights to supplementary performance is, in principle, invalid (section 309 (8) (b) (bb) BGB). The limitation period may only be reduced at most to one year. This, inter alia, does not apply to damage claims within the meaning of section 309 (7) BGB and damage claims for negligent violation of material contractual obligations.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Most contracts fall within the scope of the BGB's provisions on general terms and conditions. For this reason, there is only limited potential for limiting contractual obligations.

Exclusion of liability is therefore generally not possible with respect to:

- intentional or grossly negligent breach of duty;
- violation of material contractual obligations (the BGH has held that these are 'obligations, the fulfilment of which determines the contract, and on which the customer may rely');
- personal injury or death;
- default, if delivery by a fixed date is agreed;
- where a guarantee for the quality or existence of an outcome of performance or a procurement risk is assumed; and
- liability under mandatory statutory provisions, in particular the Product Liability Act.

If a clause re the exclusion of liability does not include one of these (mandatory) limitations, it will be invalid.

It is possible to limit the scope of liability to 'typical' and 'foreseeable' damages that are not based on intentional or grossly negligent breach of duty. Caps to limit the liability for breach of contract must, however, take into account the exceptions pointed out.

Furthermore, caps must be reasonable and reflect the 'average damages in the relevant industry sector'. Caps with too low an amount are considered void by German courts.

> Ask yourself what is the purpose of the negotiation? What do you actually want? What is the affordable price for you? Be firm and stick to it."

ITALY (COMMERCIAL)

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Tommaso Mancini heads the International Trade and Contract Law Department at Bacciardi and Partners.

He was admitted to the Italian Bar in 2007 and practiced as visiting attorney at Harris Cartier LLP, London office, in 2008.

Tommaso specialises in international business transactions and commercial agreements of all kinds including: contracts for the sale goods, machinery and industrial plants; commercial agency and distribution agreements; franchise agreements; licensing agreements and e-commerce terms of sale.

He regularly holds lectures and seminars on international commercial agreements, international payments, warranty and product liability, IP rights and commercial litigation.

Bacciardi and Partners is a business law firm based in Italy, with offices in Pesaro and Milan, focusing on cross-border commercial, corporate and M&A transactions, employment, tax and customs law.

Bacciardi and Partners has more than forty years of proven experience and operates with a team of over 16 professionals, providing strategic advisory to Italian and foreign companies to plan and implement cross-border transactions.

Bacciardi and Partners also maintains an M&A division dealing with the management of Merger and Acquisitions and Corporate Finance, domestic and cross-border transactions. The firm was recently named as Law Firm of the Year for cross-border commercial transactions during the Legal Community Italian Award 2018 held in Rome on the 20th of July 2018.

TOP TIPS FOR

Successful negotiations

Prepare yourself: do your homework and come to the negotiation table well prepared, with regard to both the transaction and the parties involved.

Establish mutual trust: mutual trust and honesty are fundamental aspects in a negotiation. Would you ever enter into an agreement with someone you cannot rely on?

Identify your best alternative solutions: you have to realise whether your interests are reachable with alternative solutions. Only if you have feasible alternatives can you successfully influence the negotiation.

Don't take it personally and stay focused on the topic: if your nature drags you to move the challenge from the content of the transaction to a personal clash, keep calm and try to analyse the problem with a critical eye. This is particularly important when negotiating with Italian people!

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Negotiation is often a complex process. It becomes even more difficult when it involves international counterparties, as different cultures result in different approaches and behaviours.

For this reason, it is extremely important to come to the negotiation table well prepared from a business/legal point of view, as well as a human perspective. Skilled negotiators always try to establish a relationship based on mutual respect, confidence and trust, before they start discussing the details of the case.

Quite often, they also embrace the so called 'win-win strategy', striving to find a solution which allows either of the parties to gain something. Arguments and dead points are always around the corner, but various techniques can be used to overcome them.

For instance, the parties could try to unpack the issue on the negotiation table in order to evaluate each smaller matter separately. Likewise, they could add new elements to the negotiation table in order to compensate the party who has made greater concessions. If the parties are not able to come to an agreeable result, they should try to think out of the box and find alternative solutions.

Finally, if the challenge becomes too big to go ahead with the negotiation, the best thing to do is to relax the tempo or even adjourn the meeting. This allows the parties to take their time, further review their positions and reflect on the alternative solutions. They should come back to the negotiation table with a new proactive and constructive approach, ready to reach a satisfactory solution.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

The Italian legal system encompasses a variety of 'international mandatory rules' aimed at protecting certain categories (e.g. consumers, commercial agents, employees) or certain public interests (e.g. competition, fair commercial practices).

Such mandatory rules apply irrespective of the law chosen by the parties to govern their contractual relations. For example, foreign companies wishing to sell their products or services to Italian consumers - who are always considered the weaker contractual party - must be aware of the mandatory provisions of the Italian Consumer Code. This includes such provisions as those on product warranty and those on consumers' right of withdrawal in case of distance sales and contracts negotiated away from business premises (e.g. e-commerce). Likewise, companies wishing to appoint an Italian commercial agent must be aware that the latter is entitled to claim a goodwill indemnity upon termination of the relationship.

Foreign principals must also enrol their Italian agents on the social security fund managed by ENASARCO (Ente Nazionale di ASsistenza per gli Agenti e i Rappresentanti di Commercio), and make periodical payments to the fund.

The whole amount paid to the ENASARCO fund will be part of a goodwill indemnity to be paid to the commercial agent when the relationship comes to an end.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

In Italy, the contracting parties may enter into a shareholders' agreement (SHA), either for an indefinite period or for a fixed-term period of time.

In the first case, each shareholder is granted the right to withdraw from the SHA at any time, by simply providing sufficient and reasonable prior notice to allow the remaining shareholders to reorganise their internal dealings. In the second case, Italian laws provide for a mandatory maximum initial term of validity of the SHA which, in no event, can exceed five years of duration.

In this regard, a recent Italian Court decision (Corte d'Appello di Brescia, Sent. 1568/2018) has confirmed that the parties to a fixed-term SHA can enter into it for a maximum initial five-year term of duration. It also stated that the parties cannot agree on a tacit and automatic renewal of the SHA, upon expiry of said maximum initial five-year term.

Considering the mandatory maximum five-year term of duration, the parties must, prior to its expiry date, either meet and negotiate in good faith an express renewal of the same SHA for a second term of duration, or negotiate in good faith and enter into a new and additional SHA, having a maximum initial term of duration which shall not exceed five years.

Another relevant recent trend concerns the way the shareholders to a company construe the articles of association governing their relationship as shareholders.

In particular, shareholders have started to exploit the powers provided for by article 2468 of the Civil Code and by DL 179/2012. Pursuant to this, shareholders of limited liability companies may either be granted with special or particular rights, or be assigned with 'special categories of shares'.

The aforesaid powers are normally used in order to transfer into the articles of association certain provisions of the SHA pertaining to, by way of example, the voting rights or the decision making procedures that shareholders follow to take relevant decisions for the development or termination of the business.

The inclusion of such rights and provisions within the articles of association, allows the shareholders to ensure that any future internal resolution taken in violation of the special or particular rights granted to the shareholders, or assigned to them by the special categories of shares, be regarded as null and void. This way, the shareholders may achieve a higher legal protection as opposed to the same provisions being agreed upon and included solely in the SHA. In fact, violation of those provisions within the SHA would simply trigger a breach of contract and claim for damages compensation.

ENGLAND (COMMERCIAL)

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Colin Smith is a Partner in the Corporate & Commercial team. Colin combines formidable technical expertise with 'hands-on' industry experience from his former career in retail and consumer marketing with Procter & Gamble, BHS and Wickes.

Corporate transactions are at the heart of Colin's practice, including Joint Ventures, management buyouts (MBOs) and mergers & acquisitions, where he frequently acts for buyers and sellers in business and share sales and purchases.

Colin advises on corporate governance, providing guidance to directors and shareholders in relation to their rights, duties and obligations.

Robert Cain is a Partner and Head of the Corporate & Commercial team, with over 20 years' legal experience.

Robert has particular expertise in corporate and commercial transactions in the technology, motorsport and brand distribution industries. He has also served as a non-executive Director, providing advice on legal issues.

Prior to joining Blaser Mills Law, Robert worked at a number of leading UK law firms, before latterly establishing Cain Law, a niche corporate and commercial firm based in Silverstone. During his career, Robert has formed strong foundations with heavy-weight City and global law firms.

Blaser Mills Law is a leading law firm based in South East England, UK with 22 partners and over 70 lawyers. It is a full-service firm, offering a comprehensive range of legal services to businesses and private individuals including Corporate & Commercial, Employment, GDPR Data Services, Dispute Resolution, Business Crime and Real Estate & Development.

Advising a wide range of blue-chip and small-medium sized enterprises, as well as non-for-profit organisations with an international reach, Blaser Mills has been recognised in The Legal 500, UK and Chambers & Partners UK legal guides and accredited by Lexcel, the UK Law Society's legal practice quality mark for excellence in legal practice management and client care.

TOP TIPS FOR

Successful negotiations

Know your client

Make sure that you have a sound grasp of your client, their business and the market they operate in. Discuss parameters and walk-away positions in advance of negotiations with the other side, so that you can maximise their leverage, and continue to communicate with your client throughout the process.

Agree heads of terms

Encourage the parties to agree key provisions in advance and set them out in a single document. This provides clarity and avoids misunderstandings, allowing the detailed negotiations to focus on the key issues.

Negotiate the contract as a whole

The traditional approach of seeking all comments on a draft contract in a single redline mark-up has stood the test of time. Apart from maximising efficiency, it enables both parties to assess the deal as a whole, putting trade-offs and concessions in proper context. The alternatives of negotiating piecemeal or in sequence, risk conceding important points without obtaining anything in return and/or a slow-down in negotiations as previously dealt-with issues are revisited in the light of subsequent discussions.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

International contract negotiations can face challenges over and above the normal 'rough and tumble' of commercial dealings, driven by differences in language, business norms, legal systems and cultural expectations.

When discussions become 'bogged down', one of the most powerful tools available is simply to listen.

All too often, lawyers enter negotiations with arguments intended to persuade the other side of the legitimacy of their positions. Unknowingly, they're giving up power from the first time they open their mouths. Negotiation power goes to those who listen and learn. It's thus critical to ask questions and get as much relevant information as you can throughout the negotiation process. With information in your pocket, you have power. Without it, you'll be scrambling.

Effective lawyer-negotiators know this well. Instead of trying to convince the other side of the strength of their case or why the other side should agree to their proposals, they start by getting information. How? By building rapport, developing relationships, asking questions (especially open-ended ones like what, how and why), finding out their counterparts' negotiation reputations, and probing the other sides' fundamental goals, needs, interests and options.

Another crucial consideration is the participants' cultural awareness. Culture strikingly affects the manner and method of negotiation, influencing how members of groups interact with each other and how individuals from different groups relate to one another. Learning about the other party's culture can therefore play a pivotal role in succeeding in negotiations. In addition, use of the other party's language or providing translation must be a consideration in order to conduct a successful negotiation. Lawyers offer an expertise in researching and identifying cultural differences. Importantly, they may assimilate actual experience with foreign cultures against the backdrop of foreign law.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

England & Wales is a common law jurisdiction and English law is the governing law of choice for many international cross-border contracts. The key areas where English law differs from the law in many civil jurisdictions and most US states are as follows:

- The parole evidence rule applies to interpreting contracts and extrinsic evidence cannot generally be introduced to add to, vary or contradict a written contract. Courts see their role as analysing objectively to ascertain the contextual meaning of contractual language.
- The equitable remedy of rectification is available to correct a written agreement if, as a consequence of a common or unilateral mistake, it does not reflect the terms of the true agreement at the time it was made. The failure to record the agreement correctly must be acknowledged and convincing proof is required.
- A duty to act in good faith is not usually implied into contracts and, in general, English Courts are less likely to accept implied terms.
- Loss of profit attributable to breach is considered to be a direct loss and therefore needs to be specifically excluded rather than relying on exclusion of indirect and consequential losses.
- Every contracting party has the right to terminate a contract on grounds of the most serious breach (repudiation). This includes any breach of a condition, serious breach of an intermediate term, renunciation (i.e. a party's outright refusal to perform all or substantially all its obligations under the contract) or if a party makes it impossible to perform the contract.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

The most far-reaching recent developments for UK contract law have been the introduction of the Consumer Rights Act 2015 (CRA) and the General Data Protection Regulation (GDPR).

CRA

The CRA has consolidated and reformed consumer rights in respect for goods services and digital content. Practitioners should note that the definition of 'consumer' is wider than that adopted in EU consumer law, being 'an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession.' For the first time, the rules cover the supply of digital content, which is defined as 'data... produced and supplied in digital form.' Digital content must comply with certain standards which broadly reflect the standard for goods: satisfactory quality, fitness for purpose and compliance with description. Consumer terms were already subject to a fairness test. The test has been extended to consumer notices, to the extent that it relates to rights and obligations between a trader and a consumer or purports to exclude or restrict a trader's liability to a consumer. Consumer notices which are unfair are not binding on the consumer.

GDPR

The GDPR came into effect on 25 May 2018 and will be incorporated into UK law when the UK exits the EU. Whenever a controller uses a processor it needs to have a written contract in place. The GDPR specifies what needs to be included in the contract, namely details of the processing and the processor's obligations. This includes the standards the processor must meet when processing personal data and the permissions it needs from the controller in relation to the processing. GDPR-specific guidance on issues relating to data sharing between controllers, including any appropriate contractual wording, have not yet been published but they are anticipated and we recommend putting appropriate arrangements in place now. If the UK leaves the EU without an exit agreement and there is no formal adequacy decision in place on the exit date, data transfers into the UK from the EEA will need to be covered by 'adequate safeguards'. Multinational groups may be able to adapt binding corporate rules (BCRs) but otherwise standard contractual clauses (SCCs) may need to be put in place.

BRAZIL (COMMERCIAL)

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Martim Machado is a founding partner of CGM Advogados and a lawyer with over 25 years of experience representing international companies and their Brazilian subsidiaries in connection with a variety of legal matters in Brazil. He specialises in corporate law, commercial contracts, foreign direct investments and M&A. Martim is a graduate (LL.B.) from the Catholic University of São Paulo Law School – PUC/SP and holds a Master of Laws degree (LL.M.) from Georgetown University Law Center in Washington, D.C. Prior to founding CGM, Martim was a partner at major Brazilian law firms, an attorney with the Inter American Development Bank – IDB in Washington, D.C., and a foreign associate at Mayer, Brown & Platt (currently, Mayer Brown) in New York, NY.

CGM Advogados was founded in 2014 by an experienced group of lawyers who had been working together for a very long time (in some cases, more than two decades) and shared ideals, values and goals. Based in São Paulo, Brazil, CGM's full service practice has been delivering sound legal advice to companies from different countries, with different sizes and operating in different markets.

More than a law firm, CGM is a team that works in a very close and coordinated fashion across practice areas to assist clients to solve their problems, implement their projects and reach their goals. It is a team that continues to grow by relying on qualified professionals who are ethical, creative, proactive and passionate.

TOP TIPS FOR

Successful negotiations

Be mindful and sensitive about the parties' goals and expectations. The negotiation process is not about winning or losing, but about bridging gaps and building long term and fruitful relationships.

'Trees are important, but don't forget they are in a forest!' A contract is a risk allocation tool; a myriad of complex rights and obligations that must work well together. Details are important, but that hardly negotiated, written-to-perfection clause will not do the trick if there are flaws elsewhere in the contract. Spending time on the 'nuts and bolts' without losing sight of their role and importance for the functioning of the 'engine' is key.

Focus on what is important. Have clear goals throughout the way and pursue them fiercely but with elegance and intelligence. Concessions are the building block of a successful negotiation and knowing when and how to make them is important to move the negotiation process forward.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

The negotiation process is dynamic and may vary depending on the type of contract to be negotiated and the characteristics of the parties involved. For this reason, several techniques can be used to overcome the obstacles that normally arise during the negotiation process, including the following:

Knowing the parties involved in the negotiation process is essential. Obtaining information from the client about its objectives, while assessing the main risks involved in the contract and understanding potential ways to mitigate these risks, are also important. Getting a sense of the expectations and interests of the other party is equally important.

Obtaining background information on your counterparty is key to a successful negotiation. A first draft that is insensitive to the characteristics of the counterparty and contains clauses that may be seen by it as unbalanced (even if they would not be unbalanced in other jurisdictions or under different circumstances) is unlikely to contribute to a friendly and collaborative negotiation process.

In negotiations involving complex commercial contracts, investing some time in preparing and discussing a term sheet with the main conditions to be included in the contract is very important. A consensus on these key conditions and on how they should be dealt with allows the parties and their advisors, including lawyers, to work more efficiently. When the preparation of a term sheet is not possible, holding a kick-off meeting before any draft is prepared to align expectations and objectives is a good compromise to a term sheet.

Establishing a clear timetable for the negotiation process, with well-defined (and feasible) timelines is another important step. Lack of discipline during the negotiation process normally leads to delays, which often make the entire negotiation process more complicated.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

There are three things that are peculiar to Brazil that I would point out. Firstly, Brazil is a civil law country and many contracts governed by Brazilian commercial law are subject to mandatory and default rules, established in the Civil Code or specific statues. Generally speaking, parties are allowed to modify default rules, but cannot avoid or override mandatory rules. When preparing a commercial contract to be performed in Brazil, non-Brazilian parties should be mindful of existing mandatory and default rules. Many standard forms prepared in common law jurisdictions and used by non-Brazilian parties in various parts of the world may not work as intended in Brazil. In order for a client not to be surprised by the application of default rules to a contract, it is important that standard forms be carefully evaluated before being adopted as the basis for commercial contracts to be performed in Brazil.

Secondly, there are several legal principles applicable in Brazil, some of them already codified in the Civil Code, that may be invoked by contracting parties to repudiate or obtain relief from certain contractual clauses. Principles requiring parties to act in good faith or authorising parties to excuse themselves from complying with contractual clauses upon the occurrence of 'extraordinary and unforeseeable events' that make their obligations 'excessively onerous' are some examples.

Not everything written in a contract and subject to Brazilian commercial law will be binding and enforceable as expected by the contracting parties. Pacta sunt servanda, a Latin brocard that means that 'agreements must be kept' or, in other words, that agreements are 'law between the parties,' finds exceptions in Brazil.

Finally, it is always important to carefully consider contractual clauses on applicable law and dispute resolution method/venue. The choice of arbitration as a dispute resolution method gives parties more flexibility to define how, where and under which law disputes will be resolved. However, arbitration awards issued outside Brazil are only enforceable in Brazil if they are approved by the Superior Court of Justice, one of Brazil's highest courts alongside the Supreme Court.

Although the Superior Court of Justice will not revisit the merits of arbitral awards when vetting them, it may deny enforceability to an award if it offends 'national sovereignty', the 'dignity of human beings' or 'public order.' So, the enforceability in Brazil of a non-Brazilian arbitration award may never be taken for granted. The choice of courts abroad to rule on disputes may also bring some difficulties for contracting parties. For example, court decisions issued outside Brazil are also subject to the approval of the Superior Court of Justice under the same requirements mentioned above. Non-Brazilian parties to a commercial contract involving a Brazilian party should thoroughly evaluate the pros and cons of choosing non-Brazilian venues and foreign laws to rule disputes. The choice of a non-Brazilian court or law may create difficulties for the enforceability of the contract in Brazil.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

The Brazilian Congress has been discussing for some time a new Commercial Code. In a similar way to the existing Civil Code, the new Commercial Code will establish several mandatory and default rules that will apply to commercial contracts and corporate documents in general, including articles of incorporation and shareholder agreements. There are still uncertainties about whether the new Commercial Code will be approved by Congress and, if so, about when it will come into effect, but an approval is at this point more likely than not. A new Commercial Code will bring an additional and very important set of rules to be taken into account during the preparation and enforcement of commercial contracts in Brazil.

HONG KONG (COMMERCIAL)

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Clinton is a Hong Kong and Australian admitted lawyer whose practice focuses on corporate finance and commercial transactions, including public offerings and placings, structuring, mergers & acquisitions, takeovers, cross-border corporate transactions, financing and security transactions, licensing matters and regulatory compliance.

Clinton's capital market experience includes acting for both issuers and sponsors in respect of listings on the Stock Exchange of Hong Kong and as a Hong Kong advisor in respect of AIM and ASX listings and takeovers. Clinton's M&A practice has covered a range of sectors and clients including financial and fund services, health and medical, mining and resources, automobile manufacturers and dealers, information technology and media.

Clinton was named as a Rising Star Lawyer for Corporate/Mergers and Acquisitions for 2016, 2017 and 2018 in Asialaw Leading Lawyers.

Charltons is a boutique Hong Kong corporate finance law firm with branch offices in Beijing, Shanghai and Yangon, Myanmar. Charltons focuses on Hong Kong corporate finance law and provides cutting edge legal advice to Hong Kong, PRC and international clients. Charltons has a track record of over 20 years representing major multinational clients on complex cross border transactions as well as domestic transactions. The firm is experienced in advising local and international companies, controlling shareholders, sponsors and underwriters on initial public offerings on both the Main Board of The Stock Exchange of Hong Kong Limited, and the GEM market.

TOP TIPS FOR

Successful negotiations

DOS

Take the time to really understand the counterparty's position and what they want from the transaction.

While it is common for all negotiations to be done remotely from all parts of the world, if negotiations are stalling, it is often most efficient for all parties to physically meet to process and finalise negotiations.

Use timing to your advantage. Depending on your objectives, putting pressure on counterparties to resolve matters quickly or otherwise prolonging certain matters can often yield results.

DON'TS

Don't make ultimatums unless you are really prepared to walk away.

Unless of critical importance, don't reopen previously closed issues as this can often erode trust.

Don't focus on why you need to complete the transaction, but focus on why the counterparty needs to complete the transaction. This often relives pressure when negotiating and also allows you to focus on what the counterparty really needs/wants.

Don't simply quote market practice as a negotiation strategy, as this shows it is not specifically important to your needs and also that you are not actually considering the counterparties specific needs and requirements.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Overseas counterparties often look to engage local Hong Kong counsel as a means to minimise any cultural challenges when negotiating Hong Kong law documents. While in most circumstances this can indeed assist in the negotiation process, there can be issues with 'too many cooks in the kitchen,' where there is usually the principal, their overseas coordinating counsel and the Hong Kong counsel leading the negotiation. This can sometimes lead to inefficiencies in obtaining instructions and can cause misunderstandings between principals where information is passed and filtered between too many parties. One effective method we have seen is where the principal prefers to instruct their offshore counsel as opposed to Hong Kong counsel direct. The offshore counsel then takes the lead in negotiations on behalf of the principal, with the Hong Kong counsel taking a more review and comment role.

Further, when dealing with Chinese speaking counterparties, even if the negotiations are conducted in another language (typically English), a good technique is to have a Chinese speaking negotiator as part of the team. This helps pick up on the subtleties of the counterparties position, minimises misunderstandings and also shows a genuine intention to understand the counterparty and work together.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Notwithstanding it is part of China, Hong Kong has its own unique set of laws and regulations as enshrined in the Hong Kong Basic Law. As part of a former British colony, the majority of contract law has developed from English common law principals. What is somewhat unique to Hong Kong commercial law, is that, as an international finance hub, Hong Kong Courts will not only look to Hong Kong precedents to determine case law, but will frequently look to other common law jurisdictions (such as Australia, Canada and the United Kingdom) on matters of law that have not yet been decided in Hong Kong or otherwise where international norms have moved on. This is exemplified in the membership of the Hong Kong Court of Final Appeal (which is the final appellate court within Hong Kong) which may, as required, invite judges from other common law jurisdictions to sit on the Court. Currently these non-permanent overseas judges include judges from Guernsey, Australia, the United Kingdom and Fiji.

This international outlook allows Hong Kong law to continue to reflect not only Hong Kong's robust common law system, but also to adapt to international laws and norms on an evolving basis.

I QUESTION THREE

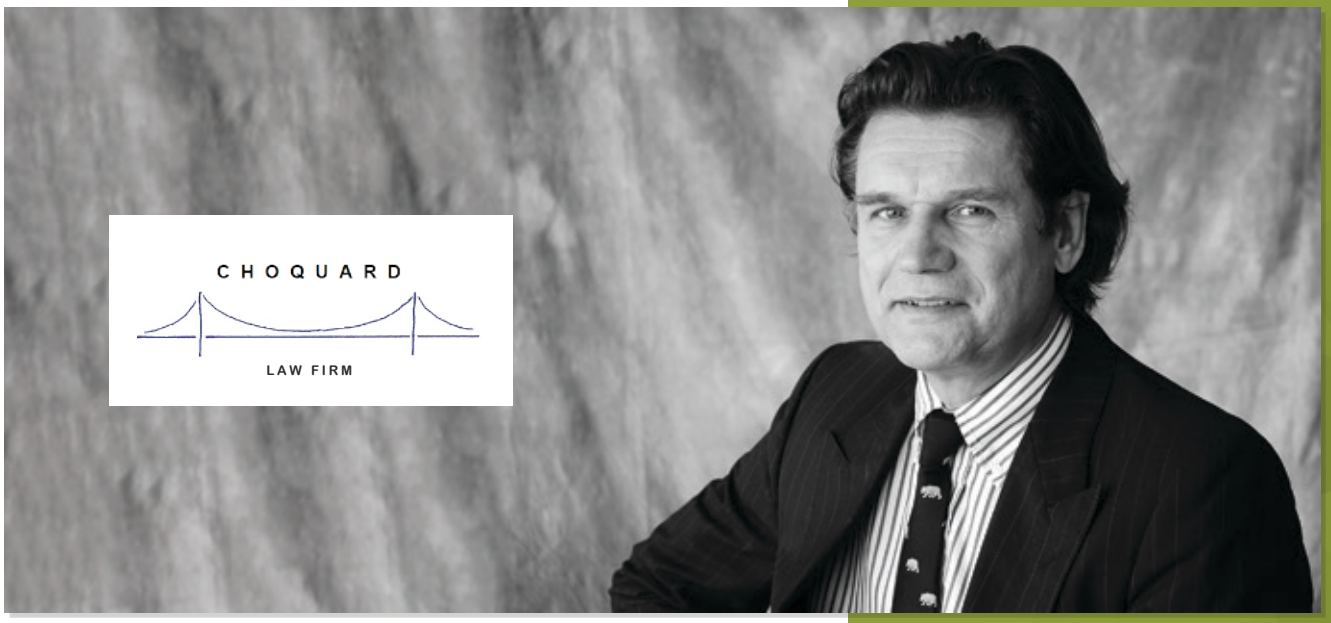
What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

We don't see that any recent legislative changes have generally impacted common legal documents or the negotiation thereof. Relatively recent legislative changes such as the introduction of the Contracts (Rights of Third Parties) Ordinance (Chapter 623 of the Laws of Hong Kong) in 2016, have legislatively overridden the common law privity of contract principle. This has largely been dealt with by updated boilerplate language in general agreements and the passing of amendments to the Companies Ordinance (Chapter 622 of the Laws of Hong Kong). With effect from 2018, a Significant Controllers Register requires that all shareholders of Hong Kong companies who exercise significant control are recorded on the company's Significant Controllers Register. Other relatively recent changes such as the amendment to the Competition Ordinance (Chapter 619 of the Laws of Hong Kong) and changes to the Hong Kong Stock Exchange Listing Rules, have wider impact when dealing with listed entities and potential competition issues.

One common law principle that is followed in Hong Kong and is frequently overlooked relates to the relationship between a company's Articles of Association and the shareholders' agreement between its shareholders. As Hong Kong operates a public register for Hong Kong companies, any third party is able to download a copy of a Hong Kong company's Articles of Association from the Hong Kong Companies Registry.

As such there is often a desire to omit commercially sensitive information from the company's Articles of Association and deal with such issues in the shareholders' agreement, which is often a private document. In the Hong Kong case of Re Greater Beijing Region Expressways Ltd the Court of Appeal largely upheld an English common law principle that a shareholders' agreement that fettered a company's statutory right to exercise powers was invalid against the company and invalid against the shareholders where it was not a purely personal agreement. In this case, the shareholders' agreement required that both shareholders must agree before the company (a company incorporated in the BVI) could petition for a winding-up. The shareholders' agreement also included typical assignment provisions whereby it was a condition of any transfer that the incoming shareholder was bound by the shareholders' agreement. The Court held that as the right of a company to petition for winding-up was a right enshrined in BVI company law, the requirement for both shareholders to agree to petition was inconsistent with the company's statutory right and therefore against public policy. As between the shareholders, such agreement would be enforceable if it was a private agreement however as there was a condition effectively binding future shareholders, it rose to a regulation of the Company and therefore was invalid for the same reasons. This position was generally supported in Alan John Muir v John Robert Lampl & Another which declared a provision in a shareholders' agreement which purported to restrict the removal of directors as void for fettering the company's statutory right and also void against the shareholders as it was not a personal agreement.

While this case law has been somewhat established in Hong Kong for a period of time, it is still common for shareholders' agreements to include such provisions and as such it is important that appropriate care is taken when negotiating these agreements.



SWITZERLAND (COMMERCIAL)

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Maurice P. Choquard was born in 1951 and became licensed as a Swiss attorney at law in 1977 in Geneva. He is also licensed as an attorney in the State of California, USA since 1980. He began his career with BBC, Brown, Boveri and Cie as in-house counsel, before becoming General Counsel of the Kuehne & Nagel Group. Since 1989, he has been a partner in various private practices in Zurich. Consequently, Maurice's expertise is both of General Counsel (9 years) and attorney at law (29 years).

Maurice studied at the JD School of Law in the University of Geneva, before earning a Master of Law qualification from the University of California at Berkeley.

Choquard Law Firm is a boutique law firm, based in Zurich. We practice in both Zurich and Geneva, covering most jurisdictions of Switzerland.

The firm is focused on both international, commercial and inheritance law, with wide experience in international transactions. This includes the negotiation of hundreds of contracts, from the purchase of a Modigliani painting, to the turn-key supply of the USD2 billion Four Corner States Electrical Project. Maurice has used his experience to develop an 'external in-house counsel' approach to law. He acts as (general) counsel for several enterprises on a part-time basis.

TOP TIPS FOR

Successful negotiations

Should English be foreign to my French/German clients, then one of the other languages should be selected as the contract language.

Engage in systematic preparations with clients and learn all about their strengths and weaknesses, plus the deals at stake.

Write down the list of all legal issues to be considered, while preparing a list of solutions in Swiss law to the most important legal issues to be considered.

Communicate with clients/their customers in a clear, transparent, complete and professional fashion, systematically confirming in timely writing all information exchanged and decisions (to be) taken.

Divide work by topics and elect a responsible person for each topic in order to facilitate proper communication.

Above all, do think preventively: Corporate lawyers should always be focused on AVOIDING future problems as much as possible. Disputes are a curse for business.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Counterparts trying to impose their own prepared contract forms is something commonly seen, as is the technique of creating time pressure and attempting to acquire trade secrets or technical know-how without consideration.

During the negotiation process, counterparts will often attempt to add in more supplies or services for no additional cost and may also refuse or postpone payments until advance work has been done.

Changing their negotiating personal in order to start anew and drop promises is common, while many prefer 'ad hoc' agreement forms instead of selecting internationally-recognised forms of contracts like FIDIC, UNCITRAL, VIENNA Convention, etc.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Commercial contracts governed by Swiss law benefit from a very sound body of rules which form part of the Swiss Codification System, which might apply in addition to the various dispositions agreed upon in the Contract (except if they contradict the latters that are not infringing mandatory rules of law). This enables us to draft much shorter contractual texts, than the 'bibles' too often seen in the Anglo-Saxon system. The risk of forgetting some points in the Contract is suppressed by the automatic replacement by the adequate rule of law. But one must of course be aware of the exact content and meaning of the substitute rule.

In case of dispute, what counts is to be able to demonstrate the real and common intention of the parties, as expressed by the wording of the contract texts and to be understood pursuant to the Principle of Trust. Consequently, it is of the utmost importance to clearly state all details of such intentions, by using proper words, drawings or other specifications. The Principle of Good Face supported by the real intention of the parties surpasses the words used in the contract, in terms of importance.

Swiss laws of Procedure-Evidence-Torts reflect typical Swiss reserve;

- No discovery tools, such as those used in the USA.
- Everything is subject to the rule of reason.
- No triple damages nor large awards.
- Liquidated damages are implemented under strict conditions.
- No jury system except for highest criminal Courts.
- The defeated must pay the winner's attorneys & court costs.
- Switzerland is known as world centre for Commercial Arbitration.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Articles of Association (AoA) are indirectly affected by the increasingly strict treatment of members of boards of corporations by the Swiss courts.

These courts no longer hesitate to condemn members for their law violations. Board Members' duty of due care and duty of loyalty, can no longer be ignored. The Swiss Federal Tribunal or Swiss Supreme Court decided on Jan. 23, 2018 (4A_349/2017) to confirm the immediate termination of the employment contract of a President of the Board of Directors of a Swiss company because of his violations of several obligations and duties.

Mr Pierin Vincenz was a super banker and President of the Board of Raffaisen Banks, the third largest bank-group in Switzerland, for more than a decade. After spending more than three months in jail, he is facing severe condemnation for mismanagement decisions and wrongful enrichments, with a possible lengthy prison term and the requirement for him to restitute large sums of money. This is a totally new situation for our country.

The issues of duration of a Shareholders' Agreement and of the right to terminate such an agreement, have been amended by the Federal Tribunal (Swiss Supreme Court; 4A_45/2017; June 27, 2017), as follows:

Under Swiss law, a contract cannot be validly entered into for an indefinite period. There is a risk that such agreements be terminable at will by giving six month's written notice. Long term commitments in a Shareholders' Agreement are valid under strict conditions, like the respect of the personality rights of all signing shareholders, including the threat to the economic freedom/existence of a signatory, and the balance of their rights and duties. In case of violation of such conditions, the contract can be declared as no longer valid.

French Saint Gobain Corp's. attempts to takeover the Swiss SIKA Corp. have been the subject of a judicial saga over several years, terminated in 2018 by a settlement agreement. The court decisions made during this process, have widely enriched Swiss corporate and contract law, including the dos and don'ts in shareholders' agreement.

Internationally speaking, Switzerland is ranked in second or third position on the scale of very high executive compensations. CEO compensation increased by 41.2 per cent between 2009 to 2016 on average, and, contrary to general belief, compensation in non-financial services firms grew faster than in financial services firms (banks, etc.).

The aftermath of the MINDER Initiative (Swiss people refused by votes to institute caps for executive bonuses) cannot be summarised as 'business as usual': First of all, shareholder representative institutions, like ETHOS, are exercising growing control over the policies of large companies, by imposing guidance during general assemblies. Second, most companies are self-imposing sound internal rules in response to such pressure, often reported in the media. UBS just disclosed a total change in their 'bonus' policy', which included the suppression of bonuses for more than 10'000 executives, or the reduction of all bonuses in line with proven results.

Finally, the Socialist Party is proposing a whole new Swiss Companies Compliance Charta, with a lot of change proposals. The fact that this legislation bill has very little chance of being approved by Parliament does not prevent large debates on all kinds of topics taking place, preparing the way for future, better designed proposals.

US - FLORIDA (DISPUTES)

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Throughout his distinguished legal career, Gary has obtained favorable judgments on behalf of clients in complex international litigation, arbitration, and commercial disputes. His work in these areas has been recognised by the Legal 500, Chambers, Best Lawyers in America, Martindale-Hubbell, Super Lawyers, and the South Florida Legal Guide.

For nearly ten years, Gary spearheaded the effort to create the first board certification program in the U.S. for attorneys who specialise in international litigation and arbitration. In 2018, he was appointed by the Florida Bar to the inaugural board certification committee for this new specialty, following approval of the program by the Florida Supreme Court.

Miami-headquartered with offices on five continents. Diaz-Reus's global practice is centred around parallel proceedings & transactions, sovereign immunity issues, trade, commerce, finance, fraud, civil litigation & arbitration; asset identification, location, tracing and recovery; white collar crime, regulatory & criminal investigations, defense in matters of corruption, anti-money laundering, OFAC, SDN, Magnitsky Act, CAATSA, FCPA, Bank Secrecy Act & politically sensitive investigations including the recovery of U.S. immigration status & visas.

TOP TIPS FOR

Successful negotiations

The most likely way to resolve a dispute after commencement of contentious proceedings is through the mediation process. Lawyers in many jurisdictions in the United States have become accustomed to being required by courts to go to mediation during litigation. In my experience, well over 80 per cent of all disputes get resolved at some point in mediation. Mediation has only lately emerged as a favoured form of dispute resolution in international practice.

Three tips with respect to mediation:

Use a mediator who is professionally trained in the mediation process. While this isn't a science, there are aspects to negotiations over disputes that can be learned, and a professionally trained mediator typically is more helpful in getting to yes than one who is not.

Preference should be given to mediators who are skilled, active disputes practitioners, as opposed to former judges or other types of professionals. By choosing a mediator who is a skilled disputes practitioner, you bring into the room a third party who is savvy as to the pitfalls and advantages that each party enjoys during litigation or arbitration.

Try, try again. If at first you fail in mediation, do not hesitate to go back later in the proceedings. A few years ago, I handled a case involving a partnership dispute where the parties had become bitter enemies. Prior to my involvement with the case, the parties had twice tried to resolve it through the mediation process. That had failed. During our final pre-trial hearings, the court ordered the parties to mediation once more. This time we chose a seasoned practitioner to serve as the mediator. And although it took two separate sessions to effectuate a resolution of the case, we succeeded in settling a matter that by all outward appearances was not settleable.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

Think who, what, where, when and how.

Who: Who is on the other side? Are they an existing vendor or a new business partner? A supplier or a buyer? Are they a well-heeled company or a small business? Are they foreign or domestic? Are they state-owned or controlled or are they private? The answers to these questions will drive the decision-making with respect to the crafting of a dispute resolution clause. For example, in the international arena, if the other side is a state-owned or controlled company, then they will no doubt have their own protocols that they will likely refuse to deviate from with respect to a dispute resolution clause. It will be very much, "my way or the highway." Typically, the very best you can hope for in such situations is to persuade your counterpart to arbitrate in a neutral forum.

What: What type of transaction is this? Is it going to be an entirely domestic one where you have the comfort of knowing that your laws will apply? If it is an international transaction, does it involve the sale of goods and are there treaties that need to be addressed with respect to how payments will be structured and whose laws will apply in the event a dispute arises?

Where: Where do you want to resolve a dispute should one arise? It is here that considerations of enforcement proceedings come into play. Specifically, assuming your side wins the dispute, how do you recover? Location of assets plays a critical role in determining where outside counsel should be choosing to seat the resolution of any dispute. For example, if you are negotiating with a foreign state-owned enterprise that does not sell anything outside its own borders, precautions will need to be built into the contract to protect you in the event of a dispute.

When: When do you as General Counsel want to think about and address dispute resolution issues during the course of contract negotiations? Litigation and arbitration practitioners are accustomed to getting last minute calls in the late evening hours on the day the final deal is being struck. This is a particularly bad way to get forum selection and dispute resolution clauses crafted in any meaningful fashion. Consulting outside disputes counsel early in the course of the negotiations is not just useful, it is imperative. This is particularly important when undertaking international transactions. Specifically, if parties are contemplating using another country's laws to interpret the deal terms or are considering the pros and cons of arbitration or litigation in one or more countries, it would be important to consult with local counsel in those countries to determine the legal and strategic risks to be borne by agreeing to particular terms.

How: How do you persuade the other side to agree to your desired approach in negotiating dispute resolution clauses? And how will any dispute get resolved? Should it be by mediation, arbitration, litigation, or a combination of more than one? This is not a cookie-cutter analysis. One size does not fit all. The "how" decision requires lawyers to get out their proverbial toolbox and figure out what will work best given the specifics of the deal.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Litigation and arbitration third-party funding is permitted in the United States. There are many options and companies to choose from. Outside counsel should be used to guide decisions as to which funder to use. General counsel should note that there is a move afoot in Congress to require disclosure during litigation of any such funding obtained by any party. It is difficult at this point to assess what level of support such legislation will garner in the currently constituted House and Senate.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Everyone is always looking to gain the advantage in any dispute. There are certain ways, based upon the terms of dispute resolution clauses, that such approaches can prove profitable for the clever litigant. For example, where an arbitration clause requires mediation as a condition precedent to the commencement of arbitration, difficulties often arises for the antsy counter-party seeking to get immediate relief from an arbitral panel. In the United States, courts have routinely held that conditions precedent to arbitration will be strictly enforced and parties will be required to perform contractually mandated obligations prior to moving the dispute into arbitration. For this reason, parties are well advised not to require mediation prior to commencement of legal action in the first instance.

Another way that parties seek to gain an advantage during a dispute is through the preemptive filing in a jurisdiction with unfavourable laws that will burden their opposition. If there is no enforceable forum selection or mandatory dispute resolution clause in the contract, then all bets are off with respect to who gets to file first and where. Controlling venue and how the dispute is to be resolved – through arbitration or litigation – provides the best way to forestall preemptive filings in a foreign jurisdiction. Nevertheless, even with those requirements in place, parties at times look to circumvent them either by resort to vague and ambiguous language in the clauses or simply out of bravado. In short, don't think for a minute that just because you have a forum selection clause in place that the party sitting across the table from you is going to by necessity file in that particular jurisdiction should a dispute arise.

Finally, what we often see in international disputes is the attempt by parties to do an end run around arbitration by resort to litigation in the "home country." Again, it is imperative that corporate counsel have immediate access to sophisticated local counsel in the foreign jurisdiction of its counterpart for on-the-spot advice on issues that arise during the course of contentious proceedings.

US - CALIFORNIA (COMMERCIAL)

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Friedemann Goldberg LLP is recognised nationally as a top-tier law firm. The firm's attorneys are rated at the highest level of excellence by their peers; signifying their high ethical standards, knowledge, capabilities, judgment, communication ability, and experience. The firm was founded in 1999 to combine the high-quality legal services of large firms with the attention to detail and responsiveness of small firms. Now one of the premier law firms in California, Friedemann Goldberg represents multi-billion dollar corporations as well as start-ups in transactions and litigation. The firm has contract, fintech, intellectual property, tax, real estate, and estate planning practice areas.

TOP TIPS FOR

Successful negotiations

Define victory before negotiations start. Force decision-makers to discuss possible outcomes, good and bad, and identify the range of outcomes which will be considered a win. Good negotiators are goal-oriented. Define your goals at the start.

Research, research, research. Before you start negotiating, learn everything there is to learn about the subject, the parties, possible outside influences, deadlines, and objectives. Some people think that negotiation is all about technique—the art of deal-making. It is really all about the substance of the deal.

Is there a tail that will wag the dog? Is there an issue that seems minor but will have more weight than reasonably expected? Example: People sell businesses and often become employees, at least during transition. The terms of that employment seem minor compared to the sale of the business, but that tail will wag the dog every time. Plan for this.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

When counterparties are in different jurisdictions, certain issues are sure to arise. Jurisdiction, venue, and choice of law come up most of the time.

Venue and jurisdiction are closely related, but not the same thing. Jurisdiction is the authority agreed to by the parties for the resolution of disputes. Jurisdiction in contract negotiations refers to agreement regarding which court or arbitrator will be empowered to resolve a dispute. Jurisdiction may be exclusive or shared. Jurisdiction may also denote the geographical area in which the authority is granted by the parties to seek justice. A court without jurisdiction cannot be given jurisdiction by contracting parties. Jurisdiction is based on authority.

Venue is the location where a case is heard. In the United States, venue for a dispute is either a county or a district in the United States. Venue deals with locality of a lawsuit and decides the place a lawsuit may be filed.

The normal arguments over jurisdiction and venue might turn on which party is coming to the other party. The party being approached by an out of state suiter should be able to argue that the suiter should agree to jurisdiction and venue in the location to which they have come in solicitation of the business opportunity. That party is more likely to have multi-jurisdiction experience and representation, but may also have greater negotiation leverage.

Practical considerations might help resolve the question. Where is there better and faster access to justice? Where are the courts resolving disputes in months and where will disputes drag on for years? Where are the laws more fully settled by a long and broad commercial litigation history? People think of New York and California as litigious states, but a commercial dispute will likely be resolved under well-reasoned and settled precedent.

Conflict over these issues can be overcome in different ways. The parties might decide to say nothing about jurisdiction or venue and allow the issues to be resolved by the courts if an issue arises. The first to file a lawsuit will usually win the jurisdiction battle—an inappropriate incentive to pull the trigger early, perhaps. The parties might agree that a party initiating litigation must do so in the other party's jurisdiction. This sets the opposite incentive.

Generally, parties cannot agree to litigate in court in a neutral jurisdiction because courts of that location may lack jurisdiction. But the parties might agree to arbitration of disputes privately in a neutral forum.

Choice of law is the election to have the law of one jurisdiction govern the interpretation of an agreement. Generally, each side will seek to have the laws of its own jurisdiction control. Often this is just the preference of the attorneys involved who are only licensed and fully informed about the laws of their home state. The choice of law does not need to match the jurisdictional choice of the parties, but a judge may be reluctant to apply the law of a foreign jurisdiction with which he or she is unfamiliar. Even so, the parties might choose the law of a major commercial area as the law of their contract, such as New York or California. For corporate governance type issues, the law of Delaware is often chosen

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Advance jury waivers are unenforceable in California. But California has a unique and effective alternative to traditional litigation or arbitration—Judicial Reference. Under a California statute which spells out the rules, parties can agree by contract that disputes will be resolved by a retired judge who will conduct a private trial without a jury. The trial is efficiently conducted and decided under the laws of California and is dramatically expedited. The parties employ the judge and negotiate with the judge on questions of timing and scope. The judge must answer to the local presiding judge and the judgment in the case is subject to appeal in the California Courts of Appeal. Judicial Reference allows parties to avoid slow, costly, and unpredictable jury trials. Judicial Reference also avoids dictatorial arbitrators answerable to no one and free to ignore law without oversight or appeal.

Recently, the California Supreme Court decided the case of Mountain Air Enterprises, LLC v. Sundowner Towers, LLC, 3 Cal.5th 744 (2017). That case changed the rules regarding the circumstances where legal fees may be recovered in a contract dispute. The language used in an agreement must now be drafted carefully with this case in mind if the parties intend that the successful party is to recover the money spent in litigation, even where the successful party is defending itself in a lawsuit.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

IIn Dynamex Operations West, Inc. v. Superior Court, 4 Cal.5th 903 (2018), the California Supreme Court rejected the longstanding Borello test for determining whether workers should be classified as employees or independent contractors. This is a worker-friendly result that some predict will topple the independent contractor labor market. The standard adopted by the Court presumes that all workers are employees—not contractors—unless the heavy burden of the newly adopted 'ABC test' can be met.

The Court's decision was broadly framed and characterised the misclassification of independent contractors as harmful and unfair to workers, honest competitors, and the public as a whole. Under the ABC test, a worker will be deemed an employee, unless the employer proves:

(A) that the worker is free from the control and direction of the employer in the performance of the work, both under the contract for the performance of the work and in fact;

(B) that the worker performs work outside the usual course of the employer's business; and

(C) that the worker customarily engages in an independently established trade, occupation, or business of the same nature as the work performed.

All three requirements must be met to rebut the presumption that a worker is an employee and has been properly classified as an independent contractor.

All three requirements must be met to rebut the presumption that a worker is an employee and has been properly classified as an independent contractor.

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Tony Gruchot is a Senior Associate in the law firm of Graham Thompson, and a member of the firm's Litigation and Dispute Resolution Practice Group. His practice comprises complex corporate and commercial disputes; most notably in the construction, banking and insurance sectors.

Tony has worked on multi-party actions, contract breaches, insolvencies, and liquidations, involving multinational and domestic companies. His practice extends to admiralty litigation and maritime law, which has included environmental claims; family law, including matrimonial disputes, child access and custody matters and divorce; and litigious matters related to employment and labour. He regularly represents clients in court at all levels.

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His work has included multi-jurisdictional claims and multi-party actions, and he is especially noted for his expertise in complex corporate and commercial disputes. He is highly regarded for his knowledge of constitutional and administrative law and is a leading attorney in the field of asset recovery.

Established in Nassau, The Bahamas, in 1950, the top-ranked Graham Thompson Attorneys is a highly regarded law firm with expertise in admiralty & maritime law; banking and financial; corporate & commercial; employment & labour; immigration & naturalisation; insurance; litigation & dispute resolution; private clients, trusts and estates; and real estate & development. The Graham Thompson family includes former attorneys general, cabinet ministers, justices and other leading roles including chairmanships of public boards, councils and special commissions. Graham Thompson operates four offices: Nassau and Lyford Cay in New Providence; Freeport, Grand Bahama; and Providenciales, the Turks and Caicos Islands.

TOP TIPS FOR

Successful negotiations

Do your homework and be prepared: Research the topic and gather as much pertinent information prior to the negotiation as possible. What are the counterparty's needs? Where are their pressure points? What are their options? Doing your homework is vital to successful negotiation.

Clearly define your goals: Prior to the negotiation, make sure you are clear on what you want as well as your 'walk-away' point.

Aim high: A proven strategy for achieving higher results is opening with an extreme position. Those looking for payment should ask for more than they expect to receive; those having to pay should offer less than they are prepared to pay.

Don't dangle a carrot you cannot give up; and don't wield a stick you are not prepared to use: No matter how much you want to reach a deal or a particular outcome, don't promise something you are unable to deliver. The use of ultimatums and threats (best made without getting emotional) are part of a negotiation but never make a threat you are not prepared to follow through.

Listen, listen, and … listen: Spend more time listening than talking during the discussion. The other negotiator will tell you everything you need to know – all you have to do is listen.

QUESTION ONE

What is your best practice approach when advising General Counsel to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

Because of the antiquated state of the arbitration law in the Turks and Caicos Islands ('TCI') - the Arbitration Ordinance (Cap. 4.08) came into force 10 years before the UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law and is as sparse in its provisions as the Arbitration Act 1889 of England and Wales. The result is that the law in TCI remains much the same as it was in England and Wales before the Arbitration Act 1934 – we always advise that arbitration clauses are drafted in as much detail as possible and incorporate by reference institutional rules (such as the AAA), as well as providing for the selection of arbitrators through a recognised international arbitration organisation. Qualified, impartial arbitrators are not easy to find in TCI.

In addition, the TCI is not a contracting party to and has not ratified the New York Convention, meaning that any arbitration award made in a TCI arbitration is not automatically recognised and enforceable elsewhere. As such, we would generally recommend that any arbitration clause selects a jurisdiction other than the TCI and one which is a party to the New York Convention as the seat of the arbitration.

As for other forms of alternative dispute resolution, there is a genuine absence of qualified, impartial mediators in TCI. We would again suggest that any dispute resolution clause providing for mediation as a form of dispute resolution is drafted to select mediation in a jurisdiction that benefits our client and with which he/she is comfortable and familiar.

The TCI is not a party to any treaty dealing with the mutual recognition and enforcement of judgments, meaning that judgments and orders of the TCI courts are not automatically enforceable in other countries. An exclusive jurisdiction clause selecting the courts of the TCI can be advantageous to a client if it has assets elsewhere in the world and not in the TCI.

QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Contingency fee arrangements, that is to say, an agreement whereby the amount of the legal fees is contingent on the success of the claim, and is dependent on the value of the damages recovered, are unlawful at common law. A contract which breaches the rule against champerty and maintenance is against public policy and is therefore unenforceable.

Conditional fee agreements have been common place in England and Wales since their statutory introduction in 1995. A conditional fee differs from a contingency fee in that the fee, whilst still only payable in the event of success, is calculated as a percentage uplift on the normal hourly charging rate i.e. it is independent of the amount of damages recovered. There is no equivalent legislation in the Turks and Caicos Islands ('TCI') and conditional fee agreements are not present in the jurisdiction.

Damage-based agreements ('DBAs'), a form of contingency fee arrangement, are now available in England and Wales for most contentious work (other than criminal or most family matters) under relevant legislation. Again there is no equivalent legislation in the TCI and DBAs are not present in the jurisdiction. In the absence of any specific legislation in the TCI to allow for any form of contingency fee, any arrangement which amounts to be a contingency fee would offend the rule against champerty and maintenance and would be unenforceable.

There is also an absence of legal protection insurance and 'after the event' insurance and as a result all litigation is funded on a private client basis.

QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Depending on the nature of the claim, an international counterparty may seek to either establish a jurisdictional basis for a claim in the TCI, or seek to avoid the jurisdiction of the TCI courts at all costs. Finding or avoiding a jurisdictional hook is a technique that must be deployed early in the proceedings to be effective. The civil procedural rules play an important part.

As to establishing a jurisdiction in the TCI, the TCI courts will follow the principles established at private international law. The Rules of the Supreme Court 2000 (which are based upon the Rules of the Supreme Court of England and Wales as they stood at 1 January 1999), provide that a defendant who wishes to dispute the jurisdiction of the court, must do so within the time limited for the service of a defence in those proceedings. A defendant must therefore act quickly and must not be seen to "take a step in the proceedings" to avoid coming within the court's jurisdiction.

Jurisdictional challenges are often deployed by international counterparties as a means to delay or stymie unwanted litigation.

Advising an international client on whether to submit to the TCI jurisdiction or not, will very much depend on the nature of the claim. For large commercial matters, the TCI has a highly competent and independent judiciary with very limited backlog, so matters can be determined quickly. For other matters, such as personal injury claims, we may well advise a plaintiff client that awards outside the TCI are likely to be more favourable.

An international counterparty with resources and a lot at stake, may seek to have the litigation (although based in TCI) driven primarily by a large international firm. While this will no doubt afford the client (and the TCI attorneys) with extended resources in terms of manpower, it may have significant costs consequences for the client. Although the TCI courts follow the general principle that costs will follow the event, the Legal Profession Ordinance provides that costs are only recoverable in respect of work done by attorneys admitted to the roll of attorneys in TCI.

TURKEY (COMMERCIAL)

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Şafak Herdem is founder and managing partner of Herdem Attorneys At Law. Herdem has advised some very well-known multinational companies, with a client portfolio that includes defense & aerospace, aviation, pharmaceutical and emerging tech companies.

Herdem is also regarded as a defence / civil offset expert and is frequently asked for his comments and advice on offset-related regulatory and non-regulatory developments. He is also the author of the book 'Savunma Sanayi Hukuku' (Defense Industry Law) which has become a guidance for all industry actors in Turkey. Herdem also teaches on emerging technologies law in one of the most prestigious universities in Turkey.

Herdem Attorneys at Law is a general practice, transaction-focused, law firm headquartered in Istanbul. Herdem's client portfolio includes entities in defense & aerospace, life science/pharmaceuticals, tourism and travel and aviation. Herdem is the Turkish partner for clients who need help with complex local matters. The firm's approach is always to prioritise their client's best interest, just as a real partner would do..

TOP TIPS FOR

Successful negotiations

Finding a common ground

Never forget the goal is to close the deal, not make the other party suffer. Always remember that everyone has their own goals and agendas. Compromise when necessary to get a good deal for your client. Do not overlook major points when focusing on minors.

Leading the negotiation

Always bring written documentation in the form of draft agreements, memorandum of understandings and letter of intents. Anchoring bias may work in favour of the negotiators that present written documents first. Setting the rules first may shift the balance in your favour.

Don't ignore the physical factors

Your arguments in the negotiation matter, but what also matters is the physical factors. Do not let the counterparty's team outnumber yours. Negotiating is like playing chess, sometimes a pawn can be a game-changer.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Differences in cultural and legal background may pose a challenge for negotiation, since healthy communication is a must for the negotiation process. Based on our experiences of negotiating international contracts, we find that mechanising the negotiation process is a safe technique that greatly helps to overcome challenges during the negotiations. Mechanising the process means setting the agenda ahead of the meetings, while getting the required documentation ready before the meetings; and, most importantly, sticking to the plan.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Suretyship clauses (or agreements for that matter) in commercial contracts in Turkey are important. As per Turkish Law, maximum surety amounts and the date of surety are handwritten by the suretor. The existence of a joint surety would also require an affirmation of such surety in handwriting as well.

Lack of compliance with such rules causes the suretyship clause or agreement to be null and void. Secondly, contractual breach damages is also an issue that all lawyers and legal counsels should be aware of. Very often, commercial contracts in Turkey have penalty clauses that are used as an estimation of damages in the event of a contractual breach. The claimant may claim damages in accordance with such penalty clauses and has the option to claim positive or negative damages as per the Turkish law. Positive damages includes damages incurred due to the non-performance of a specific obligation as stipulated in a contract. Negative damages, on the other hand, include losses suffered by the claimant due to the reliance of the validity of the contract. Clauses stating that the defaulting party shall be liable for all damages are misleading, as the claimant may not claim positive and negative damages concurrently. Only negative damages and damages stipulated in a penalty clause may be claimed if the contract is terminated by the claimant. If the contract is still in effect, positive damages and damages stipulated in a penalty clause may be claimed.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Shareholders agreements are widely used, especially post-share transfers to stipulate the rights of the shareholders. Contrary to their popularity, shareholders' agreements, unlike the articles of association (AoA), are not required under Turkish legislation. An AoA and a shareholders' agreement may have similar provisions, but the AoA of a company and amendments thereto (if any) is declared in the Turkish Trade Registry Gazette. It binds the third parties who enter into a contractual relationship with the company as a prospective shareholder or a creditor. On the other hand, a shareholders' agreement does not bind third parties; it only binds signatory parties. Turkish Law offers protection measures against a breach of AoA by the board of directors or other shareholders. Parties to the shareholders' agreement shall not benefit from additional protections offered by the Turkish Law. The shareholders' agreement may offer remedies such as a penalty clause or contractual breach damages.

Rights such as tag-along, drag-along and the right of first refusal, generally are not stipulated in AoAs. However, in some cases, such rights may be stipulated under an AoA by the parties, especially after a merger or acquisition. Their inclusion in an AoA would not give shareholders the right to refer to the remedies offered for AoAs in Turkish Law.

> Based on our experiences of negotiating international contracts, we find that mechanising the negotiation process is a safe technique that greatly helps to overcome challenges during the negotiations."

DENMARK (COMMERCIAL)

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Anders Hedetoft specialises in international trade, EU law, customs, VAT, export controls and international contracts as well as M&A. Anders' practice includes advising on indirect taxes, including registration duties.

Anders also has extensive litigation experience, including conduct of cases before both the Danish Supreme Court and the Court of Justice of the European Union. His advice is typically aimed at commercial undertakings in Denmark and abroad. In addition, Anders serves as a member of the board of directors in several Danish companies.

TOP TIPS FOR

Successful negotiations

DO analyse and understand your own and your counterparty's starting point in terms of culture, negotiation and tactics.

DO listen. The more you listen, the more information you get on your counterparty and therefore get a better understanding of their side, what you have in common and where their hard lines are.

DO be aware that negotiation is all about compromise and reaching a point where both parties are satisfied. Identify the areas where you are willing to be accommodating towards your counterparty and the areas where you are not willing to give in.

DO be precise in language style – both written as well as spoken in order to avoid misunderstandings.

DO engender confidence; comply with the time schedule and agreements already concluded.

DON'T think you have to win every battle - only the war!

DON'T underestimate anyone - appearances can be deceptive.

DON'T get caught up in emotions. Keep your emotions to yourself, act calm and don't let your counterparty know if you want this deal more than he does. If your counterparty smells blood, you are finished.

DON'T ignore or overlook your counterparty's criterion for success. If you do, you'll never reach a win-win.

DON'T gloat after a win. Act professionally.

Holst, Advokater was established in 2007 and is a large commercially-focused law firm headquartered in Aarhus and with office facilities in Copenhagen. A total of 85 people work at Holst. The firm provides full-range advisory services to commercial clients in Denmark and abroad, to the public sector and to private clients under the highest professional and ethical standards, based on our corporate culture and core values.

Holst supplies value-adding solutions in close cooperation between our clients and skilled employees. Our clients' success is our success.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Cross-cultural creation of relationships has become a widely spread and effective technique for negotiating

Hardball approaches are not very common anymore. Negotiators often focus on identifying and recognising sensitivity and awareness during the negotiations. You often hear open-ended questions intended for you to open up and feel secure during the process of negotiations. However, do not let yourself be fooled by this empathetic approach. Whereas some negotiators focus on creating an atmosphere of trust and a spirit of mutual success with a pure heart, others may use that trust to suddenly catch you off guard.

One of our best techniques to overcome challenges in the negotiating process is to allow the negotiating parties a break. Allow them to go for a walk, take a deep breath, clear their heads and then let them think about the remaining unresolved issues. If, for example, five items remain unresolved and the negotiations on the issues are not leading anywhere, we have found it useful for the parties to take that break and let each of them return with a prioritised list of the remaining items. Indicating which of the items are of most and least importance for them, will show that perhaps your top priority is the lowest priority to the counterparty and therefore compromises on the remaining items may be easier to find.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

In Denmark the system of justice is very pragmatic and not at all formalistic when it comes to commercial contract law (and in other areas too). General Counsels should be aware of that when entering into contracts governed by Danish law.

If, for example, you enter into a contract in which it is stated that changes and amendments to the contract shall be enforceable only if they are in writing and are signed by both parties. you cannot rely on it.

In Denmark a party becomes bound by not only what the party writes, but also what the party says, and how the party acts. Therefore, if, by your acts or omissions, you make your counterparty reasonably believe that you deviate from a certain term in your contract, a Danish court may well find that you have accepted to do so, regardless of the term in the contract, specifying that changes must be agreed in writing.

Denmark is a civil law country and therefore General Counsels from common law countries must be aware and conscious of the differences. Agreements may be established informally. Hence, a party shall be attentive to what he commits himself to and the grounds by which a party wishes to be bound shall be agreed with great precision.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

In Denmark, the provisions of a shareholders' agreement are only binding for the parties, not the company. The validity of a resolution of a general meeting therefore does not in any way determine whether the parties to a shareholders' agreement have exercised their voting rights in accordance with the provisions of the shareholders' agreement. Thus, shareholders may enter into agreements on voting rights, however such agreement is of no relevance for the company.

Resolutions on a general meeting only need to comply with the law and the company's articles of association. Hence, where relevant, provisions of the shareholders' agreement must be applied in the articles of association in order to establish any obligations on the part of the company too. It is, however, important to be aware of the fact that the articles of association, contrary to the shareholders' agreement, are accessible to the public. If the shareholders of the company do not find it attractive that rights contained in the shareholders' agreement are made public, the only actual alternative is to intensify the remedies for breach between the shareholders in the event they do not comply with their internal agreement (the shareholder's agreement).

Another thing to be aware of is that for many years it was against the law in Denmark to grant loans to shareholders in a company. This prohibition was repealed within recent years, and now Danish companies may legally grant loans to its shareholders. Loans may, however, only be granted subject to special conditions; it is, for example, a condition, among others, that the decision to grant financial assistance may only be made after presenting the first annual report of the company.

> Hardball approaches are not very common anymore. Negotiators often focus on identifying and recognising sensitivity and awareness."

ITALY (DISPUTES)

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Ruggero is a qualified lawyer in Milan (Italy) and in Paris (France) and has good experience of international relationships, thanks to time spent working at international law firms in London, New York, Paris and Munich.

His practice is focused inter alia on arbitration and in general on litigation in domestic and international disputes. With his team he advises clients in litigation concerning international trade, M&A, construction projects, sales representatives and distribution agreements, pharma and biomedical contracts.

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

LawFed BRSA is a nationwide law firm, with an international practice, belonging to the LawFed group of firms which covers the Mediterranean and the Middle East.

LawFed is involved in domestic litigation, international litigation and arbitration, and negotiations in the field of contracts, construction law, mergers and acquisitions, sales of goods and joint ventures and all civil matters.

The firm uses English, German, French, Spanish and Italian and represents large national and multinational corporations, as well as foreign Governments and public companies. It has a network of correspondents in a great number of jurisdictions.

LawFed's assistance to Italian clients abroad and to foreign clients in Italy has given its lawyers a greater understanding of the needs and psychology of clients in transnational and international disputes. The firm is active in large international construction projects in Africa, Middle East, Asia and Europe and corporate matters such as mergers and dismissals, multi fora disputes, joint ventures and corporate litigation.

TOP TIPS FOR

Successful negotiations

Study the screenplay and its actors

Check where the counterparty comes from and where it is heading to.

Listen to the soundtrack

Pay attention to how negotiations are conducted.

Confess to yourself

Know your final aim and the viable options available to you.

Have a vision

Understand what the transaction really means and its impact on a larger scale.

Think outside the box

The shortest path is not always a straight line. Look for alternatives for your side, as well as for the opposite side.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

Discussing and understanding the needs and the targets of the client is key. Confidentiality, speed, costs, final decisions, win-win solutions, issues of principle, multi-party disputes, are the main topics to address with the client, in order to identify which dispute resolution mechanism to select. Clarifying what comes next is fundamental to reduce the risk of unpredictability.

Once the priorities have been identified, there is still a long way to go. You need to check them in light of the various interests at stake (business, finance, legal, shareholders). There is rarely a way forward that does not have drawbacks, and the interaction between priorities may have a significant impact on the eligible solution. Planning and making strategy may have a significant impact on the transaction. If a risk of dispute exists, it has to be properly assessed and addressed.

What fundamentally drives the decision, in my view, is enforceability. If it does not lead to a 'product' that may properly be enforced, then it may be a waste of time and money. If the goal of a dispute resolution clause is to solve a problem, let us make it possible.

Do not be tempted to draft the dispute resolution clause in a way that it makes it impossible for the other party to accept it. This can lead to 'a dispute within a dispute' with all the related disadvantages of such a scenario.

The simpler the clause, the better. This does not mean that it must be short, but it is preferable to avoid complicated language that can create objections from the opposite party.

Francis Bacon said power is knowledge. You must be sure that the decision makers among your clients know the terms of the dispute. Make sure that the dispute is a well-reasoned conclusion for the client and not a mistake.

Counsel, in spite of their talents, cannot always solve all the issues, since they are often too involved in the dispute. The answer is to find someone else who is technically and psychologically able to help you to find acceptable solutions for both parties (mediation).

If you cannot find a mutually acceptable common ground, then be ready to fight. Be careful in choosing the battlefield though (arbitration/court proceedings).

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

There are no specific rules on this in Italy. However, the lack of good faith on one side and abuse of law on the other, might be considered as the boundaries of third-party funding.

Conflict of interest is the main concern. Funding a suit just to obtain confidential information, or to undermine a competitor, may be against the system and as such may be subject to hurdles.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

In chess, each move, if well played, is the outcome of a strategy. The same applies to dispute proceedings.

Getting an interim order or determination, delaying tactics, joining third parties, attempts to replace the deciding body, focusing on collateral arguments. There are all tools which impact on a dispute. To stay ahead of a dispute, you do not need to be a football manager to apply 'the best defense is a good offense' golden rule.

I was recently involved in a significant dispute on behalf of an Italian State-owned entity, facing an unfounded claim related to intellectual property (IP) rights, that was threatened by a US company. Instead of waiting to be served a writ to appear before the US Court, my firm advised the client to immediately institute proceedings against the US company before the Italian Courts, seeking a negative declaratory judgment. After we had served the writ of summons in the US, the opposite party realised that it had lost the advantage of the initiative and we were able to get rid of the claim quickly. This allowed us to win the fight efficiently. The client enjoyed a positive result without incurring significant legal fees that would have deprived the success of its sweet taste.

Rules are made to protect the members of the community. Knowing them allows you to be in control of the situation. Recently one of the most influential Italian Justices of recent years, told me that judges are motivated to be defenders of the judicial system, even more than to be fair vis-à-vis the parties. You do not have to fear the rules, but use them to your client's advantage.

This is the art of the process.

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Legem Attorneys at Law, SC. was founded in 2006 to continue supporting foreign direct investment in Mexico. Founding and Managing Partner, Oscar Conde Medina, has more than 20 years of experience dedicated to attracting, consulting and assisting direct foreign investment in Mexico. In 1996, he supported and participated, together with other experts, in the purchase of one of the most important financial institution in Mexico (Banca Confia) acquired by Citibank.

From 2000 to 2003, Oscar participated in high profile credit restructuring operations in the north of the country, including the restructure of Pyosa, Cydsa. He also worked on the merger and public stock sale of the Coca-Cola bottling company Arca (formerly Procor).

Legem Attorneys at Law, SC is a law firm comprised of professionals who specialise in a variety of legal disciplines. They have offices in the north, bajio and central Mexico, ensuring the highest ethical, professional and commercial standards are maintained. Their commitment is to help clients grow by providing them with opportune legal services oriented towards protecting their personal, economic and commercial interests.

The firm's areas of practice include litigation in civil, commercial, criminal, family, administrative and tax law. This includes corporate, banking, immigration and real estate law, as well as compliance expertise covering topics such as money laundering prevention, protection of personal data, anticorruption, evaluation and management of legal and regulatory risks programs.

TOP TIPS FOR

Successful negotiations – DOS

Do keep in mind the necessity of the negotiation

It is important to always keep in mind why the business must take place. By doing so, it will be easier to identify the zone of possible agreement, as well as to actively seek solutions to the impediments that may arise during the negotiation. This is preferable to not closing the deal.

Do use a trustworthy third-party

The presence of a third party trusted by both sides may help move things forward. They may have a valid opinion regarding the best way to make the business happen.

Do have equivalent offers prepared

When a condition to negotiate is presented, it is important to have in mind other equivalent options, which may replace the one suggested.

DON'TS

Don't look for non-ethical or non-legal alternatives to close a negotiation

It is important to keep in mind that anticorruption regulations impose dire consequences for non-compliance, some of which may include criminal charges and high fines.

Don't enter a negotiation before having analysed all the required information

Take enough time to evaluate alternatives, study the applicable law, and gather as much information as possible.

I QUESTION ONE

Typically used techniques by international counterparties to overcome challenges in the negotiation process?

Establishing a minimum of rules regarding the process and steps that will guide the negotiation is helpful, as is understanding that the party with the apparent least negotiating power, might have broader protection under the applicable law, which in most cases applies in substitution for the non-negotiated terms of the agreement.

Maintaining communication allows both parties to maintain the focus of the negotiation in the common interest, rather than in their positions, as well as to identify a zone of possible agreement.

It is also essential to have at least one alternative option to the business in negotiation, in order to keep negotiation power and be able to say no to a non-appealing contract.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Electronic Contracts

The validity of electronic contracts (e-mail, word, PDF) cause big controversy before the courts in Mexico, given that it is often considered that the legal requisites of consent are not fulfilled, thus making them invalid. In order to comply with the principle of functional equivalence of the data message with the information documented in non-electronic means, and of the electronic signature with the original handwritten signature, the suggested strategy is always to use the valid electronic signatures of the parties.

Contractual Penalties and Damages

A very common mistake when drafting a contract is including both the payment of a contractual penalty and damages in case of default. Mexican trade law establishes that, in case of breach of contract, claimants must choose between the payment of one of these.

Additionally, it is often a challenge for attorneys in court to prove the value of the damages that were effectively caused from a breach of contract. Therefore, in order to avoid both a nullity statement regarding these two penalties, and the burden of proving the quantification of the damages, it is advisable to establish a unique consequence for the cause of default: the contractual penalty.

Services Agreements

When drafting personal services agreements, it is important to clearly differentiate labour from commercial obligations. For an agreement not to be considered as labour subcontracting, but rather as a pure services agreement, Mexican legislation establishes the following requirements regarding the services provided:

- They may not constitute the totality of the activities developed in the company;
- They must be justified by their specialised character; and
- They may not include similar or equal activities to the ones developed by the employees of the contracting party.

Any case that does not fulfill each and every one of these requirements will be considered subcontracting. Therefore, the client and the services provider will be jointly and severally liable with regard to labour obligations.

Non-Compete Agreements

Derived from the systematic interpretation of the Mexican Constitution, Federal Law of Economic Competence and Federal Labor Law, non-compete agreements in Mexico must always delimit the validity of the non-compete obligations, as well as the matter of the restriction as much as possible. Otherwise, Mexican Courts consider these agreements as unconstitutional, based on the criterion that they limit the freedom of work granted by the Constitution.

Data Protection Clauses

The protection of personal information has become increasingly important in contracts, due to recent reforms on the matter establishing high fines in case of non-compliance. The most important obligation regarding personal information in contracts is the inclusion of a transference clause, through which the parties establish the terms in which the personal information is being transferred.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Shareholder Agreements

An important reform to the General Law of Commercial Companies took place in 2014, allowing the existence of shareholder agreements -previously prohibited and considered as invalid- regarding, among other things, purchase rights and limits to voting rights. This reform constitutes a big step towards more flexibility and the prioritisation of the principle of party autonomy, governing in private law.

Unipersonal Legal Entity

As of 2016, the General Law of Commercial Companies includes the existence of a unipersonal legal entity. The Simplified Joint-Stock Company, grants legal personality and thus a separate patrimony to a Commercial Company with social partnership of one or more shareholders. This legal entity must be incorporated through the electronic system of the Ministry of Economy, and requires the Advanced Electronic Signature of the shareholder(s).

SPAIN (COMMERCIAL)

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José María Dutilh is Managing Partner at LeQuid, Social Enterprise and Business Law Firm. He specialises in social enterprises, restructuring and distressed M&A.

José is a law and economy graduate from ICADE (Universidad Pontificia de Comillas) and has an LLM in Business Law and Tax Law from the Instituto de Empresa and an MBA from Esden. He also has an LLM in Corporate Insolvency and Restructuring from CEU (Universidad San Pablo/CEU), and is a lecturer in distressed M&A on the Master of M&A Expert Course at ISDE.

LeQuid consists of a team of professionals with solid training and track records as well as extensive experience in the provision of legal advice to national and international clients. The team is made up of experts from diverse specialties and nationalities, making it possible to provide a truly comprehensive advisory service, responding to clients' needs quickly and effectively.

TOP TIPS FOR

Successful negotiations

Identifying and assessing the potential for risks, working to reduce them and being able to anticipate what could happen if things go wrong.

Defining a **staggered resolution to conflicts** is particularly important when it comes to resolving a conflict with a minimum amount of time and money. We recommend beginning with negotiation, continuing with mediation and arbitration and eventually ending up in a previously agreed jurisdiction venue for litigation, when the previous stages have failed.

Including a specific arbitration clause in contracts is important. When it comes to international contracts, arbitration is usually the best bet because disputes can be resolved on neutral ground. Not including this clause can lead the company to litigate in a foreign jurisdiction, under foreign laws, where it's unlikely to succeed.

Anticipating contract termination means that the contract should outline the steps necessary for a valid termination, without a material breach of the agreement, with the least possible damages. For example, how far in advance must each partner be notified, and how should that notification be delivered? Also, it is important to define what situations might be grounds for termination, particularly before the end of a defined contract term.

You should also include anticipated liquidation of damages penalty clauses in order to pre-determine the minimum amount of damages, but with the right to claim a higher amount once solid evidence is provided.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Confirming the identity of the specific company, alongside your counterpart's mandate to negotiate can be a useful technique. The decision-making chain is often too long and negotiation can get stuck easily. To avoid this tired contract negotiation tactic, it is important to ask the counterpart before the negotiation to clarify the ability to make a commitment on behalf of the organisation. Clarifying the other party's negotiating authority could pay off if the deal ever ends up in court and if the other side argues that its negotiator did not have the necessary authority to bind the organisation to a deal.

Breaking the negotiation into parts, can also help to drive a successful negotiation forward. Some negotiations disintegrate because the parties take an 'all or nothing' approach, in which the other party must agree to all of their terms in order to move forward. A good way past this type of issue is to compartmentalise the negotiations into sections and reach an agreement on each part separately. This makes it feel as if you are reaching a series of solutions, and making progress, rather than fighting one big war.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Laws on contracts are set by every individual state, however, the European Union (EU) has harmonised some aspects of contract law across the whole of the European Community. Spain, as an EU Member, is obligated by European legislation. In addition, some EU legislation affects contract law because it takes precedence over national laws.

Every contract in Spain should follow the regulations listed below regarding jurisdiction and governing law:

- Brussels Regulation EU 1215/2012
- Rome II Regulation EC 864/2007
- Rome I Regulation EC 593/2008
- Regulation EU 2016/1191 regulation for presenting public document within European Union territory.

General Counsel should also be aware of the changes to the New Spanish Commercial Code related to the general norms applied to obligations and contracts. Generally, these norms have an efficiency purpose and will only be mandatory in the cases expressly provided for.

The Commercial Code regulates the different phases of a contract's life, from the pre-contractual phase to the contract's extinction and incompletion, and goes over the perfection, modification, interpretation and compliance of each phase.

The Spanish legal system follows the principle of freedom of form in legal transactions and, therefore, special attention must be paid to electronic mails exchanged with counterparts.

The regulation of electronic contracting concentrates on the principles of functional equivalence, technological neutrality, freedom of pact and good faith. Additionally, the Code regulates contracting through public auctions and automatic machines as special forms of contracting. The previsions regarding the General Conditions of Contract and the Confidentiality and Exclusivity Clauses are included as well.

The Code includes a vast number of commonly used commercial contracts in the economy, in order to promote legal security through the establishment of a previously known legal regime. Financial or provision of computer services contracts are regulated for the first time at the legislative level. The possibility of considering other contract types as commercial is maintained. General norms on obligations and commercial contracts will be applied to these atypical contracts.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

The Law 31/2014, of 3 December, amending the Law on Capital Companies for the improvement of corporate governance, is a recent legislative development in Spain. It affects commonly drawn up contracts such as articles of incorporation, shareholders 'agreements or executive remuneration.

Perhaps the most noteworthy novelty in this area, is the introduction in the legal text of a differentiated regime for the faculties of Directors, according to the functions they perform for the company.

A series of formal requirements are added to the delegation of powers by the Board:

- A formal delegation requirement (already incorporated in registry practice) is the indication of the content, limits and modalities of delegation.
- The need is established for a contract to be signed between the company and the CEO or its executive directors, which must be approved by two thirds of its members. Article 249.3 LSC establishes that such a contract must necessarily include details of all remuneration items. It is explained that the executive director may not receive any remuneration that is not explicitly contemplated in the contract.
- The contract should also include the list of rights and obligations assumed by the executive director and the company. It is expressly required that the director concerned abstain from attending the deliberation and from participating in the vote. Finally, it is indicated that said contract must be attached to the minutes in which his appointment is agreed.
- Spain has also incorporated within the directors' liability system the so-called 'business judgement rule' under which the board of directors should be allowed to make decisions without fear of being prosecuted. The business judgment rule further assumes that it is unfair to expect those managing a company to make perfect decisions all the time. As long as the courts believe that the board of directors acted rationally in a particular situation, no further action will be taken against them.

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Dimpy Mohanty, is a founding partner of Lex-Counsel and has 20 years of experience in corporate and commercial matters. She also has a special focus on labour and employment, biotechnology and regulatory matters and speaks on effective implementation of sexual harassment policies, anti-corruption compliance programs and issues connected to international workers. Dimpy has written the 'India Chapter' of the book 'International Food Law and Policy' published by Springer.

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Seema Jhingan, founding partner of Lex-Counsel, has over twenty-five years of experience. She advises in areas including M&A, Education, Defence and Aviation, Private Equity, Franchising, Media & IT, General Corporate and Commercial matters. Seema has substantial expertise in representing commercial and collaborative alliances, brand and technology licenses, corporate structuring and divestment. She has been recognised as one of India's Trusted Corporate Lawyers by ICCA.

LexCounsel is an Indian law firm, with its head office in New Delhi and associate offices across India (Mumbai, Bengaluru, Kolkata, Hyderabad, Chennai, Pune and Goa). LexCounsel provides comprehensive legal services to both domestic and foreign clients and is recognised as a leading Indian law firm for its work in Corporate and M&A, private equity & venture capital, labour & employment, telecommunication & IT, education, life sciences and IP, food & health, real estate, tax, dispute resolution etc. Many partners of LexCounsel have been voted leading lawyers in areas such as IT, telecommunications & media, venture capital & private equity, and labour & employment, in recognition of their excellent work.

TOP TIPS FOR

Successful negotiations

Preparation

No matter how experienced one is, an advanced knowledge of the key contract terms and the end objective, alongside a well thought out negotiation strategy is imperative.

Trade-Offs

Beware of the 'my way or the highway' approach. Making 'concessions' to find a place of mutual agreement is essential for successful negotiations.

Understand the non-negotiables

While negotiating is all about finding the middle ground, understanding the non-negotiables is equally important. Get an agreement on those first, and then move on to the rest.

Familiarise and Compartmentalise

Understand your counterparties, assess their pain points and then prioritise your negotiations on the key issues.

Don't sweat the small stuff

Be conscious of the key requirements of your client. Don't labour on minor issues and mere contractual language which takes you away from the main goal of closing the negotiations.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Sensitivity to the cultural nuances/ethos of the jurisdiction of the counterparties is one of the most essential techniques for effective negotiation in an international transaction. Being aware and considerate of the negotiating culture/work practices of the country is imperative for building a positive negotiation environment. Techniques that help to close a transaction in the USA may not work in Japan and would be fraught with hurdles.

Another negotiation strategy, peculiar to international negotiations, is that lawyers often seek to justify a condition by adopting a 'these are standard contractual clauses in our country' approach. Using a local jurisdiction advisor is always helpful and enable the parties to move past the veracity of this standard clauses claim.

It is always helpful if counterparties are able to lead the negotiations from the front with the support of their advisors. This minimises the scope of miscommunication/misunderstanding and keeps the negotiation focused on the end objective.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Under the (Indian) Contract Act, 1872, an agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is considered void. An exception is provided in case of non-compete arrangements involving sale of goodwill of a business where the seller is restrained from carrying on similar business. Despite this, non-compete covenants operating beyond the tenure of the contracts, particularly in employment contracts, are generally held unenforceable by Indian courts.

Further, 'reasonability' of such non-compete arrangements is another key consideration for its enforceability. Therefore, contracts containing non-compete arrangements need to be carefully drafted to stand the test of enforceability in Indian Courts.

Similarly, in M&A transactions, contractual clauses on exit mechanisms in the form of put options for foreign investors can come under the scrutiny of the Reserve Bank of India (RBI). This is because the RBI only allows issuance of shares to foreign investors with optionality clauses subject to certain conditions, including a restriction on 'an exit at assured return' and compliance with pricing guidelines. Therefore, having multiple exit options, including the right to assign the option rights in favour of Indian nominees/affiliates, allows investors with a greater flexibility to exit in compliance with Indian laws.

M&A transactions involving listed Indian companies can be impacted by certain additional laws, such as the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. These requires a mandatory open offer to be made by an acquirer in case of acquisition of voting rights above a specified threshold.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Shareholders agreements are private contracts between shareholders dealing with the rights and obligations of shareholders and management and control of the company. This is unlike the articles of association which is a public document regulating a company.

So, what happens if there is a conflict between the articles of association and shareholders' agreements?

Indian Courts have held that, in case of any such a conflict, the articles of association will prevail. For instance, the Supreme Court of India in Vodafone International Holdings BV Versus Union of India & Anr [(2012)6SC C 613] clearly stated that in the event that the provisions of a shareholders' agreement are contrary to the articles of association, the articles of association govern and not the shareholders' agreement.

Some Indian courts have also gone a step further and stated that the rights of a shareholder vis-à-vis the company (such as affirmative voting rights) cannot be enforced if such rights are not incorporated in the articles of association. As such, it is critical that the relevant provisions of the shareholders' agreement are incorporated in the articles of association of the company, to ensure their enforceability.

Remuneration of executive employees or key managerial personnel of public companies is regulated under CA 2013. Additionally, in the case of listed companies, adherence to the listing regulations issued by the Securities Exchange Board of India (SEBI) is also necessary. Quite often, investors (especially private equity investors) enter into profit sharing/compensation agreements with executive employees of listed investee companies, based on the achievement of performance targets by such companies. In recent years, SEBI has expressed concerns regarding potential corporate governance issues and unfair practices arising, as a result of such agreements (which are typically entered into without shareholders' approval).

Accordingly, certain amendments in the listing regulations were introduced in 2017 which regulate these arrangements inter alia mandating prior approval of the shareholders and the board of directors of the listed company before entering into such agreements. Interestingly, the scope of these amendments seems to have been extended to cover employees of unlisted subsidiaries of listed companies. For instance, SEBI, in an informal guidance issued to Mphasis Limited (a listed company, with respect to proposed payments to certain employees of its unlisted subsidiaries) took the view that such employees would also be covered under these new amendments.

CHINA (COMMERCIAL)

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Liuming International is the international business group of the Beijing Liuming Law Firm, a fully-licensed Chinese law firm. Liuming International focuses on cross-border transactions and is headed by Graham Brown and Wei Xin, who commenced their collaboration on Chinese law and business culture in 1991.

Wei Xin is from a prominent Chinese legal family. She studied in China and Australia and has a strong background in commercial and IP law. She commenced her foreign legal career with Baker & McKenzie in Sydney, moved to Mallesons in Sydney and subsequently became their chief representative in Beijing. Later she moved to Coudert Brothers and subsequently became the Beijing partner of White & Case. She is now also the chair of the East Asia & Pacific Sub-committee of the Non-Traditional Mark Committee of INTA.

Graham Brown followed an academic path, teaching contract law in Australia and China for more than 10 years. His strong interest in business has led him to consult to Chinese companies in foreign-related transactions. Among his consulting experience is advising Chinese parties in contract negotiations with foreign parties. Currently, he is also a member of the IR Global practice management committee.

In 2002, Graham Brown and Wei Xin established the team that is now Liuming International. They have assisted foreign companies from around the world with their China investments and substantial contracts of all types.

TOP TIPS FOR

Successful negotiations

Ensure that your advisers are licensed in China, and are not just a consulting company claiming to provide professional advice.

Engage experienced on the ground legal counsel.

Prepare thoroughly and seek competent advice very early in the project.

Be certain that you know who you are dealing with. Legal and reputational due diligence is essential.

Work closely with your local counsel, to plan what you want to achieve, what you are prepared to give up, and when you will walk away.

Successful negotiations require exceptional Chinese language and cultural skills.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Successful China negotiations depend on a methodical approach, an acceptance that China is different, and reliance on experienced on-the-ground advice and support. It is common to hear a foreign party complaining about China. China just "is". How you engage with it is the key to success. Language is very important.

Knowing who you are dealing with is an essential first step. There is no point in negotiating with a party that cannot deliver on your project, or whose reputation is such that they would not be a suitable partner. Really relevant information is only available in China and in Chinese. The expertise for conducting these enquiries is unlikely to be found outside China.

China is a challenging place to do business. Among its major challenges are the legal and regulatory environment. Any transaction with a foreign element is likely to involve legal and regulatory issues that may not apply to domestic transactions. Understanding these, and their impact on a proposed transaction, is an essential preliminary to successful negotiations. Foreign exchange controls impact every cross border China transaction and must also be taken into account.

When the legal due diligence is complete and it is decided to proceed, it is time to plan the negotiation process.

It is best to enter the negotiation process with a draft heads of agreement (HOA) that takes account of all of the major issues to be agreed, including those uncovered in the preceding two steps. This document should be in English and Chinese and serve as the agenda for negotiations. Chinese language is important at this stage because everyone on the Chinese side will understand the issues.

As negotiations proceed and the agenda items are generally agreed, they should be 'signed off' and only reopened if absolutely essential. Only give up something if you get something in return. Be aware that, very often, the Chinese side of the table have limited authority to give up anything in negotiations. If you do not get an offer of compromise to match yours, it is probably a sign that you need to insist that someone with the authority to negotiate is present. Pending that, it might be best to suspend negotiations.

Controlling the documents, version by version, is very important. If, as we suggest, you have commenced with a HOA agenda, it is best to follow through and control all subsequent documentation. As with the HOA, all documents should be maintained in English and Chinese. Resist suggestions by the Chinese side that they translate or maintain documents.

It is important to have your own translation at meetings. The Chinese side will always have somebody fluent in English, probably someone that has studied abroad. Very often they will know more about you, your company and your business culture than you know about them and theirs. The process of knowing who you are dealing with partly compensates for this, but not completely.

Execution of documents is important. The only person that can bind a Chinese company on a signature is the holder of the statutory position 'legal representative.' The only other way to bind a Chinese company is by use of its company seal. We recommend that both signature by the legal representative and affixing of the company seal be adopted.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

China's contract law, like that of many countries, has its traps and quirks. These are known and understood by experienced practitioners. Some of them are not in the contract law itself but arise from interactions with other law. For example, foreign exchange control in China impacts almost every cross border contract.

In many cases, parties wish to use a foreign law as the governing law of a contract because of a lack of familiarity with Chinese law. Chinese law permits choice of governing law, but this choice is subject to some limitations.

Chinese law must be the governing law of contracts between Chinese entities unless a sufficient 'foreign' element is present. In practical terms, this means that almost all contracts between Chinese entities in China, including foreign invested entities, must be governed by Chinese law.

Chinese law also provides that foreign law, even in international contracts, cannot be used to override mandatory provisions of Chinese law. Practically, this means that in many contracts where foreign law governs, the contractual provisions must also comply with Chinese law. If this is not adhered to, the contractual provisions can be unenforceable. Even if international arbitration is the dispute resolution method in such a contract a Chinese court is unlikely to enforce the award on policy grounds.

The Chinese side will always press for dispute resolution in China, court or arbitration. This should only be considered after receiving competent advice. There are very few treaties that permit the enforcement of a foreign legal judgement in China. Very often arbitration is the preferred dispute resolution method when the value of the contract is sufficient to warrant it.

Moving risk around in documents and relying on dispute resolution is not effective. Contracts should take account of the practical realities and contain provisions to manage the practicalities of risk. Formal dispute resolution provisions should be a last resort.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts?

China's personal income tax regime prior to 2019 operated in a way that meant most foreigners deriving income in China would not be tax resident, limiting their liability for personal income tax to their China derived income.

China adopted the new Individual Income Tax (IIT) law on August 31, 2018 which became effective on January 1, 2019. This new IIT law, similar to common practice elsewhere, is a significant change providing that a foreigner who is not domiciled in China, but has stayed in China for 183 days in a tax year, will be regarded as a Chinese resident taxpayer. The result is that the global income of a tax-resident foreigner is subject to Chinese individual income tax from 2019.

This change significantly impacts foreign employers and employees in China, but the real effect is yet to be seen.

GERMANY (DISPUTES)

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Dr Florian Wettner is a partner of METIS Rechtsanwälte LLP. 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 and officers.

According to Legal 500 Germany 2018, Florian is described as an 'excellent and assertive lawyer and litigation strategist'.

Founded as a spin-off of the international law firm Freshfields Bruckhaus Deringer LLP in 2010, METIS has grown to be one of the leading business boutique law firms in Germany. The firm provides high end legal advice to its domestic and international clients with a strong focus on corporate law and M&A, employment law and dispute resolution.

All partners of METIS have lived and worked abroad, the practical understanding of foreign legal systems and cultural backgrounds including various languages spoken (amongst others, Arabic, Chinese Mandarin and Russian) make METIS a competent partner in international mandates.

TOP TIPS FOR

Successful negotiations

Knowing the facts: Perfectly knowing the facts underlying a dispute is key for successful negotiations as it is for successful dispute resolution in general. The vast majority of disputes is decided through the facts, not through questions of law.

Realizing the aims and sensitivities: It is absolutely essential to realize not only the own aims and sensitivities, but also those of the other parties involved. Where do I want to get? What is the others aim? What aspects might be negotiable, which might not? Are there interdependencies between several actors on one side that could influence the negotiation and the aims? All this should be thoroughly thought about before entering into negotiations.

Fortiter in re, suaviter in modo: While driving a hard bargain in terms of strongly pursuing the envisaged aim, one should always distinguish the matter from the people dealing with it. Don't take attacks from the other side personal, don't personalize arguments yourself. Being fair and reliable often helps reaching the envisaged aim.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

When considering an appropriate dispute resolution clause in a cross-border contract, the substantive law governing that contract is a meaningful starting point. The applicable substantive law usually suggests the jurisdiction to be agreed on, as it basically makes sense to choose the national courts that know the applicable national law.

Once the possible national courts are thereby (preliminarily) determined, it has to be figured out if litigation in these national courts, or alternative dispute resolution procedures, namely arbitration or mediation procedures, are in the best interest of the client in the event of a dispute.

A major consideration is whether the client would have to litigate in the courts of the country where the other party is domiciled. Whereas in constitutional states, fair and objective proceedings can basically be assumed, it cannot be ruled out entirely that a judge may be more favorably inclined to a party who is well known and respected in the country of the court. This could be an argument to seek arbitration on neutral ground instead.

Another important consideration is whether the title to be obtained in the respective dispute resolution procedure, can actually be enforced against the unsuccessful party and, in particular, its assets. This is not an issue if the parties to a cross-border contract are all located in the EU, but it could be an issue if at least one party is located outside the EU. If reciprocity is not guaranteed, via international treaty, this could encourage a party to agree on the jurisdiction of the home courts of the other party.

As regards the enforcement of arbitration awards, it appears sensible to agree on 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, however, this is a given since most states are part of the New York convention.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

In general, contingency fees or conditional fee arrangements with attorneys are not permitted under German law. They are only allowed if the client would otherwise be deterred from proceedings, and thus from access to justice, because of its financial situation. German law also allows for the payment of no attorney fees or fees lower than the applicable statutory fees where a case has been unsuccessful.

Litigation funding by non-parties to the litigation is allowed, provided that the litigation funder does not provide legal services in the litigation. Since litigation funders are neither qualified as banks nor as insurers, any regulatory provisions do not apply. Litigation funding is not regarded as frivolous. Therefore, the third-party litigation funder cannot be held liable for any adverse costs of the counterparty.

The minimum funding amount for disputes is approximately EUR100,000. German funders usually structure their remuneration either as a percentage of the amount actually recovered, or as a multiple of the amount invested. Standard terms call for a 30 per cent share of proceeds up to EUR500,000 and a 20 per cent share of any proceeds in excess of this amount. The civil law principle of common decency should limit the agreeable share of proceeds to be paid to the funder in case of success. Shares of up to 50 per cent of the proceeds are discussed to be safe in that respect.

Generally, the funder may terminate the funding agreement at any time and at its sole discretion should the chances of success have been impaired for whatever reason. In such case, the funder will of course lose his right to a share of the proceeds.

Neither the funding, as such, nor the underlying agreement has to be disclosed to the court or the opposing party. It can be disclosed of course if this appears advantageous from a strategic point of view.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

The asked for techniques typically used by international counterparties depend on the forum where the dispute would have to be ultimately solved, as well as on the applicable type of dispute resolution. The accordant rules framing the dispute resolution, e.g. civil procedural rules, are important.

If there is no contractual dispute resolution clause applicable, agreeing on a certain mechanism once the dispute has already arisen might often not be feasible. The counterparties usually tend to attempt to gain initiative by using the 'unilateral weapons' available to them.

When preparing an action or a defense against a potential action, a party will have to weigh the arguments speaking for and against each of several possible forums. For example, a claimant might seek to bring an action in the courts of his home jurisdiction, or in a jurisdiction which provides for certain plaintiff-friendly instruments, such as punitive damages. A potential defendant may consider the lis pendens doctrine by seizing a court in a jurisdiction which is known for its slow proceedings.

Another typical instrument to gain initiative and to enhance your own (negotiating) position in a dispute, is to choose expedited procedures in order to surprise the counterparty or to obtain a (preliminary) title. In this regard, proceedings for provisional relief (attachment and preliminary injunction) could be an option. In Germany, another frequently used instrument in this context are summary proceedings based on documentary evidence only. This allows the claimant to quickly obtain an enforceable title subject to reservation; the defendant who was not able to prove his position by documents may (only) in a later stage raise objections and submit evidence without restrictions. The mere fact that a judgment was rendered against him and the looming enforcement proceedings may induce the opponent to seek an amicable solution to the dispute.

SWEDEN (DISPUTES)

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Cristina Bergner specialises as a private or public defence counsel in white collar crime and in international/national criminal proceedings relating to financial crimes and/or corruption. Cristina also specialises in dispute resolution in general court and in arbitration.

Part of Cristina's background includes working at the Swedish Tax Agency, which enabled her to acquire specific experience in tax proceedings. Her other areas of expertise include employment-related matters and general commercial law.

Advokatfirman Nova offers specialist advice in all the major fields of commercial law, with specialist knowledge and considerable experience in areas such as franchising, property law, private or public defence in white collar crime including corruption and dispute resolution.

Nova offers a first-class service, providing tailor made solutions to its clients with a high level of commitment and genuine interest invested in the client's business. The firm believes in establishing close, long-term lawyer-client relationships. This enables us to understand what is important to our client's business and offer advice that is specifically tailored to a particular situation for the individual client.

The commercial benefit to our clients is of paramount importance to us.

TOP TIPS FOR

Successful negotiations

DOS

Do thorough financial research into the counterparty to find out if there are actual assets to collect.

Do research whether there is an insurance company on the counterparty's side that could be involved as a cost bearer.

Do a list of all the negative effects of a trial and present the content of the list to the counterparty to show what the alternative to settlement is.

If possible, offer something that is valuable to the counterparty, without costs for the client.

Write a crystal clear settlement agreement so that there is no question about what should be done. If you are representing the claimant, add a clause in the settlement agreement stating that a larger amount than the settlement amount, preferably the entire amount in dispute, has to be paid if the settlement amount in full is not paid on time.

DON'TS

Never offend anyone. You should always be firm but still polite.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

When choosing a dispute resolution method in cross-border disputes, one should consider what parties are involved, what problems may arise and what actions may be needed. Generally speaking, however, arbitration is preferred when both countries are parties to the New York Convention or LCIA Arbitration in London.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

There are no rules around litigation funding in Sweden and there is consequently no prohibition against it. However, third party funding might cause a dilemma for Swedish lawyers in regard to loyalty issues etc. Additionally, Swedish lawyers cannot take a stake in the outcome/percentage of the amount in dispute, generally, according to the ethical rules of the Swedish Bar Association.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Civil security measures, such as freezing assets, are possible according to Swedish law, but we do not find it very commonly used in commercial litigation. The party claiming security measures in civil litigation has to deposit adequate security to cover potential damages for the counterparty because of the measures. Consequently, it is a costly action.

Depending on the amount in play, the costs can of course be worthwhile. In infringement cases techniques such as cease and desist letters in combination with injunctive measures are common and often used.

“Civil security measures, such as freezing assets, are possible according to Swedish law, but we do not find it very commonly used.”

US - NEW YORK (COMMERCIAL)

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Norman W. Bernstein has advised on a wide range of regulatory matters under U.S. environmental laws and argued numerous environmental cases in federal appellate and district courts. He has assisted venture capital firms in establishing legal structures to minimise the risks of financing environmentally sensitive deals, advised on environmental disclosure issues and acquisition structuring, extracted a large pigment manufacturing plant from enforcement proceedings, made presentations on behalf of a client before OSHA and the National Toxicology Program regarding the alleged risks posed by silica and on the alleged carcinogenicity of rock wool and slag wool.

He has filed comments with EPA on a wide range of rule makings and has negotiated successful settlements in Clean Air Act enforcement cases. He is also a Trustee at two Superfund sites; one is on EPA's National Priority List.

N.W. Bernstein & Associates LLC's capabilities include representation in the areas of environmental law, environmental litigation and related corporate finance on matters of local, national and international significance. Clients of N.W. Bernstein & Associates, LLC, benefit from the experience the firm's lawyers bring to environmental, real estate and related financial matters.

TOP TIPS FOR

Successful negotiations

Prepare thoroughly.

Bring in specialised attorneys early (such as tax and environmental) so that the basic structure of the deal is appropriate. As to environmental risks, if you wait to see the results of due diligence, and there are problems, the whole deal may have to be restructured.

Know the other sides' needs.

Have principals available for an in-person meeting to resolve difficult issues (that are usually saved to the last).

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

A way to overcome challenges in negotiations is (a) thorough preparation, (b) understanding the other side's objectives, and (c) an in-person meeting (with translators present if there are language barriers) between principals in order to resolve the toughest issues that are typically left to the end.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Environmental risks are a special contracting risk in the U.S. This is because of the complexity of the environmental laws, the enforcement mechanisms, and the scope of potential liability.

It is beyond the scope of this article to try to summarise those laws, but a few basic points need to be understood. Governmental enforcement is by U.S. EPA, the U.S. Justice Department, and by analogous state bodies. Penalties can be harsh. For example, a violation of the Clean Air Act subjects the violator to penalties of up to USD37,500 per day per source. (Four laminators out of compliance would cost up to USD150,000 a day.) If suit is brought by the Justice Department for an ongoing violation that started a year ago, the price would be USD150,000 x 365 = USD54,750,000 for the past violations. You can challenge the alleged violation in court, but (unless you win) the meter continues to run at USD150,000 per day while you litigate. There is also private enforcement by what are referred to as 'citizens' suits.' If there are violations and the government does not prosecute, private environmental groups are all too willing to sue. If they win, they can get attorney's fees. If you don't want to litigate with them, they are often willing to settle for a generous contribution to their favorite environmental charity. Willful violations of U.S environmental laws can also lead to criminal penalties.

The scope of environmental liability in the U.S. is not limited to violations of law. In the U.S., the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) creates, in general, strict joint and several liability, for anyone who owns contaminated property, owned or operated the property at the time of disposal, or arranged for the disposal of a hazardous substance. Liability is for all necessary cleanup costs and potentially for the loss of use of natural resources. Cleanup costs can run into the millions, tens of millions or more, depending on the severity of the problem. Because there may be many parties responsible for contamination of soil, groundwater, or sediment that may go back a hundred years or more, many CERCLA suits spawn third-party claims against numerous other parties that, over time, may have contributed to the contamination. Defending a CERCLA claim can be very expensive.

There is obviously no single contractual solution, but some basic principles may be helpful. For example, the typical contract in the U.S. defines environmental risk broadly, to cover all of the main federal and applicable state statues, but a key term is whether future laws, rules or regulations are also incorporated. If you are the seller that wants the buyer to take future risks, you want future laws and regulations included. If you are a buyer, you generally want to limit the term to just existing environmental law, regulations, etc. Representations, warranties and indemnities are normal contractual devices for allocating risk. But those provisions presuppose that they will be enforced. If a party provides an environmental representation or indemnity, what happens if the promisor goes bankrupt and the provision cannot be enforced? You also need to consider unenforced claims that may be lurking in the background. For example, in a recent case, a buyer bought property at what it thought was an attractive price and confirmed that it had been cleaned up to applicable state standards. After the closing, the buyer was sued by the State of Pennsylvania under CERCLA for the costs of a cleanup the State had previously conducted at the site for an amount many times the buyer's purchase price. A U.S. Court of Appeals ruled that when CERCLA says that liability is for 'all costs' it means all costs - no matter when they were incurred.

Although environmental studies by environmental engineers are commonly used before contracting, they are generally limited to historic and existing contamination of property and compliance with current permits. They may not pick up unasserted claims and frequently will not pick up the financial implications of new environmental restrictions that are in the regulatory pipe line. Those may require process changes, affect cash flow projections, and alter future capital costs. And, engineering studies will be unlikely to identify legal trends that a contracting party may need to consider.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Differences among the federal courts as to the scope of the Clean Water Act need to be considered. The statute requires a permit for a 'point source' discharge of a pollutant such as a pipe or other conveyance into a river or stream. Obtaining such a permit is time consuming and expensive, but the consequences of a discharge of a pollutant without a permit are serious and can include jail time. An open question is whether the discharge from the point source needs to flow directly into the water body, or whether a discharge by a point source to ground water that eventually migrates to an ocean or stream also requires such a permit. In February 2019, the United States Supreme Court granted certiorari to answer that question. How it does so, will have an impact on contracts pertaining to business and properties discharging to groundwater.

A reasonable conclusion is that environmental engineering reviews are necessary but not sufficient. consulting a legal professional knowledgeable in environmental law, environmental litigation, and deal structuring will add cost. But, it may help to assure the environmental risks are understood and contractually mitigated.

AUSTRIA (DISPUTES)

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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 Attorneys at Law in 2004 and before that he worked for Freshfields Bruckhaus Deringer and Vienna McDougal Love Eckis Smith & Boehmer.

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

Oblin's core focus is the management and resolution of commercial disputes. The firm represents its clients in all phases of domestic and international litigation and arbitration proceedings, from the initiation of the proceedings to the enforcement of court judgments and arbitral awards.

They also advise clients in general business law matters including commercial and corporate law as well as real estate and construction law.

TOP TIPS FOR

Successful negotiations

Separate the people from the problem

Don't attack people personally for using a tactic you consider illegitimate. If they get defensive it may be more difficult for them to give up the tactic, and they may be left with a residue of anger that will fester and interfere with other issues. Question the tactic, not their personal integrity. It will be easier to reform the negotiating process than to reform those with whom you are dealing. Don't be diverted from the negotiation by the urge to teach them a lesson.

Focus on interests, not positions

Why are you committing yourself in the press to an extreme position? Are you trying to protect yourself from criticism? Or are you protecting yourself from changing your position?

Invent options for mutual gain

Suggest alternative games to play. For example, you might commit that both parties undertake to make no statements to the press until they reach agreement or break off the talks.

Insist on using objective criteria

Above all, be hard on principle. If, for example, you are being made to sit in the low chair with your back to an open door, then make sure you try out the principle of reciprocity on them. "I assume that you will sit in this chair tomorrow morning?"

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

There are a number of formal requirements for an arbitration agreement:

An arbitration agreement must sufficiently specify the parties (they must at least be determinable), it must also sufficiently specify the subject matter of the dispute in relation to a defined legal relationship (this must at least be determinable and it can be limited to certain disputes, or include all disputes).

The agreement must sufficiently specify the parties' intent to have the dispute decided by arbitration, thereby excluding the state courts' competence; and be contained either in a written document signed by the parties, or in telefaxes, e-mails or other communications exchanged between the parties, which preserve evidence of a contract.

A clear reference to general terms and conditions containing an arbitration clause is sufficient.

In certain circumstances an arbitration agreement is no longer enforceable. These include arbitration agreements and clauses that can be challenged under the general principles of Austrian contract law, in particular on the grounds of error, deceit or duress, or legal incapacity. There is controversy over whether such a challenge should be brought before the arbitral tribunal, or before a court of law. If the parties to a contract containing an arbitration clause rescind their contract, the arbitration clause is deemed to be no longer enforceable, unless the parties have expressly agreed on the continuation of the arbitration clause. In the event of insolvency or death, the receiver or legal successor is, in general, bound by the arbitration agreement. An arbitral agreement is no longer enforceable if an arbitral tribunal has rendered an award on the merits of the case, or if a court of law has rendered a final judgment on the merits and the decision covers all matters for which arbitration has been agreed on.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

There are no specific provisions in Austrian legislation, however, professional conduct regulations do not allow for lawyers to be paid on the basis of contingency fees only; thus any funding agreement that directly or indirectly results in such a model is not available to legal practitioners.

On the other hand, the Austrian Supreme Court approved litigation funding by a third-party in a 2013 decision (OGH, 6 Ob 224/12b). In addition, in 2004 and 2012, the Vienna Commercial Court denied the defendants' objections to third-party funding of the respective claims.

Thus, today, litigation funding in Austria is accepted and has been judicially endorsed by Austrian court practice. Although the courts did not comprehensively cover all aspects involved, they established in Austria an unquestioned and favorable environment for third-party litigation funding.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Sometimes, even the best preparation cannot prevent determined counsel from using measures that are inappropriate, offensive, unethical and may result in the proceedings being derailed.

In order to tackle any such attempts, a step-by-step approach is advisable:

- request interim (procedural) measures (preserving documents, delivery of the requested documents, security for costs)
- suggest negative or adverse inferences (e.g. negative assessment of the behavior at the evidence stage)
- ask for to penalisation by cost sanctions, reporting unethical behaviour to arbitral institutions or bar associations, ex-parte awards and exclusion of abusive counsel.

“Sometimes, even the best preparation cannot prevent determined counsel from using measures that are inappropriate, offensive, unethical and may result in the proceedings being derailed.”

HONG KONG (DISPUTES)

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Established in 1992, ONC Lawyers has become one of the largest domestic law firms with more than 150 solicitors and qualified staff. The firm is a member of the prestigious International Society of Primerus Law Firms, and designated by Asialaw Profiles as a 'highly recommended' law firm and ranked by Chambers and Partners as a leading firm in the Asia Pacific Region.

We are dedicated to providing quality services based on our four core values: Integrity, Collaboration, Excellence, and delivering Solutions without complications.

We offer a full range of legal solutions to individual and corporate clients of all sectors.

Before joining the legal profession, Dominic worked in the banking sector and the Independent Commission Against Corruption (ICAC). Dominic's practice focuses on advising clients on matters relating to anti-corruption, white-collar crime, law enforcement, regulatory and compliance matters in Hong Kong, including advice on anti-money laundering. He also handles cases involving corporate litigation, shareholders' disputes and insolvency matters, defamation cases, domestic and international arbitration cases, cybersecurity, data security and privacy law issues, competition law matters, e-Discovery and forensic investigation issues as well as property litigation.

TOP TIPS FOR

Successful negotiations

It is important to know your claim in terms of having a proper cause of action if you are suing, and whether the claimant has a cause of action if you are defending the claim.

Just because there is a signed contract does not mean that it is a valid one. It might have been time barred.

Or there might be a clause in the contract that the dispute should be resolved by arbitration, but the claimant has commenced a civil litigation claim in court, which could be stayed.

Know your facts well. Even if the law is not on your side, sometimes the facts might be and might at least help to give a good impression to the adjudicator.

Be thorough and do not just rely on the client's version of the story. One needs to test the case by probing it and ensuring that it is believable, logical and reasonable.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

General Counsel should work closely with their business colleagues who should know about the business counterpart, their financial situation and where their assets are located. There is no use in obtaining a judgment, even if that can be done quickly and cost effectively, that could not be enforced against the assets of the losing party. Identifying where the assets are, is important because some jurisdictions have reciprocal enforcement agreements and arrangements with Hong Kong so that it is easy to just register a judgment and then enforce it, without the need of re-litigating the action.

Some jurisdictions do not have such agreements with Hong Kong, which means that the matter might need to be re-litigated before the Hong Kong judgment can be enforced. In such cases, General Counsel should consider arbitration, because many countries are party to the New York Convention, including Hong Kong and a Hong Kong arbitral award can be enforced in places that do not have reciprocal enforcement judgment with Hong Kong.

The decision to include an arbitration clause in the dispute resolution clause needs careful consideration, as arbitration is not without its limitations. For example, arbitration may not have a fast track procedure for entering a quick judgment if the other party does not respond (a judgment by default of the defendant acknowledging the claim or raising any defence). This would mean that certain costs and time would need to be spent before one could obtain an arbitral award. Various factors, such as location of the assets, time, costs and likelihood of the other side being engaged will all need to be considered carefully with the business and operation colleagues to assess what dispute resolution clauses would best suit the particular party and business transaction.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Litigation funding in Hong Kong is not allowed due to the Maintenance and Champerty Rules, unless there are exceptional circumstances. The parties involved (e.g. the claimant and the funder) may, for example, have a legitimate common interest in the subject matter of the litigation, or genuine commercial interest in the outcome of litigation, which would justify one of them supporting the conduct of the litigation by another.

It is also possible to fund insolvency litigation. It is lawful to assign a cause of action by a liquidator to a litigation funder. Accordingly, for winding up and bankruptcy cases, litigation funding is an exception to the Maintenance and Champerty offences.

Recently in Hong Kong, a new law was passed to allow third party funding of arbitration. While we still have the offence of Maintenance and Champerty, the law provides that such offences do not apply to third party funding of arbitration. A Code of Practice that set out the practices and standards with which third party funders are expected to comply, are being formed. Once that is in place, the new law allowing third party funding of arbitration will become effective. This means that, in the near future, litigation funders may fund parties in arbitration to resolve disputes.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

- The party may choose to press on with the case quickly and also take procedural steps to force the engaged party to incur costs by responding to different types of applications such as discovery and inspection of documents, and providing further and better particulars of their pleading. Depending on the types of claim and whether the international counterparty is a claimant or defendant, the party might challenge whether Hong Kong is the proper jurisdiction to resolve the dispute. This might lead to a side battle on jurisdiction at an initial stage. The Hong Kong civil procedure has a voluntary mediation stage after what is known as 'close of pleadings', which means the claimant and defendant have completed filing their statement of claim and defence (and counterclaim, if any). While it is a voluntary process, generally the parties will try mediation first to see if the dispute can be resolved before moving forward. Hence one technique would be to push for the close of pleadings so that the parties could go for mediation and have that out of the way.
- Civil procedural rules are very important because if there is non-compliance and no proper justification for that, the court may have the power to disallow the party to file certain documents or could sanction that the lawyers be responsible for any wasted legal costs. There are rules that also require that one must state all arguable points and submissions and failure to do that without any good cause would mean that the party is not allowed to raise certain points or submissions, which could be detrimental to the party's case if the party's other points were not successful.
- Civil procedural rules also govern matters such as the use of experts and filing of expert reports, and the filing of witness statements. All these need to be thought through as there are case management conferences where the court will monitor the parties' compliance of the procedural rules. Failure to comply would not only mean legal costs penalties and delays, but in some cases, might mean the loss of chance to file important documents and submissions. It also does not create a good impression to the court, even if one has a good case in the dispute.

CHINA (DISPUTES)

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Jian Zhang is a China-licensed lawyer based in Pamir's Shanghai office. He has more than 10 years' experience advising clients in China.

Jian worked for Shanghai Highway Administration Bureau as legal counsel for three years, which gives him an insight and understanding of how governmental entities work and make decisions. He has also practiced in a local law firm and in-house at a multinational company, which enables him to develop practical solutions for international clients in China efficiently and thoughtfully.

He is a member of the Administration Law Committee of the Shanghai Bar Association and is a consultant to the Shanghai Municipal Council.

Pamir Law Group provides international business and legal advisory services in Asia with offices in Taipei, Shanghai, and Beijing. Pamir has a long track record of successfully supporting clients to achieve their goals in a broad range of industries in the People's Republic of China (PRC) and Taiwan.

Pamir has advised companies in a wide range of planning, entry, operational, transactional (expansion/re-structuring/partnering) and dispute resolution, enforcement and preventative and crisis-response anti-corruption situations. Pamir has advised family groups and wealth management professionals in a full range of support services. Pamir's services have been instrumental to clients when the stakes really matter.

TOP TIPS FOR

Successful negotiations

Know yur counter party

Do your own due diligence, and be thorough. Choose your partner carefully and only after a careful examination of their experience and background. Verify everything.

Persistence pays off

Relationship building is key to successful negotiations in China. Process is as important as results. Negotiations will take longer than expected, accept it and be patient. Articulate your goals clearly and find ways to achieve them through cooperation. Try soliciting the suggestions from the other side instead of dictating terms. Avoid emotional/confrontational approaches.

Avoid traveling to China if there is a dispute

A local court can issue an exit ban without notifying the individual affected. You could be allowed to enter and remain in China, but would not be able to depart. This of course could be used as leverage to force you to agree to unreasonable demands.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

First, ensure the agreement is being signed by the real party in interest. Dispute resolution clauses are of little use if the counterparty is a paper company without assets. Piercing the corporate veil is extremely difficult in China, therefore it is critical to ensure that the entity has sufficient assets that can be attached or liquidated after prevailing in a dispute. Do not rely on statements from the counterparty, verify everything independently. For example, if the counterparty is a manufacturer that claims to own their production facility, ask for documents evidencing ownership, verify them against official records, and make sure the same entity is signing the agreement in question. Be very suspicious if a counterparty suggests signing agreements with 'SPVs' or offshore entities.

Second, venue and governing law selection are key. Remember that any jurisdiction can be used as long as both parties agree. Even though your first impulse may be to use the jurisdiction where your company is located, you should check with your lawyer to explore other options on a case-by-case basis. In some cases, choosing the other party's jurisdiction may better facilitate seizure of assets in case of a dispute.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Third party litigation funding is not illegal in China, however currently there is not a developed ecosystem of third party lenders.

Litigation on a contingency basis is allowed. The government has issued guidance regarding acceptable contingency percentages based on a sliding scale (the higher the amount, the lower the suggested percentage). However, this guidance is not binding therefore clients and firms are free to negotiate their own arrangement.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Petitioning a local court for an injunction to attach the counterparty's assets is a good way to gain the initiative. Generally, the only requirement for this attachment is placing a bond of 30 per cent of the claimed amount. There is generally no adversarial hearing required to evaluate the merits of the case before such an injunction is granted. The injunction order is valid for one year and can be renewed in certain cases. Having their assets frozen for an extended period can be disruptive to the counterparty's operations, which often brings the counterparty to the negotiation table quickly and with a more cooperative attitude. Finally, given the long backlogs at most courts in China, judges tend to be quite conciliatory and encourage out of court settlements as soon as possible.

Understanding civil procedural rules in China is important in order to prepare for and solve a dispute. For example, one can choose to challenge the jurisdiction of the court/tribunal in question in order to have additional time to prepare a defense strategy even if the challenge is without merit in China. Obviously, as in most other jurisdictions, it is important to keep in mind procedural rules regarding statutes of limitations and admissibility of evidence in order to prevent having an action dismissed, or losing the use of important evidence.

"Petitioning a local court for an injunction to attach the counterparty's assets is a good way to gain the initiative."

UAE (COMMERCIAL)

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Thomas Paoletti is a qualified lawyer specialised in protecting the personal and business interests of entrepreneurs in the United Arab Emirates (UAE), and globally, by providing corporate and commercial legal support.

His small team of lawyers aims to listen to clients, analysing their requests, respecting their needs and paying attention to their overall strategy – tailoring legal approaches accordingly.

Paoletti Legal Consultant is a global legal services firm advising clients across the Middle East, EU countries and the rest of the world. They provide value adding and cost-effective solutions for national and multinational businesses in a wide range of sectors including corporate domestic and cross border transactions, finance, new technologies, construction, and oil & gas. Headquartered in UAE, the firm maintains offices in Rome and Milan, and grants its clients access to a worldwide network with operational desks in key jurisdictions around the world.

Please visit www.paoletti.com for comprehensive information about the firm's services.

TOP TIPS FOR

Successful negotiations

Do be polite. Politeness is cross-cultural. In my experience, pretty much everybody, regardless of their cultural background, appreciates courtesy, a calm tone of voice, and behaviour that is respectful and considerate of other people.

Do be aware of the protocol. Formalities in business may vary from country to country and one should never be caught off-guard. Depending on the situation, using the wrong title when addressing your counterparty may cost you the deal.

Do your homework. Know the deal inside out and, most importantly, identify in advance the main potential deal breakers so that you come to negotiations with a couple of possible solutions in mind.

Don't rush, especially in the UAE. UAE business practice may appear quite uncommon for a foreign lawyer. In the Arab countries it is not rare at all to conclude a negotiation after many hours of talking about non-business related topics with your counterpart, maybe late at night after an abundant dinner together.

Do not take anything for granted. As the saying goes, "don't count your chickens before they hatch". When it comes to international negotiations, it is not closed until it is closed. Be ready for the unexpected, until the very moment the deal is signed.

Do not think of your transaction as 'in a vacuum'. When working on a specific transaction, it is helpful to think of it in the context of comparable deals. Keeping in mind the kind of deal that the specific transaction belongs to, helps you depict what expectations your counterparty may have in mind.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

My day-to-day practice never fails to prove that cultural barriers between parties are the hidden challenge of cross-border negotiations.

In this respect, I believe that doing your homework and maintaining a low business profile are key. You have to be willing to know as much as possible about your counterparts, including the laws and practices they are familiar with and their main cultural assumptions. It usually takes some time and effort for the beginner to adopt this approach, but the more you practice in the legal arena of international negotiations, the more you realise the importance of learning how to turn intercultural differences into opportunities to establish and develop trust between the two sides of an international negotiation.

International counterparties receptive to this topic, effectively rely on simple techniques to establish trust. For example, they recognise that, even in our 24/7 online world, there is nothing better than a face-to-face meeting to discuss the important points of a transaction. They also track the pulse of any given situation and can 'feel' when it is appropriate to postpone discussion around heated points. This is also useful in avoiding deadlocks in the negotiation.

From my side, I take pride in actively listening to my counterparty and I really appreciate whenever I have the chance to work with counterparties that show some reciprocity on this point. I am lucky enough to say that this is what happens most of the time.

As a side note, I personally enjoy being committed to understanding my counterparty to the best of my ability, because being aware and valuing the colourful diversity of human interaction is the single trait that make my every day practice a lot more engaging, challenging and satisfying.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

There are many peculiar aspects to the United Arab Emirates (UAE) legal system. One worth mentioning is the case of the UAE Agency Law.

One of the most viable options for a foreign company wishing to enter the UAE market is for them to enter into a commercial agency or distribution agreement with a local distributor or agent. Commercial agency and distribution agreements in the UAE are regulated by the UAE Agency Law (Federal Law no. 18 of 1981, as amended) and, subject to certain conditions, must be registered with the UAE Ministry of Economy (MoE).

Foreign principals might not be fully aware of the fact that, after an agreement is registered with the MoE, the local agent/distributor is granted significant protection under the UAE Agency Law.

For example, the local agent/distributor is entitled to commissions for all transactions made within the territory, regardless of whether or not the transaction was a result of his contribution. The local agent/distributor is also entitled to prevent the import of the principal's products into the UAE.

Perhaps the most relevant consequence of the registration is that the local agent/distributor is protected against termination of the agreement. Under the UAE Agency Law, termination of a registered agency is only permitted for a 'material reason.' However, what constitutes a material reason is not expressly provided for in the Agency Law.

Considering the above, it is not unlikely that, in order to withdraw from a registered contract, the foreign principal will have to pay a high compensation to the local agent.

For all the reasons above, it is key for foreign principals to make sure that the agency agreement is properly drafted to counterbalance the protection enjoyed by the local party under the UAE Law as well as to take special care in selecting the local partner.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

The most impactful recent development in the UAE legal system is the introduction of VAT, pursuant to the UAE Federal Law No. 8 of 2017, which came into effect on 1 January 2018.

With the new legislation in force, commercial contracts have to deal with VAT, not an easy task for local economic players since, historically, the UAE has not seen any forms of taxation whatsoever.

Although the UAE VAT law contains helpful transitional rules on how existing contracts should be amended to take VAT into consideration, they are not granular enough to regulate every possible situation. Occasionally the task of adjusting contractual provisions to the VAT has proved more challenging than expected. In this respect, the ongoing guidance and support coming from the government authorities, is crucial in helping businesses to adjust to the new scenario.

Secondly, the UAE is perhaps the most digitally advanced country in the Arab world, with a rapidly evolving IT legal framework.

Abu Dhabi General Market (ADGM) is a financial free zone in the Emirate of Abu Dhabi with its own judicial and legislative infrastructure based on Common Law. It amended its data protection regulations in 2018, introducing updated defined terms, data breach notification timeframes and more extensive enforcement provisions, consistent with EU and international standards. Under the regime, ADGM registered companies are imposed with specific obligations when collecting, storing, processing and transferring individuals' personal data, with the aim of protecting the right to privacy of the individuals to whom personal data relates. This has a direct impact on the ADGM registered entities that have to update their internal procedures.

IRELAND (DISPUTES)

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Mark Regan is the managing partner at Regan Solicitors. He has practised as a commercial lawyer for the past 23 years and was the senior partner in the Commercial and Litigation Department of a commercial firm for 15 years. He established Regan Solicitors with a view to providing and expanding his existing client base with a bespoke and efficient service. He is highly regarded in the area of Commercial, Company and Corporate Law. He serves both the large and small with consummate ease and the strong ethos is to add value to clients' businesses and not cost.

Regan's Corporate & Commercial Department offers its clients a fast and responsive service. The firm exercises sound commercial judgment combined with the ability to find innovative legal solutions. In all cases, the firm has the ability to assimilate information quickly, determine key issues and advise clients fully as to the legal position and implications. Regan's trademark is the strength of its lawyers who always develop a long lasting tangible relationship with their clients. The firm designs a critical pathway for each client and gives clear direction on process and cost that helps them achieve their goals.

TOP TIPS FOR

Successful negotiations

DO Check the parties have capacity. A limited company can only enter into a contract if permitted in its Memorandum of Association. Secondly, check if the person who is entering into the contract on behalf of the company has the power to do so.

DO Check the type of contract. Most terms in a commercial contract are agreed between the parties, however, there may be implied terms or obligations dependent on the type of contract. The Sale of Goods and Supply of Services Act 1980 and the Consumer Protection Act 2007 apply to consumer contracts and the Land and Conveyancing Law Reform Act 2009 to the sale of land.

DON'T Omit provision for breach of contract. Insert a jurisdiction and governing law best suited for an effective and quick resolution. Include a mediation or arbitration clause that is clear as to how it will be implemented.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

The Republic of Ireland will soon be the largest English speaking Common Law jurisdiction within the EU. Due to its procedural effectiveness and certainty, common law is the preferred governing law for a high proportion of international clients. There are advantages arising from Ireland's continued membership of the European Union, including that Irish judicial decisions are recognised and enforced throughout the European Union, There are also the benefits of uniform interpretation of rules regarding jurisdiction and choice of law and the ability for other legal procedures in Ireland to be recognised and enforced throughout the European Union (including insolvency proceedings where the "centre of main interest" is in Ireland).

Ireland has an experienced legal profession and the Irish Government has a record and commitment to the nature and demands of international business.

For higher value commercial disputes, Statutory Instrument No 2 of 2004 created the Commercial List. Ireland has become the forum of choice for judicially managed commercial disputes. Most claims over EUR1,000,000 (and some below) can seek to have the matter moved to the commercial list in the High Court where specialist and experienced judges preside. The court uses a detailed case management system that is designed to streamline the preparation for trial, remove unnecessary costs and stalling tactics, and ensure full pre-trial disclosure. The court can also adjourn to facilitate mediation, conciliation or arbitration. The rules are designed to give the court flexibility in managing cases.

It is a quick and effective forum for high value commercial litigation.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

The recent Persona judgment from the Irish Supreme Court confirmed that third party litigation funding agreements are prohibited under Irish law. The principal restriction for such agreements are based on the torts of maintenance and champerty. Of course, a third party with a legitimate interest in the proceedings can fund the litigation, such as a creditor or shareholder, but may be liable for costs should they lose the case. After the event insurance is permissible in the Republic of Ireland but this does not address the costs of running the case.

Parties can lawfully enter into conditional or contingency arrangements, where any payment made to the solicitor they instruct in the litigation is contingent on the success of the case. These arrangements are less common in commercial cases. Whilst these arrangements are lawful, Irish lawyers are prohibited from charging fees by reference to the damages awarded in the litigation.

Cases before the Commercial List have a distinct advantage as the case management system removes costs uncertainty with quick resolutions, the courts refined approach to decisions on costs and the exchange of summaries of witness evidence and experts' reports in advance of the hearing.

Conditional or contingency arrangements, where any payment made by the client to the solicitor they instruct in the litigation is contingent on the success of the case. These arrangements are nor encountered commercial cases. While these arrangements are lawful, Irish lawyers are prohibited from charging fees by reference to the damages awarded in the litigation.

Law firms have increasingly moved towards a monthly payment system on an account basis which is preferred by many clients as a means to avoiding a lump sum bill.

In all instances, these matters are a matter for discussion and are influenced very much on the complexity of the matter, liability and anticipated length of time a matter is expected to take and the number of fee earners required.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Instructing local legal advisers at an early stage is critical. Here at Regan Solicitors we have a wealth of knowledge, skills and practice in advising international clients in cross-border transactions, working with non-Irish governing law and daily engagement with international businesses and financial institutions.

Businesses with a presence in the Republic of Ireland should also consider having an entity within the jurisdiction. Where there are employees working and/or residing within the jurisdiction, the employer should have a registered address within the jurisdiction. Any future dispute can be dispensed with efficiently and effectively.

There are a number of interim remedies available in Ireland that allow a party to take more immediate action while the litigation proceedings take their course. For example, a party can seek a freezing injunction to restrain the dissipation of assets by another party if they believe that the other party will do so before they are able to obtain and enforce a court judgment against them. A freezing order is a type of interlocutory injunction and the object of such injunctions is to maintain the status quo between the parties until the final disposal of the action in court (or such other period as ordered by the court). Other examples of interlocutory injunction are injunctions to prevent the publication of potentially defamatory articles, or injunctions to prevent breaches of contract. A party can also seek to obtain a search order where they believe that certain documents may be destroyed or withheld from the discovery process. The availability of such interim remedies is strictly controlled by the courts.

In Ireland, the civil procedural rules are very important. Failing to meet directions of the court, filing the wrong document or missing a filing deadline can have costs implications and delay matters. Instructing an experienced local legal team alleviates any concern in adhering to these rules.

SWITZERLAND (DISPUTES)

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Peter Ruggle, founder of Ruggle Partner, studied Law at the University of St. Gallen. After his bar exam he was employed by a well-known law firm in Zurich. He worked at a local district court, ending his time there as a Judge. He is also a professional mediator.

Peter publishes on a regular basis in the field of Financial Services Law and Dispute Resolution. He speaks German, English, French and Italian.

Ruggle Partner is a boutique law firm. We offer individuals and companies in set-up, growth, crisis and change phases, our extensive knowledge and experience. We advise national and international clients in all matters of corporate development, transactions (M&A), tax, contract negotiations, company restructuring and succes-sion planning.

The services of Ruggle Partner are characterised by consistent focus on finding holistic solutions, accomplishing the economic goals of our clients and protecting their interests. Ruggle Partner approaches its work with creativity and commitment. The aim is to find legally sustainable answers and the best commercial solutions.

Our clients have access to an exclusive global network.

TOP TIPS FOR

Successful negotiations

Prepare

The most effective negotiation strategy is preparation. Be sure to determine the desired outcome. Setting a bottom line will enable you to know when to step back from negotiations and when to move forward. Also research the person with whom you'll be negotiating.

Use a friendly approach

Warmth and friendliness in business negotiations go a long way, even as you're aware of the need to be cautious and not too open. Do listen to others; give them time to outline their position, but, on the other hand, don't let your emotions dictate your approach. One potential pitfall of negotiating is underestimating what you and/or your organisation have to offer the other party.

Alternative options

It's important to keep your mind open to a variety of options. All possible options should be considered. Business negotiations require compromises. The best negotiation tactics are those that focus on developing a mutually beneficial deal for both parties.

Act professionally in any respect

Whatever the outcome of your negotiations is, act as professionally as you did throughout your discussions. After all, businesses change quickly. The person you gloated in front of yesterday may be the person you're working with or reporting to tomorrow.

Respect your opposite

Regardless of the number of people or appearance of strength and size (or lack thereof) on either side, don't underestimate the power of a determined competitor. Financial worth and business size may be powerful, but so are preparation, a solid plan, and a great attitude.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

Dispute resolution clauses should be included towards the end of modern commercial contracts. In this field, there is an increasing trend among commercial parties engaged in international business to provide for a mechanism other than litigation.

An increasingly popular alternative for commercial contracts is arbitration and mediation. Arbitration and mediation provide the privacy that commercial parties seek when resolving disputes. Other mechanisms commonly found in international commercial contracts include adjudication and expert determination. Sometimes, those involved in the negotiations often pay less attention to these clauses than ought to be the case. A lack of attention to the drafting of a dispute resolution clause may lead to defective drafting and the clause becoming unworkable, or 'pathological'.

The aim when drafting a dispute resolution clause should therefore be to ensure that it is clear, internally consistent, workable and reflects the intentions of the parties. Therefore, sufficient time should be allowed in negotiations for careful consideration of the dispute resolution mechanism to be included in the contract. Where the subject matter of the contract is of significant commercial value, expert advice should be sought to ensure that pathological defects are avoided and the dispute resolution mechanism is effective in the manner intended by the parties.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Litigation funding is becoming increasingly popular in Switzerland. One major force behind this trend is procedural law. At the beginning of proceedings when the action is filed, the plaintiff may already have incurred substantial costs. Swiss civil courts may demand the plaintiff to make an advance payment up to the amount of the expected court costs. There will be a decision on the procedural costs in the final award. Costs are allocated in accordance with the outcome of the case. The plaintiff, in addition to the general risk of litigation, always bears the defendant's credit risk should the defendant be incapable of reimbursing the plaintiff for the advances paid.

According to the Swiss Federal Supreme Court of 10 December 2004, DTF 131 I 223, litigation funding is generally permitted in Switzerland.

A substantial legal restriction in Switzerland is the prohibition of the pactum de quota litis, which severely restricts the financial participation of the mandated attorneys in the success of the relevant proceedings. Another crucial question revolves around how the funder will be refinanced, since the individual refinancing structures might violate Swiss financial market regulations.

The aforementioned judgment by the Federal Supreme Court, ruled that litigation funding is considered as permissible (see also Federal Supreme Court decision 2C_814/2014 of 22 January 2015).

Up to the present day, there are no best practice guidelines or other legal framework in Switzerland for funding schemes. Accordingly, the regulatory framework has not been conclusively defined in Switzerland. Even the Federal Supreme Court did not comment on the legal qualification of the litigation funding agreement, but denied a qualification as an insurance contract.

Drafting a litigation funding agreement under Swiss law, the following parts should be reviewed.

In return for financial support, the funder participates in the litigation gain in case of success. In addition to the reimbursement for the invested capital, the plaintiff undertakes to pay a share of the remaining net proceeds to the funder. The funder's share may vary greatly, depending on the funder, the plaintiff and the individual disputed claim. In practice, quota participations of approximately 30 per cent to 50 per cent, are observed. Other forms of participation are also conceivable, such as in the form of a multiple of the costs paid. Concerning the legal boundaries of the amount of profit-sharing, there has not been a judgment from the Federal Supreme Court yet. Certain types of funding agreements or individual clauses may be inadmissible.

The individual funding entity is not regulated by any state supervision. However, the funders have to ensure that their internal funding structure is compliant with the applicable Swiss financial market laws.

The mandated attorney must be independent and as free as possible from conflicts of interest. In case of litigation funding, the Federal Supreme Court argued that even if the plaintiff gives the funder the right to be informed about the progress of the proceedings or to be able to codetermine a settlement offer, such contractual rights do not affect the independence of the mandated attorney.

The funder's conduct on the other hand is not regulated. Funder's involvement in a procedure does not have to be disclosed. The funder can directly influence the litigation only if they substantiate a legal interest, a merely economic or factual interest is not sufficient. The interests of the funder are in most cases mainly of an economic nature. There is a functioning market in Switzerland for litigation funding, but only relatively small.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Switzerland is one of the preferred venues for hosting international arbitrations and mediations, whether in ad hoc proceedings, or in proceedings administered under the rules of the leading arbitration and mediation institutions.

Many international contracts referring to arbitration or mediation in Switzerland are governed by Swiss substantive law too, since Swiss Law is easily accessible and intelligible for lawyers or non-lawyers. In other words, the liberal and predictable legal framework of Swiss law attracts contract negotiators and drafters from all over the world. Swiss Law has been tested in thousands of contracts, including in international litigation and arbitration proceedings

Switzerland's international arbitration law (Chapter 12 of the 1987 Federal Private International Law Act) is one of the forerunners of modern arbitration laws worldwide, and has been an inspiration to many jurisdictions.

While many arbitrations are ad hoc, i.e. not governed by a specific set of arbitration rules, parties frequently choose the specific arbitration or mediation rules of a specialised institution. The most frequently used arbitration rules are:

- The Rules of the ICC International Court of Arbitration (ICC Rules) (www.iccwbo.org)
- The Swiss Rules of International Arbitration (Swiss Rules) and Swiss Rules of International Mediation, a uniform set of arbitration rules issued by the Swiss Chambers (i.e. the Chambers of Commerce of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich) (www.swissarbitration.ch)

CZECH REPUBLIC (COMMERCIAL)

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Aleš Eppinger is a partner of the Schaffer & Partner group from 2008. He is primarily focused in rendering legal services in area of business law, in particular in mergers and acquisitions, furthermore in civil law, property law, insolvency law and judicial and arbitration proceedings.

During his professional career, Aleš has been involved in many international transactions, including important cross-border acquisitions by multinationals, the complex restructuring of important holdings and also in international arbitration. Furthermore, Aleš provided important banks, engineering and energy companies with legal services in particular in business law matters.

Aleš speaks fluent Czech, German and English.

Schaffer & Partner Legal s.r.o., advokátní kancelář specialises in commercial and contract law, labour law and property law. As a member of international networks, such as CBBL (Cross Border Business Lawyers), WIRAS International and IR Global, S&P Legal is closely connected to law offices throughout the world and uses this experience to offer its clients expert assistance with a global outlook. The many years of experience and the professionalism of our attorneys make sure that we adopt a professional approach to handling every case, have the required overview and sense that an individual solution is required.

TOP TIPS FOR

Successful negotiations

Always read the draft before a meeting, even if your side wrote it.

Do not point out inconsistencies to the other party, but do use them to alter a specific provision in the way you proposed.

Do not let your ego prevail over business goals.

Get information about the counterparty and the negotiators in advance. Cultural differences and points that both parties have in common are important. Start the discussion with an interesting subject, to which both parties may contribute, in order to create a rapport.

I QUESTION ONE

Which techniques are typically used by international counterparties in your experience to overcome challenges in the negotiation process?

Always carefully assess in advance which party needs the other more and act accordingly during the negotiations (i.e. adjusting requests, insistences, concessions, deal breakers). Bold negotiation of the key provisions in a contract can allow them to be traded for others later on.

It is advisable to not be insistent on the less important points, and have some 'bonus' concessions ready in advance. The priorities of both parties may be different, and you may win back important points in return.

A final decision maker should be present next to their lawyers at the meeting. This can help to convince the other party that you are results-oriented and both parties are serious about the successful execution of the contract.

Providing a break for tea, coffee or a meal when you cannot mutually agree on a specific issue, provides time to calm the environment. Each party then has time to reassess and rephrase their requests.

If a counterparty tries to avoid including a provision that you propose with vague language (e.g. 'we'll handle it'), remind them that it must appear in the written contract being negotiated.

It is also important to always stress that you understand a counterparty's points or concerns, but that understanding and agreeing are not the same thing. Therefore, if you are stuck on a specific provision for longer than necessary, propose to skip it for a while. Do not forget that impressing the counterparty with sympathy, confidence and honesty sometimes can return as an acceptance of a request, which "normally" would not be accepted.

I QUESTION TWO

Is there anything special or peculiar about commercial contract law in your country that General Counsel should be aware of?

Czech commercial contract law is no longer ruled by the separate Commercial Act No. 513/1991 Coll., Commercial Code, in the version valid by 31 December 2013, but by the Act No. 89/2012 Coll., Civil Code, as amended (hereinafter referred to as the 'Civil Code').

It is worth taking note of Section 1729, where it is stated: 'If contract negotiations between parties reach a point where the conclusion of the contract seems highly probable, the party which terminates the negotiations without a just cause despite reasonable expectations of the other party to conclude the contract, is acting unfairly.'

Section 1729 also confirms that;

'A party who acts unfairly shall compensate the other party for the damage, but only to an extent not exceeding the loss from failing to conclude a contract in similar cases.'

Czech civil/commercial law is based upon the principle of the autonomy of the person´s will, but this also has its limits. The dishonesty of the party's conduct lies in the fact that such an expectation has been triggered by its actions and negotiations have subsequently ended without a fair cause.

Commonly, the last step in a transaction provides the greatest hurdle – namely the achievement of the required form, or proof of fulfilment of certain conditions (e.g. expert opinion). The high probability that the contract would otherwise have been concluded has to be objectively assessed.

I QUESTION THREE

What recent legislative developments in your jurisdiction affect commonly drawn up contracts such as articles of incorporation, shareholder agreements or executive remuneration? Can you provide any relevant case law to illustrate this?

Changes have been made to Czech law covering the requirements of written contracts in regard to agreements concerning executive performance and remuneration. (hereinafter referred to as the 'Agreement')

According to the latest legislation, the Agreement has to be in written form, containing defined provisions around remuneration (the exact amount, or the percentage, plus any other non-monetary bonuses). If this is not done, remuneration is deemed to be zero.

Agreements must be approved by the General Meeting and the individual. According to recent case law, post-approval is possible, but we recommend approval prior to commencement of the contract. The approval of the General Meeting is also required for work performed outside of an employment contract, while executives may not receive a percentage of a company's profit, unless stated in the articles of association.

Another change relates to the incorporation of a company and its procedures. New legislative changes speed up the administrative process of company incorporation. The public notary, who prepare the articles of association (establishes the company), can now incorporate the company into the Commercial Register themselves.

The minimum amount of capital required to register a company has also changed. A limited liability company can now be incorporated with CZK 1, since the minimum input of an individual partner is CZK 1 and the company can be incorporated by one person. Previously the minimum amount of capital required by Czech articles of association was CZK 200,000.

The Czech Commercial Corporations Act does allow a limited liability company to create special shares (e.g. shares with fixed profit distribution claim but with limited voting rights). In this event, creating a joint venture and incorporating all the specifics into a shareholders' agreement has become crucial and can be also quite challenging if it is to be done in harmony with the articles of association.

SPAIN (DISPUTES)

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SLJ Abogados is an exclusively litigation boutique. Their activity is that of the defence of their clients' interests in civil, commercial, bankruptcy and/or criminal cases both at courts or through arbitration.

The firm was founded in 2014 by Daniel Jimenez, a former partner and Head of Litigation and Arbitration at Ashurst Madrid office and a leading lawyer on dispute resolution at Chambers & Partners Directory. He has more than 20 years´ experience in both national and cross-border litigation and arbitration matters and has taken part in some of the most significant civil and criminal cases in recent years.

SLJ Abogados is composed of seven experienced litigators. The firm works together with international firms in high profile international cases involving Spanish jurisdiction. Among their clients, they have multinational companies, banks, funds, and individuals (such as HP, UBS, PIMCO, ACCOR, MELIÁ, etc.)

The firm's main sectors are banking, hotels and technology and it is also very active in international arbitration where they normally act for foreign companies in different arbitration centres (ICC, London Court of Arbitration, etc). Daniel is also an arbitrator of the Madrid Bar Association Arbitration Court.

TOP TIPS FOR

Successful negotiations

Never make the first offer. Wait for the other party to make it.

Be patient. Whoever rushes or shows anxiety about reaching an agreement loses out.

If necessary, break off the negotiation. Sometimes this allows the other party to reflect and reach an agreement.

Keep calm and cool.

Strengths. Use the strengths of the case to weaken the position of the other party.

Weaknesses. Deny the weaknesses of the case itself even if they are true.

Coordination. To be in perfect coordination with the client and to know which his limit in the negotiation is.

Limits. Try to find out what the other party's limit is in the negotiation.

Analysis. Analyse very well the content of the agreement. It is important to make sure that it is a definitive and non-revisable agreement.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

In international contracts it is necessary to involve lawyers from different jurisdictions to understand the pros and cons of litigating in each one of them. In addition, make sure that the dispute resolution clause is valid and enforceable in all countries. In general, it is always best to litigate where the evidence is expected to be. However, it is also necessary to consider other issues such as the greater or lesser speed of the courts, the ease and speed in the execution of the judgments, the quality of the judges, etc.

In general, in international contracts, our advice is to establish an arbitration clause to resolve possible disputes.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Litigation funding is perfectly legal in Spain, although it is not regulated by any specific rule. The doctrine considers that it resembles a participation account agreement. It is also possible, in our legal system, to assign a litigation claim to a third party in exchange for a price. Litigation funding agreements are growing rapidly in the Spanish legal market.

> “Litigation funding is perfectly legal in Spain, although it is not regulated by any specific rule.”

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

The way to win the initiative during litigation is to obtain an early injunction (i.e., before filing the lawsuit). But to do so, the request must be very clearly founded in law and to prove there is a risk that the length of the proceedings will jeopardise the execution of the future judgment.

If the party is sued and has a weak case, it will try to use strategies to delay the proceedings, and make them more costly for the defendant. Unfortunately, Spanish courts, especially in capitals such as Madrid, are overburdened with cases and proceedings take too long to resolve. It is preferable to resort to arbitration whenever possible.

The mastery of civil procedural rules is very important, as it is a complex and very technical regulation. a lack of proper knowledge of procedural rules may lead to serious mistakes that jeopardise the case.

US - NEW YORK (DISPUTES)

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Len Rodes is the managing partner of Trachtenberg Rodes & Friedberg, a mid-town Manhattan disputes firm. Licensed in New York and Florida, he is IR's exclusive New York commercial arbitration member.

Over 35 years, Len has helped hundreds of clients resolve conflicts with contract counterparties, partners, investors, employees, employers and regulators. His clients have included hedge fund managers; real estate developers; large retailers; satellite companies; PE firms; music publishers; an Israeli agribusiness; an oil trading firm; banks and other lenders; media, marketing and public relations firms; architects; franchisors/franchisees; and manufacturers. He also represents executives and other individuals embroiled in high-value disputes.

An alumnus of Princeton University (A.B., Politics) and Boston University Law School (J.D.), Len has received an AV rating from Martindale, and is a New York Super Lawyer.

Founded 30 years ago by former Big Law litigators, Trachtenberg Rodes & Friedberg LLP is a premier Manhattan-based dispute resolution boutique.

TRF lawyers view themselves first and foremost as problem-solvers. Combining large-firm expertise and small firm client service, TRF lawyers never lose sight of the fact that, for most clients, litigation is a costly distraction. For each disputes client, they strive to find a creative solution that will end the dispute quickly, efficiently and favourably.

TOP TIPS FOR

Successful negotiations

DOS

A thorough understanding and evaluation of pertinent legal and factual issues is indispensable. Preparation is crucial.

Confirm in writing the confidentiality and inadmissibility of all statements to be made in the negotiation, not only those that are statutorily protected. This will promote candor on both sides.

DON'TS

Ignore collateral issues that are neither financial nor legal. Emotion is often the biggest obstacle to settlement, even in a business setting.

Select mediators the same way you do arbitrators. It may be best to accede to an adversary's choice of a (well-qualified) mediator, on the theory that the adversary may be more likely to be influenced by a mediator picked by its own lawyers.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

Not infrequently, new clients engaging us for U.S. litigation or arbitration, express surprise at the ways in which the various dispute resolution provisions in the relevant contract or governance instruments work against them. In many such instances, the provisions had been imported from prior contracts as mere boilerplate, with unintended consequences.

For example, while an exclusive home-state venue provision may be unassailable in one case, its inclusion in a contract involving performance and property wholly outside of the home state may cause proceedings arising therefrom to be delayed, dismissed, or transferred to an unfriendly forum, based on convenience and fairness doctrines. Similarly, a foreign counterparty's contractual consent to New York jurisdiction, may not be worth much if a resulting judgment (especially if on default) may be disregarded in its country, where its assets are located. The lesson to be learned from these and numerous other examples, and the most important advice we can give to clients drafting dispute resolution provisions, is to consider and draft such provisions in the specific context of each contract or instrument that calls for them. Taking the time to do so – to consider the most likely dispute scenarios and tailor the resolution provision accordingly – may not be easy when the client's dealmakers are anxious to ink a contract that, for them, presents only upside. But the practice may pay important dividends if the deal goes south.

Finally, a word about commercial arbitration clauses that are subject to the Federal Arbitration Act (relating to interstate and international commercial contracts). It has been settled for some time that an arbitration clause may effectively vest an arbitrator with authority to decide threshold questions concerning the validity and scope of an arbitration clause. But until recently, even where an arbitration clause did so, some U.S. courts have been willing to stay or limit arbitration if they found the argument for arbitrability to be "wholly groundless." However, under a 2019 decision by a unanimous U.S. Supreme Court, courts may no longer consider arbitrability questions if a broad arbitration clause vests the arbitrator with the authority to decide them. So, in drafting arbitration clauses, general counsels (GCs) must carefully consider not only any limitations on the scope of arbitration under the clause, but also whether they wish a court or the arbitrator to decide the question. A GC wishing to preserve the power of a court to decide such issues, should make that intention clear in the clause, especially if the clause otherwise incorporates the rules of the large arbitration administration companies (like the AAA or JAMS) which state that their arbitrators have the power to determine the scope of their own authority.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Third party litigation funding, which has long been in widespread use abroad, has not only spread to the U.S. in the last decade, but is growing rapidly. Today, in addition to financing individual cases with their own resources, several established litigation finance firms (from abroad) have begun forming and raising investment in funds that finance 'pools' of lawsuits. These funds attract capital from wealthy investors, family offices, endowments, and PE firms who regard litigation finance as an alternative asset class that is largely uncorrelated with equity and debt markets. This recently prompted a Bloomberg headline claiming, 'For the World's Super Rich, Litigation Funding Is the New Black.'

While opponents of litigation funding have pushed for its regulation, almost no regulation has so far been promulgated in the U.S. There is growing debate on the issue, which appears to be focused on the question of disclosure. Should such financing arrangements be disclosed? If so, should disclosure be mandatory and automatic, or subject to case by case consideration? Should funding agreements be reviewed only in camera by the judge, or should opposing parties also get to know the details of financing agreements? While legislation has been introduced in the U.S. Senate that would require limited disclosure of funding agreements in class actions and multidistrict litigation, it has so far not progressed to passage. On the state level, as of this writing, only Wisconsin has enacted a law mandating disclosure of funding agreements upon the filing of a state court action in that state.

Finally, attempts by defendants to obtain disclosure of funding-related documents under U.S. court discovery rules have met with limited success. As for funding agreements themselves, while there are federal court decisions that have required disclosure (of at least portions of such agreements), other decisions deny all access to them on the ground that they are not relevant to any material issue in the case. Regarding documents reflecting communications between plaintiffs and their funding sources, there is consistency: in general, the courts have viewed such communications as either privileged or protected by the work product doctrine, based on the view that the "common interest" or "agency" exceptions to waiver are applicable.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Under federal law (28 U.S.C. §1782), the U.S. district courts may, upon application of a foreign court or litigant, issue subpoenas to U.S. residents to give testimony or produce documents relevant to a foreign legal proceeding. Needless to say, the opportunity for parties in foreign proceedings to obtain U.S. style discovery of evidence relevant to those proceedings is invaluable. This evidence gathering mechanism is available to, among other litigants, foreign bankruptcy trustees who may have an interest in investigating potential claims against U.S. persons and companies. In one interesting matter we have handled, a Norwegian bankruptcy trustee obtained documents and deposition testimony which, while relevant to the Norwegian bankruptcy, also provided a basis to assert misfeasance claims against the debtor's U.S. advisors, leading to a seven-figure settlement reached on the basis of an un-filed draft complaint. This recovery would not have been possible without the information obtained under the aforementioned procedure.

NETHERLANDS (DISPUTES)

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The Managing Director of Wolfs Advocaten, John Wolfs, is a thoroughbred entrepreneur. He is the founder of Wolfs Advocaten and has been working as an attorney for almost 25 years.

Before founding Wolfs Advocaten in 2003, John worked for a number of leading firms in Washington DC and Rotterdam. He is well known for his creativity, specialist (sector) knowledge and the top quality service he provides. He is direct, proactive, constructive and able to analyse situations quickly. John often lectures in the field of (international) transport and customs law, (international) commercial law and insurance law.

Wolfs Advocaten specialises in legal solutions for entrepreneurs in the Netherlands and abroad.

Wolfs Advocaten is a so called full-service firm, where all areas of law are covered. The firm is mainly specialised in the field of (international) transport law, business law, international commercial law, customs law and insurance law. Our philosophy is that law is a tool that primarily has to be used effectively and practically and only serves one purpose: unhindered continuation of your business activities. At Wolfs Advocaten we believe that there should be law and justice for all entrepreneurs.

TOP TIPS FOR

Successful negotiations

Listen more than you talk: Finding common ground means knowing common ground exists, which could lead to a win-win situation.

Always get when you give: Whenever you make a concession, make sure you receive something in return.

Always be willing to talk: Take emotion out of the equation and don't (ever) take it personally.

Don't have an 'all-or-nothing' attitude: Negotiation requires finding compromises.

Don't underestimate anyone, including yourself.

Don't argue, but discuss items in which there are disagreements.

Don't be afraid to ask for what you want – be specific about what you want and definitely don't want.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

One of our top clients is a multinational Dutch entertainment group which organises concerts all over the world and licenses music and concert footage to TV stations all over the world.

When advising clients, regarding concert-related performance agreements and TV license deals, we first check whether or not the activities are taking place in the European Union (EU), whether it is feasible to apply Dutch law and if the courts in the Netherlands will have exclusive jurisdiction to determine any dispute. Outside of the EU market, we normally advise our client to opt for arbitration under the Rules of Arbitration of the ICC. This depends on the condition that the member state in question has ratified the New York Convention (convention on the recognition and enforcement of foreign arbitration awards). However, we do not lose sight of the fact that in certain situations - depending on the contract's interest and risk – a client may have a preference to contract under foreign law and make the local court competent for dispute resolution. We determine this in consultation with local lawyers.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

Funding litigation does not have a wide-spread acceptance in the Netherlands, unlike many Anglo-Saxon jurisdictions. Therefore, although it is allowed, there are at the moment no specific legal requirements around funding litigation when it comes to the position of a company. Nevertheless, there is certainly a trend visible that shows that popularity is on the rise. Therefore, despite the lack of any legal provision, there are certain aspects of which a General Counsel should be aware of.

One of those aspects deals with the essential element of funding litigation, i.e. no-cure-no-pay. The General Counsel needs to be aware of the fact that Dutch attorneys, unlike the third party funder, are in general not allowed to offer their legal assistance on the basis of no-cure-no-pay. Therefore, litigation funding should cover a reasonable and cost-covering fee for the attorney. For the same reason, in most cases, a law firm may not offer litigation funding itself. Nevertheless, Dutch attorneys are allowed to agree on a result-fee, however this will never be based on a percentage of the result!

The General Counsel should furthermore be aware that finding a third party prepared to finance large amounts of cases will likely not be an easy task, given the fact that it is yet fairly uncommon. In addition, the parties that do offer such financing, are currently fairly picky. However, there is a growing number of parties that see the gap in the market and intend to fill it over the course of the coming years.

Apart from this, it is also important to understand that litigation costs awarded by Dutch courts are generally fixed on a certain amount, which is in many cases substantially lower than the actual costs. This can affect the conditions of the funding and more specifically the percentage of the contingency fee.

On a concluding note, it can be said that although litigation funding is currently not common in the Netherlands, it is nevertheless working hard to make a strong case for itself. Given this development, it can be interesting for a General Counsel to consider funding litigation in the Netherlands. In doing so, he should take into account the previous point.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute?

The most striking example of gaining a head start from the outset is the requirement to contract to the other party's national law and to leave dispute resolution exclusively to the national court of the country of residence of the other party. By acting accordingly, the opposing party also immediately raises a blockade for direct representation of interests by the lawyer on the other side, since foreign lawyers are often not allowed to represent their client in the national courts abroad because of the legal monopoly of the native legal professionals. The lawyer on the other side will therefore have to be assisted by a native lawyer whom he cannot easily instruct due to lack of knowledge of the indigenous procedural rules. Another disadvantage not to be underestimated is the foreign language that the lawyer from abroad often does not have or does not sufficiently control, making him powerless to properly represent the interests of his client abroad.

How important are civil procedural rules?

As indicated above, civil procedural rules are very important and not to be underestimated since they can put the foreign lawyer off side because of the aforementioned process monopoly of the native legal professionals. However, in the Netherlands the District Court of Amsterdam accepts procedures taking place in the English language instead of Dutch. Dutch arbitrated tribunals often also cover proceedings in English. Apart from that, one of the first topics to decide upon is whether or not to raise an objection against the competence of the Court, depending on the interest of the client.

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