Let's go (forum) shopping

Latham & Watkins' SIMON BUSHELL says managing public scrutiny is a crucial concern when choosing the arena for international legal battles

IN RECENT YEARS, LONDON HAS BEEN THE venue for numerous high-profile Russian disputes fought out in the full glare of the public eye. But for the attention those cases have received in the Western media – with the public's preoccupation with Russia's big business and geopolitics – they might never have been brought. Certainly, it is impossible to imagine them ever having been brought in what you might consider the natural forum, Russia itself. Such cases highlight the importance of choice of forum when looking to engage the media.

Savvy and streetwise advisers understand how different jurisdictions and tribunals have different ground rules governing transparency and publicity around legal proceedings. So choosing a forum with a restrictive approach to media engagement can have a big impact on the tools available to them.

Often the choice of forum is determined upon signing a commercial agreement, long before any actual or particular dispute arises. Occasionally however, the choice can be made when a dispute crystallizes. If all other considerations – for example location of assets, judicial independence and relevant applicable laws – are evenly balanced, then a venue with a more media-friendly legal process could be decisive.

Generally speaking, if a dispute is heard in the ordinary courts of a particular country, the proceedings will be open to the public. On the other hand, if the dispute is being heard by way of a private arbitration process, the parties will most likely be constrained by contractual duties of confidence and the proceedings will be private.

There are nuances to these general propositions. There may be additional laws that restrict what information relating to ongoing proceedings can be published or broadcast by the media.

In the US, for example, although jury trials are commonly used in commercial disputes, the constitutional right to freedom of speech under the First Amendment is so enshrined that the press has a relatively free hand. But judges are responsible for directing jurors to refrain from paying any attention to the media; a potential juror could be disqualified if they have gained any awareness of the dispute from media coverage.

The position in the UK is different because all commercial cases are tried before a judge and, as in the US, judges are not considered to be influenced by the media (see "Order in the court," page 21). However, UK courts regulate how case documents can be used other than for the litigation itself. Briefing the media under these sorts of restrictions is a potential minefield.

SOMETIMES, MEDIA EXPOSURE IS positively in the interests of one party – usually the claimant. For them, major financial centers such as London or New York will provide an easier route to develop media interest.

Offshore jurisdictions such as the Cayman Islands, British Virgin Islands or the Isle of Man tend to be less straightforward. Media access to materials and insiders may be hard to obtain and a claim may be viewed as less interesting because the forum is obscure and far away. This, of course, could be ideal for a litigant who wants to keep off the front pages. Then again, the media's increasing suspicion of tax haven jurisdictions regarded as "sunny places for shady people" – particularly after the "Panama Papers" scandal – may actually encourage media interest. One way to elevate interest in proceedings in a far-flung location is to generate an appeal on

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an interim basis. For example, many Caribbean jurisdictions have final appeals that are heard in London by the Privy Council.

In arbitration, proceedings are confidential and therefore much less likely to be the focus of media attention. But that is not always the case. While most arbitration institutions have rules that build in privacy and confidentiality, some are more rigorous (and therefore more restrictive) than others. Media pressure can be achieved by launching satellite proceedings in a court against a party who has not signed the arbitration agreement. Later appeals or enforcement of arbitration awards in ordinary courts may bring previously confidential material into the public domain.

INVESTMENT TREATY ARBITRATIONS have become an increasingly popular mode of dispute resolution if an investor feels that their interests have been unlawfully interfered with or prejudiced by a host state. These disputes are generally of considerable interest to the media, but parties are discouraged from briefing the media. There is, however, a view that such investment treaty cases should be made more transparent. It is worth noting that the largest award in legal history (to the best of my knowledge) arose out of an Energy Charter arbitration in The Hague involving Yukos – the $50 billion award was subsequently set aside by the public courts in The Hague, but until that point the case had been largely confidential.

> **"If all other considerations ... are evenly balanced, then a venue with a more media-friendly legal process could be decisive"**

In an effort to mirror the attractiveness of perceived confidentiality, some public courts have sought to adopt a "behind closed doors" approach. For example, in proceedings before the Singapore International Commercial Court – increasingly a hub for Southeast Asian (and more recently, Russian) disputes – parties can collectively agree to have the case heard entirely in private (see "London on the Singapore Strait?" below). But even this approach, and the more robust arbitration rules, are unlikely to be watertight.

While no jurisdiction can guarantee a perfect situation, the variables within a company's communications calculus will be materially affected by where the case is heard.

Simon Bushell spoke to **JONATHAN GLASS**, a Partner in Brunswick's London office.

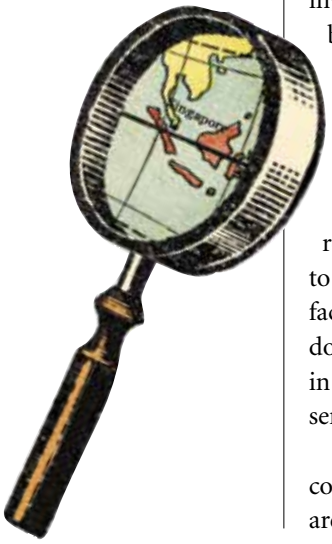
London on the Singapore Strait?

Leading lawyer LUCIEN WONG says Singapore's rise as a dispute resolution hub is no accident

IT IS WIDELY ACCEPTED TODAY THAT Singapore is a hub for international business disputes. The city-state's reputation as an international dispute resolution center has grown steadily, particularly in the last 20 years.

Today most businesses know that when they choose Singapore, they will get a fair trial, or a quick, even-handed private arbitration.

We didn't get here by accident. It was an achievement born of a deliberate, critical strategy involving the reform of laws and regulations, the development of infrastructure, the cultivation of legal talent and a dedicated effort to inform the world's businesses.



Singapore is one of the world's leading ports. It sits at an important juncture for trade and shipping to China, East Asia and the West. Geography worked to our advantage; Singapore developed as London did, offering all the services around shipping, international trade and finance.

Today in Singapore you find everything that London has to offer – for example, companies involved in shipping, trading and insurance, banks, brokers and agents, and international law firms.

We built that up piece by piece. Singapore grew to become a regional trade and finance center. As more foreign investments came to the region, Singapore also became a regional business center. But previously if there was a regional business dispute, the parties would go to London, engage high-cost lawyers and pay for facilities there. So we asked, why do they need to do that? If it's an Asian dispute it can be resolved in Asia. We set about making that high quality of services available in Singapore.

Regionally, our advantages are that we are common-law based; we are English speaking; we are independent politically; and our rule of law

– including an independent judiciary – is held in high regard.

Singapore is adaptable, nimble, flexible and accustomed to actively designing its future. We recognized our natural strengths, set up a deliberate plan and implemented important changes. First we adopted a worldwide standard for law practice to serve as our template for international litigation and arbitration. Then we made it easier and more attractive for legal talent to come here. And we established or developed courts and institutions to handle the work.

At every step, we looked at our goal and asked, what are the missing pieces? What do we still need to do to become the dispute resolution hub for the region? And we worked to plug those gaps.

ONE IMPORTANT MOVE was the establishment of the Singapore International Arbitration Centre (SIAC), which recently celebrated its 25th anniversary. It has grown tremendously, particularly in the last five or six years. In the first year we had fewer than 10 cases. By 2005 we were doing 74 new cases a year and that number has climbed since then. In 2015 it was 271, a 22 percent jump over the previous year, with parties coming from 55 jurisdictions.

By early 2015, both the Singapore International Commercial Court (SICC) and Singapore International Mediation Centre (SIMC) had been set up. SIMC already has had more cases than SIAC had in its first year. The aim for SICC is to create international panels with foreign judges to hear cross-border disputes – not just in accordance with Singapore law, but also English law, French law, Swiss law, whatever is applicable.

LUCIEN WONG

The Chairman and Senior Partner of Allen & Gledhill, Lucien Wong is also Chairman of the Maritime and Port Authority of Singapore and the Chairman of the Board of Directors of the Singapore International Arbitration Centre.

Allen & Gledhill was founded in Singapore in 1902 and is one of the nation's largest law firms.

To promote those institutions, we participate in conferences, and organize seminars and roadshows at both regional and international levels. For SICC, for instance, we presented at The Balestier Series for AmCham in Singapore; the International Business Association's Annual Litigation Forum in San Francisco; and the St. Petersburg International Legal Forum in Russia. We've sent representatives to India, Moscow, Tokyo and Seoul, arranging client roundtables and direct meetings with major law firms. The SICC also hosts foreign delegations in governmental, judicial and academic communities. TV, print news and websites naturally play an important part.

The next area is corporate restructuring. The first committee meetings are being held to discuss what needs to be done. What laws need to be changed? What kind of infrastructure and judicial expertise do we need? If we have the appropriate reforms and effort from all stakeholders, we are confident there will be considerable growth. Perhaps we can see the same level of growth as with the SIAC.

For the future, we're considering third-party arbitration funding, where an investor might fund a case on behalf of a client and expect to take some of the award. This is a controversial practice, but other dispute centers have rules that permit it. Singapore is considering a review of some of its laws to allow certain types of dispute funding.

That's the future we want: whatever any other city can offer that is relevant and material, Singapore can offer.

Lucien Wong spoke to **WILL CARNWATH**, a Partner in Brunswick's Singapore office.

COMMERCIAL LITIGATION: THE WORLD TOUR

In any conversation about international dispute resolution, certain locations are always mentioned as preferred venues. **LONDON** has long been considered the world's leading commercial litigation hub. Its court rulings are widely enforceable and its judiciary is seen as strictly impartial. **PARIS** is popular for similar reasons and its French-speaking courts and close relations with countries around the Mediterranean add appeal for some businesses. In Northern Europe, **GENEVA** and **STOCKHOLM** are favorite venues. In Asia, **HONG KONG** serves as a thriving gateway for China and operates under common law. Reforms in 2011 have improved its arbitration practices. Meanwhile, **SINGAPORE** has emerged as a leader not just regionally, but globally. In 2015, Singapore's International Arbitration Centre reported it had 271 new cases; that same year, the London Court of International Arbitration opened 326. In the US, **NEW YORK** is recognized as the nation's leading dispute resolution seat, but cities such as **MIAMI** and **HOUSTON** have taken steps to build their own credentials. All this activity points to the fact that, increasingly, companies have no shortage of options as to where they settle their cases – and cities are vying for this valuable business.