GOWLING WLG

BILINGUAL - INTERNATIONAL AND DOMESTIC ARBITRATION SEMINAR: AN EFFECTIVE OPTION FOR DISPUTE RESOLUTION

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On Sept. 20, our arbitration experts held a seminar in Montréal to share their opinions on the latest developments and opportunities in the world of arbitration:

- Current trends in domestic and international arbitration
- The growth of investment treaties
- Third-party funding and costs associated with arbitration

CLE Credits

This seminar counts for up to 2 hours of CLE credit under the rules of the Barreau du Québec.

Transcript

JOËLLE BOISVERT, Managing Partner Gowling WLG - Montréal

Je me présente. Joëlle Boisvert. Je suis l'associée directrice du bureau de Montréal de Gowling WLG. Ce n'est pas à ce titre ce matin que je vous parlerai mais à titre de modératrice et d'avocate qui pratique en litige et qui pratique aussi, particulièrement, en arbitrage.

While we're in Montreal and we could have this conversation in French for the next hour and a half, we've got very significant and important guests who are joining us today so that we can talk about international arbitration and the international scope of arbitration, and we will make the presentation in English.

I am joined by Tom Price, my partner from our London and Birmingham offices in the UK. Tom is a very well-known and experienced practitioner in the arbitration field with over 20 years of experience in numerous arbitration centres around the world. He spends much of his time acting on behalf of clients in the energy and natural resources sectors, and of course his clients range from state-owned industry to owner-managed businesses and individuals. As you may know, Gowlings, as it was then called, joined Wragge Lawrence Graham in February of 2016, so we've celebrated a year of our combination, and we are very happy that we combined with the Wragge Lawrence Graham based in Europe and in the UK with offices around the globe, because we are now a law firm with 1,400 professionals around the globe in ten countries and 18 cities. This provides us with the opportunity to have a better understanding of what's going on around this big planet and join our forces and our expertise with that of our colleagues from outside of Canada. Tom is a colleague with whom we've developed relationships in the last year. Our discussions with Wragge Lawrence Graham of course started before February 2016, but our combination is confirmed since then, and the objective that we've had in Canada is to ensure that we have an alignment with the expertise of our professionals in other offices so that we are able to address issues for Canadian companies, Quebec companies, that have repercussions outside of our borders. We all know that life no longer is dealt with within borders. Any business that has activities, deals with businesses from around the world. So the fact that we are now an international firm enables us to address those issues with a broad understanding of the topics, issues and problems. So Tom is joining us, and I'll explain how we'll proceed.

I also want to present to all of you another of our special guests this morning, and we're

very happy to have Tania Sulan join us. Why? Because she will be speaking about something which we've not heard a lot I think in Canada, which is third party funding for arbitration proceedings, and this is going on - this has started elsewhere in the world - and we thought it would be relevant for people in the business world, whether it's in-house counsels or people involved in business transactions, to have an understand of what's going on with respect to third party funding pertaining to international arbitration. Tania has a decade of experience in third party litigation funding, and before that, experience as a commercial litigator in Sydney, Australia, and then in London. She is the Chief Investment Officer at Bentham IMF, and I will ask her later to tell us what Bentham IMF stands for and what it does. She is, in our view, at the forefront of introducing to the Canadian market the third party funding principles that have been successfully started elsewhere around the planet by Bentham. To this end, Tania was responsible for the arrival of Bentham in Australia at one point, and she'll be able to explain to us what Bentham is all about and what third party funding is.

So that's basically the presentation of those who are here today. The agenda is as follows. First of all, we expect to be done by five to ten, so that you are able to deal with your other obligations today. We will try and stick with the time. If you need to leave earlier, we understand, and please feel free to do so. We will not be offended. We understand that you have other obligations, and we are very happy and grateful that you have joined us this morning.

I will ask Tom to provide you with an overview pertaining to international arbitration and the latest trends. Tom's presentation will be around 25 or 30 minutes, and it will be followed by my small input with respect to the perspective from Quebec. I like to say that practising in Quebec sometimes is not very different than practising around the world. In arbitration, it is true. There are some slight tweaks and comments that I can make for Quebec purposes, but the objective is to talk about international arbitration and not for this talk to be about Quebec arbitration as provided for by our rules, but I'll raise some issues on that so that we can maybe link international arbitration with what's going on in Quebec on that front.

Then we'll talk about the growth and impact of third party funding. I will ask Tania to talk about third party funding, what it is, and then I will ask Tom the lawyer's perspective and what he sees in the market with respect to the third party funding of arbitration. Finally, briefly we'll touch on the impact and growth of investment treaties with respect to arbitration. That part should last approximately five minutes.

Our suggestion would be that questions - there are two options, questions at the end or

questions throughout the presentation. I think we should be agile with this. We have a small group around the table, and while this is a presentation which will be done by mostly Tom and Tania, we welcome your views and your questions, if needed, throughout the presentation so that this can be a more conversation-type presentation if you'd like - but that's your choice. So that's what I suggest.

What we wanted to do before we started the presentation and my questions to Tom about international arbitration trends and latest trends is maybe just briefly - we don't want to put you on the spot - but we'd like to have a sense of the audience's knowledge pertaining to international arbitration, so I'll start the conversation over questions like this. My understanding from the list of attendees and those who are present is that you are mostly in-house counsels, within companies that have activities in Quebec - am I correct? Do we have a business, no lawyer, everyone's an attorney, an in-house counsel in the room?

AUDIENCE MEMBER

I'm a lawyer with Reed Commercial Group in infrastructure at SNC-Lavalin.

JOËLLE BOISVERT

Okay, so...

AUDIENCE MEMBER

California lawyer.

JOËLLE BOISVERT

Okay. Well, that's good. That's a lawyer.

<Audience laughter>

JOËLLE BOISVERT

So, just briefly, by show of hands, who has been involved in the past in an internal arbitration dispute for his or her company? Okay. And was it governed by, for instance, the ICC rules or other rules?

AUDIENCE MEMBER

Quebec.

JOËLLE BOISVERT

Quebec rules.

AUDIENCE MEMBER

ICC.

AUDIENCE MEMBER

AAA.

JOËLLE BOISVERT

AAA. <inaudible>.

AUDIENCE MEMBER

Quebec.

JOËLLE BOISVERT

Quebec. Okay.

AUDIENCE MEMBER

<inaudible>

JOËLLE BOISVERT

Okay.

TOM PRICE:

That's good <inaudible>.

JOËLLE BOISVERT

Okay, does that give you a sense? Okay. Well, then what I suggest is that we start, and, Tom, maybe even though everyone - most of you - understand and have been involved most probably in international arbitration, in order to have a successful conversation about the topics, I would ask Tom to start us off with maybe the big answer - the big question, I'm sorry - which is what is international arbitration? What does it stand for? And please, Tom, take us through your views on that.

TOM PRICE, Partner Birmingham, United Kingdom

Okay. Well, Joëlle, thank you very much for the kind words of introduction, and thank you

for inviting me to come and...

...address you today in Montreal. I do apologize I can't deliver this in French, but I think it would be painful for everybody, if indeed it was possible at all.

We want to make this interactive, or at least interactive between Joëlle and myself in relation to sort of having a bit of a dialogue rather than me just doing a presentation. But there are some slides which hopefully give it a little bit of structure.

Down to basics: what is international arbitration? Well, it is a method of private, binding and enforceable dispute resolution chosen by the parties as an alternative to the national courts. Each of those components is really important, and in a sense some of them give rise to some of the advantages of arbitration. The fact that it is private, that is one of the key points in relation to arbitration as opposed to the national courts. The fact that it's enforceable, it actually is effectively the parallel to court proceedings.

I think the most important thing, though, about arbitration is that it's the autonomy of the parties that is really crucial, and this is really why arbitration I think is growing in popularity because the parties often want, when they know that there are going to be disputes that might arise in relation to that project, but rather than being subject to the vagaries of a national court which they may be unfamiliar with, they can at least agree at the outset that they will have a process which they're going to be able to have some buy-in to, that they'll have some input into it, the process, and into the choice of the arbitrators.

That's another really important aspect of an international arbitration. It's this idea that you can choose your own tribunal. I mean, that advantage probably varies depending on what the alternative might be in terms of a national court, so in some countries you have in the commercial field actually no commercial court at all, you'll just have a general civil court, and you may have 300 judges and it'll just be a lottery as to which judge you might get to decide your dispute. In England, that's less of a lottery because if we're talking about the commercial world, we have a sophisticated commercial division of our High Court and the commercial judges are experts in the fields that come before them. But that is not the case in every country.

So one of the big, big advantages of arbitration is that you get to - I say choose your tribunal. It's not quite as straightforward as that, as you'll know. It is a lot of detail around how you actually get your tribunal, but you can go some way in your arbitration clause to setting up a mechanism where perhaps it is a panel of three, that each of you nominate an arbitrator of your choice, and then the two wing men or women arbitrators then nominate or choose the chairperson. So there is, as I say, some buy-in to who your arbitrators are

going to be.

The final bullet point is that arbitration is conducted all over the world against very different legal and cultural backgrounds, and I think again this is a statement of the obvious, why is international arbitration and I am talking predominantly about international arbitration. If I can just make that distinction. I can't talk for Canada, and Joëlle will. In England, domestic arbitration is not particularly common, actually. If we mean by domestic arbitration an arbitration between two domestic parties, two English parties, tends not to be that common, and the reason for that is because the parties are generally happy with the English courts, and why would you go to arbitration? The perceived advantages - and I'll come onto the advantages - are not there for domestic arbitration. But for international arbitration, it's a very different matter, much, much more popular, and of course the reason for that is - and I'm stating the obvious - massively increased international cross-border trade, and that's where international arbitration comes to the fore, and I'll come to the reasons for that in a moment.

JOËLLE BOISVERT

Specifically, in line with what you just said, have you seen a change recently whereby more and more companies choose to pursue resolution of a dispute via arbitration? And why do you explain this trend, if there is?

TOM PRICE

Well, I think that... I mean, there clearly is, and the English experience is that there - well, just to get it out of the way, if there's a question about whether there's an increase in international arbitration and the answer is yes, there is. There's empirical evidence of that. You only have to look at the figures of the cases that are going through the ICC and the LCIA in London, in the London Court of International Arbitration. In fact, so much so, that the English Commercial Bar and the judges have indicated there has been some concern or disquiet that maybe if the rate of arbitration continues at the rate it does, there are obviously less cases going through the Commercial Court and therefore less opportunity for those judges to make law and, of course, that is how the law is made, and a concern that some of the very big areas of the law in insurance, shipping and international trade is now being dealt with behind closed doors. So there's a bit of a question mark about that.

Why is there an increase in international arbitration? I think that as international trade exponentially increases, people are seeing the benefits of those... of the ability to have your own tribunal, the skill of the arbitrators. Enforcement is a massive issue, and so - well, we'll come to that in a moment - but enforcement in international arbitration is

probably, I would say in my view, is the key advantage of why you would want to arbitrate rather than to litigate. So if you have an award under international arbitration you can take it - and we'll come to this later - to pretty much... well, to at least 150 countries in the world that are party to the New York Convention and enforce it there. That can't be said about litigation judgements.

And there are an increasing number of fields of commerce which are looking to arbitration. Traditionally arbitration has been the domain of large projects, infrastructure projects, oil and gas, natural resources, but now there is an increasing uptake in relation to IP disputes, pharmaceuticals, tech, all of those sorts of areas, which historically have not actually looked at arbitration very much. And then the one big area where still I think arbitration is slightly under-represented: financial services, in which I still think you see predominantly court clauses, and I think the reason for that is that - and again, come to this later - in arbitration it's quite difficult to get summary judgement, and banks and financial institutions I think like the idea that they may be able to at least have the option of some form of summary process. That's open to debate.

JOËLLE BOISVERT

Mm-hmm. Is there such a thing as a standard international arbitration in all those topics and fields that you've discussed, and do the same rules apply? How does that work?

TOM PRICE

Is there such a thing as a standard arbitration? No, there isn't. One of the advantages of arbitration is that it's not standard. But having said that, there are ways that you can structure it. So, forgive me if people know this, but there are two types of arbitration. There is an institutional arbitration, and there is an ad hoc arbitration. Institutional is where you choose an institution who will run your arbitration and will have a set of rules that you will be governed by. Classically, the ICC.

AUDIENCE MEMBER

Which rules are the most useful? <inaudible>

TOM PRICE

I think it would be difficult to say worldwide, because you'd have to have knowledge of every single arbitration going on all over the world. But I think up there as the most common will be ICC, institutional, LCIA, SIAC, Singapore, China, AAA - those would be the most common. So you have the institutional rules, and the institutions themselves that

administer. Or you have an ad hoc arbitration, which is that you've agreed to arbitrate, but you don't have any rules, or you have an institution, and the parties in conjunction with the arbitrators decide the procedure and the arbitration proceeds in that way. Then there is a sort of hybrid which is where you have a set of rules - and it's commonly the UNCITRAL Rules - but no institution. That's pretty common, as well, and that's a sort of hybrid.

But within that sort of overall framework of ad hoc and institutional, no, there's no such thing as a standard arbitration. I mean, an ICC arbitration will predominantly run one much like another, but there are still huge variations in the process, and much of it is down to the actual tribunal and how they like to deal with it once you get beyond the initial stages of the arbitration. I've put up there on the screen - which I don't expect people to read - it's really just there for reference, which is to do with the arbitration clause, because this all starts with the clause. The arbitration, as I said, is a consensual process, and its genesis is in the arbitration clause in your contract. The one message I would like to get across today if I leave you with no...

JOËLLE BOISVERT

That's my next question. You were ahead of me. It's okay. I was going to ask, but you were not going to talk about it now.

TOM PRICE

We can say it twice. If you take away one point today, it's that you want to think about... this is all about when it all goes wrong - but you want to be thinking about that when you're doing the deal, and you want to be looking at the arbitration clause right at the outset, not at three o'clock in the morning when you're just about to sign it, and really work out what it is that you want. Do you want to arbitrate, or do you actually want to go to the national courts? And once you've worked out that you are going to arbitrate, if that is the answer, what do you want your arbitration clause to say?

You can start off with a sort of a standard - and forgive me, this is going to keep sounding like I'm just talking about England, but that is my experience and expertise - you can start off, and get off the Internet the standard ICC arbitration clause or the LCIA or the AAA. But you need to... don't just stick that in, you need to give it some thought, and really work out what it is that you want to do, and I'll talk a bit more detail about the variations to that.

JOËLLE BOISVERT

And on that point, and Tania, maybe you'll jump in, as well, the experience - Tom's experience, my experience on the Canadian and Quebec perspective - is that

unfortunately, whether we like it or not, the arbitration provision in the contract is usually something which is discussed very briefly and not thought through. Whether or not it's right or wrong, that's not the question. The question is that's usually how an arbitration clause is included in an asset purchase agreement, a share purchase agreement, or any kind of commercial agreement between two parties, and in the litigator's view, for all of us who arbitrate and assist clients in arbitration processes, the comment - and in French we say "constat" - that we find is that there has been no discussion about that when it was time to deal with the contract, and usually clients are really not knowledgeable about how this will proceed. And our takeaway about arbitration is to really think about this because you are stuck with the arbitration after, when it goes sour, and you can't change it. And because it's a consensual provision, there are some thoughts to be given with respect to the choice of the institution, so why ICC, why not others? There can be some provisions about who will be the arbitrators when it's a very technical matter, when it's a very significant matter in oil and gas, in energy. There are some provisions that can be thought of in advance which will provide the best arbitration provision possible, given the expected litigation that may arise out of significant projects and transactions.

And Tania, on the third party funding aspect, what's our recommendation with respect to an arbitration clause and why you'd put arbitration in a contract?

TANIA SULAN

I think thinking carefully about the arbitration clauses is a key factor, and when a case comes to us, obviously things have gone wrong, and we're trying to assess whether we can get involved and assist clients and their lawyers with the funding of the case, and one of the key things that we look at is how is this dispute to be arbitrated. But moreover, a key consideration is what it's going to take, by terms of legal budget and arbitration budget to get this case completed, and, relative to the client sides. So if, for example, you have a relatively small dispute by a claim number but you've got a three-person panel, which is going to be a very expensive arbitration, the metrics from a funding perspective might not stack up. So that's just something from a funder's perspective that we look at early on. So I think the size of the contract, the size of the potential dispute relative to the mechanism that the parties choose is really important.

TOM PRICE

The important point to have in mind is there's no such thing as a right answer to an arbitration clause. I do get asked by my corporate colleagues in our firm - quite frequently they'll say, "Well, should we have an arbitration clause here? You know, I've heard about arbitration. I'm told it's good now, and it's the thing, and so should we have an arbitration

clause?" And the answer is, "Well, it depends," which isn't very helpful, but then we have to take... we take them through it. And I think it's a lot to do with what is the nature of the deal that is being done? Where are you likely to... what will the dispute end up being about? Is it going to be very technical? Or is it something where you're going to probably want, let's say, the expertise of arbitrators? Where are you going to want to enforce, and therefore court proceedings might not be the right thing? Those are all the points about whether you would have the arbitration process at all.

And then once you've got to that point and said, "Yes, that is the thing we should be doing," then a couple of questions around, well, should it be institutional or should it be ad hoc onto that is probably should be institutional because it will be more efficient, but it may be a little bit more expensive - will be more expensive - but in the long run, query even that because an ad hoc arbitration can get bogged down in disputes. And should it be a three-panel tribunal or one, and that's often a very big question - and that comes a bit down to well, what's going to be the likely size of the dispute because you don't want to have a three-panel tribunal for a dispute for $150,000. A panel with three, though, will take a long time to constitute, and will take a bit of their diary is going to be even more difficult, but if you have a one-panel tribunal, one-member tribunal, you get the so-called risk of a quick rote decision, so a decision that just... well, you just don't agree with it - and I'll just... I'll just finish my sentence, then I'll do... - and the trouble with that is that because arbitration usually precludes a right of appeal, you're then stuck with that decision, and I'm talking about a decision that's not so off-the-wall that you can't challenge it for some sort of a... you know, there's something odd going on. But you just... you're just stuck with it. So those are the kinds of issues.

Sorry, I just saw two questions.

AUDIENCE MEMBER

That's pretty standard clause that we see <inaudible> but to what extent should you negotiate how the proceedings will unfold, like for instance, discovery rights, depositions? Because what we're finding in my organization is that we're facing or have faced two large scale arbitrations, over $500 million each, we were defence(?), and basically the plaintiffs want to reduce(?) what's <inaudible> system. So I don't see the benefits from a cost standpoint because it's probably even more expensive than going to court <inaudible> discovery service providers are very expensive. The loss(?) custodians. Witnesses. You know, like, all those are factored in and <inaudible> so then you have the <inaudible>, as well, that factor in as well to the equation, and basically, you're reproducing a court case or action.

So some have suggested maybe you should negotiate <inaudible> already in your contract what exactly are the <inaudible> in terms of all of those proceedings. But I think <inaudible> that's what I struggle with...

TOM PRICE

It's a great question, and it raises a multitude of issues. I mean, I don't think you tend to see very often clauses which deal in that kind of level of detail because, I mean, that's almost going down two levels of detail, and the first level of detail is sometimes you do see parties who are trying in the arbitration agreement to lay out what at least the general process will be. So, you know, will you have a kind of what we would call the US or UK style where you have pleadings at the beginning, then you have the facts through discovery or disclosure, and then witness statements and expert evidence - that's one way of doing it, and the way that I'm comfortable with. Or do you have the sort of the civil law, continental Europe method of, you have a memorial and you just shove everything in at the beginning, expert evidence, the whole lot, and then you reply to that, and it's almost like sometimes ships passing in the night, they're coming quite isolated issues, and then you have a second round of memorials. So people try and sometimes who maybe try and do... to get that into the arbitration clause.

The trouble with doing that is that you're sort of... in a way you're slightly circumventing the rules, and you can... I think the difficulty is, the more you put in your arbitration clause, there's a danger that the more actual dispute you're going to have later on in terms of satellite procedural litigation. Because if you have a clause and you stick all of that stuff in, and then you say it's going to be governed by the ICC rules, the tribunal will say, well, I've got these ICC rules, and I've got power to decide anything. Yes, you've agreed things previously, but, you know, there's a question mark about whether I can overrule that.

I mean, it's a great question, and you're going at it even a step further about laying out <inaudible> and I can't say that's the wrong thing to do, but it's a minefield.

AUDIENCE MEMBER

Agreed(?).

TOM PRICE

He says unhelpfully.

JOËLLE BOISVERT

And your question and the comments go back to the initial point: I think businesses need

to understand when they choose arbitration and refer to ICC or other institutions, what that entails, what are the usual processes that will be followed, what will be the rights of the arbitrators, because once the process has started, there is an automatic... you get into the process. If it's ICC then it's the ICC rules and the rights of the arbitrators. So at least if there is comprehension in advance of what the provision provides for and will trigger if there is litigation, then there is the conscious decision, and less surprises down the road, instead of just putting in something and not having thought through whether or not this process fits with the nature of the expected litigation that we foresee.

AUDIENCE MEMBER

Definitely. ICC there are costs involved.

JOËLLE BOISVERT

Oh, absolutely.

AUDIENCE MEMBER

<inaudible> five thousand dollars <inaudible> advance on costs and it's a process fixed on the amount of the quantum(?), so I think <inaudible> estimates <inaudible>.

TOM PRICE

And also - we're straying into other questions, but it's relevant to your question - I mean, this whole idea of the... well, a lot of the process that you end up getting in an arbitration is down to just the nature of the tribunal and what the tribunal think about how it should be done. But it's also to do with the seat of the arbitration, and, you know, if it's a particular... if it's seated in a particular jurisdiction which, for example, doesn't put much store by disclosure or witness statements. I have one at the moment where we're dealing with a jurisdiction where there's very little disclosure, and that's alien to our culture - my culture. So those sort of things are... those are all things you've got to factor in.

AUDIENCE MEMBER

My question has more to do with a sort of escalating arbitration clause. Do you ever see - and it goes a little to your point - because there can be extensive costs involved - a clause where there are threshold, for example, a litigation under X amount would be one arbitrator, and a sort of ad hoc arbitrations, maybe it's between X and Y, then it would have maybe three arbitrators or institutional roles, or even under a certain amount you just go to regular courts. Do you see that kind of...?

TOM PRICE

I thought you were going to ask a slightly different question, but I will answer the question you asked. You'll be pleased to know. Do you know, you don't see that very often, and I think the reason for it is because it's always quite difficult to draft in a watertight way - well, you can draft it, but I'm not sure you can make it work, because people will claim what they want to claim to sort of get round that. But I think there is nothing to stop you trying that.

But maybe a different approach is that certainly the ICC have brought out, as of this year, their new expedited rules for arbitrations under I think it's $2 million. They worked out that actually, although everybody thinks that the ICC has massive cases, the majority of their cases are actually under $2 million. But you need, I think, to opt into those rules - I think I'm right in saying. But that's a method, because if it's under $2 million, then you'll be on an expedited process, there's limited disclosure, they have to render the... they have to get to a final hearing I think within six months. And I think other arbitration institutions will follow suit in relation to that.

So, I think that's where you're going to see those kinds of things. As I say, this idea, yeah, one-member tribunal if it's below a certain threshold, as a matter of practice - sorry, matter of theory - that could work, but it's just a question of whether people will abuse it by inflating their claims or whatever.

The question I thought you were going to ask, which I will still answer is, do people have tiered clauses, which is that they say, before you can arbitrate, you must negotiate? And that's a big topic, which is important because - and it cuts both ways. Yes, you should... a lot of parties think that's a good idea to do that. But it depends where you're sitting - on which side of the fence you're sitting on, because you might actually want to get on with bringing an arbitration claim, the other side are just prevaricating. They're not really properly negotiating, and there can be some limitation issues as well, although frankly you can overcome that by I think just starting an arbitration to preserve limitation.

But there is a nasty sting, which is that if those tiered clauses are drafted so that they are really binding - in other words, you must negotiate before you can arbitrate - then actually that - and jump the gun - then actually that can give rise to a jurisdictional challenge that the tribunal just didn't have... they just didn't have jurisdiction because there was a contractual exclusion to their jurisdiction. And...

AUDIENCE MEMBER

I have seen those types of clauses, and the one that I had to deal with recently worked I think because the rules were very precise, the pre-arbitration engaged in, where there was a notice that had to be sent, you had a certain delay to reply and so on...

AUDIENCE MEMBER

And you escalated before …

AUDIENCE MEMBER

Exactly. So it was easy sort of to <inaudible> and to prove that you followed the process. So to your point, I think it can be messy, but I think those clauses were important(?) when you're very precise about this <inaudible>.

JOËLLE BOISVERT

And I guess I see them often. There's a little internal process, business-to-business, then you escalate to a higher CEO level, and then if it fails arbitration, I've seen those in numerous types of agreements.

AUDIENCE MEMBER

Well, that's done in practice anyway, right? It's like… I've seen that and myself I'd find that a bit confusing because in practice it's been done <inaudible> people discussed for weeks or months, so that will be done as well, you may want to judge, you put that in, but you must ensure that <inaudible> all the operation rules that allow you to go through, to get injunction relief(?). <inaudible> to issue <inaudible> the arbitrator to do that. So I think, for me, <inaudible> I'd like to follow up on the question <inaudible> arbitrators. Apart from the cost issue, you were mentioning the risk of the <inaudible> decision, <inaudible> decision, but how true is that? Is it <inaudible> indeed we should shy away from <inaudible> arbitrators and go for three? But everything being equal, <inaudible> one arbitrator will do the case, but just for the fact that we want to avoid another trial(?) decision, we go with three. Is that true? Because we're nominating the arbitrator at the end. So, we're minimising the risk of having a person out there <inaudible>

TOM PRICE

I take your point that it might be something of an urban myth. I mean, in terms of - and I think probably difficult to disprove - I mean, I think if you've got... well, you say you've been... if you've got a single arbitrator, that's a situation where you're not really choosing your arbitrator at all, because the mechanism is going to be that... yes, I guess the parties can put forward, it depends what your dispute clause says, the parties could put forward

choices, and then if there was agreement between the parties, you'd have somebody who was agreed up. But I think that's quite rare. I mean, normally, with a sole arbitrator, you're going to end up with somebody who's been chosen by the institution. The LCIA court or the ICC court.

AUDIENCE MEMBER

<inaudible>

TANIA SULAN

We actually have an arbitration clause in our funding agreement, and we pre-designate three arbitrators with subject matter expertise so that the parties are comfortable, and we just go down the list. But the trouble comes if you can't schedule with those people, and then you end up with some other process to achieving.

TOM PRICE

I take your point <inaudible>.

JOËLLE BOISVERT

It's ten after nine, so we need to cover some ground before we get to third party funding...

TOM PRICE

We do. But then, so that's good because...

JOËLLE BOISVERT

I know, but you covered, so...

TOM PRICE

We covered it.

JOËLLE BOISVERT

So, let's go... try and go back on our agenda. We've talked about arbitration. Two things I want to touch on, Tom, is basically does it matter where we arbitrate, and is arbitration in one forum the same as the other one? But once we get to that topic, I want to talk about confidentiality which is a big issue around arbitration, so is there a confidentiality, is there not, and what's the status around that topic?

TOM PRICE

Okay. Where should you arbitrate? We can deal with this. This is the so-called seat. The seat is the legal home of the arbitration. It's not necessarily where the hearings are. It usually is, but that's just a physical thing, where the hearing's going to be. So the seat is important. It's important for two reasons. One is that it dictates where the award needs to be given, handed down, for the purposes of whether it's given in a New York Convention state for enforcement purposes. That's one reason. And the second and perhaps... well, that's the important reason in itself, but the other reason is that the seat dictates what is the legal system that will effectively govern the arbitration. I don't mean govern it in the sense of the rules, because let's assume you've chosen some institutional rules. On top of those rules, it is the legal system that supports the arbitration. Pretty much I think every country will have some form of Arbitration Act which sets out mechanisms to support the arbitration, and so the seat will tell you which Arbitration Act you're looking at, and which court is going to have the supervisory powers. Those courts and those Acts deal... they tend to deal with things such as how do you appoint a tribunal if you manage to conceive a situation where you didn't manage to agree in the arbitration clause. It will set out usually what the court can do in terms of trying to support an arbitration, like giving ancillary relief, injunctive relief in what circumstances can that be given; it will set out what the rules are about challenging awards, because if you want to challenge an aware you tend to challenge it in the courts of that particular country.

So what you need to do if you are going through the exercise I guess thoroughly at the outset of deciding on arbitration, and you need say, and it's one of the things that you really do need to say in the arbitration agreement, the clause, what is the seat? You need to give some thought to what that seat is. And my view is that you want to look at an... I mean, sometimes it's obvious. It's going to be the parties may not be that far apart, but maybe they are, and you want to be looking at a seat where you're looking at a country that is generally arbitration-friendly, in other words, a system that lets the party get on with the arbitration without the court unduly interfering, if I can put it that way. I'm not going to give any examples of countries where they are perhaps less arbitration-friendly - but there are some - and there are some countries that are very arbitration-friendly, and the UK is one which is very arbitration-friendly.

So it means that it will give support to an arbitration, to parties who have agreed to arbitrate in the sense of it will give injunctive relief. If the tribunal hasn't been appointed, there's a mechanism for appointing arbitrators if they haven't decided. But it's also arbitration-friendly in that it basically is very difficult to challenge arbitration awards. The threshold is relatively high, and that's because they don't want to... you know, the view is if

the parties have agreed to arbitrate, then the courts really shouldn't be getting involved unless there's a very, very good reason for it. So it's quite difficult to appeal an award to the English courts, and the law reports in England that - I don't know about Canada, but I suspect it may be the same - are littered with decisions saying we're not going to grant permission to appeal. The test is not made out. It's too high a hurdle.

And so that is why the seat is important. There are other more practical, I suspect - although all of those points are practical - but there are other reasons why the seat is important, which is that the seat has some impact on how the arbitration will be run in terms of disclosure, witness statements, expert evidence - although that's a little more opaque because so much of that is down to the rules that you've chosen, and actually, frankly, the way that the tribunal thinks about things. But, you know, to give an example, if you are arbitrating in England, you will tend to, I think, find that you'll have reasonably favourable sort of reception to having reasonable amounts of disclosure. It's not as if the tribunal's going to say, "No, not giving you any disclosure," and will understand that there should be witness statements. But if you were in other countries where there was limited disclosure and perhaps no history of witness statements, you might find that slightly harder. But that is slightly more opaque, because as I said much of that is down to what the tribunal actually wants to do.

JOËLLE BOISVERT

Let's touch now on confidentiality, Tom, if you want? So we can...

TOM PRICE

Confidentiality, deal with this, is a very important topic, but I'll try to move a bit more swiftly. Confidentiality is sort of one of those areas where that's one of the big, big reasons, one of the big three reasons why you arbitrate. So, expertise on the panel, enforcement, confidentiality. But - is arbitration actually confidential?

The first question is, well, actually what law are you going to work out - or what law are you going to use to work it out? Because in a genuine international arbitration context that might not be necessarily straightforward. Is it the law of the arbitration agreement or is it the law of the seat, which might be the same thing? English law says that arbitrations are private. So in other words, only the parties can go to an arbitration hearing, not have somebody wandering in off the street, or a journalist. There is an implied duty of confidentiality, that is that the hearings, as I say, will be confidential. You won't be able to use the information in those hearings, except to the extent the information is in the public domain already. Documents generated in the arbitration will be confidential. Again, unless

they were already in the public domain. And the same with disclosure of documents and of awards.

Interestingly, the English Arbitration Act is silent on the question of confidentiality. And the reason for that is because the Legislature, when it was enacting the Arbitration Act in 1996, realized that actually this was such a complex topic and that there were so many exceptions that it actually didn't want to legislate that it should be confidential. But there is generally an implied duty of confidentiality.

But don't get hung up on it just being England, because English law might not be the relevant law. It might be... you might be under a different seat, different governing law of the arbitration agreement. And also the institutional rules that you may have chosen often say something about confidentiality, and they vary depending on which rules you're using, and they vary as to who they bind and over what matters. So just very briefly, the ICC rules say that only persons involved in proceedings may attend hearings. But that's the only thing that the ICC rules say about confidentiality. There is a provision that they... I think that they say that the tribunal may make an order in relation to confidentiality, but it requires an order.

So one does have to be a bit careful with confidentiality. It may not be quite as confidential as you thought.

The LCIA goes a little bit further. It says that confidentiality applies to all the parties, and the tribunal's Awards and documents are confidential. And the IDRC, confidentiality applies to the tribunal; limited confidentiality of the award.

So it's a minefield, but it's an area where you need to look quite carefully at the whole issue of confidentiality. There are some common issues that come up from confidentiality. What about if you need an award to assert or defend a claim? What about disclosing awards to third party funders? Tania may say a bit about that. And then witness evidence which is inconsistent with evidence given in previous arbitrations. As I say, in most cases, the public interest in justice outweighs confidentiality. Judgements from the courts in relation to anything to do with arbitration, that's a whole area, as well, and there is I would say a growing trend in this kind of satellite litigation that goes on in the courts in aid of an arbitration, whether it be an appeal or whether it be for a freezing injunction, before an arbitration has started. There's an awful lot of that, and those rulings - the hearings are in private, as far as English law is concerned - but then there's a question about actually the judgement itself, whether the parties should be anonymised.

So confidentiality is a complex topic, and I think the message is don't just assume that

everything in arbitration is confidential.

JOËLLE BOISVERT

Yes, and on that point, I'll maybe just briefly touch about one aspect with respect to Quebec law. If the seat is Quebec, if the law governing the agreement is Quebec, our civil, our current civil procedure confirms as of 2016 that private means of dispute resolutions are confidential. It also provides that the arbitrators need to keep everything that's going confidential. But nevertheless, even though, for instance, Quebec is the seat or another jurisdiction is the seat - to Tom's point - there is this expectation that arbitration will be confidential, but as he mentioned, the ICC rules are silent, except that they provide the arbitrators the right to issue confidentiality orders when asked for by the parties.

So the takeaway from all of this is that this perception that it's absolutely confidential is not accurate, depending on the rules of the institutions that apply, thus, again, thought process with respect to the arbitration provision: do we want to address the issue of confidentiality, and should it not be something to be decided in the arbitration provision, so in the arbitration clause within the agreement, so that this issue is dealt with in advance? Of course, there are pros and cons. Why? Because if it's full confidentiality, what about having the award recognized? What about any kind of publicity around the award for execution purposes? But still, confidentiality is something that can be thought about when drafting the arbitration provisions so that there is a decision made as to whether or not we want to make sure that the provision really outlines that the arbitration process, the proceedings, the testimonies, the exhibits, will be kept confidential by the parties, blah, blah, blah. It's something to consider if you want to avoid future issues about that.

Generally, Tom, because we want to go to third party funding, what about the procedure in arbitration versus what's going on before the courts? Are there differences, significant differences? What would be your general comments on this before we talk about the enforcement of the awards?

TOM PRICE

I'll be very brief on this because we're running out of time. For me, the thing that really... I actually think that in terms of process, arbitration and certainly the English court system, there is almost like they're becoming very, very similar to each other. Arbitration used to be... the idea was that it was quicker, less formal way of resolving a dispute. I'm not for a second saying that corners were being cut, but that the idea was that you didn't do just what you did in the court process, and that there was more flexibility and so on and so forth. I think that, certainly my experience, and it may not be replicated across the piece,

is that international arbitrations now tend to be a little bit more similar, certainly the ones that are seated in London tend to be a bit more similar to a High Court trial, and that is because, in part - I say the main difference is in relation to disclosure, actually. Disclosure in international arbitration has for a long time often used something like the IBA rules on the taking of evidence in international arbitration, so rather than the parties either not disclosing anything or disclosing everything they have, it's done by means of request, so you basically disclose the documents you rely on and then the other side asks for documents that they think you've got that might not be helpful to you, and the tribunal will make a decision if there's a dispute on those. And that's how the IBA rules on taking evidence work. I think it's regarded that that's pretty successful and pretty sort of, well, standard, but often used.

That's definitely more restrictive disclosure than you would get in a standard case in the UK, but actually the UK courts are beginning to work out that disclosure is taking over and it's making a lot of litigation unbelievably expensive, and so there's some move to try and move some disclosure in the English courts to something akin to the IBA rules.

So I think the actual difference in process is narrowing, actually. I mean, having said that, there are still particularly if you're... It also depends what you're comparing it with, because I'm talking about an arbitration seated in London, and I'm doing one at the moment which is seated in Paris. That will be very different I'm sure when we actually get to the final hearing from an English trial. It will probably be more akin to a French trial, I suspect, and there will be more limited time for cross-examination of witnesses and expert evidence. We will have that that, but it will probably be more limited. <inaudible>

JOËLLE BOISVERT

What about after the award is rendered? What are the comments with respect to having the awards recognized?

TOM PRICE

I'll deal with this together in two parts. I'm just looking to get the... challenging the award. We've talked a little bit about appeals. Appeals - and this is why it's relevant to go back to who is the court at the seat of the arbitration, what is the relevant supervising court and Arbitration Act, because that will probably say something about appeals. Under English law, you are allowed to appeal. There is permission - sorry - there is the ability to appeal an award to the Court, but that is excluded by many of the institutional rules. So the ICC rules, I think they preclude the right of appeal. So one of the advantages of an arbitration is that's it, done and dusted - in terms of an appeal.

There are other rights of recourse that you might have, but they are generally very limited, and are usually prescribed by the relevant act that you're acting under in the particular country, so may be a challenge... there's been some serious irregularity, procedural irregularity, it's got to be very serious. There is an increasing trend, I think it's fair to say, in challenging arbitrators themselves for actually lack of independence or... generally lack of independence. So that's...

JOËLLE BOISVERT

And conflict of interest.

TOM PRICE

And conflicts of interest. So that's a big area, as well. And I would say again that that's one of the trends in arbitration, is this whole area of those types of challenges.

The flip side of all of that is you've got your award and you want to enforce it, and I touched on this, and the key is the New York Convention 1958, more than 150 countries have signatures to this. There are limited grounds of challenge, so you take your award and you can take it to one of those 150 countries and ask a court there to enforce it against assets in that particular jurisdiction. That I think has been one of the great driving forces of international arbitration and recognized as being a very important convention. I wouldn't propose to say any more on that at this stage, bearing in mind our time.

JOËLLE BOISVERT

Yes. Thank you. I suggest we... so, international arbitration perspective from Quebec, just briefly, because I've touched on the... let me just change the... When a contract is governed by Quebec law, it is the seat of the arbitration, whether or not it's governed by ICC rules or other rules. If the seat is Quebec, then the Quebec rules will generally apply. We have provisions that explain how we can deal with issues relating to the nomination of arbitrators and the annulment of the award under really specific circumstances.

But really, four points that I wanted to touch on briefly, the fact that Quebec law has confirmed that it values private dispute resolution. Our Code of Civil Procedure obliges parties before they go to court to try and have... they need to have tried to settle the case, and as a commercial litigator before the Quebec courts, the Canadian courts and someone who practises in arbitration, whether it's national or international arbitration, the Quebec courts will require... will ask us if we've tried to settle, if we've tried mediation, and if we are willing to look at arbitration before they hear us. That's the new trend before the Quebec courts, so there's a positive view by our legislator pertaining to arbitration.

Of course, the parties to a contract, as I said, have the right to determine how they will deal with a dispute, and they can choose to arbitrate. I've made my comments with respect to the need to have a really significant review of the arbitration clause in advance to make sure that the parties involved in the agreement do understand the consequences of choosing, for instance, the ICC rules, which are rather stringent - and this is a very expensive process, to your point - not a lot of people enter into a contract referring to ICC and have read the fees which are required just to file. So that's something which is important.

I raised the confidentiality issues. The Code of Civil Procedure in Quebec provides that arbitration mediation, that it's confidential, but that's a recent...

...provision, and there's a question to be asked whether or not this provision will apply to contracts which have been signed prior to the enforcement of this provision, whether or not confidentiality is provided for in the arbitration provision, thus my comment that this is also something which needs to be discussed.

And finally, to Tom's point, that - I'm not going to get into that - but there's a confirmation by our Quebec legislator that it confirms the special provisions which are applicable to international commercial arbitration, so the New York Convention and all of that, so we are a friendly jurisdiction to arbitration, to Tom's point about the UK court.

So that's it for Quebec. Again, as I said, this was an international arbitration topic. What I really want to do now, because this is something interesting - that I hope you'll find interesting - it's all this third party funding of arbitration. We've got Tania here who is, as I said, your title - I just don't want to...

TANIA SULAN

Chief Investment Officer.

JOËLLE BOISVERT

...Chief Investment Officer at Bentham IMF, and we've secured approximately 15 minutes to talk about the third party funding part, and we're good on the clock. So, Tania, first of all, would you tell us what Bentham IMF stands for? What it is? A bit of its history, what's third party funding with respect to arbitration, and basically how does that work? And so you know, Tom will intervene as well within that section to give us a better understanding of what this is.

So, please: What's Bentham IMF?

TANIA SULAN, Chief Investment Officer Bentham IMF

The Bentham part of it...

...comes from the English legal philosopher Jeremy Bentham who amongst other things spoke about access to justice, and the company is an access-to-justice for-profit company. We were listed on the Australian Securities Exchange in 2001, so it's been going for 17 years. We also have operations in the US for the past six years, and 18 months ago I moved to Toronto from Australia to set up the Canadian operations. The IMF part of Bentham IMF stands for Insolvency Management Fund, which is really the genesis of our business. We funded a lot of claims of insolvent estates, and there's a natural fit there, as you imagine. There's a company that's gone into external control, it might have had claims against third parties that they just could not pursue because there was no assets in the estate. So that was really the genesis of the business. From there we started to move into commercial disputes and funding litigation, funding arbitration for companies and individuals who primarily needed the financial support. There's a natural fit in a David and Goliath space where the litigation funder can level the playing field and assist a David to bring a litigation or an arbitration against a Goliath.

But I think as the litigation funding market has matured in overseas jurisdictions, we're seeing an increasing interest of more sophisticated and well-resourced companies and entities who are looking to litigation funders to assist them in pursuing their disputes, either through litigation or through arbitration in a cost and risk-free way, or to manage the cost and risk around what is inherently a very risky enterprise.

We had a recent chat with a CFO of a company out west who was looking at using our services. He'd not heard of litigation funding before. He'd been referred to us by his financial advisors. I think that's a very common thing in Canada. It's a brand new concept. He said, well, look, litigation is just another asset that the company holds. It's a contingent asset. We use finance for all areas of our business. We'd never pay outright for a building or for a fleet of cars or for our plant and equipment, so it makes sense, so we look at external sources of capital to monetize our litigation assets, if that's the way that we'd want to go.

This bit of background - as I said, it's very new in Canada. When we came to this market 18 months ago, there had been some litigation funding activity mainly in the personal injury space, also a little bit in the class action space. But over the last 18 months, we've been educating the market and our first case, which is a patent dispute, is being run by Joëlle's colleagues out of <inaudible>, so we're really delighted to have that <inaudible> and to be

making some law in Canada that has a <inaudible>.

But in broad strokes, the litigation funder is going to cover all or part of the legal costs, so the lawyers' fees as the case goes along, all or part of the fee disbursements, and in cost-share-shifting jurisdictions - and I appreciate Quebec largely is not one of those - cost-share-shifting jurisdictions like the UK and like Australia, the litigation funder will typically cover any adverse costs if the litigation is unsuccessful. So it shifts all of the downside risk of the litigation off the company and onto the funder.

I think the other key aspect of litigation funding is that the funding that's provided is on a non-recourse basis. So if the case is unsuccessful then the loss sits with the litigation funder and not with the company.

AUDIENCE MEMBER

Generally how much of a cut do you take?

TANIA SULAN

In terms of return, we structure the arrangements in all sorts of ways. But typically we look at either a multiple of what we invest, and historically as a company we try to aim for - and we're a publicly-traded company, so we have quite strict protocols around what we invest in and the returns that our investors expect - but we look at a three times return on our investment, which includes the money that we've spent. So if we put a million dollars in a case, at the end of the case, assuming a $20 million award, we'll want to take out our $3 million at the minimum. But there's a risk assessment to be done: we look at how long our money's likely to be tied up; the risk profile of the case; whether the client or whether the lawyer want to share the risk and the reward with us, that can alter the dynamic. And many agreements are based on a percentage of the outcome which tends to align everybody's interests to get the best possible monetary outcome on the case. And depending on the size of the case, we often put in monetary caps, because in a very large case there can be potential for a windfall which makes the incentives misaligned, if the return of the lawyers who might be acting a partial contingency basis and the funder is on a pure percentage.

AUDIENCE MEMBER

Once you come into the picture, you get to pick the lawyers, the experts, who...

TANIA SULAN

No.

AUDIENCE MEMBER

...<inaudible> of the case.

TANIA SULAN

It's a very good question. I think it's the question that's on the tip of everyone's tongues when we're discussing this phenomenon. We're very mindful of what I call the sanctity of the client and lawyer relationship. The third party, as the funder, we're really a third party that's removed from that relationship, and so typically the cases come to us when the lawyers have already been instructed, and we won't interfere with that retainer between the client and the lawyer. We would rather not do a case because we had concerns about the lawyer, than seek to interfere.

We've had a couple of cases where, for example, recently we had an intellectual property case, and that lawyer didn't have the expertise that we felt was required, and we said to the lawyer, "Would you co-counsel with someone with the expertise?" and he was quite delighted to do that, and I think took a lot of stress off him actually. But if that lawyer had said, "No, no, no. I'm fine, I can do this," then we would've said, "This case is a pass."

I think the kind of pointiest end of the control issue comes around settlement, and depending on what jurisdiction you're in, what the local courts have allowed in terms of funder control is quite variable. In Australia, our courts are taking quite an expansive... <inaudible> has said that funders can get quite involved. We actually don't want to do that. We work with great lawyers, and we really have to trust them to know the minutiae of the case and to provide the advice. But I think overall we work as a strategic sounding board. We've got a budget to manage. We like to know where there's key fork-in-the-road decisions that are going to be made, and to hear about what the parties' views are, what the lawyers' views are, and maybe we'll have some input to offer, but we're not imposing our views on anyone, and settlement is a big issue under our agreement, and it will depend where we're operating. But in Australia and what we're seeking to emulate in Canada, and hopefully we'll never have to come to a situation where this becomes a subject of judicial consideration. But if everything's going haywire at the end of the case, and you've got a funder who is paying all the costs, taking all the risks, and a client who suddenly sees the blue sky of this litigation and is saying, "Justice has an extra zero," and the lawyers are saying, "Really, we have a very reasonable settlement offer here that should be accepted," we have an arbitration clause in our agreement. It's a short fuse arbitration, so number one the parties have to consult in good faith to try and see if the settlement can... we can form a common view on whether this settlement should be

accepted or not. But if there's a dispute, short fuse arbitration with three pre-nominated arbitrators, very defined, which may or may not be wise according to what we've heard here today, but as to what will be considered by the arbitrator who makes the decision as to whether this settlement offer should be accepted or not.

AUDIENCE MEMBER

<inaudible> the funder before us, the part that go the distance instead of settling, let's say <inaudible>.

TANIA SULAN

Well, I think usually it's the other way around, and I should hasten to add that we've never had to enforce <inaudible> contractual rights around settlement in our 17 year history. So I think it speaks to the collaborative relationship we have with the lawyers and the clients. But if you had a rogue client who was not accepting the lawyers' advice, then we do have this clause. But we're all ex-litigators within the company. We understand the vagaries of litigation and that a case that looks in a certain way at the start and part way in can look different, and so we're quite attuned to that. We're very reliant on the lawyers who are closest to the litigation to be advising the client as to what the proper response should be to any offers. And so really, it's a kind of rogue client situation that we're trying to deal with, but we haven't had in our history.

JOËLLE BOISVERT

High level, how does it work? You said that you talked about David and Goliath. Basically, how does someone come to you and what's the high level, the process?

TANIA SULAN

Yeah. I think it's really not just for the David and Goliath. I think that's the most natural fit, of course. We will have very sophisticated clients who might come to us and say we're thinking of pursuing this litigation, these are the lawyers that we are considering using, but we really need to think about how we're going resource this litigation. But as I said, mainly it's the lawyers who are coming to us to explore.

So the first thing we do is enter into an NDA so that we... everything that we're told is covered. We aim to put it under the rubric of privilege and to maintain the confidentiality, which I think is very important for everyone. We always want the client to be signing that NDA because sometimes the lawyers want to explore things - which we're happy to do on a no-names basis - but I think once you're getting into the nitty-gritty, we really need to

have the client involved in the process.

We enter into an NDA, and then we look at some high level factors, which are really the merits of the case. Does this case, on a high level, make sense? Does it seem to make sense? Is it something that fits within our parameters? We look at breach of contract, breach of duty, international treaty claims. We do a merits' analysis. We do an analysis of the commerciality of the case from a funding perspective, because you can have a very strong case; it just might not be suitable for funding because once you get involved with funders it can become expensive. We look at the likely budget as best as can be estimated at the time relative to the likely claim size, which again is the best estimate, and typically we're looking at a ratio of 1:10, of legal budget to likely claim size. The reason that we do that is historically we've returned 62% to 63% of the claim recoveries to the client, and that is something that we think is really important is sustainable funding industry and is a repeat plan. In this business we want not to be a funder and lawyer fee fest, and for the clients to really extract a lot of value-added of the claim. There's a lot of US hedge funds and venture capital funds that are looking in this space and we're seeing some examples in the Canadian market of international arbitrations where those investors are taking 70%-plus of the client's recoveries, which is something that's... it doesn't fit with the ethos of how we as a repeat <inaudible> business want to do business. That's an important metric that we look at.

And then, of course, enforcement and recoverability is another key thing that we look at the outset. And then if all those things weigh out, we would enter into a term sheet with the lawyer and the client and us, so everybody knows the commercial terms on which we would proceed. That's a non-binding term sheet, except as to exclusivity, so we will ask for a period exclusivity to look at the claim in detail, so usually 30 to 60 days depending on the nature of the case where we will do a really deep dive into the case and make sure that we can recommend it to our Investment Committee. In that process, we often will get second opinions. If the quantum case needs some work and there's an expert that needs to be engaged, we can do that. If there's a complex technical area, we can also engage with those experts at that time. And then if we get comfortable then we have a five-person Investment Committee who we report to and will make a decision as a company as to whether we want to make the investment. The Investment Committee includes a retired judge, so we have lots of different perspectives in relation to our investments.

Just in terms of the modelling, it's overall a very flexible solution. We fund single cases. We fund portfolios of cases for clients, so there might be a group of cases and the due diligence on those cases that we would do would be less involved, but we do a bit of due diligence on all of the cases, and we can cross-collateralize our return from each of the

cases, which means it's a less-risky proposition for us, but our returns are generally less. But that's been less of a feature of litigation funding up until now. It's been more about single cases, so on the single case basis we really can step into the shoes of the client in terms of billing and pay all of the costs, all of the disbursements and the fees, any adverse cost orders, or there's all sorts of risk-sharing arrangements that we can with clients and with law firms where the risk and reward of litigation can be shared.

What we're seeing as quite an attractive model in the Canadian market is where I don't think lawyers in commercial cases are 100% comfortable with doing complete contingency arrangements that maybe the lawyers will carry part of their fees on a contingency basis in return for a small uplift. The client may pay some of the disbursements. We'll pay the balance of the legal costs. And it really aligns everybody's interests, and I think from a client perspective having your lawyer <inaudible> carry some of the fees is quite compelling because they are really believing in the case. It's a completely different dynamic that's available than just paying the lawyer on an hourly basis.

JOËLLE BOISVERT

So that's the funder is you. On the lawyer's side, Tom, what do you see with respect to third party funding pertaining to arbitrations?

TOM PRICE

I think what third party funding does is it takes away all of those evils, if you like, of the relentless monthly bills that you see in a piece of litigation <inaudible> arbitration and, once it's started it's not just the relentlessness of those bills, it's the unpredictability of them. Most clients, as I understand it anyway, their complaint about bills is not necessarily the size of them, although that's probably something to do with it, but it's the unpredictable nature of them, and perhaps the lack of transparency, and the fact to a large extent a case takes on a life of its own once it's started, in terms of the other side may have an army of lawyers and are just running up huge costs which you have to meet.

So I think litigation funding fills that or addresses that angst. It's also - I don't want to get in... we haven['t got time. I don't want to get into too much history - but there've been other ways of trying to fund litigation and arbitration, other than just paying your lawyers the hourly fee, and I don't mean just on having a fixed fee for the case, because that has its challenges, as well. But what about paying the lawyers a conditional fee where there's an uplift on the fees if you're successful, but nothing if you're not? And that was very popular in England, actually, for about 20 years sort of through the '90s, and early 2000s, but that's fallen out of favour because you now cannot recover the uplift from the other

side, and so there's now no particular benefit in doing that. Contingency fees have never really caught on in England. I don't know really why that is, because... well, I do know why it is, but I don't know why there's a disparity between that and the US for example, but our regulations don't make it very easy because they have to be a complete contingency fee; you can't do a partial contingency fee. And also, there are some difficulties around getting out of the agreement. The regulations make that rather difficult. So contingency fees aren't really an option either, which then leads you to third party funding, and so that's why it's growing.

And the other reason is, which may lead us neatly to the last bit, is that there is a growing market in investment treaty claims, and this might seem quite rarefied. Joëlle, shall I go to this bit? Is this... A moment to go to this. I'm not going to take you through my slides on investment treaties, you'll be pleased to know, because we're right in the last five minutes.

But this may be of interest only to some of you, none of you, but I'll keep it short. If you've got an investment into a particular country, you may end up having a contractual claim against your counterparty for something. You've invested in a power project in Venezuela and there may be issues that arise out of that, and you have a contractual claim against your counterparty. But there may be some form of expropriation by the government, and that expropriation isn't necessarily, but it might be, sending the military in, but that's usually a bit unsubtle, but I have seen that in some cases - obviously, we all have. It can be a creeping expropriation. It can be withdrawal of licenses. It can be increasing tax audits. It can be all sorts of things. And that leads to a claim - a potential claim - against the government of that state. These are all based on... nowadays tend to be based on investment treaties between that state and the state of the investing entity. In history, a lot of these claims have been based on state support guarantees and suchlike, but now they tend to be more based on bilateral and multilateral investment treaties, and there has been an explosion of the number of these treaties.

The key is - and what these cases tend to be about is - do you have a qualifying investment, and the definition of the investment in the treaty, and they are usually very broadly defined, so it's not just, you know, you've invested in a power plant or whatever. It may be a licence, it may be a contractual claim, some sort of intellectual property claim. Do you have a qualifying investment, and has there been breach of the standards that you would expect? And those standards are also set out in the treaty and tend to be things such as fair and equitable treatment, non-changes in the law, and so forth.

And then the key to all of this is that those claims are then subject to an arbitration provision, and very often that arbitration provision - well, the arbitration provision is laid out

and in some cases may be before ICSID at the Centre for Settlement of Investment Disputes run by the World Bank - and that is all I want to say on investment treaties in the sense that there is a growing number of those, and that's the direct effect of the growing number of investment treaties that exist. But the point is that those types of claims tend to be quiet susceptible to third party funding, because it's not that you just don't want to have the cash flow issues of paying your monthly bills, you simply may not have any money to bring the claim, because it may be that the investment was set up through a special purpose vehicle and it may simply be that there's nothing there - the investment has been expropriated.

And Tania will possibly be able to speak more to this in terms of numbers, but certainly investment treaty claims are I think a popular area for investors to go to funders and say, "Is this something that you're prepared to fund?" The numbers tend to be large, as you will understand, and that has a factor to it. And so that's I think where these two interact.

TANIA SULAN

I don't have any precise numbers, but I do agree that there's been an increasing trend. I think from a funders' perspective, the key issue <inaudible> is enforcement, and we're seeing a number of these types of claims with positive outcomes against South American countries that how you collect is quite another thing, and there are funders who really specialize in that, who have in-house capacity that if you're going to work with a funder for that type of client, you've got to make sure they have that capacity that they can partner with someone who does.

TOM PRICE

My only final comment on that is that what is really important is, and this comes back to actually - neatly perhaps - the thing about looking at your arbitration clause when you're dealing with your deal... when you're doing the deal, rather than looking at what you've got afterwards, is - and this is a big topic - the whole idea of if you are making some form of investment it doesn't necessarily need to be some massive power project, it could be something much more, though, but, you know, it doesn't matter what your project is. When you are making an investment, are you structuring it in a way that benefits the available investment treaties that might be out there? And that might mean incorporating a special purpose vehicle in a jurisdiction which has a treaty, whereas, if you haven't done that, there might not be any treaty available.

So there is a piece of work there to be done around making sure that your deal, which will go no doubt through all of the tax and compliance angles, is it actually looking at the

investment treaty landscape, as well?

JOËLLE BOISVERT

Thank you, Tom. Thank you, Tania.

TANIA SULAN

Thank you.

JOËLLE BOISVERT

We told you we would be done by 10:00. It's a couple of minutes before 10:00, but we still have time for questions, if you have any. If you don't have questions now and they come up through the day or in the days forward, feel free to reach out to Tania or Tom. You have their contact info in the information. On my personal behalf, thank you for being here, and on all our behalf, and on behalf of Gowling WLG, thank you to all of you for taking the time this morning to join us. We hope that the presentation was interesting, useful, and that your leaving with some takeaways. Thank you very much.

<Audience: applause>

<End of Recording>

Related International Arbitration

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