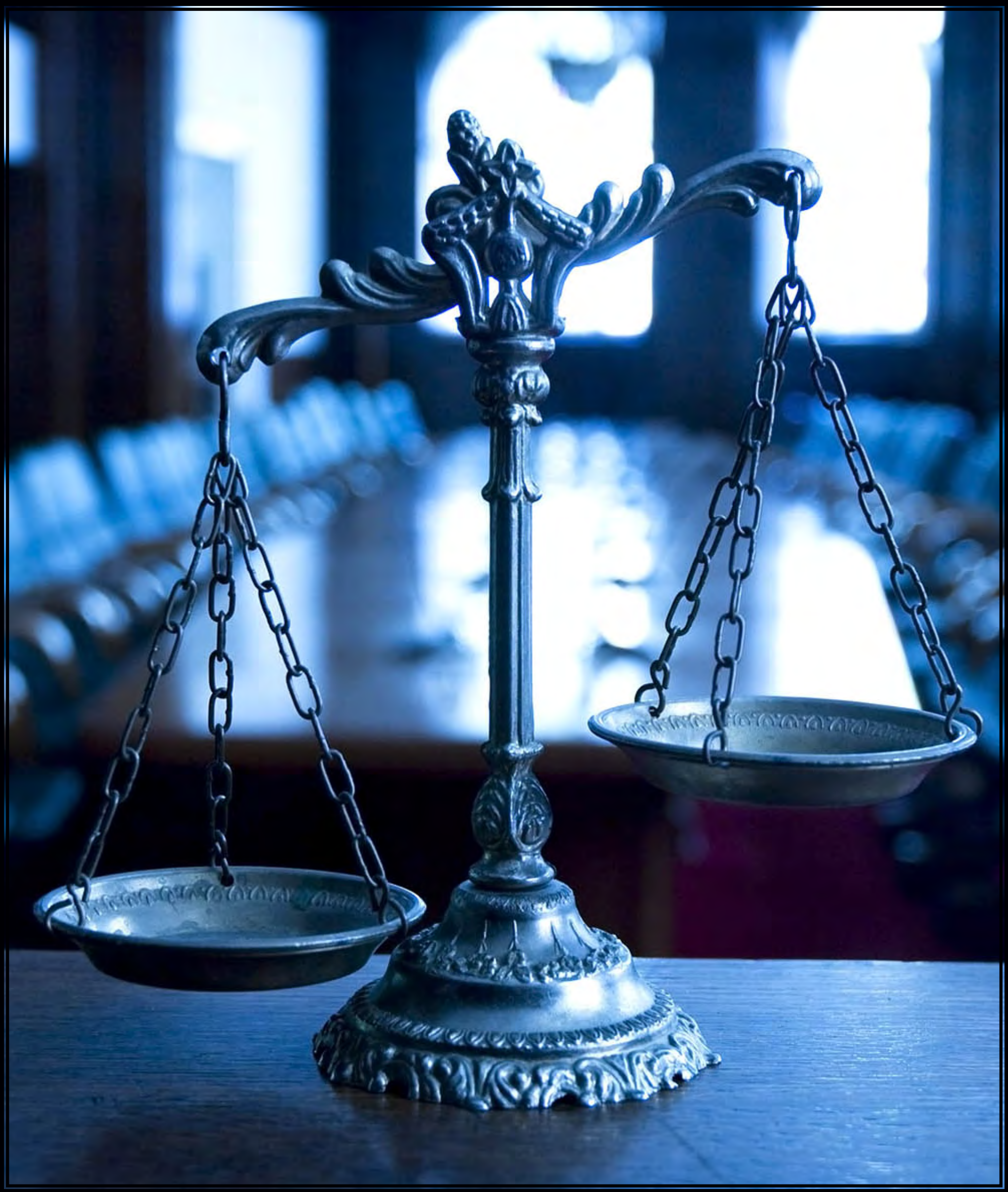
VIRTUAL ROUND TABLE

CORPORATE LiveWire

Litigation & Dispute Resolution 2014



MEET THE EXPERTS

Selvyn Seidel - Fulbrook Management LLC
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Selvyn Seidel founded and chairs Fulbrook Capital Management LLC, an institutional advisor in commercial claims. Fulbrook identifies, evaluates, manages, and arranges capital for commercial claimants to apply towards prosecuting meritorious claims. Fulbrook specializes in complex national and international claims, whether brought in the United States, or in another country. It has a special and in some important ways unique capacity and goal to assist in enhancing the value of the claim closer to its true value, reducing costs needed to prosecute the claim, and bringing more certainty to the process and costs involved.

Prior to Fulbrook, Mr. Seidel co-founded and chaired Burford Group Ltd., the investment manager for Burford Capital, LLC. Burford Capital went public on the UK Aim market of the London Exchange in October of 2009. It is now the largest institutional litigation funder in the world. Mr. Seidel is often identified as a leading voice and visionary in the funding industry.

Before entering the funding industry, Mr. Seidel practiced as a litigation attorney, and has over 40 years of experience in complex litigations and arbitrations. He represented business entities in diverse complex projects in the United States and abroad. Until December 31, 2006, he was a senior partner at Latham & Watkins, a leading international law firm. At Latham Mr. Seidel was a co-founder of Latham's New York office in 1985, and was, at different times, the Chairman of its International Practice, the founder and Chairman of its International Litigation and Arbitration practice, and the Chairman of its New York Litigation Department.

Mr. Seidel was for ten years an Adjunct professor at New York University School of Law. He is an Advisory Board Member of the Center for International Arbitration law of New York University Law School. He is currently an Alumnus Lecturer at Linacre College, Oxford University. He is also a Board Member of Oxford Law Alumni of America. He lectures on the industry and participates in conferences and presentations at various leading law schools in the U.S. and UK, and at leading Institutes (such as the RAND Institute of Civil Justice). He has authored many papers and publications relating to Third-Party Funding of Commercial Claims. He is widely referred to and cited in the media.

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Mr. Rosovsky leads the firm's litigation practice and represents Israeli and international clients in complex litigation, with emphasis on corporate and commercial disputes, class actions, large-scale environmental cases, telecom, antitrust and administrative law. Mr. Rosovsky routinely appears before courts of all instances and arbitration panels and he has been involved in numerous high profile litigations. Most recently, Mr. Rosovsky has been representing: the bondholders of I.D.B. Development (Israel's largest conglomerate) in proceedings to protect their rights in NIS 3.7 billion of debt; Bank Leumi, Israel's second largest bank, in connection with the bankruptcy of a major holding company and against its controlling shareholder; Apax Partners, a global private equity firm, in a dispute concerning the disclosure of financial statements; The Saban Group, in a class action against the acquisition of Partner, a cellular company; Tnuva, Israel's largest food conglomerate in various consumer class actions; cellular companies, in class actions relating to radiation and consumer protection; Discount Bank and First International Bank, in various commercial cases and class actions; Psagot, Israel's largest investment house, in class actions; Russian businessman Arkady Gaydamak in various multi-million dollar litigations; Russian businessman Oleg Deripaska in a claim brought by rival businessman Michael Cherney; Veolia, in a shareholder dispute concerning the Jerusalem Metropolitan Railway.

Mr. Rosovsky is also active in public affairs: he served in a five-member committee for the selection of Israel's Attorney General and is a member of the advisory committee to the Minister of Justice on civil procedure. In 2012, he was the only private attorney to be on the shortlist of nominees to the Israeli Supreme Court.

MEET THE EXPERTS

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Guy Harvey joined Shepherd and Wedderburn's London office in 2009, having previously been Head of Commercial Litigation and a London office partner for two of the largest regional law firms. He has over 30 years' experience of a wide range of complex disputes across various sectors, including competition, judicial review, professional negligence, international litigation, contentious chancery work and cases at every level of the English Courts. Guy has also had extensive experience of mediations across a wide range of disputes and of various international arbitration and ADR procedures. He has been consistently recognised as a leader in his field in legal directories.

Simeon V. Marcelo - Cruz Marcelo & Tenefrancia
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Simeon V. Marcelo was appointed Solicitor General in 2001. Due to the delay and the paltry value of assets recovered (P26 Billion) since the 1986 Revolution, he gave priority to cases against the Marcoses and their cronies which led to the recovery of ill-gotten wealth worth at least P130 Billion Pesos. Two years later, he assumed the position of Ombudsman, the youngest appointed to it, until November 2005. As Ombudsman, he headed the panels prosecuting anti-graft cases against senior government officials, including President Estrada who was convicted of Plunder. In 2008, in resuming his private law practice, he was described by two publications as "perhaps the country's best litigator".

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Practice Areas

Marco Tulio Venegas is engaged in the following pratice areas:

Constitutional and Administrative Proceedings

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Industrial and Intellectual Property

National and International Commercial Arbitration

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Greg Fullelove is a Partner in the international arbitration and international disputes teams at Osborne Clarke. He has acted as counsel and advocate in both international commercial and bilateral investment treaty arbitrations under the leading arbitral rules, in particular in the financial services, energy (including renewable energy) and mining sectors. He has also been involved in litigation at all levels of the English court system and in 2004 served as judicial assistant to The Rt. Hon. the Lord Woolf. Together with Julian D.M. Lew QC and others, Greg is an editor of the practitioner text on arbitration law and practice, Arbitration in England.

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Joel is National Head of Commercial Litigation with responsibility for team and individual performance throughout the UK litigation team. Joel regularly leads high profile and high value cases, providing strategic analysis and direction whilst creating and delegating to the appropriate members of his team to drive the case forward as necessary.

Joel's approach is to create teams and project manage cases to meet the client needs and to lead to the most cost effective outcome for the client. Joel is one of the leading litigators in the Northwest. The Legal 500 describes Joel as "excellent", and Chambers Guide describes him as being "pragmatic, commercial and very knowledgeable" and is praised for his "sound commercial approach allied to his concerns for the client's goals".

MEET THE EXPERTS

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Partner and Head of Litigation, Ross frequently acts in complex international insolvencies, restructurings and security enforcements and is regularly retained by local and overseas insolvency professionals, directors, fund administrators, auditors, creditors and investors in connection with all aspects of the restructuring and winding up of companies, investment funds, limited partnerships, SIV's and structured finance entities. He has specific experience of coordinating cross-border appointments and obtaining recognition and assistance for insolvency professionals appointed by foreign courts. Having practiced continuously in the Cayman Islands since 1994, Ross is one of the most experienced litigators at the Cayman bar and has acted in more than 40 reported cases and was admitted in the British Virgin Islands in 2008.

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Stuart Evans is Head of Litigation at Rawlison Butler LLP and responsible for many of the firm's key litigation clients. Stuart is a registered mediator. Rawlison Butler LLP provides complex and highly valued advice to multinationals, plcs, SMEs and high net worth individuals, with close links to leading international lawyers. In terms of dispute resolution, the firm looks to find successful early outcomes where possible, using litigation as a tool in that process and flexible litigation funding solutions. Particular areas of specialism include contractual disputes, boardroom disputes, brand protection, professional indemnity, insolvency, engineering, international asset tracing, commercial fraud and defamation disputes.

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Tom Wiegand is a trial lawyer whose practice includes complex business litigation, class actions, white-collar criminal matters, antitrust matters, and state and federal government investigations.

Mr. Wiegand has represented both plaintiffs and defendants in complex business litigation matters involving a wide variety of claims, including common law and UCC contract claims, statutory and common law fraud, fiduciary duty, and myriad federal and state statutory claims, including RICO, TILA, FCRA, the Lanham Act, the Sherman Act, and various securities laws. He also has represented clients in numerous state and federal class actions, often grouped through the federal Multidistrict Litigation Panel, which have involved cutting edge procedural and substantive issues.

Litigation & Dispute Resolution 2014

In this roundtable we spoke with 10 experts from around the world about the latest changes and developments in Litigation and Dispute Resolution. Our chosen experts discuss key topics including the recently implemented Jackson Reforms, litigation funding and the advantages and disadvantages of alternative dispute resolution.

1. Have there been any recent legislative changes or interesting developments in your jurisdiction?

McDonough: There have been interesting developments in the area of litigation funding. In the Cayman Islands traditional common law rules against champerty and maintenance made it difficult to introduce alternative fee arrangements for litigation funding. However, in October 2013 the Cayman Grand Court sanctioned the entry by official liquidators into a conditional fee arrangement by which the liquidators' attorneys would be entitled to a significant uplift in the fees that they could recover in the event that they were successful in litigation being pursued by the liquidators. The Court held that the increased access to justice that these types of arrangements potentially provided outweighed the public policy concerns - rooted in the concepts of champerty and maintenance - and that attorneys acting under such arrangements might be tempted to act improperly.

Marcelo: In late 2012 the Philippines Supreme Court created a National Committee [with Atty. Marcelo as a member of the Core Committee and Content Chairperson (Special Remedies During Trial)] to revise the rules of civil procedure to solve the problem of heavily congested court dockets. The approval of the proposed Civil Procedure by the Supreme Court will depend on the results of its pilot testing next month.

Prior to its drafting of the most important development in our procedural rules (which was incorporated in the proposed Civil Procedure) is the Judicial Affidavit Rule. Under this Rule, in lieu of direct examination, judicial affidavits of witness are submitted.

Heap: The Jackson Reforms, which amongst other things, abolished the recoverability of success fees and ATE premiums from the losing party. Despite the stated aim of the reforms, the concern is that there will be a perceived increase in the risk and upfront cost of litigation. Whether in commercial or PI the balance of power has shifted to defendants. DWF remains open for business to risk sharing and third party funding to share risk and cost with Claimants but our emphasis is clearly on the clients' best interests and in many cases it's hard to see how a CFA is.

Fullelove: Recently there have been significant developments in civil litigation resulting from the "Jackson reforms" (most of which were implemented from 1 April 2013). These reforms are named after Lord Justice Jackson, who in a 2010 report made a series of recommendations aimed at controlling costs and promoting access to justice.

An important development is that new 'contingency-fee' style funding arrangements – known as "damages-based agreements" (or 'DBAs') - can now be used. This opens the door for the first time to lawyers litigating in return for a (capped) share in any recovered damages. There is general agreement, however, that the applicable DBA regulations will need to be clarified before DBAs can really be widely-used.

The Jackson reforms are also set to impact on how disputes are litigated in the courts. For example, there are new rules relating to: (i) the preparation of litigation budgets; (ii) 'disclosure' of documents (with courts encouraged to make use of a flexible range of disclosure options); (iii) costs sanctions for parties who have rejected formal settlement offers (known as 'Part 36' offers) but then 'failed to beat' such offer at trial; and (iv) the handling of witnesses and experts.

Evans: The "Jackson Reforms" (effective 1 April 2013) introduced significant changes to the conduct of litigation in England, with judges now taking a more active role in managing costs and cases. In brief, success fees under Conditional Fee Agreements and After the Event insurance premiums ceased to be recoverable from losing opponents for any arrangements reached post 1 April, with limited exceptions. Damages Based/Contingency Agreements are now permissible. Costs budgets must now be agreed early on by the parties and approved by the Court. The Court also has more options for the management of disclosure/discovery, requiring the advance preparation of disclosure reports. There are also

fresh sanctions for parties rejecting prescribed settlement offers that are beaten at trial.

Harvey: 2014 will see the effect of full implementation of the so-called Jackson reforms to the English court process. This marks a significant increase in the management of cases by judges, who will be involved from the outset in policing costs, timing of steps and in driving forward efficiencies. Already the effect of producing full costs budgets for agreement or approval has led to some stark differences of approach between lawyers. This whole area will be the subject of interesting judicial management decisions over the coming months. The traditional laissez-faire approach to time limits has gone to be replaced by much great scrutiny by the courts.

Venegas: Recently, there have been two reforms to the provisions regulating the Mexican arbitration act, which is contained in the Commerce Code.

The first amendment was published in the Federal Official Gazette on 27 January 2011 and was aimed at regulating judicial intervention in arbitration, amongst other matters. With this amendment, a special proceeding for commercial transactions and arbitration was included, regarding challenge of arbitrators, competence of the arbitral tribunal, precautionary measures in arbitration, annulment of commercial transactions and arbitral awards and recognition and enforcement of an award requested as a defence in a proceeding or trial.

The second reform, published on 6 June 2011, introduced specific rules regarding the courts' obligation to remit the parties to arbitration if an arbitration agreement exists.

The Public Works Law and the Acquisitions Law were also recently amended to include arbitration as a method of settling disputes arising from contracts executed between a private party and a state entity.

In ordinary litigation, class-actions were recently introduced in certain specific legislations (see question 3).

Rosovsky: There were two major relatively recent legislative developments in our jurisdiction that concern Litigation and Dispute Resolution:

The first one is an amendment of the Civil Procedure Regulations [1984] (section 503A) concerning the jurisdiction of Israeli courts over foreign defendants. Prior to the amendment, a foreign defendant who was served with a complaint attempted to vacate to leave for service outside the jurisdiction, was at risk of subjecting himself to the jurisdiction of the Israeli court merely by attempting to challenge the jurisdiction. A foreign defendant, who appointed an Israeli attorney in order to challenge the jurisdiction, was at risk of being served through the attorney, who could have been deemed as an agent for service of process. And a foreign defendant, who arrived to Israel in order to participate in a hearing concerning the jurisdictional issue, was at risk of being served personally. This situation led to the development of a complicated body of law concerning the drafting of the limited power of attorney to be given to the local attorney, and the matters in which the local attorney could act on behalf of the foreign defendant. The lack of clarity on that matter created situations in which local attorneys who were given a limited power of attorney for purposes of challenging the jurisdiction were deemed to have acted outside the power of attorney, and therefore became agents for service in Israel, subjecting their client to the jurisdiction of the courts.

Under the amendment, a foreign defendant challenging the jurisdiction of the Israeli courts, on any grounds, can be served with the statement of claim, however, this action does not impart the Israeli court jurisdiction until a final decision is given on his jurisdictional argument.

A second significant renovation was with regard to a recent judgment (dated February, 2013) given by the economic court in Tel-Aviv in the field of class-actions. In this recent judgement, a petition to file a class action was accepted even though the petitioner did not have a personal cause of action (as required under the Israeli Class Actions Act [2006], with minor exceptions), but rather it was an non-governmental organisation, advocating for public causes. In its judgment, the court decided that in circumstances where an individual petitioner, with a personal cause of action, is hard to find, a public organisation may have standing to file a petition to file a class action.

2. With the economic recovery gaining traction, do you expect to see your level of activity affected?

McDonough: The Cayman Islands is the domicile of more than 80% of the hedge

funds in the world. Although many of these funds are open-ended, some funds have effectively lain dormant with redemptions being suspended since the liquidity crisis and economic downturn of 2007/2008. As economic activity increases and investors see better and more opportunities for investment, it is anticipated that there will be more investor agitation to withdraw capital from these so-called "zombie funds", so that it can be put to other uses. Accordingly, we anticipate that investors will more actively consider their options in relation to forcing an exit from such funds including increased use of winding up proceedings on the just and equitable ground asserting that a fund has lost its substratum because it has become impractical, if not actually impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based upon the representations contained in its offering documents.

Marcelo: As regards the present economic recovery of the Philippines, our law firm is now handling more tax cases due to radical changes in the relevant regulations introduced by the Department of Finance. Also, the number of intra-corporate disputes is starting to increase. Further, since the Government has finally escalated the pace of bidding of numerous big-ticket government infrastructure projects, many losing bidders resort to litigation and other alternative modes of dispute resolution to contest the awards to the winning bidders.

Heap: We've actually been really busy through the down turn which feels counter intuitive but that's because we offered funding solutions to our clients who were feeling the pain in that period which allowed them to bring cases that might otherwise have been stifled.

But as the economy grows; we as a business see our clients' transactional activity picking up which inevitably leads to more disputes arising out of corporate transactions like warranty claims, earn out, completion accounts, and additional consideration claims.

Financial institutions will remain a target for negligent advices given, but they themselves will become claimants as asset values recover.

Seidel: The level of activity in third party funding of commercial claims in the United States and the United Kingdom - the two most active funding jurisdictions - should not materially affect our level of activity in this coming year. There are so many claims and claimants who are in financial distress, that even though some of those will be less distressed this coming year, there should not be a material impact this coming year on the level of activity of third party fund for at least two reasons (1) the number of the claimants in need is so great that even if this population diminished, the remaining number would still fuel a level of activity that should not be less than last year, and (2) the number of claimants who are turning to third party funding who are not in financial distress but view this as an attractive alternative to funding the case themselves, is starting to increase, and that should itself cause an increase in the level in the industry.

Evans: We expect to see raised levels of activity this year, as an economic recovery will improve the parties' prospects of funding a case, and also increase the chances of a successful recovery. As parties transact a higher volume and value of business, inevitably there will be a proportionately increased number of matters to resolve between those parties. On the flip side, banks may also see "sick patient" customers moving to a position where a bad debt becomes a recoverable debt, and with the Revenue also having targets to meet, it is possible that more insolvencies may arise, leading to a greater flow of disputes between office holders, creditors and board members.

Harvey: Litigation is traditionally said to be counter-cyclical and it is true that during the recent recession there has continued to be a flow of work. That said, much of the disputes which exist because of the slump have yet to be litigated; it is only now that some of the losses are being crystallised. Some businesses have been unprepared to put more good money forward following the turbulence during the last few years. The growth of third-party funding, the introduction of damage-based agreements and alternative insurance products should lead to a greater freeing up of disputes in the pipeline, with the result that litigation work should continue to grow at a steady pace in more clement economic conditions.

Venegas: Economic recovery in Mexico is generally traduced in a significant increase in foreign investment and in the execution of major public works, especially in the energy and telecommunication sectors. Therefore, the level of activity for lawyers in general tends to increase as well.

Rosovsky: Yes. An increase in the level of activity is already noticeable. There are (and we expect to see more) transactions made by foreign investors and foreign investment funds in Israel. We also see a surge in cases involving creditors' rights in publicly traded debt. In the past year, the most influential case was that of I.D.B. - Israel's largest conglomerate. The I.D.B. case, which was initiated by our firm as counsel for bondholders holding over NIS 3 billion in debt, In that case, ended with the court approving an arrangement in which the control of the company was transferred from its controlling shareholder to a third party.

3. What impact do you believe class-action litigation will have in 2014?

Marcelo: While the Philippines recognise the institutions of class suits, the Supreme Court has applied stringent conditions for a suit involving numerous parties to be considered a proper class suit. (cf. Rule 3, Section 12 of the Rules of Court) Thus, this procedural rule is hardly used.

With the increasing interest and awareness on environmental laws and protection, however, environmental class actions are expected to increase. The Rules of Procedure on Environmental Cases recognise common rights and interests which may inhere in a group of people upon which a class suit may be brought. (cf. Section 1, Rule 7)

Weigand: We might start seeing a swing of the pendulum back in favour of class actions. In securities class actions, for example, even if the fraud on the market presumption of reliance from Basic v. Levinson is overruled in whole or in part, classes of securities owners still can be certified and they can fulfil useful functions. Aside from determining reliance, a plaintiff in a securities action has to address the paramount question of whether the challenged public disclosures were materially misleading. This factual issue is common to all class members, and determining this issue "once and for all" benefits not only the parties, but the integrity of the judicial system. Otherwise, when multiple trials proceed on this same issue, we risk that different finders of fact reach conflicting conclusions. Once the common issue is determined for all class members, individual class members could then proceed with separate cases in which only certain additional issues would need to be proven, such as reliance, injury, and damages in the securities context. Similar key issues could be decided in antitrust collusion cases or a variety of other class cases.

Fullelove: Class actions in the sense of the US term do not exist in the UK. That said, a more limited "group action" process has been increasingly seen in England since the introduction of the Civil Procedure Rules in 1999. Under these procedures, claimants have to be identified and 'opt into' the proceedings. Indeed, each claimant must start its own proceedings. Group litigation has long been popular in pursuing securities, product liability and competition claims.

The current law is also set to develop. The Consumer Rights Bill (January 2014) includes controversial plans to increase the scope for class action litigation by allowing victims of competition law violations to receive compensation automatically as a result of a successful class action unless they have opted out.

Evans: One area where we would expect to see greater activity is in relation to class action litigation against banks. The list of alleged claims is significant. These include Payment Protection Insurance (PPI) mis-selling claims, interest rate swap claims, LIBOR claims, overcharging and claims arising out of advice on securities and investments. It is understood that RBS, for example, has set aside more than £3 billion for compensation claims and legal costs, with Lloyds also set to confirm provisions. The similarity of the claimants' positions on some of these claims may make a class action an appropriate and proportionate course.

Venegas: Class action litigation was fully introduced in the Mexican legal system as per the constitutional amendments of 2010. Before 2010, class-actions were exclusively regulated in consumer protection matters. Based on the aforementioned constitutional amendment, a series of legislative amendments were published between 2010 and 2011, which included modifications to the Federal Code of Civil Procedures, as well as secondary regulation of class-action litigation for the defence and protection of collective rights and interests, but exclusively in the following matters:

- Consumer Protection;
- Environmental protection matters;
- Protection and defence of the users of financial services;
- Antitrust matters.

The use and practice of class-action is therefore still under development. Thus after two years of their formal

implementation, practice and case law will certainly have an impact in 2014, especially considering that the Mexican legal system and access to justice in general were individually designed and the protection of collective rights was limited. As class-action litigation spreads, a decrease in caseload is expected for Mexican courts.

Rosovsky: We believe, as in recent years, that the class-action litigation will have a substantial impact in 2014. For several years now, there has been a large increase in the number of petitions for approval of class-actions in Israel (according to Israeli law, the representative plaintiff must first obtain the court's approval to submit the class-action). Between 2010 and 2013, the number of petitions to file a class-action in submitted in Israel rose from 433 to 1,132 per year. Most petitions for approval of class-actions are filed against utility and communication companies, municipalities and water corporations. However, they also play a significant role in the securities arena.

4. Can you outline the benefits and drawbacks of typical court proceedings?

Marcelo: Court proceedings in the Philippines suffer from unreasonable delay. However, the enactment of the Judicial Affidavit Rule by the Supreme Court has substantially reduced trial time by at least 50%. Under this Rule, the oral direct examination is replaced by the affidavit of the witness. Furthermore, the approval of the proposed New Civil Procedure, which will be pilot-tested next month, will hopefully further lessen the number of cases and trial time. The Revised Civil Procedure, apart from incorporating the Judicial Affidavit Rule, provides, inter alia, for stages of mandatory mediation, even before the filing of a suit.

Weigand: Court proceedings have several benefits. I will highlight four:

- A typical court proceeding involves a judge who tries to get it right on a daily basis – that is her job, and she is called upon to make decisions far more frequently than most mediators or arbitrators. Experience in judging is terribly important.

- There exists a known set of discovery and other procedural rules that have been thrashed out by thousands of advocates before us, with the end result that these rules are refined and balanced, and their application generally predictable.

- Sometimes disputes require court process over third parties for purposes of documents or testimony, and you cannot achieve that through other channels.

- And when the judgment is thought to have missed the mark, the result can be appealed. The benefit to the system of an appeal is not only for the individual case, but for the guidance that it provides to judges, who then further improve their skill in judging.

The drawbacks are that this process takes time and money. While sometimes an arbitration limited to a single trial day would suffice, there is no way to force an abbreviated process on one's opponent.

Evans: In typical Court proceedings, a trial gets to the truth of the allegations made. This follows a careful process of the parties particularising their claim, providing proper disclosure of documents and witness statements that are then tested on cross examination, and where necessary, suitably qualified technical experts to assist the Court. Ultimately, justice is truth in action, and the fairness and formality of this process ensures that parties can decide, following a sensible risk assessment, whether to go to trial or settle commercially at an earlier stage. The drawbacks are that there can occasionally be delays, sometimes excusable, sometimes not, and the exacting procedural requirements of a case from the outset, which is reflected in front loaded costs.

Harvey: English court proceedings are ever more highly-regulated and for the first time (except in particularly high value cases) cost budgets are ensuring that a party can know its maximum downside liability. The quality of justice is, by and large, high and the high court judges are impressive. Where what is required is a legal ruling on an interpretative point, for example, there is no real alternative to court. On the other hand, the courts have only a limited repertoire of remedies, largely financial, whereas ADR can offer more creative and more practical solution.

Venegas: Despite the increasing development of arbitration, litigation is still widely used in the region. Court proceedings provide a number of advantages, including:

- Potentially less expense, since no court fees apply and it is constitutionally established that justice must be freely administered by the judiciary.

- The avoidance of delay in the ordering and implementation of interim remedies and general provisional relief.

- The avoidance of delay in the judicial enforcement of awards.

- Mexican procedural law is overall modern.

However, the main drawback of typical court proceedings is the heavy caseload that the judiciary faces. In both state and federal courts, a commercial claim can take up to one to five years to be finally settled.

Additionally, the interpretation of Mexican law by national courts is still narrow and formally exaggerated. Courts still have a very domestic approach to cross-border litigation.

Rosovsky: The benefit of court proceedings in Israel is the professionalism of the judges. In the past years, a professional economic court was established in the Tel-Aviv District, and its justices specialise in business transaction and securities.

The most obvious drawback of court litigation in Israel is the amount of time it requires. In average, a case in the first instance can take between 3-5 years.

5. How is litigation funded and can the costs incurred be claimed back through insurance?

McDonough: We have already dealt with recent developments in relation to conditional fee arrangements. However all manner of different funding arrangements are now being utilised. Common arrangements include those where the funder will advance funding at very attractive (to the funder) rates of interest and will also obtain a percentage of any damages or judgment sum recovered. It should be noted that pure contingency fee arrangements by which attorneys obtain a percentage of the recoveries in litigation remain illegal and contrary to public policy in Cayman Islands. However, given that these "damages based arrangements" have recently been made legal in England and Wales there is a distinct possibility that consideration will be given to changing this rule in the Cayman Islands.

It is possible to obtain insurance to cover legal costs and also to ensure that a fund is available to pay any adverse costs awarded against the litigant. Such insurance is generally called "after the event insurance". Although commonly resorted to in England and Wales it is not something that has been widely used in the Cayman Islands but there is no reason in principle why it should not be.

Heap: Litigation is either privately funded or the cost is either shared with the lawyer (through a CFA or DBA) or with a third party funder. With the abolition of success fees and the doubts about the drafting of the legislation for the use of DBAs the government is expecting the "before the event" insurance market to widen. BTE is what you commonly get with bank accounts or house hold insurance. Whilst this may prove useful for consumers it does not (currently) provide a solution for corporates.

Seidel: Litigation in the U.S. is typically funded by the claimant (from its capital or loans); through contingency lawyers who "fund" principally by contributing human resources; through insurance of plaintiffs or defendants; and through funding by third parties (including mainly institutional third party funders, individual commercial funders such as a family office, indemnitors and guarantors, and by friends and family). Costs can sometimes be claimed back or claimed beforehand through insurance, such as in a subrogation case. There is also specific insurance to return legal fees spent, under certain qualifying circumstances, although this insurance is more common in the United Kingdom than in the United States.

Weigand: Litigation is being funded in an increasing number of ways. Part of this is due to an increased willingness on the part of lawyers and clients to price legal services in ways that align the incentives of the client and the lawyer. The ways in which this can be done are multiplying, involving variables such as whether a case ends at an early stage, how long a certain stage of a case lasts, and yes, that old standard – how much work actually is done. What is increasingly arising is that outside litigation funders now might be used where a client and its lawyer do not want to absorb all of the risks themselves. For example, a client might want to pay only a contingency fee, but the lawyer might prefer to be paid in part on an hourly basis and in part contingency. A litigation funding firm can often bridge the gap, paying a partial hourly fee and receiving some of the contingency fee that the client is willing to give.

Fullelove: The funding options for civil litigation costs in England and Wales have changed as a result of the recent Jackson reforms discussed

above. Damages-based agreements or 'DBAs' (whereby the client's legal fees are calculated by the amount of damages recovered, if any) can now, theoretically, be used. That said, DBAs may not be widely utilised until the current (unclear) regulations are amended. Conditional fee agreements (or 'CFAs') in which the lawyers' fees become payable only in the event the client wins can still be used. However, following the Jackson reforms any additional "success fee" cannot be recovered from the losing party. "After the event" insurance policies can be purchased to cover a party's costs (and those of their opponent) in the event that they lose. Finally, third party funding from companies that effectively invest in litigation is increasingly available for claimants (although usually only in higher value claims). Such funding typically involves the funder agreeing to pay legal fees in return for a sum recovered from the eventual judgment or settlement.

Evans: Traditionally, litigation was funded through the parties' resources, with strict rules preventing a third party backing a case or sharing in its reward (maintenance and champerty). Today, there are many more options available to litigants, including Conditional Fee ("No Win, No Fee") Agreements, where solicitors charge a success fee. There is also After the Event insurance, which insures against an adverse costs order (England being a loser pays jurisdiction), and also covers certain disbursements, such as Counsel's and Expert's fees. Insurance policies that cover a party's own solicitors' costs have not been as prevalent, as solicitors in these instances are expected to be sharing risk through a CFA, but this may change. The new Damages Based/Contingency Agreement is still in its infancy. A comparatively recent innovation is that of third party litigation funding, where funders pay for the costs of litigation, in return for sharing in the net spoils of victory once those costs have been recouped.

Harvey: Traditionally in England litigation has been funded by the parties as the case proceeds with the norm being that the winner then recovers a proportion (typically 60/70 per cent) of his costs from the loser. Over recent years there has been a growth in conditional fee arrangements (under which the client pays nothing, or a reduced rate, during the litigation with the obligation to pay at a higher rate in the event of success). Since 2013 it has been lawful to have damage-based agreements (under which the client pays nothing unless successful but then pays a proportion of any damages recovered – a true contingent system, like the USA). It is now common to insure against an adverse costs liability and more recently various insurance products also insure against one's own liability – these products are by their nature and degree of risk inevitably expensive.

Venegas: Pursuant to the Federal Constitution, administration of justice by Mexican courts and by the judiciary in general, is free of charge. Therefore, court fees including but not limited to witnesses' expenses and costs for court activities conducted outside the place of the trial are not charged to the parties.

Based on the foregoing, Mexican law does not regulate the funding of litigation, nor any provision on insurance for litigation costs exists, thus legal fees are usually funded by each of the parties independently, unless otherwise determined by the judge in each particular case.

Rosovsky: For the most part, the litigation is funded by the parties themselves. It is not uncommon for the Israeli court to award costs for the prevailing party, but these costs hardly come close to the actual expense. If a claim is covered by insurance, it is common that the policy also includes coverage of the legal expenses.

6. Which industries are currently experiencing high levels of disputes?

McDonough: There is significant activity in the hedge fund litigation space at the moment. Most disputes concerning funds fall into one of three broad categories:

- Firstly, investors' attempts to realise their investment through seeking declaratory relief as to their redemption rights or bringing winding up proceedings.

- Secondly, disputes as to the value and priority of claims against failed hedge funds.

- Thirdly, claims by liquidators to recover losses from failed funds' service providers and from investors who have managed to redeem or extract their investment from funds in which the net asset value at which the investor was redeemed out of the fund has subsequently been discovered to have been overstated, typically in a Ponzi scheme type situation.

Seidel: Those experiencing high levels

of disputes which are seeking third party funding include: patents, international arbitration, and insolvencies or other serious financial distress cases.

Weigand: The financial industry is one. The financial crisis is an obvious explanation, but without an increased willingness to bring lawsuits the impact would be far less. Rather than any definable community of financial institutions with a common interest around which a clean line can be drawn, there is a greater variety of financial institutions and it seems that former alliances are no longer sacred. Part of this arises because of the increased observance of separateness among affiliates within a single corporation. While one subsidiary of Bank A might not be willing to sue Bank B because of perceived mutual interests, a separate subsidiary of Bank A does not hesitate to sue Bank B. Part of the explanation might also be the rise in prominence and collective market share of hedge funds, private equity firms, and other investors, which can be fiercely independent and approach litigation in their own ways.

Fullelove: As a result of the continuing fall-out from the credit crisis, the financial services sector appears to be experiencing a high level of disputes, which are being resolved both by means of High Court litigation and international arbitration. With regard to financial services arbitration, together with 'traditional' institutions such as the LCIA and ICC; it is worth keeping an eye on the development in coming years of P.R.I.M.E. Finance, a new institution based in The Hague which aims to provide a 'bespoke forum' for the resolution of complex financial disputes, including cases relating to derivatives and swaps. The increase in recent years of the number of regulatory investigations and enforcement actions in the financial services sector is also notable. In our experience, the energy sector consistently experiences high levels of complex and high-value disputes. At the moment, there are a number of eye-catching disputes in the renewable energies sector, including solar claims against Spain and the Czech Republic under bilateral and multilateral investment treaties. Within the renewables sector we view waste, solar and wind energy as likely areas for an increase in future disputes.

Evans: As we have observed, litigation in the banking sector is likely to be a busy area for litigators at present. There are also a number of insurance-related disputes, where parties are challenging insurers over failures to indemnify, based upon such issues as non-notification and policy wording. Professional service industries are also seeing high levels of disputes, dating back to the start of the recession in 2007, as the loss of value of investments, including in real estate, has resulted in claims being made. We are also seeing a high level of disputes in relation to established brands, where counterfeiters are constantly endeavouring to steer business away into the grey market.

Venegas: The highest levels of disputes have arisen in the public sector, especially in public works and public acquisitions related contracts. Additionally, due to the recent enactment by the Mexican government of a reform agenda to several sectors of the economy, the use of arbitration has increased significantly in various industries, including energy, telecommunications and public-private partnerships.

Rosovsky: One litigation field that is currently very active in Israel in insolvency and protection of creditors' rights. Some of the largest corporation in Israel have been involved in litigations initiated by bondholders and the law in this field is developing. We also see an increase in class-actions, in particular in capital market matters.

7. Can you outline the advantages and disadvantages of alternative dispute resolution?

Marcelo: Alternative dispute resolution has the following advantages:
- speedy resolution;
- confidential proceedings;
- parties' control over the process and outcome;
- increased possibility of a win-win situation;
- arbitrators' own expertise; and
- due to a weak judicial system, heightened chance of impartial resolution of the dispute since arbitrators are chosen by the parties.

Alternative dispute resolution has the following disadvantages:
- right to appeal is limited;
- outcome dependent on arbitrators;
- cost affected by incorrect arbitration design;
- possibility of no definite resolution of the dispute; and
- disputed contract may have a vaguely worded mandatory arbitration.

Heap: Gives the parties an opportunity to achieve a resolution at an early stage

and limiting exposure to the cost, time and risk of court proceedings.

The disadvantage is that a party is likely to be required to accept a significant compromise to achieve a resolution and detail which would, in court proceedings, be extremely useful and relevant to the claim, is not going to get the same level of attention.

Weigand: Sometimes parties are not able to agree on a resolution of their substantive dispute, but they can agree to procedural limitations that still allow them to have their dispute decided by a neutral party. Examples of some process modifications are limited exchanges of documents, limited or no depositions, a single day or other limited period for a mini-trial, or agreed high and low judgment amounts that depend on the determination of a key factual or legal issue. Such agreed limitations allow parties who have a serious but narrow controversy to custom-design the process around their specific area of dispute and avoid the other aspects of a long and expensive court process. These agreements are never reached in a court setting, even though judges might allow many of them if parties stipulate to them.

Fullelove: There are of course a number of forms of alternative dispute resolution that do not involve 'adversarial' proceedings such as you would find in a court or arbitration. These include direct negotiation, mediation and expert determination. The 'pros and cons' of such mechanisms may differ slightly depending on the precise circumstances and method chosen. That said, the advantages of dispute resolution by such consensual means are generally said to be that: (i) it can be significantly faster than formal proceedings and as a result less expensive; (ii) a 'conciliatory' approach can foster better relationships for the future; and (iii) there is increased flexibility as to the settlement reached: part of any settlement could be something that a court or arbitral tribunal could not order, such as a 'restructuring' of the business relationship.

As to disadvantages, the following are sometimes cited: (i) parties may half-heartedly engage in alternative dispute resolution procedures (or not at all), leading to delay; (ii) parties may fail to abide by any agreement reached leading to further court/arbitration proceedings being required; and (iii) a 'heavy' mediation or expert determination may lead to significant costs, which could be additional to court/arbitration costs where the alternative dispute method fails.

Evans: Alternative Dispute Resolution brings mainly advantages. In a mediation, for example, parties can "have their say", and then focus on creative outcomes that a Judge could not impose, for example, discounts against new business. For those who are keen to risk assess a dispute, it is a valuable innovation that can be considered at any time from the outset of a dispute. The disadvantages are that it is non-binding, absent an agreed settlement. Whilst it is not mandatory, parties that do not engage in ADR may, however, suffer significant costs penalties. It is therefore possible for a party to fold its arms at a mediation and cynically refuse to co-operate, in order to "tick the box" and avoid such a sanction.

Harvey: ADR is a system designed to move a dispute away from the public scrutiny and all-or-nothing outcome of the courts to a place where the parties can take control of the settlement process and, in more creative mediations, produce a result better tailored to them than the limited range of outcomes available at court. Commercial solutions which suit both may for example extend beyond a straight cash award, which is ultimately what a court normally offers. The process and the outcome are also both private. On the other hand, if what is required is a "win", a decision on a point of law or something like an injunction, Court represents the only route. Also, ADR calls for flexibility on both sides so it is rare for either party to walk away wholly satisfied at the time.

Venegas: Aside from arbitration, which has become the most commonly use alternative dispute resolution method in Mexico to settle commercial disputes (especially in the construction and financial sectors), other ADR methods, such as private mediation and conciliation, are still under development.

ADR methods (other from arbitration) are only regulated in labour and ordinary civil proceedings and no express provisions exist in the relevant commercial legislation, namely the Commerce Code, the Federal Civil Procedure Code and the State Civil Procedure Codes, thus private mediation and conciliation have not been particularly encouraged by Mexican judges.

Despite the above, the use of ADR methods is developing rapidly, as Mexico has proven to be an

efficient and cost effective seat for proceedings conducted in the Spanish language. Additionally, institutions and arbitration centres based in Mexico, such as the Arbitration and Mediation Commission of the Mexico City Chamber of Commerce (CANACO) provide the opportunity for parties to resolve their disputes through mediation and are certainly contributing to increasing the forum for other ADR options.

To the extent that the Mexican judiciary system has shown to have an excessive work load and since commercial disputes taken to court usually take years to be finally settled, companies seem to be increasingly willing to explore ADR methods. As these have proven to be compelling reasons for companies to avoid litigation, the field for mediation (mainly) is becoming wider. However, as noted above, this trend is still developing.

On the other hand, arbitration has become one of the most effective dispute resolution methods in Mexico. As Mexico's arbitration statute has incorporated the UNCITRAL Model Law and it is a party to the New York Convention and to the Panama Convention, both Mexican law and the judiciary in general, are supportive of arbitration. Thus the approach of Mexican courts to the recognition and enforcement of awards has proven to be favourable to arbitration.

On the other hand, recent legislative amendments now guarantee the availability of interim measures in support of arbitration proceedings, both before and during the proceedings. Such provisional relief can be ordered by the relevant court or by the arbitral tribunal, in which case the interim measure is statutorily recognized as binding and shall be enforced upon request to the court.

In contrast to litigation, arbitration offers the main advantage that an arbitral tribunal has more time availability to solve a dispute, in contrast to the local courts which normally have an excessive work load.

Local courts are still however, used for commercial disputes as they can provide a number of advantages over arbitration, including potentially less expense (as no court fees apply), the avoidance of delay in implementing interim remedies and the avoidance of delays in the judicial enforcement of awards.

Additionally, as the amendments to the Commerce Code, in which the 2006 amendments to the Model Law were implemented, are recent (published in the Federal Official Gazette on 27 January 2011 and 6 June 2011, respectively), the provisions included or amended have not yet been extensively interpreted by Mexican courts and case law to assist in their interpretation is still either not available or very reduced. Therefore, in many cases, it will not be possible to foresee the result of a proceeding based on a new provision, until a controversy is brought to and settled by Mexican courts.

Rosovsky: The two main alternative dispute resolution methods in Israel are arbitration and mediation.

The clear advantages of arbitration are that the arbitration is a much faster process than court litigation. The parties appoint the arbitrator (or agree on how the arbitrator shall be appointed) so they can pick a neutral person of their choice. When the claim is for damages in a substantial amount, arbitration could be beneficial because filing the same case in court would require payment of court fees, equalling 2.5% of the claim. Arbitration is also beneficial for parties who want to maintain their affairs in secrecy. The main disadvantage of arbitration is the cost of the arbitrator and the limited possibilities of challenging the award.

The advantages of mediation are that it is a completely voluntary process which is subject to the parties' consent and each party can withdraw from it at any time.

8. What are the main ADR methods used to settle large commercial disputes in your jurisdiction?

Marcelo: The main methods used are arbitration and mediation. In arbitration, arbitrators are appointed in accordance with the agreement of the parties. The Philippine Dispute Resolution Center, Inc., which has been in existence for around 15 years, administers arbitration when the parties' agreement includes a clause that provides for arbitration under its rules. The Construction Industry Arbitration Commission has exclusive mandatory jurisdiction over arbitration of construction disputes.

In mediation, the mediator selected by the parties facilitates their negotiation and agreement. The Alternative Dispute Resolution Act of 2004 also provides for mediation-arbitration, mini-trial, court-referred mediation,

and court-annexed mediation.

Heap: Mediation, commercial negotiation, and expert determination.

Weigand: Mediation is by far the most often used form of ADR. Everyone is familiar with the process, it takes only a limited amount of time, it gets both parties thinking about settling the case at the same time, and frankly there is no downside because a party does not give up any control over its destiny. Mediation is so common that sometimes parties seriously consider settling a case only in the context of mediation.

Fullelove: Alternative dispute resolution methods are increasingly popular in England and Wales with the main forms being (international) arbitration, mediation and, of course, negotiation between the parties or their representatives. Arbitration has long been a dispute resolution method of choice in a number of sectors, including commodities, maritime and insurance. The growth in popularity in recent of years of international arbitration has been reflected in England by the increasing number of disputes being submitted for resolution to the London Court of International Arbitration (the 'LCIA').

Other methods which are common include early neutral evaluation (typically an evaluation of a case by a third party at an early stage) and (particularly in the field of construction and engineering disputes) expert determination, adjudication and dispute resolution boards. The use of ADR, especially mediation, is only likely to increase as a result of the Jackson reforms. One of the publications that has been produced as part of the Jackson Reforms is the pro-ADR "Jackson ADR Handbook".

Evans: Putting arbitration to one side (see below), the main ADR method used to settle disputes in England is mediation, a structured negotiation presided over by an independent mediator, which usually takes place either over one day or on a time limited basis. The process is confidential and non-binding unless and until the parties have signed a settlement agreement. The success rate for mediation (if not on the day, but soon thereafter), is still high. There is also expert determination, which is often a useful contractual mechanism for resolving a dispute in relation to such matters as post-acquisition completion accounts. Other methods include early neutral evaluation, which is a non-binding independent assessment of the case, and also Med-Arb, where a mediator agrees to arbitrate the dispute between the parties if a settlement is not achieved.

Rosovsky: The main ADR methods used to settle disputes in Israel are arbitration and mediation.

It is also common in Israel for the court to refer the parties to one of these methods either after a preliminary hearing is being held or even beforehand. Likewise, it is also common for the parties to try one of the ADR methods prior to filing a claim in court.

9. Can you describe arbitration facilities and processes in your jurisdiction?

McDonough: The Cayman Islands has sophisticated and recently improved and revised statutory provisions to allow for disputes of virtually any nature to be arbitrated in the Cayman Islands. Further, the Cayman Islands has adopted the New York Convention on the recognition and enforcement of foreign arbitral awards and has an advanced and sophisticated statutory mechanism in place to enable the swift enforcement of foreign arbitral awards. Having said that, arbitration and ADR are not that commonly resorted to in the Cayman Islands with most litigants preferring to resolve their disputes through the Court. A factor behind this phenomenon may well be the quality and specialist knowledge of the Judges in the Cayman Islands' Financial Services Division and the ability to have cases fast-tracked to ensure speedy resolution.

Marcelo: There are various laws governing the Philippine Arbitration System. The domestic arbitration process includes submission of agreements, request for arbitration, exchange of basic pleadings, and issuance of an arbitral award. The confirmation and enforcement as well as the setting aside of the award must be done under the jurisdiction of our Regional Trial Courts.

Arbitration is classified as (i) ad hoc proceedings, (ii) Institutionalised arbitration through the Philippine Dispute Resolution Center Inc., and (iii) specialised arbitration for construction disputes through the Construction Industry Association Commission. It is common in contracts involving foreign companies to include a clause that disputes should be resolved through arbitration by international institutions.

Heap: Limited experience but the service offered by the London Court of International Arbitration is very efficient – in managing a dispute and adopting an approach which is particularly suitable (e.g. choice of arbitrator) to the specific facts of a dispute. The advantages are privacy (which the court system is not) but the disadvantage is the cost of the arbitrator (Judges are free!)

Seidel: In New York, they are excellent. We have a wide variety of arbitration facilities and processes, including the AAA, the new New York Institute of Arbitration, the new Centers of International Arbitration, one started by New York University School of Law and the other by the Columbia Law School (the CICIA), the ICC which has recently established a presence here, and others. Indeed, New York has announced its commitment to becoming the international arbitration centre in the world.

Fullelove: England is a renowned centre for international arbitration. One of the major attractions of England is that it is seen as a 'safe seat' for arbitrations. First, it has up-to-date legislation in the form of the Arbitration Act 1996, which governs all domestic and international arbitrations seated in England, Wales and Northern Ireland. Second, the judiciary in England is supportive of and familiar with the law and practice of international arbitration. England is also home to a number of prestigious arbitral bodies. The LCIA is one of the world's leading institutions for commercial dispute resolution as well as one of the oldest. The LCIA's varied caseload continues to increase with parties from around the globe electing to use it for their commercial arbitrations. Other notable bodies include the Chartered Institute of Arbitrators, the London Maritime Arbitrators Association and a number of trade and industry organisations including the Grain & Feed Trade Association ('GAFTA'), the Federation of Oils, Seeds & Fats Association ('FOSFA'), and the London Metal Exchange ('LME').

Evans: Arbitration in England and Wales is governed by the Arbitration Act 1996 and/or any arbitration agreement settled between the parties. There are a number of English arbitral institutions that have their own standard rules, which can be adopted by the parties by agreement. Benefits to arbitration include flexibility of procedure and confidentiality, although some find it an expensive option. To commence arbitration, a notice of arbitration must be served, and an arbitrator or panel of arbitrators appointed. The 1996 Act places a number of duties on a tribunal, including acting fairly and impartially and avoiding unnecessary delay. Awards are final and binding, subject to limited rights of challenge. The Act provides for summary enforcement of the award in the same way as a High Court judgment.

Harvey: London has been a natural choice for arbitration for some time for reasons which are clear. English law is the law of choice for many contracts, even if neither party is based there; whether through private arbitration or bodies such as the LCIA there is an established series of procedures which are both understood and respected; the cadre of arbitrators in England is well-respected and covers most disciplines; the Arbitration Act has been a model for other jurisdictions as well.

Venegas: Arbitration is nowadays one of the main dispute resolution methods used in Mexico, thus over the past few years, facilities, processes, as well as the judiciary in general, have been improved and made "friendlier", as the Mexican State has implemented a pro arbitration policy. For instance, Mexican arbitration law was amended in 2011 to incorporate the UNCITRAL Model into the Commerce Code. Mexico is also a party to the New York Convention and to the Inter-American Convention on International Commercial Arbitration.

Procedurally speaking, Mexico has recently amended its legislation to guarantee that the intervention of national courts in arbitration proceedings is framed as judicial assistance in support of arbitration, and not as interference. Such judicial assistance is dependent on the prior request of either party and is limited to the cases and circumstances expressly regulated by the Commerce Code: remission to arbitration upon the existence of an arbitration agreement and prior request of either party; appointment of arbitrators; production of evidence in arbitration; consultation on arbitrator's fees; challenge of arbitrators; provisional relief; recognition and enforcement of provisional relief ordered by the arbitral tribunal; and competence of the arbitral tribunal.

Rosovsky: Most arbitrations in Israel are ad-hoc arbitrations before practicing lawyers or retired judges. In recent years, there is a rise in the use of institutional arbitration panels, such as the Israeli Bar Association and

the Chamber of Commerce.

The parties may voluntarily choose to turn to arbitration (prior to filing a claim in court) or there is often an arbitration clause in commercial contracts.

Even after filing a claim in court, it complicated matter it is very common for the court to attempt to refer the parties to arbitration prior to proceeding with the case.

10. To what extent are the challenges & complexities of dispute resolution amplified by cross-border situations?

McDonough: In the Cayman Islands virtually every piece of major commercial litigation has a cross border element. This is particularly the case in insolvencies where companies may be registered in the Cayman Islands but do their business in other jurisdictions. This fact can lead to litigants looking to "forum shop" and the possibility of Courts in different jurisdictions rendering conflicting decisions.

Seidel: In the Third Party Funding market and industry, the challenges and complexities are multiplied many times over by cross-border situations. That is true if one looks only at the disputes themselves, but the complexities are double-barrelled when one adds the issues relating to cross-border funding, which themselves hold their own distinct challenges and complexities, and which when combined with those of international disputes, produce integrated new challenges and issues.

Fullelove: Much will depend on the nature of the cross-border situation, but common themes/challenges in cross-border disputes are: (i) complex proceedings about which courts in which jurisdiction should determine the dispute; (ii) ensuring correct service of process on parties internationally; (iii) bringing proceedings in multiple jurisdictions to preserve/freeze assets; (iv) dealing with conflicts of laws issues relating to the gathering of evidence; (iv) the need for careful coordination of lawyers across jurisdictions, often working in different languages and to different deadlines; and (v) at the end of the process, dealing with issues relating to the recognition and enforcement of awards and judgments internationally. It is therefore essential that parties begin with a strategy which: (a) anticipates where the problems might arise; and (b) identifies how to avoid them.

Evans: We find that in terms of disputes between parties within the EU, the challenges and complexities are not as great as they were. It is certainly easier to found jurisdiction in accordance with the principles of the Brussels Regulation, the formalities of service are more streamlined and enforcement is also more straightforward. The position is slightly more complicated when one party is outside the EU, where there may not be a bilateral enforcement treaty in place. However, the English Civil Procedure Rules provide clear guidance on the procedure for such claims, and given the close networks of international lawyers with whom we work, we find that challenges can be met.

Venegas: Local challenges and complexities inherent to litigation, which should be considered in cross-border situations, are the following:

- The interpretation of Mexican law by national courts is narrow and formally exaggerated. Courts still have a very domestic approach to cross-border litigation. In this regard, for example, even though Mexican law regulates and accepts the validity of agreements executed through electronic means, civil and commercial courts still require the parties to file contracts in writing and duly signed.

- The rules of judicial competence applicable to litigations in Mexico focus on the respondents' domicile and there is practically no relevance of the place in which the facts giving rise to civil liability have occurred.

- Mexican courts' are still reluctant to comply with letters rogatory that require the implementation of foreign procedures or institutions, such as the practice of discovery that prevails in common law jurisdictions.

Rosovsky: Cross-border disputes are becoming very common and bring about questions of enforcement of foreign judgments, proof of foreign laws by experts witnesses, jurisdiction over foreign defendants, testimony of witnesses who are not present in the jurisdiction, and more.

11. Can you talk us through what needs to be included in an effective multi-national commercial contract?

Marcelo: In drafting an effective multi-national commercial contract, the dispute resolution clause should include the following:

- indication of the coverage or the kinds of dispute that are included in the arbitration clause;

- the qualifications of the arbitrators;

- the complete rules governing the arbitration procedure;

- the requirements for the enforcement of the arbitral award; and

- if the arbitration proceedings will be under the auspices of an arbitration institution, the complete name of the designated institution.

Fullelove: We should start with some basics. To be effective, a dispute resolution clause needs to be clear and certain. A first key choice in the clause is between court proceedings and arbitration. If you want to go to court, you should specify where and (as a rule) that such courts will have 'exclusive jurisdiction' to hear all disputes under the contract. This is designed to prevent parties running to the courts of other jurisdictions.

If you choose arbitration, the relevant clause should as a minimum: (i) state that all disputes under the contract are to be finally resolved by arbitration; (ii) specify the applicable arbitration rules (e.g., the LCIA rules); (iii) specify the number of arbitrators (1 or 3) and the language of the arbitration; and (iv) state what the 'seat' of the arbitration is. The choice of seat decides which procedural laws will apply and is vital. Parties should check with their counsel that they are selecting a 'seat' with up-to-date and reliable arbitration legislation (as is the case throughout the UK and Ireland). For a sample clause, take a look at the LCIA standard arbitration clause: http://www.lcia.org/.

Dispute resolution clauses commonly also provide for the 'escalation' of resolution procedures, which could mean there will be a requirement not to commence formal litigation or arbitration proceedings until a set time period for (say) negotiation (often directly between company executives) or mediation has expired. Whichever dispute mechanism is chosen, the contract should also, of course, expressly designate the law that governs it.

Evans: This should include consideration of:

• A governing law clause specifying which State's laws will apply.
• A jurisdiction clause specifying which state's courts have exclusive/non-exclusive jurisdiction to determine any disputes.
• Specifying the language of the agreement (e.g. English).
• An ADR clause, to cover:
o escalation of disputes;
o mediation of dispute if parties cannot resolve;
o arbitration or litigation;
o which arbitration rules apply (e.g. ICC), location for/language of arbitration, appointment mechanism for arbitrators, number of arbitrators, etc. and that arbitration is final and binding, save for manifest error.
• There may be mandatory overriding local laws on a variety of matters such as data protection, commercial agency, TUPE type transfers, upon which local legal advice may be required.

Venegas: Although the provisions of the Commerce Code on Arbitration have been recently updated to include the regulation of the UNCITRAL Model Law and now recognise the validity of an agreement to arbitrate if executed in any type of telecommunication means (provided that the agreement is properly recorded), the approach of national courts regarding the enforcement of arbitration agreements is still practical and formal. Thus it is advisable to have the agreement to arbitrate duly executed in writing, signed by the parties and for each party to keep an original counterparty.

The use of a standard institutional arbitration clause should also be considered for the successful conduction of a future arbitration, determining only key elements in advance, such as the applicable law and the seat of the arbitration and avoiding an overregulation of the proceedings.

Rosovsky: An effective multi-national commercial contract shall include a clause stating the governing law that will apply in case of a dispute, and a clause granting exclusive jurisdiction to the court. If one of the parties is not a resident of Israel, it is advisable that such party shall appoint an agent for service in Israel, so that the Israeli party shall not have to seek leave for service outside the jurisdiction.

12. What trends or patterns are you expecting to see emerge over the course of 2014?

McDonough: As alluded to earlier, we consider that there will be an increase investor activism and efforts made to extract capital from moribund investment vehicles. The Cayman Islands Law Reform Commission has also recently issued a consultation paper on the question of statutorily codifying directors' duties currently governed by rules developed under the

common law.

Heap: Post Jackson, the market in litigation funding will pick up and the third party funding market will have to find a workable solution to cases with a value of <£1m. More parties attracted to mediation and to arbitration to avoid Jackson.

Seidel: In the Third Party Industry, the single emphatic point to make here is that there will be a host of new trends and patterns, too many to count in a limited space. One powerful individual trend will be the rapid increase that will occur in Third Party Funding of International arbitrations – a product of the growth of international arbitration itself, and Third Party Funding itself, as well as the growth of their growing partnership.

Weigand: As the U.S. imports goods from foreign companies, the U.S. has been exporting its set of laws and regulations to multinational corporations. One concrete example is the FCPA, which was written for the purpose of changing how companies operating in foreign countries look at bribery or kickbacks. Even if the country's culture allowed or even relied on these payments, the U.S. has slowly forced its contrary norms into foreign countries. Change also is occurring through laws that were not written solely to affect foreign corporate activity. For example, in the last year Chinese companies lost an antitrust trial in New York because they had complied with directions from Chinese government regulators that they adhere to volume and price restrictions – perhaps laudable in China, but illegal in New York. Compliance policies adhering to U.S. antitrust laws are assuredly being taught and enforced at an accelerated rate in large corporations in China as well as other countries with similar traditions. These policies will work their way into the broader corporate culture in these countries, and eventually, even if slowly, into the culture itself.

Evans: We expect to see more bedding in of the "Jackson Reforms". A recent high profile case involving a Government Minister showed the Court's approach to relief from sanctions was much stricter than was previously the case. If this is reflective, parties will have to seek the Court's consent to variations to the litigation timetable. With costs budgeting being very much at the forefront of the reforms, there is a likelihood that costs will be front loaded further to ensure that there is proper procedural compliance and a smooth progression to trial. Disclosure exercises, on the whole, may be trimmed down in future cases rather than escalating into forest fires previously seen. If so, this should have a considerable costs saving.

Rosovsky: We expect to see more international (cross-border) cases. We also expect to witness more cases in which the courts interfere with the management of insolvent companies and further enhance the rights of creditors. We also expect to see more class-actions relating to securities and business matters.