# CAN THE YOUNG PRETENDERS STEAL OUR CROWN?

**Increasingly parties are choosing and being encouraged to arbitrate rather than litigate. London has long been heralded as the global hub for arbitration and, even despite Brexit, continues to maintain that position. Other jurisdictions, like Singapore and Paris, are jousting to knock us off the top spot. Is our eminence justified? How can we ward off the competitors?**

We spoke to four eminent arbitration lawyers to hear their views.

Duncan Bagshaw is a partner at Howard Kennedy LLP. Duncan sees himself first and foremost as an advocate. He qualified as a barrister and started off by doing a very wide range of commercial disputes including some financial cases. After a few years of practice, he realised that the international ones were, for him, by far the most interesting – because of the clash of cultures, the differences of legal cultures, the differences of approaches between parties and lawyers from different places. He decided to expand his international knowledge and practice, and finished up in Mauritius. Duncan had a particular interest in Africa-related matters, having worked on a few such cases, and had fallen in love with the continent.

"At the time, the London Court of International Arbitration (LCIA) were looking for someone to help and set up the new arbitration centre in Mauritius and I went for that job as I saw it as a fascinating challenge, real departure from my usual job and therefore valuable experience. It was great. I spent a lot of time travelling to different African countries, I met a lot of African lawyers and businessmen, I also met a lot of Government representatives and heard about their attitude to international dispute resolution and how they thought it was serving or failing to serve them. I was also offering Mauritius as an alternative place where disputes could be resolved. It had the potential to be an African Switzerland, a reliable and safe jurisdiction."

This set Duncan up for his future work in London which is focussed on international disputes mainly in arbitration, many of which involve an African party.

After three years, Duncan returned to London and joined Stephenson Harwood LLP, because they had a strong international arbitration and African practice which they were looking to grow. He joined Howard Kennedy in 2019 to expand their international arbitration practice.

Does Duncan see London as the main choice for arbitration?

"I think it is one of the main choices. It has never been the main choice for civil law jurisdictions. That has been shared by Paris and a few other major centres like Switzerland and Stockholm. But London has always been the first choice for common law jurisdiction related disputes, particularly in English. It's about getting a tribunal who are most likely to approach the matter in a way you are familiar with. In recent years, the distinction between common law and civil law is getting more blurred, the parties to disputes involving civil law countries are becoming more sophisticated and are aware of the different approaches that may be taken, and are comfortable with them. Also arbitrators are getting more comfortable to tailor their approach, and to make it more nuanced, not just for common law or civil law clientele. In addition, disputes are more frequently occurring between parties where one side may be from a civil law jurisdiction and the other from a common law country."

Duncan thinks London risks suffering from this blurring because there could be less perceived value in London's status as the place of choice for common law arbitrations. Nonetheless Duncan believes we are a long way off from saying London has had its day.

"The quality of the arbitrators who are here, the quality of the court system and the arbitral institutions, and the popularity of English law which is still the most obvious choice will inevitably lead people here more than anywhere else. London still holds the status as the venue of choice despite it being slightly threatened by this globalisation and harmonisation of arbitration between different traditions."

What can London do to lessen that threat?

"We have to make sure that the institutions here are considered both open and accessible to parties from around the world. The LCIA is doing this but it needs to continue its efforts to make it a success. It needs to continue to ensure that it has good representation of lawyers from a very wide range of jurisdictions on its users councils and on the Court. If you have an LCIA arbitration and it relates to South America or East Asia or Australasia, it is really important the users feel the institution is really well plugged in these regions so it knows who the good arbitrators are. The ICC does it in a slightly different way by having committees in a large number of locations around the world so they have local knowledge which feeds into a good selection of arbitrators. Something that has also happened – which the LCIA could have done nothing about – is that the ICC is no longer seen as a French institution but a global one and they have ensured that within the institution there are teams who speak English as a first language. This has allowed the ICC to transcend its geographical location. In London, arbitrators, lawyers, the court, institutions – there is a slight sense they do not need to transcend their location because they are in the right place anyway. We all need to work to maintain the attractiveness of London, to make sure we don't act at all complacently. We need to remain relevant in a world that is globalising and is seeing major shifts in economic influence and power. The pool of arbitrators in London is the best in the world. We need to leverage this to maintain our leading role whilst also supporting the development of emerging jurisdictions."

Arish Bharucha is also a partner at Howard Kennedy LLP specialising in arbitration. Arish finds arbitration a hugely interesting and stimulating practice which, because it is so international in nature, brings its own complexities. He likes the process of arbitration which has a flexibility to it, not burying lawyers in procedure, but allowing them to focus on the substantive dispute. He believes the calibre of people working in arbitration is strong and he is constantly inspired by, and learning from, them. He says arbitration has excellent professionals practising as counsel and tribunal members – so you get exposure to retired members of the senior judiciary, eminent lawyers from other jurisdictions, academics and others.

Why does Arish believe London is considered to be a global hub for arbitration?

"English law is very important. It is the preferred governing law for international commercial contracts because of how well established it is, how much jurisprudence there is, and it is the common law system from which many other jurisdictions have derived their procedures and their legal principles. Whilst that does not necessarily mean that the seat has to be London, people often think the best place to have an English law matter decided is London.

The quality of arbitrators here is extraordinary. Some are retired judges who have been held in the highest esteem. The standard of the counsel and solicitors is also very high. And, beyond that, the experts you can get here, the hearing facilities, there's a whole ecosystem that has built up around dispute resolution in London that is hard to compete with. Time zone and geography is also important; London is a good central point in the world and relatively easy to get to from most places."

Despite all these pluses London has going for it, Arish still believes it has its challenges and its competitors.

"For sure, for the foreseeable future, London will remain a key centre for arbitration. The centre that has caught up the most and which has the potential of challenging London for the number one spot is Singapore, which has certain advantages. It has massive government support. It is a city state with a strong focus on the service sector which brings in excellent talent from overseas to settle there, to work there and (amongst other things) to arbitrate there. The SIAC has a lot of support and a lot of resources at their disposal. They equally have certain geographical advantages. It is an obvious place for China related matters to be resolved, there is also a massive Indian diaspora in Singapore, and it is slightly closer to India

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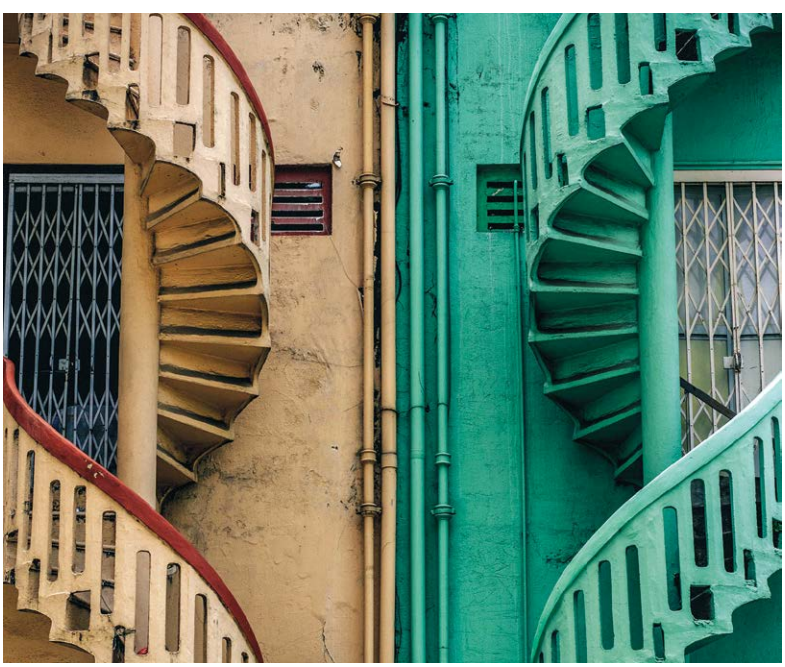

than London. Traditionally it has been seen as being cheaper yet more efficient than London. That perception is, perhaps, changing now. But that, combined with strong marketing, helped attract a lot of work from India in particular who are one of their largest users of arbitration services. It is also a very flexible system when it comes to arbitration. It is relatively easy to set yourself up there and to establish yourself and practice. It has a lot going for it and is mounting a strong challenge to London."

What can London do to ward off not just Singapore but to maintain its attractiveness?

"I believe it's about the legal community (including through the Law Society and the Bar Council) and institutions (such as the LCIA) reaching out to lawyers and to corporates all over the world and marketing the benefits of London as a jurisdiction and debunking some of the myths that are out there. We are just as efficient as everyone else, maybe more so, we are not more expensive than competitor jurisdictions – perhaps that was the case historically but not now. Having more events like London International Disputes Week and raising awareness of what we can offer would also be helpful.

I think we need to show an element of humility too. There was a perception of London and London lawyers as being a bit imperious and expecting the work to flow in without necessarily making an effort. Whilst this may or may not be the reality, the perception still needs to be addressed.

Constantly reviewing and updating the law is also fundamental. The Law Commission is looking at the Arbitration Act and making some positive amends.

A combination of all of these factors should keep London relevant. Government support in flying the flag for legal services in general would also be very helpful."

Hendrik Pushmann is Head of Farrer & Co's Arbitration Group. An English lawyer and German lawyer, he came into the law after an academic career. He fell into arbitration, he says, because he was "looking for an outlet for excess energy" during his legal practice course. There is a big international arbitration moot court that happens in Vienna every year and he put together a team (Naomi, who features next in this article was his mooting partner) and got funding from what was then the College of Law. He found it way more interesting, he says, than the Takeover Code he was made to study and even though he confesses to having done "abysmally badly" in the moot, he realised arbitration was stimulatingly varied and a huge amount of fun to practise.

"You are dealing with a variety of rules as well as a variety of governing laws. And there is a huge variety of subject matters too – anything from oil paintings to oil pipelines. It is a vibrant area to be involved in."

Why did Hendrik choose to practise in London rather than his home, Germany?

"I was here anyway on a research fellowship, dealing with some very niche points of Polish history and politics. I was deliberating what to do with this and then thought I would try the law to see if it appealed and it did. I stayed here and the rest is history."

Why does Hendrik believe London to be a centre of excellence for arbitration? Like Duncan and Arish he points to the fact that English law is still a very commonly used choice of substantive governing law because parties anywhere in the world have some exposure to it.

"There are many reasons why London is a global arbitration hub. Professionals all over the world practice English law. It is known. It is very much tried and tested. Contract law is very well developed and fine tuned.

It is a system that parties that do not necessarily have any economic nexus to the UK will still be comfortable agreeing on.

There is also the fact that London has such a historical reputation. And it has critical mass. It is not just that many leading practitioners are based here, it is also the facilities, the backbone. London has several fully developed arbitration hearing centres; many of the leading transcribers and other service providers are here. But in times where remote facilitation becomes more prevalent will this continue to be seen as a crucial factor?

England's got a very well developed arbitration law – again tried and tested albeit somewhat idiosyncratic in relation to the Uncitral Model Law which is the global standard, but not in a bad way.

However, we must not be complacent. Yes, we are a leading (maybe the leading) global hub now. But it is not a foregone conclusion that this will continue forever."

Hendrik believes the revision to the Arbitration Act that is currently underway is timely.

"There are some areas such as the arbitrability of trust disputes where there has been development that makes other jurisdictions, like Singapore, more attractive. Reflecting global best practices and making the necessary revisions to be in line with them is a positive move for England to be taking."

Hendrik sees the competition as being, in our region, first and foremost Paris. But he says there are also arbitration-friendly jurisdictions with credible, efficient institutions in many other places like Vienna, Geneva, Stockholm (in Europe) or, globally, Singapore, Hong Kong and New York, to name only a few. In Europe, Dublin is also making a big push to position itself as a competitor.

"As the saying goes, the competition never sleeps. There are credible alternatives and we who practise here need to be mindful of that."

Having said that, Hendrik believes London is definitely a centre of great legal talent and that all the support facilities that are needed to be in place are excellent here. He contrasts this with a situation he found himself whilst sitting as an arbitrator in another arbitration jurisdiction where he requested an electronic hearing transcript and was dismayed to be told that he would have to wait 6–8 weeks for it.

"London is a very attractive proposition and in a league of its own at the moment. But, as London based practitioners, we are going to have to hustle to maintain this."

Our final interviewee, arbitration lawyer Naomi Briercliffe, is a partner in the International Disputes Resolution practice at Squire PB (the American law firm we featured in the previous article). She joined the firm from Allen & Overy and specialises in both international commercial arbitration and public international law, including investment treaty arbitration. Her practice is roughly split 50/50 between these. She has handled disputes in various legal seats and in most of the major institutions. She has particular expertise in the energy sector.

We asked Naomi how she finds working in an American firm contrasts with her experience in more English practices?

"I love it. Our global spread is enormous. And we have specialists and real expertise on everything – you name it, we've got it."

The global culture benefits when it comes to arbitration too.

"Squire PB has a very strong public policy team as well as deep expertise across traditional areas of law. In the US they do lobbying, which we can't do in the UK. But even within our UK team, we have international policy specialists who can help our clients – be they corporates or states – manage complicated political situations. This means we can come up with holistic solutions that try to resolve problems."

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What attracted Naomi to arbitration?

"The opportunity to work with people and parties from across the world and being able to work on projects relating to different jurisdictions. I have always been very international in my mindset. Also, as an arbitrator, you tend to take your disputes from the client's initial problem to the hearing. I am an advocate as well as a solicitor and that is a very attractive part of the practice."

Naomi absolutely sees London as a centre for excellence in arbitration;

"London remains one of, if not the, leading arbitral centres of the world and the reason for that is we have a modern and well-drafted arbitration law – which may be about to be updated to make it even more relevant. Clients from across the globe also recognise that we have a very strong rule of law in England generally and so we can rely on the London courts for clear and concise decisions in terms of arbitration. It's an arbitration friendly jurisdiction; our courts understand the need to support arbitration as a practice and we also have a very large pool of experienced counsel based here. Lastly, English law in general is a very attractive law under which to conclude international commercial transactions, largely because of the recognition of the freedom to contract so the four corners of your contract really are the limits of the parties' relationship. You do not have to have English law as the governing law of a contract in order for the seat of arbitration to be in London, but the two often go hand-in-hand."

With regards to our competition, Naomi references the annual Queen Mary survey which puts London and Singapore as being neck and neck followed by Hong Kong and Paris. This is the first time they have been ranked equally.

"There is a potential risk that London is displaced by Singapore in future. Singapore sees arbitration as big business so has been promoting it recently. It is also a natural seat to consider for parties operating in expanding Asian markets. Work is, however, ongoing to keep London relevant, including – for example – the ongoing review of the Arbitration Act 1996 by the Law Commission."

Much consensus within our four. Yes London is at the top currently and with a lot of justification. But Singapore is equalling us and Paris – and a few others – are not far behind. We must not be complacent. We must stay relevant. Amendments to the Arbitration Act hopefully will help us. The calibre of our people here and of our facilities are both definitely huge assets. With humility, determination and innovation, we could keep that very valuable crown.