ARTICLE

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LAW 360'S Q&A WITH APPLEBY'S JOHN WASTY

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Q: WHAT ATTRACTED YOU TO INTERNATIONAL ARBITRATION WORK?

A: International arbitration has been a necessary, and growing, part of my dispute resolution practice for some time. International arbitration is ubiquitous in a number of industry sectors as the dispute resolution mechanism of choice. In part, this is due to the difficulty of agreeing on and applying domestic dispute resolution processes to international transactions. It is also in part due to the (sometimes real and sometimes perceived) benefits that attach to international arbitration such as its expediency, flexibility and confidentiality. Indeed, transactions that would otherwise not be pursued by parties can be entered into with some comfort due to the inclusion of international arbitration in the event of a dispute. Working within international arbitration is a necessity for any dispute resolution practitioner, especially working with clients who conduct international business or domestic business with international counterparts.

International arbitration is also a very exciting and often demanding area in which to practise. In addition to issues directly related to the dispute, there are often unique issues relating to the arbitration such as complex choice of law determinations, applicable arbitration rules and evidentiary considerations as well as tricky enforcement and annulment conscripts which do not arise in domestic or other types of dispute resolution. This demands a high degree of responsiveness, adaptability and creativity and allows for a varied, and often fun, work experience.

Q: WHAT ARE TWO TRENDS YOU SEE THAT ARE AFFECTING THE PRACTICE OF INTERNATIONAL ARBITRATION?

A: There has been a steady trend over the past few years of increased implementation of expedited or fast-track procedures in international arbitration. I expect this to continue in the future. A frequent criticism of international arbitration is the delay in finalising proceedings often due to process infractions or other delay tactics by one or more parties and the failure of arbitral tribunals to publish awards within a reasonable time. This criticism incorporates another, being that such delays often bring with them an inherent complexity of proceedings and increased cost to the parties. This denigrates international arbitration as an efficient and expeditious dispute resolution process. In response, many international arbitration institutions have implemented simplified or expedited arbitral proceedings with the specific aim of tightening delay loopholes in procedures and enforcing time periods for award publication.

This trend continued in 2015, with a number of institutions issuing new, or amending existing, expedited procedures in an effort to provide parties with relevant and commercially sound dispute resolution mechanisms. In addition, ad hoc international rules were also updated to include fast-track provisions. Most notably recent rules include the Financial Services Expedited Arbitration Procedure in England and the expedited rules of the Singapore International Arbitration Centre (**SIAC**) and the Australian Centre for International Commercial Arbitration's (**ACICA**). An analogous trend was also evident in the implementation of (often mandatory) expedited domestic arbitration legislature in many jurisdictions around the world. The need to provide commercially relevant rules and procedures arises from the requirements of the parties, the increased choice (and competition) between institutional and ad hoc arbitrations available to the parties, and also potentially increased forum choice available to parties through the coming into force of the Hague Choice of Court Convention on 1 October 2015. We accordingly expect the expedited and fast-track procedure trend to continue in 2016 and beyond.

There have been a number of interesting, and conflicting judgments, by enforcing courts as to the ambit of their discretion to enforce an international arbitral award subject to a suspension order of another competent court. This discretion has been contentious for many decades, as it places the underlying predisposition of enforcement contained in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (Convention) against the fundamental right of due process. This is particularly evident in instances where an award has been suspended by a court of a competent jurisdiction pending the outcome of annulment proceedings on the basis of the alleged invalidity of the award or part thereof.

Enforcing courts have historically shown a tendency to refuse enforcement in such instances. Indeed, the Bermuda Court of Appeal held in LAEP Investments Ltd. v. Emerging Markets Special Situations 3 Ltd. [2015] CA (BDA) 10, that under the provisions of the Bermuda International Conciliation and Arbitration Act 1993, as the enforcing court it had no discretion but to stay enforcement of a suspended award. Considerations of extreme delay (in that case, two to 10 years) or prospects of success of the annulment proceedings were held to be entirely irrelevant. However, the English Court of Appeal in IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corporation [2015] EWCA Civ 1144, has introduced constructive new precedent that an enforcing court is obligated to exercise its discretion to enforce arbitral awards and not to defer doing so blindly on the basis of unresolved due process proceedings or comity between courts. The jurisprudential trend of courts to consider this issue will hopefully continue and provide refinement of the ambit of this discretion.

Q: WHAT IS THE MOST CHALLENGING CASE YOU'VE WORKED ON AND WHY?

A: I represented the enforcing party in the enforcement proceedings in Bermuda in the case mentioned above. The most challenging aspect of the case is the frustration felt by the enforcing party after obtaining a favorable award, particularly given the commercial intentions of the parties when entering into international arbitration.

However, as detailed above, it is hopeful that the decision in IPCO may develop into a trend which will go some way to alleviate this challenge in the enforcement of arbitral awards.

Q: WHAT ADVICE WOULD YOU GIVE TO AN ATTORNEY CONSIDERING A CAREER IN INTERNATIONAL ARBITRATION?

A: Dispute resolution is by its nature varied, challenging and often quite frustrating in its processes. All of these attributes are magnified in international arbitrations. There are a number of personal and professional attributes that will be of assistance to an attorney wanting to pursue this area of law, including being adaptable and open to changing circumstances, working well as part of a team and being able to maintain focus on and drive different processes simultaneously. However, ultimately as with any type of dispute resolution, an attorney must have a sound understanding of the clients' industries and commercial realities that form the context of the dispute and provide advice and representation that is relevant and pertinent to each client regardless of whether this involves international arbitration or not.

Q: OUTSIDE OF YOUR FIRM, NAME AN ATTORNEY WHO HAS IMPRESSED YOU AND TELL US WHY.

A: I have worked with and against many, many attorneys, who have impressed me but one team, stands out particularly: Donald Donovan, Christopher Tahbaz and Dietmar Prager at Debevoise & Plimpton LLP who combine fierce intelligence and tactical nous with a passionate and relentless commitment to their clients. They are also a great deal of fun to work with.

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