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International Arbitration: Permitting Both Parties To Participate In A Strictly Neutral Process

The Editor interviews ***Peter J. W. Sherwin****, Proskauer Rose LLP.*

Editor: Mr. Sherwin, would you tell our readers something about your professional experience?

Sherwin: I graduated from Columbia Law School in 1992 and then clerked for U.S. District Judge Ann Aldrich in the Northern District of Ohio. After clerking, I came to Proskauer because of the broad range of litigation practice specialties that it offers – I thought Proskauer would be an excellent educational experience – and because of the people at the firm. It turned out that I made the right choice, because my colleagues are a wonderful resource for me, both personally and professionally, and I have been having a great career here. So I was very happy to make partner in 2001.

Editor: Would you tell us about your practice and how it has evolved over the course of your career?

Sherwin: At the beginning, I was trying to gain as much litigation experience as possible. That meant working with a lot of different partners on a lot of different types of matters. In addition to learning how to be a litigator, I think I also learned a great deal about how to achieve a client's goals as efficiently and economically as possible. A lot of what a litigator might do out of habit or because it is the standard way of doing things may not be the best way to get the client what it wants.

After a few years, I started to focus on private investment disputes, including disputes over sophisticated investment products such as derivatives, disputes between joint venturers, disputes between minority and majority shareholders in privately held companies, and so on. Many of these disputes had a cross-border dimension – usually a U.S. interest on one side and a Canadian, French, British or Latin American interest on the other – and were just as likely to be in court as in international arbitration. I found the combination of complex factual and legal issues with an international framework fascinating. I also discovered that I was really good at explaining to our U.S. clients how the non-U.S. opponent was approaching the dispute so that we could better develop an effective strategy. And that then led to being retained by an increasing number of non-U.S. clients who are new to U.S. litigation and U.S.-style international arbitration to advise them in a similar way.

Peter J. W. Sherwin

A couple of years ago I was appointed head of Proskauer's international arbitration practice group, and I now split my time between our New York and our Paris offices. It's great to be in two of the centers of international arbitration.

Editor: Speaking of the international arbitration group, would you give us an overview of the practice?

Sherwin: The practice covers a number of Proskauer's offices, including New York, Paris, Boston and Washington, DC. There is a core group of partners who handle a considerable volume of international arbitration, including, in addition to myself, Bruce Fader and Brad Ruskin in New York, Christophe Lapp in Paris, and Steve Bauer in Boston. Depending on the specific dispute, we also draw upon our colleagues in various other practice groups. The ability to combine strong experience in conducting international arbitrations under various rules and contexts with depth of substantive knowledge in so many areas is a real strength of Proskauer and something that differentiates us from many other international arbitration practices.

Editor: Does the potential forum influence the way in which you draft arbitration clauses?

Sherwin: Drafting arbitration clauses – or reviewing and revising clauses that others have drafted – is an important strategic exercise. My corporate partners call upon me on a regular basis to address arbitration clauses. The initial question, for me, is whether our client is more likely to sue or be sued. *That* consideration influences a multitude of choices, including the appropriate forum, the appropriate law, whether to have American-type discovery, whether to have three arbitrators or one, and so on. For example, if our client is the one likely to be sued, and also happens to be a large international

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enterprise, it may be important to insist on three arbitrators and discovery because the expense of a full-blown process may be turned into a strategic advantage. Cutting the other way, if our client is the one likely to be sued, and happens to be a small start-up operation, it may be important to argue for a lean arbitration process. One constant, I think, is that the rules governing the process should be those of a reputable and well-known arbitration organization.

Editor: What are the principal forums that you find yourself before in this practice?

Sherwin: The group is often in arbitrations administered by the International Chamber of Commerce, the ICC. Its headquarters is in Paris, but ICC arbitrations can be anywhere in the world. We also appear regularly in arbitrations administered by the International Center for Dispute Resolution arbitrations, which is the international arm of the American Arbitration Association with its headquarters in New York. ICDR arbitrations can also be carried on anywhere, but it is still most common for them to be in North America, with Latin America being an increasingly important site for ICDR cases. Another major forum for us is the London Court of International Arbitration. In addition, we handle a lot of *ad hoc* arbitration, where the arbitrators fashion the rules that will govern the proceedings. There are a number of specialized forums as well. For example, Proskauer has a celebrated sports law practice, and from time to time our group finds itself involved before the Court of Arbitration for Sport, CAS, which is located in Lausanne, Switzerland. An appeal from a CAS award goes directly to the Supreme Court of Switzerland, which provides us with an excellent opportunity to work with Swiss lawyers.

Editor: Is there much variation in the rules among the various tribunals?

Sherwin: There is some, and although it is very important to know what those differences are, I do not think any one set of rules is head and shoulders above the others. You cannot go wrong with ICC, ICDR, or LCIA rules.

Editor: Are there some industries or industry sectors that seem to lend themselves more to arbitration than to litigation?

Sherwin: Any kind of investment on the part of a foreign enterprise in a domestic operation appears to call for arbitration over litigation. As for particular industries, we represent some of the leading European construction companies, which are engaged in projects all over the world. When a dispute arises, it is often much more favorable for them to be in arbitration before a multinational panel than in the domestic courts of the country where the construction is underway. Another area is cross-border intellectual property disputes, including licensing disputes.

However, whether it is a U.S. company faced with the choice of international arbitration or litigation before a foreign court, or a foreign company faced with the same choice, even where the court system is well-developed, imminently fair, and blind to a party's citizenship – such as here in New York – there are still the strong factors of cultural differences and a foreign legal system that generally is not well understood. International arbitration is the obvious default position in these circumstances.

Editor: Would you share with us some of the recent successes that the practice has had?

Sherwin: A very significant recent success was on behalf of the owner of the Florida Marlins baseball team. His Canadian limited partners brought various claims in an ICDR arbitration – as well as ancillary federal litigation in Miami – seeking well over $100 million. The dispute concerned his management of the predecessor team, the Montreal Expos, and specifically about players' salaries and the plan to build a new stadium in downtown Montreal. After five weeks of hearings, the three-member panel issued a unanimous final award that completely vindicated our client.

Another recent success was in an LCIA arbitration in London concerning the unwinding of a U.S.-Indian joint venture. This also resulted in a very favorable final award, which we just got enforced in the United States.

The first case is an example of the high-stakes, bet-the-company kind of international arbitration that we often handle. The second is the type of mid-range dispute that we also regularly handle. Although the latter is not of the same magnitude as the first type of case, it is extremely important to our clients, and we bring to bear in these matters our same experience and expertise to achieve a favorable result effectively and efficiently.

Editor: Are there any trends in international arbitration that we ought to call to the attention of our corporate counsel readership?

Sherwin: Yes. I think that international arbitration is becoming more and more aligned with U.S. practice. We see more cross-examination of witnesses and more discovery. Many of our European clients, coming from a civil law background, have not necessarily welcomed this development, but with an increasing exposure to it, they are coming to see the benefits. That is a positive. And it is positive for our U.S. clients because it permits them access to tools in international arbitration they are used to having in domestic litigation. The downside, however, is the increase in cost and time. It is no longer the case that international arbitration can be touted as a less expensive way of resolving disputes. So, international arbitration is now taking a little longer, costing a little more and functioning a little more intrusively than it did in the past. However, it remains the best way to go, at least most of the time, in cross-border disputes because it permits both parties to participate in a neutral forum.

Editor: Where would you like this practice to be in, say, five years? New locations, new areas of expertise?

Sherwin: I certainly think that London is a part of our future, and I expect we will have a London-based international arbitration practice within the next couple of years. Latin America is also a very attractive destination, as it is generating a great deal of international arbitration. We already have significant clients in Brazil, Argentina and Chile, and I'd like to see that grow.

With respect to an industry focus, Christophe Lapp and his team recently joined our Paris office from one of the premier litigation firms in France.His client base in the European construction industry is very strong, and we look forward to growing that further with him.

This is a very exciting time to be engaged in an international arbitration practice.

Editor: Is there anything you would like to add?

Sherwin: Lou Solomon, the co-head of Proskauer's litigation department, and I are working on an international practice guide, along with others in the department. Lou is addressing cross-border litigation in the U.S., and I am focusing on international arbitration with a U.S. aspect. When completed, this guide will serve as a very valuable tool for general counsel and the senior leadership of corporations which are involved, or considering getting involved, in the international arena. It will be available on the firm's website and on DVD without charge. Please stay tuned.