INTERVIEWING SARAH GANZ, Counsel, WilmerHale

By Sarah Ganz and Stavroula Angoura

1) Recently there has been a considerable amount of debate regarding time and cost efficiency in international arbitration. A major trend in many revised rules includes mechanisms to increase the efficiency and speed of arbitrations. What are your thoughts on this?

Efficiency and speed are important considerations for clients in international arbitration, and there have been related concerns that arbitration proceedings are becoming too long and judicialized. The focus on efficiency and speed in many of the revised rules shows that these concerns are being taken seriously. Several rules now include, for example, an explicit provision regarding decisions on costs that allows the tribunal to consider whether the parties have conducted the arbitration in an expeditious and cost-effective manner, as well as provisions on emergency arbitrators and expedited procedures. These provisions are, more generally, a good example of international arbitration's dynamic nature and its ability to evolve in response to relevant needs and demands. The mechanisms now included in some of the revised rules will not be suited to every case, and their effectiveness will depend on how they are applied in practice by arbitrators, parties and counsel. Nevertheless, as concrete initiatives aimed at increasing speed and efficiency, they are to be welcomed.

2) Another recent development is the Annex to the 2014 LCIA Rules which sets out guidelines for the conduct of legal representatives. Could you explain how this facilitates arbitration proceedings?

The guidelines in the Annex to the 2014 LCIA Rules are one of several attempts made in recent years to address the issue of the ethical conduct of legal representatives. Other attempts include the IBA Guidelines on Party Representation and the proposal by the Swiss Arbitration Association to set up a new transnational body to deal with ethical complaints. The LCIA's response is unique, however, in that provisions on ethical conduct are for the first time integrated into institutional

arbitration rules – these provisions are therefore binding on legal counsel in all proceedings where the parties have agreed to apply the 2014 LCIA Rules. It also addresses the question of who may decide on issues of unethical conduct: Under the Annex, it is the tribunal which is empowered to determine whether there has been misconduct and to order sanctions.

Whether the Annex will facilitate arbitration proceedings remains to be seen. It may help set a basic minimum standard of conduct, for example, where the counsel's home jurisdiction does not provide equivalent rules or where the counsel feels that there is no threat of sanction in the event of a breach. However, some issues at the heart of the debate remain, such as the uncertainty as to which ethical standards other than the 2014 LCIA guidelines apply to counsel – the law(s) of their home jurisdiction(s) and/or the law of the seat of arbitration, etc. – and potential discrepancies between the rules applicable to counsel in an arbitration. Any additional standards, like the LCIA Rules, which do not contain "meta"-rules that override national rules, will arguably run the risk of adding a further layer of standards on ethical conduct without resolving those particular aspects of the debate.

3) What would you say are the essential qualifications or skills to consider when selecting an arbitrator?

There are qualifications or attributes that will be required in most, if not all, cases, such as some experience in the field of arbitration and a certain level of legal expertise. What other qualifications are needed is a matter that depends on the specific case at hand – which is consistent with the nature of arbitration as a procedure that normally allows the parties to choose an arbitrator for a specific dispute. For instance, some cases may require an arbitrator who is prepared to delve into the fine specificities of a highly technical matter or into complex levels of damage calculation, whereas other cases raise difficult questions of law and would require a good understanding of the relevant legal system. Another factor to consider when selecting an arbitrator for a panel is the possible panel dynamics given the identity of other panel members, to the extent this is known.

4) What do you think about the extension of the application of the UNCITRAL transparency rules in Treaty-based Investor State Arbitration signed in March?

There has been a gradual move towards greater transparency in investor-state arbitration over the years. The UNCITRAL Rules on Transparency have been part of this development by introducing provisions, inter alia, on public hearings and on the publication of the award, the parties' submissions and other key documents. The signing of the UN Convention on Transparency in Treaty-based Investor-State Arbitration is a further natural step in that direction. This convention will extend the scope of application of the UNCITRAL Rules to proceedings under pre-April 2014 investment treaties and non-UNCITRAL proceedings.

This development assumes special significance given the recent surge of criticism against investor-state arbitration, particularly in the context of TTIP, the Transatlantic Trade and Investment Partnership. An allegation of secrecy of the proceedings is one of the main arguments made by critics. This argument seemed overly skeptical even before the UN Convention on Transparency was signed, as some investment arbitrations were already conducted publicly at that point, and awards under the ICSID Convention were often public. However, the UN Convention on Transparency will help to further meet that criticism and, as such, it is a particularly timely development.

5) One of the most important topics in the practice of international arbitration is cross-examination. What advice would you give for a successful cross-examination?

A successful cross-examination in my view requires a combination of thorough preparation and, somewhat paradoxically, the ability to remain spontaneous and adapt one's approach to the witness, tribunal, and developments in the course of the cross-examination. So prepare your notes carefully, but don't stick to them religiously.

Another piece of advice concerns the objectives of a cross-examination. Newcomers to the field can sometimes have a slightly unrealistic image in mind – and, let's admit it, many of us got our first notion of what a cross-examination entails from movies or TV dramas. But not every cross-examination will end with the opponent's witness breaking down in tears and admitting to all his lies. While one of the aims of a cross-examination certainly is to bring the other side to concede important facts, there is much more to it. For example, it can be used as a powerful tool to advance the client's case by directing the spotlight on certain factual or legal aspects of the case which support the client's claim, drawing attention to key evidence in favour of one's client, and incrementally but effectively undermining the credibility of the opponent's version of events.

6) You joined WilmerHale in 2009 and gained your spurs acting for Deutsche Telekom in a series of disputes before the ICC International Court of Arbitration and the VIAC. Since then you have represented clients in multiple cases and were recently promoted to Counsel. What was it that led you to a career in international arbitration?

As a law student, I was fortunate to have the opportunity to do an internship at Haver & Mailänder in Stuttgart with Dr. Gerstenmaier. That was my first exposure to international arbitration, and where I first became interested in the field. I found that it combines several things that particularly appeal to me, such as the opportunity to engage in written and oral advocacy, the challenge of adapting to different legal systems and cultures, as well as the diversity of industries and substantive issues which arbitration spans. Another internship in an arbitration practice during the final stages of my legal training, this time at WilmerHale, reinforced that impression, and I returned to the firm's London practice as an associate after completing my doctorate in law in Munich, Germany.

7) What advice would you give law students and

young practitioners who envision working in international arbitration?

I hope I am not saying this only because it got me into arbitration, but I think internships can be an excellent first step towards a career in arbitration, as an opportunity to gain relevant experience and to establish first contacts in the field. They can also be a helpful way to ensure that arbitration is the right thing for you.

I would also point out that it is not necessary in my view to build a portfolio of experience which consists only of arbitration activities. Several of my colleagues studied or worked in other legal fields before joining arbitration practice, and my own graduate studies, for example, included subjects such as comparative law and competition law. Such activities are not a stumbling block to a career in international arbitration, and can in fact be a useful supplement to one's experience.

8) International arbitration is a field in constant change, and regulatory reforms in this field are not infrequent. Can you identify any particular areas of potential change or new trends in the near future?

These are interesting times for investment arbitration. The public debate over investor-state arbitration which I mentioned earlier has led to several proposals, such as those calling for the establishment of a permanent investment court or the introduction of an appellate mechanism. But these are only rudimentary proposals and it is unclear whether and to what extent they will eventually be adopted. A further topic of uncertainty is the relationship between EU law and intra-EU investment treaties. The European Commission has recently requested five EU Member States to terminate their intra-EU investment treaties and has directed Romania not to comply with an ICSID award rendered against it. The lively debate on this issue continues and it remains to be seen exactly how it will be settled and what implications this will have.

Another area of change is the on-going development of arbitration practice and institutions around the world. For example, in recent years several countries in Africa have taken steps to facilitate arbitration proceedings, such as setting up arbitration centres or acceding to the New York Convention – and it is to be hoped that this trend will continue. Finally, I believe that diversity – e.g., gender and geographical diversity – is a topic that will remain on the agenda in the near future. We have already seen some movement on this front, but there is still potential to go further and to achieve even greater diversity among counsel and arbitrators.

THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: Patterns in the prescription of provisional measures and their implications for offshore oil and gas projects in disputed international waters

By Sarah Vasani and Charity Kirby

I. INTRODUCTION

On 25 April 2015, the Special Chamber of the International Tribunal for the Law of the Sea (the "ITLOS" or the "Tribunal") delivered its Order on a provisional measures request filed by Côte d'Ivoire regarding a dispute with Ghana concerning their maritime border. While Ghana and Côte d'Ivoire have been entangled in a border dispute concerning approximately 30,000 km² of territory in the Gulf of Guinea for decades, the stakes have increased significantly since Ghana granted concessions for nine oil blocks that fall either partially or entirely within the disputed area. The USD 5 billion Tweneboa-Enyenra-Ntomme ("TEN") project, which is being developed by the UK's Tullow Oil and is expected to produce 80,000 barrels a day when it comes online in 2016, is the most advanced project in the disputed waters.

In its provisional measures application, Côte d'Ivoire sought an order requiring Ghana to suspend all ongoing oil exploration and exploitation activities in the disputed area, including those related to the TEN project, and to refrain from granting any new permits for such activities.[1] Côte d'Ivoire based its request on allegations that Ghana's oil exploration and exploitation activities would cause physical harm to the seabed and subsoil in the disputed area, and that Ghana's hydrocarbons laws failed to provide adequate environmental safeguards or technical and financial criteria for contractors.[2]

While the ITLOS Special Chamber did order Ghana to refrain from new drilling until the nations' maritime border