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#MondayArbitrationDay

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KÜRÜM

INTERVIEW

ARBITRATION
In-house counsel experience

When did you start laying the foundations for a career in international arbitration?

It is difficult to pin point an exact moment, but I think that it starts on the first day of law school. On the very first day, you will take lessons and gain knowledge that will serve as the foundation of your future career in International Arbitration, although you may not e aware at that moment that it will be your choice of career.
Personally, I had the privilege to study at Paris II Pantheon-Assas University and the University of Edinburgh under the supervision of professors whose personality and passion was so contagious that it steered me into commercial and contract law.
Later on during my practice, in particular in litigation before the Albanian courts, I came to realize that law had another side of the medal that was not stressed enough during my academic years abroad. I found myself often in a position of having an extremely strong case, but that had to be tried in front of an ineffective and incompetent judge who is unable to keep the pace of the modern day business affairs.
In this context, arbitration came to me as a necessity to ensure a proper and effective way of enforcing agreements and grant my clients the right and timely remedies, which were otherwise impossible before the Albanian judiciary system. This practice extended into public contracts as well, since with many clients we negotiated and incorporated arbitration clauses into the contracts with the Albanian state. Some of these clients, being important foreign investors, were well-versed in the matter of international arbitration which had become common practice of their business routine. So, I got into international arbitration gradually seizing every opportunity to advance my knowledge and expand it whenever I could.

You have acted as a counsel for an international arbitration case. Can you describe that experience?

As a counsel, I was accustomed to the proceedings before the local courts or authorities that are oftentimes routinely conducted by the public servants. Therefore, it is up to you as a lawyer to spark their curiosity in order to be able to engage in a meaningful exchange and get the officers interested in the case and its implications.
In the international arbitration case, I was somewhat expecting something broad along these lines. However, that was far from reality. I discovered that every party was deeply involved in the process and committed to do their best. It was stimulating as you could see the case as a real challenge and a competition. It triggered my imagination and allowed me to work alongside some outstanding professionals that gave me the opportunity to gain an invaluable experience.

Which would you pick as the most difficult moment when acting as a counsel and the most "unusual" one?

My first case in international commercial arbitration was about an Albanian company that had ordered a significant quantity of raw materials from a foreign supplier and secured the payment via first demand bank guarantees. Up until the delivery date, the price of the commodity had jumped considerably prompting the supplier to look for ways to terminate the contract and the situation ended up in an argument over an uncertainty as to the payment, despite having fully valid bank guarantees. We offered to pay the price in full, which was not accepted by the supplier.
The facts of the case seemed quite straightforward and I thought that our case was rock-solid. However, as the proceedings went on, we started to see cracks appearing when the other party pointed out to some elements of the case that at first seemed irrelevant. I think that was the most difficult moment for me, as I had to start considering the prospect that despite being morally right, we might end up losing. Discouragement can settle in especially after you have lined up so many hours of work and fatigue. This is a crucial test, but not for your knowledge but for your character, and resilience is something that only life can teach you.

What is the most important thing that an in-house counsel needs to do regarding the anticipation of an arbitration proceeding?

As an in-house counsel, you are the person who has the best knowledge of the case, in particular if you have been involved since the earliest stages of the dispute. Therefore, if arbitration is foreseen, for example based on a clause, a Bilateral Investment Treaty or any other instrument, it is imperative that you prepare and keep track of everything. Since the beginning, you need to consider and act as if the dispute will be submitted to arbitration. Practically, this means that you need to consider every action that you undertake with regard to whether it will affect your future claim in arbitration, in particular as to jurisdiction. It may seem innocuous, but even changes in the shareholding structure, for perfectly legitimate business purposes, can have detrimental consequences on your case in arbitration.
Therefore, you should keep a very good track of every document that you receive or produce, you should collect testimonies as soon as you can as it may prove impossible in the future, address memos and notes to management, keep track of phone calls and record notes taken during meetings.
With regard to anticipating arbitration, the most important job as in-house counsel, in a way, is to create and keep a set of documentation as complete as possible and to be constantly alert as to the implications of your employer's actions and decisions.

Lately, scholars have discussed the need for the development of arbitration rules for disputes resulting from technologies such as smart contracts or cryptocurrency. What is your opinion about this?

Despite smart contracts or cryptocurrencies being relatively recent developments they pose, in fact, issues that are as old as information technology itself. Many, in the late eighties and early nineties, such as J.P. Barlow for instance, thought that law and states could not regulate what

they called "cyberspace". However, history proved them wrong.
The booming of technology was not able to overthrow the law, but it merely changed the mechanisms and tools at the disposal of the state to regulate it. In Prof. Lessig's idea, computer "code" regulates technology, but computer code is itself regulated by law.
Simply put, smart contracts being automated contracts do not constitute an exception despite being based on distributed ledger technology (DLT), blockchain technology or any other future technological development that has no central regulating authority. This automaticity and lack of central authority does not mean that there are no conflicts arising over these matters. Legal issues will continue to arise for instance, as to whether these contracts are binding, in cases of errors as a result of coding and the respective responsibilities, discrepancies between versions etc. These problems are already regulated by states or international bodies and rules are already in place to resolve them. However, given the anonymity often inherent in these technologies standard rules and procedures may prove difficult or impossible to apply and arbitration seems to be the most appropriate and effective way.
In this prospect, the incorporation of an arbitration clause or procedure is understandably preferable in these situations. However, this needs to be done at the technological level, or "code", and the lack of a central technical authority governing these technologies constitutes a very challenging obstacle as there is no one to negotiate with.
In the end, as history has proved over and over again, I believe that states will intervene and legislate on this matter. What balance will the states strike between the self-regulation of the technology through possibly arbitration and the role to be played by local courts remains to be seen. I personally see a form of arbitration that shares similarities with the Uniform Domain Name Dispute Resolution Policy (UDRP) as an adequate solution to these disputes.

Unnecessary complications of the arbitration proceedings are considered a reason for the long duration and high costs of international arbitration. Which would be your strategy in the conduction of the arbitration in the most cost-effective manner?

I must say that clients, particularly those who experience international arbitration for the first time, tend to focus too much on costs, presuming that all services are equal and of equal quality. This is not the case, though, and using costs as a compass can lead you off course. However, many costs and working hours can be saved by being properly organized even before the conflict crystallizes. Proper company procedures will save you a lot of working hours and money in the long run. Keeping track of emails, conversations, meetings, company documents, etc., in a consistent and truthful manner will allow lawyers to save many working hours sorting or understanding the case. Involving potentially cheaper local counsels to execute certain fractions of the procedure but always under the supervision of the main counsel can be a good way of keeping costs down.

How do you see the future of arbitration at the national and international level?

I strongly believe that arbitration will see significant extension and development in the near future. The pace of business and life in general is constantly speeding up. Procedural rules,

even when they are speedy, often require days or weeks, which might have been adequate decades ago, but nowadays there are situations when a remedy sometimes loses its value for the other party if it has not been ordered within hours or a day. Enforcement is also a matter to be taken into consideration. Traditional bailiff or enforcement by other public officer of a decision is not always satisfactory. Therefore, as technology penetrates deeper into our society and our way of life, I see arbitration becoming more and more part of our daily life.

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