INSIDE ARBITRATION: INTERVIEW WITH PAULA HODGES QC: PRESIDENT OF THE LCIA

16 July 2019 | Global
Legal Briefings

Paula Hodges QC's career is pretty remarkable. Head of Herbert Smith Freehills' Global Arbitration Practice, she is ranked as one of the leading arbitration practitioners in the world. During her career to date she has had no shortage of interesting cases, involving clients from across the world, concerning disputes centred on the North Sea, Dubai, the Caspian Sea, Nigeria, Korea, Kenya and Indonesia to name but a few. Her outstanding skills as an advocate were recognised when she was Awarded Queen's Counsel in 2014. In May 2019, Paula took over as President of the London Court of International Arbitration (LCIA), one of the main international arbitral institutions, chosen by parties across the globe as the institution to administer and supervise the resolution of their complex international disputes.

We asked Paula about her career choices, the glass ceiling, her new role at the LCIA and Continuing full-time private practice at Herbert Smith Freehills.

PAULA, COULD YOU START OFF BY TELLING US A LITTLE ABOUT YOURSELF AND YOUR BACKGROUND. HOW DID YOU COME TO BE A LAWYER AND WHY DID YOU CHOOSE TO SPECIALISE IN ARBITRATION?

I first thought about becoming a lawyer when I was about 15, when I started to do quite a lot of debating and public speaking and one of my teachers asked whether I had thought of becoming a barrister. That rather piqued my interest and I started to look into being a barrister or a solicitor. Both appealed and I ended up reading law at Cambridge. While I was studying, I decided the bar was not for me; I liked the idea of being the person with the client connection and interaction. That said, I still really wanted to do advocacy and disputes work. Looking around at the law firms in London, Herbert Smith (as was) had a market-leading reputation in this area and felt like the ideal fit for me.

I was lucky to qualify in 1989 just before the introduction of the Courts and Legal Services Act in 1990. This piece of legislation offered solicitors the opportunity to get higher rights of audience and enabled me to become an advocate and do as much advocacy as I could on cases. My early years as a litigation associate were focussed on high court trials where I was encouraged to do the advocacy on procedural applications. After three or four years, I started to do some arbitration work and by the end of the 1990s, I had built up a base of clients, particularly in the Energy and Natural Resources sector. They were either exploring for or extracting new resources all over the world, going to ever more exotic locations and wanted to use arbitration to resolve their disputes rather than litigate in local courts. I had a big decision to make around the year 2000 as to whether I would follow my clients into the world of arbitration or remain as a litigator doing some arbitration – and it was a big decision, to be honest, particularly given Herbert Smith's reputation for litigation prowess! Nevertheless, I followed my instincts and opted for arbitration. I am absolutely delighted that I did because I managed to ride the wave of arbitration to other sectors, different clients and into new regions. Being made a QC in 2014 was the icing on the cake and a huge honour. And at a personal level it felt like a real vindication of all the career decisions I'd made from my student days onward.

HUGE CONGRATULATIONS ON THE NEWS OF YOUR APPOINTMENT AS PRESIDENT OF THE LONDON COURT OF INTERNATIONAL ARBITRATION. CAN YOU TELL US WHAT THE ROLE ENTAILS? AND HOW DOES IT DIFFER FROM THE ROLE AS VICE PRESIDENT THAT YOU'VE HELD FOR FOUR YEARS?

The President of the LCIA is the figurehead of the institution. The President works alongside the Director General, Jackie van Haersolte-van Hof, the Secretariat team and works closely with the members of the Court and Board. The aim is that we work seamlessly to achieve the strategy that the Board has set for the LCIA; which is for the LCIA to continue to internationalise itself and to ensure that the LCIA keeps ahead of trends within commercial arbitration. The President is the leader of the Court, which has 42 members who are highly accomplished and recognised arbitration figures in different regions around the world. We try and ensure there's broad global coverage and representation to cater for parties worldwide. The President is also the steward of the organisation and the guardian of how the rules are applied, seeking to ensure and retain the high standing of the LCIA as an arbitral institution. The President oversees the administration of LCIA arbitrations, including appointments and challenges of arbitrators.

The Secretariat carries out the day to day administration, together with the Vice Presidents, who deal with most of the appointments of Arbitrators; because under the LCIA Rules the LCIA appoints all Arbitrators whether they're nominated by the parties or chosen by the LCIA.

The Vice Presidents also deal with applications for expedited proceedings, emergency arbitrations, they set the rates and costs the Arbitrators can charge and they deal with other procedural issues that arise before the Tribunal is in place. The President overseas any challenges to Arbitrators during the course of the Arbitral proceedings, choosing a Vice President or a team of Vice Presidents to consider the challenge application depending on the complexity. Given that I am a partner in private practice, I will not be involved in any issues relating to a case in which Herbert Smith Freehills has a role or a client of the firm that has an interest. That will be dealt with by the Vice Presidents and we can also call on our vastly experienced honorary Vice Presidents of the Court.

"The aim is that we work seamlessly to achieve the strategy that the Board has set for the LCIA"

YOUR ROLE AT THE LCIA IS IN ADDITION TO YOUR POSITION AS HEAD OF HSF'S GLOBAL ARBITRATION PRACTICE. HOW DO CLIENTS OF A FIRM BENEFIT FROM HAVING THEIR LAWYERS INVOLVED IN ARBITRAL INSTITUTIONS LIKE THE LCIA?

Being involved in the Institution as an officer or a member of the board, enables you to have a very detailed understanding of how the relevant institution administer its cases and how the rules are applied in practice. It may seem obvious, but institutions can't include every detail of how the rules will be applied in the rules themselves. By seeing the administration of the cases from the inside, you gain an understanding of how the institution deals with knotty procedural issues, and monitors the progress of the arbitration. You also have advance notice of emerging trends in arbitration and stay in close contact with other institutions and practitioners around the world. You're also invited to participate in events all around the world, which enables you to stay ahead of the game in terms of the issues that are being faced in arbitration proceedings, whether that's in Africa, in Asia or in the US. As a consequence, when you're advising clients you can give a richness to your advice and will have had experience that is very relevant to the issues they're facing. Another very important factor is that you meet a high number of arbitrators from around the world so when your clients are choosing an arbitrator, you have extensive knowledge and experience of arbitrators which is very helpful in identifying the most appropriate arbitrators for particular cases. It also enables you to try and diversify the pool of arbitrators you suggest to clients because you're meeting both male and female arbitrators from different nationalities and of different ages around the world.

WITH THE CLOSURE OF LCIA INDIA AND LCIA-MIAC, IT APPEARS THAT THE LCIA HAS UNDERGONE A PERIOD OF GEOGRAPHICAL CONTRACTION AT A TIME WHEN ITS COMPETITORS (LIKE THE ICC) HAVE DONE THE OPPOSITE. HAS THE LCIA DECIDED TO REVERT TO BEING A LONDON-BASED INSTITUTION?

Absolutely not!! You are right in saying we have drawn back from our operations on the ground in India and Mauritius. I think it's fair to say at the outset that the LCIA took a different route to the ICC in that the LCIA produced specific rules for the countries in which it established a presence in India, Mauritius and of course Dubai, which continues. In contrast, the ICC has opened branch offices around the world to aid administration of its cases and hasn't produced bespoke rules for those different countries. I sincerely believe that by establishing a formal presence overseas, the LCIA was able to internationalise its image and I think the LCIA will continue to benefit from that. Unfortunately there were particular issues experienced in India and Mauritius which meant that continuing operations on the ground was not viable. We also found that parties preferred to use the principal LCIA rules as opposed to using the Indian or Mauritian version. This has been less so for Dubai and so we continue with our cooperation with the DIFC using specific LCIA-DIFC rules, albeit very much based on the principal LCIA rules.

The LCIA will have to make the decision going forward about the extent to which it needs to have operations overseas, or whether it should continue to operate from its London base, maintaining its international presence through events around the world. The number of arbitrations received by the LCIA is still on the rise, we reached over 300 in 2018, so certainly the business continues to expand. We have also seen that the absence of a physical presence has not been an impediment in various markets where the LCIA is strong, such as Russia. It's just a matter of how we decide to continue that growth going forward.

The LCIA has indicated it will be releasing an update to its 2014 rules. Why an "update" at this stage rather than a wholescale revision?

The LCIA issued new rules in 2014 which had some quite significant differences from the previous set of rules which were introduced in 1998. These changes included the annex to the Rules which sets out guidelines to party representatives in order to promote good and equal conduct within the arbitration. The introduction of that annex is still very different to the approach taken by other Institutions. It's therefore only five years since we made some fairly significant changes. Now, some may say that five years in the world of arbitration is a long time. Arbitration is increasing in popularity all over the world, there are more and more users using arbitration and they come with different ideas of how they want the institutions to provide arbitration services. The arbitration institutions have grown in number too, and it's become quite a competitive environment so everybody is obviously watching what the others are doing and ensuring their rules evolve to keep pace with the changes and trends around the world.

As an institution the LCIA is always horizon scanning and looks at changes that other institutions make. But it is absolutely critical that we don't lose the USP of the institution. We're very proud of the LCIA's heritage and some of the core provisions that it has, not least the confidentiality of proceedings. The Board and the Court have looked at the changes we made in 2014 alongside recent innovations and developments and decided it wasn't necessary to have a wholescale rule change. We are of the view that the LCIA Rules as they stand are sufficiently flexible to deal with issues such as expedition of proceedings, early determination of issues and multi-party arbitrations. However, we appreciate that it is helpful to users and arbitrators to have express provisions to refer to when considering ordering expedition and early determination for example. We have therefore tried to expressly describe the powers that arbitrators already have under the LCIA Rules in a little bit more granular detail in certain respects. By making these powers more overt, we hope to encourage arbitrators to be brave and to run proceedings more expeditiously where appropriate in the circumstances.

"***It may seem obvious, but institutions can't include every detail of how the rules will be applied in the rules themselves***"

THE LCIA STATISTICS OVER THE PAST FEW YEARS HAVE SHOWN AN INTERESTING TREND IN THE USE OF ARBITRATION FOR FINANCIAL INSTITUTIONS AND BANKS. WHAT DO YOU THINK IS BEHIND THIS TREND AND DO YOU SEE IT CONTINUING?

It’s a trend that those in private practice who are involved in drafting clauses for transactional departments will have seen coming for about five years. However, there was a considerable delay in banks and financial institutions adopting arbitration compared to other sectors. I think banks still favour using court proceedings where their headquarters are in a mature economy with an experienced and established commercial judiciary. Traditionally, banks and financial institutions have had the bargaining power to dictate to the borrower what the dispute resolution provisions would be, so they would always choose the courts in their home patch, whether that be London, Europe, the US or in Asia. However, as business has globalised, companies have sourced financing for projects all over the world and increasingly in less developed countries. The banks have, quite rightly, realised that if they are lending to entities that are based in those jurisdictions, or the project is based there, that arbitration is a much safer route in order to have more certainty about enforcing the collateral over the financing or whatever other security they have sought. I'm obviously delighted that banks have recognised the benefits of arbitration and I do see the trend continuing, not least because I can't see globalisation reversing – in fact, as more less developed countries try to attract foreign direct investment, I think it's only likely to grow. I think the LCIA has benefitted from this trend in particular because it is a London-based institution and there is such a strong financial market in London. I don't see that changing even if the UK exits from Europe. I firmly believe that London will remain a strong financial centre interacting both with Europe, but also with the rest of the world as well.

YOU HAVE ACHIEVED A HIGH PROFILE POSITION IN THE WORLD OF ARBITRATION. YOU ARE THE PRESIDENT OF THE LCIA, HEAD ONE OF THE WORLD'S LEADING ARBITRATION TEAMS AND ARE RANKED AS ONE OF THE LEADING ARBITRATION PRACTITIONERS IN THE WORLD. TO WHAT EXTENT DO YOU THINK THAT THERE IS STILL A “GLASS CEILING” FOR WOMEN IN ARBITRATION TODAY?

I am delighted by the focus on gender diversity that has really gathered pace over the last five years or so, particularly with the Equal Representation in Arbitration Pledge. Arbitral institutions and practitioners involved in arbitration have realised that there is much to be done to move from the more traditional silver haired, white male arbitrators dominating the arbitration scene. While no one would wish to lose the experience of those long standing arbitrators, it’s obviously critical that we diversify the pool to include women and indeed arbitrators from a more varied national background as well. I think what has been achieved by the community has been more than simply empty words – we've only got to look at the statistics published by the institutions in particular to see that more women are being appointed. I'm delighted by the progress the LCIA has made, in particular, when it has an opportunity to select and appoint arbitrators. That said, parties are still lagging behind and there's a long way to go in improving the gender balance in party appointments. From my experience, multi-nationals with experienced in-house legal teams are very welcoming of a diverse shortlist of arbitrators which includes women; indeed some require that there is at least one woman on that shortlist. What we're not seeing though is the conversion of female arbitrator candidates on the shortlist into them being chosen as the arbitrator in the case. I fully accept that companies will often want an experienced arbitrator, particularly if it's a high-value complex case, but not all cases are like that. Often an arbitrator that has not been selected before will have the time, enthusiasm and commitment to do an excellent job on the case and it's incumbent on the institution and law firms to persuade clients of that possibility going forward.

"***I sincerely believe that by establishing a formal presence overseas, the LCIA was able to internationalise its image and I think the LCIA will continue to benefit from that***"

So at the moment the glass ceiling is still there for women in arbitration as of today, albeit that the glass is starting to crack. The historic appointment of more men than women means that there are not as many women with extensive experience of sitting as an arbitrator as there are men. Clearly, that's going to take time to change. But I'm very optimistic about the future. Everyone across the arbitration sector realises that diversity is one of the inherent characteristics of arbitration. It brings people together from different jurisdictions to resolve their disputes and the people presenting those cases and determining those cases should be from a diverse pool that reflects the diversity of its users.

More Inside Arbitration

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

PAULA HODGES QC
HEAD OF GLOBAL ARBITRATION PRACTICE, LONDON
+44 20 7466 2027
Paula.Hodges@hsf.com