

# SPOTLIGHT ON DR PATRICIA NACIMIENTO

01 August 2017 | Germany

Legal Briefings - By **Dr Patricia Nacimiento, Partner**

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Dr Patricia Nacimiento has a leading reputation in the world of both commercial and investment treaty arbitration. Here she reflects on her career to date, the increasing role of public international law in disputes and the global nature of her practice.

## **WHAT ATTRACTED YOU TO A CAREER IN INTERNATIONAL ARBITRATION?**

Cross border disputes are like the Tower of Babel. There are different laws and languages, legal backgrounds and traditions, practices and expectations that those involved in the dispute may simply fail to understand each other.

Navigating cultural difference is a familiar situation for me. I was born in Germany, but come from a family of seven with five different nationalities - parents from Paraguay and Argentina, originally from Italy, siblings born in Brazil and the US, I was raised at the French-German border, and married a Dane. Having lived, studied and worked in all of these countries, speaking these languages and understanding the culture, I was thrilled to learn about the existence of international arbitration. Interviewing for my first job with a US partner who was to become my mentor and who at the time was amongst the few dedicated arbitration practitioners in Germany, I was naturally attracted to the practice area and immediately hooked - this has not changed since then.

International arbitration is designed to create a level playing field in this situation. It requires counsel who can act as translator, making sure on the one hand that the voice of the client is heard, and who can contribute on the other hand to finding a common language. In today's world a profound understanding of diversity as well as cross cultural experiences are essential.

## **YOU ACT AS COUNSEL ON COMMERCIAL AND INVESTMENT TREATY ARBITRATIONS - WHAT ARE THE SIMILARITIES AND DIFFERENCES IN HOW YOU APPROACH THE WORK?**

In terms of procedure, conducting a commercial or investment arbitration may not look very different. These similarities, however, are only on the surface. A sovereign State as party in an arbitration brings in fundamentally different issues to the proceedings. Political considerations as opposed to mere legal considerations need to be taken into account. Also the decision-making process within a State has an impact on the proceedings. The same applies to the choice of witnesses, the submission of documents and the selection of experts.

### **YOU HAVE A DEGREE IN POLITICAL SCIENCE - DO YOU FIND THIS HELPFUL IN YOUR INVESTMENT TREATY WORK?**

Absolutely. Handling the political dynamics is crucial when working for states. It is important to understand fully the position of the State and to ensure proper involvement of all relevant state bodies. At the same time, the decision-making process within a State must be respected and complied with, as well as a rather high degree of formality.

### **CAN YOU COMMENT ON THE RELEVANCE OF PUBLIC INTERNATIONAL LAW FOR THE FIRM'S CLIENTS?**

Public International Law (PIL) nowadays more than ever, is of practical relevance for our clients. Investment protection is actually one of the few but also the most important area of practical application of PIL. In this area, PIL not only provides the legal basis for investment protection but at the same time also offers a means for dispute resolution. It is quite unique that PIL treaties directly reach out to non-state parties.

In these political times, PIL and the protection that it provides is more important than ever. Cross-border trade and international relations need to be safeguarded. PIL is also a tool for peace keeping and the development of global values. It substitutes military aggression by, for example, sanctions or negotiations and solutions in state-to-state disputes. It is further one of the decisive factors for fostering human rights in business relationships.

Last not least, for our clients, PIL is a central element in their investment planning, because it provides them with a mechanism to enforce their foreign investor rights which would remain otherwise only a piece of paper. To give you an example, a client planning a major investment abroad will have easier access to financing or governmental investment guarantees if an effective law enforcement mechanism is in place.

But I believe that PIL and investor-state arbitration also help states. PIL can help to implement good governance, where State institutions would otherwise be unsuccessful. This is well reflected in the international efforts to ban corruption.

### **COULD YOU COMMENT ON THE ROLE OF PIL IN SUCCESSFULLY RESOLVING INVESTOR-STATE DISPUTES WHICH MAY, IN THE PAST, HAVE ESCALATED TO STATE TO STATE LEVEL?**

I would dare to say that before PIL was enforceable through investor-state arbitration, there was practically no effective means to resolve investor-state disputes. Diplomatic protection is not in a position to grant the same level of protection and is rather limited. And even if an individual managed to get the diplomatic machinery up and running, actual compensation cannot be guaranteed.

**SINCE 2008 YOU HAVE BEEN APPOINTED BY GERMANY TO THE ICSID PANEL OF ARBITRATORS AND MEDIATORS, WHICH MUST BE A GREAT HONOUR. GERMANY IS, HOWEVER, ONE OF THE COUNTRIES IN WHICH INVESTOR-STATE ARBITRATION HAS BEEN (AND STILL IS) A HOTLY DEBATED TOPIC, BOTH IN THE CONTEXT OF THE INVESTMENT CHAPTER IN THE CETA AND MORE GENERALLY. DO YOU HAVE ANY COMMENT ON THE FUTURE OF INVESTOR-STATE ARBITRATION?**

I consider the appointment by the German government both a great honour and responsibility. I have actively engaged in the ongoing debate on investment arbitration from the very beginning. I engaged with the aim of providing facts in a debate which was mostly emotionally fuelled. The debate started in Germany; while it has quietened down recently, the effects are still perceptible in a general criticism not just against investment arbitration but against arbitration generally. My view is that investment protection is here to stay. While it may not be a perfect system it is the best available and there are no alternatives in sight. The system of investment protection together with its dispute resolution mechanisms has evolved to be one of the globally most important tools for safeguarding the international economy, peace and human rights. At the same time, the debate has helped in not allowing us to be too complacent about the existing system. Criticisms and shortcomings of the system need to be addressed and the debate has certainly contributed to highlight this.

**WHAT IS THE MOST IMPORTANT THING FOR IN-HOUSE COUNSEL TO ANTICIPATE AT THE START OF ARBITRATION PROCEEDINGS?**

In my view, the most important thing for an in-house counsel at the beginning of an arbitration is to properly brief all relevant staff members of the company about the arbitration, and ideally designate a team that assists the external counsel team on all issues. In-house counsel and external counsel need to work closely together to achieve the best result. This also ensures that a proper case strategy is devised early on and that each relevant decision in the case is jointly taken. Actually, clients can save a lot of time and costs if their staff fully understands which documents are needed to advance a case or which person can provide the relevant witness testimony. Having a full understanding of the case, its strengths and its risks very early on and before starting formal proceedings, is crucial for the success of the working relationship between in-house and external counsel.

**THE GERMAN PRACTICE IS THRIVING (SEE ISSUE 3 OF INSIDE ARBITRATION) BUT IN THE LAST FEW YEARS YOU HAVE ALSO WORKED ON MATTERS RELATING TO MANY OTHER COUNTRIES INCLUDING RUSSIA, CHINA, INDIA, SAUDI ARABIA AND MOST EUROPEAN COUNTRIES. HOW DOES THE GERMAN ARBITRATION PRACTICE FIT WITHIN THE GLOBAL INTERNATIONAL ARBITRATION PRACTICE?**

I am a German qualified attorney, based in Germany but servicing clients all over the world. These can be German clients with disputes taking place outside of Germany, governed by laws other than German law or, vice versa, clients from outside of Germany with disputes relating to Germany or governed by German law. Many of the cases I handle have no connection to Germany and clients come from different parts of the world. The matters can be commercial arbitration, investment arbitration, arbitration-related court proceedings or asset tracing and recovery.

In any event, I will proceed with a team tailored to the specific matter - the right people in the right places and covering whatever is required in the case: applicable substantive and procedural law, sector or technical expertise, location, language and so on. This is usually a cross border team composed of members from different offices or where necessary also other law firms or experts. Within HSF, we work seamlessly and appear before the client as one HSF team independent of where the individual members actually sit. For example, I recently represented a German client in a London seated arbitration governed by English law where my London colleagues advised on English law and were a natural part of the team. Global team work on many different levels is required for asset tracing and recovery. I am currently representing a client in asset tracing and investigation with a team working in various European States, in Central Asia and in off shore jurisdictions. We are able to handle most of this with our own resources working hand in hand, and we draw on external resources working closely with us, were required.

### **HOW WOULD YOUR TEAM DESCRIBE YOU?**

Up in the air and down to earth.....

## **KEY CONTACTS**

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



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