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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Covington & Burling's Marney Cheek

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Marney Cheek

Marney Cheek is co-chairwoman of Covington & Burling's international arbitration practice. She arbitrates international disputes before tribunals in complex commercial and investment treaty cases and litigates international disputes in U.S. courts. Her practice spans a range of jurisdictions and industries, including oil and gas, mining, and life sciences, and she is recognized by Chambers and Legal 500 as a leading arbitration practitioner.

Cheek also routinely counsels clients on a range of World Trade Organization dispute resolution and international trade issues in areas such as intellectual property, financial services, standards, trade preferences, non-tariff trade barriers, and climate change. Her advisory practice draws upon her trade, investment and public international law expertise, as well as her experience as associate general counsel at the Office of the U.S. Trade Representative. Among other matters, Cheek counsels clients on investment treaty negotiations and advises clients on public international law and investment issues related to the Russia-Ukraine conflict.

Q: What attracted you to international arbitration work?

A: Having completed graduate studies in both law and international policy, international work has always been a focal point of mine. My first exposure to international arbitration was as associate general counsel at the Office of the U.S. Trade Representative, where part of my portfolio included representing the U.S. in state-to-state disputes before the World Trade Organization. When I returned to private practice, I sought out a practice area where I could continue international disputes work. International arbitration was a good fit, particularly given my focus on treaty arbitration. I do a lot of advisory work for clients on trade, investment and public international law matters, and I find that work very satisfying. But there is no substitute for the intellectual rigor inherent in writing briefs and arguing a case. International arbitration allows me to tap into that skill set. The fact patterns are often fascinating and complex, and the cases raise interesting questions of international law. I am constantly engaged, and I enjoy pulling everything together into a compelling narrative.

It also happens that the team of people in the international arbitration practice at Covington are great colleagues — I may have been attracted to international arbitration work on an intellectual level, but the people I work with are really the key to making day-to-day practice enjoyable and rewarding.

Q: What are two trends you see that are affecting the practice of international arbitration?

A: One trend is a move towards greater transparency, particularly in investor-state arbitration. The UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration came into effect in April 2014. While parties must agree to the application of the rules in UNCITRAL disputes arising out of treaties concluded prior to April 2014, and the rules do not formally apply to non-UNCITRAL arbitrations, the transparency rules nevertheless are being looked to for guidance across the board as tribunals consider ways to incorporate greater transparency in investor-state arbitration proceedings. So, for example, written submissions may be made available to the public, there may be public access to hearings, and third parties may share their views with the disputing parties and the tribunal through amicus curiae submissions. Given how much misinformation and misunderstanding there is about investor-state arbitration, the general trend towards greater transparency is a positive one. That said, transparency is not necessarily one-size-fits-all, and the rules ensure that tribunals will adequately take into account the need to protect business confidential information and to ensure that greater transparency does not disrupt or unduly burden the arbitral proceedings or jeopardize the integrity of the proceedings.

The second trend, unfortunately, is how long arbitrations take. Procedural calendars often become quite extended, post-hearing briefs are often ordered in addition to closing arguments at the hearing, and it can be six months or more before an award is issued after the hearing on the merits. The result is a process that can drag on for years. For investors bringing cases and states defending them, the longer the proceeding, the greater expenditure of resources. For parties looking to investor-state arbitration for a meaningful remedy and to bring a dispute to closure, the length of the proceedings can be discouraging. When I speak to my clients who are users of the system, the length of the process is of great concern.

Q: What is the most challenging case you've worked on and why?

A: For many years, I have represented American shareholders in Yukos Oil Company. Americans owned approximately 15 percent of Yukos when it was expropriated by the Russian Federation through a series of confiscatory tax and other measures from 2004 to 2007. Americans lost upwards of $14 billion as a result of the expropriation.

The challenging aspect of this case is not on the merits, but in having these claims heard. On the merits, three respected international investment tribunals already have concluded in unanimous decisions joined by Russia's appointed arbitrators that Russia expropriated Yukos and must compensate shareholders. Two of those decisions involved minority investors like the Americans. But American investors have no investment treaty under which to bring claims. This is a textbook case of why investor-state dispute settlement in investment treaties is so important. Without a treaty providing for investor-state dispute settlement, and knowing that a fair trial in Russia is simply futile, Americans must rely on a diplomatic solution.

A bilateral investment treaty between the United States and Russia was signed by both parties and ratified by the United States Senate, but never ratified by Russia. That is a shame, because unlike Yukos shareholders in other countries, my American clients have not had the same recourse to an independent international tribunal to resolve this dispute. I remain hopeful that there is an opportunity to seriously address compensation for American Yukos shareholders through diplomatic channels, but the lack of a treaty has made resolution of this dispute more challenging.

Q: What advice would you give to an attorney considering a career in international arbitration?

A: These days, for law students, moot competitions are a great way to learn more about international arbitration and get exposure to some of the types of complex fact patterns and legal issues that can arise in the field. Given how many experienced arbitration practioners support moot teams and participate in these competitions, moots also are a good way to learn from members of the bar. There also are, of course, many opportunities to enroll in small seminars that dive deeply into topical issues while still in school, and I would encourage attorneys to take advantage of specialized arbitration training courses for younger practitioners.

But there is no substitute for on-the-job training. It goes without saying that as a young lawyer on an international arbitration matter, you always should be looking for ways you can contribute to a case. And as young lawyers build their arbitration skill set, I would encourage them to look through a slightly broader lens. While many young lawyers I speak with see international arbitration as a unique practice niche, when it comes to developing the right skill set, international arbitration is the close cousin of litigation. Focusing on developing written and oral advocacy skills is critical to success. If a pro bono or other litigation matter will give you the opportunity to write a full brief, make an oral argument, or work directly with witnesses and experts, it may be a worthwhile opportunity to gain skills early in your career that will help you take on increasing responsibility on international arbitration cases.

Q: Outside of your firm, name an attorney who has impressed you and tell us why.

A: In my practice, I often partner with local counsel, particularly when the seat of an arbitration is in a jurisdiction where Covington does not have a presence. My ideal local counsel is not only a resource on questions of local law, but also a strategic partner. I have certainly found that combination in Silvia Pavlica Dahlberg of the Vinge firm in Sweden. Silvia not only has a solid understanding of Swedish procedural law, but she can explain unique Swedish law concepts in a way that is clear, concise and easily digestible for someone who comes from a common law background and a legal system with quite different procedural rules. I have been very impressed with her level of sophistication and strategic insight.