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Q&A With Gibson Dunn's Penny Madden

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Penny Madden

Penny Madden is an English qualified partner and co-chairwoman of Gibson Dunn & Crutcher LLP's international arbitration practice group. She has recently been selected for appointment to Queen's Counsel. She has a range of experience in all key aspects of international arbitration with particular expertise in shareholder, SPA, telecommunications, international trade and insurance disputes. She represents clients across the globe in a wide variety of arbitration proceedings, including those before the London Court of International Arbitration, International Chamber of Commerce, United Nations Commission on International Trade Law, International Centre for Settlement of Investment Disputes, and London Maritime Arbitrators Association, as well as in ad hoc proceedings. In addition to representing clients as counsel and advocate, she regularly sits as an arbitrator.

Q: What attracted you to international arbitration work?

A: I was attracted to international arbitration by the unrivaled advocacy opportunities afforded by this practice area — the ability to argue complex issues of law and fact in high-value and high-profile cases before some of the best legal minds in the world was a huge draw for me. The global ambit of the practice was also very alluring, affording cases that encompass a broad range of cultural backgrounds and diverse legal systems, as well as the opportunity to build up expertise in the fascinating and developing sphere of public international law. I was also very lucky to have had some inspirational mentors along the way, including key arbitration practitioners Karyl Nairn, Nic Fletcher and Chris Colbridge.

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

A: Greater access to third-party funding has had a significant impact on the practice of international arbitration, especially in the sphere of investment treaty work. Historically, investors who had suffered expropriation of their investment often found it difficult to pursue treaty claims owing to a lack of funds. Third-party funding now affords greater opportunity for those cases to be pursued, which has in part accounted for the increase in the number of investment treaty arbitration claims being brought. The increase in the availability of third-party funding has been accompanied by a move on the part of external counsel towards greater flexibility in the fee arrangements available from law firms: some firms are even willing to take cases on pure contingency fees. This has further increased optionality for claimants, including the ability to retain lawyers that have a personal vested interest in the outcome of their case — clients historically looked for contingency fees when they could not afford up front legal

fees; now some clients positively want their lawyers to have a degree of "skin in the game" to incentivize them to win. But such a trend should be treated with some caution, and as a profession we need to ensure that a need to win at all costs (including for the lawyers' own financial survival) does not have a corrosive effect on integrity and ethical standards.

Contingency fee structures and third-party funding also give rise to other thorny issues such as the potential for conflict of interests, how to award costs either in favor of or against the funded party, and whether special fee or funding arrangements should have to be disclosed to the arbitral tribunal. More fundamentally, there are still jurisdictions where third-party funding is not permitted on the basis that it violates the doctrines of "champerty" and "maintenance."

The international arbitration community has also continued to focus energy on a drive towards more efficient and cost-effective arbitration, looking at how to streamline arbitration without compromising the quality of representation and awards. A number of jurisdictions have introduced legislation to speed up the procedural process to an award (such as India and the U.S. state of Delaware), and most arbitral institution rules now include special expedited arbitration procedures for circumstances where the case is urgent. Consistent with an increased focus on efficiency, many arbitral rules also include provisions to facilitate consolidation of arbitrations to accommodate multiple interconnected agreements between the same or related parties, and it is increasingly common for arbitration agreements to contain sophisticated bespoke consolidation clauses.

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

A: The multibillion dollar investment treaty case on behalf of a global telecoms company against a North African state before The Permanent Court of Arbitration pursuant to the UNCITRAL arbitration rules with seat of arbitration in The Hague. The claim was for breach of the fair and equitable treatment standard and expropriation protection under a bilateral investment treaty, and arose out of the state's hostile actions against one of the investor's mobile telecommunications subsidiaries, including unfair taxes, spurious forex criminal changes, importation bans, enactment of preemption rights, and the imposition of a two-year prison sentence against the subsidiary's CEO. The case required mastering a complicated intertwined factual matrix, as well as innovative arguments under public international law and complex issues of foreign criminal law. The case was also emotionally charged, as it involved a key client contact facing a two-year custodial sentence in a North African prison and jeopardized the survival of a thriving telecoms business which provided employment to thousands of local nationals. We also faced significant enforcement challenges.

The case required intensive action by a diverse fully integrated team over many years and included hotly contested procedural hearings, extensive pleadings, numerous witness statements and expert reports, and a vast volume of documentation. The dispute was ultimately favorably concluded through a multibillion dollar settlement, involving a $4.4 billion cash transfer, and a new multibillion telecom joint venture transaction with a sovereign investment fund of the state. The CEO was never imprisoned.

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

A: Go for it — I cannot think of an area of the law that is more interesting, more challenging and more exciting. Our cases regularly involve issues covered in the international press and often include an intriguing political angle. I would love to have time to write a book based around international arbitration — our practice makes John Grisham's tales look parochial and tame! My other advice to attorneys looking at a career in international arbitration is to master at least one foreign language to the

highest standard. The international nature of the practice makes linguistic skills invaluable and highly prized. To make it in any sphere of the legal profession, you need to stand out, and bilingual lawyers really have an edge when it comes to the practice of international arbitration.

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

A: I have long been impressed by Toby Landau, who is a master of international arbitration. Toby was a key architect of the Arbitration Act 1996 which has formed the foundation of London's preeminence in international arbitration. He is an exceptional advocate, who argues cases with great skill, erudition and immense charm, and is one of the cleverest lawyers I have known. He is also delightful to work with and a brilliant arbitrator, who quietly but authoritatively wins the confidence of other tribunal members and the parties before him, and consistently ensures that arbitrations are run efficiently and result in well-drafted and well-reasoned awards. He is also the only advocate I know who claims to develop his best oral arguments in the shower!

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