An Interview with Lucy Reed

Introduction

Lucy Reed is a partner and co-head of the global international arbitration group at Freshfields Bruckhaus Deringer and former President of the American Society for International Law, 2008–2010. In this interview, discusses her work in international commercial arbitration, her experiences negotiating in North Korea, and one of her favorite books on international law. Many thanks to Lucy Reed for taking the time to share her thoughts with the Harvard International Law Journal and our readers.

Q: For those unfamiliar with international arbitration, can you briefly describe your current work as an arbitrator and an advisor to clients involved in international arbitrations?

My colleagues and I work primarily as counsel to clients in international arbitrations, both companies and government entities. In international commercial arbitration, the disputes typically involve alleged breaches of contract (sales, construction, joint ventures, M&A), which the parties—from different States—have agreed be resolved through binding arbitration rather than one of the party’s national courts. These cases, for example under the International Chamber of Commerce (ICC) or London Court of Arbitration (LCIA) Rules, are by definition confidential.
We are also specialists in investment treaty arbitrations, in which a foreign investor is allowed by the relevant treaty to bring a dispute relating to that investment directly against the host State (rather than having to rely on its home State to represent it) for resolution through binding arbitration. Many are heard by panels constituted under the World Bank’s International Centre for Investment Disputes (ICSID), and the existence of the cases is public. For example, we represent ConocoPhillips in a multi-billion dollar ICSID case against Venezuela for (among other things) alleged expropriation of COP’s oil investments. We also defend the Government of Turkey in a multi-billion dollar claim brought under the Energy Charter Treaty by an alleged Cypriot investor.

As Freshfields is recognized as the pre-eminent international arbitration firm, we tend to get hired for major disputes, involving hundreds of millions and often billions of dollars. Unlike domestic arbitration, these international proceedings are rarely quick or inexpensive. We write extensive factual and legal “memorials” (briefs), interview witnesses, and do oral advocacy at hearings. Cases can go on for years, but the different stages of the cases provide a lot of variety.

I do not sit as an arbitrator in investment treaty disputes, to avoid facing “issue conflict” in connection with recurring legal issues under the investment treaties. In international commercial arbitration, I still prefer serving as counsel—I like advocating more than I like deciding—and so I sit as arbitrator in only two or three cases at a time. I just finished almost a decade of sitting on the Eritrea-Ethiopia Claims Commission, which was the first arbitration panel constituted to decide issues of international humanitarian law.

Q: What skills or attributes make people best suited for international arbitration?

Really the same skills and attributes that make one a good litigator: critical and strategic thinking, clear and convincing oral advocacy, attention to detail, a team mentality, and most important, a competitive spirit, maybe better described as “heart”—with ethics.

For international arbitration, add international experience, empathy, and curiosity.

Q: How did you first become interested or involved in international arbitration? How has the kind of work that you do evolved over the years?

As I always tell students, I first became involved in international arbitration because of the Islamic Revolution in Iran in 1979. After a federal trial court clerkship, I joined the Washington D.C. firm (long closed) of Wald, Harkrader & Ross, which had over forty U.S. corporate clients with claims against the Islamic Republic to be brought before the new Iran-U.S. Claims Tribunal in The Hague. Why? Because John Westberg, a former U.S. AID lawyer who had founded the first western-style law firm
in Tehran, joined Wald and brought those clients. So, as a young lawyer, I was immersed in international arbitrations involving contract and expropriation claims.

Between my time at Wald and at Freshfields, I did more purely international commercial arbitration cases. Interestingly, the treaty cases I specialize in now, which involve essentially public international law matters, are quite close to my early Tribunal work. As they say, there is nothing new under the sun.

**Q: What do you enjoy most about your work in international arbitration? The least?**

I enjoy many things, or I would not still be doing international arbitration. I really like working with clients and colleagues from so many places and so many walks of life; in a typical case, we will work closely not only with lawyers and economic experts but also with CEOs, engineers, and scientists. I really enjoy the jigsaw puzzle–like process of putting a case together—finding out what happened by reviewing documents, interviewing potential witnesses, researching the law, brainstorming, and strategizing with clients and colleagues, finally perceiving how to tell the story most clearly and convincingly. And I really like working with my colleagues in the international arbitration group at Freshfields—so many nationalities, so many personalities, so smart, so funny, best in the world by far.

What I least enjoy is the often long wait for the final decision in a case. And explaining the wait to the client, whether a company or a government.

**Q: Can you describe your favorite legal issue/project that you have worked on (and why)?**

My two favorite legal projects, because they were unique, were (1) serving as general counsel of the Korean Energy Development Organization (KEDO), the international organization set up after the North Korean nuclear crisis in 1994, and (2) sitting on the Eritrea-Ethiopia Claims Commission (EECC).

As for KEDO, it is hard to beat the experience of leading negotiations with North Korea and in North Korea. I remain proud of the work we did, with hundreds of experts, in effectively negotiating from scratch the regulatory infrastructure necessary to commence a nuclear power plant construction project in North Korea. I wrote about this process in my Hague Lectures in 2001.¹

As for the EECC, it was a privilege to be part of the first tribunal resolving international humanitarian law disputes; as rough and imperfect as the EECC claims

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process had to be, the two governments did agree on a legal process rather than keep fighting. All EECC decisions are publicly available on the website of the Permanent Court of Arbitration.\(^2\)

**Q:** You have worked on international arbitrations that involved countries in which women are not expected to work as lawyers. Has that caused any issues? If so, how have you handled them? Do you have any advice for other female lawyers who encounter similar problems?

I have been fortunate enough not to face any serious issues, but I have not had to work in some of the toughest countries like Saudi Arabia. At the Iran-U.S. Claims Tribunal we co-existed with our own traditions, and the Iranian Government representatives treated me no differently than they had the U.S. Government’s Agents who were men. (I have a favorite story about how there were more comments on my height than my gender.) True, they did not shake my hand, but I recognize that as part of their religion. And the one time I visited Iran, in 2002 as the guest of the Ministry of Foreign Affairs for an arbitration conference, I dutifully fulfilled the legal requirement of wearing a coat and a headscarf—it did not affect the high level of our discussions and debates as lawyers. In North Korea, if they were surprised that a woman would be head of delegation, they never showed it.

Advice for others? Prepare culturally, pick your battles, and practice responses to the worst that might happen.

**Q:** You have arbitrated all over the world and even negotiated in North Korea (as general counsel for the Korean Peninsula Energy Development Organization). What was the biggest cultural shock or difference you have experienced in your work?

I will answer this with a story. On one of our trips to North Korea, I took an old towel from home because I had learned from experience that they don’t have real towels in the “hotels” where we did our negotiations. I planned to leave it behind when we returned to Beijing. As we were saying formal goodbyes, a maid came running through the lobby and held out my wet towel to me. As I started to tell her that I meant to leave it, my South Korean colleague told me to take it or she would be severely punished for theft. I have thought of this encounter so many times over the years: the incomprehensible gulf between my life and hers.

Q: What is your advice to students or young lawyers who are interested in practicing international law in general, and international arbitration in particular?

My advice is always the same: become the best possible national lawyer first, and learn the building blocks of your own common law or civil law (or other) system. In our practice in New York, we look for young lawyers who have studied contracts, constitutional law, civil procedure, UCC, evidence, remedies, accounting, as well as survey courses in international law and perhaps an arbitration seminar. We look for an intense writing experience, whether it be the law journal, another law journal, a moot court competition, or legal aid. Languages are also helpful, especially Spanish, Mandarin, and Arabic.

International arbitration is not that big a practice area, so students have to be realistic about their prospects. Nor is it litigation without all the tedious bits and with all the glamour!

Q: Given that past arbitration decisions are non-binding and often confidential, have academic articles influenced your thinking in practice more so than they might for other legal fields?

I would not say that. Investment treaty awards are available, as are excerpts of many commercial awards. We tend to use these sources more than secondary discussions of them. Having said that, I do find books and articles on arbitral procedural helpful.

Q: What do you think have been the most influential academic articles or authors in international law in recent years?

There really are too many to count. I will say that my practice perhaps takes me most often to James Crawford’s publication on the ILC’s Articles on State Responsibility.³ My partner Jan Paulsson is writing on the moral hazard of party-appointed arbitrators and urging more use of all institution-appointed arbitrators, a (seemingly) radical idea that is generating a lot of buzz.⁴ I have a lot of time for Professor Susan Frank’s new empirical research on investment arbitration awards.⁵

A personal favorite is Lou Henkin’s *How Nations Behave*.6

Q: The Harvard International Law Journal recently published an article by Julian Davis Mortenson arguing that the definition of “investment” in ICSID arbitrations has been interpreted too narrowly by tribunals in recent years.7 Having been involved in ICSID arbitrations and having co-authored a treatise on ICSID arbitration,8 what are your thoughts? Do you think a broader definition of investment would be more faithful to the original goals of the ICSID Convention and/or would make more sense from a policy perspective?

Interesting that you raise Professor Mortenson’s article, as I just included it as a “must read” in a presentation I gave in Seoul on the meaning of investment. Particularly important is his presentation of negotiating history going to the coverage of investment in Article 25 of the ICSID Convention. But it is better that I not take an abstract position on your last question.

Q: You also served as President of the American Society of International Law (ASIL) from 2008 to 2010. What were the biggest projects ASIL undertook during your leadership tenure? What would you consider your greatest successes from that time?

It was absolutely fantastic to be President of the American Society of International Law, particularly working with our very talented Executive Director (and human rights lawyer) Betsy Andersen. A huge project was dealing with the major embezzlement of funds by the former CFO, which was not how I expected to spend my time as President and certainly not fun. Counter-intuitively, the end result was a much stronger Society, both in terms of fiscal/governance protections and overall mission.

In terms of projects, I think our greatest success was the report of our McArthur funded bipartisan Task Force—chaired by Judge Patricia Wald and former Legal Adviser Will Taft—on U.S. policy towards the International Criminal Court. We know the Task Force’s recommendations have had an impact.9

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8 *Lucy Reed, Jan Paulsson, & Nigel Blackaby, Guide to ICSID Arbitration* (2d ed. 2010).
9 *Independent Task Force, The American Society of International Law, U.S. Policy Toward the International Criminal Court: Furthering Positive*
Q: What are the most important roles that you believe ASIL plays? What are the greatest challenges facing it or any other international law organization in the coming years?

The most important role ASIL plays is that of convener: convener primarily of academics and practitioners, but also of government lawyers and leaders, to discuss and debate—in person and in print—the most pressing international law issues of the day. The mission of ASIL is public education, to host and elevate the discourse, to emphasize that international law is not some elite specialty but rather real law that is on the front page and all around us.

Q: In twenty years, what do you think will be the biggest difference in international commercial arbitration compared to today?

Hard one. I don’t expect international commercial arbitration—which is overall quite a good regime, despite calls for greater efficiency—to change that much. There will of course be new names and faces. It could be we will see a greater percentage of international commercial disputes go to arbitration, if the trend to arbitrate even financial and banking disputes continues.

I do expect greater change in investor-state arbitration. Although there is no formal doctrine of precedent in international law, the publication of awards means that there is an informal jurisprudence. Which means that there will be ever clearer contours for jurisdiction and certain merits issues. Which should discourage the reckless claims that are lightning rods for criticism. I also think there will be new systems, more or less formal, to ensure quality and consistency in awards.