

To be Frank...

Sebastian Perry

Thursday, 21 February 2013



Sir Frank Berman KCMG QC

Sebastian Perry interviews Sir Frank Berman QC, arbitrator and former Legal Adviser to the UK Foreign & Commonwealth Office, about documentary overload, arbitration's gender imbalance, and the legacy of his friend and mentor Sir Arthur Watts.

How many cases do you have at any one time?

Given that most of my cases are as arbitrator, the load varies but it can be up to six or seven on the go at once. But they'll be at different stages, and some can string themselves out for several years. To give one counter-intuitive example, I'm sitting on an important inter-state case between Pakistan and India [over hydroelectric activities on the Kishenganga River]. It's a heavy case and you might have assumed it would drag on for years, but it's been operating to a brisk timetable. Whereas some of my investment arbitrations, for good or bad reasons, can go on for a long time.

Do you also do commercial arbitration work?

I have done some commercial arbitration but always with a big international element to it, and always as arbitrator.

Where do you stand on the 'double hat' debate, as to whether arbitrators should also act as counsel in investment treaty cases?

I don't feel the need to stand on the rooftops and preach about my own practice. I have not appeared as counsel in investor-state arbitration or indeed inter-state arbitration. It doesn't stop me appearing as counsel before the International Court of

Justice [for example, on behalf of Cambodia against Thailand in the Temple of Preah Vihear case].

I find it more comfortable to confine my arbitration role to being an arbitrator or member of an ICSID annulment committee. But then my circumstance is different to others. I came to arbitration late in my career after working for government. It was easier for me to be a bit selective. I have a lot of sympathy for those who say you need arbitrators with skill and experience. How on earth does somebody get established as an arbitrator if he or she never gets a chance to start?

So I think inevitably there has to be some overlap. But there may be a stage in one's career when it becomes sensible to do one thing or the other. I'm also conscious of ICSID's need, when appointing an annulment committee, to show it has chosen members who won't be sniped at from the wings because they're thought to be affected by relationships with clients. But the truth is there's a shortage of arbitrators for what is now an extraordinarily active part of the international legal landscape.

At the ICCA conference in Geneva in 2011, you made some memorable comments about the gender imbalance on investment tribunals. Do you think the situation is improving?

I do think it's getting better. Sometimes it's quite surprising how quickly things change. I have absolutely no doubt that if you look at the balance in five or 10 years' time you'll see the picture has shifted perceptibly because there are so many able women practitioners in the field. It is odd, this impression that arbitration gives of being a male club. Part of that is simply due to the way in which parties or law firms set about the process of choosing arbitrators.

When I joined the Foreign Office many years ago, there was a small minority of women among the legal staff. By the time I left, there was an exact parity – not because anybody had introduced a scheme of positive discrimination but because the world had moved on and that was reflected in the professional staffing of government departments. I've seen the same change in the gender balance of the law classes I teach.

SIR FRANKLIN BERMAN KCMG QC

Chair of board of trustees, British Institute of International and Comparative Law (2011-)

Member, Permanent Court of Arbitration (2010-)

Member, ICSID panel of arbitrators (2004-)

Barrister, Essex Court Chambers (2000-)

UK Foreign & Commonwealth Office (1965-1999)

* Legal Adviser (1991-1999)

Counsellor, UK Mission to the United Nations (1982-1985)

Legal adviser to British Military Government, Berlin (1971-1972)

Visiting professor, Oxford University and University of Cape Town

ICSID appointments

As chair: *Rompetrol v Romania*; *Alemanni and others v Argentina*; *Global Trading v Ukraine*

As party appointee: *F-W Oil Interest v Trinidad and Tobago*; *Bayindir v Pakistan*; *Russell Resources v DR Congo*; *Libananco v Turkey*; *Marion and Reinhard Unglaube v Costa Rica*; *Vattenfall v Germany*

As annulment committee member: *Consortium RFCC v Morocco*; *Lucchetti v Peru*; *CECF Transgabonais v Gabon*; *Togo Électricité-GDF Suez v Togo*

Other appointments

Arbitrator, Indus Waters Kishenganga Arbitration (*Pakistan v India*), PCA (2010-)

Tribunal chair, HICEE v Slovakia (UNCITRAL/PCA) (2009-2011)

Chair, Claims Committee of the Austrian General Settlement Fund for Victims of Nazi Persecution (2001-)

Chair, Appeals Board of the International Oil Pollution Compensation Fund (1985-2004)

Judge ad hoc, Case concerning Certain Property (*Liechtenstein v Germany*), ICJ (2003-2005)

Was the Foreign Office where you got your first exposure to international arbitration?

Yes, in the 1970s I was the deputy agent in the Continental Shelf arbitration between the UK and France, and agent in the Young Loan arbitration [relating to Germany's post-First World War reparations debt]. There was also a fair amount of litigation work, which of course every lawyer wants to do. It's deeply fascinating and attractive because, unlike many international disputes that drag on forever, the case comes to an end with a judgment.

In the Foreign Office, though, we never acted as counsel in our own cases. Counsel were always appointed by the attorney general. We'd be involved more in a back-room capacity – preparing papers, more like a modern law practice. We weren't on our feet in court except when there were big proceedings in the ICJ, for example, when a senior legal adviser might have a joint role as agent and counsel.

I always had in mind that it would be good to go into practice as an arbitrator after I retired. When I was in the service, there was a compulsory retirement age of 60, though it's no longer in place.

Do you see counsel as primarily responsible for managing time and costs?

Oh gosh, yes. It's up to the parties and their counsel. There's a terrible temptation to over-litigate and the result is extra expense. Sympathetic arbitrators are always alert to the need to get parties to streamline the process while feeling they are at liberty to express their arguments in full. If you plead a case in an extremely complex way, it is unavoidably going to take longer because the arbitrators are obliged to absorb and respond to all important lines of arguments that the parties have put before them.

Do you have any tips for counsel to avoid unnecessary expense and delay?

Documentary overload is a real and growing problem. The urge to be complete is understandable and laudable but it leads to the essential becoming swamped by the peripheral. It's perfectly possible for parties to agree on sensible document management, on the basis that there can always be supplementary document requests by the tribunal.

It's a physical problem as well, posing difficulties as to storage space, accessibility and portability of documents, not to mention their safe preservation. There are huge benefits at the hearing stage if the parties can agree on core bundles. But all that demands cooperation between counsel on both sides – which, in any case, is what the tribunal ought to be entitled to expect.

Electronic documents are also an issue. Most arbitrators are highly mobile and have several cases on the go at any given time, so most of the work on each case will be done off the electronic version of the papers. It's in everyone's interest to help them find their way around the document store, especially when it runs to several hundreds of documents. The law firm capable of giving titles to each PDF exhibit deserves to win the case!

Do you take a side in the debate over party versus institutional appointments?

I've followed the debate with interest and it's always good to see the colourful vigour with which people argue their side. But I don't see them as two equally viable, practical alternatives.

I've had a lot of experience of the way international institutions operate. It would be immensely difficult to go over to a system of purely centralised appointments because, with the best will in the world, no secretary general of any international institution is going to adopt a completely autonomous, unilateral approach towards making appointments. There will always be a need for consultation with the parties to ensure you don't end up making appointments that, for reasons you couldn't have imagined, are deeply unacceptable.

I don't think there will end up being a bright-line rule about institutional or party appointments. Which is not to say any sensible observer closes his eyes to some of the problems that party appointments might cause.

But I must say flatly that, in my years of experience as an arbitrator, I have rarely felt that a party-appointed arbitrator regarded himself as the representative of the appointing party. I've always found that party appointees feel they have a duty to make sure that the arguments put forward by the party that appointed them are properly considered – and that's it. That is no different than the role of an ad hoc judge at the ICJ, in which capacity I've also served.

Do you believe dissenting opinions have value, and have you ever dissented in a case?

I have dissented once, in an ICSID annulment proceeding [Lucchetti v Peru]. Again, I don't take a black or white attitude to the question. I certainly don't agree with the radical view that dissent is always unfortunate. There are occasions when it's useful or necessary. But then you do expect the dissenting arbitrator to keep the dissent civilised in its expression and within the narrow terms of the disagreement.

This debate was held years ago in relation to the ICJ. From the 1920s, there were arguments about whether dissenting or concurring opinions can serve a useful function in international proceedings. My view is that they can, and that they don't detract from the authority of the judgment of the court.

What about the argument that dissents can undermine the enforceability of an arbitral award or lay down a blueprint for a set-aside or annulment action?

It depends entirely on what the points of dissent are and how they're expressed. There are all sorts of ways to draft an award to show that the arbitrators disagree on some issues but are in agreement on the main points. I had an UNCITRAL case at the Permanent Court of Arbitration recently in which the terms of a dissent were seen in draft by all members of the tribunal. In the same way, the dissenting arbitrator saw and had a chance to comment on the majority award. That's the way to do it if possible.

You practise from Essex Court Chambers in London. Have you encountered the problem of barrister chamber conflicts?

It's certainly a problem to be confronted but my personal view is that it's been hugely exaggerated and is largely artificial. I am a member of a set of chambers that is full of people who are active in the world of arbitration in all kinds of roles and it never crosses our minds that there's anything strange in finding a fellow member of chambers appearing before us as counsel or sitting as a co-arbitrator on a panel.

Judging again from my own experience, there's also absolutely no danger of a lack of confidentiality in the way information is handled. People say, "We're not talking about actual bias but the appearance of bias." But that has to mean the appearance of bias to a reasonable outside observer with a reasonable knowledge of the facts. That's the standard our domestic courts use and it ought to apply in arbitration.

Of course, arbitration is a more complex, highly internationalised system than that encountered in our domestic courts. You get people from different legal systems and sometimes with the most unexpected differences in their rules of professional ethics. In that context, one can understand why there have been attempts to draw up codes governing this issue. But I've never seen it as a problem and I've seen every single permutation on the theme in relation to my set of chambers.

One also ought to take into account that we have an extraordinary sense of professional ethics in the English legal profession and we all rely on it implicitly. Other people find that hard to accept occasionally.

Vaughan Lowe QC recently gave a speech in honour of the late Sir Arthur Watts, calling for international lawyers to focus on practical realities rather than abstract principles. Do you agree?

I thought it was a very good speech indeed. I'm familiar with Professor Lowe's way of approaching problems. It's the workman's attitude to international law. A lot of international law is elevated to abstraction by people who quite rightly have a lot of academic interest in it, but who sometimes live in fairyland. And law is anything but fairyland.

Is there too sharp a divide among investment arbitrators between those with experience as practitioners and those with a purely academic background?

It depends so much on the individual. It's not simply a problem in arbitration but in standing international judicial bodies too.

There's always the problem of what sort of people should be nominated to sit on a court. Should the International Criminal Court be comprised of those who know all about the growing field of international criminal law – who in the early days were mostly academics – or people who know how to handle criminal trials?

You see the tension in the ICJ as well, though rather less so at the European Court of Human Rights in Strasbourg. It's one of the things that makes the field interesting.

The academics have a huge contribution to make. Then occasionally you get these remarkable figures like Rosalyn Higgins, Arthur Watts, Christopher Greenwood, Vaughan Lowe, Ian Brownlie and James Crawford, who combine the highest academic standing with vast experience of practice.

New Zealand arbitrator Campbell McLachlan QC was challenged in an ICSID case a few years ago on the basis of his academic writings. Can the fear of being challenged have a chilling effect on arbitrators' academic output?

That's not an easy one to answer. Arbitrators who publish academically not only face the risk of a formal challenge at the appointment stage. They also face not being appointed in the first place because of inhibitions in the mind of the appointing authority or party because of their writings.

On the other hand, one should be able, in a mature profession, to distinguish between views expressed by individuals in an academic capacity and as counsel. The problem arises if what somebody has said and written in the academic field indicates they have a clear view and is taken as implying that they can't be relied on to confront the issue in an open-minded way.

I dare say there are some in the hard-bitten, non-academic arbitrator fraternity who are known to have clear views on issues too – and pay the price. It's a problem generally if you sit on a whole series of tribunals. You find yourself taking part in a decision in which a view is taken on a general issue in the specific context of the dispute before you, but emphatically you do so on the basis of the way in which the parties have argued it before you.

Good tribunals don't launch into academic exercises of their own. They make an informed choice between the way the parties have argued a dispute and in the light of their broader knowledge of the legal context. There's always scope for someone to claim that an arbitrator isn't open-minded but that doesn't necessarily mean it's a good objection.

Lowe also complained in his speech that there is "an excessive degree of specialisation" in the academic study of international law. Do you agree?

Specialisations are useful but also dangerous. I try to avoid the catchphrases "international human rights law" or "international criminal law" – it's all international law, even though it has a lot of compartments that feed into one another.

I tell my students that any problem they confront in international law will not stay within a single departmental boundary. It necessarily implicates other parts of the law so you need a concept of international law as a system, and well-trained people who can then make developments that are coherent with the system as a whole.

That's been a particularly British contribution to international law over many years. There's a whole string of people that embody that approach, of whom Arthur Watts was one.

At ICCA 2011, you were sceptical of Bruno Simma's suggestion that arbitrators in investment cases should integrate human rights law in their decisions. Would that not be one way to achieve coherence within the system?

Judge Simma's viewpoint is important and convincing. What I was trying to say was that arbitrators have to decide disputes on the basis of the law as it applies. It's not their job to pull in different considerations that aren't part of the dispute between the parties. But there are important questions as to how you interpret existing international law or treaties in relation to the way the law as a whole has developed.

As chair of the board of trustees of the British Institute for International and Comparative Law, you're leading the fundraising efforts for the institute's new research fellowship in honour of Watts. How has the response been so far?

The response to the appeal has been good. It's quite striking how many people had the same high regard as I do for Arthur Watts. He was a pre-eminent example of the British "can do" approach, believing that the law is there to be used and shaped to make it useable by practitioners.

I was gratified by the fact that a lot of donors to the appeal are individuals as well as governments from whom Arthur had briefs, not to mention family members. The fellowship is an important post and needs a high-level person to fill it, so BIICL must be able to fund that properly for the foreseeable future. We're going to launch a second phase of the appeal to make that happen, and to ensure that public international law remains at the heart of BIICL's activities.

For more information on the fundraising appeal, please contact BIICL's development director, Alice Reynolds