



Précis Paper

Skirting Danger Abroad: What it Means to be an International Lawyer Today

Robert Amsterdam gives us a fascinating glimpse into the arcane life of the modern international lawyer, and serves a cautionary word to the wise

Discussion Includes

- What does it mean in 2018 to be an international lawyer?
- Operating outside of jurisdiction
- Are there many law firms doing what Amsterdam & Partners LLP does?
- Robert's advice to young aspiring human rights lawyers

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Skirting Danger Abroad: What it Means to be an International Lawyer Today

1. In this edition of BenchTV, Robert Amsterdam (Partner, Amsterdam & Partners LLP, International) and Mark Davis (Principal, Mark Davis Legal, Sydney) discuss what it means to have an international law practice in 2018, the novel challenges faced by practitioners of international law today, how the rule of law is preserved in an international context, and the ongoing struggle to accord fairness to all those who have a right to it.

What does it mean in 2018 to be an international lawyer?

2. Being an international lawyer largely involves going out to the various countries in which a firm operates, and trying to present an international context often to an important domestic dispute. The reality of being an international lawyer differs from the perception most people hold about international law as being some rarefied practice taking place before select United Nations tribunals.
3. Amsterdam & Partners LLP has been retained by Desarrollos Energéticos S.A. (DESA), the renewable energy firm responsible for the Agua Zarca hydroelectric project in Honduras to assist with issues relating to the Honduran government's prosecution of two DESA executives accused of responsibility for the 2016 murder of high-profile activist Berta Cáceres.
4. All of the big-name NGOs have basically declared the DESA executives guilty of planning the murder of Cáceres before their first hearings. We are living in an age where individuals are being pronounced guilty before trial even begins - and the media plays a large role in this. The #MeToo movement is a good demonstration of this phenomenon.
5. There is a great need to provide equal push back against international NGOs and advocacy groups on the importance, from a human rights standpoint, of affording the accused the same due process as is afforded victims.
6. We have witnessed a swing in Western media whereby victims are almost untouchable now, and an attack on their narrative is somehow viewed as illegitimate. In Australia, as in England to some extent, it is virtually impossible to speak about cases once charges have been laid. But the phenomenon is becoming increasingly problematic as individuals are increasingly being tried in the court of public opinion.

Operating outside of jurisdiction

7. Amsterdam & Partners LLP ('the firm') represented the former head of the Yukos oil company in Russia, Mikhail Khodorkovsky, in the Yukos shareholders vs. Russia case, which was a series of international court and arbitral cases seeking compensation from the government of Russia to the former shareholders of Yukos.
8. Russia is a member of the Council of Europe, and the firm had a special rapporteur appointed by the Council of Europe. The firm was able in this way to create a parallel action.
9. It is critical in states that lack rule of law to take initiative, parallel action or otherwise, when engaging in cross-border litigation.
10. Amsterdam & Partners LLP was retained by Thaksin Shinawatra (former Prime Minister of Thailand) to represent the 'red shirt' movement in the 2010 Thai political protests. The firm assisted the 'red shirts' in surrendering to international media so that they could avoid being summarily executed.
11. In this case, the firm had to come up with a completely original way in which to curb the abuses that were being perpetrated by the Abhisit Vejjajiva government, as it then was. The red shirts were targeted by the Abhisit government, and were among the more than 90 others who were murdered. Abhisit Vejjajiva was one of the first Asian Prime Ministers ever to have been charged with murder, but he was never brought to trial.
12. One of the ugly perpetrators of the massacre, Prayut Chan-o-cha, who was Commander in Chief of the Royal Thai Army at the time, is now serving as Prime Minister of Thailand.

Are there many law firms doing what Amsterdam & Partners LLP does?

13. The practice of international law has for a long time been limited to fairly large multi-jurisdictional firms, who do not have the amplitude to act as Amsterdam & Partners LLP does.
14. The firm took on the Chávez government in the Eligio Cedeño case, ultimately securing freedom for Cedeño, who had been in jail for 10 years illegally. The firm ran a very aggressive legal, political, and media-driven campaign, and when he was finally freed, the judge who freed him was arrested by Chávez within 10 minutes and burned alive, barely surviving. Cedeño was miraculously able to escape Venezuela.
15. In securing Cedeño's asylum in the US, Amsterdam & Partners LLP had hired a certain type of local lawyer – basically, the furthest thing from a large law firm. A big mistake large law firms often make when they operate internationally is that they go into foreign countries seeking to work with people who look like them, rather than locals. They should really instead be looking for those who have their fingers on the pulse.

16. The firm defended the award-winning democracy activist Dr Chee Soon Juan of Singapore. After the firm wrote a lengthy exposé about Singapore's very powerful internal controls, Robert attempted to get back into the country, and ended up being seriously harassed and eventually deported.
17. Robert, as a result of his work, has been banned from many countries and even sued. The practice of international law is deeply concerned with the political and economic realities that too often inform the litigation and arbitration that take place in its context. It is critical for practitioners of international law to understand these realities, drivers and motivators, all of which are almost without exception obscured at first glance.
18. There is this fallacy that hiring a major New York name firm is the best option. The truth is that the more regionally plugged-in firms tend to be the better option, because an understanding of local politics is absolutely critical to success in international litigation and arbitration.
19. As the world becomes increasingly more globalised, and so too the legal and regulatory structures that govern us at the international level, we are increasingly starting to speak a common language. Due process is not limited to any one particular country's constitution.
20. Robert and his firm have found the practice of wielding the common language of human rights against those who have attempted to portray themselves as populists, for example, extremely effective. If it is anyone who understands what it is like to feel the heel of an oppressive state, it is the common man.

Robert's advice to young aspiring human rights lawyers

21. A human rights lawyer is someone who understands how to translate compassion into law. Robert tells young lawyers interested in the international side of human rights law that the gross inequality of our everyday society is a great place to start.
22. Robert has another, perhaps less popular, message - that is that corporations, investors, wealthy people, etc. have human rights too. Human rights are not just the preserve of the poor and the oppressed. To Robert's mind, the most important attribute of the practice of human rights law is the fight for fairness. What we are seeing in today's pop culture in the trashing of due process is a huge attack on fairness.
23. So there is all sorts of scope for us to rethink political correctness, and try to get to the economic and racial underpinnings of the bias and discrimination still very much alive in our society, and other societies. As readers are most likely aware, there has recently been a big global awakening with respect to indigenous rights.

24. A new development that has taken place in the last 5 to 10 years is the way in which commercial arbitration is increasingly being used as an investor-state-type forum in which to obtain a ruling on the legality of criminal detentions.
25. It is an innovative and incredibly useful way in which to caution countries who are frustrated with BIT (bilateral investment treaty) practice, and who are as a consequence criminalising the behaviour of foreign investors to get around international norms. That certain arbitrators have the courage to even begin to delve into reviewing the conduct of criminal courts is a pretty big thing. One of the countries that has been a pioneer in this regard is Romania.
26. The current trend demonstrates interestingly that in the scope of commercial arbitration issues relevant to human rights are being raised. Recourse to arbitration by international investors is, however, probably happening too often and too quickly. There is actually scope for fighting some of these disputes domestically; and immediately turning to arbitration may not always be in the interests of the client.
27. There are many supranational not only human rights organisations, but also international institutions, whereby ad hoc tribunals have been set up specifically for these purposes. For example, the Common Market for Eastern and Southern Africa (COMESA) and The Economic Community of West African States (ECOWAS) have their own distinct type of court system. And they are not alone - these types of systems are starting to emerge elsewhere, like in Latin America, for example.
28. What is truly unique about the arbitration explosion that is taking place is this aspect of 'common language', which allows companies from countries on opposite sides of the world to come together not only to sort out a location in which to arbitrate, but also a law under which to arbitrate, and under the *New York Convention*, parties have a real shot at achieving enforcement of whatever it may be that they seek. Now we also have a whole financial industry that is prepared to help fund arbitration.
29. We are in a sense now witnessing the setup of a whole new international system. The problem is that it is not being systematically identified to clients in a way that is probably optimised yet. Unfortunately, arbitration is becoming somewhat buried in procedure and costs. In some cases, parties are much better able to reach resolution in their local court. It is an option that should not be overlooked by parties.
30. In Robert's view, we are at the apex of the anti-corruption hysteria that has gripped the world. The US has been hounding the Organisation for Economic Co-operation and Development (OECD) to in turn hound other countries to ensure that American companies are not being disadvantaged by following the *Foreign Corrupt Practices Act* (FCPA).
31. It is part of an attempt to further import American law internationally, and give US companies a level playing field against the Chinese, Russians, Indians, for example. To this extent, it is

also something that, from a foreign policy standpoint, would be seen as sterilising China's dominance of some of these markets. The US is increasingly using the law as a foreign policy tool.

32. In Robert's opinion, a lot of the anti-corruption legislation will have to be amended. Anytime a war is declared on something, such as is the case now on corruption, its purpose is never quite relative to the perceived need for, and consequent proliferation of, legislation. Legislation created solely in the name of combating corruption as part of a wider war against it is almost setting the stage for abuse. Often, in the process of drafting this type of legislation, the rule of law is sidelined, and watered down.
33. The upshot of this is that emerging markets are losing out on the best American, Canadian, British etc. companies, because these companies are deciding that they do not have the scope to enter into markets where they need to meet such a level of compliance – there is too much risk involved from the standpoint of their key personnel.
34. The US Department of Justice (DOJ) has recently made it very clear that they are interested in scalps. Action taken against companies under the FCPA is almost viewed as a political and/or economic tax. There has been a recent memo released by the DOJ that calls for individual culpability.
35. As far as Robert is aware, the Serious Fraud Office has in a number of cases behaved in a fairly scandalous manner. Their agenda is almost one of cultural transformation.
36. The war on corruption, although of course positive in many respects, is causing tremendous collateral damage to the investor community, which is at the moment going unseen.
37. Australian companies - big and small - should be protesting against the proposed anti-corruption legislation, and applying to government to instead provide support to Australian investors overseas.

BIOGRAPHY

Robert Amsterdam

Partner, Amsterdam & Partners LLP, International

Robert is an international lawyer with 35 years' experience working on high-profile cases in emerging markets. His practice, Amsterdam & Partners LLP has offices in London and Washington DC. Amsterdam is a member of the Canadian and International Bar Associations, and is licensed as a solicitor in the United Kingdom. He earned his BA from Carleton University in Ottawa, and studied law at Queen's University in Ontario (LLB).

Mark Davis

Principal, Mark Davis Legal, Sydney

Mark Davis was admitted to practice in the Supreme Court of Victoria in 1993. He has worked principally in commercial law with a particular focus on dispute resolution, capital raisings and investment trusts. He has won Australia's premiere journalism prize, the Walkley Award, five times. As well as working on an array of investigative reports in Asia, the Pacific and the Middle East he was a regular host and principal interviewer for Dateline, on SBS TV.

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Foreign Corrupt Practices Act of 1977 (US)

International instruments

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