

CHANGING SEATS: LATIN AMERICAN ARBITRATION COMING OF AGE

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With the rise in inter-regional business and the global emergence of economies such as Brazil, arbitration experts see the number of cases continuing to rise and more interest in the use of local seats

En una reciente Master Class de Iberian Lawyer y Kluwer Law International en Miami, que coincidió con la Conferencia Anual Latinoamericana de la CCI, los expertos en arbitraje coincidieron en las ventajas que supone actualmente el uso de sedes arbitrales en Latinoamérica. Esto se debe al creciente número de negocios internacionales en la región y el surgimiento de economías emergentes como la de Brasil con sistemas ya maduros de resolución de disputas.

Participants at a recent Iberian Lawyer and Kluwer Law International Miami Master Class, held to coincide with the ICC's Annual Latin American Arbitration Conference, heard how businesses across the region are now exploring the use of a local seat when an arbitration arises.

Yves Derains, of Paris-based Derains & Gharavi, moderated the debate which began with an assessment of the rise of arbitration across Latin America by Nigel Blackaby, Washington DC-based partner with Freshfields Bruckhaus Deringer.

The rise in the global economic significance of Brazil, along with an upturn in intra-regional corporate activity and commercial agreements, is all contributing to a dramatic rise in the number of arbitrations involving the region with a greater number being held locally, he said. Over half of all ICSID arbitrations and a significant number of ICC arbitrations now involve a Latin American party.

"We are seeing things we would have thought improbable only a decade ago. Brazilian companies are now the dominant players across the region, we see greater reliance by parties on their rights under bilateral investment treaties (BITs), and growing comfort and confidence in national courts."

The willingness of the local judiciary to remain "hands off" in arbitration cases is fundamental to the differing perception of countries across the region, say others. A number of Latin American countries have long had a strong arbitration culture, but the stance of the local courts vis-a-vis arbitration is critical if companies are to feel comfortable that their dispute will be heard fairly and free of judicial interference.

Others noted that there remains however a significant gap between the day-to-day reality and the commercial awareness of many national judges, and the perception many foreign General Counsel have of countries' legal systems and courts. Even Venezuela, which under the leadership of President Hugo Chávez has adopted a policy of nationalisation of foreign-owned businesses, routinely abides by its arbitration obligations with the Judges still reluctant to interfere with arbitration procedures, noted some.

Other participants were less sure, saying that there is not yet enough evidence to say Latin American seats were rising in popularity. C Ryan Reetz an arbitration partner with Squire Sanders & Dempsey in Miami acknowledges that some companies now readily agree to move the arbitration hearings to the region but senses that many nonetheless remain reluctant to select a local seat. "In terms of cost, it makes sense to keep the witnesses and even arbitrators within the region and to hold proceedings here. But there remain queries around the stability of some of the region's arbitration institutions as well as the separate issue of political stability."

Many of the region's arbitration laws are modern and sufficiently robust, said Gilberto Giusti of Brazil's Pinheiro Neto, with institutions keen to demonstrate they have the know-how to manage major cases. Nonetheless he acknowledged that issues may however surround the enforceability of arbitral awards if not rendered locally, while for those disputes arising out of Government contracts, as in his native Brazil, specific legislation may also place pressure for proceedings to be managed locally. What is important therefore is that parties undertake the correct level of analysis of local case law.

"We have to understand what trends are emerging and whether courts are truly promoting a pro-arbitration doctrine. In addition, we continue to see tension when companies have a claim against a

state and so are very reluctant to have a seat locally, while national Governments take an opposite stance."

Arbitration lawyers and counsel have therefore to help educate their clients as to the relative differences between national systems, and to overcome some of the negative perceptions, believes José María Abascal of Abascal Segovia in Mexico City.

"We have seen a lack of confidence arising from certain decisions by national courts, wide coverage is only done for those wrong decisions, even ignoring that many of them have been already overturned by countries' upper courts. Yet the judicial 'bad smell lingers. There is always a lot of coverage of the wrong decisions but relatively little promotion of the good ones."

A more nuanced view of the region has therefore to be taken, agrees Marco E Schnabl of Skadden Arps Slate Meagher & Flom in New York. "We have to help our clients to differentiate and to understand what issues may arise and where. But we also have to demonstrate where significant advances are being made, for example in Brazil, Chile and Peru."

The view was echoed by John Beechey, Chairman of the ICC, "What is important, and ultimately required, is local understanding to help clients make an informed choice as to the merits and demerits of a particular jurisdiction, and to help them decide the most realistic way forward to resolve their disputes."

Perhaps first however lawyers and businesses need to stop regarding Latin America as a homogenous whole, believes Yves Derains. "We should not view specific issues as typically 'Latin American'. Some of the major concerns of General Counsel, for example surrounding the influence of the State and judicial interference, can occur anywhere. Europe is as guilty of some of these acts as Latin America."

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