IS LATIN AMERICA TURNING ITS BACK ON ARBITRATION?

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An especially invited panel of arbitration experts attended an Iberian Lawyer Master Class in Buenos Aires recently, sponsored by Kluwer Law International and the Chartered Institute of Arbitrators, organised to coincide with the International Bar Association's Annual Conference, to debate the challenges facing the arbitration community in Latin America.

A pesar de la extensa retórica que utilizan algunos líderes latinoamericanos, y la creación del foro de resolución alternativa de conflictos, que sustituye al ICSID en algunos países, el arbitraje sigue en buena forma en Latinoamérica, según se puso de manifiesto en una reciente clase magistral. En la región, algunos países están adoptando nuevos instrumentos para promover el uso del arbitraje en conflictos internacionales, especialmente en aquellos que versan sobre inversión, e incluso en aquellos conflictos que apuntan hacia otra dirección, el arbitraje permanece. No se pueden hacer suposiciones cuando, a lo mejor, es simplemente el mecanismo del arbitraje lo que genera debate

The Master Class was opened by Teresa Cheng, President of the Chartered Institute of Arbitrators,

who stated that while certain Latin American countries are adopting new instruments to promote the use of arbitration in international disputes, especially those involving investment disputes, others are heading in a different direction – terminating or narrowing the scope of existing commitments to arbitration.

"Some countries are approving new pro-arbitration approaches, for example, Peru's Free-Trade Agreement with the USA, while others such as the members of the Alternativa Bolivariana para Las Américas y El Caribe (ALBA) have, over the last year, announced measures to limit investors' recourse to international arbitration."

In addition, some countries are evaluating and implementing a wide spectrum of options, ranging from constitutional reforms or amendments of legislative provisions against ICSID, she stated.

The Washington DC International Centre for Settlement of Investment Disputes (ICSID), affiliated to the

World Bank, is the primary arbitral body for bilateral investment treaty (BITs) and inter-state arbitrations (ISAs) within the Americas.

Miami-based José I Astigarraga, who moderated the event, clarified the scope of the debate: "Despite the high profile talk among some regional leaders of abandoning trade and bilateral investment treaties, notably Venezuela, Bolivia and Ecuador, what is actually happening behind the rhetoric? Also, are any of the issues that surround BITs spilling over into private commercial arbitration?"

Claus Von Wobeser of Mexico City-based Von Wobeser & Sierra stated that despite the headlines, Latin America remains a big user of arbitration and inevitably parties may have both good and bad experiences across the region. "The issue is what impact will the stance of certain governments have on the viability of arbitration in disputes across the region and how may this impact on the enforcement of arbitral awards?"

The increasing enthusiasm for arbitration in countries such as Colombia, Mexico and Peru, and the Central American Free Trade Agreement (CAFTA), are clearly positive developments, he said.

"But the decision of Ecuador to terminate BITs with eight states across the region, the nationalisation of international companies' operations by the Venezuelan government, and the creation of ALBA, which may limit international arbitration, clearly sends out a much different message."

It is important therefore to distinguish between the approaches of different countries, emphasised Henri Alvarez of Fasken Martineau DuMoulin in Vancouver. "It is not possible to make assumptions. Mexico, for example, has played by the rules even when decisions have gone against it. Peru is taking different approaches under different BITs. But even the ALBA countries, such as Ecuador or Bolivia, acknowledge the importance of arbitration although they may want to find a different way of doing things."

Guido Santiago Tawil, of M&M Bomchil in Buenos Aires, suggested that the prevailing economic crisis may prove an important test of countries' commitment to BITs and inter-state agreements (ISAs). "We have not yet seen the impact but it will likely be very big."

Relevant, he believes, will be the question of enforcement of awards and the interplay of Articles 53 and 54 (concerning recognition and enforcement) of ICSID. "Within the region, Brazil remains a non-signatory to ICSID while the only country in which there have been significant issues with the enforcement of awards is Argentina."

Gilberto Giusti of Pinheiro Neto Advogados in São Paulo, believes that within Brazil there is an increasing awareness and use of arbitration, and a willingness among judges to enforce arbitral awards emanating from commercial disputes.

"But Brazil's position as a non-signatory to ICSID is beginning to cause concern. Brazil is no longer merely a recipient of international investment. We are now seeing our own businesses expand across the region and feeling the negative effects of not having recourse to ICSID."

The business and arbitration communities are though beginning to bring pressure on the Brazilian government to protect investments abroad. "The government may not yet be willing to commit to change but in the medium-term I think the current position will be reevaluated," he said

Some, such as Bill Rowley QC, of MacMillan Binch Mendelsohn, in Toronto, question how much pressure is needed and how many investments by Brazilian companies will need to go bad before change is effected.

Brazil's 2010 Presidential elections may prove the catalyst, said Gilberto Giusti. "We believe that there may be a change in the political scenery, and that these issues will become more pressing as Brazilian multinationals play increasing emphasis on operations elsewhere in Latin America and increasingly Africa."

Claus Von Wobeser highlighted again the Mexican experience. "Since joining NAFTA, foreign investment into the country has increased to US$60bn (€47bn). We have learnt that paying out arbitral awards is good for business. Mexico is also not a signatory to ICSID, although it does have in place a large number of BITs, but is now considering membership because of the strong signal it sends out to investors."

Nigel Blackaby, Washington DC-based Head of Latin America disputes at Freshfields Bruckhaus Deringer, questioned how negative it would be if a country left ICSID. "The issue is important but clearly less so if that country has BITs in place that offer alternative courses of actions, such as UNCITRAL or the ICC. ICSID is presumed superior to UNCITRAL but this is now being challenged."

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 to promote and harmonise trade law. Bolivia, which has announced an intention to leave ICSID, he notes, has nonetheless accepted UNCITRAL in a number of BIT disputes.

The process may not always be ideal but in the early stages it is considerably quicker than through ICSID and the process is determined by the law of the seat, which can be negotiated."

Commercial arbitration

When it comes to assessing the viability of private commercial arbitration across Latin America, Oliver J Armas of Chadbourne & Parke in New York, believes it remains in "pretty good shape".

There is a growing awareness of the process among even junior lawyers and while there may be sporadic enforcement issues there is, he believes, an increasing embracing of the process by commercial judges.

"Nonetheless what we see occurring with BITs raises concerns. There is a lack of confidence around investing in particular countries, and even in private disputes anecdotal evidence that judges are facing political pressure in some instances."

There may also be a perception among clients outside of the region that matters are in fact worse than they really are, believes José I Astigarraga. "The high profile issues within specific countries inevitably impacts on the decision of CEOs and General Counsel, even if in reality they may not actually be 'big' issues."

Paris-based Yves Derains admits to being an optimist. "We see clients from Italy, Germany and France who are happy to have arbitrations in these countries and can see through the misplaced negativity. The starting position is always to avoid having to come up in front of a judge in a domestic

court."

Oliver J Armas agrees. "There will always be a party who does not accept a decision and will seek to avoid enforcement or their obligations. It is important however to also spread the good news, to allay clients' concerns."

In response, Gilberto Giusti highlighted that despite some adverse judgments against arbitral awards in the Brazilian lower courts, almost all have been overturned on appeal. "The Brazilian upper courts are now very well disposed to arbitration and where there is an excellent technical understanding of the issues involved."

Education

In order to continue to promote arbitration across the region a process of education must be undertaken, suggests Audley Sheppard, arbitration partner at Clifford Chance in London. "Many commercial and M&A lawyers have outdated fears or perceptions. But also, arbitration clauses must not be inserted as an afterthought and that particularly for Latin American agreements there is an understanding of the most accommodating seats."

Henri Alvarez agrees. "Lawyers must have an awareness of the differing stand points of certain governments, of the degree of public understanding, and the differing benefits of BIT and UNCITRAL processes – which is though hard enough for the specialists to agree on."

But education needs also to spread beyond merely law firms to include all the "consumers" of arbitration, suggested Ramon Mullerat of KPMG in Barcelona, as well as to include the judges and the company general counsel.

José Mariá Alonso , President of the Club Español de Arbitraje and managing partner of Garrigues, suggests that while it pays not to make predictions, especially about the future, there is a certainty that the prevailing economic crisis will raise new types of disputes, between states and companies.

"As regards Latin America, there has to be an awareness of the differing positions taken by 'populist' governments, where the common view which pevail in certain countries is that international companies have somehow illegally exploited countries' assets, and this has to be dealt with through arbitration but before national courts – and the more pragmatic view held by many more governments that arbitration helps encourage investment, and thus economic growth."

Nonetheless many US and European companies see that Latin America is now the place to go. "Investment is growing, and my personal opinion is that a few bad decisions will have little negative effect. Arbitration is not an option for most multinational companies, it is a must."

In his conclusion, Astigarraga observed that two themes seemed to emerge: first, that there exists a disconnect between perception and reality, with anti-arbitration developments in specific countries shaping perceptions about arbitration in the region generally, and second, that careful distinction must be made between countries in the region, as the state of arbitration varies markedly from country to country.