

THE EXPANDING ROLE OF LOCAL COUNSEL IN LATIN AMERICAN ARBITRATION

Posted on 13/07/2010



Jonathan Warne

Category: [In-house news](#)



While parties to the major Latin American arbitrations may typically have appointed lawyers from the renowned international law firms, there is now a more level playing field, suggest leading experts. Local law firms are now increasing their share of what is a growing area of legal practice.

This was one of the conclusions of the latest Arbitration Master Class – an invitation only “think-tank” of the world’s leading arbitration experts convened by Iberian Lawyer and Kluwer Law International – which was held in Rio de Janeiro last month.

The meeting, held as part of the biannual ICCA conference, was chaired by leading Spanish arbitrator Bernardo Cremades. "Is it appropriate that the lead advocate roles in international arbitrations in the region are often played by US law firms, with Latin American law firms appearing in ancillary roles?" he began by asking participants.

Tradicionalmente, las partes en los grandes arbitrajes en Latinoamérica seleccionaban a abogados de despachos con renombre internacional. Sin embargo, se percibe ahora un juego más equilibrado, según indica un grupo de expertos en arbitraje. Los despachos locales están ampliando su conocimiento en esta área por estar actualmente en crecimiento. Este fue uno de los puntos concluyentes del último Arbitration Master Class, un "think-tank" con una audiencia selecta de árbitros destacados de todo el mundo, organizada por Iberian Lawyer y Kluwer Law International en Río de Janeiro.

For José Astigarraga, whose practice at Astigarraga Davis in Miami sees him closely involved in Latin American disputes, there has been a significant increase in the expertise of local firms: "If we rewind the tape 15 years we can see huge changes in both the adoption of more effective arbitration laws across the region plus an important transfer of know-how from the North American and European law firms."

If the Latin American firms were traditionally perceived as support players to their international counterparts, participants heard, this is not now necessarily the case – many now serve as main or co-counsel.

For Eduardo Zuleta at Gómez-Pinzón Zuleta Abogados in Bogotá, "Latin American law firms are now more involved in international arbitration as lead counsel. Many of their lawyers have trained in the US and Europe and have expertise in international cases. The firms have also benefited from an increasing use of domestic arbitration by state entities, who prefer using local rules even in international contracts."

The view was echoed by other participants. "We have learned a lot from the US law firms and are getting better as a result. In fact, it has been a learning process for us both," says Fernando Eduardo Serec, a partner with leading Brazilian firm TozziniFreire Advogados. There are nonetheless still major challenges for local firms, some suggested, not least the heavy investment required in technology, know-how and support systems required by increasingly large and complex disputes.

Inevitably also, the international firms have greater experience in the major disputes. "On major cases parties still seek comfort in a big international law firm name," says Zuleta.

Horses for courses

An increase in local arbitration expertise in no way marks the demise of the global firms, Astigarraga believes, it only provides a more level playing field, with domestic firms providing local businesses with a wider range of options. "Global firms still have a huge history of expertise and deep resources. It is a case of horses for courses, law firms have to work out more clearly where they can add the most value."

"For a dispute in any part of the world, the parties can choose, say a New York or local firm. We need to communicate the extra value that we believe a firm like ours can bring to each dispute," agrees David W. Rivkin of Debevoise & Plimpton.

"I think that we may have previously been perceived in the market as too English. We were always dealing with the major international banks and financial institutions but almost all of the clients came via London."

American Bar Association (ABA) president Carolyn Lamm, an arbitration partner with White & Case in Washington DC, explained that her practice sees her working increasingly in cooperation with local

law firms. "The international firm can bring a wider experience, approach and technology infrastructure to each specific dispute, but local insight may also be necessary, knowledge of the local and cultural insight is also available," she said.

Balance is the key, suggested Guido Santiago Tawil at M&M Bomchil in Buenos Aires. The challenge for the international firms is to understand how things work locally: the place, culture, codes. "Local lawyers do not need to imitate the international firms just to build upon their strengths. It is not an issue of size, or the brand, but of knowledge. Our biggest disadvantage is a matter of numbers. We can still build excellent teams but to put three or four top teams into work at the same time is not easy."

Foreign legal cultures

A second question poised by Cremades was the extent to which foreign legal cultures, languages and approaches have too much influence on cases when applying the law of the host countries. In response, Yves Derains of Derains Gharavi and Catherine Kessedjian, both Paris-based arbitrators, said the problem is perhaps deeper – the application of local laws by foreign lawyers unaccustomed to the legislation or the culture.

For Yves Derains: "Language is never neutral even if we think we know the meaning of one word in a foreign language. A word as simple as 'witness' reflects different legal concepts in different languages." While the application of domestic laws is clearly a challenge to foreign lawyers, participants debated whether this was an inevitable outcome of international arbitration. "This is a real issue we need to recognise but there is no easy answer, that is why we all need local lawyers within our teams or to work with local law firms," said one participant.

In response to the increasing demand for international arbitration across Latin America, international firms have therefore been recruiting local lawyers into their teams, participants heard; a process that encompasses internship programmes, secondments from local firms, foreign attorney schemes and more senior level recruitments.

Over the last decades, arbitration has moved towards a transnational practice, said Gabrielle Kaufmann-Kohler from Swiss firm Levy Kaufmann- Kohler: "It is not easy for lawyers to apply laws they do not know but that is what we do all the time. And we cannot ignore local cultures. I would not manage an arbitration with say Dutch and German parties in the same way as with UK or US parties."

American and UK law firms are clearly adapting their approach to the prevailing local practice across Latin America, said Zuleta, for example where discovery or cross-examination is generally not used or required.

And while the transnational aspect of arbitration is a major challenge it may also be its major benefit. "Whatever the challenges of applying other's laws that may come with it, the neutral international legal platform of international arbitration is the principal attraction for the parties," said Marinn Carlson of Sidley Austin in Washington.



Each process is tailored, others suggested, adapting the laws and proceedings to the specific requirements. Lawyers are never as comfortable as when working in their own jurisdiction, so all are equally challenged.

"Yes, we can encounter the same words but with different legal interpretations," said Judith Gill QC who leads the arbitration practice at Allen & Overy. "Working in integrated teams with lawyers from different countries is a step in the right direction but we have to recognise that this is a frequent challenge of our practice."

A third way

In order to reflect local laws and cultures, and the application of regional business ideas and rationale, arbitration will inevitably remain a hybrid area of practice, said Miguel Virgós of Uría Menéndez in Madrid. As such, is there a specific role for Spanish law firms to play across Latin America? asked Bernardo Cremades. Spain is, of course, the major investor in Latin America alongside the USA – levels of investment still yet increasing with the economic slowdown in Spain and across Europe.

"More businesses are seeing that, with their experience in both the European and Latin American arena, Spanish law firms can add value to a dispute – the language, laws and culture are all very familiar to us and we know the domestic firms very well," says José María Alonso of Garrigues.

There is inevitably a closer cultural understanding and advantage, and an ability for Spanish law firms to bridge the Atlantic from Europe, say others. "International arbitration has become too North American and too procedural. As Spanish lawyers, we can do things in a 'third way', with an understanding of the cultural and legal context, while bringing a more international mindset," agreed Miguel Angel Fernández-Ballesteros.

One conclusion therefore is that there is room for everybody, and perhaps a false separation of local and international law issues, and the relative role of "local" and "international" law firms.

"There may be a false dichotomy of international or local law firms. International firms can only do well and demonstrate the added value they bring to Latin American disputes on the basis that they understand local legal and business concepts, which includes having lawyers from different legal cultures onboard. Similarly, local firms can only succeed if they understand the expectations of global clients" says David W. Rivkin.

For further information on the Arbitration Master Class series please contact Moray McLaren via

moray.mclaren@iberianlegalgroup.com

[Subscribe now to receive your copy of Iberian Lawyer](#)