HERBERT SMITH FREEHILLS

INSIDE ARBITRATION

PERSPECTIVES ON CROSS-BORDER DISPUTES

In this issue

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Welcome to the seventh issue of Inside Arbitration

Our aim in producing Inside Arbitration is to highlight developments in the field of arbitration and to raise issues of interest for different regions and sectors that our clients may find helpful.

This aim holds true for our latest issue, but we have also decided to take a slightly different tack, by including an in-depth focus on one particular region - Latin America. Herbert Smith Freehills has always had a strong Latin American practice, but the opening of our New York Office in 2012 brought around a real shift in gear for our arbitration practice and we have established a very experienced group of practitioners operating across Latin America out of our offices in New York, London, Paris, Madrid and Frankfurt, linking up with our other offices across the network, particularly Asia. The sense of excitement in the work that they do is palpable and I hope that excitement is conveyed by the articles included in this Issue.

Our spotlight articles focus on Christian Leathley, Head of our US arbitration practice and our Latin America Group, and Florencia Villaggi, a senior associate in our New York office. Both have a fascinating "back story" and a true understanding of the region which has proved invaluable for our clients. Indeed, one of the articles below, written by Associate Daniela Paez and Law Clerk Silvia Marroquin, draws on our success representing the Republic of Costa Rica in a landmark investment treaty case to look at its implications for environmental claims in future investment treaty disputes.

We are also very fortunate to have conducted an interview with Alexis Mourre, President of the ICC International Court of Arbitration. Alexis has spoken most frankly about the ICC's expansion in Latin America, the ICC's plans for the future and the challenges it faces as an arbitral institution - important reading for practitioners and clients alike.

No issue of Inside Arbitration would be complete without a sector-focused piece. Given the infrastructure growth in Latin America, Partners James Doe and Christian Leathley, and Professional Support Lawyer Noe Minamikata look at the rise of "Giga Projects" in the region and the disputes landscape they create. Enforcement of arbitral awards is a critical issue for many of our clients involved in Latin America-related disputes, and Senior Associate Florencia Villaggi and Associate Lucila Marchini have prepared a helpful guide to enforcement in Brazil, Chile, Colombia, Peru and Argentina.

I hope this issue of Inside Arbitration piques your interest and that you enjoy reading it. Please check out our new "Watch this space" page where we highlight some global developments to monitor and ways that you can find out more. I also invite you to take a look at our infographic, a snapshot of our arbitration practice from 2016-2018, which offers us a chance to share with you some statistics about our global practice and our case load.

Feedback on the content is, as always, very welcome and we should be delighted to receive your thoughts on the topics covered.

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Introduction

The growth of international arbitration in Latin America has been stratospheric. In quick succession over the last 15-20 years the New York Convention was ratified and modern arbitration laws were promulgated across the region. Now, the entire region has embraced the modern practice of arbitration, and national courts are becoming well-versed at implementing the word and spirit of the New York Convention.

With the rapid levels of investment from overseas companies in the energy, infrastructure and resource-based sectors, the insertion of international arbitration clauses was commonplace. As those projects matured, we are now in the period when disputes naturally come to fruition. The region has attracted investment from all corners of the globe: North America, Asia, Europe, Australia as well as the Middle East in recent years.

This in and of itself could explain the stratospheric growth of international arbitration, and yet Latin America, with all its tremendous resources and potential, has systemically allowed the left/right swing of political administrations to significantly define the extent to which commercial and investment arbitrations have emerged. For example, the region has witnessed multiple trends that have fostered some of the most significant investor-State arbitrations. Similarly, the underlying policy influences of those political swings have influenced the rise and fall of commercial projects.

In recent years, many Latin American nations have seen the deep swings from left to right calm somewhat, to become more like oscillations, instead defined by reactions to previous governments – a characteristic common in most other parts of the world. But while this might otherwise lead to a lessening influence on the emergence of commercial and investment disputes (based on the assumption that this should result in greater stability), there have in its place emerged other factors that have fuelled the growth of international arbitration.

These include corruption on both a major and minor scale; the support for environmental protection and indigenous communities impacting major projects; the intervention of state administrative bodies to oversee the expenditure of public or quasi-public funds; cultural divides between contractual counterparties operating in the region; and (ironically) the sometimes paralysing effect of overt levels of transparency, promoted out of good intention and a desire to rid the region of corruption. The sum is that Latin America continues to foster a sustained level of international arbitrations.

The institutions that have administered such arbitrations have also grown in each country, while of the international institutions there is no doubt the ICC remains in the lead – and to this extent, it is a pleasure to share in this edition the contribution of ICC Court of Arbitration President, Alexis Mourre. We hope you enjoy this edition and share with us our continued respect for, and fascination in, this magnificent region.

Christian Leathley
Partner, Head of Latin America Group and US Head of International Arbitration

"The growth of international arbitration in Latin America has been stratospheric"

Watch this space...
Arbitration news and developments to keep an eye on

The ICC has released (Dec 2018) an updated Note to Parties and Arbitral Tribunals on the Conduct of Arbitration. Points to note are provisions on data protection, the publication of arbitral awards, arbitrator disclosure and greater clarity on the role of tribunal secretaries. Our blog post, here, covers the details.

The UK's Supreme Court is due to hear an appeal against the controversial decision in Halliburton Company v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817, which is widely perceived to have set too high a threshold for a finding of apparent bias in arbitrators. There is a great deal of community and institutional interest in the outcome.

Herbert Smith Freehills is a founding member of London International Disputes Week (LIDW). The inaugural event, bringing together legal practitioners from around the world to celebrate London's heritage as a leading centre for handling international disputes and to consider the future of international dispute resolution, takes place 7-10 May 2019. Herbert Smith Freehills is co-hosting the Commercial Arbitration, International Investment Disputes and Energy Disputes sessions.

For more information about LIDW please visit the website here.

The new HKIAC Rules came into force on 1 November 2018. The Rules are viewed as some of the most developed rules in the market. The amendments allow for greater use of technology, include an early determination procedure and expand the provision for the resolution of more complex arbitrations (multi-party and multi-contract). For full details, see our blog post here. Our Step by Step Guide on the 2018 HKIAC Rules can be obtained by emailing: arbitration.info@hsf.com

Anyone entering into contracts with a Russian link should be aware that the Russian Supreme Court ("SC") recently found that a reference to the arbitration rules of an arbitral institution was not sufficiently clear evidence that the parties had agreed on that specific institution to administer the resolution of their disputes. The ICC has since modified its model clause for Russian-related disputes to make express reference to the ICC Court. The clause is discussed here.

We understand that the Arbitration Foundation of Southern Africa (AFSA) will be undertaking a revision of its rules over the coming year to service an increasing number of international disputes. AFSA is keen to capitalise on changes to the South African arbitration legislation and international parties looking for a "safe seat" on the African continent. We will monitor progress.

Hong Kong's third party funding legislation came fully into force on 1 February 2019. Hong Kong has joined Singapore in permitting third party funding of arbitrations and there are likely to be interesting funding options available from both jurisdictions over the coming months.

For more information please contact Briana Young.

The Prague Rules were launched in December 2018. These rules are soft law that can be adopted by parties or arbitral tribunal to guide their arbitral procedure. They have a more "civil law" approach to procedure, with a more inquisitorial role for the tribunal and more limited document production. It will be interesting to see what uptake they have amongst parties and arbitrators.

Brexit planning remains a source of uncertainty and concern for many business leaders. The arbitration enforcement regime is based on an international treaty and enforcement of arbitrations seated in England and other seats will be unaffected by Brexit. If you would like more information, refer to our Brexit hub or get in touch with partner, Andrew Cannon.

The International Swaps and Derivatives Association (ISDA) has revised its Guide to Arbitration. The new version of the Guide reflects developments in the field of arbitration since the Guide was first launched in 2013, such as the increasing availability of emergency arbitration, and the possibility of early dismissal of claims and defences. The Guide also now features model arbitration clauses for various additional institutions, including the German Arbitration Institute (DIS) Rules clause, to which Herbert Smith Freehills contributed (see here for further information).

"The only truly global arbitral Institution": **An interview with Alexis Mourre, President ICC International Court of Arbitration**

The International Chamber of Commerce (**ICC**) is one of the main international arbitral institutions. Indeed, in the 2018 Queen Mary survey on the evolution of international arbitration, the ICC had a pre-eminent position as the preferred institution of 77% of respondents. In this issue of Inside Arbitration, we interview Alexis Mourre, President of the ICC International Court of Arbitration. We discuss with him the ICC's expansion and plans for the future with a particular focus on Latin America.

Alexis, can we perhaps start with your own background and, in particular, how you came to be the President of the ICC Court?

I've been practising as a lawyer for over 30 years. I started my career as a litigator in the French courts, specialising in private international law and cross-border dispute resolution. I then became more involved in arbitration. My first arbitration matter as counsel for a client was in 1995, and my first appointment as arbitrator in 1998. I was fortunate enough to be able to specialise in the field. Since that time, I've served as parties' counsel, president of the tribunal, co-arbitrator, sole arbitrator and expert in more than 260 international arbitrations, both ad hoc and before most international arbitral institutions (ICC, ICSID, LCIA, ICDR, SIAC, SCC, DIAC, VIAC, etc). I've also held a number of institutional positions, as Co-Chair of the IBA Arbitration Committee, LCIA Court member and member of the Arbitration Council of the Milan Chamber of Commerce. In terms of my involvement at the ICC, I was in 2009 appointed as Vice President of the ICC International Court of Arbitration, and held that position for 6 years under the presidency of John Beechey. On 1 July 2015, I was elected as President of the ICC Court. I was elected for a second three-year term earlier this year.

The ICC has begun a period of global expansion in the last few years. As part of that expansion, you recently opened a case management team in Brazil and were involved in the hearing centre that opened in São Paulo earlier this year. Can you talk us through the ICC's rationale for opening in Brazil?

We launched a case management team in São Paulo in November 2017, which is led by Gustavo Scheffer da Silveira. At the time, it was the third ICC case management team outside of Paris, the first one being in Hong Kong (founded in 2008) followed by New York (founded in 2012). We have since then also launched a case management team in Singapore.

We took the decision to establish a case management team in Brazil to meet the demands of our users in Brazil, who wanted to see the ICC have a physical and active presence there. Brazil is a unique and important market for the ICC, as there are a large number of large Brazilian transactions which include ICC arbitration clauses. Many of these cases are domestic, in that all parties are Brazilian, Brazilian law applies, the seat of arbitration is in Brazil and the members of the tribunal are Brazilian. Brazil is also a country where there are other active arbitral institutions, and it was important that the ICC be closer to our users by no longer dealing with these cases from Paris. São Paulo has been a great success. In one year, we have registered 31 cases there, involving more than 100 parties for a total amount in dispute in excess of 7 billion BRL. We expect that the team will be even more successful in the years to come, and we are extremely encouraged by the very positive reactions to our opening.

I should also mention that the national committee of the ICC in Brazil has worked with us to open a new hearing centre facility in São Paulo. The hearing centre is now up and running, and is a fantastic facility which surpasses anything else available in the region. It is available to parties to use it for any arbitration or dispute resolution process, not just for ICC arbitrations.

> "We expect that the team will be even more successful in the years to come, and we are extremely encouraged by the very positive reactions to our opening"

You mentioned that the ICC has a large number of domestic Brazilian cases. Do you believe there is a particular reason that the ICC has been successful at attracting Brazilian parties to choose the ICC to administer their arbitrations?

I think that there are several reasons for this. First and foremost is of course the very high quality of the service that the ICC provides, in particular its scrutiny of awards. In a recent survey published by the Queen Mary University of London and the law office of White & Case, 77% of respondents ranked the ICC as their most preferred institution. The ICC is a premium arbitral institution which is able to retain the trust of the parties in large, high-value, multi-party and multi-contract disputes. We also are the most trusted institution in disputes involving the public interest. That is particularly true in Brazil, where a very significant part of our cases involve the Brazilian state or Brazilian state entities. The proportion of our cases where a State or a state entity is present has grown steadily. Globally, it has doubled from 2008 to 2018, from less than 7% to more than 15%. We are seeing the same trend in Latin America, with that proportion increasing from less than 5% in 2008 to more than 12% now. These cases come to us because of the unique experience of the Court, its complete neutrality and because of the high level of quality of our services.

Could you explain why it is important for the ICC to open regional case management centres? Are there any other markets that you feel would benefit from an ICC case management centre and do you anticipate opening anywhere else?

The ICC is the only truly global arbitration institution. We are not civil law or common Law. We are not French, European, Asian, American or African. Our Court members originate from more than 130 different jurisdictions. Our secretariat is able to work in more than 25 languages. We are culturally neutral and not rooted in any particular legal culture. Hence, our global footprint and our presence in different continents where we are easily accessible to our users. This is what the market rightly expects from us, and this why we have expanded our network of offices. In addition to the two new case management teams in São Paulo and Singapore, we have also opened two new representative offices, one in March 2016 in Shanghai and another in Abu Dhabi in autumn 2017. We have no immediate plans to open more offices, but we will of course in due course consider future moves, in particular in the Middle East where I think that we are particularly strong.

Do you see the demand for arbitration administered by the ICC changing or growing in any way? Do you expect demand to grow or alter in any particular sectors?

We have seen a steady growth in our caseload and, perhaps more importantly, in the average amount in dispute in our cases. This average value in dispute was in 2017 of US$137 million, which is a testament to the fact that parties recognise the added value of the ICC in complex cases.

"These cases come to us because of the unique experience of the Court, its complete neutrality and because of the high level of quality of our services"

At the moment, the largest sectors that are represented in arbitrations administered by the ICC are energy and construction. I don't expect that to change. These two categories overlap to a certain extent; many construction arbitrations relate to energy projects, and many energy arbitrations to questions of construction. Energy is also a vast, multifaceted, industry, and we administer cases in the oil, gas and electricity sectors, concerning both upstream, downstream, gas pricing, transportation and all other sectors of the industry.

You mentioned that the Court and the Secretariat come from multiple jurisdictions and speak many different languages. Diversity in terms of an arbitral institution is obviously very important, and there has been a lot of focus on gender diversity in arbitration. Do you think regional diversity of arbitrators is also important?

Diversity is extremely important to us. As I said, we are neither a civil law or common law institution, and want to be home to parties of different horizons and legal cultures. We are also making a very significant effort to increase the gender and generational diversity of our Court and our tribunals. I am in this respect very glad that we have complete gender parity in the Court, and of the fact that 50% of our Court members are less than 50 years of age and first time appointees to the Court. However, we need to do more to increase the diversity of our population of arbitrators, the 1600 or so individuals that the Court each year appoints or confirms. The proportion of arbitrators originating from Western Europe and North America is still too high, and not reflective of the global diversity of international arbitration. Parties are far too conservative in their selection of arbitrators, with a tendency to pick from the "usual suspects". In the years to come, we will see many more arbitrators coming from India, China, Indonesia and Malaysia. I also expect to see many more excellent arbitrators coming from Africa, where we need to provide more support to the local arbitration community. To that effect, we have in July 2018 created the Africa Commission of the Court, which is ably led by one of our Court Vice Presidents, Ms. Ndanga Kamau from Kenya. I am very hopeful that this group will help us increase in a very significant way the ICC footprint in Sub-Saharan Africa.

Latin America is a stronger and more consolidated arbitration community with excellent and well-respected arbitrators. Our recent regional conference in Miami was an all-times record in terms of attendance, which reflects the unique position of the Court in the region. However, we definitely need to continue to do more to encourage young Latin American arbitrators to come to the forefront.

You mentioned that you opened in São Paulo to meet the needs of your users. What do you think are the challenges facing the ICC in Latin America? Is competition from regional institutions increasing?

Latin America is indeed a region where local arbitration institutions have been more active in recent years, with some of them aiming at playing a regional role. This is certainly a positive development, as it contributes to spreading the arbitration culture across the continent. It also encourages us to raise our game in order to remain the most preferred institution in all segments of our practice. We need to constantly innovate, and continue focusing on the quality of our services, on efficiency, transparency and of course ethics. Of paramount importance is maintaining the scrutiny of awards at the very high level where it is today. Scrutiny increases the

quality of awards, and it reduces the likelihood of non-recognition or annulment. We also need to constantly improve the cost and time efficiency of our arbitrations. In this respect, we have recently adopted important measures such as the expedited rules, which are mandatory save contrary agreement of the parties in arbitrations where the amount in dispute is less than US$2 million and the arbitration agreement postdates the entry into force of our 2017 Rules, and are also applicable to all other arbitrations in case of an agreement by the parties. The expedited rules allow to at the same time maintain the high quality of an ICC arbitration and to obtain an award within 6 months from the case management conference with limited costs. It has so far worked very well and is very popular with our users. We have also reduced the time limit for establishing the terms of reference and introduced a time limit for the submission of awards to the Court, with financial consequences for the tribunal in case of a delay that is not justified by the circumstances of the case. We are also aiming at establishing the highest level of ethics in ICC arbitrations, in particular by ensuring that conflict disclosures are made by arbitrators on a forthcoming and transparent manner. It is a fundamental principle in arbitration that the parties have the right to be aware of any circumstances that may in their eyes affect the independence or impartiality of the tribunal. Finally, it is important that the parties cooperate in good faith with the tribunal, and we have adopted guidance to that effect.

On the question of costs, do you believe cost is likely to be a factor in attracting parties to choose regional institutions over the ICC?

First of all, I do not think that the costs of the institution are a major driver in the choice of an arbitral institution. Institutional costs are very small fraction of the overall costs. I also believe that it is important that arbitrators are properly remunerated in order for them to conduct cases efficiently and produce high quality awards. This being said, the Court gives a lot of attention to controlling arbitrators' fees in many respects. First, fees are normally fixed below the average provided by the scales when the amount in dispute is high or very high. Second, fees are reduced in case of unjustified delays. Finally, at the difference of other institutions, the Court does not allow tribunals to seek payments from the parties to remunerate the administrative secretary, if any. More generally, fixing fees on the basis of an ad valorem schedule allows the institution to control costs more efficiently. Remunerating arbitrators by the hour, to the contrary, makes it more difficult to control costs and may generate inefficiencies in case of delays. In an ad valorem system, arbitrators are not rewarded for delays, whereas an hourly rate-based system makes it more difficult for the institution to have oversight over the efficiency of the arbitration and it is very difficult to control effectively the number of hours that are declared by arbitrators.

You speak very passionately about the ICC's competitiveness in terms of cost. Other competitor institutions such as SIAC, HKIAC and LCIA have published statistics on institutional and arbitrator costs. Are there any plans for the ICC to publish something similar?

I do not think that arbitral institutions should be engaged in a race to the bottom on costs. This is not what the market expects. We want arbitrators to be properly remunerated because they have to deliver awards and decisions in a speedy and efficient way and at the highest level of quality. Our philosophy is certainly not to promote us by constraining arbitrators' fees to the lowest possible level. I also do not think that the ICC is at all more expensive than others. Many of the studies you just mentioned compare apples with pears, and the result they produce are flawed because they adopt as a benchmark the ICC average fee produced by the scale, without considering that the Court frequently departs from it by going below in large cases and on top of it in cases where the amount in dispute is limited. The perception that ICC is more expensive than other institutions arises, most of the times, from the fact that parties have to pay upfront a significant part of the costs of the arbitration, but this has the advantage of allowing parties to know where they are at the beginning, and parties may if they wish pay the advance in instalments. Overall, a protracted arbitration where arbitrators are able to charge significant hourly rates with no or little control from the institution will certainly result in higher costs than an ICC arbitration. Let me add that we will in the course of this year release the results of a completely transparent study conducted by the Miami University and Compass Lexecon on the costs of ICC arbitrations.

About the author

Alexis Mourre is an independent arbitrator and President of the ICC International Court of Arbitration.

Alexis is the author of numerous books and publications in the field of International Business Law, Private International Law, and Arbitration Law. He is founder and past editor in chief of Les Cahiers de l'Arbitrage – The Paris Journal of International Arbitration, a leading French publication in the field of Arbitration.

He lectures in different universities and participates as speaker or moderator in numerous conferences and seminars on international commercial arbitration.

He is fluent in French, English, Italian and Spanish, and has a working knowledge of Portuguese.

Spotlight article: **Christian Leathley, US Head of International Arbitration**

Christian Leathley is an English solicitor and New York attorney, who became a partner in 2012. Since then, he has worked in our London and Madrid offices, before relocating to New York in 2015. Two years ago, he was appointed Head of our US International Arbitration Practice.

Throughout his career, Christian has focused on arbitrations involving Latin America – both commercial and treaty cases. We asked him about building a practice, the changing landscape of investment treaty arbitration, and being a real-life "Englishman in New York".

How did you come to focus on Latin American arbitration?

After law school I travelled to Spain, where I learned enough Spanish to spend time in Madrid during my training contract. I returned to London and qualified in 1999, just before the Argentine financial crisis that marked the real beginning of the Latin American arbitration boom. Argentina had responded to the crisis by removing the peso's peg to the US dollar. That radically devalued the currency, and slashed the revenues of many foreign investors in Argentina. The investors brought claims under Argentina's investment treaties with their home states. The rest, as they say, is history.

At the same time, the New York Convention was beginning to be ratified in enough Latin American countries, and there was enough foreign investment in those same countries, that I could see the investment arbitration trend coming. I also saw that there was a lot of commercial arbitration in the region.

Against that background, I consciously focused my career on Latin American work. I was lucky to be in a minority of Spanish-speaking, English mother tongue lawyers. I spent time in the Latin American arbitration group of Wilmer Hale, where I worked on a number of these cases. I also wrote a book on resolving disputes in Latin America, which was a useful springboard.[1]

You have worked on investment treaty claims since the early 2000s. How has the playing field changed in that time? What are your views on the pros and cons of treaty cases?

Herbert Smith Freehills represents both states (Costa Rica, The Kingdom of Spain, and more) and investors, so I have seen these cases from both sides.

Historically, just a handful of firms did investment treaty cases, and they developed a deep expertise. Now, everyone is pitching for this work; the field has expanded enormously.

The cases themselves have expanded too; both in number and in length of time. A treaty claim can run for five to ten years, and cost the parties millions of dollars. The rise of third party funding has also played a part. Although funding can be empowering for investors with genuine claims, it has also led to some more opportunistic claims, which are concerning for both states and their populations.

There is a pool of experienced treaty arbitrators, but many of them are overly busy. In recent years, we have seen more and more arbitrators on treaty claims who are less busy, but may lack the relevant experience to be making important decisions on matters of state responsibility. Both are concerning, and need to be addressed.

However, treaty arbitration still has many advantages. It gives investors a powerful tool for controlling state interference. This can be particularly useful in Latin America, where the rule of law is not consistently observed. Treaty claims tend to arise particularly in the energy, natural resources, and infrastructure sectors, all of which are particularly susceptible to pendulum swings from left to right in Latin America. Traditionally, swings to the left have led to behaviours that trigger treaty claims. Treaty arbitration is a way to hold states accountable.

Why do you think other regions haven't seen the rush of claims that Latin America has? In particular, Asia?

In my view, the relatively larger number of treaty claims in South and Central America stems from historical state behaviour there, including the prevailing level of institutional corruption. Protection for natural resources tends to be much stronger in Latin America than in other regions. However, that protection is not so extreme that the rule of law is perceived as being altogether absent. As a result, investors have tended to enter the region with a reasonable level of expectation they will be treated fairly and can rely on rule of law. Where that has not been the case, it has created a "perfect storm" climate for treaty claims.

1. International Dispute Resolution in Latin America: An Institutional Overview; Leathley, Christian; Kluwer Law 2007

One of the biggest criticisms of investment treaty arbitration has been lack of transparency. As a member of UNCITRAL Working Group II on transparency in arbitration, do you think progress has been made?

We are definitely seeing greater transparency. A recent case in which I acted for Costa Rica was live-streamed on the internet, and I got emails daily from people who had watched and wanted to comment. I think it's great for states and their publics to see these cases in action; it should really help to address some of the concerns. Critics argue that it can also lower the level of debate, but in my view, the pros far outweigh the cons.

You represented Chevron in an arbitration that it claims was a sham to extract money in the form of an "award". Is this a sign of things to come in international arbitration?

This is an extraordinary case. The claimants concocted a claim against Chevron at a fraudulent arbitration centre, the head of which was later arrested for forgery in connection with the sham award and has recently resulted in criminal convictions for the arbitrators and representatives of the fraudulent centre. Fortunately, we have not seen many sham cases to date, but there have been a few, and we know that there are more of these fraudulent institutions out there. It is a worrying development, which leaves parties vulnerable to exploitation of the worst kind. Fraudulent claimants can simply concoct a claim, institution and award, and rely on the New York Convention's presumption of enforceability. Even where the fraud is eventually revealed and enforcement refused, the respondent will have been forced to spend time and (significant) money defending itself and resisting enforcement.

You have recently been appointed head of the US International Arbitration team, having taken over from Larry Shore in 2017. What is your vision for the team?

Larry built incredibly strong foundations here in New York and the practice has continued to grow and thrive. We have a steady stream of active cases for investors, states and commercial parties, as well a number of cases in the pre-arbitration phase. We have a good stream of client work out of China, working with our Energy team there. We also have strong working relationships with our European offices including Paris, London and Madrid.

I am lucky to work with a very strong team that includes native Spanish speakers from Latin America, as well as Brazilian Lusophones, all with great arbitration credentials. We have a strong US attorney base, a great axis with Asia (including two Singaporean lawyers), and an Arabic-speaking team led by my partner Amal Bouchenaki.

The team has more than doubled in the time I've been here; we now have 18 lawyers. Language capabilities include English, Spanish, French, Arabic, Italian, Mandarin, Japanese and Portuguese.

My aim is for the team to be a "go-to" Latin America practice for international arbitration. With our experience of the region, language skills, and appreciation of what clients need and want in the region, we are getting closer.

You are an English lawyer, focusing on Spanish language cases, New York-qualified and practising in the US. Tell us about this combination of cultures, and what you think it brings to your practice.

Latin American work has been a part of my life all my career. I have developed some really deep relationships with people who have lived through the development of arbitration in the region. Although I am English originally, I feel very much part of the Latin American arbitration community, and have a genuine affection for the region. In my experience, people see that and respect it. It is a wonderful region to work in. It presents natural challenges, but I feel very lucky to be able to spend a large amount of time with fantastic people.

"Larry built incredibly strong foundations here in New York and the practice has continued to grow and thrive"

Practising in the US bears no resemblance to the UK. The legal culture is entirely different. Despite the US/UK "special relationship" the Americans and Brits have very different ways of approaching the practice of law. There is no one way better than the other – but seeing the difference strikes me on a daily basis. I think we have the best of both worlds in our team, which prizes both technical legal skill and all-roundedness. Our combination of cultures makes us appealing to clients.

Professionally, New York is an obvious place for us to base our Latin America practice. The time zone makes sense, and there are so many natural synergies with the Latin American region. The arbitration community here is extremely international, even by comparison to London.

Personally, I love the energy of New York. From the food, to the culture, the museums, to the people, it feels like you're in the world's capital. It's a fascinating, fun city; I'm very happy to live and work here.

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The rise of giga projects in Latin America

Over the last few decades countries such as Brazil, Mexico, Chile, and Panama have embarked on ambitious multi-billion dollar "giga projects", which have frequently been in the global spotlight, but not always for the right reasons.

In this article, James Doe, Christian Leathley and Noe Minamikata consider the issues that have arisen on some of these Latin American giga projects and explore what likely lies at the heart of these high-profile and often controversial disputes.

On any large-scale construction and engineering project, contentious issues – both foreseeable and unforeseeable – are bound to arise regardless of the country or region in which it is based.

These issues can range from adverse ground conditions, supply shortages and labour disputes, to changes in law and prevailing economic and political conditions, as well as more generic commercial issues such as under bidding the contract price. The risk of problems increases where the project involves complex engineering, multiple contracting parties and a wide range of investors as well as other stakeholders, which cause further political, social and economic complexities.

Where these issues are not anticipated at the outset of the project and therefore inadequately provided for in the relevant project agreements (including in the contract price) or where they are not effectively dealt with as they arise, all this can lead to significant delays and cost overruns which, in turn, can develop into costly and protracted arbitration cases.

Projects in Latin America are no exception to this phenomenon. Whilst significant differences exist across the region, Latin America has one of the poorest track records for project delays and cost overruns on large-scale projects, as compared to some other regions of the world.

Giga projects can give rise to giga claims and disputes

The Panama Canal Expansion Project

The Panama Canal Expansion Project is reported to have incurred a number of serious problems before its opening in 2016. These included the suspension of works over disputed payments and disruption claims related to adverse ground conditions, amongst others. The project, in turn, has suffered huge cost overruns of over US$2.5 billion and almost a two year delay to commencement of operations, which has resulted in millions of dollars in lost revenues for the operator.

These problems have reportedly led to several dispute adjudication board decisions and seven high-value ICC arbitrations, the first of which was commenced in December 2013 and only concluded in July 2017. The legal costs of the employer, the Panama Canal Authority (**"ACP"**), have been reported to be in excess of US$22 million for the first arbitration alone.

Two years on from the opening of the project, the majority of ICC arbitrations have yet to be concluded or settled. Further, in August 2018, the contractor consortium group, Grupo Unidos por el Canal, S.A. (**"GUPC"**), filed a separate investment treaty claim against Panama pursuant to the Spain-Panama bilateral investment treaty. As a result, the fallout from this particular giga project could continue for many years to come.

The Panama Canal Expansion Project (also known as the Third Set of Locks Project) involved the creation of a third set of locks for the Panama Canal. The expansion doubled the Canal's capacity and has allowed larger ships to use the Canal. The project commenced in 2009 and was due to be completed in 2014, but numerous delays on the project delayed its opening to June 2016. The original cost of the project was US$3.1 billion, but increased to approximately US$5.3 billion (as at 2017).

The New International Mexico City Airport Project

Another multi-billion dollar project that has been overshadowed by controversy since its inception is the New International Mexico Airport ("NAICM") Project, which is currently thought to be at least US$4 billion over budget despite being only 30% complete.

In addition to the major cost overruns, numerous other issues have arisen on the project, including allegations of corruption and tender irregularities. Several lawsuits have reportedly been filed against the airport group, including an ICC arbitration case commenced by Parsons, the project manager. A wave of investment treaty claims are also expected if Mexico's president, Andrés Manuel López Obrador (commonly known as "AMLO"), adheres to his promise to cancel the project in response to a public consultation in which nearly 70% of those polled voted for the project to be cancelled.

The New International Mexico City Airport Project is located on part of the dry lake bed of Lake Texcoco, roughly 25km northeast of Mexico City, Mexico. The project is technically complex and involves the construction of a main terminal of 743,000 square meters, three runways and a capacity of 66 million passengers annually. By the final stage of construction in 2065, the airport is expected to have a capacity of 125 million passengers annually. The original project cost was approximately US$9 billion, which has increased to US$13-14 billion.[1] The initial stage of construction of the project began in 2016 and was scheduled for completion in 2020.

The Panama Canal Expansion Project and NAICM Project are perhaps extreme examples of the types of problems that giga projects can suffer in Latin America. Nevertheless, they stand as useful case studies of the types of problems major projects can suffer in the region. It is also possible to identify from these two projects some common factors, which not only contribute to the destabilisation of large-scale projects, but also trigger major arbitrations.

The Panama Canal Expansion Project and NAICM Project are perhaps extreme examples of the types of problems that giga projects can suffer in Latin America.

1. According to the study "¡Ojos a la Obra!" conducted by the public policy think tank, México Evalúa, the cost of the project is expected to be in the region of US$14 billion. According to other estimates, the figure is around US$13 billion.

Common issues on high value and complex construction and engineering projects in Latin America

There are certain factors that contribute to claims and disputes on high value and complex construction and engineering projects, regardless of jurisdiction. These can range from inadequate planning and early design work to poor project management and mismanagement of change during construction. The following appear to be factors that are more common to projects in Latin America.

Under-pricing

Under-pricing of bids is a widespread issue that affects the construction industry in many jurisdictions, although perhaps even more so in Latin America due to the scarcity of big-ticket infrastructure projects, leading to a greater competition between regional contractors to win the work. On the Panama Canal Expansion Project, for example, GUPC's initial bid of US$3.1 billion (which was eventually accepted as the contract price) is reported to have been approximately US$1 billion lower than its nearest competitor.

Under-pricing also tends to arise where the bid process is governed by strict public procurement rules (as most large-scale infrastructure projects in Latin America are), which require criteria such as transparency and budget constraints to take precedence over quality or a more innovative technical offering.

Of course, the cheapest bid does not always represent the best value in the long run. As the works progress, it often becomes increasingly apparent that the original bid price is insufficient to cover the risks assumed by the contractor. Partly as a consequence of that, claims begin to increase in quantity and value as the contractor attempts to recover the shortfall. Due to the size of sums in issue and the commercial and political pressures facing both parties, such claims often lead to arbitrations as both parties adopt entrenched positions. These arbitrations further hinder the progress of the project by diverting crucial management resources away from the works.

Given the scale of the sums involved and the duration of the construction phase, it is often impossible for the contractor to wait until the works are completed to recover the additional sums claimed because of much needed cash flow.

Project related claims also arise due to the paralysis caused by such cost overruns. Given that giga projects often involve public funding, the scrutiny and intervention of local "fiscal" authorities (often called Contraloria) can be brought to bear on projects. Public officials requested to make cost increases are fearful of the civil and criminal sanctions that can flow from a proven mismanagement of public funds. Accordingly officials often do not sign off on necessary cost increases, instead preferring to allow disputes to accrue and leave the resolution to arbitral tribunals. This paralysis is all too common and can lead to major delays.

Labour shortages

Several years of recession and the fall in commodity prices have impacted the region's labour market. According to the World Economic Forum, Latin America has the largest skills gap in the world, and regional construction firms often struggle to find workers with the right skills. [2]

2. https://www.weforum.org/agenda/2018/03/latin-america-has-the-biggest-skills-gap-in-the-world-here-s-how-to-bridge-it/

A shortage of adequately trained and experienced workers in the country, as well as project management resources, can materially affect the productivity and timely completion of construction projects. This may be exacerbated further if local laws require a minimum level of local labour to be employed during construction. These local content requirements are a common feature of Latin American projects.

Strikes and disturbances

Although not universal across the region, strong labour unions are known to have had a significant impact on construction projects in Latin America. In jurisdictions such as Brazil and Mexico, where labour unions play a prominent role, construction projects can be at greater risk of strikes, labour disturbances and even riots instigated by the unions seeking to improve their negotiating position in relation to collective bargaining agreements.

Failure to manage the relationship with labour unions can lead to periods of low productivity. These, in turn, can lead to project delays and cost overruns, which increase the probability of arbitration. If, as is often the case, the mismanagement of labour relations is attributable to both the contractor and the employer, the allocation of risk of any resulting delay is not always clear-cut. More generally, the allocation of responsibility for delay, whether caused by labour relations or other issues, can be one of the most challenging aspects of giga project arbitrations.

Disturbances can also manifest themselves through local indigenous communities (comunidades) interrupting projects. The environmental, property and health related claims that might impact such communities are being supported or promoted by NGO's who are working with the communities. The organisation of such communities is becoming extremely common, resulting in local court actions that can suspend major projects from progressing.

Political uncertainty

The success of major infrastructure projects in Latin America can often depend on the prevailing political climate at the time. A prime example of this is the NAICM Project discussed above.

Jurisdictions such as Mexico permit public contracts to be terminated on grounds of general interest, and if continuing with the work is determined as not being beneficial to the state.[3] Whilst contractors of cancelled projects would typically be entitled to compensation where a project is cancelled, disagreements inevitably arise as to the level of compensation to be paid, which can frequently lead to high-value disputes. The authors' experience suggests that construction contract terminations are on the rise across the international construction market, leading to an increase in construction arbitrations around the globe, including those in Latin America.

The success of major infrastructure projects in Latin America can often depend on the prevailing political climate at the time.

Corruption scandals

Brazil's "Car Wash" investigation in 2017 exposed widespread corruption not only within Brazil but across Latin America, including the revelation that Odebrecht, the biggest contractor in the region, had paid millions of dollars in bribes to government officials in order to secure public contracts.

Under the laws of many Latin American jurisdictions, contracts obtained illegally, such as through corruption, are rendered null and void. The scandal has led to

3. Article 60 of the Law of Public Works and Related Services.

numerous Odebrecht contracts – such as the US$1 billion contract for Ruta del Sol 2 in Colombia and the Gasoducto Sur Peruano pipeline in Peru – to be cancelled. These have, in turn, triggered investment treaty arbitration claims against Columbia and Peru by other contractors.

Since the investigation, governments in Latin America have become more cognisant of the need to tackle corruption in the construction industry. Corruption, however, continues to pose a real risk for contractors and suppliers operating in the region. As the Car Wash scandal has demonstrated, even where corrupt practices are committed by others within a consortium or even within different parts of the supply chain, the fallout can jeopardise the entire project and bring a slew of associated disputes and arbitrations.

The consequence is greater vigilance, but also the obsessive drive for transparency. In this latter regard, we have already begun to see how giga projects with state owned entities are now becoming seriously hamstrung because of the constant need for transparency in every aspect of procurement and contract management, in order to avoid any criticism of corruption. Thus the pendulum swings from one side to the other – often resulting in complications for such projects.

Conclusion

Large-scale complex construction and engineering projects are inherently risky. However, those in Latin America can be particularly challenging given the significant potential for issues to arise, which are outside the direct control of the parties. The ongoing infrastructure investment gap in the region also means that projects are often subject to strict financial and also political constraints, with limited scope for cost overruns to be financed by the owner.

Given the significance of giga projects to the economy of the host country, determining responsibility for cost overruns can create severe political as well as commercial problems for the parties involved. It is therefore crucial that, when participating in large-scale projects in the region, parties to construction contracts insist on, and actually operate, robust project and claims management procedures, which enable issues to be addressed promptly as they arise.

If disputes become unavoidable, it is important that project participants understand their legal position under the local law and the contract, and prepare their legal, factual and technical case properly. Disputes of this nature tend to be lengthy and complex and require significant amounts of evidence in order to achieve success, so having the right information management systems in place is essential.

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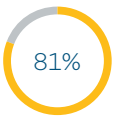

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David Aven v Costa Rica: Key takeaways for foreign investors to consider when resorting to investor-state arbitration in environmental disputes

Investment disputes related to environmental protection can sometimes imply a tension between a state's obligation to protect its natural resources from environmental harm and its desire to promote foreign investment. Historically, environmental regulation has been thought to be inconsistent with international investment law. Indeed, investors have challenged the application and enforcement of states' domestic environmental regulations, as 'expropriation' and sought compensation for the state's actions.[1]

Introduction

Despite the historical perception of the role of environmental regulation, the past six years have seen a wave of over sixty cases involving environmental issues being filed.[2] These cases have coincided with ever-increasing global focus on the environment and the blossoming of international, regional and national regulatory regimes aimed at responding to the challenges of environmental protection and climate change. The outcome of these cases and the evolution of investment tribunals' reasoning on the balance between investment protection and environmental protection are of significance for international law practitioners, but also for investors considering whether to bring a claim under an investment treaty.

The recent decision in *David Aven v Costa Rica*[3] contributes to this debate as it (i) recognized – as a matter of international law – a state's right to apply and enforce its environmental protection laws against foreign investors; and (ii) admitted jurisdiction to entertain Costa Rica's counterclaim for environmental harm. This latter point is of particular note given the number of cases involving counterclaims for environmental harm are rare and those in which a tribunal has accepted jurisdiction over them are even more limited. The Latin American team of Herbert Smith Freehills' New York office successfully represented Costa Rica in this significant case, which constitutes a major milestone for Costa Rica's traditional and strong policy for the protection of the environment.

The Tribunal's Award

The Claimants – citizens of the United States of America – brought claims under Chapter Ten, titled "Investment", of the Dominican Republic-Central America Free Trade Agreement (**"DR-CAFTA"**) against Costa Rica. The dispute arose from investments comprising several parcels of land and a concession site in Esterillos Oeste on Costa Rica's Pacific coast in 2002 to develop a real estate project, the "Las Olas Project".

The Claimants alleged they obtained all municipal permits and approvals, including environmental viability and construction permits, required to commence the development. They argued that based on unsupported complaints by neighbours to the site, local authorities conducted inspections and identified alleged wetlands and forests within the project site. According to the Claimants, the administrative and judicial actions that shut down the project to avoid further environmental harm – which caused the destruction of the investment – were in breach of Costa Rica's obligations under the DR-CAFTA. In particular, the Claimants alleged that Costa Rica had failed to afford them fair and equitable treatment, had treated them discriminatorily and had indirectly expropriated their right to the value of their investment without compensation.[4]

In response, Costa Rica argued that the protection of the environment is a key governmental policy acknowledged under the DR-CAFTA, that the rights of investment protection granted to investors under the treaty may be subordinated to the protection of the environment, and that it had acted in accordance with its environmental laws to prevent further environmental harm to its protected ecosystems. Costa Rica also filed a counterclaim against the Claimants for breach of mandatory rules of environmental protection based on Article 10.16 of the treaty,[5] and reasons of procedural economy and efficiency.

The Tribunal concluded that Costa Rica's actions were neither arbitrary nor in breach of the DR-CAFTA. A wetland had been damaged by the Claimants' development activities and the state's measures to protect the wetland were taken in accordance with domestic laws and international law. The Tribunal also found that DR-CAFTA could provide jurisdiction to hear counterclaims by Contracting States against investors for breach of the treaty's environmental and other obligations but rejected Costa Rica's counterclaim for environmental damage for procedural reasons.

States must adopt and enforce their environmental laws in a fair, non-discriminatory fashion, following principles of due process

While older generations of bilateral investment treaties (**"BITs"**) generally do not include provisions relating to environmental obligations – as their primary purpose is to protect foreign investments – modern trade agreements more frequently include provisions to address states'

environmental concerns. In this regard, since the early 1990s countries such as Canada, Mexico, the US, Belgium, Luxembourg and the Netherlands have included environmental language in their more recent treaties.[6] The way in which states have incorporated environment-specific language into their treaties varies: some include a preamble where the object and purpose of the treaty mentions the environment;[7] others confer wider latitude to states and enable them to determine their own level of environmental protection with carve-out clauses in relation to investment protection for environmental protection;[8] while others include provisions on corporate social responsibility by incorporating soft law and guidelines.[9]

Consistent with this trend, the DR-CAFTA adopted the approach taken in the US 2004 and 2012 Model BITs[10] to include a series of provisions relevant to environmental protection, and went even further to include a complete chapter (Chapter Seventeen, titled "Environment") dedicated to its Contracting States' environmental obligations. A key provision from the treaty which seeks to balance the Contracting States' obligations in Chapters Seventeen and Ten is Article 10.11, which provides that:

> "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

In interpreting this provision, the Tribunal recognized that the express terms of the DR-CAFTA subordinate the rights of investors to the rights of states to ensure investments are carried out "in a manner sensitive to environmental concerns".[11] However, the Tribunal held that this did not give Costa Rica an "absolute right" to implement its environmental laws as it desired but that it must do so in a fair, non-discriminatory fashion, following principles of due process.

After setting this standard, the Tribunal went on to analyse whether Costa Rica's conduct vis-à-vis the Claimants had been compliant with the DR-CAFTA and customary international law. After conducting a heavily fact-based assessment, the Tribunal concluded that Costa Rica's conduct was not in breach of the DR-CAFTA.

States' counterclaims are admissible under DR-CAFTA

For the first time, an investment tribunal has ruled that counterclaims by respondent states are admissible under Chapter 10 of DR-CAFTA.

First, the Tribunal looked at the treaty's language.[12] While Chapter 10 sets out Contracting States' obligations, it could be concluded that only states can be sued and investors cannot be respondents. However, Chapter 10 also contains implicit obligations for investors with respect to compliance with environmental laws of a host state. In this sense, for the Tribunal, the investors' obligations to comply with environmental laws would not only arise under domestic laws and regulations, but also under Chapter 10 of the DR-CAFTA. The Tribunal went on to say that if those provisions could be interpreted to impose affirmative obligations upon investors, then it was "not impossible either de facto or de jure, that a foreign investor could be found to breach an obligation under Section A [of Chapter 10], by the violation of environmental domestic laws and regulations."[13]

Second, the Tribunal acknowledged that most investment tribunals have not recognized jurisdiction over counterclaims in the absence of explicit agreement between the parties to submit a counterclaim to the Tribunal. However, the Tribunal noted that two recent ICSID tribunals had asserted jurisdiction over a counterclaim in the cases of *Urbaser v Argentina*[14] and *Burlington v Ecuador*.[15]

The Tribunal distinguished *Burlington* from the case before it, since in that case the parties had reached an agreement expressing their consent to resolve counterclaims arising out of the investments through arbitration, thus there was no challenge to the tribunal's jurisdiction. In addition, the tribunal in *Burlington* relied on Article 46 of the ICSID Convention, which empowers ICSID tribunals to decide "counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Center."

In *Urbaser*, the tribunal found that the counterclaim had sufficient nexus to the underlying investment contract and the

Respondent's right to bring counterclaims against investors was "supported by the need to avoid the duplication of procedures and to prevent the risk of contradictory decisions".[16] The Tribunal in *Aven* agreed with the tribunal in *Urbaser*, which affirmed its jurisdiction to hear Argentina's counterclaim based on Articles 25 and 46 of the ICSID Convention and Article X of the Argentina-Spain BIT, stating that it could no longer be considered that investors operating internationally were immune from becoming subjects of international law, specifically with regards to the protection of the environment.[17] In this sense, the Tribunal recalled the International Court of Justice's observation in *Barcelona Traction* that, "[i]n view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes".[18]

The Tribunal considered that "environmental law is integrated in many ways to international law, including DR-CAFTA" and that although the enforcement of environmental laws is primarily to the states, foreign investors are also subject to international law obligations in light of the specific environmental protection provisions of the treaty.[19]

Similarly, the Tribunal considered that under Section A of Article 10 of the DR-CAFTA, investors have an obligation to abide by and comply with a state's measures to protect the environment and there are no "substantive reasons to exempt [a] foreign investor of the scope of claims for breaching obligations under Article 10 Section A DR-CAFTA, particularly in the field of environmental law."[20]

Finally, the Tribunal considered issues of procedural economy and efficiency by referring to Prof Reisman's 2011 Dissenting Opinion in *Spyridon Roussalis v Romania*,[21] noting that Article 46 of the ICSID Convention worked to the benefit of the respondent state and the investor.

Conclusion

The award in *David Aven v Costa Rica* is highly significant. It contributes to the development of the jurisprudence regarding the interaction between a state's right to apply and enforce its environmental protection laws and the protection of investments. *Aven* is also only the second publicly known case to recognize that states may bring counterclaims against investors.

Given Costa Rica's focus on environmental protection and tackling environmental issues,[22] this award is of considerable importance to that country. It affirms Costa Rica's right to protect its environment, finding that the measures taken to protect wetlands and forests were not arbitrary or in breach of the trade agreement.

The award also alerts investors of the limits to the development of their investments within Costa Rica (and DR-CAFTA Contracting States more widely): investments must be carried out "in a manner sensitive to environmental concerns",[23] and in accordance with the environmental laws of the host state.

The wider impact of this award has not yet been felt. However, the Tribunal's reasoning confirms that the *Aven* case can be seen within the context of a wider trend in investment treaty jurisprudence of holding investors accountable as subjects of international law. For instance, for investors, compliance with domestic and international environmental obligations might now be critical before considering bringing a treaty claim.

The possibility of counterclaims is also a fascinating development and one that we will all, no doubt, be watching with interest. This is yet another issue for careful consideration by investors, who might now have to include the possibility of facing a counterclaim in any risk assessment they conduct prior to pursuing international law avenues. Then again, respondent states would certainly embrace this decision as a useful precedent for future defences from claims where compliance with environmental law might be part of the issues in dispute.

Notes

1. Martin Wagner, J., "International Investment, Expropriation and Environmental Protection", 29 Golden Gate U. L. Rev., 1999, pp. 465-466; Sundararajan, A., "Environmental Counterclaims: Enforcing International Environmental Law Through Investor-State Arbitration", Salzburg Global.
2. Parlett, K. and Ewad, S., "Protection of the environment in investment arbitration – a double edged sword", *20 Essex Street Bulletin*, September 2017; Viñuales, J. E., *Foreign Investment and The Environment In International Law*, Cambridge University Press, pp. 17-18 (explaining that only four investment disputes with environmental components occurred prior to the year 2000).
3. *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (hereinafter *David Aven v. Costa Rica*).
4. *Id.*, paras. 359-363.
5. DR-CAFTA, Article 10.16: Submission of a Claim to Arbitration: "1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: **(a) the claimant, on its own behalf**, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and (ii) that **the claimant** has incurred loss or damage by reason of, or arising out of, that breach; and (b) **the claimant, on behalf of an enterprise of the respondent** that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. [...]." (Emphasis added).
6. For example, US Model BITs (2004 and 2012), United States-Georgia BIT (1994), United States-Trinidad and Tobago BIT (1994), United States-Uzbekistan BIT (1994); Mexico-Costa Rica FTA (1994), Articles 11.04, 13-15. Belgium/Luxembourg BITs contain language on the environment in addition to provisions confirming the state's right to legislate to protect the environment and excluding environmental measures from the scope of the dispute settlement mechanism. See for example, Belgium/Luxembourg-Libya BIT (2004), Article 5 "Environment" and Belgium/Luxembourg-Colombia BIT (2009), Article VII, "Environment".
7. The first references to environmental concerns appear in BITs signed by the U.S in 1994 and FTAs. These were later followed by China, Finland, Germany, Japan, Korea, the Netherlands, Sweden, Switzerland. The North American Free Trade Agreement preamble states: "Undertake each of the preceding in a manner consistent with environmental protection and conservation; ... strengthen the development and enforcement of environmental regulation." The Energy Charter Treaty (ECT) preamble also contains language related to the environment: "Recognizing the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy; Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and [...]."
8. See for example, China-Canada BIT (2012), Canada-Slovak Republic BIT (2010), Mexico-Bolivia FTA (1994), Mexico-Costa Rica FTA (1994), United States-Georgia BIT (1994), United States-Trinidad and Tobago BIT (1994), United States-Uzbekistan BIT (1994); see also, Zhan, J., "Investment policies for sustainable development: addressing policy challenges in a new investment landscape," in Echandi, R., and Sauvé, P., eds., **Prospects in International Investment Law and Policy**, Cambridge University Press, 2013, p. 26 and UNCTAD, *World Investment Report: Investing in a Low-Carbon Economy*, 2010.
9. See, Canada-Benin BIT (2013) and Brazil-Mozambique BIT (2015). The Dutch 2018 Model BIT includes reference to the G20 Guiding Principles for Global Investment Policymaking.
10. The 2004 and 2012 US Model BIT, state in their preamble: "Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment [...]." and "Article 12: Investment and Environment" acknowledges that it is "inappropriate to encourage investment by weakening or reducing the protections afforded to domestic environmental [...]."
11. *David Aven v. Costa Rica*, paras. 733-734.
12. DR-CAFTA, Article 10.9.3.c, "[...] paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources. [...]."; Article 10.11, "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."
13. *David Aven v. Costa Rica*, Award, para. 735.
14. *Burlington Resources Inc v. The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017 (hereinafter *Burlington v. Ecuador*).
15. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 (hereinafter *Urbaser v. Argentina*).
16. *Id.*, paras. 1118, 1151.
17. *David Aven v. Costa Rica*, Award, para. 738 citing *Urbaser v. Argentina*, Award, para. 1195.
18. International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Report, 1970, para. 33 cited in *David Aven v. Costa Rica*, Award, para. 738.
19. *David Aven v. Costa Rica*, Award, para. 737.
20. *Id.*, para. 739.
21. *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011.
22. See *David Aven v. Costa Rica*, paras. 417-420.
23. *Id.*, paras. 733, 739.

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Spotlight article: **Florencia Villaggi, Senior Associate (Argentina), International Arbitration group**

Florencia Villaggi is a senior associate in our International Arbitration group, specialising in Latin American work. An Argentinian national, she qualified and practised in her home country for six years, before winning a UK Government scholarship to pursue a Master's degree in London. Although she finished the degree, she didn't feel finished with London, and looked for opportunities to stay longer. She applied for an internship at Herbert Smith Freehills, which turned into an associate role. The rest, as they say, is history.

After six successful years in our London office, Florencia has recently relocated to New York, where she will continue her focus on Latin American arbitration. She tells us about her perspectives as an expat lawyer, the history of LatAm arbitration, and the arbitration landscape in Latin America today.

What does it bring to your practice to be working outside your region of focus?

It's been a great challenge to be out of my comfort zone, working in a second language and a different legal system. It has definitely had an impact on my practice, and made me more creative and productive. Being in an international city like London or New York allows you to interact with people from so many different backgrounds, and has really increased my awareness of different people, cultures and approaches. Being at Herbert Smith Freehills, which is so focused on diversity, has helped as well. The fact that we are a global firm has given me a genuinely international perspective on the Latin American arbitration market, and exposed me to international best practice in my work. Importantly, I have also gained an understanding of the common law system, which is a huge advantage for my work in arbitration. My move to New York was a natural one, given its status as a hub for LatAm disputes work. I'm thrilled to be joining our team there.

When we think of LatAm arbitration, we recall the raft of investment-treaty cases against Argentina in the early 2000s. Were you aware of those cases at the time? How did they inform your understanding of investor-state dispute resolution and its impact on the population of the host state?

Yes, I was very well aware of those cases. My firm in Argentina was involved in a number of ICSID claims and I represented investors in some of those cases. Everyone working in international law in Argentina was aware of those cases. But I'd say that the general population of Argentina wasn't really aware of the facts, importance and number of cases against Argentina at the time. This was happening in the context of a profound economic, political and social crisis with very high unemployment rates; the ICSID cases were not the main news in the media really. Later on, there was a lot of media attention focused on claims by the so-called vulture funds, holders of defaulted Argentine bonds which did not agree to the restructuring, rather than the ICSID claims. Those funds tried to seize the Argentine frigate Libertad in the courts of Ghana. They also filed a claim in the New York District Court, which ordered Argentina to pay the total price of the bonds plus 9% interest. For some investors, this amounted to a return of over 1500%. This really caught the public's attention and there was a strong opposition to paying the vulture funds. However, when the government changed in 2015, the new government had as one of its main objectives to attract foreign investment to the country again and therefore settling the cases with foreign investors was a key priority. Argentina finally settled the vulture fund cases for 50% (which still was a huge return for the investors) and paid out investors on some of the ICSID awards. This was heavily reported in the media in 2016 and the population was generally supportive. People were hopeful that these settlements would promote investment to boost the economy, which was going through a recession.

What are the attitudes to ISDS in Argentina today, and in Latin America more broadly?

Historically, one third of ICSID's cases were against Latin American states. Venezuela, Bolivia and Ecuador (the most frequent ICSID respondents after Argentina) reacted by renouncing the ICSID Convention, and terminated a large number of their bilateral investment treaties (BITs). Despite being the most common respondents in ICSID cases, Argentina chose not to take that path.

A few years ago, a group of Latin American countries, led by Ecuador, called for an alternate arbitration centre under the rubric of the Union of South American

Nations (UNASUR) to resolve investment disputes. However, that has not yet seen the light of day.

Now, the landscape is changing again. Only 15% of ICSID's current cases are against a Latin American state. Cases against European countries have risen to 40%. Ecuador's new government has announced that it will renegotiate its previously terminated BITs with 30 countries, using a new model treaty that provides for arbitration. Colombia has entered into 14 new BITs in the last few years. Mexico signed the ICSID Convention in 2018, and its recent trade deal with the EU includes a version of investor-state arbitration.

What trends are you seeing in LatAm commercial arbitration?

It's largely energy disputes, together with cases that arise from the "car wash" corruption scandal that rocked Petrobras, the main construction companies in LatAm and even Brazil's government. The aftermath of the "car wash" investigation has resulted in arbitrations all over Latin America at present.

Most LatAm arbitrations are ICC cases, with seats largely in Miami or New York, as well as in London, Geneva, Paris, with some in Latin American jurisdictions. Most of the LatAm countries are now Model Law jurisdictions, and their courts are increasingly arbitration-friendly. As a result, we are seeing more and more cases seated in the region. 25% of ICC's current case load has some connection to Latin America; Brazilian and Mexican parties are among the ICC's top ten users.

You mentioned energy disputes - what trends are you seeing there?

South and Central America are extremely rich in energy reserves, so it's not surprising that energy disputes predominate. Venezuela has the largest proven oil reserves in the world, for example, and Brazil and Mexico are the world's 11th and 12th largest oil producers. Argentina recently discovered the world's second largest reserve of shale gas.

YPF, the Argentinian state oil company, has secured US$ 30bn from several multinationals to help it explore the shale reserve. In our experience, projects on that scale frequently give rise to disputes. Similarly, Mexico has seen a rise in sentiment against private investment in its energy industry; indeed the new administration was elected on an anti-private investment platform. We could well see disputes arising there too.

Disputes won't be confined to the oil and gas sector, however. Latin American governments are actively promoting investment in renewable energy, including by Asian investors. Latin America has seen significant investment in renewable energy in recent years, exceeding US$80 billion over the period 2010–2015 (excluding large hydropower projects). For the first time in 2015, in addition to Brazil, both Mexico and Chile joined the list of the top 10 largest renewable energy markets globally. Brazil has one of the largest renewable energy programmes in the world (involving production of ethanol fuel from sugar cane, which provides 18% of the country's automotive fuel). By 2025, Argentina is aiming for 20% of its electricity to be produced by renewables by 2025. Such initiatives will involve construction on a massive scale, which could give rise to disputes. There may also be disputes with suppliers, and disputes if current tax incentives for investors are withdrawn or amended. Some of these disputes may be referred to investor-state arbitration, if there are applicable treaties that still provide for ISDS. Others may be resolved by commercial arbitration. Either way, it doesn't look like there will be a slowdown any time soon.

Herbert Smith Freehills recently sponsored the Global Pound Conference Series, which surveyed 4,000 users of dispute resolution services in 28 countries. The survey showed a clear demand for non-adjudicative ways to resolve disputes, including mediation. What are Latin American attitudes to mediation, either together with, or instead of, litigation or arbitration?

In my experience, Latin American clients are open to alternative dispute resolution. This stems partly from the fact that their national courts can be very slow; it's not unusual for a case to run for three to five years in the courts. Arbitration is better, but can still be time consuming and costly. We have a saying in Argentina that "a bad settlement is better than a good trial", which really sums it up!

In Argentina, the state supports alternative dispute resolution to reduce the number of cases coming to the courts. In many Latin American jurisdictions, it is mandatory to refer a case to mediation or conciliation before you can take it to the courts. There is a culture of mediation, and mediators can be certified by the state. In Argentina, Mexico, Peru and Colombia, you can enforce a mediated settlement as a judgment.

Despite this, there is still plenty of room for improvement. Particularly when it comes to high stakes international disputes, still only a handful of those cases are resolved by mediation. It would be good to see the institutions that work in the region promoting mediation as a way of finally resolving complex international disputes. With increased promotion, better model clauses, and a bigger pool of experienced mediators, we could start to see better results from mediation of international disputes in the region.

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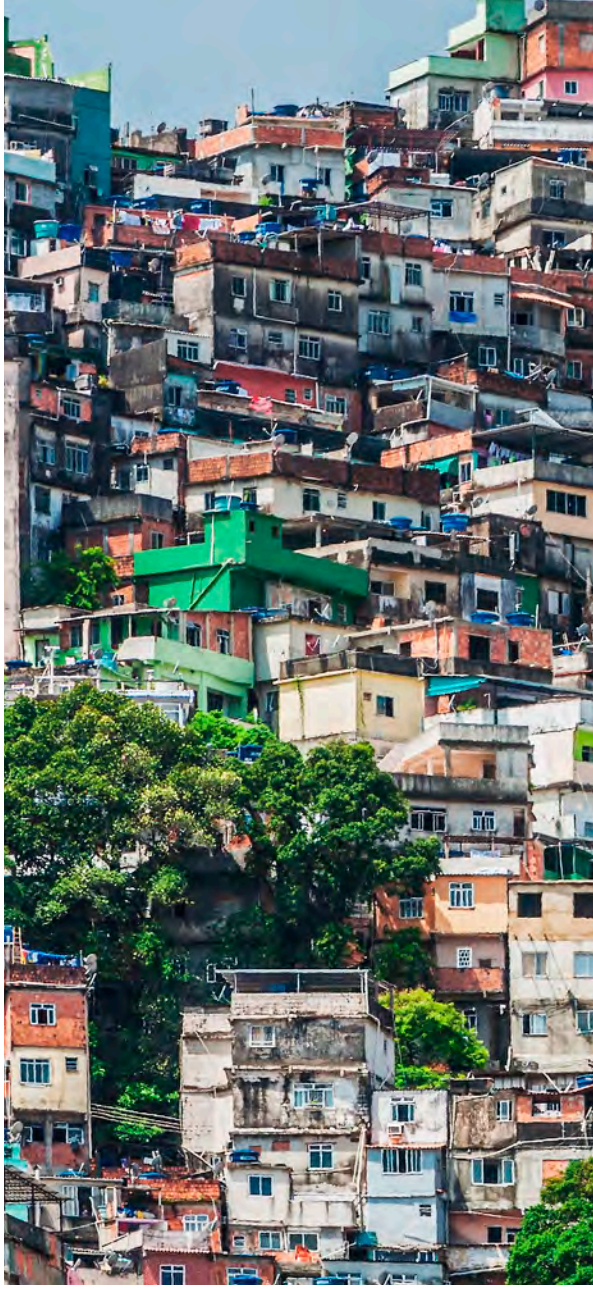
Enforcement of foreign arbitration awards in Latin America



Enforcement proceedings can be of the utmost significance in international arbitration. If a losing party does not make voluntary payment after an award has been made against it, the award will be meaningless if it cannot then be enforced against the losing party's assets. To avoid such a pyrrhic victory, domestic laws and international treaties - of which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**" or the "**Convention**")[1] is the most important and successful instrument - provide for enforcement mechanisms which assist the prevailing party to collect the awarded sums.

When negotiating an arbitration agreement the parties remove the resolution of any potential dispute from national courts. However, at the stage of enforcement, they cannot be avoided: the local courts of the place where the losing party has assets have a fundamental role to play.

The New York Convention

The New York Convention offers a very straightforward method to ensure the enforcement of foreign arbitral awards provided that its requirements are met. Although the losing party may object to the attempted enforcement of the award, the grounds to resist enforcement under the New York Convention are very limited. In particular, Articles V(1) and (2) of the Convention provide that recognition and enforcement may be refused if:

- the arbitration agreement is not valid or the parties to the agreement were under some incapacity;
- the respondent was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case;
- the award deals with a difference not contemplated by or outside the terms or beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, absent such agreement, not in accordance with the law of the country where the arbitration took place;
- the award is not yet binding on the parties, or has been set aside or suspended at the seat of the arbitration;
- the subject matter of the dispute is not arbitrable under the law of the enforcement country; or
- enforcement would be contrary to the public policy of that country.

Despite these limited grounds, there are cases where a party seeking to resist enforcement may turn the enforcement proceeding into an adversarial process that can be both costly and time consuming.

The enforcement framework in Latin America

In general, Latin America has been a late-adopter of the New York Convention compared to other regions of the world.[2] It might be for that reason that in some Latin American jurisdictions, local courts have applied the Convention alongside with provisions of domestic law, even when these provisions should not play a role in the enforcement of foreign arbitral awards. In some worst case scenarios, some domestic courts have "forgotten" about the New York Convention's existence or interpreted its provisions incorrectly.

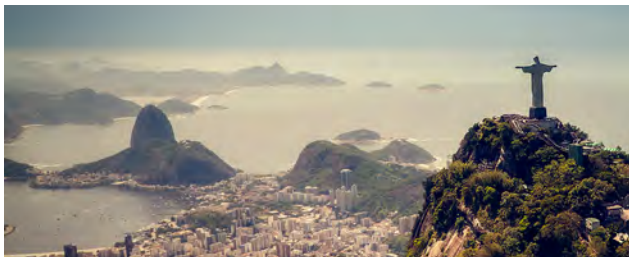
Being aware of the approach of specific domestic courts to the New York Convention, and the application can be key to a successful outcome for a client in enforcement proceedings in Latin America. It is also crucial to be aware of procedural and substantive requirements necessary in a specific jurisdiction as well as other practicalities characterising the enforcement process there.

Comparison

In this article we have selected five jurisdictions in Latin America (Brazil, Argentina, Chile, Colombia, and Peru)[3] whose courts have been regularly asked to enforce foreign arbitral awards and sought to highlight the key features of the enforcement process in each jurisdiction.

From a comparative standpoint:

- Each of these jurisdictions have recently modernised their arbitration laws, promulgating national arbitration laws that are based (to greater or lesser extent) on the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"). This means that even if a local court fails to apply the New York Convention when deciding a recognition and enforcement application, there is some fall back as the modern domestic legislation reflects the provisions of the Convention.
- The normative framework suggests that these jurisdictions share a commitment to the regime of enforcement and recognition of arbitral awards. In fact, there is very little difference between these countries in terms of the nature of the recognition and enforcement process and the grounds to oppose to it.
- Whatever differences exist in terms of enforcement, these relate more to the local legal regime dealing with the attachment or liquidation of assets.[4]
- Although the limited grounds to resist enforcement operate as a way to limit the scope of any review of the merits of the award, there is still a window for the local courts to do it, especially considering that issues such as arbitrability and public policy have to be assessed by the enforcing courts according to their own laws. Most of the jurisdictions have recently attempted to limit the scope of these grounds by defining public policy from a restrictive perspective, only covering the most basic and fundamental principles of the legal system.
- It is also remarkable that each of these jurisdictions (with the exception of Argentina) still require a decision on recognition by a different court before any enforcement order is issued. This is a procedural step that most "arbitration-friendly" jurisdictions around the world do not require and is likely to cause delays when the successful party attempts to collect the sum awarded.



Brazil

Domestic legal framework for enforcement

- Brazilian Arbitration Act (1996) – Articles 34 to 40
- Brazilian Code of Civil Procedure - Articles 513, 515(VII) and (VIII), 523 to 538
- Internal Rules of the Superior Court of Justice

Competent court

- The Superior Court of Justice ("STJ") recognises the foreign award
- After recognition, Federal Courts are competent for enforcement

Substantive requirements

- The award must have been issued by a competent authority and upon a valid arbitration agreement
- Parties must have been properly served with a summons
- The award must be a final and binding decision
- The award must not violate national sovereignty, human rights or public policy

Procedural requirements

- The award must be authenticated by the Brazilian consulate and accompanied by an official or sworn translation only in cases where the 1961 Hague Convention does not apply[5]
- Updated statement of the amount due
- All necessary documents to prove the sums awarded

Adversarial proceeding?

- Yes – a party can resist enforcement on very limited grounds[6]

Public policy standard

- Restricted version of public policy – the fundamental principles of its jurisdiction, including the political, legal, moral and economic aspects of the country
- It has to be interpreted in harmony with the best international standards, avoiding any reference to an internal perspective

Arbitrability requirement

- Limited to cases involving "negotiable rights" (*direitos disponíveis*). Therefore, certain matters may not be arbitrated even by agreement of the parties (family matters, certain public policy matters and, arguably, individual employment-related matters)
- However, most commercial disputes may be arbitrated, including many disputes involving government-controlled entities.

Chile

Domestic legal framework for enforcement

- Chilean Law on International Commercial Arbitration – Articles 35 and 36
- Civil Procedural Code

Competent court

- The Chilean Supreme Court recognises the foreign award by exequatur
- After recognition, the court that would have had jurisdiction to rule on the case, if that case had been brought in court instead of in arbitration is competent for enforcement

Substantive requirements

- The requirements are identical to the New York Convention

Procedural requirements

- Original award or a duly certified copy
- The original arbitration agreement or a duly certified copy must be submitted

Adversarial proceeding?

- Yes – during the exequatur proceedings

Public policy standard

- Restricted version of public policy – fundamental basic rules of the country

Arbitrability requirement

- Parties cannot submit to arbitration disputes related to family law issues, felonies or criminal violations; cases that should be heard by specific lower courts; and all matters in which the law requires a public prosecutor.
- Cases involving public policy issues are not arbitrable such as capacity or civil status; antitrust; employment and labour law; disputes between legal representatives and individuals the former act on behalf of; and disputes concerning foreign investment agreements executed under Chilean Foreign Investment Statute.

Colombia

Domestic legal framework for enforcement

- Colombian Arbitral Statute (2012) – Articles 111 to 116
- General Code of Procedure

Competent court

- Civil Chamber of the Supreme Court of Justice
- Third section of the Administrative Chamber of the Council of State, when public entities or entities with administrative functions are parties to the dispute

Substantive requirements

- The requirements are identical to the New York Convention

Procedural requirements

- Original or a copy of the award, along with a translation of the award in Spanish
- Case law has recently requested the original arbitration agreement or a duly certified copy under Article IV of the New York Convention

Adversarial proceeding?

- Yes – a party can object to enforcement on limited grounds identical to the New York Convention
- However, the court is also allowed to refuse enforcement under certain circumstances, such as arbitrability and public policy

Public policy standard

- Restricted version of public policy – most basic and fundamental principles of Colombian juridical institutions

Arbitrability requirement

- The principle is that disputes related to non-mandatory (waivable) rights are arbitrable.
- The law also provides for specific matters that cannot be settled by arbitration: disputes that involve marital status, the legality of administrative acts, insolvency and some issues regarding antitrust law and intellectual property.

Peru

Domestic legal framework for enforcement

- Peruvian Law on Arbitration (2008) – Articles 74 to 77
- Civil Procedure Code

Competent court

- The Civil Court specialised in commercial matters recognises the foreign award
- After recognition, the First Instance Commercial Court is competent for enforcement

Substantive requirements

- The requirements are identical to the New York Convention but with further clarifications as to their interpretation[6]

Procedural requirements

- Original or copy of the award, authenticated according to the laws of the place where the award was rendered, and certified by a Peruvian diplomatic or consular official
- If the award was not rendered in Spanish, a translation should be provided

Adversarial proceeding?

- Yes – a party can object to enforcement on limited grounds identical to the New York Convention
- The court is also allowed to refuse enforcement under certain circumstances, such as arbitrability and public policy

Public policy standard

- Restricted version of public policy - a group of principles and institutions that are considered essential in the organisation of a state and that inspire its legal system

Arbitrability requirement

- Matters not of 'free disposition' of the parties (matters like criminal law) cannot be arbitrated. Contractual disputes (even with the state) are of 'free disposition' and can be arbitrated.
- Furthermore, the law provides that disputes on matters authorised by law or international treaties or agreements can be referred to arbitration. This provision leaves the door open to national laws and treaties to provide for arbitration on certain matters even if they are not freely disposable by the parties.

Argentina

Domestic legal framework for enforcement

- Argentinean Law on International Commercial Arbitration (2018) – Articles 102 to 105

Competent court

- First Instance Commercial Courts

Substantive requirements

- The requirements are identical to the New York Convention

Procedural requirements

- Original award or duly certified copy
- If the award was not rendered in Spanish, the court may request the party to submit a translation

Adversarial proceeding?

- Yes – a party can object to enforcement on limited grounds identical to the New York Convention
- However, the court is also allowed to refuse enforcement under certain circumstances such as arbitrability and public policy

Public policy standard

- Restricted version of public policy – the basic and fundamental principles that underpin the domestic legal system
- In the past courts have included in the public policy exception norms that were not specially protected by other courts in the region (for instance, an award imposing a particular type of interest has been considered against Argentinean public policy). This practice has allowed courts to exert a certain control over foreign awards. However, courts have recently reversed these types of decisions with the priority given to arbitration through the enactment of a new arbitration law passed in 2018 based on the UNCITRAL Model Law.

Arbitrability requirement

- The following matters cannot be submitted to arbitration: matters referring to the civil status or capacity of persons, family affairs, those involving the rights of users and consumers, contracts of adhesion and those derived from labour relations, those involving rights in relation to properties located in Argentina, matters related to the validity of registrations made in a public register in Argentina; and issues regarding intellectual property registration.
- Furthermore the domestic code of Civil and Commercial law which governs domestic arbitrations provides that matters affecting public policy issues and disputes with the state are not arbitrable. These provisions have been subject to strong criticism and the current Government has sent a bill to the parliament to remove them. In any case, it is unclear if these provisions would be applicable to international arbitration and if these provisions were to be tested in the courts it is to be expected that they would be interpreted restrictively in line with the pro-arbitration trend that courts have recently adopted in Argentina.

The future

The adoption of the New York Convention as well as the fact that domestic arbitration laws in these jurisdictions are based on the UNCITRAL Model Law demonstrate the legislative efforts already made by these Latin American jurisdictions to become an arbitration friendly forum.

There is more to be done, particularly in cutting down the procedural steps involved in enforcement and in improving judicial education on the enforcement process in particular on concepts such as public policy and arbitrability; but most of the Latin American countries are generally on the right track following the global modernisation trends in arbitration.

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Notes

1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959).
2. For instance, Chile ratified the Convention on 4 September 1975; Colombia on 25 September 1975; Peru on 7 July 1988; Argentina on 14 March 1989; and Brazil on 7 June 2002. In addition to the New York Convention, Latin American countries have ratified the Inter American Convention on International Commercial Arbitration of 30 January 1975.
3. All parties to the New York Convention, as mentioned in footnote 2.
4. Attachment proceedings are triggered by recognition and enforcement orders. Once the enforcement is granted, the courts will have to attach the enforcement debtor's assets. These proceedings are governed not by national arbitration laws but local procedural rules, which provide for the requirements for enforcement measures against immovable and movable property. These rules certainly vary from one jurisdiction to the other – and even within each jurisdiction.
5. The Hague Convention abolishes the requirement of legalisation for foreign public documents. Therefore, where awards are issued in countries that are signatories of the 1961 Hague Convention, there is no need to authenticate the award, but simply to apostille it.
6. Such as improper service of the arbitral proceedings; the debt arising from the award has not yet accrued; there is an error in the seizure of assets or a wrongful evaluation of these assets; lack of standing to enforce the award; lack of jurisdiction for enforcement of the award (Article 525 of the Brazilian Code of Civil Procedure).
7. For instance, a party cannot invoke that the arbitration agreement is not valid or the parties to the agreement were under some incapacity, or that it was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case if, having appeared before the arbitral tribunal, it did not raise it during the arbitration proceedings (Article 75, paras. 4 and 5 of the Peruvian Law on Arbitration).

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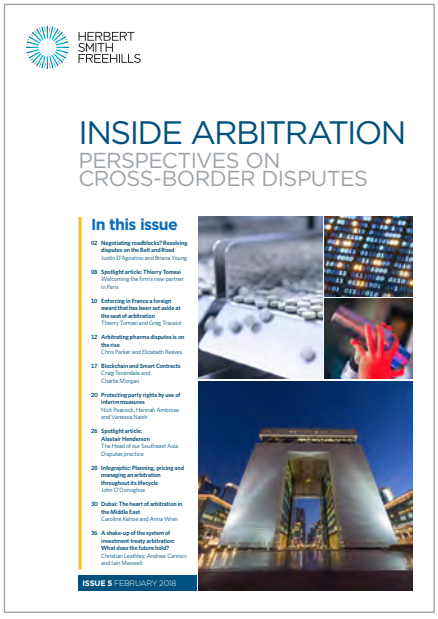

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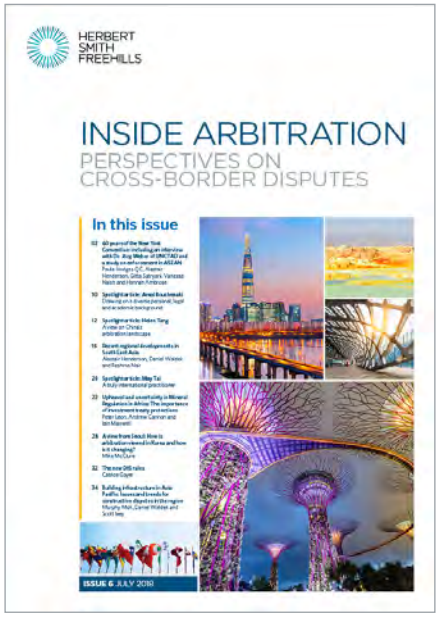

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