Kluwer Arbitration Blog

International Arbitration in the Americas: An Agent of Change?

Joseph Mamounas (Bilzin Sumberg Baena Price & Axelrod LLP) · Thursday, January 8th, 2015

Perhaps on a daily basis, in at least one city somewhere in the Western Hemisphere, an international-arbitration practitioner is asked to describe the benefits of arbitration over litigation in Latin America. The common refrain: "Predictability." As conventional wisdom goes, this almost automatic response is borne out of the notion that litigating in many Latin American jurisdictions can be fraught with difficulties that otherwise would make proceeding with an international business transaction in such jurisdictions simply too risky.

But what happens when a Latin American jurisdiction—its judiciary, legal infrastructure, users, and educational institutions included—embrace arbitration? Some may say this phenomenon would be a dream, but that dream seemingly is becoming reality in Colombia. Colombians even have organized a Centro de Arbitraje y Conciliacion through their Camara de Comercio de Bogota (CCB), with locations in Bogota, Cali, and Medellin, to support these efforts. Arbitration is on its way to becoming a permanent fixture in the legal and business fabric of Colombia.

To enhance the growth of arbitration in Colombia, the CCB has entered into a strategic partnership with the International Center for Dispute Resolution (ICDR). Under this relationship, the CCB handles domestic Colombian arbitrations and the ICDR handles international, Colombia-related arbitrations. The two institutions also share expertise, engage in mutual promotion, and cooperate on rulemaking. The end result is increasing dispute-resolution predictability for international businesses looking to invest or even setup shop in Colombia.

Since 2012, the CCB and ICDR also have hosted a joint conference on international arbitration in Bogota. This year's conference, which took place on October 28, featured a number of topics—ranging from infrastructure projects, to effective advocacy, to ethics—bearing on arbitration today in Colombia and elsewhere internationally. Not surprisingly, a common thread throughout the conference was enhancing predictability in Colombian arbitrations, by allocating risk, understanding and capitalizing on the arbitral process, and enforcing international norms to ensure fairness.

One particular lesson from the conference is the importance of planning. With $25 billion in infrastructure projects currently on the table in Colombia alone, and an estimated $70 trillion in such projects worldwide over the next 40 years, panelists agreed that infrastructure investors must identify, understand, and allocate risks, at the time of contract and especially in crafting a right-sized arbitration clause.

Investors also must have confidence that their contractual allocation will be enforced. As panelist Oscar Ibanez Parra explained, Colombia has a legal framework to address risks in infrastructure projects, and Colombia-bound investors should consider an arbitration clause specifying that Colombian law will apply, while the international arbitration will be administered by the ICDR. That said, American and Colombian jurists participating in the conference reported a difference in the power of courts to review arbitral awards. While US law reflects an emphatically strong orientation in support of arbitration, Colombian courts technically have somewhat more leeway to review awards, particularly under the tutela power.

Even if a dispute arises once an infrastructure project is underway, arbitration can facilitate, rather than hinder, progress. According to panelist Jerry Brodsky, parties can constitute mesas de resolucion de controversias—or arbitral dispute-resolution boards—which are empowered either to render an immediately executable award (in the case of an adjudicative board) or non-enforceable recommendations. These boards also can resolve irregularities and vagaries in the parties' contract. As Brodsky explained, these boards serve to protect the overall project by resolving disputes expeditiously and keeping the project moving.

Intelligently navigating the arbitral process also is critical to predictability. For example, panelist Jose Ferrer recommended that the parties agree in their arbitration clause on specific parameters for an arbitrator, if not her or his identity. Ferrer also described recent ICDR rule changes requiring greater specificity in statements of claim, which must attach all supporting documents then held by the claimant. Ferrer also recommended that users insist on an initial scheduling order—to force one another to think critically about planning the case—and to prepare detailed memorials to help the arbitrators to understand the evidence.

Panelists also agreed that oral argument plays a very important role in arbitration. To bridge cultural gaps between Colombian and American parties, for example, the parties should address the parameters of the final hearing at the contracting stage, if possible. Panelist Larry Shore suggested that in high-value cases, parties should consider proffering direct examination testimony to allow the tribunal the opportunity to assess credibility when the witness is not under attack. Panelist Adolfo Jimenez also stressed the importance of party-appointed experts and noted the effectiveness of asking opposing experts to work together.

Finally, recent rulemaking by various arbitrational institutions has made available to users additional tools—borrowed from the world of litigation—to enhance the robustness of arbitral proceedings. The ICDR's appellate regime is one notable example. Panelist Luis Martinez reported that these rules provide for review for material errors of law and factual findings that constitute clear error. Although introducing meaningful appellate review reshapes the notion of finality in arbitral

proceedings, the specter of such review can serve as a powerful deterrent to a tribunal inclined to give short shrift to the law and the facts in favor of "doing justice."

Similarly, the International Bar Association (IBA) has promulgated guidelines on ethics and counsel conduct, which parties can choose to adopt in their arbitration clause or after a dispute has arisen, in complement to the mandatory bar rules which otherwise apply to counsel. As panelist E. Alexandra Dosman explained, key provisions concern document preservation, disclosure of potentially relevant documents, witness preparation, and submissions to the tribunal. Remedies for violation of these rules include an opportunity for the injured party to be heard, an admonishment by the tribunal, adverse inferences, the apportionment of related costs against the offending party, and "other measures."

In sum, measures to ensure predictability in international arbitration continue to grow, and as they do, so too should the impact of arbitration on the way that Colombia orients itself towards dispute resolution. For evidence, one need look no further than the agreement the CCB reached with the ICDR during this year's conference to work together on a dispute-resolution framework for 4G infrastructure projects. By creating a predictable framework for dispute resolution, these efforts bode well for the future of international investment and business ventures in Colombia—as well as any other Latin American jurisdiction that chooses to follow its lead.

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