Kluwer Arbitration Blog

ICCA 2014. Latin America: Hottest Issues, Country-by-Country

Clovis Trevino (Covington and Burling LLP) · Wednesday, April 9th, 2014

Kluwer Arbitration Blog offers an exclusive coverage of the ICCA Conference in Miami, 2014. The posts present the discussions and presentations of the Plenary Sessions, as well as of the panels of the "Precision" and "Justice Streams", with comments from our collaborators from the following law firms: Bilzin Sumberg Baena Price & Axelrod LLP; Shook, Hardy & Bacon LLP; Gomm & Smith; Kobre & Kim LLP; Akerman LLP; Assouline & Berlowe, P.A.; and Holland & Knight LLP.

Panelists: Jonathan C. Hamilton (White & Case), Diego Brian Gosis (Gomm & Smith), Katherine González Arrocha (ICC International Court of Arbitration), Cristian Conejero (Philippi Yrarrazaval Pulido Brunner), and Joao Bosco Lee (Lee Taube Gabardo)
Chair: Doak Bishop (King & Spalding)
Rapporteur: Ricardo Dalmaso Marques

Jonathan Hamilton opened the panel by looking back at dispute resolution in Latin America prior to the emergence of the contemporary investment protection regime. *"To understand investment in Latin America, you must understand La Brea y Pariñas"*, said Hamilton, recalling a long-lasting oil dispute between Peru and the International Petroleum Corporation (IPC) arising out of the expropriation by the Peruvian government of the *La Brea y Pariñas* oilfield in the 1960s.

Hamilton highlighted three recent developments exemplifying procedural and substantive innovations in investment arbitration: *Abaclat v. Argentina*—addressing sovereign debt instruments and procedures involving multiple claimants and mass claims; *Quiport v. Ecuador*—resulting in the settlement and discontinuance of an ICSID claim arising out of the expropriation of a concession to construct and operate Quito's new international airport; and *Peru v. Caraveli*—the first ICSID case filed by a Latin American state. Closing, Hamilton questioned whether there is a legitimacy crisis of international arbitration in Latin America. Looking back at the *La Brea y Pariñas* dispute, he suggested that Latin America is only undergoing the pains and cycles of growing up.

Next, Diego Brian Gosis addressed salient developments in arbitrator challenges. He discussed recent decisions upholding challenges against an arbitrator by ICSID, such as *Blue Bank v. Venezuela* and *Burlington v. Ecuador*; decisions by ICSID Tribunals, such as *Caratube v. Kazakhstan* and *Burlington v. Ecuador*; and decisions by other investment arbitration institutions, such as *Devas v. India*. The recent surge in successful arbitrator challenges may signal a systemic rise in conflicts of interests, and a resulting need for more openness and inclusion of new players in the system.

Gosis next commented on the growth of Latin American arbitration practices, which may result in greater civil law influence in the type of advocacy and the content of decisions by arbitral tribunals. Gosis concluded with a discussion of recent developments in production of evidence in arbitral proceedings. He referred to a recent ICSID proceeding in which an arbitral tribunal granted a request to introduce as impeachment evidence pleadings and expert opinions submitted in a different proceeding. Gosis went on to suggest that this development may signal the emergence of a duty of consistency across proceedings by experts and counsel alike.

Next, Katherine González Arrocha focused on recent developments in Mexico and Central America, with particular attention to restrictions on the use constitutional *amparos* against arbitrators. Among key developments in Mexico, González Arrocha highlighted a 2011 amendment to the Mexican Constitution, recognizing the right of access to alternative dispute resolution as a human right, as well as District Court judgment, holding that arbitrators are not 'authorities' amenable to constitutional *amparos*.

González Arrocha then turned to Central America, noting that the Constitutional Court of Costa Rica has held that *amparos* are not to be presented against arbitrators. Turning to recent developments in Panama, she discussed salient features of the 2013 Panamanian Arbitration Law, providing, *inter alia*, that arbitrators and employees of arbitral institutions are not public servants, and thus are not subject to *amparos*. González Arrocha concluded that "news are generally positive" for Latin America.

Cristian Conejero also focused on "good news" in Colombia, Peru, Chile and Argentina. He first discussed salient aspects of the new Colombian Arbitration Law, noting that it clarified and improved "disperse and confusing regulation under previous regime". Conejero then highlighted a recent decision by the Colombian Supreme Court abandoning the traditional analysis of exequatur under the Colombian Code of Civil Procedure.

Turning to Peru, Conejero discussed a recent decision by the Constitutional Tribunal, ending the *amparo* recourse against arbitral awards. He then highlighted Chile's "solid arbitration culture" and discussed a recent decision by the Appeals Court of Santiago, holding that erroneous application of the law is not a valid ground to set aside an arbitral award. Next, Conejero turned to positive developments in Argentina, most notably, a recent decision by the Court of Appeals of Cordova holding that courts cannot review the merits of arbitral decisions.

Finally, Joao Bosco Lee addressed new arbitration developments in Brazil, highlighting the increasing number of ICC arbitrations with Brazilian parties, as well as arbitrations seated in Brazil. Bosco Lee provided a detailed discussion of the 2013 amendments to the Brazilian Arbitration Act, highlighting the most significant areas of innovation: the participation of public entities in arbitration, injunctions and interim measures, selection of arbitrators, and arbitrability of consumer and employment disputes.

Far from forecasting the demise of arbitration in Latin America,the panelists generally focused on 'good news' and offered a positive outlook for the development of the arbitration legal framework established over more than two decades ago. While arbitration laws and treaties across the region have nurtured arbitration and investment protection, some Latin American states have taken steps to insulate themselves from the system. The question remains open: Will international arbitration be nurtured and strengthened in Latin America, or restricted and denounced? What is Latin America anyway?

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This entry was posted on Wednesday, April 9th, 2014 at 8:00 am and is filed under Arbitration, ICCA Miami 2014, Latin America
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