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Growing Appreciation for Arbitration for Trade and Investment disputes in Latin America. (Moving towards English Common Law).

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The legal landscape in Latin America is rapidly changing. Not only has Latin America more bilateral Trade Agreements than any other region in the world, but it is also a region experiencing a growth in importance for international commerce in all areas. Can arbitration become the legal *lingua franca*, the legal trade mechanism, to enable the region to have a common meeting ground with the multiple actors that intend to engage in business there? Within that context, can English Common Law play any role in Arbitration in Latin America?

On 19 and 22 October 2015 the first seminar on English Common Law and Arbitration for Trade and Investment in Latin America to take place in the region aiming to address such questions, was held in Central America, in both Guatemala and Honduras. I led this initiative together with Andrew Baker QC, Thomas Raphael QC and Penelope Nevill from 20 Essex Street Chambers, supported by the British Embassy. It was the first time that a seminar with such focus in the area of arbitration in Latin America had taken place and was hosted by the arbitral legal community in Guatemala such as CRECIG (the Arbitral Institution of the Chamber of Industry in Guatemala or C*omisión de Resolución de Conflictos de la Cámara de Industria de Guatemala*) and the Honduran Bar Association in Honduras.

Central America has featured on the arbitral map for some time. It has been acting as host for the Permanent Court of Arbitration (PCA)'s hearings at the premises of the Inter-American Court of Human Rights in Costa Rica under a special cooperation agreement. Last July marked the third occasion that a PCA arbitration in the region was held in the case of *Consorcio John W McDougall Company Inc. y Drege & Marine Corporation (U.S.A)* and *El Instituto Costarricense de Electricidad-ICE (Costa Rica)*. It is also an area of Latin America where the Energy sector is key and where Free-Trade Agreements such as the Dominican Republic-Central America FTA (CAFTA-DR) between the United States and Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua), as well as the Dominican Republic, along with numerous Bilateral Trade Agreements entered into by Central American countries, and a Partnership agreement with the European Union, have been changing the flux of commercial activity.

In the case of Honduras, both the Constitution and domestic legislation (which follows the

UNCITRAL model) permit the use of arbitration (including international arbitration) in civil law matters such as those of a commercial nature. Honduras is a party to the New York Convention and has envisaged arbitration as the mode of dispute resolution in the Honduran Charter Cities (*ciudades propietarias*) – recently approved by Congress – which will be economic zones enjoying special autonomous regimes, or free trade zones in the manner of Dubai.

As regards to Guatemala, its Arbitration Law of 1995 is based on the UNCITRAL Model Law for International Commercial Arbitration and it is also a party to the New York Convention, the Inter-American Convention on International Commercial Arbitration (Panama Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID). Guatemala's foreign investment law also permits international arbitration or alternative resolution of disputes, if agreed to by the parties.

At the seminar, a panel comprising Andrew Baker QC, Thomas Raphael QC, Penelope Nevill and this author, discussed some of the hot topics and trends relevant for arbitration in Latin America that ranged from the Mexican Energy reform, to the Trans-Pacific Partnership and what it may mean for the Latin American region.

The recent liberalization of the Mexican Energy Reform may well be an example of the growing importance of arbitration in a region where the energy sector is attracting increasing foreign investment. The option adopted by Mexico, however, has been that Mexican Federal law will be the applicable law and Spanish the language of arbitration. Drawing from other experiences of liberalization of energy sectors such as those of Yemen, Thomas Raphael QC and Andrew Baker QC discussed what has worked and what Mexico could assess in the coming months in respect of the model adopted. A second major trend identified was the increasing commercial relationship between China and Latin America. China's growing demand for Latin American commodities and its role as investor in infrastructure in the region (e.g. a railway going from Brazil's Atlantic coast to Peru or engineering projects such as a canal three times the size of the world largest, the Panama Canal, in Nicaragua) with its correlation of international commercial contracts requiring "neutral law" and "neutral forum" for dispute resolution point at a growing demand for foreign arbitration in Latin America. That is, foreign arbitration that could offer "neutrality, certainty, expertise and efficiency and enforceability," as put by Thomas Raphael QC. International companies after all "*do not want to find themselves in a potentially hostile court*." as Fernando Pelaez-Pilar, former IBA President, observed elsewhere. Whilst Paris or New York have been traditionally popular seats for arbitration originating from Latin America, the role of London as an international arbitration centre cannot be overlooked. In a 2015 survey concerning international arbitration by the University of Queen Mary and Westfield, London emerged as the world's leading international arbitration centre, "most used" by 45 % of respondents whilst New York could feature only sixth. And this may not be just for commercial arbitration. 80 % of parties in the English Commercial Court – as pointed out by the panel – are foreign. For Andrew Baker QC, who dealt with *Key features and attractions of English Common law for International Commerce* at a substantive level, the answer of such popularity lays in the business-friendly characteristics of English Common Law as one of the oldest systems in the world used for trade (among which party autonomy, reasonable commercial expectations and objectivity play important role).

Trade Agreements such as the Trans-Pacific Partnership recently adopted by Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam reputedly "the largest mega-regional trade and investment agreement ever made, encompassing approximately 40% of global GDP and worth approximately USD 28 trillion"

has the potential to have an even greater impact upon the Latin America legal landscape. Together with Penelope Nevill, we addressed the wider-framework under Public International Law regimes, and the future of investment arbitration (with its growing tension between investment and public interests (such as human rights)) respectively.

Arbitration is not an autonomous transnational legal order though, as recently warned us Lord Mance, Justice of the Supreme Court in England, in a conference in London. It needs the support of a robust judiciary. This was a subject equally treated by the panelists at the seminar in Latin America. The seat of the arbitration has to consider a robust judiciary, able to support the arbitral process; this being a reason why London is often regarded as a popular seat. Latin American parties engaging in business with parties coming from other parts of the world therefore may find advantageous to choose London as a venue and English common law if they are seeking a neutral arbitral seat and law.

Depending on the extent to which Latin America may adapt to the rapid changes that are currently taking place, and dare to venture beyond the confines of domestic law, we will be witnessing a diversification of routes in dispute resolution regimes, namely arbitration in the region, in which English common law could certainly play an important role or London as a seat of arbitration may become popular, in light of new actors and the strengths of the system and what it can offer.

This entry was posted on Friday, December 11th, 2015 at 11:00 am and is filed under England, English Law, Guatemala, Honduras, Latin America, Mexico, Permanent Court of Arbitration, Trans-Pacific Partnership
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