Kluwer Arbitration Blog

Investment Arbitration in Latin America is Here to Stay

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The Latin Lawyer – GAR Live 3rd Annual Arbitration Summit took place on Tuesday, April 30, 2019 (the "Summit"). Practitioners from the United States and Latin America gathered for a third consecutive year in Miami to discuss the importance of dispute boards in constructions contracts, the issue of social licenses, the challenges facing the energy sector in Latin America, and the status of renewable energy disputes in Spain. The Summit, chaired by Jonathan Hamilton of *White & Case LLP* and Jose Daniel Amado of *Miranda & Amado Abogados,* showcased a US senate committee style hearing where the panelists explored the question of whether investment disputes in Latin America are phasing out or are here to stay.

Before introducing the first panel, Jonathan Hamilton emphasized the fact that Miami offers a solid ground for arbitration, and that the region has come a long way since the first ever treaty arbitration case, *Santa Elena v. Costa Rica* (ICSID Case No. ARB/96/1).

The first panel, moderated by Carlos Concepcion, *Shook, Hardy & Bacon,* dealt greatly with the issue of social license, specifically, Carlos Concepcion referred to the relationship between the community, the sovereign, and the investor/contractor. He stressed the importance of the community to endorse the investment or project for its entire duration. The *Bear Creek v. Peru* arbitration was mentioned as an example of the importance that investors and the host state involve the local community to ensure that the community is receptive to the project.

Marco Tulio Venegas, *Von Wobeser y Sierra S.C.,* explained the issue of social license from the perspective of Mexico. He noted that in reaction to President Trump's immigration policies, Mexico has been focused on developing the south of the country, but there it found resistance from local communities to new construction megaprojects. Mexico has tried to address the issue by imposing on the local government the duty to obtain the consent from the community before the project is undertaken. Ana Maria Legendre, *White & Case,* commented that, in Panama, the issue of social license is primarily left to the investor, which is to engage with the community. After securing a concession, the investor must obtain the consent from the *Saila*—a political and religious leader in certain indigenous communities in Panama. Carlos Ortega, *FTI Consulting,* focused on whether fines paid to the local government/community due to violations of the social license could be included by the investor as part of its claim. Carlos Ortega discussed that the unquantifiable value of the license and the project must be measured in light of the benefits that the project gives to the country and the community. Lastly, Katherine Gonzalez Arrocha, *International Chamber of Commerce,* introduced the subject of dispute boards in arbitration. Katherine Gonzalez Arrocha said that there has been an increasing use of dispute boards in construction arbitration. The

rest of the panelists agreed that dispute boards are increasingly used in construction arbitration in Latin America.

The second panel, moderated by Jose Daniel Amado, focused on the latest developments in the energy sector in Latin America. Gino Sangalli, *Inkia Energy*, discussed his experience as a general counsel for an energy company. He and his team perform what he calls a "BIT due diligence". This due diligence allows the company to form an idea of which jurisdictions have the best protections for investors and potentially foresee how a regulatory change may affect their project. On the other hand, Isabel Kunsman, *AlixPartners*, focused her presentation on the renewable energy cases involving Spain. When the Spanish government decided to revoke incentives designed to attract investors to the country's renewable energy market, a series of legal battles and international arbitrations ensued. Isabel Kunsman highlighted that, with respect to the calculation of damages, the *RREEF v. Spain* award refused to follow the "all or nothing" approach that had been followed by tribunals in other ECT-based claims against Spain. The *RREEF* tribunal held that because Spain had the right to endorse "reasonable" changes to its regulatory regime, the investor should only be compensated on his reasonable expectation on return.

On a slightly denser issue, Christian Leathley, *Herbert Smith Freehills*, discussed the interface of criminal actions in international arbitration and the gathering of evidence in these types of claims. Leathley stressed the fact that investments related to energy giga-projects could most likely be exposed to corruption given that they are typically handled or require the involvement of many people. This speaker reminded the audience how States have used allegations of corruption as a defense. In this context, he affirmed that during the gathering of evidence, tribunals, in commercial arbitrations, are likely to grant the request for documents and hear allegations of corruption within the merits phase; while in investment arbitration, tribunals deal with this issue at the jurisdictional stage. Co-panelists commented that these document requests might sometimes evolve into a fishing expedition. They also agreed that corruption has had a ripple effect in the region. On the other hand, Silvia Marchili, *White & Case*, noted that energy projects normally involve complex, long-term, high-stakes investments that are frequently located in challenging jurisdictions, and are sensitive to changes to volatile variables like commodity prices, making them prone to high-stakes disputes. She noted that when it comes to what the future holds for energy disputes, elements that may be relevant include public-private partnerships (PPPs), the renewables subsector, and environmental issues.

Jose Astigarraga, Reed Smith, moderated the third panel. This panel focused on lessons learned from disputes in the mining sector. Patricia Arrazola Bustillo, *Gomez-Pinzon*, delivered a practical approach regarding arbitration clauses in mining concession contracts with the Colombian government. Arrazola Bustillo noted that, although the concession agreement is an adhesion agreement, there is a possibility of including a dispute resolution clause through negotiation with Colombia. From an institutional perspective, Luis Martinez, *International Centre for Dispute Resolution*, discussed several factors, such as licensing and mobilization, surrounding project finance transactions, particularly EPC contracts. In addition, Martinez stressed the importance of parties to reach a consensus on the dispute resolution mechanisms that will be adopted by them. Furthermore, Martinez addressed the use of step or tier clauses and their possible benefits. He reasoned that by incorporating multi-tier dispute resolution clauses in their contracts, parties could get familiar with the issues giving rise to possible disputes through early negotiations or mediation, before reaching arbitration proceedings or alternatively, resolving these issues before reaching arbitration. The figure of "amigable componedor" used in Colombia was mentioned as an example.

On the other hand, Adolfo Jimenez, *Holland & Knight,* stressed the importance of taking into account while developing a project, the interests and well-being of the local communities. Jimenez noted that politics have transitioned to corruption in different cases, especially in the mining industry in which multiple ministries are involved. Thus, he recommended that the investor must make sure that it delivers on its promises. The next speaker, Jose Antonio Rivas, *Vannin Capital,* discussed the life-cycle of a mining project, which, he said, comprises five (5) main stages. With the support of visual aid consisting on a timeline showing the events giving rise to several investment disputes in Latin America, Rivas compared and contrasted different placements of quantum results, thus showing the audience possible damages valuation scenarios. Finally, extending the conversation on valuation and damages issues, Chris Milburn, *Secretariat International,* spoke about the different approaches that Tribunals could take while analyzing damages in the context of mining claims – income approach, market approach, and cost-asset approach. Milburn also stated that environmental issues might give rise to mining claims. In fact, when asked where the social license enters into a valuation, Milburn generally recommended the following: (i) a base line industry risk level could be included for discount rate, depending on case specifics, and (ii) risk may be diversified by the investors by developing projects in different jurisdictions where the risks assumed are equally diverse.

The fourth panel, moderated by Jonathan Hamilton, *White & Case,* focused on the destiny of investment disputes in Latin America and asked whether it is a historical moment or it is here to stay. He notes that original objectives of investment arbitration were to have lawyers resolve foreign investment problems instead of soldiers or politicians and asked whether that still exists today. Additionally, the panel discussed the dispute resolution clauses contained by new and renegotiated treaties and the future of regional treaties and arbitration centers. Mark Kantor, *Independent Arbitrator,* stated that dispute resolution and dispute settlement are inevitably political in part. Kantor noted that it is difficult to predict the future of investment arbitration given U.S. policies under the current Administration and recent E.U. Court of Justice decisions further supporting the idea that with sovereignty in re-ascendance, new challenges for foreign investments could arise. In other words, the future of foreign investments is uncertain given a rise in nationalism, as advanced by policies developed by different administrations and rulings by different courts, located in more than one continent. Kantor further stated that there is a fundamental rationale: not an evolution towards military control, but populism, and the idea of people rejecting the establishment system. Marike Paulsson, *Albright Stonebridge,* discussed whether politics used to try to resolve investment disputes aggravates proceedings. Patrick Pearsall, *Jenner & Block,* discussed the current role of the U.S. in the investment treaty regime. Ignacio Torterola, *GST,* discussed the approaches of regional governments in transition. Juan Marchan, *Perez Bustamante & Ponce,* posited that politicians interfere with arbitration. However, Marchan emphasized, economic development most probably depends on access to arbitration given that new investments are of a contractual nature.

Jonathan Hamilton shared his experience and reasoning on how investment arbitration has supported the development of projects such as the Quito Airport in Ecuador. The panelists and the audience further proceeded to discuss other topical issues: (i) is Washington backtracking from its pro investment treaty position? (ii) Who is investing and in which projects in the current regulatory environment? (iii) Do foreign direct investments face a new battleground? Having explored the question of whether investment disputes in Latin America are phasing out or are here to stay, the audience and panelists agreed that investment treaty arbitration is here to stay!

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