

Kluwer Arbitration Blog

ITA Americas Initiative Hosts Innovative Forum on Latin American Arbitration in New York

Eric Franco (Legal Delta) and Julio Rivera Rios, Sebastián Briceño (Debevoise & Plimpton LLP) · Tuesday, November 19th, 2024

On October 1st, over 40 attendees—including senior lawyers, arbitrators, and law students—gathered at Debevoise & Plimpton’s New York offices for a groundbreaking ITA Americas Initiative event titled “Dialogues on Latin American Arbitration: Mining Disputes, China’s Growing Influence, and Recurring Damages Issues.” Organized with the support of the Asociación Latinoamericana de Arbitraje (ALARB), this forum marked a significant departure from traditional conference formats, embracing an interactive, participant-driven approach that fostered open and informal conversations among attendees.

I. The ITA Americas Initiative

The evening began with opening remarks from **Eric Franco**, Chair of the ITA Americas Initiative, who highlighted the evolution of arbitration in the Americas—from a novel alternative dispute resolution method to a well-established practice linked to the rule of law globally. He emphasized the importance of creating more interactive spaces like the forum, where participants can openly share ideas without the constraints of traditional speaker-led presentations. “One of the most interesting formats that ITA events have is what is called the forum. The idea is to share the speaker role and to hear one another and to share ideas,” Eric noted. **Julio Rivera Ríos**, senior associate at Debevoise & Plimpton and ITA Americas Initiative officer, emphasized the value of these forums, humorously noting that typical conferences often feature attendees with “a question, which is not a question, but rather a comment that lasts for 15 minutes.” The forum’s structure is designed to welcome such contributions and cultivate a dynamic, collaborative environment.

Adding historical context, **Dietmar W. Prager**, Partner at Debevoise & Plimpton and the first chair of the ITA Americas Initiative, recounted how the ITA was established in the mid-1980s to educate legal professionals about international arbitration when it was relatively unknown. Recognizing Latin America’s growing importance, the ITA launched the Americas Initiative in 2005 with pioneering workshops in Mexico City—where holding an arbitration event was still unusual at the time—and later expanded to cities like Buenos Aires, promoting dialogue and strengthening collaboration within the arbitration community across the Americas.

II. Insights into ICC Arbitration in Latin America

The forum featured a presentation by **Paul Di Pietro**, Counsel at the ICC International Court of

Arbitration. Paul provided valuable insights into the landscape of ICC arbitration in Latin America, emphasizing the region's significance to the ICC. He noted that in 2023, 14% of all parties involved in ICC cases came from Latin America, with Brazil and Mexico ranking among the top ten countries represented. This substantial involvement underscores the region's growing engagement with international arbitration.

Paul discussed trends such as the types of disputes commonly arising from the region, highlighting that approximately 30% of cases relate to the energy and construction sectors. These cases often involve large-scale projects with high amounts in dispute, reflecting the substantial economic activities in these industries. He also mentioned the increasing participation of state and state-owned entities, which constitute about 25% of ICC cases in Latin America, with Brazil's figure as high as 40%.

An interesting trend that Paul highlighted was the preference of Latin American parties to have more control over the constitution of arbitral tribunals. Traditionally, the ICC Court would appoint arbitrators, but there is a growing desire among parties in the region to be involved in selecting arbitrators, including using list procedures where parties rank and strike candidates provided by the ICC. Additionally, while English remains the dominant language in ICC arbitrations, Spanish and Portuguese rank second and third, reflecting the linguistic diversity of the region.

Paul also noted that while settlement negotiations leading to the suspension or withdrawal of cases are more common in North American disputes, there is a slow but noticeable increase in such resolutions in Latin America. However, alternative dispute resolution methods like mediation are still not as prevalent in the region.

III. Mining Disputes in Latin America

The forum then transitioned into moderated discussions, with the first session led by **Dietmar W. Prager** and focusing on mining disputes in Latin America. The discussion centered on recent regulatory changes, particularly in Mexico, where new mining reforms have introduced challenges for mining companies. These reforms include:

- Shortened concession periods, reducing the time frame for which mining rights are granted.
- Increased government oversight, granting authorities more power to withdraw licenses for various reasons.
- Greater community consultation requirements, mandating engagement with local and indigenous communities before exploration begins.

Participants delved into the complexities arising from these changes. One key topic was the concept of "social license," referring to the ongoing approval and acceptance of a company's activities by local communities and stakeholders. Attendees emphasized that, depending on the circumstances of each case, obtaining a social license might not be just a one-time requirement but an ongoing process that necessitates continuous engagement with local and indigenous communities.

The conversation highlighted specific cases, such as the *Almaden Minerals* case against Mexico, where a mining company's concession was challenged due to issues related to prior community consultation. Participants discussed the implications of international conventions like the ILO Convention 169, which mandates prior consultation with indigenous communities that may be affected by projects.

The discussion also touched upon the challenges of evolving legal standards, where projects initiated under one regulatory framework may later be subject to new laws or interpretations, potentially impacting the validity of concessions and licenses. This legal uncertainty poses significant risks for investors and emphasizes the need for continuous legal assessment throughout the lifespan of a project.

IV. China's Growing Influence in the Region

The second session, moderated by **Caline Mouawad**, Partner at Chaffetz Lindsey, examined China's growing influence in Latin America. The discussion highlighted the substantial increase in Chinese investments across sectors such as mining, energy, infrastructure, and telecommunications. Participants noted that trade between China and Latin America has grown exponentially, from \$12 billion in 2000 to over \$315 billion in recent years, with projections suggesting it could exceed \$700 billion by 2035.

Attendees explored how this influx of Chinese investment affects the regional economy and the dispute resolution landscape. One key point was the preferences of Chinese companies in arbitration proceedings. It was observed that Chinese parties often:

- Do not prioritize the choice of applicable law or seat of arbitration, sometimes agreeing to local laws and seats.
- When they do have a preference, seats like Singapore or Hong Kong are perceived as neutral and offering legal systems familiar to Chinese entities.
- Exhibit cultural differences in litigation approaches, tending to avoid litigation and preferring negotiation and settlement.

Participants shared experiences indicating that while Chinese companies may be reluctant to initiate arbitration, they will engage in legal proceedings when significant financial interests are at stake.

The conversation also addressed the challenges of enforcing arbitral decisions in Mainland China. While international arbitration awards are generally enforceable in Mainland China under the New York Convention, issues can arise with interim measures. Participants noted that Hong Kong-seated arbitral proceedings administered by qualified institutions like the HKIAC offer a unique advantage: parties can apply for interim measures from Mainland Chinese courts—including preservation of assets, evidence, and conduct—prior to the issuance of the arbitral award. This capability gives Hong Kong-seated arbitrations an edge over others in terms of enforceability and legal support from Mainland authorities. The importance of understanding these nuances was emphasized, particularly for parties drafting arbitration agreements involving Chinese counterparts.

V. Key Takeaways and Future Considerations

Throughout the event, several key takeaways emerged:

1. Procedural Trends

The arbitration landscape in Latin America is evolving, with trends toward:

- Greater party control over tribunal constitution.

- Increased use of local laws and seats, even in international contracts.
- Importance of language considerations, with proceedings often conducted in Spanish or Portuguese.

2. Due Diligence and Community Engagement in Mining Projects

Mining companies must adopt a holistic approach to due diligence, compliance, and community engagement in the face of evolving legal standards affecting the mining industry. Key points included:

- Assess both local and international laws specific to mining—including non-binding conventions like ILO Convention 169 and soft law instruments such as the UN Guiding Principles on Business and Human Rights—and adapt to new requirements to ensure ongoing compliance throughout the mining project lifecycle.
- Build relationships and goodwill with local stakeholders by engaging proactively, even when not legally required, to address concerns and build trust, thereby preventing mining project delays and legal challenges.
- Monitor political and legal developments that may impact mining investments and develop strategies to mitigate risks—such as seeking legal protections through investment treaties—to navigate the uncertainties of changing mining regulatory landscapes.

3. Impact of Chinese Investment

China's growing influence in Latin America presents both opportunities and challenges. Understanding the preferences and cultural approaches of Chinese companies is important for managing relationships and resolving disputes. Key points included:

- The significant role of state-owned enterprises in Chinese investments.
- Differences in negotiating styles, contractual preferences, and overall litigation appetite.
- The importance of understanding potential challenges associated with the enforcement of interim measures in mainland China.

VI. Conclusion and Networking Reception

The evening concluded with a cocktail reception, where attendees continued their discussions against the backdrop of the New York City skyline, including a stunning view of the Empire State Building. Organized by **Julio Rivera Ríos** and **Sebastián Briceño**, associate at Debevoise & Plimpton and officer of ALARB, the event was hailed as a success due to its innovative format and enthusiastic participation.

Participants appreciated the opportunity to engage directly with peers, share experiences, and explore complex issues in depth. The forum demonstrated the value of creating interactive spaces for dialogue in the arbitration community, allowing practitioners to collaborate on addressing the challenges and opportunities within Latin American arbitration.

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