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EXPERT FORUM

ARBITRATION IN THE AMERICAS



PANEL EXPERTS



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CD: Could you provide a general insight into the evolution of arbitration across the Americas? Is there a growing appetite to resolve disputes through arbitration?

Martinez: It is difficult to generalise as to the evolution of arbitration throughout the Americas, as there are many countries that have had vastly different experiences regarding the development of arbitration and other alternative dispute resolution (ADR) methods within their borders. Moreover, there have been differences regarding the development of their arbitration cultures as it relates to commercial arbitration and investment arbitration, where we have seen varying levels of acceptance and rejection from country to country. I do believe that in the Americas there is a broader acceptance of international commercial arbitration that continues to grow and gain in popularity as a mechanism to resolve cross-border disputes.

Dosman: Resolving commercial disputes by arbitration is becoming increasingly popular in the Americas. Parties are drawn to the neutrality of the forum, the potential to choose the decision-makers, and the increased confidentiality afforded by arbitration proceedings. The growth was recognised by the International Court of Arbitration of the International Chamber of Commerce (ICC), which in 2013 established a full branch of the ICC Secretariat

in New York (SICANA). The statistics on case filings to date have also borne out the growing attraction of international arbitration as a dispute resolution mechanism. In 2014, the number of US parties in ICC arbitration increased by 28 percent over the previous year. And the International Centre for Dispute Resolution (ICDR) – the international arm of the American Arbitration Association – reported over 1000 new cases filed last year. In the Southern hemisphere, demand for arbitration services continues to increase, with the ICC reportedly planning to open a branch in São Paulo, Brazil.

Yanos: Arbitration will continue to grow as a form of dispute resolution in the Americas. There are three primary drivers to the inclusion of arbitration clauses in international agreements – that is, agreements covering more than two jurisdictions. First, the desire to avoid any discrimination in the home courts of the other party to the agreement. Second, the desire to maintain the confidentiality of the legal arrangements underlying the contract. Third, the desire to appoint specialised arbitrators to resolve the dispute in question – that is, arbitrators with a legal or technical expertise that will ensure that the award is consistent with the trade usages applicable in the relevant industry or consistent with the legal regime chosen by the parties to govern their agreement. On the latter point, only in an arbitration can the parties agree to resolve a dispute in New York that is governed by Peruvian law and decided by

jurists that are trained in Peruvian law. As investment in the Americas, particularly from Asia, increases, the choice of arbitration clauses to govern the parties' agreement becomes greater.

Venegas: To make a proper assessment of the evolution of arbitration in the region, we must divide between the US and Canada on one side and the Latin American countries on the other. Historically, the US and Canada have been keener to arbitrate disputes, not only related to commercial contracts, but also to several other relationships, such as consumer disputes. In this context, national arbitration is in widespread use in both countries. In connection with international arbitration, although accepted and commonly used, the culture of arbitration developing in the US and Canada could not yet be compared to the arbitration culture in Europe. In Latin America the growth and acceptance of arbitration has been slow but steady. Arbitration existed in several civil procedural codes of Latin American countries, but was not used, or its use was very limited, due to the state controlled nature of their internal markets. The opening up of Latin America's markets and the advent of free trade in the 1990s, however, gave rise to the incorporation of the UNCITRAL Model law in some countries or, in the alternative to new Arbitration Acts which incorporated the newest

worldwide trends in arbitration. The impact of these developments has been an increase in the use of national and international arbitrations in old and young practitioners across the region. The number

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*Marco Tullio Venegas,
Von Wobeser*

and quality of arbitrators and counsel in countries such as Argentina, Brazil, Colombia, Chile, Ecuador and Colombia has increased exponentially recently and has been successfully tested in disputes with more seasoned US and European attorneys. In fact, it could be argued that because of the growth potential in the region, the future of arbitration in Latin America looks brighter than in the US or Canada.

CD: What key trends have shaped arbitration rules and processes, as well as the infrastructure to support them, in the Americas?

Yanos: Over the last 20 years, there has been a general trend in the Americas to modernise the legal regimes applicable to arbitration. Brazil adopted a variant of the UNCITRAL Model law and ratified the New York Convention. Chile, Colombia and Peru also adopted variants of the UNCITRAL Model law. Unfortunately, Argentina has not sufficiently reformed its arbitration legislation and states like Venezuela have seen a deterioration of their legal system over the past decade that makes it dangerous to agree to arbitrate with Venezuelan counterparties in Venezuela. A second important trend is the development of a highly experienced and specialised arbitration bar in numerous jurisdictions throughout the Americas. Whereas 20 years ago it would have been uncommon to encounter litigators in the Americas who specialised in international commercial arbitration and dedicated more than 65 percent of their time to such matters, today there are numerous such lawyers in Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Peru, Venezuela and, of course, the US.

Venegas: One of the key trends to emerge is that arbitration practitioners have responded to the challenge of having a mixed education – both common law and civil law. Arbitration in the Americas has evolved to incorporate practice and institutions of both, civil and common law. Civil law attorneys not

used to the oral cross-examination have developed the necessary skills to be able to put it in practice. On the other hand, common law attorneys have to adapt to the more legal-oriented argumentation of civil law litigation. With regard to the infrastructure, in Spanish speaking countries, several service providers – which were non-existent previously – have appeared. Transcription services for hearings, collection evidence services, consulting experts in several

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market areas, and so on, have been developed and are now ready to contribute to arbitrations in Latin America.

Martinez: We have seen the passage of modern arbitration laws in many countries from the Americas. The number of professionals in the field now specialising in international arbitration has grown, along with an increasing number of law firms that

have created arbitration practice teams. In addition, some countries have developed infrastructures of good local arbitration centres with professional staff and arbitrators, well-established arbitration rules and processes, and awards that are enforced. The role of the judiciary is equally important in supporting the arbitration framework and applying the accepted trends and standards in compliance with the New York and Panama Conventions. For example, the Brazilian Arbitration Act establishes that foreign arbitration awards in Brazil shall only be subject to the confirmation proceeding before the Superior Court of Justice (STJ). This has had a positive effect in terms of the consistency of the arbitral decisions rendered by the STJ.

Dosman: The Americas are well-served by the legal framework for international arbitration, which includes not only the New York Convention, but also the Panama Convention. National laws then govern the *lex arbitri* in each jurisdiction. Within this legal infrastructure, the arbitration rules of each administering institution can adapt to incorporate innovations and changes in best practices. For example, one major trend in the last decade has been the inclusion of default emergency arbitrator provisions in many leading institutional rules, including the ICDR in 2006 and the ICC in 2012. This means that parties can now request that an emergency arbitrator be appointed prior to the constitution of the regular tribunal and can seek

interim relief within the arbitral process itself. Another move has been toward increased transparency. This trend is most pronounced in the investor-state arbitration context, with the opening for signature of the Mauritius Convention in early 2015. But it is also apparent in the commercial arbitration field, with the ICC recently announcing that it would, in certain circumstances, release to the parties written decisions by the ICC Court on challenges to arbitrator appointments.

CD: How would you describe the sophistication and efficiency of arbitration centres in the region? How does this compare to leading arbitration centres in other parts of the world? Is there a need for ongoing improvement?

Venegas: There are several types of arbitration centres. Several local chambers or institutions have created their own arbitration rules, targeting either specific practices – such as construction – or more general markets. However, this proliferation in arbitration centres has resulted, in some cases, in poorly managed arbitrations. In any event, this phenomenon should lead to the ‘survival of the fittest’, leaving only the best quality arbitration institutions alive. Despite the above, there are some reputable arbitration centres in the region which compare favourably with more international oriented centres, such as the ICC and LCIA. In fact, some of

these centres have agreements with international arbitration centres which give them a more stable set of rules and experience – in exchange they help to develop local markets.

Dosman: Arbitration centres in the Americas are not only sophisticated and efficient, but also highly adaptive to the evolving needs of users of arbitration. In 2013, the New York International Arbitration Centre was opened to provide a dedicated hearing facility for international cases, along the lines of Maxwell Chambers in Singapore. New arbitration centres are appearing to serve users across the US, such as the launch of the Atlanta Centre for International Arbitration and Mediation in 2015. In terms of administration of arbitrations, users have a multiplicity of options, from relatively 'light' administration to more thorough involvement by arbitral institutions. Parties are also free to define the limits disclosure obligations – such as by adopting the IBA Rules on the Taking of Evidence in International Arbitration – thereby reducing time and cost. Parties may also choose to allow the arbitral tribunal to shift the costs of the arbitration to the losing party. Overall, the system in the Americas respects parties' choices on the procedure and conduct of the arbitration, including in areas where domestic practice differs from international norms.

Martinez: There are some good centres in the Americas, such as the ICDR, the international division

of the American Arbitration Association (AAA), which operates throughout the Americas as well as globally. The ICDR works with a number of prominent centres in the Americas and has cooperative agreements with several, for example the Arbitration Centre of the Chamber of Commerce of Bogota and the Arbitration Centre of the Brazil-Canada Chamber of Commerce are two institutions that cooperate with the ICDR in the region. Yet there are many centres throughout the Americas that, although purporting to be impartial and independent with the infrastructure and capabilities to administer international arbitrations, are not. There have been numerous examples of problems encountered with centres that simply are not able to administer these types of cross-border cases. Because they may not have the essential experienced staff, rules, or infrastructure, the parties' wishes to resolve their disputes through arbitration can be frustrated.

Yanos: The arbitration centres in New York, Miami, Houston and Washington DC are commensurate with the best arbitration centres anywhere in the world. Bogota, Lima, Mexico City and Santiago also have state of the art arbitration centres and applicable rules. Hopefully, we will soon see similar changes in Buenos Aires, Caracas, Sao Paolo and the other major capitals in the Americas.

CD: Is there a strong track record of supporting arbitral decisions and awards



handed down in the Americas? Should parties considering arbitration have faith in the predictability and certainty of the outcome?

Dosman: Most arbitral awards are complied with voluntarily, but when court intervention is required a supportive judicial system is crucial. In New York, we have started a project of collecting and making public all international arbitration related court decisions. To date in 2015, these decisions reflect consistent support for the arbitral process at the two key stages of contact with municipal courts – firstly, enforcing valid agreements to arbitrate, and secondly, enforcing arbitral awards rendered both domestically and abroad. US courts recognise the deference due to international arbitral tribunals and the awards they render. The fact that a federal statute – the Federal Arbitration Act – governs almost all international

arbitrations in the US provides additional comfort to parties from abroad.

Yanos: In the US, there is a strong track record supporting the recognition and enforcement of international arbitration agreements and awards. However, many courts in the US continue to require parties seeking to enforce arbitral awards to prove that the court has jurisdiction over the award debtor. In addition, many courts have applied the *forum non conveniens* defence in connection with the enforcement of foreign arbitral awards. Both practices have been criticised by proponents of international arbitration as inconsistent with the obligations of the US under the New York Convention. In Latin America, there have been some disturbing cases in Argentina and Brazil where local courts have interfered with arbitrations involving state parties. However, these cases have generally proven to be the exception, not the rule. That said, it is advisable,



if one is arbitrating against a state owned entity in Latin America, that the parties select a neutral site for the arbitration to take place – so as to avoid any temptation on the part of the courts in the jurisdiction of the state owned entity to interfere with the arbitration.

Venegas: An important trend in the region is that with the exception of arbitrations involving state-owned companies, the courts have been oriented to facilitate the enforcement of arbitral awards. In the arbitration against state-owned companies, there is a tension between arbitration enforceability and public policy. However, there have been encouraging signs that state courts are raising the bar and dismissing these kinds of public policy objections, unless it is proven to cause real – not simply economic – damage to the constitutional principles of a country. In this context, we can safely say that there is a positive degree of predictability not only on the quality of the award but also on its enforceability before local courts.

Martinez: These issues depend upon the institution that is selected by the parties in their arbitration agreement. The ICDR has a strong track record for enforced awards throughout the Americas, including awards enforced in Brazil, Chile, Colombia, Peru, as well as in the United States and globally.

Predictability can be enhanced by the careful drafting of the arbitration agreement. A starting point is the institution's model arbitration clause. The ICDR's model clause can be found in its international arbitration rules and further fine-tuning suggestions can be found in online tools that assist the user in drafting the arbitration clause by highlighting a number of issues that should be considered. Predictability also is strengthened by the institutional role in providing consistent administrative procedures and by interpreting its rules and applying

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Hughes Hubbard & Reed LLP*

its policies. One example of the latter is the way the ICDR handles challenges and disclosures to help ensure that the arbitrators are impartial and independent. The ICDR's policy that requires full disclosure so that the parties' are given the choice to accept or reject the disclosure is well established and

provides the user with a clear understanding on how these potential conflict issues will be resolved.

CD: What do you believe are the major challenges associated with arbitration processes in the Americas?

Martinez: It is difficult to generalise, but surely one of the continuing challenges will be how the region reacts to investment arbitration in the years ahead. A number of countries are including specific arbitration agreements in their contracts for foreign investments as opposed to just having the arbitration provisions of their BITS or the Washington Convention apply. Time and costs are a continuing challenge; in response, for example, the ICDR last year promulgated its expedited procedures for international arbitration that have greatly accelerated the arbitration process and consequently lowered the costs.

Yanos: In the US, the most significant challenge comes from the rising tide of opposition – legal and legislative – to the arbitration of consumer products and employment disputes. This opposition is not, in and of itself, problematic for the arbitration of commercial disputes, but there is a risk that decisions in the consumer products or employment context could be imported into the commercial arbitration context. Furthermore, the public sentiment against arbitration in the consumer products and

employment context could inadvertently spill into the commercial realm, leading to legislation that undermines the arbitration support structure currently in place. In Latin America, the two biggest challenges associated with the arbitral process are, firstly, the market's perception that Latin American states and Latin American state-owned entities will not comply with adverse arbitral awards and local courts will interfere with arbitrations involving state-owned entities or refuse to enforce adverse awards against host states or state-owned entities, and secondly, the spectre that many deals cannot be agreed in Latin America without corrupt payments.

Dosman: The expansion of international arbitration means that new entrants are using the system. This is terrific for the field overall, but may present a challenge for counsel who are not yet familiar with international norms and best practices. There has also been a great deal of debate about the ethical rules that apply to counsel engaged in international arbitration. The International Bar Association (IBA) recently issued Guidelines on Party Representation in International Arbitration. The Guidelines are a useful resource, but fundamental questions remain regarding the applicable ethical standards and the powers of an arbitral tribunal to regulate counsel conduct. Finally, complex issues can arise when disputes involve more than two parties – when can additional parties be joined to an arbitration agreement? Against whom can an arbitral award be

enforced? The issues of joinder and consolidation will only grow in importance as arbitration is adopted as a dispute resolution mechanism in larger and more complex commercial relationships.

Venegas: The biggest challenge is to extend arbitration in more commercial relationships, and to expedite the enforcement proceedings. In addition, there is a need for more qualified arbitrators in upcoming markets, such as energy and infrastructure disputes. Educating younger attorneys outside of the capitals of Latin American countries of the advantages and benefits of arbitration is also a challenge. It is an undisputed fact that the centralism existing in said countries has limited the growth of arbitration outside of capital cities, leaving the rest of the country with a slow development for national arbitrations.

CD: What recommendations would you put forward to improve the efficiency of the process and help the parties involved to manage associated costs?

Yanos: The arbitral system needs to be restructured so as to ensure that all stakeholders – tribunal, counsel and parties – have an interest in the prompt resolution of disputes. Unfortunately, it is difficult to put pressure on counsel to act more quickly because of their ethical obligation to zealously represent their clients. Thus, the most

logical place to place pressure and create incentives for an increase in the speed and efficiency of the arbitral process would be to withhold payment to the arbitrators in all arbitrations until the award is rendered. This would not only encourage arbitrators to deliberate more quickly but it would also discourage them from agreeing to open-ended discovery periods and over long briefing periods. The arbitration rules could also be amended to provide shorter periods for the briefing and resolution of motions ancillary to the arbitral process such as challenges to arbitrators. Such challenges often take months to brief and months more to be decided. In point of fact, they could be briefed in weeks and decided in days. The greater delay such motions create, the more incentive some parties will have for making such motions – in some cases spuriously.

Venegas: The best recommendation would be to be very careful in the appointment of the members of the arbitral tribunal. An experienced arbitration tribunal is very helpful in ensuring that the process could be cost-effective. Moreover, it is also very important to avoid the practice of artificially increasing the amounts in dispute, or to add weak claims to the arbitration which extend, in an unnecessary manner, the duration of the arbitration.

Dosman: Cost management and predictability are a primary concern for parties using international arbitration. Careful attention at the contracting

stage, and again at the outset of an arbitration, can significantly reduce costs and increase efficiency. For example, parties may choose to explicitly incorporate guidelines or protocols that provide for a reduced disclosure burden. Once an arbitration has begun, it is critical to think through the various stages and potential disputes that may arise during the proceedings. Often, setting a hearing date at the very outset of the case can be a powerful tool in ensuring the efficiency of the process. Institutions have also been responding to users' concerns regarding the length of proceedings. Under the ICDR Rules, as revised in 2014, the default is for the final award to be rendered within 60 days of the close of the hearing. In addition, ICDR expedited international rules are available in certain circumstances, under which all submissions and the oral hearing – if any – must be held within 60 days of the procedural order, followed by a final award within 30 days of the close of the hearing. Similarly, the International Institute for Conflict Prevention and Resolution (CPR) offers accelerated rules for the resolution of commercial disputes.

Martinez: It is strongly recommended that the parties participate in the early stages of the process. By attending the administrative conference calls and the preliminary hearing, the parties can better understand the complexities of the case, the amount

of requested information, the hearing schedule, and how the case will progress through to its conclusion. Parties can also opt to customise their arbitration agreement to save time and money. They can opt for the expedited rules, select a sole arbitrator, and perhaps waive the need for in-person hearings and have the dispute resolved on the documents only.

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*Luis M. Martinez,
American Arbitration Association*

CD: Are there any particular issues that foreign parties need to consider when approaching arbitration in the Americas? What advice can you offer on managing the overall process?

Venegas: In Latin American countries, it is always important to understand the local market, identify the local law firms specialised in arbitration and make a proper assessment of the likelihood of recovering

any amount awarded. The best advice regarding the management of the overall process is to use the best local law firm to figure out the duration, costs and worst case scenarios before entering into arbitration. Once these factors are clearly defined, then it is easy to manage all the related variables of the arbitration.

Martinez: It is vital to be aware of the reputation of the administering institution that is being considered for their arbitration agreement and to know its policies and rules. The importance of staff cannot be overstated. The process can be customised to avoid surprises and to have a level playing field with the rules of the game clearly spelled out. That is the importance of having a well thought-out arbitration agreement administered by an institution with an established track record.

Yanos: Too often, foreign parties preparing for arbitration in Latin America assume that, if the arbitration is governed by the law of a particular jurisdiction, then counsel from that jurisdiction can handle the arbitration. They also tend to appoint a specialist in the law of the particular jurisdiction as arbitrator, without care as to how that legal specialist will interact with the other arbitrators or how counsel will be perceived by the arbitrators. Sometimes, the cost of the arbitration factors into these decisions. In our opinion, if the arbitration is worth bringing, it is worthwhile doing everything one can to prevail in the case. Bringing in counsel

that is specialised in the field of international arbitration and allocating a realistic budget that is commensurate with the amount involved in the case is the best way to maximise the chances of success. If the client lacks the funds to pay for counsel with a track record commensurate with the value of the case, then there are alternative fee arrangements, including contingency fees and third party funding arrangements available to pay for the arbitration.

Dosman: As with any legal dispute, preparation is key. Both foreign and Americas-based parties will be sure to understand the legal framework governing the arbitration, including the national arbitration law and any applicable institutional rules. Any local practices with respect to procedural matters should be discussed with qualified counsel. For the overall process, institutions like the International Council for Commercial Arbitration (ICCA), the International Bar Association, and the Chartered Institute of Arbitrators have produced excellent guides and protocols.

CD: Looking ahead, how do you expect arbitration in the region to develop over the coming years? Will the process continue to attract parties looking to resolve their commercial disputes?

Dosman: In the coming years, we expect to see growth in both the number and the complexity of international arbitration cases that are based in

the Americas. In terms of industries, international arbitration is commonly selected in matters relating to international construction, international energy contracts, and cross-border mergers and acquisitions. Arbitration also appears to be increasingly popular as a means to resolve disputes relating to intellectual property. Another interesting trend is the increase in investor-state related disputes being heard in New York, which traditionally have focused on Washington DC. Given the core attributes of the process – greater party autonomy, increased confidentiality, the potential to keep costs down – commercial parties are likely to continue to choose international arbitration in the Americas.

Yanos: We expect the economies in Latin America to continue to grow in the coming years. The shale gas and oil revolutions, together with the Brazilian pre-salt and the vast heavy oil reserves in Canada and Venezuela have ensured that both hemispheres in the Americas will play an even larger role in the energy business over the next 20 years than they did over the past 20 years. We expect the opening of the oil sector in Mexico to foreign investment to reap similar benefits. This means investment and a growth in related infrastructure. Furthermore, we expect investment in the Americas from Asia to increase even more in the coming years once the Trans-Pacific Partnership Agreement (TPP) is ratified. The TPP will

further tilt the economic focus of the global economy away from the Atlantic Coast and toward the Pacific Rim. All of this increased business and trade will result in a massive increase in the use of arbitration.

Venegas: Arbitration will continue to evolve and attract new practitioners and companies. In several countries the right to arbitration is now considered as a constitutional right. This endorsement will surely play a role in increasing the trust that the state courts have in arbitration. A more experienced legal market – arbitrators, attorneys, academic investigators – will surely help to enhance the costs and timing of the arbitration proceedings. As always, once a proceeding proves to be beneficial in time, cost and quality, it will become more used. Therefore, there is no doubt that the future of arbitration in the region looks bright.

Martinez: We do expect continued growth and efficiencies in international commercial arbitration for the Americas. Why? Because the process works. It is faster, and the enforcement treaties are an important part of the framework that will continue to support its use. Business users want to resolve their disputes and get back to business, and arbitration provides them with a predictable and faster method to meet their expectations. 