

ARBITRATION OVERCOMING THE UPS AND DOWNS - SQUIRE SANDERS & DEMPSEY

Posted on 31 August 2009





Latin American businesses are embracing arbitration to resolve regional and international disputes with Miami a preferred arbitral seat

Arbitration continues to grow in significance across Latin America where it is now considered the default dispute resolution mechanism, says Pedro J Martinez-Fraga, Miami-based coordinator of the Latin American dispute resolution practice at Squire Sanders & Dempsey.

"The trend remains firmly towards arbitration even in the face of populist moves by some governments within the region, notably efforts by Ecuador, Venezuela and Bolivia to limit its application."

These countries may have opted out of, or threatened to opt out of, the International Centre for Settlement of Investment Disputes (ICSID) – the dispute resolution forum of The World Bank – but such moves are nonetheless perceived as a deviation from the regional norm, says Martinez-Fraga.

"There is a very strong perception that these policies are transitory, and reflect immediate political expediency rather than mid-term foreign policy."

Likewise the recent events in Honduras, where a military coup ousted the President, Manuel Zelaya, are also no longer indicative of regional politics, he emphasises. "The Honduran situation is very peculiar. With the exception of Cuba, all of Latin America is democratic and with a very strong democratic tradition and highly favoured towards free market policies."

Arbitration is seen as an extension of this, beyond the sphere of government intervention and which reflects private sector autonomy, agrees fellow dispute resolution partner C Ryan Reetz. There is no going back.

"Recent years have seen countries across Central and Latin America implement strong arbitration laws signalling a growing confidence in the process. Even among those governments with the most populist rhetoric there is nonetheless a recognition that strong mechanisms have to exist to encourage and even protect foreign direct investment."



Lino Torgal

Without a transnational judicial system, arbitration will continue to grow they say. In any event, arbitration is a process that is already embraced by Latin America's own major and multinational companies.

"There is no doubt that the multilatinas have a great appetite for international commercial arbitration and are using it as they expand regionally, into the US and EU," says Martinez-Fraga.

The top executives of many of the largest and most dynamic businesses have been educated or trained in the US or Europe, he notes, so there is a growing tier of corporate leadership that is both highly international and responsive to new management styles.

This includes a desire to resolve disputes beyond national court systems.

"In Latin American deals there is often not even a hint of a suggestion that the local company with which you are dealing would itself want to resolve any disputes in a foreign court," adds Reetz.

Significantly it is Miami that is now regarded as the preferred arbitral seat for regional commercial investments.

Parties like the comfort that if there is a challenge to the arbitral award then the appeal process will take place in a US court, with all the benefits of due process and transparency this entails, they say.

"Miami is the premier venue for disputes that arise in an arbitral context between EU and Latin American or US businesses or investors. It is because of the applicable procedural laws and appellate concerns, but also because it is easily accessible and the majority of the leading legal practitioners are bilingual in Spanish and English," says Martinez-Fraga.

As to the types of arbitration disputes they are seeing, there remains a bias towards disputes held under the rules of the AAA and ICC, although there is also a flow of ad hoc arbitrations with their seat in Miami.

"There is a relative split in terms of the rules that parties choose. AAA is often preferred among parties in a deal with a US element, although the tremendous flow of European investment means that the ICC perhaps still holds the edge," says Martinez- Fraga.