

THE STRATEGIES BEHIND LATIN AMERICAN ARBITRATION - CHADBOURNE & PARKE

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The use of arbitration by both companies and states is growing ever-more sophisticated across Latin America as international and regional investment grows, says Oliver Armas, Head of the IDR practice at Chadbourne & Parke in New York

'The ICDR, ICC and increasingly the LCIA all now play an important role in commercial arbitration across the region, but realpolitik is also prompting an emerging emphasis on ad hoc and UNCITRAL-led arbitration for investor disputes.'

ICSID remains very important regionally, but the withdrawal of Bolivia and Ecuador from the Convention has prompted a rise in ad hoc disputes being administered by what government parties regard as a more neutral location, for example, the ICC in Paris, or the Permanent Court of Arbitration in The Hague. Although for purely corporate disputes, New York and Miami, remain favoured seats.

'We are also seeing much more mediation in arbitration, which is increasingly regarded as a favourable early option. Clients are asking counsel to 'front load' their strategic efforts in order to find solutions before entering formal arbitration,' he says. Nonetheless this can itself raise issues, including the cultural reluctance in the region towards mediation in international disputes, as well as the need to avoid bias, retain impartiality and not to prejudice any subsequent arbitration should the mediation fail.

'Challenges can also emerge around whether the mediator should follow a facilitative approach, and merely aim to bring the two sides to an agreement, or take an evaluative approach, to highlight the relative strengths or weaknesses in a party's case as a means of reaching a settlement, and continuing commercial relations.'

But such a strategy is now encompassing both commercial and treaty-based investor disputes, says Armas.

'Claimants have come to realise that winning an award against a state is only half the battle, getting payment is the major challenge. For many businesses, for which an exit from a country is not a viable option, some therefore now look to renegotiate deal terms. They are picking which battles to settle and those to fight all the way.'