Latin seats go mano-a-mano at GAR Live

David Samuels • Monday, 30 September 2013

A session on Latin America at *GAR* Live New York showcased the maturity of Latin American seats of arbitration and suggested the region is now a serious rival to Europe and North America. It ended with a fun, quick-fire question round to establish which city is 'the best'. **David Samuels** reports

Five leading names from the region had travelled to the University Club, New York, for the conference:

- **Eduardo Zuleta** (Gómez-Pinzón Zuleta), of Colombia;
- **Alfredo Bullard** (Bullard Falla Ezcurra) of Peru;
- **Claus von Wobeser** (Von Wobeser y Sierra) of Mexico;
- **Andrés Jana** (Bofill Mir & Alvarez Jana) of Chile; and
- **Adriana Braghetta** (L O Baptista Schmidt Valois Miranda Ferreira Agel) of Brazil.

They were, according to panel moderator **Jonathan Hamilton** of White & Case, "part of the crème de la crème of Latin American arbitration. They have written the arbitration laws, argued the cases and decided the cases."

The bulk of the session comprised frank reports by each panellist on the pros and cons of their home as a seat. But the intent, they admitted, was to persuade the audience that the most stable countries in Latin America are now in a position to offer a serious challenge to New York, London and Paris when it comes to seating an arbitration.

An impressive picture emerged that may have surprised some of the New Yorkers in the room.

Contributions focused on the degree to which Colombia, Chile, Peru, Mexico and Brazil can now boast a track record of pro-arbitration law, treaties and court decisions; the degree to which domestic and international arbitration law and

practice are kept separate (as several of the countries represented on the panel have busy domestic arbitration regimes, creating the risk of contamination between standards of control); and the degree to which the government backs arbitration – along with the usual 'soft' factors such as transport links, hotels, and fine dining.

Key points included:

- Low annulment rates. For example, in 20 years and 2,479 Lima Chamber of Commerce awards, only five have been annulled "and all very reasonably" according to Bullard; while Brazil was **recently described** as a "model" hen it comes to the enforcement of foreign awards, by none other than **Albert Jan van den Berg**. And Colombia has already had several pro-arbitration decisions under its new law. But the daddy of them all is Mexico, with 100-plus pro-arbitration cases on the books, and only one blip (the recent ***Commisa v Pemex*** case).
- Modern laws. Colombia's law is brand-spanking new, and based on the Model Law ("adopted with no Colombianisation!" reported Zuleta). Peru is already on to its second modern arbitration law. Other reform projects are underway (notably in Chile, expected 2014).
- Literacy in international disputes. Andrés Jana observed that Ecuador is now using Chile as a substitute for ICSID as a venue in disputes with oil investors. Brazil and Mexico are routinely selected by esteemed organisations such as the ICC and ICDR for cases. An audience vote revealed around 20 per cent of them had already worked on a case that was seated in the region (usually São Paolo or Mexico City.) Brazilian lawyers routinely work on arbitrations *outside* Brazil – Braghetta noted that she's got work on at the HKIAC, and Stockholm isn't uncommon for her or her colleagues (along with London, Paris and New York). Local arbitral chambers in all five countries often hear foreign-related disputes, usually because one side is the subsidiary of an international company.

Was the audience persuaded that the era of Latin American seats had arrived?

Hamilton thought the case was made for the most stable jurisdictions with good security and the rule of law. He said, after Bullard's presentation: "it makes me think that the rest of the world needs to wake up. We live in a multipolar world. It's quite clear that some of the arbitration laws in Latin America have in effect skipped a generation of problems experienced elsewhere and gone direct to developing the most cutting edge frameworks in the world."

And he said that whether you agreed with the panel or not, it didn't matter: because word has already reached corporates that Latin America seats are okay.

He shared a story about a call he'd had from the other side of the world, a few years ago. A company – investing in Latin America for the first time – wanted to know which the better institution was: the Lima Chamber of Commerce or the AmCham Peru?

"I was shocked ...." Hamilton said, "so I said, 'Wait, they're from so far away ... they've never done business in Latin America, and they've narrowed it down to these two *local* arbitral institutions?' And my contact said 'Yes.' They're already confident that Peru has a secure legal environment for arbitration, that the courts are reliable, and that these are the most cost-effective options for their needs.'"

"At that moment I knew the world had already changed, whether people sitting in New York or Paris or beyond had realised it."

Did the audience feel the same way?

A vote suggested many in it did. Hamilton asked for a show of hands on who would – now – consider designating a Latin American seat, if one side to the dispute were likely to be a Latin American party.

About half the room – 50 per cent – raised their hands.

The quick-fire round

If Latin American seats are coming to be regarded as user-friendly, then which individual seat is the best? The session tackled that issue too, briefly, with a quick-fire round. Hamilton invited the panel members to ask each other "one tough question".

It started with 'Peru' (Bullard) asking 'Brazil' (Braghetta) a question. Bullard zoomed in on Brazil's language difference: "Adriana, Brazil is almost the only country in Latin America that doesn't speak Spanish. Do you think that can be an obstacle to being chosen as a seat, especially in a conflict that involves Latin American companies?"

Braghetta had already told the audience how large Brazil's arbitration bar has become and how often its members now arbitrate abroad. ("Brazilians are doing a *lot* of international arbitration" she said). So her response to Bullard was: "If the language of the arbitration is Spanish, you have other options in the region. But if it's English – why not Brazil?"

She added that Spanish-language arbitration in Brazil was also an option.

Next it was 'Brazil''s turn to ask 'Colombia' (Zuleta) a question. Braghetta focused on *amparos*, a constitutional remedy available in some Latin jurisdictions that has been used to thwart arbitration.

"Eduardo, one of the things that makes Brazil different is that – fortunately – we don't have this *amparo* stuff. Explain to us if *amparos* are damaging, or not, if one is arbitrating in Colombia."

Zuleta returned to an earlier theme with his answer – namely, the different treatment that Colombia affords to international matters. He replied, "First, *amparo* is an invention of lawyers, not judges. So we cannot blame judges for problems with *amparos*. Second, in the context of Colombia, we have seen a number of *amparos* in arbitration cases, but none in international cases. The only *amparo* we have seen in an international case was the decision of our constitutional court in 1999 – the *Merck* case – and it totally failed. That was the end of the story for people trying to mess with international arbitration via *amparo*."

Next it was the turn of 'Colombia' turn to ask a question to 'Mexico' (von Wobeser).

The subject of Mexico's judiciary had already come up – in particular its strong track record of decisions. Zuleta selected judicial training for his question.

"Claus, earlier we heard about how we all tend to focus on speaking and writing for the benefit of other lawyers, not judges. What can we do in Mexico, and elsewhere, to train judges and give them pointers and tools to work better with arbitration?"

Von Wobeser explained how a leading Mexican law school invites judges to attend its arbitration course for free "and they do." That meant these judges receive "two classes a week for six months, usually five or so judges among the 40 attendees." That in part explains the strong track record of pro-arbitration decisions in Mexico, he said.

Next it was the turn of 'Mexico' to quiz 'Chile' (Jana).

Von Wobeser raised its remoteness: "Chile is about the farthest place from anywhere in the world – it's a 10 hour flight even from Mexico! So, how will you attract arbitration to a country so far away?"

Jana opted for an 'it's good when you get here' reply (having already played up the fact Chile is very "un-Latin"). "The seat is a juridical concept… the courts are very important. So I would say, if you are sure of getting a good seat at the end of it, then an eight or 10 hour flight isn't that big a deal."

To close the round, 'Chile' got to ask 'Peru' (Bullard) a question. Hamilton described it as the moment every Chilean dreams of – a chance to have a pop at neighbouring Peru. Jana seized the moment, asking about judicial integrity and reliability.

"Alfredo," he said, "it seems as if we hear of some distrust of judges in Peru – and more broadly across Latin America. How would you paint the Peruvian judiciary, not just in relation to arbitration, but more generally in terms of efficiency, freedom from corruption etc?"

Bullard took the question in his stride.

He'd already made it clear that Peru has firmly walled off arbitration from the courts, meaning there are minimal opportunities for judges to interfere ("All roads lead to arbitration," he had explained). But on the rare occasions the courts *do* deal with it "they have always been very very positive towards it, especially the constitutional tribunal, and the number of annulments are very low."

That concluded the session and the morning.

GAR Live New York continued with a session on damages and remedies and an Oxford Union-style debate in the afternoon.