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INTERNATIONAL COMMERCIAL ARBITRATION IN THE AMERICAS: PROCEDURAL, EVIDENTIARY AND CURRENT ISSUES WASHINGTON D.C., MARCH 4, 2009¹

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The Center on International Commercial Arbitration, in cooperation with the Inter-American Bar Association, hosted a full-day seminar on March 4, 2009 at the American University Washington College of Law. The program brought together distinguished experts with a variety of backgrounds to address procedural, evidentiary and current issues in International Commercial Arbitration in the Americas.

The seminar was divided into 3 panels. The first panel addressed Procedural and Evidentiary Issues in Latin American Arbitration. The second panel focused on an *Analysis of Recent Arbitration Cases in Latin America*. The third panel concentrated on *Current Issues in International Commercial Arbitration in the United States and Canada*. The following is a brief summary of the topics and issues discussed.

I. Opening Remarks

Dr. Horacio Grigera Naón, the Director of the Center on International Commercial Arbitration, welcomed speakers and participants and introduced the topic of International Arbitration in the Americas. He mentioned the change of attitude towards arbitration in Latin America in the early 1990s when there was a shift from a history of antipathy vis-à-vis arbitration to a more favorable and open attitude. He also pointed out the opposite trend move in certain countries. In addition, he highlighted that developments in international arbitration in North America, and particularly in the United States, have worldwide impact and therefore, should be closely followed. Finally, he acknowledged the expertise of the panelists who were invited to participate and he introduced John H. Rooney, partner at Shutts & Bowen LLP and the Chair of the International Arbitration Law Committee of the Inter-American Bar Association (IABA). Mr. Rooney discussed the history of the IABA and upcoming events hosted by the Association.

II. Panel 1: Procedural and Evidentiary Issues in Latin American Arbitration

The moderator of the first panel, Dr. Horacio Grigera Naón, introduced the panelists and explained that the purpose of the panel was for the speakers to share their personal experiences with respect to procedural matters in arbitration in a Latin American context.

The first panelist, Daniel Gonzales, a partner at Hogan & Hartson LLP, argued that international arbitration is extremely flexible and challenging because the arbitral panel has broad discretion as to how evidence will be taken. To support this argument he mentioned a case between two Latin American entities in which the arbitration provision was very straight forward yet said nothing about what the procedure or evidentiary procedure of the case should be. In that case, the overpowering advocacy of certain lawyers in the arbitration led the arbitrators to apply U.S. Federal Rules of Evidence³ to the case.

In addition, he referred to the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration⁴ to demonstrate that the arbitral panel has considerable discretion when taking evidence and emphasized that evidentiary issues in arbitration are largely determined by the dynamics of the arbitrators, the chairman and the advocates. Finally, he emphasized that there is a strong influence from other legal systems, such as the American, French and Swiss legal systems, in Latin American arbitrations.

The second panelist, Marcelo Muriel, a partner at Mattos Muriel Kestener Advogados (São Paulo), provided a brief historical summary of international commercial arbitration in Brazil. He emphasized that despite its late start, international arbitration in Brazil has increased rapidly and the Brazilian judiciary has reacted positively to international arbitration.⁵ Furthermore, he stressed that production of evidence in

¹ This article highlights current trends and issues addressed at the Arbitration in the Americas Seminar in March 2009. The article does not provide a comprehensive narrative of the events. Citations have been added by the authors who take full responsibility for any errors found.

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³ Fed. R. Evid. (2009) available at <http://judiciary.house.gov/hearings/printers/111th/evd2009.pdf>.

⁴ See International Bar Association Rules on the Taking of Evidence in International Arbitration (1999), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [hereinafter IBA Rules] (revised on May 29, 2010).

⁵ Brazil enacted the Brazilian Arbitration Law in 1996 but it took the Brazilian Supreme Court 5 years to confirm that arbitration was compatible with the Brazilian Constitution. Therefore, not much happened in Brazil until 2001. Then, in 2002, Brazil finally ratified the New York Convention. See United Nations Commission on International Trade Law, Status 1958 — Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

international arbitration is one of the main topics in which cultural and background differences will be apparent.

The third panelist was Carlos Bianchi, an arbitrator and mediator based in New York. He pointed out that in Latin America, as in other regions, there are not many problems or conflicts over procedural issues because the procedure tends to be uniform. However, he did emphasize that there are major differences when it comes to the production of evidence. For instance, the rules on the production of documentary evidence in Latin America tend to be more restrictive and there tend to be differences in determining the weight to be given to witnesses. Nevertheless, Mr. Bianchi concluded that most arbitrations in Latin America are a procedural hybrid of international legal systems and general international rules.

III. Panel 2: Analysis of Recent Arbitration Cases in Latin America

The moderator of the second panel was Henry Saint Dahl, a council member of the Inter-American Bar Association in Washington, D.C. He opened the panel up by introducing the speakers. The purpose of the panel was to deal with judicial resolutions, constitutional developments and legislative developments and to discuss the treatment of international commercial arbitration in the judiciary and the treatment of claims against Latin American governments in the investor-state form.

The first panelist, John H. Rooney, focused on constitutional and legislative developments in Latin America. He began by examining the new constitutions of Bolivia and Ecuador and how they approach arbitration. In addition, Mr. Rooney analyzed legislative developments in Chile⁶ which fully adopt the UNCITRAL Model Law.⁷ Finally he considered the new arbitration laws of Peru⁸ and the Dominican Republic,⁹ which deviate significantly from the UNCITRAL Model Law, but still take it into account. He closed with a discussion of the influence of the 2006 amendments to the UNCITRAL Model Law on the new arbitration laws in Peru and in the Dominican Republic.

The second panelist, Raul Herrera, a partner at Arnold & Porter in Washington, D.C., reviewed a few recent cases in the investor-state arena (both under ICSID and UNCITRAL Arbitration Rules). Moreover, he referred to a few investor-state cases involving Latin American countries, particularly cases involving Argentina. For instance, he discussed the case of *Railroad Development Corp. (R.D.C.) v. Republic of*

Guatemala,¹⁰ the first claim filed under the DR-CAFTA,¹¹ which was registered in August 2007. He also examined the case of *Compañía de Aguas and Vivendi v. Republic of Argentina*,¹² the second longest ICSID case ever, and defied the notion that arbitration is quick and cost-effective. This case underwent multiple proceedings that lasted ten years after it was first registered in 1997.

The third panelist, Claudia Frutos-Peterson, a counsel at the International Center for the Settlement of Investment Disputes (ICSID), focused on the attitude of Latin American courts towards arbitration. She examined the recent trends of international commercial arbitration in Mexico, Venezuela and Chile to demonstrate that fluctuation. She referred to a few decisions by Mexican, Venezuelan and Chilean courts to illustrate the fact that the attitude of national courts towards arbitration fluctuates like a pendulum (i.e. sometimes courts issue decisions that are very pro-arbitration but other times the decisions can be quite negative).

IV. Panel 3: Current Issues in International Commercial Arbitration in the United States and Canada

The moderator of the final panel, Lorena Perez, from the Department of Legal Services for the General Secretariat of the Organization of American States introduced each of the panel members.

The first panelist was Jay Alexander of Baker and Botts LLP. Mr. Alexander addressed the “manifest disregard of the law” standard after *Hall Street Associates v. Mattel*,¹³ in which the Supreme Court decided that the provisions for judicial review in the Federal Arbitration Act (FAA) are exhaustive and parties cannot legally agree to increase the standard of review. Under case law at that time, a “manifest disregard for the law” was an acceptable standard, though it is not explicitly listed in the review provisions of the FAA.¹⁴

Next, Mr. Alexander addressed the issue of conflicts of interest and the ABA disclosure requirements. The ABA Dispute Resolution Section developed guidelines on conflicts of interest. Under the ABA guidelines, failure to disclose potential conflicts may constitute grounds to vacate an award. Mr. Alexander believes that such unrealistic standards could give the other side broad opportunity to find ground for vacate. Finally, Mr. Alexander commented on the Arbitration Fairness Act of 2009,¹⁵ which focuses on employment, consumer rights,

⁶ Ley No. 19.971, 29 de septiembre de 2004, Ley de Arbitraje Comercial Internacional, 37.974 Diario Oficial [D.O.] 2 (Chile) [International Commercial Arbitration Law].

⁷ UNCITRAL Model Law on International Commercial Arbitration, 1985, UN Doc. A/40/17 (1985), reprinted in 24 I.L.M. 1302 (1985), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited on October 21, 2010).

⁸ Decreto Legislativo No. 1071, 28 de junio de 2008, Decreto Administrativo que Norma el Arbitraje [Peruvian Arbitration Act 2008], Diario Oficial El Peruano [B.O.P.], 1 September 2008 (Peru).

⁹ Ley No. 489-08, 19 de diciembre de 2008, Ley sobre Arbitraje Comercial [Commercial Arbitration Law], 10.502 Gaceta Oficial [G.O.], 30 de diciembre de 2008 (Dom. Rep.).

¹⁰ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (US CAFTA-DR FTA).

¹¹ Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR). For the final text, see OFFICE OF THE UNITED STATES TRADE REP., CAFTA-DR (DOMINICAN REPUBLIC-CENTRAL AMERICA FTA) (2004), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

¹² *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (France/Argentina BIT).

¹³ *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008).

¹⁴ *Id.* at 577.

and civil rights disputes, mostly involving arbitration clauses in boilerplate agreements. Mr. Alexander argued that this Act constitutes a lack of deference to arbitral tribunals.

The second panelist was Mr. Luis Martinez, Vice President of the International Center for Dispute Resolution (ICDR). Mr. Martinez echoed Mr. Alexander's concern with the Arbitration Fairness Act. Mr. Martinez then spoke about an addition to the International Rules in 2006, which allowed filing parties to request interim relief and have an emergency arbitrator appointed at the time of filing, while seeking a hearing in a tribunal.¹⁶ Once the tribunal is appointed, it can review the emergency arbitrator's ruling, and if parties have not complied with the ruling this can weigh heavily on the outcome of the arbitration. Finally, Mr. Martinez mentioned the ICDR Guidelines on Arbitrators Concerning Exchange of Information and highlighted that although not binding, the new guidelines for information exchange would create a duty for each side to be proactive in limiting discovery requests to those that are relevant and material.

The final panelist was Ms. Lucinda Low from the D.C. office of Steptoe & Johnson LLP. She spoke on corruption in commercial arbitration and current efforts to require transparency in investment disputes. Ms. Low highlighted that, traditionally, corruption has been focused on the misbehavior of foreign governments but recently more attention has been given to corruption issues in commercial arbitration proceedings, specifically in the U.S. and Canada.

She referred to a few cases to demonstrate that fraud, inducement and corruption have been successfully raised. For instance, she examined the case of *Siemens v. Argentina*,¹⁷ and pointed out that this case brings up an interesting dilemma. What

happens if evidence of corruption occurs years after there has been performance on an award? Once a company has already received an award, it is possible the company will have spent the money by the time that corruption is discovered. Ms. Low questioned whether dismissal would then be the appropriate remedy. Further, what if the same government that accepted the bribe or whose officials were party to the corruption tries to use evidence of corruption against the company? How should this weigh on the case? Ms. Low predicted that these issues will begin to be more prevalent as corruption charges increase.

Finally, Ms. Low briefly addressed the current efforts of UNCITRAL to revise the rules of arbitration and pointed out that several NGOs have made efforts to include transparency requirements in these revisions. Particularly, the NGOs see investment disputes raising particular public policy issues that they feel would be solved by instituting transparency requirements. The UNCITRAL community has fought these efforts because of the traditional importance placed on confidentiality in commercial arbitration, which is also governed by the UNCITRAL rules.

V. Conclusion

Once again, the Center on International Commercial Arbitration brought together distinguished experts to discuss relevant topics in International Commercial Arbitration. The speakers and participants of this full-day seminar exchanged very interesting thoughts about current issues in Arbitration in the Americas, with a special emphasis on procedural, evidentiary and current issues in international commercial arbitration in the Americas.

¹⁵ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). This bill has not yet been enacted and is currently under review in the Senate Judiciary Committee.

¹⁶ International Dispute Resolution Procedures art. 37, available at <http://www.adr.org/sp.asp?id=29003> (last visited Oct. 22, 2010).

¹⁷ *Siemens v. Argentina*, ICSID Case No. ARB/02/8 (Aug. 3, 2004) (Germany/Argentina BIT).