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Jurisdictional Considerations: A Global Guide To Arbitration, The Americas

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Commentary

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A myriad of considerations exists in deciding where to seat an arbitration. The often countless conventions and treaties that each jurisdiction may, or may not, be subject to can pose difficult questions when deciding the seat of an arbitration. On top of this, the domestic arbitration framework of the potential seat, and the interpretation of such framework by its judiciary, will give rise to cause for thought. Such considerations also extend beyond the question of seating. When considering, for example, enforcement options and risks, or protections and comforts that bilateral treaties may offer, such issues arise once more.

In the Americas, arbitration is becoming a popular and preferred method of resolving international commercial disputes. Figures from the International Chamber of Commerce (**"ICC"**) reflect this trend. The United States of America, Brazil and Mexico consistently rank among the most numerous ICC users. This can be further seen in local arbitration law throughout the region. In recent years, countries throughout the Americas have updated and modernized their own arbitration laws as well as other mechanisms of alternative dispute resolution.

That said, arbitration has not been welcomed uniformly across the region. With many states not participating in the ICSID Convention (**"ICSID"**) and with others having experienced a backlash against arbitration – likely influenced by negative experiences in investment treaty arbitration – the need to understand each state's arbitration framework is paramount in order to take advantage of the opportunities that now exist across the Americas.

The New York Convention

The New York Convention is the cornerstone of international arbitration. It is, therefore, encouraging to see that no less that twenty-one countries in the Americas (in fact, all jurisdictions of relevance) have acceded to the New York Convention. Moreover, this is not a new phenomenon: the most recent of these states to see the New York Convention come into force was Nicaragua, on 23 December 2003, some fifteen years ago. Interestingly, unlike the Central and South American countries, the United States has acceded to the Convention on a conditional basis. Specifically, the US will apply the convention on the basis of reciprocity, namely to the recognition and enforcement of awards made *only* in the territory of another contracting state. The Convention's application will also only arise out of legal relations that are considered to be, under the national

law of the United States, commercial. With regard to the rest of the Americas, the New York Convention operates in full, without such caveats.

ICSID Convention

The ICSID Convention has been ratified by 154 contracting states across the world. With regard to the Americas, its uptake has not mirrored that of the New York Convention. For example, Brazil and Cuba have not ratified the ICSID Convention, nor has the Dominican Republic despite having signed the convention back in March 2000. On the other side of the coin, Bolivia and Ecuador, who had previously ratified the ICSID Convention, denounced it in 2007 and 2009 respectively. The same became true of Venezuela shortly thereafter, in 2012. The Foreign Ministry of Venezuela cited its rationale for its termination as being to fix the mistakes of the previous government (who had ratified the Convention) and to regain Venezuela's national sovereignty. Ecuador also denounced almost all of the bilateral investment treaties that it had previously entered into. On a more positive note, Mexico signed up to the ICSID Convention in 2018, with the instrument taking effect there as of 26 August 2018. This now means that all three North American states (United States, Canada and Mexico) are signatories to ICSID.

The position in the Americas with regard to the ICSID Convention does not reflect the otherwise strengthening trend in arbitration in the region as portrayed, for example, by the International Chamber of Commerce's statistics. Rather, it exposes some of the vulnerabilities posed by such conventions and treaties, which can be terminated upon a change in government or political direction. This stresses the need to always be aware of the current political climate when taking jurisdictional decisions. The same is true for bilateral investment treaties which can have far reaching implications.

UNCITRAL Model Law On International Commercial Arbitration

The UNCITRAL Model Law (**"Model Law"**) on International Commercial Arbitration (1985) has been adopted, at least in part, by eleven states in the Americas. For example in Chile, Peru, Paraguay, Mexico, Honduras and Costa Rica seated arbitrations will be governed with a degree of regard to the Model Law. In the United States, this is true in California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon and Texas. Standing for many in the international arbitration community as a framework of best practice, it is welcome to see the adoption of the Model Law across the Americas in this way. Moreover, it should be noted that the U.S. Federal Arbitration ("FAA") is an arbitration-friendly statute and generally provides for safe and effective arbitration across all fifty states. In the United States, New York, Miami, Houston and Los Angeles are the most utilized places selected for international arbitration.

Domestic Arbitration Law In The Americas

One of the more complex considerations with regard to jurisdiction in any arbitration is the relevant domestic arbitration law. Even with the adoption of the Model Law in certain jurisdictions, it is necessary to understand if and how this model template was tailored or tweaked when incorporated into a particular state's domestic legal framework. Each jurisdiction's governing law is, of course, different and every nuance has to be considered when looking to questions of jurisdiction. For example, issues such as the availability of summary procedures and partial awards is an issue that should be thought about.

Colombia recently celebrated the five year anniversary of its *National and International Arbitration Statute of Colombia*. Heavily focused on the Model Law, Colombia's domestic arbitration law has many arbitration-friendly features, including provisions for expedited proceedings for processing the recognition of international arbitral awards. This is true, also, for grounds upon which recognition can be refused; these echo the same sentiments as in the New York Convention in addition to the Model Law, in that recognition will be refused in the event that the award for which recognition is sought would violate the international public policy of Colombia.

Looking to Brazil, its domestic arbitration act is also heavily modelled on the Model Law. For example, it imposes no restriction on the substantive law that the parties are able decide on to govern the proceedings, subject to this not being contrary to Brazilian public policy or moral values. In amendments made to the domestic arbitration law in 2015, arbitrators here now have the power to maintain, modify or even cancel any court decision that was rendered on an urgent basis prior to the constitution of the tribunal.

Until earlier this year, one of the few jurisdictions in the Americas without a full and complete domestic

arbitration law was Argentina. Previously, the *New National Civil and Commercial Code* governed the contractual aspects of arbitration in Argentina but did not, however, contemplate the procedural aspects. In July of this year, the Argentine Congress approved a new international arbitration law based heavily on the Model Law: the *Ley de Arbitraje Comercial Internacional*. Argentina has, therefore, joined countries such as Mexico, Panama, Costa Rica, Ecuador and Chile in basing its local arbitration legislation on the Model Law.

After having denounced the majority of its bilateral investment treaties, earlier this year Ecuador overhauled its framework governing arbitration in an effort to promote foreign investment. With the introduction of *Ley de Fomento Productivo*, all disputes arising out of investment agreements are to be resolved by way of an arbitration and any arbitral awards which may arise as a result are enforceable in Ecuador. There are, no longer, additional requirements to those contained in the New York Convention. This is a fundamental shift for Ecuador. Previously, the recognition of a foreign award against the State required that the investor proved that the award was not in breach of the Ecuadorian Constitution or law. That said, the new arbitral framework expressly excludes the availability of any emergency arbitration rules which might have otherwise been available to investors.

As mentioned above, many states across the United States have adopted domestic arbitration laws that are based on the Model Law and the FAA otherwise provides for a highly arbitration-friendly environment in all fifty states. This makes the United States a very safe place to arbitrate. Moreover, the United States is home to the Americas' largest arbitration institution, the American Association of Arbitration ("AAA"), whose international arm – the International Centre for Dispute Resolution (ICDR) - provides an excellent option for the administration of international disputes.

As a final example, arbitral proceedings in Mexico are governed by the Code of Commerce. In essence, this largely reflects the Model Law with some minor modifications. While no rules or restrictions exist in Mexico's Code of Commerce with regard to the consolidation of separate arbitral proceedings under one or more contracts, the general sentiment is that, given such rules are well established in the most common arbitral institutions, these can easily be enforced in an arbitration seated in Mexico too. Such flexibility may explain the large number of arbitrations being seated in Mexico. Much like the Model Law, arbitrators in Mexico have broad powers insofar as they must simply run the arbitration with equality and fairness, giving due consideration to both parties to exercise their rights.

ICSID Cases

As referenced above, many countries in the Americas are among the most frequent players subject to ICSID arbitration. For example, Mexico – in spite of having only officially acceded to the ICSID Convention in January of this year – has concluded 16 such cases. Thus far, of cases where an award has been handed out, all but one have been awarded in favour of the investor as opposed to the state.

Conclusion

International arbitration is growing throughout the Americas, with many countries in Latin America taking steps to progress and update their arbitration framework. It is not, therefore, a surprise to see countries in the Americas ranking among the most numerous ICC users. It is also encouraging to see, in recent developments throughout the region, the growing trend of arbitration. While this is not uniformly the case, it is clear to see that in an effort to attract foreign investment many countries, particularly in Latin America, are putting in place a legal framework which incorporates arbitration-friendly provisions and provides an attractive incentive to international players. ■

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