

**HOUSTON INTERNATIONAL ARBITRATION CLUB MARCH
11, 2008**

**TOPIC: THE PLACE OF THE ARBITRATION, A COMPARATIVE
ANALYSIS IN LATIN AMERICA**

**Dr. Leonel Pereznieto Castro
Counselor at Jáuregui, Navarrete y
Nader, S.C. (Mexico City) and
Professor at National Autonomous
University of Mexico**

I. Introduction.

The place of the arbitration is an important topic to be taken into account considering the drafting of the arbitration clause in an agreement. In order to decide on which place of the arbitration is practical, the counselors for the parties consider both judicial and opportunity issues.

Among the first, they basically consider whether the country where the place of the arbitration is located has a legal system favorable for arbitration, an essential factor for the good performance of the proceedings, and for the acknowledgement of the Award as well; and among the second, geographical location is important in three different ways: it should be midway for the parties, it should be neutral, and accessible having the necessary infrastructure to carry out the hearings.

Based on the previous considerations, I will deal with the topic reviewing the main Latin American countries where arbitration hearings are more frequent at present, and I will also talk about some of the general legal issues included in this topic.

To be concise, I will focus this presentation on a few countries where the number of arbitrations has increased: Mexico, Brazil, Argentina, Colombia, Chile and Costa Rica. I will analyze this six countries from a double perspective: their international links and their legal system. This analysis will show that except Argentina, these countries are very favorable for arbitration.

Nevertheless, before I discuss the topic as explained above, let me first briefly talk about the present situation in which one of the most important issues is: the link between the place where the arbitration process will be carried out and the applicable law.

II. Location and applicable law.

In the first three international conventions on arbitration: the Geneva Protocol on Arbitration Clauses, 1923; the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 (the New York Convention), the principle that stated that **the procedural law of the place of the arbitration be applied as background for the arbitration procedure rules chosen by the parties was established.**

In other words: if the parties chose the trial rules of an administering institution (CCI, AAA, ICDR, etc.) everything not provided for in those rules, must be resolved in accordance with the local procedure rules; the same must be applied if the parties have not chosen the applicable arbitration rules.

Yet, such a proposal originates different problems, among others: it leads to different solutions due to the difference of the local laws, or, because the local legal systems are not prepared for arbitration trials, these become difficult, etc.

In the three conventions I mentioned before, a legal frame that supported arbitration, in case the parties, as previously stated had

not chosen the arbitration rules for their trial, or if they had stated that said rules were insufficient to govern all the difficulties that could emerge during the procedure was established. The New York Convention even stated that an award granted against the provisions of the place of the arbitration could not be recognized in a foreign country. (Art. V. 2 (a) y (b)).

Among the reasons said conventions supported their arguments, was that in those days arbitration was not a common practice in the world, and they intended to give arbitration a margin of certainty, even if only general, to the parties when choosing the place of the arbitration. They started with the idea that the parties would be able to choose the arbitration center depending upon internal legal systems that had norms that would support the development of the arbitration process. Yet, this answer was not completely satisfactory because through the years only a small number of countries, among others Switzerland and Luxembourg, were able to modify their internal legal systems in order to become favorable place of the arbitration.

Nevertheless, this panorama began changing when the United Nations Commission on International Trade Law (UNCITRAL) approved in 1985 the **Model Law on International Commercial Arbitration** so that all those countries interested in promoting arbitration would include it in their legal systems. Purpose of said Law: be the legal frame when the parties had not determined the applicable rules for their arbitration procedure or be applied when the chosen arbitration rules were insufficient. Thus, the countries except Argentina now had the basic arbitration rules which included as a national law would act as the legal frame for the arbitration procedure.

However, at present there is an important difference between arbitration in Europe and in the United States in respect to arbitration in Latin American countries, because in the last countries the criterion of Art. V.2. (a) and (b) of the New York Convention still prevails. As mentioned before, this Article states that the procedure

internal rules will be applied when the procedure arbitration rules chosen by the parties are insufficient.

A completely different situation prevails in Europe, where, as everyone may know, as of the Convention of Europe of 1961, the criterion changed to give full liberty to the parties to choose the applicable procedural law, in addition to choosing the rules for that specific arbitration (Art. IV, 1. b). Years later the ICSID Convention of 1965, mainly promoted by the United States, also changed the criterion, not only for the parties to freely choose the procedure rules for their arbitration, but also granting the arbitrators broad faculties so that, in the event the parties did not expressly choose the above, the arbitrators themselves could determine the procedure local rules to be applied (Art. 44).

Latin American countries have ratified the New York Convention as they have integrated to international trade. This has allowed them to become International place of the Arbitration because in the New York Convention the criterion to subject arbitration to the rules of the forum still prevails. Any award granted contrary to this rules can cause the annulment of said award. This is something important that should be taken into consideration.

III. Most representative Latin American countries within the Arbitration Area.

The six Latin American countries mentioned before can be recognized under the next criteria:

(a) The international link that provides information on the degree of internal development of arbitration and more specifically on the specialists these countries have. In this sense, there is in these countries a CCI National Chapter that helps to provide information to the parties about the ease with which the hearings will be carried out in the country where the place of the Arbitration is. In all these countries, except Costa Rica, there is a group of renowned attorneys and arbitrators who promote arbitration within their own countries,

and who, at the same time, are linked to international groups that promote arbitration world wide. (International Bar Association, Latin American Arbitration Group of the CCI, etc.).

(b) The six countries have ratified the New York Convention; this indicates that in said countries there prevails the criterion that the law of the country where the place of the arbitration is located will be applied subordinatedly to the arbitration rules chosen by the parties. Brazil was the last country that ratified the New York Convention (2005).

That criterion is also applied in the countries that ratified the Inter-American Convention, that in regards to this issue confirms the criterion of the New York Convention (Art. V, 2 (a) and (b). Except for Argentina and Brazil, the other four countries have ratified this Convention.

(c) Another criterion that must be considered is that those countries have adopted the Model Law on Arbitration of UNCITRAL, thus it will be known that at that the place of the Arbitration's internal rules will be those internationally accepted that give the procedures and the awards granted in those countries the legal support foundations. The six countries except Argentina, that were analyzed, adopted the Model Law in the last ten years, except for Mexico that did before so in 1994.

As can be noted, the fact that in any of the six analyzed countries Arbitration Trials are carried out based on the criterion of the New York Convention by which the Law of the Forum is applied due to the insufficiency of the Arbitration rules chosen by the parties, and that internally the local applicable law is the UNCITRAL Model Law, evidences that this internal law is completely favorable for the Arbitration process, except in this last case Argentina.

(d) Lastly, I will consider about the last criterion; that of opportunity, not legal but important because it provides the easiness to carry out the Arbitration hearings at the place of the Arbitration. Here three

different aspects must be mentioned: geographical location, and the opportunities offered by the institutions that administrate Arbitration, and those offered by others outside those institutions.

Geographical location plays an important role. It is obvious that Mexico and Costa Rica are to the north of the continent, thus they are attractive for Arbitration hearings between United States companies and their arbitration procedures in Central and in South America. The same thing happens with some European countries because these places of the arbitrations are located half way between them and their opponents. Bogota is also a place of the Arbitration where Arbitration procedure that involve other South American countries are hearings.

Administrative Institutions. Within this classification, in all of the analyzed countries there is a national Chapter of the CCI that includes an Arbitration Commission. These institutions provide information to any Arbitration hearing in the place of the Arbitration. In turn, the AAA, through the international branch of the ICDR, has entered into cooperation agreements with the national chambers of commerce by which said chambers can lend their facilities to hold arbitration hearings and provide logistic support such as: meeting rooms, translators, sound and recording equipment, etc.

Besides the administrative institutions, in the 6 analyzed countries there are hotels from the larger international networks that have conference rooms that can provide all the required logistic support where the Arbitration hearings can be held.

As can be noted, at least six countries in Latin America have stood out in Arbitration matters and being chosen as place of the Arbitration originates no difficulties, except for the application of the restrictive criterion on the New York Convention that has already been mentioned.

Having said the above, I would like to talk as an example about Mexico for two reasons: first, it is the country I am most familiar with

and, secondly, the one that can explain some of the problems the other countries went through to reach a certain level of development for Arbitration.

IV. The case of Mexico

Mexico, after remaining practically closed to other countries for more than sixty years in the XX Century, opened its economy and its judicial system as from 1986. Nevertheless, while closed it signed the New York Convention in 1971 and the Inter American Convention in 1978. This indicates, that in spite of still having a closed economy the Mexican Government considered that the evolution of the arbitral system to solve controversies was prevailing in the rest of the world.

Its international link was completed as the increasing number of attorneys interested in Arbitration, as from the sixties, were willing to have their clients include arbitration clauses in their agreements to avoid said clients from having to submit to a foreign jurisdiction that would be costly, both money and time wise, or to Mexican courts which at that time were not quite independable, and in addition, the Mexican trial system includes several levels of appeal that make trials a long and costly process.

As a result, those who first became familiar with the arbitration system preferred to resort to this new technique and participate in this kind of procedure. Ever since the fifties, international commercial arbitration procedures were heard in Mexico, ruled by the arbitration rules of the International Arbitration Court of the CCI and by those of the American Arbitration Association (AAA). There is no evidence that supports that the awards granted during that period faced any difficulties, nevertheless, attorneys interested in arbitration at that time were the ones who promoted the ratification by Mexico of the two above mentioned conventions.

Mexico ratified the New York Convention in 1971, and as from that date the number of Arbitration trials began increasing. The Inter American Convention was ratified in 1978.

In 1994, the Mexican Congress introduced the UNCITRAL Model Law as part of the Code of Commerce, in Title Five, Book Four. Yet, there are some differences, among which I shall mention the following:

Firstly, the Code of Commerce sets forth that the application of the rules is both for International Commerce Arbitration and also for internal arbitration (Art. 1415). That is, it was considered useful to apply the same rules of the Model Law for internal arbitration.

Art. 1427 of the Code of Commerce, III, a) and b), sets forth that if no agreement is reached between the parties to appoint arbitrators or when the proposed arbitrators cannot reach an agreement to appoint their president, within the next thirty days after they were appointed by the parties, any of the parties can ask the judge to make the appointment.

Including the legal authority in this Model Law originated many questions in regards of how these appointments were to be made, and especially if this legal intervention could be one that would take long because of the challenges or appeals against the decisions made by the judges when appointing arbiters and thus skew the nature of arbitration.

There is always this possibility, yet during the 14 years that the provisions of the Code of Commerce have been applied, there has never been such problem. Even in the Federal District that comprises Mexico City, the Supreme Court of Justice in and for the Federal District has established a Consultation System together with the Chamber of Commerce of Mexico Arbitration Commission to request, when required, the names of the people the judges will appoint to act as arbitrators, when one of the parties asks for such information under the terms of the provisions mentioned above.

The Code of Commerce sets forth the obligation of the judge of verifying the conditions provided for by the parties in the arbitration agreement, that the appointed arbitrator is “independent and impartial” and “in the case of a sole arbitrator or of a third arbitrator, the judge must also consider how suitable it is to appoint an arbitrator who has a different nationality from that of the parties” (Art. 1427).

Well now, who would be the competent judge the parties must approach to appoint the arbitrator or arbitrators the parties request? Art. 1442 of the Code of Commerce establishes that when legal intervention is required, a federal trial court or a common court of the place where the arbitration will be heard is competent; that is, a judge from the city where the place of the Arbitration is located.

Opportunity.

Here, two types of facilities should be mentioned; those offered by the arbitration administrative institutions, and the ones offered outside them. In this sense, the Mexican Chapter of the CCI includes an Arbitration Commission that provides information to any arbitration heard in Mexico. In turn, the AAA through the international branch of the ICDR has entered into agreements with the National Chamber of Commerce (CANACO) by which said chamber can lend its facilities to carry out arbitration hearings and provide services such as: meeting rooms, sound and recording equipment, translators, etc.

On the other hand, there are international network hotels that have conference rooms that provide all the necessary equipment, where the arbitration hearings can be held.

Conclusion

From this fast review of the 6 countries where arbitration has increased, it can be concluded that international commercial arbitration in Latin America is a consolidated fact which will continue growing. Including Argentina which sooner or later will be included in its legal system the UNCITRAL Model Law. There is also a generalized legal foundation that gives certainty to arbitration when any of these countries is chosen as a place of the arbitration.