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RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS IN LATIN AMERICA

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EXPERT FORUM

RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS IN LATIN AMERICA

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CD: Could you provide a brief overview of arbitration across Latin America? To what extent is this dispute resolution method well-supported by local legal frameworks?

Ossa: There is a wide array of situations in Latin America with respect to arbitration. In very general terms, however, there is a steady growth of arbitration as the main dispute resolution mechanism for commercial disputes. With the egregious exception of Argentina and Uruguay, the leading jurisdictions have adopted the Model Law. Some countries such as Peru have even enacted the Model Law with the amendments introduced in 2006. Also, both practitioners and the judiciaries have become more sophisticated and increasingly embrace international arbitral standards.

Gosis: Many if not most jurisdictions in Latin America have adopted modern arbitration legislation in the last 20 years, and each individual legal community is currently thriving with local talent. Separate from the local domestic arbitration communities of each jurisdiction, there has been a tremendous growth of pan-Latin American arbitration practices based in the region and they are expanding their reach to other jurisdictions in the continent. It is not uncommon to see Latin American firms acting as leading counsel against major US or European practices. While there is still room for improvement, in some discrete legal frameworks, the overall map of the region shows a mature regulation of arbitration.

Venegas: Arbitration has become a very important dispute resolution method in Latin America. Several countries have made the conscious effort to modernise their laws, either adopting the UNCITRAL Model Law on Arbitration or even creating their own Arbitration Acts with provisions that reflect the 'state of the art' in arbitration worldwide. Arbitration has come hand in hand with the liberalisation of the economy in Latin American countries and the signature of Free Trade Agreements. It is only natural that the increase in the number of foreign investments in the region and the consequent economic growth at the local level would lead to the multiplication of the number of commercial agreements. The complexity of legal relationships and the experience of foreign companies in the use of arbitration – which is at the same time promoted by the local Congresses with the issuance of modern laws in arbitration – has led to a widespread use of arbitration. In Mexico, for instance, after the implementation of NAFTA, arbitration exploded as one of the most utilised dispute resolution methods, dealing not only with disputes between corporations but also between public entities and private companies. The strength of the adoption of arbitration has led to

the inclusion of provisions allowing the adoption of arbitration in Administrative Laws, which were traditionally against arbitration because of the public nature of governmental bodies and their activities. Just recently, with the energy reform implemented by the Mexican government, the state-owned oil company PEMEX and the state utilities company CFE have adopted in their organisational laws the use of arbitration, and other forms of ADR, for the contracts they execute with private companies.

Bédard: In the past, Latin American countries demonstrated some reluctance toward commercial arbitration. Today, however, the region has largely overcome this traditional hostility, as demonstrated by not only the increasing recognition and use of commercial arbitration as a means of resolving disputes, but also the adoption of multilateral treaties requiring the recognition and enforcement of arbitration awards, such as the Inter-American Convention on International Commercial Arbitration (Panama Convention) and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention). These treaties have been supplemented with favourable changes in local law, as many Latin American states have adopted and modernised their domestic arbitration statutes, including by incorporating, in whole or in part, the UNCITRAL Model Law. Although commercial arbitration has gained acceptance in the region, the same is not necessarily true for investment treaty arbitration, a species of arbitration that occurs between foreign investors and host states concerning investment disputes under various international treaties. Historically, Latin American states often adhered to the Calvo Doctrine, a doctrine of international law which stated that foreign investors who choose to invest in a particular country were required to submit their investment disputes to the courts of the country they chose to invest in. In the 1990s and early 2000s, however, most Latin American countries appeared to retreat from the full-fledged articulation of the Calvo Doctrine and instead adopted treaties, including the ICSID Convention and various bilateral investment treaties (BITs), which permitted investors to bring international arbitration proceedings against host states with respect to certain categories of investment-related disputes. However, as more investors initiated arbitrations under these treaties in a variety of circumstances, the region has seen some political opposition to the concept of investment arbitration. For example, Bolivia, Ecuador and Venezuela have denounced the ICSID Convention. Nevertheless, numerous investment protection treaties in the region remain in force and have been declared constitutional by the constitutional courts of certain countries. Both concluded and proposed free trade agreements in the region, such as the contemplated Trans-Pacific Partnership, incorporate investment treaty arbitration.

Grion: In the past, Latin American nations have generally been opposed to arbitration, largely based on the Calvo doctrine, which held, in summary, that jurisdiction in international disputes lied within the country in which the investment is located. However, starting in the 1990s, most Latin American countries adopted a number of legal and policy changes with the objective of promoting free markets and trade. In this context, given the development of international commerce and the need of attracting foreign investments, Latin American countries in general have started to accept arbitration as a viable method for resolving disputes. To facilitate commercial arbitration, many countries changed their domestic arbitration laws or enacted new ones, and ratified important international arbitration treaties such as the New York and the Panama Conventions on the recognition and enforcement of foreign arbitral awards. In addition, most countries ratified the ICSID Convention, with one notable exception being Brazil, numerous bilateral investment treaties and free trade agreements with investment protection chapters. However, when we speak about a region as big and diverse as Latin America, it is important to note that the legal framework for international commercial arbitration has been changing at different paces and ways in each jurisdiction in the region. This being said, many Latin American states based their domestic arbitration laws in whole or in part on the Model Law on Commercial Arbitration formulated by the United Nations Commission on International Trade Law, which is perceived to reflect worldwide consensus on key aspects of international arbitration practice. In light of all the changes that have occurred in the last almost three decades in the legal framework created the foundation for a significant increase in the volume of commercial arbitration in Latin America, as it can be seen, for example, from the statistics of the International Court of Arbitration of the International Chamber of Commerce, a leading institution for international commercial arbitration. If we just take one example, Brazil was ranked third in the world in terms of number of parties participating in ICC arbitrations in 2014.

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Skadden, Arps, Slate, Meagher & Flom LLP

CD: How does the recognition and enforcement of arbitral awards differ between countries in the region?

Gosis: As a result of the global reach of the New York Convention of 1958, and the regional reach of the Panama Convention of 1975, there is very little difference between the countries in the region when it comes to recognition and enforcement of foreign arbitral awards. Whatever differences do exist in terms of enforcement are more properly a function of the different legal regimes dealing with actual attachment or liquidation of assets than a

consequence of the legal nature of the decision being enforced. Still, in a few jurisdictions in the region there are different procedures for enforcing domestic and foreign awards, which may result in additional grounds to challenge enforcement being available in the case of domestic awards.

Bédard: Latin American countries are subject to numerous treaties concerning the enforcement of arbitration awards. Nineteen Latin American countries have, for instance, signed the New York Convention. Although Latin American countries often operate under common principles of civil law, and will look to each other's legal systems and international principles for guidance on issues of arbitration law, there is no perfect uniformity with respect to the recognition and enforcement of arbitration awards. Differences can emerge, for instance, in particular issues, such as whether partial or interim awards are final awards subject to the New York Convention. However, with the increasing interpretation of the terms of the New York, Panama and Montevideo Conventions throughout Latin America, and increasing adoption of the UNCITRAL Model Law, we can expect to see a more uniform treatment of arbitration awards in the region.

Venegas: The recognition and enforcement of arbitral awards in Latin American does not differ greatly in terms of the nature of the process and the causes which may be brought to oppose it. However, the duration and the interpretation given to opposition causes vary from country to country. In some countries there is an additional constitutional control which would open the door to review the decisions issued by the competent courts regarding the recognition and enforcement of arbitral awards. In addition, the interpretation of the 'violation of public policy' as a cause to oppose to the recognition and enforcement of arbitral award differs between different countries. In any event, we could suggest that generally in the region the pro-arbitration trend is stronger than the obstacles to its enforcement.

Grion: The recognition of awards in Latin America is relatively uniform due to the New York Convention on the Recognition and Enforcement of Foreign Awards. Indeed, recognising the growing importance of international arbitration as a means of settling international commercial disputes, several countries in Latin America ratified said Convention, which seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges signatory countries to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the New

York Convention is to require courts of signatory countries to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. The New York Convention is widely acclaimed as being an incredible success around the globe, and in Latin America is no different. It is generally acknowledged that most courts around the region, as a rule, are doing well in properly interpreting and applying the Convention. Of course, problems of interpretation and application do happen from time to time, from jurisdiction to jurisdiction, but recognition of foreign awards under the New York Convention is usually perceived as non-problematic in the region. Brazil is one good example where the Convention has been applied very technically by the Superior Court of Justice, the court in charge of recognising foreign arbitral awards. It is a generally accepted view that most arbitration awards are complied with voluntarily. Nevertheless, it is worth noting that in some Latin American countries the procedure to enforce a domestic award is essentially the same as that followed to enforce a state court judgment. In several Latin American countries a foreign arbitral award must, in general, be initially recognised by a court through an exequatur proceeding. Once the foreign award is recognised, normally the enforcement is sought before the competent first instance civil or commercial court. That said, as the statutory provisions on the *enforcement* – for example, provisions dealing with attachment or liquidation of assets – of foreign awards are different from one country to the other, it would be preferable if an internationally recommended text of statutory provisions for enforcement of foreign awards were available.

Ossa: Until recently, although most countries had adopted the New York and Panama conventions on recognition and enforcement of foreign arbitral awards, in practice State courts often required additional formalities or reviewed the merits of the awards. Over the last decade, however, the recognition and enforcement of arbitral awards has become a streamlined and relatively simple process in many Latin American jurisdictions. In some countries this change has come about through new legislation. Brazil, for example, last year amended its regulations to simplify the exequatur procedure before the Superior Tribunal of Justice and dispensed with the need to provide certified documents. Other jurisdictions which already had an adequate legal framework have adopted a more favourable approach to enforcement. This is the case in Chile, where the Supreme Court applies the New York Convention systematically, refusing to revisit the merits of the case. Also, it no longer requires a certificate from an authority of the seat that the award is final – which effectively amounted to double exequatur and defeated the whole purpose of the New York Convention.

CD: What particular challenges exist in terms of recognising and enforcing judgements made on foreign awards? Do Latin American courts tend to adopt a pro-enforcement bias in Convention cases?

Venegas: Latin American countries are all part of the New York Convention. Therefore, in general terms they have assumed the obligation to recognise and enforce arbitration awards. That said, differences in the culture of enforcing arbitral awards arise from the different arbitration laws enacted by each country. In this context, I would say that the more evident challenges that the zone is facing regarding the recognition and enforcement of foreign awards relate to the lack of uniformity. Although most Latin American countries have a civil law system, the regulation of the limits of arbitrability and public policy varies greatly from country to country. In my opinion, only through years of experience and the consequent creation of national jurisprudence, which then may permeate in the Latin American forum through seminars and conferences, may a more uniform criteria concerning said matters be created.

Bédard: Recent cases have demonstrated that Latin American courts are more likely to uphold a policy favouring the enforcement of foreign arbitral awards. Nevertheless, parties may face specific challenges while trying to enforce a foreign international award in Latin America. For example, certain Latin American jurisdictions may have less familiarity and experience in international arbitration matters, though that is changing. In addition, many Latin American legal systems also recognise writs of *amparo*, extraordinary actions whose purpose is to protect constitutional rights. Parties have increasingly relied on *amparo* petitions to set aside arbitral awards or avoid their recognition and enforcement, in a bid to circumvent traditional annulment or enforcement proceedings. The use of *amparo* in this regard is not universal, however. For example, in Peru the Constitutional Court decided that a writ of *amparo* was not an admissible remedy to challenge arbitration awards.

Grion: In most Latin American countries the attitude of state courts toward arbitration seems to be favourable and recognition and enforcement of foreign awards under the New York Convention are usually seen as non-problematic, with limited scope for any review of the merits. Being such a diverse region, however, it is difficult to generalise and this analysis can vary from one country to another and from one case to the other.

Ossa: The main challenge is for the courts and even practitioners to rid themselves of parochial rules and practices. In the case of Chile, although most decisions are favourable, the Supreme Court

continues to cite domestic legal provisions that do not apply to international awards. In other countries such as Colombia and Venezuela, awards may be challenged on constitutional grounds, which certainly poses a threat to enforcement or at least creates a significant delay. In other jurisdictions such as Brazil and Mexico, the regular process to obtain recognition of a foreign award may take several months or even years.

Gosis: In general, based on the wide acceptance of the New York and Panama Conventions in the region, it is probably easier to obtain recognition and enforcement of foreign awards than it is to obtain it with respect to a domestic award. In fact, with very few, idiosyncratic exceptions, the threshold to avoid recognition and enforcement of a foreign award before a Latin American judicial court is rather high, and fairly consistent across the region. That said, we would suggest that the cause for that is not a pro-enforcement bias in Convention cases as much as a very limited choice of valid grounds to resist recognition and enforcement under the New York and Panama Conventions, which are predominantly peacefully applied throughout the region.

CD: To what extent does political influence guide court decision-making? Is this a major concern?

Gosis: The fact that the success rate of recognition and enforcement of foreign award proceedings in the region is consistent across jurisdictions indicates that, if in any given country there is a perception of risk that there might be political influence on court decisions, such perception is certainly not relevant or justified in the context of recognition and enforcement of foreign arbitral awards. In general, the division between the executive and judicial branches of government operates swiftly, and the constitutional systems of the countries in the region generally provide

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> *Diego Brian Gosis, Gomm & Smith*

adequate guarantees against undue interference with the workings of the judiciary.

Ossa: Political considerations generally do not play any role in court decision-making. There have been, however, a couple of isolated – and rather infamous – cases in the recent past. In Colombia, an arbitral award ordering a state-owned entity to indemnify Termorrío was annulled on grounds that ICC rules were not compatible with Colombian law. Similarly, Argentine courts set aside an arbitral award that was contrary to the interest of YPF.

Bédard: Parties have sometimes expressed a concern that Latin American courts demonstrate a 'home party' bias, or are otherwise influenced by political considerations or perhaps even corruption. The degree to which this is true varies dramatically from country to country, often based on the depth of democratic norms in a particular country. Region-wide observations are therefore difficult, if not impossible to make. Undoubtedly, however, many Latin American courts and judges are independent, impartial and apolitical, and the capacity of these courts and judges to render an unbiased decision has been demonstrated.

Venegas: In general, the judiciary of Latin American countries has become more independent from the executive branch with the consolidation of democracies in the region. In this context, political influence has not been a factor in private commercial cases. As for arbitration, between private and public entities, the results are definitively not as clear. The potential influence exerted by political factors or powers within the court system is difficult to prove. The issue gets more complex in these cases considering that the legislation that regulates the public contracts subject to arbitration mixes principles of public policy with principles of commercial law. The result is that there is always room for interpretation within the court system. This legal scope may lead them to favour a posture that is more akin with the arguments of the public entity than with the position of the private company. This exercise of interpretation, itself, should not be deemed as politically influenced, but at the same time, it would always be unclear if the court adopted it because of simple criterion or because of political influence. In any event, we would not categorise political influence in the decision-making of enforcing awards as a major concern, but simply as an additional risk factor that a party should take into account when in litigation with a public entity.

CD: In your opinion, is a greater degree of education and guidance required to improve support for arbitration in some countries?

Ossa: Greater knowledge of arbitration in the Latin American legal community would be very

useful. In particular, judges' awareness of their role in arbitration is fundamental. Paradoxically, although arbitration seeks to be independent from state justice, judicial support may play a crucial part in arbitral proceedings, be it enforcing an arbitral clause, granting an interim measure or recognising a foreign award.

Bédard: Obviously, education plays a key role in developing support for arbitration in any region. But Latin America has many sophisticated jurists and legal practitioners who are well-versed and experienced in the law. The issue therefore is not who one-sided 'education' or 'guidance' has to be unilaterally offered to, but instead, what type of two-way 'discourse' and discussion should be had among and with these jurists and practitioners. In that respect, the arbitration bar – especially the Latin American arbitration bar – should continue to reach out to, and communicate with, Latin American lawyers and jurists to discuss the principle concepts and practices of international arbitration. They should also discuss how, why and to what degree arbitration should be supported in the Latin American context.

Venegas: It is always important to educate not only attorneys but also staff about the benefits of arbitration. Arbitration is at the end of the road one of the most important manifestations of personal freedom. Recovering the ability to resolve disputes through a private proceeding without the intervention of the state judiciary is an act of democracy and belief in the abilities of individuals to solve their disputes in a legal manner. In addition, although the use of arbitration has increased exponentially in Latin America, the room for growth continues to be outstanding. In certain countries, arbitration is only used for small or low profile disputes. If the legal culture could change to adopt arbitrations for said type of disputes, the workload of the Courts would diminish with the benefits of less government expenditure and a more quick and efficient impartation of justice.

Grion: If the major developments in international arbitration seen in Latin America in the last few years are bound to continue and expand, they should reach the vast majority of lawyers and judges who are required to deal with arbitration. It is only through information and greater knowledge that some barriers against arbitration can be overcome. Consideration should therefore be given to adopting measures that will help to disseminate information on, and increase awareness and acceptance of, the benefits of arbitration, which has proved to be particularly useful in international transactions.

Gosis: In every conceivable context, greater education of the corporate, legal and judicial communities will, without doubt, improve the conditions in which arbitration in that particular

jurisdiction is conducted, or the awards resulting from such arbitrations are recognised and enforced. There are in place a number of very successful initiatives – including projects led by the Organisation of American States (OAS) – aimed at training members of the judiciary of the countries in the region on the workings of the New York Convention and the Panama Convention.

CD: Have there been any recent, high-profile cases relating to enforcement of awards Latin America? What lessons can we learn from their outcome?

Grion: There have been a number of recent high-profile cases relating to enforcement of awards in Latin America. Arbitral awards related to international commercial cases seem to draw a bit less attention than arbitration awards rendered in investment arbitrations, given the public nature of the latter and the involvement of a state in the dispute, such as in the cases of awards rendered against Argentina and other Latin American countries in the last few years. A lesson that can be learned from previous cases is that a favourable award does not necessarily mean that its enforcement will be easy and straightforward. Arbitration, just like any other type of dispute resolution, ultimately depends on the enforcement of a decision, whether you are attempting to enforce an arbitration award or a judgment. If the losing party does not have confidence in the opposing party's capacity to enforce an arbitral award, for example, it may be less likely to comply with it.

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Gosis: Probably the most interesting lesson to be learned is that there are no spectacular or very high-profile cases with particular elements of Latin-Americanism relating to the enforcement of awards in commercial arbitration cases, which proves the point that the region is mature in terms of a peaceful application of the New York Convention. The most commented cases in the region are very high profile cases coming from the many investment arbitration proceedings involving Latin American states or administrative law disputes submitted to arbitration,

which respond to a different phenomenology than recognition and enforcement proceedings of purely commercial awards.

Venegas: The COMMISA case has been one of the most high-profile cases of the decade, not only in Latin America but worldwide. This case opened again the discussion about the enforcement of awards previously vacated in the country, which served as the seat of the arbitration. In the COMMISA case, the award was vacated in Mexico because it was deemed that the arbitral tribunal exceeded its jurisdiction by awarding the damages arising from the administrative rescission of a public contract. Administrative rescission was not considered at the time of the execution of the contract as a decision, which could not be subjected to arbitration. However, the position of the Mexican judiciary and some amendments to the Law of Public Works, which occurred during the duration of the dispute, led to the decision that administrative rescission is a decision of the sovereign which could not be subjected to arbitration. Consequently, when the award was subjected to a nullity proceeding before Mexican Courts, after three instances the final decision vacated the award based on the inarbitratibility of the administrative rescission. The inherent unfairness of the decision led a New York Court to uphold the validity of the award, which is currently pending decision before the Appeal Court. As for the lessons to learn from this case, the most important one is that arbitration with public entities is always tricky in Latin America, particularly given that the arguments of public policy, which are usually associated with the internal regime and proceedings of said entities, are always a risk. Commercial arbitration with these entities is not chemically pure. Therefore, it is important to properly assess the risks involved with this type of case, and if possible have clauses included in the contracts in which the public entities clearly and unequivocally waive their exorbitant prerogatives and agree to consider themselves as 'commercial entities' for all legal purposes in said contracts.

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Bédard: There have been a number of cases concerning the recognition and enforcement of

arbitration awards in or concerning Latin America. In April 2014, an Argentina Commercial Court of Appeals decided, in the cases of *Pluris Energy Group vs. San Enrique Petrolera*, that a partial award that disposed of some of the claims between the parties could be subject to annulment proceedings under Argentina's Arbitration Act. However, it found that the party seeking annulment of the award had not done so within the five-day period provided for such actions under Argentine law. On 1 September 2014, in *Newedge USA, LLC vs. Garcia*, the Brazilian Superior Court of Justice issued a decision recognising an unreasoned arbitral award rendered in New York. Although the vast majority of New York based international arbitrations lead to reasoned awards, New York law does sometimes permit arbitral tribunals to issue unreasoned decisions. The Brazilian court found that the recognition and enforcement of such an award, which was made in compliance with the law of the seat of arbitration, did not violate Brazilian public policy. This decision stands in some contrast to the approach sometimes taken by other courts, such as those in Québec and the UK, which may require an award be reasoned in order to be enforced. In December 2013, in the case of *Polográfica CA vs. Columbia Tecnología Ltd*, the Colombian Supreme Court of Justice issued a judgment enforcing an arbitral award rendered against a Colombian company by a tribunal seated in Ecuador. The decision was notable for the court's analysis of whether, under the regime for exequatur established prior to Law 1563 of 2012, there was legal or diplomatic reciprocity between Colombia and Ecuador concerning the enforcement of arbitration awards. The court found that the Montevideo Convention satisfied that requirement. In August 2013, Judge Hellerstein of the Southern District of New York recognised an arbitration award rendered against Pemex by an ICC tribunal seated in Mexico City, even though the award had been set aside by the Mexican courts. Judge Hellerstein found, in particular, that an award set aside by the courts of the seat of arbitration should generally be denied recognition and enforcement under the Panama Convention if the set-aside "violated 'basic notions of justice'". Judge Hellerstein found that the Mexican court's retroactive application of a law rendering the parties' dispute non-arbitrable was such a violation, and therefore recognised the award.

Ossa: In 2008, the Chilean Supreme Court enforced an award despite the fact that it was still subject to annulment proceedings at the seat. Later, however, in 2011 the same court refused to enforce an award that had been set aside at the seat. Also in 2011, the Peruvian Supreme Court finally ruled that constitutional challenges are not admissible against arbitral awards. In 2014, Ecuador's National Court of Justice expressly recognised that local courts may not revise the merits of an arbitral decision.

CD: If parties do encounter barriers to enforcing their awards in a particular country, what options for recourse might be available?

Venegas: As the COMMISA case has showed, in practice, taking advantage of the New York Convention and enforcing an award in countries in which the debtor may have assets is the best countermeasure against a barrier to the enforcement of an award in a specific country. The risk of the debtor suffering the enforcement of an award abroad is always a good incentive either to pay or to settle the enforcement dispute. Another option tied to the above is to have, if possible, some collateral which may be easily enforced with the sole presentation of the award. This collateral should also be subjected, if possible, to the laws and courts of a different country.

Ossa: In most Latin American jurisdictions there are no further recourses, as requests to enforce are decided by higher courts, if not the Supreme Court itself. In view of this, if the potential place of enforcement is a Latin American jurisdiction, it is very important to comply with any mandatory rules of the jurisdiction from the outset of the arbitration, to ensure the enforceability of the arbitral award.

Gosis: One of the prime benefits of the system devised under the New York Convention deals with the relatively free and easy circulation of awards. As a result, in the event that enforcement is barred for some specific legal requirement in one jurisdiction that would not apply in another relevant jurisdiction, the option exists to take the award to other jurisdictions to obtain recognition and enforcement. In some limited circumstances, obtaining recognition and an order enforcing the award in another jurisdiction can change the legal scenario if the award holder returns to the 'problematic' jurisdiction seeking enforcement of the court decision recognising or enforcing the award issued in a 'non-problematic' jurisdiction. Also, in the event that the barriers to enforcement are a breach to the international obligations of the state under a treaty or convention, the alternative of seeking redress for such a breach may also be available, although in many circumstances that will require obtaining the espousal of the claim of the award-holder by its state of nationality.

Bédard: In case of refusal to enforce an international arbitral award, the available options for recourse are fairly limited. Generally, court decisions on enforcement of foreign arbitral awards are not subject to ordinary appeal. However, in some jurisdictions the enforcing party could rely on a writ of *amparo* to claim a constitutional violation if that was the case.

Grion: One of the main advantages of arbitration is that arbitral awards enjoy much simpler international recognition than court judgments. Some 145 countries have signed the New York Convention. In this context, if a party encounters barriers to enforcing their award in a particular country, under certain circumstances, that party may try to enforce the award in a different country provided the losing party has assets in that jurisdiction.

CD: What advice can you offer to parties on resolving disputes with a Latin American entity through arbitration?

Grion: My main advice would be to consult local and experienced counsel from the very stage of the contract negotiation when parties are considering the adoption of arbitration as the method of dispute resolution. Each country has its own rules and local traditions that can differ in important ways, such as the notions of public policy and arbitrability, for example, which may have an impact on the validity of a future arbitration proceeding or cause some trouble when enforcing the award. One concrete example in Brazil where legal advice is important is on the choice of the seat of the arbitration, as an arbitral award rendered outside Brazil will have to go through a recognition, or *exequatur*, proceeding – which can last several months – before it can be enforced, whereas an arbitral award rendered in Brazil can be immediately enforced before state courts as it were a domestic court judgement.

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>
> *Renato Stephan Grion, Pinheiro Neto Advogados*

Gosis: The rules on the preservation of documents and privilege can vary enormously among different jurisdictions. In the event that a party foresees that it may end up being forced to arbitrate a dispute with a Latin American entity, it would be prudent to take clear, preventive steps to guarantee that all parties potentially involved keep in a safe and accessible condition any evidence which may become relevant in the later adjudication of the dispute. Also, the procedural expectations by parties and counsel from different jurisdictions may be very different, with

common-law participants aiming at oral procedures more than their civil-law counterparts. Thus, it would be wise to have a frank, candid approach to the format of the proceedings at a very early stage of any dispute, perhaps even at the stage of drafting the arbitration clause.

Venegas: First, make sure that the arbitration clause you are including is clear in its scope and, if possible, submit to the arbitration of an established institution. Second, when including the arbitration clause in the agreement make sure to get the assistance of a local counsel to ensure that it meets all the necessary requisites of the local arbitration

law. Third, if the Latin American party is a public entity, then a careful evaluation of the applicable law and any exorbitant powers or privileges that said entity might have should be carried out. In addition, it is recommended to consult local counsel to have a complete understanding of the duration, instances and costs of enforcement and nullification award procedures before local courts. It is also essential to verify whether the subject matter of the contract could be submitted to arbitration or if there is any part of the dispute that may call into question its arbitrability leading to a potential parallel litigation before local courts. A common mistake made by foreign companies is to believe that their foreign counsel could successfully defend them in arbitration regardless of the applicable law and the local laws functioning as *lex arbitri.* Therefore, it is also advisable to retain local counsel in order to complement the assistance of the foreign counsel with whom the company usually works.

Bédard: Region-wide observations are difficult to make. A party resolving a dispute with a Latin American entity should instead be aware that its experience – from the time a dispute takes to be processed, to the degree of independence and impartiality of the decision maker – will likely depend on the particular country and forum it finds itself before. Nevertheless, common law parties resolving disputes with Latin American entities should expect to see certain differences in the culture and practice of litigation and arbitration. Latin American entities may be less inclined to offer or seek broad forms of discovery, which are not common in Latin America. Pre-hearing depositions are more likely to be anathema. Disputes may also sometimes take longer to resolve through formal processes, providing an incentive for negotiation and settlement. With respect to disputes with Latin American governments and state entities, parties should expect that local courts will apply principles of administrative law based on civil law. These principles can, in some instances, be more protective of private parties, and in other instances allow more latitude to the government, when compared to administrative law in common law countries. Parties should also carefully consider their rights under the various investment treaties alluded to above, and whether investment treaty arbitrations can be brought to enforce their claims against governments or state entities. Even when a country has denounced the ICSID Convention, the relevant bilateral investment treaties may offer alternative venues for dispute resolution.

Ossa: Parties should be prepared to deal with cultural differences. Sometimes Latin American entities, especially if represented by inexperienced local practitioners, seek to conduct the proceedings as if it was domestic arbitration or even court litigation and expect their own practices to apply. Also, whether the seat, potential place of

enforcement or applicable substantive law is Latin America, it is important to have the support of sophisticated local counsel.

CD: How do you expect recognition and enforcement of international arbitration awards in Latin America to develop in the years ahead?

Bédard: Through their adoption of various multilateral conventions – such as the New York, Panama and Montevideo Conventions – Latin American countries have, overall, demonstrated a commitment to the recognition and enforcement of valid commercial international arbitration awards. It appears that, as a regional trend, this commitment will continue to favourably develop over the years ahead. The question is more nuanced with respect to investment treaty arbitration, where it appears that Latin America is showing this species of arbitration both increasing acceptance, including by incorporating investment treaty arbitration into signed and pending free trade agreements, as well as increasing opposition, through political opposition and denunciation of investment protection treaties.

Grion: Recognition and enforcement of arbitral awards are an integral part of the functioning of arbitration as a viable method of dispute resolution. I expect that recognition and enforcement of international arbitration awards in Latin America will keep progressing in terms of quantity and quality of decisions, as the number of arbitrations in the region is on the rise. Brazil is a good example of that, as in very few years it has built a body of case law which gives predictability to parties wishing to enforce a foreign arbitral award in Brazil. As a last point, even though arbitration is a viable and important option for the resolution of disputes in the region, it is not a panacea or a solution for all problems. Enforcement issues may exist depending on the country or nature of the award, and different dispute mechanisms may be more suitable than others depending on the nature of the dispute and the relevant industry sector involved.

Venegas: Latin American courts have gotten more experienced in arbitration topics in the last 20 years. Regarding the future of recognition and enforcement of foreign arbitral awards going forward, they will likely be quickly recognised. Furthermore, the evolution of the interpretation of concepts such as public policy and due process will make the legal landscape for enforcing or vacating an award much more predictable. Moreover, the fact that some awards have been vacated or refused enforcement has led to investment arbitration complaints. This path would surely have an impact in the conscious decision of Latin American countries to be more careful in the manner in which enforcement and nullification of awards proceedings are decided. This factor will be very important in helping to force

the region to take giant steps to approach a 'golden age' of arbitration, which may keep Latin America at pace with countries such as England, France and Switzerland.

Ossa: We are very confident that most Latin American jurisdictions will rise to the challenges and overcome their limitations, accepting international standards.

Gosis: The current scenario is one where an almost universal rule – that reflected under both the New York Convention and the Panama Convention – is applied rather consistently across the region. As a result, as time goes on, with the relative increase in the number of cases, the improved training and practice by Latin American parties, counsel, arbitrators and judges, the prospects for recognition and enforcement of international awards in Latin America is a rather promising one. CD

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