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GENTIUM LAW 



Arbitration in the Americas: Report on a Survey of Arbitration Practitioners



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Introduction

The use of empirical methods in assessing the quality and effectiveness of dispute resolution is a relatively recent development in Europe, but far less so on the western side of Atlantic. This is a phenomenon worthy both of observation and explanation. Firstly, one might wonder, how can any method of study of a branch of law not be “empirical”? Law, and in particular dispute resolution, is about the study of the rules governing human interaction and legitimate conflict. Surely it must be empirical. Nevertheless, this platitude overlooks a distinction between what one might call traditional and social science-based analyses of legal process.

Scholars of law, and legal practitioners themselves, have traditionally viewed the study of law as within the field of so-called “humanities”: that is to say, academic disciplines distinctive from the sciences, that do not use the scientific method but instead apply logics of their own. The traditional way that law has been taught in European universities has been to treat it as a self-contained discipline, construed usually but not always in the context of law’s historical development. Depending upon the legal tradition involved, legal study may involve reading historical case law; analysing how the principles espoused in case law have been developed by courts across the decades or even centuries; studying the drafting of legislation; understanding the logic of civil codes; and considering how judges and tribunals apply the law to problems or disputes within the context of specific procedural rules.

This traditional view of the study of law translates into nuances of legal practice. It may encourage formalism: a view that the final answer to any problem about the interpretation of a legal principle or procedural rule lies in study of the underlying metaphysics of the legal system, if one can put things like that. In the common law, this approach may entail that a question of law needs to be determined by reference to consideration about how the law has historically been applied by courts and how it has developed. In a “legal science” tradition, the answers to questions of legal interpretation may lie in analysing the logical relationships between different terms and concepts within a legislative structure. In any event, the answers to legal problems tend to be perceived as intrinsic to the law. To answer legal questions, you ask lawyers and they give you legal answers.

There is an alternative approach to the law, which I loosely class as “empirical”, but really I consider to be a part of the law and economics movement. The thought underlying this alternative approach is that the value or otherwise of any specific legal or procedural rule should be determined by extrinsic, rather than intrinsic, factors. When faced with a question of legal interpretation or another problem of legal analysis, the so-called empirical approach involves not ever-deeper analysis of the metaphysics of the legal system in question but instead reference to value judgments whose foundations lie outside the law. This means that we answer legal questions - and we judge the value and effectiveness of legal systems - by reference to values external to the law, that we use to assess other aspects of society that we find important for human wellbeing.

In other words, in adopting the empirical approach, in asking “how should the law develop?” we decide upon an external method for assessment of the relative utility of one legal system or principle over the other and then we engage in an exercise of relative measurement. Conceptually, the origins of this approach are in what some legal scholars identify as the discipline of comparative law. But comparative law has risked periodically descending into an exercise in proverbial comparative naval-gazing. Reviewing some classical treatises on comparative law, they sometimes read as though, to paraphrase: you have that system; we have

that system; they look different but really they are not as different as we think; thus we should consider all legal systems across nations as aspects of one harmonious whole.

I consider this a somewhat intellectually light-hearted approach, with which I prefer not to associate myself. Instead my vision of contemporary legal practice is that of competition between jurisdictions and between procedural and substantive rules. Notwithstanding some trends in contemporary geopolitics that suggest a partial slowing in the speed of globalisation, I consider that we nonetheless continue to live in a world that is far more interconnected in financial and political terms than in any prior historical era. The consequence of this is that people and businesses have choices of law, legal systems and dispute resolution mechanisms when they engage in international business and politics. This gives rise to the question of which system is best. It is no good, following what one might admittedly meanly characterise as the classical comparative law approach, saying that all legal systems are the same and are just reflections of one-another through different cultural lenses. This is palpably not the case, and commercial people - who choose one legal system over another through their choices of law and jurisdiction clauses in their international contracts - know it.

Hence, we must find a method of measuring the relative effectiveness of different legal systems and different procedural rules to resolve disputes. Some are surely better than others. Legal rules matter, or nobody would bother to write those rules. We have to face the potentially uncomfortable reality that the various common law and civil law systems that are pervasive across the world can be assessed relative to one-another. Some may, and certainly will, prove better than others. To repeat, it is likely that international commercial actors will likely be the ultimate arbiters of these questions, and indeed to an extent they already are. That is why some arbitral jurisdictions are dominant: commercial people trust them more than they do the alternatives.

Nevertheless, when we consider these questions through an academic lens, we are bound to ask ourselves how to assess, in principle, the relative merits of different systems. Obviously, the answer is that we measure things. But what do we measure, and how? The law and economics movement, of which I am proud to say that I consider myself a part, has been raising questions of this kind at least since the 1970's. That movement is far more advanced in the Americas than it is in Europe. The movement says that we should measure the relative effectiveness of legal systems and legal rules, and form a view upon these issues, by reference to empirical studies as to which legal rule of which procedural system might be better. It is fundamentally a market-economy approach to the law. Even in the United States, in which the movement was pioneered (at the University of Chicago Law School, of which I am an alumnus), there has been substantial resistance to this way of thinking about the law. But I am firmly of the view that the naysayers are wrong.

A number of lawyers do not like the economist's, or empiricist's, view of the law. It is easy to see why not. It entails that people outside the law, using a range of empirical tools such as (but not limited to) surveys, data consolidation, regression analyses and the insights of econometrics, might form a view about whether lawyers are doing their jobs properly. For a relatively insular discipline in the humanities such as the law, sharp exposure to the scientific methods of external evaluation may come as a shock and may rock boats.

Nevertheless, I consider this approach important as an analytical tool applicable to evaluation of law, and it is perhaps most important in the field of international arbitration. That is for the obvious reason that international arbitration represents a privatisation of the dispute resolution process. An arbitration clause in a contract or treaty is an agreement by the parties to forego the domestic courts of a country in resolving their disputes in favour of a private system of binding adjudication in which the arbiters of the dispute will not be public servants (that is to

say, judges) but rather private people, hired by the parties upon their merits to resolve the dispute at hand. It follows from this that a competitive market will naturally develop within international arbitration, inter alia between different curial jurisdictions; different arbitral rules; and different arbitrators. The logic of the market prescribes that market-driven choices premised upon a transparent information environment will be of greater net social benefit than others. The academic question that follows is that as a matter of principle, how do we decide which system is better than the others? The answer must be empirical. It must involve measurement. The only question is what we measure.

Arbitrators, arbitral institutions (that set arbitral rules), and arbitral jurisdictions, have all to a degree attempted to resist what one might call the empirical tendency. Law is a conservative profession, and lawyers are conservative people. Even those who work in the field of international arbitration - which might, a priori, be considered as properly the most cosmopolitan of fields of legal practice - might succumb to the conservative temptation. Every arbitration lawyer is aware of his or her natural instinct to revert to the procedural conventions and comfort of the substantive legal principles of one's home system of law, in which one was trained. Hence the notion that international arbitration ought to be subject to extrinsic assessment, rather than stand as an unimpeachable edifice of legal majesty subject only to intrinsic tests for its coherence, remains profoundly attractive to practitioners within the field.

Much of the typical literature in International arbitration reinforces this perspective. The quantities written about the practice of international arbitration are quite phenomenal: surely far more than any other branch of law, proportionate to the relatively short recent history of the discipline. There may be a clear commercial reason for this. There is a lot of money in international arbitration, and hence an exercise has emerged in reinforcing the legitimacy of the discipline through publication by practitioners and arbitral institutions of academic treatises. What I nevertheless find remarkable is that while one might imagine the international arbitration community to be most diverse, drawing its practitioners from across the globe and therefore from a variety of different legal systems, in fact the discipline appears almost artificially homogeneous. Arbitration lawyers, and arbitrators, across the world all sound like they are talking about much the same thing. How can this be?

They may be papering over the cracks. The considerable proliferation of academic treatises about international arbitration may be an exercise in pretending that there is more transnational consistency in the discipline than really is the case. As long as the illusion of consistency is maintained, the intrinsic view of law - excluding an empirical, extrinsic relative assessment of legal systems to which lawyers may be so adverse because it might expose them to the vigour of the competitive market - may comfortably be preserved. Arbitration practitioners face an acute challenge. To the extent that International arbitration lawyers admit that there might be yawning gulfs between the quality of arbitration procedures in different jurisdictions, they invite external assessments of their work that they might very well prefer do not take place.

Hence, arbitrators may form cliques. International arbitration has long been known to be a profession of lawyers that suffers from a bottleneck. It is difficult to progress beyond a certain level, because the highest ranks of the profession have been monopolised by a self-reinforcing set of the imagined great and the good who propagate the notion that international arbitration is a legal discipline exhibiting uniformity of practice that does not in fact exist. If that is right, then it is easy to understand why arbitration lawyers might pursue such an artificial vision. It shields them from exposure to external comparative evaluation of what they are doing.

Nevertheless, this tendency is anti-competitive. It is bad for business. It is bad for the users of arbitration, who want to be able to assess the relative merits of different systems of international arbitration. That is because they are purchasers of legal services in an international market, and they are running commercial activities. They need and they want the best value for money, most effective system that meets their needs.

Another tool that might be perceived as being used within the international arbitration community to prevent the sort of extrinsic review that as an advocate of the law and economics movement I approve of, is the perpetuation of the myth of confidentiality as a prerequisite of the international arbitration process. I am opposed to confidentiality as a precept of arbitration or of any dispute resolution process. Arbitration, in whatever form, serves a public function, which is resolution of disputes. The resolution of disputes is in the general public interest, domestic or international, because in the dispute resolution process justice is done and facts - often inconvenient to the parties to the dispute but nevertheless in the public interest - may be uncovered. It is hard to defend the concept that any quasi-judicial process should be private. Parties to a dispute should not be able to hide from the wider world their dirty laundry. Justice should be done in public. Arbitration should not be a way of contracting out of one's obligations to society as a whole by paying money to private arbitrators rather than relying upon public judges.

The good news is that arbitration is not actually a way out of this, even if a number of people might pretend that it is so. Notwithstanding ostensible obligations of confidentiality contained in the arbitral rules or curial laws of various institutions and jurisdictions, the fact of the matter is that arbitrations are only private and confidential to the extent that both parties want them to be so. If either party wishes to publicise arbitration proceedings, and/or the arbitration awards they give rise to, there is little in practice that the other party or the arbitrators can do to prevent that. The prevalence of court appeals from arbitration decisions renders arbitrations ever less confidential, because those court proceedings will often be public. An entire financial and arbitration media and journalism industry now exists to create publicity out of arbitration proceedings. The notion of confidentiality in arbitration is now chiefly a fiction.

Nevertheless, the principally illusory concept of confidentiality in international arbitration retains a value for those arbitration lawyers who continue to avoid external evaluation of their work. In the name of confidentiality, it remains difficult to acquire statistics relevant to assessing the relative effectiveness of different procedures of international arbitrations. Figures such as the average time taken to resolve a dispute; the average expenses involved; the number of arbitration awards subject to successful appeal; and the period of time typically taken to enforce an arbitration award, are all to some extent or other hidden from view under the shadow of the totem of arbitral confidentiality. This is reinforced by the fact that arbitral institutions, being private bodies, do not habitually comply with freedom of information laws applicable to courts. Hence the task facing the empiricist in undertaking a review of the relative effectiveness of different systems of international arbitration is often inhibited.

I regard a study of the current kind as a laudable contribution in the continuing efforts to part ways with what I regard as an essentially deleterious convention of promoting indefensible confidentiality in the practice of international arbitration. Like every other activity of public interest - and the administration of justice is uncontroversially always a matter of public interest - arbitration benefits from the cleansing sunlight of unrelenting public scrutiny. The only way we are going to be able to assess the relative merits of different systems of international arbitration - which is faster, which is more just, which is less corrupt, which is cheaper, which is more suited to certain types of disputes, which can actually be enforced - is to study the different systems in use. This requires empirical methods. This study is an empirical one. There should be many more such studies. The authors are undertaking a hugely important exercise relevant to improving the

quality of international arbitration by rendering the market in international arbitration services more liquid.

To an extent, the authors of this study are going against the grain and they should be admired for that. Not every international arbitration lawyer might appreciate what they are doing. But in another way, I believe that they are going very much with the grain. The future of international arbitration can only lie within the transparent confines of a competitive market and as an acknowledged instrument in the administration of international justice, with all the obligations of publicity and transparency that entails. The people who will demand that arbitration proceeds in this way are its ultimate users: those who pay for it. They want a transparent system, which will allow them to assess the relative merits of different systems of arbitration and make their commercial choices accordingly. That is why I believe that the increasingly empirical approach towards international arbitration is not only desirable but inevitable.

Hence, I am proud to contribute this foreword, and my own modest thoughts about the conceptual foundations of this project. I would like to express my gratitude and admiration to Tony Cole, Pietro Ortolani, Daniel de Andrade Levy, Manuel Gomez, Paolo Vargiu, Masood Ahmed, Pinar Karacan and Stephanie Trindade Cardoso for their exceptional work over the past months in bringing this project to fruition, and I look forward to their further contributions to this essential field of legal study.

The contours of legal scholarship in the field of international arbitration, and elsewhere, are changing fundamentally in this relentlessly globalising world. We cannot turn back the clock. Globalisation is driven by technology, which means that ever more legal practice is undertaken across borders and hence is subject to competitive pressures between systems that did not exist previously. I believe that in an increasingly competitive global market for legal services, we will see many more such studies. I commend this as an unimpeachably good thing.

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Methodology¹

This report is based on survey research directed by Tony Cole, with Pietro Ortolani, Daniel de Andrade Levy, Manuel Gomez, Paolo Vargiu and Masood Ahmed. The research was performed with the support of the ICC International Court of Arbitration and of the Organization of American States.

The results reported here were generated through the use of a large-scale Survey that was delivered in all States of the Americas (North, South, Central, Caribbean). Particular attention was paid to the methods used for generating participants in the Survey, as the reality of arbitration as a field of practice means that it is not possible to identify a discrete group of individuals engaged in arbitral practice, and ask them to complete a survey. Rather, while in almost all jurisdictions covered by the Survey there were identifiable leading arbitration practitioners, a large amount of arbitration work is often done by individuals who do not specialize in arbitration, but rather specialize in another field and practice arbitration on a more occasional basis. In order to generate a realistic picture of arbitral practice, however, rather than merely to repeat the traditional focus of academic arbitration study on leading arbitral practitioners, it was necessary to include such non-specialist practitioners amongst those answering the Survey.

That is, the reality that arbitration as a field of practice is routinely divided into a smaller “core” of leading specialists and a larger “periphery” of less specialized individuals means that a survey solely of individuals in the “core” would risk generating results reflecting exclusively how arbitration was practiced by its most specialized practitioners, thereby misrepresenting a practical reality in which much arbitration work is done by individuals for whom arbitration is not their central area of work. On the other hand, as the “periphery” is substantially larger than the “core”, a broad survey open to all respondents would risk generating results overwhelmed by responses from individuals who engage in arbitration relatively rarely, thereby misrepresenting again the reality of arbitral practice.

This problem was addressed by promoting the Survey in two broad ways. Firstly, international directories were used to identify individuals who could plausibly be seen as members of the “core” of arbitration practitioners within each State, and these individuals were directly contacted and invited to take the Survey. Two of these directories, Chambers Europe and WhosWhoLegal, are best understood as focusing on the “elite” level of practitioner, and individuals recommended in these guides for their arbitration expertise were invited to take the Survey. The third guide, Legal500, provides a broader coverage of domestic legal practice, and was therefore important as a means of identifying individuals with strong domestic practices but potentially less international recognition. In order to achieve this goal, Legal500 was used differently, and individuals were invited to take the Survey if they were identified by Legal500 as prominent in litigation within a State and they self-identified as an arbitration practitioner on their law firm website.

The second method of generating participants in the Survey, designed to encourage the participation of “periphery” members of arbitral practice in each State, involved opening the Survey to public participation, by any individual who engaged in the practice of arbitration, whether as a lawyer or as an arbitrator. In order to achieve this goal, the Survey was promoted in a number of ways: (i) the leading arbitral institutions in each State were contacted and asked

¹ This section is adapted from Tony Cole, Pietro Ortolani and Barbara Warwas, “Arbitration in Southern Europe: Insights from a Large-Scale Empirical Study”, 26 *American Review of International Arbitration* 187 (2015) (based on the same methodology as the present report).

to promote the Survey; (ii) the Chartered Institute of Arbitrators, the leading global professional arbitration institution distributed the survey to its membership; (iii) links to the survey were distributed on OGEMID, the central online discussion forum for arbitration specialists, as well as on other email discussion groups relating to arbitration; (iv) individuals who self-identified on LinkedIn as working in arbitration were invited to take the survey; (v) law firms identified in Chambers as leading litigation firms in each State covered by the Survey were contacted, and asked to distribute the survey to any individuals at their firm engaged in arbitration. Furthermore, in order to ensure maximum participation, the Survey was translated into both Spanish and Portuguese.

The Survey was ultimately taken by 508 respondents from 39 States² across the Americas, with 422 respondents (83%) completing all questions asked. Because of the cross-border nature of much arbitration practice, individuals were asked to identify the State in which they primarily worked, rather than being allocated to a particular State based upon their geographical location.

National reports were drafted for each State from which 5 or more complete responses were received. Full response data is presented for all States, including those from which fewer than 5 responses were received.³ For Brazil, Canada, and the United States of America, responses are also reported on a state/province level.

Finally, in order to ensure the accuracy of the interpretations of arbitral practice developed in each of the national reports included here, each national report has been reviewed by arbitration practitioners from the State in question. Feedback from those individuals has been incorporated into the interpretation of the Survey results, and the individuals themselves are identified at the beginning of each national report.

² “State” as used here includes certain independent jurisdictions that are not formally States, e.g. British Virgin Islands.

³ However, where there were fewer than 5 respondents from a State, some questions have been omitted, in order to ensure respondent confidentiality.

Argentina

Profile⁴

The respondents' group for Argentina is composed of 18 individuals.⁵ All of them are qualified to practice as a lawyer in Argentina and have their primary work site in the city of Buenos Aires. As far as their professional role is concerned, 94.44% of the respondents reported working at law firms and 11.11% qualified themselves as sole practitioners. One of the respondents working at a law firm also reported being affiliated to a University.

Seat

Argentina is one of the few jurisdictions in Latin America that does not have a federal law regulating all aspects of arbitration. Before the enactment of the New National Civil and Commercial Code (NCCC),⁶ legislation regarding arbitration was scattered across multiple laws and mostly in the procedural codes of each Province.⁷ The NCCC, in force since August 2015, regulates the contractual aspects of arbitration at the federal level, but not the procedural ones, which remain regulated by the procedural codes of each Province. The NCCC tries to enhance Argentina's arbitration-friendliness, devoting 17 articles to it; the statute is mostly based on the UNCITRAL Model Law,⁸ but it is also influenced by the Quebec Civil Code and the French Code of Civil Procedure.⁹ Currently, a new arbitration statute modelled after the UNCITRAL Model Law is being discussed in the Argentine Congress.

Despite the enactment of the NCCC, the Argentinean respondents expressed a generally negative opinion on their local arbitration statutes. When asked to evaluate the supportiveness of the laws applicable to domestic arbitration in Argentina, 46.15% of local respondents qualified them as "Unsupportive" and 15.38% described them as "Very unsupportive", while only 30.77% answered "Supportive" and 7.69% answered "Very supportive". By way of comparison, only 4.85% of respondents survey-wide qualified their local laws applicable to domestic arbitration as "Very unsupportive", and 4.16% described them as "Unsupportive". Regarding international arbitration, the laws of Argentina were considered by 46.15% of the local respondents as "Unsupportive", by 30.77% as "Supportive" and by 23.08% as "Very supportive".

The level of understanding of arbitration on the part of legislators in Argentina was characterized as "Very low" by 30.77% of the respondents, "Low" by 53.85% of the respondents, "Adequate" by 7.69% of the respondents and "High" by the same percentage of respondents. The backlash against investment arbitration in Argentina has probably contributed to the negative attitude of legislators.

The most likely explanation for the negative perception of the NCCC is that some provisions still give rise to doubts, especially those concerning arbitrability and challenges against the award. As for arbitrability, according to Article 1651 of the NCCC, disputes relating to civil status, capacity and family law, consumer law, standard form contracts and labour law are "excluded from" arbitration. In addition, doubts exist as to what legislative framework should apply to

⁴ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Fernando Aguilar, José Martínez De Hoz, Francisco A. Amallo, María Inés Corra, Martín Torres Girotti.

⁵ 15 respondents qualified their gender as "Male", 2 respondents qualified their gender as "Female" and 1 respondent answered "Other".

⁶ Law n° 26.994 of 2014, enacting the New Argentinean Civil and Commercial Code.

⁷ Francesco Amalio and José Martínez de Hoz, 'Argentina' in *The Arbitration Review of the Americas 2017*, Global Arbitration Review.

⁸ Ibidem.

⁹ Amalio and Martínez (n 3).

disputes to which the State is a party, given that Article 1651 expressly excludes these disputes from the scope of application of the NCCC.¹⁰

Further uncertainties arise in connection with consumer disputes, despite the fact that the aforementioned Article 1651 apparently excludes them from the scope of arbitrability. More specifically, Article 59 of Law 24,240 on consumer protection provides for the establishment of arbitral tribunals for consumer disputes. Given this apparent contradiction in the law, it is unclear whether consumer arbitration should be deemed to be regulated by the law on consumer protection, derogating from the NCCC,¹¹ or whether this type of cases should simply be regarded as not arbitrable. Similar problems arise in connection with labour disputes.

As far as challenges against the award are concerned, Article 1656 of the NCCC gives rise to further doubts, as it provides that the parties cannot waive the right to “challenge” final award which are “contrary to law”. It is unclear, however, which challenge procedures are encompassed within the scope of such non-waivable right of challenge.

As an additional factor potentially limiting the attractiveness of Argentina as a seat of arbitration, the local respondents reported a rather strict attitude on the part of the local courts: namely, courts in Argentina seem to be strict in interpreting the validity and scope of arbitration agreements. When asked to describe the attitude of Argentinean courts in interpreting the validity of arbitration agreements, none of the local respondents answered “Liberal” or “Very liberal”. By contrast, 26.67% of them answered “Neutral”, 60.00% answered “Strict” and 13.33% answered “Very strict”. Similarly, Argentinean courts were also considered strict in interpreting the scope of arbitration agreements: 20.00% of the respondents qualified Argentinean courts as “Very strict”, 46.67% considered them “Strict” and 33.33% qualified them as “Neutral”.

It is interesting to note that, when asked to recommend five countries as seats of arbitration, the majority of Argentinean respondents did not indicate their home jurisdiction, but rather Uruguay, the United States of America, France, England and Chile. This data-point corroborates the finding that local respondents do not have a particularly positive opinion of Argentina as a seat.

Yet, despite the problems and uncertainties currently affecting arbitration in Argentina, this mechanism of alternative dispute resolution undoubtedly has a good potential for future development and expansion. Most notably, and unlike the majority of respondents survey-wide, Argentinean respondents considered that it is not more expensive to arbitrate a dispute than to litigate in the local State courts. In fact, 23.08% of respondents considered arbitration to be “Much cheaper” than litigation, 53.85% described it as “Slightly cheaper” and 23.08% reported that “Costs are the same”. Conversely, none of the respondents stated that arbitration is “Slightly more expensive” or “Much more expensive” than litigation. Besides, 76.92% of the respondents considered arbitration “Much faster”, 15.38% considered it “Slightly faster” and 7.69% considered that arbitration and litigation offer “The same speed”. In sum, arbitration in Argentina generally seems to offer advantages compared to litigation, in terms of both speed and costs. Given the importance of these factors, it is reasonable to predict that Argentinean arbitration may become much more popular and widespread in the future, once the legislative framework is made more friendly and intuitive.

¹⁰ Arroyo D. P. F., Vetulli E. H., *The New Argentinian Arbitration Law: A Train in a Unknown Direction?*, *Arbitration International*, 2016, 32, 349-372, 363.

¹¹ GAR, 15 August 2016, Amallo F., Hoz J. M., *The Arbitration Review of the Americas 2017*.

Procedure

According to the survey results, arbitration in Argentina is conducted predominantly with the support of an administrative institution, rather than on an *ad hoc* basis. More specifically, 53.85% of respondents estimated that only “0-25%” of the arbitrations seated in Argentina in the past five years were conducted on an *ad hoc* basis, and 38.46% estimated a percentage of “26-50%” for *ad hoc* proceedings.

Some insights on the procedural reality of Argentinean arbitration can be obtained by analysing which factors the local respondents indicated as strong reasons to suggest arbitration. A common reason indicated by many respondents from Argentina was the need to keep confidential all information relating to the transaction or dispute. This result suggests that commercial arbitration in Argentina is normally protected by confidentiality. Furthermore, the respondents also indicated that arbitration is advisable if “The parties hope to maintain a long-term relationship, even beyond any disputes that may arise”. This data-point seems to suggest that arbitration in Argentina is somewhat less adversarial than litigation, and therefore desirable for parties wishing to maintain positive commercial relations. In a similar vein, it should also be considered that Argentinean arbitration was reported as being significantly faster than litigation: by helping the parties avoid protracted court proceedings, arbitration can undoubtedly ameliorate the relationship between the disputants.

The survey also offers interesting insights as to how often arbitration is used in Argentina. The respondents were asked to estimate what percentage of the contracts concluded between domestic commercial entities situated in their country included an arbitration agreement; 29.41% of the Argentinean respondents estimated a percentage of “0-25%”, 47.06% answered “26-50%”, 17.65% answered “51-75%” and 5.88% answered “76-100%”. According to the majority of respondents, hence, arbitration clauses are not infrequent in domestic commercial contracts, although there are different views as to how common their use is. When asked the same question with respect to international commercial contracts, Argentinean respondents estimated a higher rate of inclusion of arbitration clauses: 29.41% of them estimated that agreements to arbitrate are included in “76-100%” of international contracts, while 52.94% answered “51-75%” and 17.65% answered “26-50%”. In a nutshell, it seems possible to conclude that the inclusion of arbitration clauses in international contracts is the rule, while the inclusion of the same type of dispute resolution clause in domestic contracts is the exception.

Consistently with these results, the Argentinean respondents also reported a predominance of pre-dispute agreements to arbitrate over submission agreements concluded once the dispute has already materialised. More specifically, 78.57% of Argentinean respondents estimated that 76-100% of domestic arbitrations seated in Argentina are based on a pre-dispute agreement, and 82.35% of them offered the same estimate with respect to international arbitrations seated in this jurisdiction.

Market

The demographics for the Argentinean respondents seem to suggest that the current local arbitration market is not particularly open to newly qualified legal professionals: namely, none of the respondents reported qualifying to practice as a lawyer in the 2007-2016 period. Conversely, 22.22% of them obtained their legal qualification in the 2000s, 27.78% in the 1990s, 27.78% in the 1980s, 5.56% in the 1970s and 16.68% in the 1960s.

The respondents were also asked to specify how many years after their qualification to practice as a lawyer they were involved in their first arbitration. In this respect, the survey results offer a rather mixed picture: 16.67% of the respondents were involved in their first arbitration from 0 to 2 years after they qualified, while for 11.11% it took 3-5 years, for 22.22% it took 6-9 years, for 27.78% it took 10-15 years and for 22.22% it took more than 15 years. Interestingly, a

significant percentage of the respondents took less than ten years to start working in arbitration, but - as mentioned above - none of them qualified in the last ten years. A possible explanation for this result is that the Argentinean arbitration market was once more open to young professionals, and has now become more difficult to access as an effect of the financial crisis.

There seems to be a community of Argentinean practitioners who devote a significant percentage of their time to arbitration, although most of them do not practice arbitration on a full-time basis. Namely, when asked to estimate what percentage of their working hours they devote to arbitration, 16.67% answered "76-100%", 27.78% answered "51-75%", 22.22% answered "26-50%" and 33.33% answered "0-25%". 72.22% of the respondents took on 1-4 cases per year over the past 5 years, 22.22% took on 5-9 cases and 5.56% took on 10-15 cases.

As for the type of arbitration that the respondents are involved in, 22.22% of them devoted 51-75% of their arbitration work over the past 5 years to international commercial cases; 33.33% devoted 26-50% of their time to international commercial arbitration and 33.33% devoted 1-25% of their arbitration work to the same type of cases. As for domestic commercial arbitration, 33.33% of respondents reported no involvement in it, while 33.33% of them dedicated 1-25% of their work to the field and 33.33% devoted from 26-50% of their time to it.

The Argentinean respondents also reported a significant involvement in energy arbitration: even though 38.80% of them never worked on this type of cases, 27.78% of the local respondents devoted from 1-25% of their arbitration work to the field, 11.11% devoted 26- 50% to it, 11.11% devoted 51- 75% to it and 11.11% devoted 76- 100% to this type of arbitration.

Bolivia

Profile¹²

The respondent group for Bolivia was rather small, with only 5 respondents (all male). For this reason, the results summarized in this report should be regarded as basic indications, providing nothing more than a broad-stroke picture of some core features of arbitration in this jurisdiction, with no pretense of completeness.

Seat

To an external observer, Bolivia may apparently seem like a perfect jurisdiction for arbitration to flourish in. The survey respondents that arbitration in Bolivia is significantly faster than State court litigation, and its costs are not disproportionate. More specifically, 80% of respondents considered arbitration “Much faster” than courts, and 20% considered it “Slightly faster”. Furthermore, when asked to compare the costs of arbitration with those of litigating a case in court, 60% of respondents described the former alternative as only “Slightly more expensive” than the latter.¹³

In addition, the law applicable to arbitration between private entities in Bolivia provides no direct evidence of an unfriendly attitude towards this mechanism of dispute resolution: Law No 708, on Conciliation and Arbitration, applies both to domestic and international arbitration, and it is largely modelled after UNCITRAL Model Law.

Despite these data-points, however, Bolivian respondents did not generally portray arbitration as enjoying wide popularity or support in their home jurisdiction. In particular, 80% of the respondents characterized the understanding of arbitration by the business people in Bolivia as “Low”, and 20% as “Adequate”.¹⁴ The question arises, then, as to what is preventing arbitration from becoming more widespread and central to the resolution of commercial disputes in Bolivia.

The answer to this question seems to lie mainly in the attitude of some key stakeholders *vis-à-vis* arbitration. Notably, none of the respondents had a positive opinion as to the level of understanding of arbitration on the part of judges in Bolivia: 25% described it as “Very low” and 75% characterized it as “Low”.¹⁵ Along similar lines, the attitude of Bolivian judges toward arbitration was characterized as “Negative” by 40% of the respondents and “Neutral” by 60% of them.

As far as the local legislators are concerned, the respondents’ perception was more mixed, but mainly not positive. When asked to evaluate the level of understanding of arbitration on the part of legislators in their home jurisdiction, 20% of Bolivian respondents characterized it as

¹² Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Pedro Barrientos, Fernando Aguirre B.

¹³ As for the rest of the sample, 20% described arbitration as “Much more expensive than litigation, and the remaining 20% qualified arbitration as “Slightly Cheaper” than litigation. One possible explanation for this diversity of views is that some respondents factored in the costs associated to the length of court proceedings, when making the comparison, whilst others did not.

¹⁴ By way of comparison, only 1.86% of respondents survey-wide described the understanding of business people as “Very low” and 32.94% described it as “Low”. However, it must also be noted that this lack of knowledge is not necessarily associated with an arbitration-unfriendly attitude: the attitude of business people towards arbitration was deemed “Very positive” by 20% of the respondents, “Positive” by 40% of them and “Neutral” by 40% of them.

¹⁵ This result is particularly meaningful, when compared to its survey-wide counterpart. More specifically, only 1.63% of respondents survey-wide described the level of understanding of judges as “Very low” and 21.58% described it as “Low”.

“Very low”, 40% as “Low”, 20% as “Adequate” and only 20% as “High”. Along similar lines, the attitude of legislators was characterized as “Very negative” by 20% of the respondents, “Negative” by 40%, “Neutral” by 20% and “Positive” by 20% of them.

The negative perception of understanding and attitude, on the part of both judges and legislators, is likely to be the result of the combined influence of multiple legal, social and cultural factors. However, it is possible to find some support for one particular explanation, connected with Bolivia’s experiences as a respondent State in investor-State disputes. In the early 2000s, Bolivia has been hit by claims brought by foreign investors, arising out of concession contracts governing the concession of essential services¹⁶ and the use of natural resources.¹⁷ The delicate nature of these cases triggered a wave of criticism against investment arbitration¹⁸ and ultimately led Bolivia to denounce the ICSID Convention, in 2007.¹⁹ These facts, together with the circumstance that Bolivia has been hit by a total amount of 14 known investment cases since 2002,²⁰ are likely to have generated a negative public opinion of arbitration as a whole, affecting also commercial arbitral proceedings which do not involve State parties. In fact, this climate has even triggered rumours that arbitration may be entirely abolished from the Bolivian legal system.²¹

It is perhaps because of this mixed picture that the survey respondents did not report a uniform view, as to how supportive of arbitration the Bolivian laws ultimately are. As far as domestic arbitration is concerned, 25% of Bolivian respondents considered their local laws to be “Unsupportive” and the same percentage considered them to be “Neutral” (25%), “Supportive” (25%), and “Very supportive” (25%). Regarding the laws applicable to international arbitration, 25% characterized them as “Unsupportive, 50% as “Neutral”, 25% as “Very supportive”.

¹⁶ *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3).

¹⁷ *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2).

¹⁸ In the wake of the cases mentioned above, Bolivia has amended the legal framework applicable to foreign investments and arbitration. The Constitutional Reform of 2009 introduced a provision according to which managing property rights over natural resources and controlling the production and industrialization of resources is the objective of state owned companies. Furthermore, foreign companies performing activities in oil and gas sector may not submit to international arbitration: José Carlos Bernal Rivera, “Can Bolivian State-Owned Companies Submit to International Arbitration? Analyzing Bolivia’s Intricate Legal Framework on Foreign Investment”, <https://www.iisd.org/itn/2017/03/13/can-bolivian-state-owned-companies-submit-to-international-arbitration-analyzing-bolivias-intricate-legal-framework-on-foreign-investment-jose-carlos-bernal-rivera/>; José Carlos Bernal Rivera, “Bolivia’s Step Back in State Arbitration”, *Kluwer Arbitration Blog*, May 15 2017, <http://kluwerarbitrationblog.com/2017/05/15/bolivias-step-back-state-arbitration>.

¹⁹ José Carlos Bernal Rivera (and Mauricio Viscarra Azuga, “Life after ICSID: 10th anniversary of Bolivia’s withdrawal from ICSID”, *Kluwer arbitration blog*, <http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/>.

²⁰ Apart from the aforementioned *Aguas del Tunari* and *Quiborax* cases, see *E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia (I)* (ICSID Case No. ARB/07/28); *Ashmore Energy International (A.E.I) Luxembourg Holdings S.a.r.l. v. the Plurinational State of Bolivia* (SCC Case); *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia (II)* (PCA Case); *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8); *Oiltanking GmbH, Graña Montero S.A. and Graña Montero S.A.A. v. Bolivia* (PCA Case); *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (PCA Case No. 2011-17); *Abertis Infraestructuras S.A. v. Government of Bolivia* (PCA Case No. 2011-14); *South American Silver Limited v. The Plurinational State of Bolivia* (PCA Case No. 2013-15); *Red Eléctrica Internacional S.A.U. v. Plurinational State of Bolivia*; *Iberdrola, S.A. and Iberdrola Energía, S.A.U. v. Plurinational State of Bolivia* (PCA Case No. 2015-05); *Paz Holdings Ltd. v. Plurinational State of Bolivia*; *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia* (PCA Case No. 2016-39).

²¹ Andrés Moreno Gutierrez and Daniel Arrondo Zelada, “Bolivia” in *Global Arbitration Review, The Arbitration Review of the Americas 2018*, 80, 82.

Ultimately, however, Bolivian respondents seemed to agree on the fact that there are some significant obstacles for arbitration in their jurisdiction: notably, when asked to recommend five seats for international arbitration, only one respondent recommended Bolivia. In order to shed further light for the reasons justifying this result, it is useful to have a look at the results concerning the procedural reality of arbitration in Bolivia.²²

Procedure

According to the survey respondents, arbitration in Bolivia is rather fast. The respondents were asked to estimate the average time between the end of the hearings and the delivery of the final awards, in the arbitrations on which they worked over the past five years. Interestingly, all of them reported an average period of “0-3 months”, thus suggesting that arbitration in Bolivia is significantly faster than the survey-wide average.²³ This data-point is consistent with the aforementioned result, according to which arbitration in Bolivia would be “Much faster” than court litigation.

Given this reported efficiency, it is not surprising that the respondents also estimated that a significant proportion of commercial contracts involving Bolivian parties include an agreement to arbitrate. Based on their professional experience, 40% of the respondents estimated that 76% to 100% of domestic contracts, entered into in the past 5 years in Bolivia, include an arbitration agreement. Furthermore, 40% estimated a range between 51% and 75% and 20% between 26% and 50%.²⁴ However, it should also be noted that the survey respondents are arbitration practitioners, and as such they are particularly likely to be exposed to contracts containing an arbitration clause. For this reason, there is an inherent risk that the amount of contracts including an agreement to arbitrate may be overestimated.

While Bolivian arbitration is generally effective, it does not benefit from a particularly favorable climate, especially as far as judicial attitudes are concerned. More specifically, 60% of the local respondents considered Bolivian courts as “Very strict” in interpreting the scope of arbitration agreements. 20% considered them to be “Strict” and 20% considered them to be “Neutral”. By contrast, none of them reported a liberal approach. Along the same lines, 60% of Bolivian respondents stated that local courts are “Very Strict” when interpreting the validity of an arbitration agreement, 20% described them as “Neutral” and 20% qualified them as “Liberal”.

It is possibly because of this that, according to Bolivian respondents, the validity of the agreement to arbitrate is often challenged. In particular, 40% of Bolivian respondents stated that the validity of the arbitration clause was challenged in 51-75% of the domestic arbitrations they worked in over the past five years, and 20% even reported a frequency of 76-100%.

Unsurprisingly, Bolivian respondents reported a prevalence of pre-dispute arbitration clauses over post-disputes agreements to arbitrate. According to 60% of them, 76% to 100% of both domestic and international arbitrations on which they have worked over the past 5 years were based on a pre-dispute arbitration agreement.

²² The top 5 Countries that respondents would recommend as the seat of arbitration for an international arbitration are as follows: United States of America (indicated by 80% of the respondents), Chile (60%), France (60%), Mexico (40%) and Colombia (40%).

²³ Survey-wide, only 17.17% of respondents estimated an average period of “0-3 months” between the end of the hearings and the delivery of the final award, in domestic cases.

²⁴ Regarding international contracts, 60% of Bolivian respondents estimated that 76% to 100% of them include an arbitration agreement; 20% estimated a range between 51% and 75% and 20% of the respondents estimated a range between 26% and 50%.

Market

Bolivia has many institutions that can offer administrative support for arbitral proceedings, such as the Center for Conciliation and Arbitration of the National Chamber of Commerce (CNC), the Center for Conciliation and Arbitration of the Chamber of Industry, Commerce, Services and Tourism (CAINCO), the Center for Conciliation and Arbitration of the Cochabamba's Chamber of Commerce (CADECO), and the Center for Arbitration of the Bolivian Engineer Society (SIB). Consistently with this feature of the Bolivian market, the local respondents reported that administered arbitration overwhelmingly prevails over its *ad hoc* counterpart: all of them estimated that *ad hoc* proceedings do not constitute more than "0-25%" of the overall amount of arbitral cases in Bolivia.

For most respondents, arbitration was not a full-time field of practice. Namely, 60% of them reported devoting from 0 to 25% of their working hours over the past 5 years to arbitration, and 40% devoted from 26% to 50% of their working hours in the same period of time. In other words, no respondent reported being involved in arbitration on a full-time basis. 80% of the respondents took on from 1 to 4 arbitration cases over the past 5 years, and 20% took on from 5 to 9 cases.

As for the types of cases the respondents were involved in, all of them reported having worked on international commercial cases over the past 5 years: 80% devoted 1% - 25% of their working hours²⁵ to international commercial arbitration and 20% devoted 51% - 75% of their time to the same type of cases. All respondents also reported working on domestic arbitration.

Interestingly, the percentage of respondents who reported an involvement in investment arbitration is rather high: 40% devoted from 26% to 50% of their working hours to investment cases and 20% devoted from 51% to 75% of their working hours to the same field. This result is consistent with the circumstance that Bolivia was involved in a relatively high number of investment cases (see *supra*).

²⁵ In this context, the expression "working hours" refers to the hours the respondents devoted to arbitration-related work.

Brazil

Profile²⁶

The respondent group for Brazil is composed of 35 individuals (30 men and 5 women). 91.43% of the respondents work at a law firm, 2 operate as sole practitioners, 2 combine working at a law firm with working at a university, and 1 works in-house at a company. 62.86% of respondents were located in São Paulo (state), Brazil's leading economic center, and 28.57% in Rio de Janeiro (state), with one respondent from each of Minas Gerais, Amazonas and Paraná. 48.57% of respondents reported working as an arbitrator.

Seat

Brazil has a prominent but ambiguous place within arbitration due to a combination of its status as one of the world's largest economies, meaning that Brazilian parties are often involved in international commercial arbitrations, and its long-standing resistance to international investment arbitration. The results of the survey indicate a similar two-sided character to Brazil's involvement with commercial arbitration, with responses indicating the existence within Brazil of a healthy arbitration sector, but with Brazilian arbitration practitioners and Brazil as an arbitration seat receiving little recognition internationally.

Brazil was historically unsupportive of arbitration until the adoption in 1996 of a new Arbitration Law. Prior to 1996, arbitration was regulated through the Code of Civil Procedure, which provided little support for arbitration, including successful legal challenges that certain arbitration agreements deprived parties of their constitutional right to access court. Indeed, even after the adoption of the 1996 Arbitration Law, which was strongly influenced by the UNICTRAL Model Law, such objections continued until the issue was finally resolved when the Brazilian Supreme Court confirmed in 2001 that the 1996 Arbitration Law was constitutional. This notion of a relatively recent embrace of arbitration in Brazil is further underlined by the fact that Brazil only became party to the Panama Convention in 1995 and the New York Convention in 2002.

Nonetheless, while the preceding is consistent with a relatively common narrative of Brazil's governments as being hostile to arbitration, 96.77% of Brazilian respondents describes current Brazilian law as either Supportive (61.29%) or Very Supportive (35.48%) of arbitration, and a similar 96.78% described it as Supportive (48.39%) or Very Supportive (48.39%) of international arbitration. This similarity in results is consistent with the circumstance that in Brazil the same legal regime is applicable to both domestic and international arbitration.

Similarly, while Brazilian respondents generally viewed Brazilian legislators as having a low understanding of arbitration (54.84% selecting Low and 6.45% selecting Very Low, with only 6.45% selecting High and none Very High), they also described them as having a generally positive view of arbitration, with 51.61% of respondents describing Brazilian arbitrators as having either a Positive (45.16%) or Very Positive (6.45%) view of arbitration, and only 12.90% describing them as having a Negative view of arbitration.

Consistent with this picture, while the adoption of the 1996 Arbitration Law was clearly a major step for arbitration in Brazil, legislative support of arbitration did not end with that single measure. For example, in 2004, Brazilian legislators adopted Law No. 11.079, which allowed

²⁶ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Luis Fernando Guerrero, Flávio Yarshell, Paulo Rogério Brandão Couto, Marco Deluiggi, Carlos da Costa e Silva Filho, Ligia Maura Costa, Luciano de Souza Godoy, Rodrigo Garcia de Fonseca, Sergio Mannheimer, Giovanni Ettore Nanni, André Luís Monteiro, Lauro Gama.

arbitration agreements to be incorporated into Public-Private contracts if the seat of the arbitration was in Brazil and the language of the arbitration was in Portuguese, and Law No. 8.987, as amended by Law No. 11.196 in 2005, allowed the incorporation of arbitration agreements into concession contracts for public utilities if the same conditions were met. Most prominently, in 2015 a major reform of the Brazilian Arbitration Law was instituted, confirming the arbitrability of disputes arising out of standard form contracts,²⁷ and the participation of State or State-owned companies in arbitration.

There seems little question, then, that whatever Brazil's historical resistance to arbitration, arbitration has now achieved a settled place in the Brazilian legal system and has strong formal support. However, indications from the survey are that the support for arbitration in Brazil goes beyond purely formal endorsement in legislation. When asked to describe the approach of Brazilian courts to interpreting the validity of arbitration agreements, 72.73% of respondents described Brazilian courts as being either Liberal (54.55%) or Very Liberal (18.18%). Similarly, when asked to describe the approach of Brazilian courts to the interpretation of the scope of arbitration agreements, 42.42% of respondents described them as being either Liberal (33.33%) or Very Liberal (9.09%), with 42.42% describing them as Neutral. The pro-arbitration attitude of the Superior Court of Justice (Brazil's highest court for non-constitutional matters) is likely to have contributed to such positive perception.

The difference between these two results suggests that while Brazilian courts are supportive of the validity of arbitration agreements, they remain unwilling to direct parties into arbitration if it is unclear that they have agreed to arbitrate the specific dispute in question, which is perhaps unsurprising given the incorporation into the Brazilian constitution of a right to access court. Nonetheless, respondents do not describe Brazilian courts as restrictive in their approach to the interpretation of the scope of arbitration agreements, suggesting that this limitation is applied moderately.

It is, however, also notable that respondents from Rio de Janeiro (state) and Sao Paulo (state) present different views of the approach of courts to arbitration agreements, with respondents from Sao Paulo describing courts as more liberal with respect to both validity and scope of arbitration agreements than did respondents from Rio de Janeiro.

Finally, although respondents are ambiguous on the level of understanding of arbitration possessed by judges in Brazil, they regard those judges as nonetheless having a positive view of arbitration. While 25.81% of respondents described Brazilian judges as having a High understanding of arbitration, 22.58% described it as Low, with 51.61% describing it as Adequate. More encouragingly, however, 70.97% of respondents described Brazilian judges as having either a very positive (16.13%) or Positive (54.84%) view of arbitration.

Respondents also generally regarded Brazilian business people as having a relatively low understanding of arbitration, with 41.94% describing it as Low, 41.94% as Adequate, and only 16.13% as High (no respondent selected Very Low or Very High). Nonetheless, respondents regarded Brazilian business people as having a relatively positive view of arbitration, with 45.16% describing it as Positive, 45.16% as Neutral, and only 9.68% as Negative (no respondent selected Very Positive or Very Negative).

²⁷ Initially, the 2015 Brazilian Arbitration Act was to expressly confirm the arbitrability of disputes concerning consumers and labour law; the provisions at hand, however, were vetoed and did not enter into force. The Act, hence, only contains a general provision allowing arbitration for disputes arising out of standard form contracts. Subsequently, in 2017, Brazilian labour law was reformed, and arbitration in labour disputes was expressly allowed under certain conditions: the value of the fixed salary must be more than double the maximum amount of pension benefits, and the initiative to choose arbitration must come from the employee.

It is also notable that this is another question on which significant variations exist between respondents in Rio de Janeiro (state) and those in Sao Paulo (state). While 50.00% of respondents from Sao Paulo described business people as having a Low understanding of arbitration, and 40.00% an Adequate understanding, only 12.50% of respondents from Rio de Janeiro described business people as having a Low understanding of arbitration, with 50.00% selecting Adequate, and 37.50% selecting High. In turn, while only 30.00% of Respondents from Sao Paulo described business people as having a Positive view of arbitration, and 55.00% described it as Neutral, 75.00% of respondents from Rio de Janeiro described business people as having a Positive view of arbitration, with the remaining 25.00% selecting Neutral. This suggests that while support of arbitration in the business community in Sao Paulo is good, it is notably stronger in the business community in Rio de Janeiro.

Nonetheless, despite these strong signs of support for arbitration within Brazil, recognition of Brazil as an arbitral seat is largely non-existent outside Brazil itself. Brazilian respondents themselves appear positive about Brazil as a seat of arbitration, with 84.38% recommending Brazil when asked to recommend five jurisdictions to serve as the seat of an international arbitration. This places Brazil equal second with France, and only slightly behind the most recommended country, the United States of America (87.50%).

Notably, while 35.00% of respondents from Sao Paulo (state) recommended Chile as a seat for international arbitrations, and 10.00% recommended Uruguay, no respondent from Rio de Janeiro (state) recommended Chile or any other country in the Americas other than the United States of America and Canada.

However, when non-Brazilian respondents to the Survey were asked the same question, only 2.11% of respondents recommended Brazil, making Brazil equal 28th among the countries included in the survey, with the same level of popularity as the small island jurisdictions of Barbados and the Cayman Islands. Particularly notably, this result does not change hugely even when only non-Brazilian respondents from neighboring countries in Central and South America are considered. Only 4.67% of these respondents recommend Brazil, making Brazil the 19th most recommended seat by respondents from this region, and only the 10th most recommended country in the region. The circumstance that Brazil is the only Portuguese-speaking country in the region may, to a certain extent, constitute an obstacle to its popularity as a seat of arbitration.

These results make clear that while Brazil may have embraced arbitration, it has not yet achieved to convey even to practitioners from other countries in its region that it is a desirable country in which to seat an international arbitration.

Procedure

One of the traditional arguments most commonly offered in support of arbitration is that arbitration is faster than litigation in court, and unsurprisingly given the delays involved in litigation in Brazil,²⁸ the results from the survey indicate that arbitration in Brazil is indeed considerably faster than litigation in Brazil. Indeed, 93.73% of respondents described arbitration in Brazil as Much Faster than litigation in Brazil, with a further 3.13% describing it as merely Faster. This speed comes, however, at a cost, with 81.25% of respondents also describing arbitration in Brazil as Much More Expensive than court litigation, and a further 12.50% describing it as Slightly More Expensive.

²⁸ For example, in the State of São Paulo, by the year of 2015, there were 25 million pending processes in the Judiciary system. “As pessoas podem resolver melhor seus próprios litígios do que o Judiciário”. *Consulta Jurídica*. Available at: <http://www.conjur.com.br/2015-jan-18/entrevista-desembargador-jose-renato-nalini-presidente-tj-sp>. Access in 07.06.2017.

Nonetheless, this comparative speed of arbitration in Brazil appears to result primarily from the particular slowness of Brazilian courts, rather than because Brazilian arbitration is itself particularly fast. Only 6.25% of respondents reported that the domestic arbitrations in which they had been involved in the past 5 years concluded on average within 12 months, and none reported an average of less than 6 months. On the other hand, 56.25% of respondents reported average duration of 13-24 months, 31.25% reported 25-36 months, and 6.25% reported 37-60 months. Results for international arbitration are similar, but slightly slower (as is standardly the case for international arbitration), with 7.69% of respondents reporting an average duration of 7-12 months, and none less than 6 months, 38.46% reporting an average of 13-24 months, 38.46% an average of 25-36 months, and an average of 25.38% 37-60 months.

Another significant feature of arbitration in Brazil is the degree to which it appears to be dominated by arbitral institutions. Indeed, when asked to estimate what proportion of domestic arbitrations they believe are conducted *ad hoc* in Brazil, 83.87% of respondents estimated 0-25%, with none estimating over 50%. Similar numbers were given for international arbitrations, with 80.65% of respondents estimating 0-25% a further 12.90% estimating 26-50%, and only 6.45% estimating 51-75%. These results are perhaps unsurprising given the relatively recent development of significant arbitral activity in Brazil, and so the lack of the sort of underlying decades-old arbitration “culture” that usually supports a significant use of *ad hoc* arbitration

Market

Despite the relatively recent institutional endorsement of arbitration in Brazil, further evidence from the Survey that arbitration has now achieved an accepted place as a mechanism for the resolution of commercial disputes comes from the responses of Brazilian respondents when asked to estimate the proportion of commercial contracts entered into in Brazil in the past five years that contained an arbitration agreement. 40.00% of respondents estimate that over half of domestic commercial contracts contained an arbitration agreement, including 11.43% who estimated 76-100%. By contrast, only 20.00% estimated 0-25%, with the remaining 40.00% estimating 26-50%.

The views of respondents are even more positive with respect to the incorporation of arbitration agreements into international commercial contracts involving a Brazilian party. 80.00% estimated that the majority of such contracts entered into in the past 5 years included an arbitration agreement, including 42.86% who estimated 76-100%. The remaining 20.00% of respondents estimated 26-50%, with none estimating 0-25%.

In terms of careers in arbitration, entry into the field and career progression both appear strongly influenced by the 1996 adoption of the new Arbitration Law. The existence of a healthy arbitration community is indicated by the ability of lawyers to commence working in arbitration from the beginning of their careers, with 28.57% of respondents stating that they were first involved in an arbitration 0-2 years after qualifying as lawyers, and a further 20.00% stating 3-5 years. Nonetheless, it is significant that 15.38% of respondents indicated a time period of 10-15 years after qualifying as a lawyer before they became involved in arbitration, and 34.62% stated it took over 15 years.

Similarly, of those respondents who stated that arbitration now constitutes the majority of their legal work, 11.54% said that it achieved this status 0-2 years after they qualified as lawyers, with 19.23% listing 3-5 years. Again, some respondents also reported longer period, with 15.38% of respondents reporting that it took 10-15 years for arbitration to become their primary field or work, and 34.62% reporting over 15 years.

Of particular note, however, is the degree to which these results, which appear to be spread over the range of possible options, are actually closely tied to the 1996 adoption of the new Arbitration Law. That is, all of those respondents who reported that it took 10 years or more for

arbitration to become their primary field or work received their law degree in 1995 or earlier. On the other hand, all of those respondents who reported that it took 0-5 years for arbitration to become their primary field of work received their law degree in 1995 or later.

Nonetheless, despite the clear existence within Brazil of a community of experienced arbitration practitioners, recognition of the expertise of Brazilian arbitration practitioners appears to be just as limited to Brazil as is recognition of the strengths of Brazil as an arbitral seat. Of respondents who reported having served as an arbitrator in the past 5 years, 56.25% reported not serving on a single arbitration in that period that was not seated in Brazil, 31.25% stated that non-Brazilian arbitrations constituted 1-25% of their arbitrator workload, 1 respondent stated they constituted 26-50%, and 1 respondent stated that they constituted 76-100%. Significantly, those arbitrators who confirmed that they had served on arbitrations seated outside Brazil in the past 5 years reported as the seats of those arbitrations only France, Sweden, the U.S.A. and England.

Given the status of these countries as global centers for international arbitration, and the complete absence of any of the neighboring countries in South or Central America, these results strongly suggest that Brazilian arbitrators are primarily selected to serve on arbitrations seated abroad when those arbitrations involve a Brazilian party. This does not, of course, reflect on the expertise of Brazilian arbitrators, but is further confirmation that despite Brazil's current engagement with arbitration, and the clear evidence from the survey that Brazil includes an active community of arbitration professionals, Brazilian arbitration practitioners nonetheless have yet to achieve significant recognition beyond their national border.

Canada

Profile²⁹

The respondent group for Canada is composed of 46 individuals (44 men and 2 women). 69.57% of the respondents work at a law firm, 19.57% operate as sole practitioners, 2 work at barristers' chambers, 1 at an arbitral institution, 1 at a university, 1 in-house at a company, and 1 combines working as a sole practitioner with working in the public sector. 45.65% of respondents were located in Ontario, 21.74% in Alberta, 19.57% in British Columbia, and 13.04% in Quebec. 58.70% of respondents reported working as an arbitrator.

Respondents were not asked questions about their specific province's laws, courts, etc., and as a result while differences between respondents from different provinces might reflect different conditions in those provinces, this is not a conclusion that can be directly drawn from the results of this survey, but only indirectly implied with further research necessary.

Seat

Canada has a challenging place within the international arbitration community, as although it has a large body of highly regarded lawyers, including some of the world's leading arbitration specialists, it is routinely overshadowed by its much larger neighbor, the United States of America.³⁰ Nonetheless, the results of the Survey confirm that Canada possesses both a strong formal foundation for arbitration, and an active arbitration community. Moreover, while in most countries a single city has developed into the primary arbitration center for the entire country, Canada's federalized political system is reflected in the development of four significant arbitration centers, scattered across the country.

Arbitration legislation in Canada has primarily been adopted at the provincial level, rather than nationally.³¹ Nonetheless, all of Canada's provinces have adopted arbitration legislation significantly reflecting the standards incorporated into the UNCITRAL Model Law, although only the law in Ontario reflects the 2006 version of the Model Law.³² Canada is a party to the New York Convention³³ and NAFTA, and in 2013 ratified the ICSID Convention.

Consistent with the conformity of Canada's arbitration laws to the UNCITRAL Model Law, Canadian respondents are very positive with respect to Canada's legal framework regarding arbitration, with 92.30% of respondents describing the laws applicable to domestic arbitration as Supportive or Very Supportive (71.79% selecting Very Supportive), and 92.10% stating the same about the laws applicable to international arbitration (71.05% selecting Very Supportive).

²⁹ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: René Cadieux, Robert Centa, Earl Cherniak, Craig Chiasson, Robert Deane, Colin Feasby, Gerald Ghikas, Thomas Heintzman, Clarke Hunter, John Lorn McDougall, Jack Marshall, Tim Martin, Martin Sheehan, Sean Smyth, Todd Weiler, Blair Yorke-Slader.

³⁰ Although one reviewer has noted that Canadian arbitrators and counsel often find it advantageous to be a Canadian in the U.S. international arbitration marketplace, since they are seen by U.S. clients and arbitral institutions as independent, neutral and of high quality.

³¹ Although there is also national legislation with a limited scope.

³² There are, however, currently legislative reform efforts underway across Canada. Ontario adopted its legislation on the basis of recommendations from the Working Group of the Uniform Law Conference (ULCC) of Canada's International Arbitration Legislation Project, and other Provinces are expected to do the same in the near future.

³³ Limited to awards relating to "commercial" relationships, except in Quebec.

However, a possible obstacle to the further development of arbitration in Canada lies in the fairly restrained endorsement that arbitration appears to receive from Canadian legislators.³⁴ Overall, Canadian respondents described Canadian legislators as having only an Adequate understanding of arbitration (56.76% selected Adequate, 16.22% High, and 27.03% Low), and only a mildly positive view of arbitration (45.71% describing legislators as Neutral towards arbitration, 37.14% Positive, and 17.14% Very Positive). The notable exception to this trend is Quebec, where 60.00% of respondents described legislators as having a Very Positive view of arbitration, although this is combined with reports that legislators in Quebec have a comparatively lower understanding of arbitration (50.00% of Respondents describing it as Low).

Nonetheless, Canadian respondents showed strong support for Canada as a seat of international arbitrations, with 95.12% of Canadian respondents recommending Canada as one of 5 preferred seats for an international arbitration, making Canada the most preferred seat amongst Canadian respondents. The other seats most recommended by Canadian respondents primarily consist of leading international commercial arbitration jurisdictions, including the United States of America (80.49%), England, Wales and Northern Ireland (75.61%), France (48.78%) and Switzerland (48.78%). Perhaps unsurprisingly respondents from Quebec showed a particular preference for Francophone countries, with 100% of Quebec respondents recommending Switzerland and 83.33% recommending France. Interestingly, the Pacific Rim location of British Columbia and Alberta appears to have influenced the preferences of respondents from these provinces, with 50.00% of respondents from Alberta and 44.44% of respondents from British Columbia recommending Australia as one of their most preferred seats.

Within Canada, Toronto was the most recommended seat (44.44%), followed by Vancouver (29.63%), Montreal (14.81%) and Calgary (11.11%). However, this was primarily a function of the location of respondents, as 75.00% of respondents from Alberta who specified a city recommended Calgary, 88.89% of respondents from British Columbia recommended Vancouver, 100.00% of respondents from Ontario recommended Toronto, and 100.00% of respondents from Quebec recommended Montreal. Nonetheless, Toronto was the only seat in Canada to be recommended by respondents from another province, being recommended by 11.76% of respondents not from Ontario.

Finally, enforcement of arbitration awards in Canada is reported as being relatively efficient. 100.00% of Canadian respondents who had been involved in enforcing an award in Canada in the past 5 years reported the process taking on average less than 12 months, with 50.00% stating it took on average less than 6 months for a domestic award (28.57% stating 3 months or less), and 57.14% stating the same for a foreign award (35.71% stating 3 months or less).

Procedure

One particularly notable feature of arbitration in Canada, as reported by respondents, is the relatively high rate of domestic *ad hoc* arbitration, with 79.49% of respondents estimating that over half of the domestic commercial arbitrations that took place in Canada over the past 5 years were conducted *ad hoc*, including 43.59% estimating that this was the case for 76-100% of those arbitrations. This was particularly true in Alberta and Ontario, in both of which provinces half or more of respondents estimated that 76-100% of domestic commercial arbitrations over the past 5 years were conducted *ad hoc* (50.00% of respondents in Alberta, 56.25% of respondents in Ontario). Results are starkly different for international arbitration, in which arbitral institutions appear to possess a more central role. 79.49% of Canadian respondents estimated that fewer

³⁴ One reviewer has suggested that this result merely reflects a lack of engagement with arbitration by Canadian legislators, rather than opposition to it, and this interpretation would be consistent with the current efforts to update Canada's provincial arbitration legislation.

than half of the international commercial arbitrations conducted in Canada over the past 5 years occurred *ad hoc*, with 43.59% estimating 0-25%.

Canadian respondents report arbitration in Canada as being significantly faster than litigation in Canada, with 66.67% describing it as Much Faster and a further 25.64% describing it as Faster. Nonetheless, significant differences exist amongst Canadian respondents regarding the speed of arbitration in Canada. Overall, 41.67% of Canadian respondents stated that the domestic arbitrations in which they had been involved in the past 5 years took 7-12 months (no respondent stating 6 months or less), and 88.89% stated 24 months or less, but responses varied greatly between provinces. While 75.00% of respondents from British Columbia described domestic arbitrations as taking 7-12 months, and 50.00% of respondents from Ontario stated the same, this was true of only 25.00% of respondents from Alberta, and no respondent from Quebec. Indeed, 50.00% of respondents from Quebec described domestic arbitrations as on average taking over 2 years (16.67% stating over 3 years).

Results relating to international arbitration again reflect arbitrations proceeding more slowly in Quebec than elsewhere in Canada, with 80.00% of respondents describing international arbitrations as taking over 2 years (40.00% stating over 3 years). This compares with only 14.29% of respondents from Alberta stating the same (none stating over 3 years), 12.50% of respondents from British Columbia (none stating over 3 years), and 35.71% of respondents from Ontario (including 7.14% stating over 3 years).

One component of the apparent relative speed of arbitration in Canada is that Canadian arbitrators are notably efficient in their delivery of awards, with 63.89% of Canadian respondents stating that in the domestic arbitrations in which they had been involved in the past 5 years, the award was delivered within 3 months of the close of hearings, and 86.11% stating less than 6 months. No respondent gave an average of over 12 months. Results regarding international arbitration are similar, with 44.12% stating that they received awards on average in 3 months or less, 73.53% in 6 months or less, and 94.12% in 12 months or less.

Notably, however, while in many jurisdictions the comparative speed of arbitration is offset by it also being comparatively more expensive than litigation, Canadian respondents generally described arbitration as also cheaper than litigation in Canada, with 51.28% describing it as Slightly Cheaper or Much Cheaper (5.13% selecting Much Cheaper), while only 20.51% described it as Slightly or Much More Expensive (2.56% selecting More Expensive). It is worth noting, however, that respondents from Montreal diverged significantly on this point from respondents in the other three provinces, with 50.00% of Montreal respondents describing arbitration as Slightly or Much More Expensive than litigation (16.67% selecting Much More Expensive), and only 16.67% describing it as Slightly Cheaper (no respondent from Montreal selected Much Cheaper).³⁵

Canadian respondents were also positive about the attitude of Canadian judges to arbitration, with 76.92% of respondents describing it as Positive, 7.69% as Very Positive, and the remaining 15.38% as Neutral.

Canadian respondents also report Canadian courts as having a liberal approach to the interpretation of the validity of arbitration agreements, with 73.33% of respondents describing it as either Liberal or Very Liberal (48.89% selecting Very Liberal). However, a notable difference on this point exists between Alberta and the remaining provinces. While in the other three provinces from which responses to the survey were received, a majority of respondents

³⁵ One reviewer suggested that this result might reflect the limited pre-trial discovery in Quebec's civil law system. This results in document production being more typical in arbitrations, including those seated in Quebec, than in courts in Quebec, along with its associated costs.

described courts as having a Very Liberal approach to the interpretation of the validity of arbitration agreements (55.56% in British Columbia, 50.00% in Ontario, 83.33% in Quebec), this was true of only 20.00% of respondents in Alberta, although 50.00% selected Liberal.

A similar differential arose regarding the approach of Canadian courts to interpreting the scope of arbitration agreements. Overall, 79.07% of respondents described Canadian courts as having a Liberal or Very Liberal approach to the scope of arbitration agreements (32.56% selecting Very Liberal). However, while a significant number of respondents in each of the other three provinces described courts as having a Very Liberal approach to the scope of arbitration agreements (33.33% in British Columbia, 35.00% in Ontario and 66.67% in Quebec), no respondent in Alberta stated the same (although 87.50% selected Liberal).

These results indicate that while courts in Alberta are accurately described as liberal in their approach to arbitration agreements, they are less so than courts in the other three provinces from which responses to the Survey were received. Of course, it is also worth noting that on both of these questions respondents in Quebec were significantly more likely than respondents in any other province to describe courts as Very Liberal in their approach to arbitration agreements.

Market

The results of the Survey indicate the existence within Canada of a developed arbitration community, with many respondents able to enter the field relatively early in their careers. Indeed, 60.00% of respondents reported having become involved in their first arbitration within 5 years of qualifying as a lawyer, including 28.89% who reported having done so within 2 years. By contrast, only 17.78% of respondents reported taking over 10 years to become involved in their first arbitration.

Also notably, those respondents who reported involvement in an arbitration within 5 years of qualifying as a lawyer received their law degrees over a wide range of dates, spread evenly over the past 4 decades, indicating a long-standing Canadian arbitration community, rather than one that has developed significantly only recently. Nonetheless, of those respondents who reporting taking more than 10 years to become involved in their first arbitration, none qualified to practice as a lawyer later than 1984, indicating that while arbitration was an active field of practice in Canada even earlier than this, it has nonetheless accelerated since the 1980s.³⁶

British Columbia is particularly notable in this context, with 77.67% of respondents from this province stating that they became involved in their first arbitration within 5 years of qualifying as a lawyer, and 66.67% stating their first two years. By contrast, only 10.00% of respondents from Alberta stated that they became involved in arbitration within 2 years of qualifying as a lawyer (50.00% stating 3-5 years); 25% of respondents from Ontario stated 2 years (20% stating 3-5 years); and only 16.67% of respondents from Quebec stated 2 years (50.00% stating 3-5 years).

Nonetheless, it is also significant that only 52.17% of Canadian respondents stated that arbitration was their primary field of practice. Again, British Columbia is distinctive, with 40.00% of respondents from Alberta describing arbitration as their primary field of work, 52.38% of respondents from Ontario, and 33.33% of respondents from Quebec, while 77.78% of respondents from British Columbia described arbitration as their primary field of work.

Moreover, of those for whom arbitration was their primary field of work, 75.00% of Canadian respondents reported that it took 10 years or more to become so, with 58.33% reporting 15

³⁶ One reviewer has also emphasized the active involvement in arbitration in Canada, particularly in Ontario, of retired judges, operating primarily in domestic arbitration.

years or more. Indeed, no respondent in either Alberta or Quebec listed a period of less than 10 years, and only 18.18% of respondents from Ontario did so. By contrast, 57.15% of respondents from British Columbia reported arbitration becoming their primary field of practice in less than 10 years.

The distinctiveness of British Columbia in these results potentially reflects the existence in British Columbia of an active but relatively contained arbitration community. That is, that arbitration as a field of practice is sufficiently established in British Columbia that entry is possible early in a legal career, but that opportunities to practice arbitration are significantly dominated by the community of specialists.³⁷

This interpretation is further supported by the responses given by respondents when asked to estimate the proportion of domestic commercial contracts entered into in the past 5 years that included arbitration agreements. Overall Canadian respondents estimated that most domestic commercial contracts did not include an arbitration clause, with 73.91% estimating that this was the case with fewer than 50% of domestic commercial contracts, including 32.61% who estimated it was true of fewer than 25% of domestic commercial contracts. However, again British Columbia differs notably from the other 3 provinces. While the percentage of respondents who estimated fewer than 50% of domestic commercial contracts contained arbitration agreements is relatively similar across all four provinces (70% in Alberta, 77.77% in British Columbia, 71.43% in Ontario, and 83.33% in Quebec), a higher proportion of respondents in British Columbia estimated that this was the case with 0-25% of domestic commercial contracts (44.44%) than was the case in the other provinces (30% in Alberta, 28.57% in Ontario, and 33.33% in Quebec). While these results indicate room for development in domestic commercial arbitration across Canada, they indicate a particular lack of engagement with arbitration on the part of commercial entities in British Columbia.

Results regarding international arbitration are also worth noting, as they indicate a further divergence, although this time between western and eastern provinces. Overall, 60.87% of Canadian respondents estimated that over 50% of commercial contracts entered into between a Canadian commercial entity and a foreign commercial entity in the past 5 years contained an arbitration clause (28.26% estimating 70-100%), suggesting a strong acceptance in the Canadian business community of international commercial arbitration, even if domestic commercial arbitration is less developed. However, these results are less strong in Ontario (47.62%, including 19.05% stating 76-100%) and Quebec (50.00%, including 16.67% stating 76-100%), than in the western provinces of British Columbia (66.66%, including 33.33% stating 76-100%) and particularly Alberta (90.00%, including 50.00% stating 76-100%). The particularly high results in Alberta arguably reflect the importance to Alberta of its petroleum industry, as 100% of respondents from Alberta reported having been involved in an energy arbitration in the past 5 years, with 40.00% reporting that energy arbitrations constituted the majority of their arbitration work over that period.

³⁷ One reviewer has argued that this result reflects a recognition in British Columbia that arbitration is a distinct practice speciality, rather than something that “any litigator can or should do”.

Chile

Profile³⁸

The respondent group for Chile is composed of 15 individuals (14 men and 1 woman). 100.00% of the respondents work at a law firm, 2 are also affiliated with a university, and 1 is also affiliated with an arbitral institution.

Seat

Chile is widely regarded as one of Latin America's leading "business friendly" jurisdictions, and consistent with this image Chile is party to all of the primary arbitral Conventions, including the New York Convention (since 1975), the Panama Convention (since 1976), and the ICSID Convention (since 1992). It has also negotiated 78 bilateral investment treaties, 62 of which are in force. Perhaps unsurprisingly given this foundation, Chile also possesses a modern legal framework relating to commercial arbitration.

As is the case in many countries around the world, Chile has two arbitration laws, with the Code of Civil Procedure and Courts Statutory Code regulating domestic arbitration, and Law No. 19.971 on International Commercial Arbitration (LICA) regulating international arbitration. Adopted in 2004, the LICA is based on the 1985 version of the UNICTRAL Model Law on International Commercial Arbitration.

Both laws are generally seen as supportive of arbitration, with 80.00% of respondents describing Chile's domestic arbitration law as Supportive (40.00%) or Very Supportive (40.00%) of arbitration, and the remainder describing it is Neutral. Notably, while respondents also view the LICA positively, views on it are diverse than with respect to Chile's domestic arbitration law, with 86.67% of respondents describing it as Support or Very Supportive of arbitration, but only 26.67% describing it as Very Supportive. Indeed, one respondent, a leading Chilean arbitrator, described it as Unsupportive. Nonetheless, despite this more qualified endorsement of the LICA, it is clear that both domestic and international arbitration laws in Chile are regarded positively by respondents.

One possible reason for this qualified endorsement might relate to pessimism over the possibility of further legislative support for arbitration in the future, and to the risk that non-arbitration legislation might have unintended impacts on Chile's arbitration environment. This possibility is suggested by the views of respondents on Chilean legislators. While 42.86% of respondents described Chilean legislators as having a Positive view of arbitration, none described them as Very Positive. However, no respondent viewed Chilean legislators as having a Negative or Very Negative view of arbitration, the remaining 57.14% of respondents selecting Neutral. In turn, 57.14% of respondents described Chilean legislators as having a Low understanding of arbitration, 28.57% selecting Adequate, and the remaining 14.29% selecting High.

Consistent with this view of Chilean legislators, respondents also provided mixed-though-positive accounts of Chilean judges. Chilean courts are regarded as taking a relatively strict approach to interpreting both the validity and the scope of arbitration agreements. 46.67% of respondents described Chilean courts as being Strict with respect to the validity of arbitration agreements, another 20.00% selecting neutral, and only 32.94% selecting Liberal (26.67%) or Very Liberal (6.67%). Almost identical results were reported regarding the approach of Chilean

³⁸ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Jorge Sepulveda, Arturo Yrarrázaval C., Juan Eduardo Palma J., Guillermo Arthur D., Rodrigo Donoso, Esteban Ovalle.

courts to interpreting the scope of arbitration agreements, with 46.67% selecting Strict, 20.00% Neutral, and only 33.33% Liberal.

Nonetheless, while Chilean judges may be relatively strict in their interpretation of arbitration agreements, they are not reported by respondents as being unfriendly to arbitration. Indeed, 53.55% of respondents described Chilean judges as having a Positive (40.00%) or Very Positive (13.33%) view of arbitration, with only 6.67% selecting Negative, and none Very Negative. In turn, 46.67% of respondents described Chilean judges as having a High (40.00%) or Very High (6.67%) understanding of arbitration, with only 13.33% selecting Low and none Very Low. Chilean courts may be relatively strict regarding arbitration agreements, then, but this is not due to a hostility to arbitration or a generalized lack of understanding of arbitration amongst Chilean judges.

Overall, the picture these results suggest is of a governmental framework that is amenable to supporting the development of arbitration in response to initiatives from the Chilean arbitration community, but is unlikely to itself take the initiative to develop arbitration further. Legislators lack a strong understanding of arbitration, and while judges often have such an understanding, their strict approach to the interpretation of arbitration agreements indicates that they see arbitration as desirable in certain respects, but also something that must be constrained rather than strongly promoted. In addition, the relative low understanding of arbitration by Chilean legislators raises the risk that they may take legislative actions on topics unrelated to arbitration that damage Chile's currently-supportive legal framework for arbitration, as they lack the expertise to recognize when legislation not specially addressing arbitration may nonetheless impact upon it. Nonetheless, given that Chile is still emerging as an arbitral jurisdiction, it is hardly surprising that Chilean legislators often lack a deep understanding of arbitration, and the combination of legislators' relatively positive view of arbitration with the existence within Chile of an active community of arbitration practitioners gives reason to be positive about arbitration's future development in Chile.

Indeed, it is notable that when asked to name five jurisdictions they would recommend as the seat of an international commercial arbitration, 100% of Chilean respondents recommended Chile. Whatever concerns there might be about then current understanding of arbitration by Chilean legislators, then, respondents are very positive about Chile's current arbitration framework. The other jurisdictions recommended by respondents included three of the leading international commercial arbitration jurisdictions, the United States of America (73.33%), France (73.33%) and England, Wales and Northern Ireland (60%), with Spain also being recommended by 53.33% of respondents, presumably due to its linguistic and cultural connections with Chile.

Importantly, this view of Chile as a favorable jurisdiction for international commercial arbitration is also shared to some degree outside Chile, as 11.74% of non-Chilean respondents to the survey recommended Chile in their top 5 jurisdiction, making it 11th overall and the highest jurisdiction in the Americas other than the U.S. and Canada (if Chilean respondents are included then Chile is recommended by 14.63% of respondents, and ranks 9th overall. Indeed, recognition of Chile becomes even more pronounced if only non-Chilean respondents from South and Central America are considered, with 28.74% of respondents listing Chile amongst their 5 recommended jurisdictions, making it the 6th most recommended jurisdiction overall (if Chilean respondents are included this changes to 34.63% of respondents, making Chile fourth overall).

Consistent with this positive view of arbitration in Chile, Chilean respondents were also very positive about the use of arbitration agreements in commercial contracts in Chile. 93.33% of respondents estimated that more than 50% of contracts entered into in the last five years between domestic commercial entities situated in Chile contained an arbitration agreement, with 33.33% estimating over 75%. Even more pronounced, 93.33% of respondents again estimated that over 50% of contracts entered into in the past 5 years between a domestic

commercial entity situated in Chile and foreign commercial entity contained an arbitration agreement, with 80% estimating over 75%.

Procedure

Arbitration in Chile seems to have developed to a significant degree in response to perceived problems with Chilean courts, rather than from specific benefits provided directly by arbitration.

For example, respondents described arbitration in Chile as considerably faster than litigation in Chilean courts, with 86.67% of respondents describing it as Much Faster, and the remaining 13.33% describing it as Faster. Nonetheless, the information provided by respondents indicates that arbitration in Chile is often somewhat slower than arbitration in the world's leading arbitral jurisdictions. 80% of respondents described the average length of time between the initial request for arbitration and delivery of the final award in a domestic arbitration in Chile as being between 13 and 24 months. The speed was even slower in international arbitration, with no respondent providing an average of less than one year, 60% stating 13-14 months, and 40% stating 25-36 months. Furthermore, it should be taken into account that arbitral awards may be subject to challenges before the competent Court of Appeal, and subsequently before the Supreme Court. As 93.33% of respondents also described arbitration in Chile as more expensive than litigation (66.67% Much More Expensive), it appears that what is being purchased by parties is a comparative advantage in speed, rather than a speedy arbitral process per se.

Nonetheless, the apparent slowness of Chilean courts does have an impact on arbitration in Chile, as respondents report that enforcement of both domestic and foreign arbitration awards is often a relatively slow process. 53.85% of respondents reported the enforcement of domestic arbitral awards taking on average over 6 months, with that number increasing to 90.91% for foreign arbitral awards. Indeed, 45.45% of respondents reported enforcement of foreign arbitral awards taking on average over a year.

Consistent with this interpretation, respondents reported relatively low rates of challenge to the validity of arbitration agreements, with 86.67% reporting challenges in 25% or less of the domestic arbitration in which they had participated in the past 5 years (20% reporting no challenges), and 100% of respondents reporting this proportion in international arbitrations (61.54% reporting no challenges). Such results are consistent with the view that arbitration is seen as a means of avoiding Chilean courts, as a successful challenge to the validity of an arbitration agreement would result in the parties being forced to litigate their dispute. The low rate of such challenges, then, indicates that this is not something either party generally sees as desirable.

Nonetheless, another aspect of arbitration's interaction with Chilean courts appears in the relatively high rate of annulments requests reported by respondents, with 33.33% of respondents stating that annulments were attempted in over 50% of domestic arbitrations on which they had worked in the past five years, and 27.27% stating this with respect to international arbitrations. While inefficient courts might serve as a disincentive to challenging the validity of an arbitration agreement, once a part knows it has lost, courts often become a very attractive means of undermining an unfavorable award.

One final aspect of international arbitral procedure in Chile that is worth highlighting is its particularly "international" character. 41.67% of Chilean respondents reported having participated in one or more multilingual arbitrations in the past 5 years, with 80% reporting having participated in an arbitration in which English was used as an official language of the arbitration. Particularly notably, of those reporting involvement in a multilingual arbitration, 40% reported having experienced multilingual pleading of case by counsel, a procedural variant generally far less common than simply allow the submission of witness testimony or written documents in more than one language.

Market

The arbitration market in Chile displays features characteristic of many emerging arbitral jurisdictions, with 60.00% of respondents stating that they spend over 50% of their work-time on arbitration, including 20% who spend 75-100%. This indicates the existence within Chile of sufficient arbitration work to support at least a small body of professionals for whom arbitration constitutes their primary focus, something that is not possible in less developed arbitral jurisdictions.

That arbitration has developed as a profession relatively recently can also be seen in the responses to the survey. 53.33% of Chilean respondents reported becoming involved in their first arbitration between 0 and 2 years after first qualifying to practice as a lawyer, with 75% of those giving this response having begun practicing law after 2000. This again indicates the existence of arbitration as an established field of practice, into which it is now possible to enter directly, rather than by spending many years gradually building a sustainable arbitration practice.

Similarly, while 60% of respondents stated that it took over 10 years for arbitration to become their primary field of work (40% stating over 15 years), all but one of these respondents entered legal practice prior to 2000. By comparison, 75% of those who became involved in their first arbitration within 0-2 years had arbitration become their primary field of work within 3-5 years.

The apparent relatively small size of the dedicated arbitration community in Chile also appears to be reflected in the views of respondents on important considerations in selecting an arbitrator, with 60.00% of respondents describing personal familiarity with an arbitrator as either Important or Extremely Important (40.00% Extremely Important). Similarly, 73.33% gave the same response with respect to having had prior experience with an arbitrator (40.00% selecting Extremely Important). Nonetheless, reputation was even more important, with all respondents describing it as either Important or Extremely Important (46.68% selecting Extremely Important). Such an emphasis on the identity of an arbitrator often reflects the existence of a small and tightly networked arbitration community, which would be consistent with the other results just discussed.

Consistent with this picture of a tightly networked arbitration community, survey responses also indicate that arbitral institutions play a particularly important role in arbitration in Chile, with 50% of respondents who practice as an arbitrator reporting that they received their first appointment as arbitrator from an institution. Moreover, 50% of such respondents reported receiving over 50% of their appointments from an arbitral institution, and reported relying to some degree on institutional appointments.

Supporting this interpretation, institutional arbitration appears to play a particularly important role in arbitration in Chile. Only 20% of respondents estimated that over 50% of domestic arbitrations in Chile occurred *ad hoc* (with no respondent estimating over 75%). Most starkly, 100% of respondents estimated that 0-25% of international arbitrations in Chile occurred *ad hoc*. Chile has one prominent arbitral institution, the Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM Santiago), and so results indicating a particularly important role for institutional arbitration supports a view of the Chilean arbitration community and relatively cohesive and highly networked. Additionally, another interesting - if less prominent - arbitral institution administering arbitral proceedings is the Centro Nacional de Arbitrajes (CNA).

Colombia

Profile³⁹

The respondent group for Colombia is composed by 11 individuals (9 men and 2 women). 72.73% of the respondents work at a law firm, 18.18% are sole practitioners, 9.09% work at an arbitral institution, 9.09% work at a university and 9.09% are independent professionals.

Seat

The Colombian arbitration statute of 2012⁴⁰ differentiates between international and domestic arbitration. More specifically, while the regime applicable to the former is largely based on the UNCITRAL Model Law, the regulation of domestic arbitration imposes a number of specific restrictions to party autonomy. The reality of Colombia as a seat of arbitration, hence, must be understood in the light of this double-track approach, with domestic arbitration being significantly more regulated than its international counterpart.

Mandatory provisions imposing restrictions on Colombian domestic arbitration concern, *inter alia*, arbitrator requirements, procedure and applicable law. More specifically, each arbitrator must be a Colombian national admitted to practice law and having no less than eight years of professional experience.⁴¹ Furthermore, the language of the proceedings must be Spanish and the applicable law must be Colombian law.

In light of this, it can be concluded that Colombian lawmakers adopt a ‘hands on’ approach to domestic arbitration, while leaving wider room for party autonomy in international disputes. This rather restrictive attitude may explain why the majority of the Survey respondents described the level of understanding of arbitration by legislators in Colombia in negative terms: 70.00% of them qualified it as ‘Low’, while only 20.00% characterized it as ‘Adequate’ and 10.00% as ‘High’.

While the attitude of Colombian legislators towards domestic arbitration cannot be portrayed as particularly liberal, it would be wrong to conclude that the national arbitration statute is deliberately arbitration-unfriendly. To the contrary, when asked to evaluate the attitude of their local legislators towards arbitration, none of the Colombian respondents expressed a negative opinion, with 50.00% answering ‘Positive’ and the other 50.00% answering ‘Neutral’. Along the same lines, Colombian laws applicable to domestic arbitration were deemed as “Very supportive” by 20.00% of the respondents, “Supportive” by 70.00% of the respondents and “Neutral” by 10.00% of the respondents.⁴²

The attitude of Colombian judges towards arbitration was also described by the local respondents in generally positive terms: when asked to evaluate this factor, 10.00% answered ‘Very positive’, 50.00% answered ‘Positive’, 30.00% answered ‘Neutral’ and 10.00% answered ‘Negative’. However, as far as the interpretation of the scope of arbitral agreements is

³⁹ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Felipe Mutis Tellez, Felipe Piquero Villegas, Julio González, Carolina Posada, Jaime Humberto Tobar Ordóñez.

⁴⁰ Law 1563 of 2012.

⁴¹ <https://gettingthedealthrough.com/area/3/jurisdiction/8/arbitration-colombia/>

⁴² However, it must be noted that the perceived supportiveness of the Colombian laws applicable to domestic arbitration is lower than the supportiveness of the regime applicable to its international counterpart: 50.00% of the respondents considered laws applicable to international arbitration as “Supportive”, and the same percentage considered them to be “Very supportive”.

concerned, Colombian courts were considered 'Strict' by 45.45% of the respondents, 'Neutral' by 36.36% and 'Liberal' by 18.18%.⁴³

One additional notable feature of arbitration in Colombia is the restriction on the possibility for public entities to use arbitration. For instance, the Presidential Directive of 23 December 2015 requires that, when a State entity is entering into a contract which contains an agreement to arbitrate, the Secretary General of the entity must issue an opinion, setting out the public policy reason justifying the need to resort to arbitration.⁴⁴

Colombia is party to the New York Convention, the Montevideo Convention⁴⁵, the Panama Convention⁴⁶, the ICSID Convention and 7 BITS and FTA with investment chapters.

Considering the above results, it is reasonable to conclude that Colombia is perceived as a positive environment for arbitration, with friendly but strict courts, despite the relatively low level of understanding of local legislators.⁴⁷ The data presented so far, though, only scratches the surface of arbitration in Colombia, by providing an overall assessment of the perceived features of this jurisdiction as a seat of arbitration. Since the local statute applicable to domestic arbitration contains some provisions that significantly depart from the UNCITRAL Model Law, the procedural reality of arbitration in Colombia presents some additional interesting peculiarities: the next section will illustrate these aspects in detail.

Procedure

The difference between the regimes applicable to domestic and international arbitration in Colombia is apparent, when considering the procedural dimension of the phenomenon. Namely, Colombian domestic arbitration is largely regulated in the same way as the local judicial proceedings: the arbitrators are considered as public servants and are subject to the same disciplinary regime as judges and they have similar procedural powers.⁴⁸ Furthermore, the statute regulates in detail the procedural development of the proceedings and the different hearings to be held throughout the cycle of a case, rather than leaving the parties free to determine how the arbitration should be conducted. Additionally, jurisdictional control on arbitration is possible through the *tutela* action before State courts. These results are consistent with the opinions expressed by Colombian respondents concerning the level of similarity between the procedures used in arbitration and those used in local courts. While the majority of Colombian respondents stated that international arbitration has 'No or almost no shared

⁴³ As far as judicial intervention is concerned, it must also be highlighted that any party whose fundamental rights have been allegedly violated by an arbitral award may request Colombian courts to issue a protective injunction. Commentators have correctly argued that this possibility should not be instrumentalised as a *de facto* appellate instance, after the arbitration: Gaviria, Juan Antonio. "The New Colombian Legal Rules on International Arbitration." *The Arbitration Brief* 3, no. 1 (2013): 65-91.

⁴⁴ The Guide to Infrastructure and Energy Investment, Two Key Considerations on Infrastructure and Energy Disputes with the Arbitral Seat in Latin America, Daniel E González and Juliana de Valdenebro Garrido 20 February 2017, Hogan Lovells LLP. Despite this restriction, arbitration involving public entities is far from uncommon in Colombia: when asked to describe what type of arbitration cases they typically work on, only 18.18% of Colombian respondents reported having never worked on proceeding involving the Public Sector.

⁴⁵ Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards of 1979.

⁴⁶ Inter-American Convention on International Commercial Arbitration of 1975.

⁴⁷ This conclusion is corroborated by the data concerning the preferred seats of arbitration. When asked to recommend five countries as seats for international arbitration, 72.73% of Colombian respondents indicated Colombia, which ranked second after the United States of America (recommended by 81.82% of respondents).

⁴⁸ <https://gettingthedealthrough.com/area/3/jurisdiction/8/arbitration-colombia/>

procedures' in common with court litigation,⁴⁹ the same respondents reported a high level of similarity between domestic arbitration and litigation in Colombian courts.⁵⁰

Given the procedural rigidity of domestic arbitration, one may assume that this mechanism of dispute resolution has no particular appeal for local users. The survey results, however, clearly indicate that this is not the case: according to the respondents' answers, arbitration agreements are commonly included in domestic contracts. 54.55% of the respondents estimated that from 51% to 75% of the domestic contracts in Colombia contain an arbitral clause. 27.27% of the respondents considered this percentage to be in the range of 26% to 50% and 18.18% considered it to be in the range of 76% to 100%.⁵¹ The question arises, then, what comparative advantage domestic arbitration has over court litigation, given their apparent procedural similarity.

The main answer to the above question seems to be the relative speed of Colombian arbitration, as compared to court litigation: 90.00% of the respondents described arbitration as "Much faster" than litigation, and 10.00% qualified it as "Slightly faster". As an example of that, 54.00% of the respondents reported that, in the domestic arbitrations they worked on over the past 5 years, the award was typically rendered within 3 months after the end of hearings.

Colombian respondents described arbitration not only as faster, but also as more expensive than court litigation. More specifically, (50.00%) of the respondents considered it 'Much more expensive' to arbitrate a dispute than to litigate in courts, and 20.00% described it as 'Slightly more expensive'. However, 20.00% stated that arbitration is 'Slightly cheaper' than litigation and 10.00% answered that it is 'Much cheaper'. A possible explanation for this divergence in the results is that some of the respondents considered the comparatively longer duration of litigation as an additional cost.

Arbitration in Colombia is mostly conducted on an institutional, rather than an *ad hoc* basis. When asked to estimate what percentage of the international arbitrations seated in Colombia, commenced in the previous five years, were conducted on an *ad hoc* basis, 88.89% of respondents answered '0-25%' and 11.11% answered '26-50%'. Among arbitral institutions, particularly prominent is the Arbitration and Conciliation Center of the Chamber of Commerce of Bogota (CAC).

Market

According to the Survey results, Colombia seems to be home to a pool of specialized professionals, who devote the majority of their work to arbitration. Namely, the Survey asked the respondents to estimate what percentage of their working time was dedicated to arbitration: 36.36% answered '76 - 100%', 45.45% answered '51 - 75%' and 18.18% answered

⁴⁹ When comparing international arbitration seated in Colombia with court litigation, the answers of local respondents were as follows: 'No or almost no shared procedures' (55.56%); 'Few shared procedures' (22.22%), 'Some shared procedures' (11.11%) and 'Many shared procedures' (11.11%).

⁵⁰ The answers were as follows: 'Few shared procedures' (22.22%), 'Some shared procedures' (22.22%) and 'Many shared procedures' (55.56%). It is interesting to note that none of the Colombian respondents answered 'No or almost no shared procedures', in stark contrast to the previous question on international arbitration.

⁵¹ This result is consistent with the circumstance that, according to the respondents, most arbitrations seated in Colombia are based on a pre-dispute arbitration clause: according to 81.82% of respondents, 76-100% of domestic arbitrations seated in the country are based on an agreement to arbitrate concluded before the arising of the dispute. As for international contracts, the Colombian respondents estimated the percentage of contracts containing an arbitration clause as follows: 9.09% answered '0 - 25%', 54.55% answered '51- 75%' and 36.36% answered '76 - 100%'.

'26 - 50%'. Conversely, none of the respondents reported dedicating only '0-25%' of their working time to arbitration.

As far as career progression is concerned, the Survey does not show a clear prevailing trend: some respondents reported being involved in arbitration from the beginning of their professional career, while other ones only started practicing arbitration after several years of activity in a different legal sector.⁵² Therefore, it seems that legal professionals can access the arbitration market at different levels of professional seniority; when they do, however, arbitration typically becomes their primary field of work, rather than staying a secondary one.

The respondents reported an involvement not only in domestic,⁵³ but also in international commercial arbitration: only 18.18% of them answered that they have never worked on international cases, while 63.64% stated that they dedicate 1% to 25% of their working hours to international arbitration.⁵⁴

Construction disputes are another popular sector for arbitration in Colombia: 90.91% of respondents reported having worked on construction arbitration in the past, for proportions of their working time varying among 1-25% (27.27% of respondents), 26-50% (18.18% of respondents), 51-75% (27.27% of respondents) and 76-100% (18.18% of respondents).

⁵² More specifically, 36.36% of Colombian respondents had their first arbitration within the first 2 years after qualifying to practice as lawyers. The same percentage received their first arbitration after 3 to 5 years of their qualification. The remainder of the respondents reported working on their first arbitration after respectively 6-9 years (9.09%), 10-15 years (9.09%) and more than 15 years (9.09%) of their qualification.

⁵³ None of the respondents reported having never worked on domestic arbitration.

⁵⁴ The remainder of the respondents reported dedicating respectively '26-50%' (9.09%) and '51-75%' (9.09%) of their working time to international arbitration.

Costa Rica

Profile⁵⁵

The group of Respondents for Costa Rica is composed of 7 individuals (6 male and 1 female). Interestingly, 85.71% of the Respondents reported serving as arbitrators.

Seat

Domestic arbitration in Costa Rica is regulated by Law No. 7727 on Alternative Dispute Resolution and Promotion of Social Peace of 4 December 1997 (ADR Law). International arbitration, instead, is governed by Law No. 8937 Law of 25 May 2011, mainly modelled after the 2006 version of the UNCITRAL Model Law (but with some amendments). Interestingly, the possibility to resolve economic disputes through arbitration is also mentioned in Article 43 of the Chapter of Fundamental Individual Right of the Costa Rican Constitution.

The Respondents from Costa Rica expressed a particularly positive opinion about the legal framework applicable to arbitration in their jurisdiction. When asked to evaluate the supportiveness of the laws applicable to domestic arbitration in Costa Rica, 80.00% of the local respondents answered “Very Supportive” and 20.00% answered “Supportive”. The laws applicable to international arbitration were considered “Very Supportive” by 40.00% of the respondents and “Supportive” by 60.00% of them.

Despite this positive perception of the local legal framework, however, the level of understanding of arbitration on the part of legislators of Costa Rica was not immune from criticism: 60.00% of the respondents characterized it as “Low”, 20.00% described it as “Very Low” and only 20.00% qualified it as “High”. As for the attitude of legislators towards arbitration, 80.00% of the Respondents described it as “Neutral” and 20.00% characterized it as “Positive”. Nevertheless, things may change in the future, as new legislators have recently been elected and several proposals for reform concerning alternative dispute resolution are currently being discussed.

The understanding and attitude of the Costa Rican judiciary were evaluated in comparatively better terms. The understanding of arbitration on the part of judges in Costa Rica was characterized as “High” by 40.00% of the respondents, “Adequate” by the same percentage and as “Low” by 20.00%. As for the attitude of judges *vis-à-vis* arbitration, 40.00% of the respondents characterized it as “Neutral”, 40.00% characterized it as “Positive” and 20.00% characterized it as “Very Positive”, while none of the respondents offered a negative assessment. One factor that is likely to contribute to this positive opinion is that many matters concerning international commercial arbitration are sent to the First Chamber of the Supreme Court: such a specialized competence can undoubtedly facilitate the perception of an arbitration-friendly judicial attitude. Another factor that should be taken into account is that alternative dispute resolution in Costa Rica was initially promoted by the judiciary, starting from the 1990s, as a tool to reduce court congestion and ensure efficiency. In light of this, hence, it is not surprising that the respondents generally described the attitude of judges towards arbitration in positive terms.

Given this positive climate for arbitration, it is unsurprising that arbitration clauses are often included in both domestic and international commercial contracts concluded in Costa Rica. The Respondents were asked to estimate what proportion of contracts concluded between domestic commercial entities in the past 5 years in Costa Rica includes an arbitration agreement: 50% of

⁵⁵ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: José A. Schroeder, Rodrigo Oreamuno B., Alberto Fernández López, Roberto Yglesias.

them answered “51-75%”, 16.67% answered “76-100%” and only 33.33% answered “0-25%”. As for international contracts between a Costa Rican entity and a foreign commercial counterpart, 16.67% of the Respondents estimated the rate of “0-25%”, 33.33% answered “26-50%”, 16.67% answered “51-75%” and 33.33% answered “76-100%”.

Although arbitrating a dispute in Costa Rica is perceived as more expensive (“Slightly more expensive” according to 60.00% of the respondents, and “Much more expensive” according to 40.00%) than litigating in State courts, it offers a particularly noticeable advantage in terms of speed. Namely, 100.00% of Costa Rican respondents agreed that arbitrating is “Much faster” than litigating the same dispute in their home jurisdiction.

The understanding and attitude of Costa Rican business people towards arbitration was not evaluated in negative terms, but there seems to be some room for further improvement in this respect. As for the attitude of business people, 60.00% of the local respondents qualified it as “Positive” and 40.00% qualified it as “Neutral”, while none of them described it as “Very positive”, “Negative” or “Very negative”. As for the understanding of arbitration on the part of local business people, 40.00% of the Costa Rican respondents described it as “Low”, another 40.00% stated that it is “Adequate” and 20.00% qualified it as “High”.

When asked to recommend five seats of international arbitration, Costa Rica ranked second among local Respondents, behind the United States of America. This result offers an additional confirmation of the generally positive opinion that Costa Rican practitioners have of their home jurisdiction as a place of arbitration.

Procedure

One notable feature of arbitral procedure in Costa Rica is that challenges concerning the validity of arbitration agreements seem rather frequent. More specifically, none of the respondents reported having experienced no such challenges over the past five years: 50.00% of them estimated that the validity of the agreement was challenged in “1-25%” of the cases on which they worked during this period of time, 33.33% estimated a rate of “26-50%” and 16.67% estimated a rate of “51-75%”.

Despite the high frequency of challenges regarding the validity of arbitration agreements, the prospect of success of this defence does not seem to be particularly high. More specifically, Costa Rican courts were not deemed to be very strict when interpreting the validity of arbitration agreements: 66.67% of the local Respondents described them as “Liberal”, 16.67% of them considered Costa Rican courts “Neutral” and only 16.67% answered “Strict”. These results are consistent with the fact that Costa Rican courts correctly apply the separability doctrine and consider arbitration clauses as autonomous and independent from the main contract they make reference to. As a result, possible invalidities affecting the main contract under Costa Rican law (such as the failure to pay the taxes to which the main contract is subject) do not normally extend to the agreement to arbitrate.

As for the assessment of the scope (rather than the validity) of the agreement to arbitrate, the attitude of Costa Rican court was described as “Liberal” by 66.67% of the Respondents and “Strict” by 33.33% of them.

Market

Costa Rica seems to have a flourishing arbitration market, with practitioners taking up a high number of new cases every year. When asked to estimate how many new arbitration cases a year they received over the past 5 years, almost half of respondents (42.86%) answered “1-4”, 14.29% answered “5-9”, 28.57% answered “10-15” and 14.29% answered “16-20”.

The conclusion above is reinforced by the circumstance that Respondents from Costa Rica seem to devote a great part of their work for the field of arbitration. When asked to evaluate what proportion of their working hours was devoted to arbitration in the past five years, only 28.57% of the Respondents answered that they devoted less than half of their hours (0-25%) to this field, while 28.57% of them answered “76-100%” and 42.86% answered “51-75%”.

Along similar lines the existence of a well-functioning arbitration market is confirmed by the existence of many institutions administering arbitral cases, such as the Costa Rican Chamber of Commerce Center of Conciliation and Arbitration (CCA), the US-Costa Rican Chamber of Commerce International Center for Conciliation and Arbitration (CICA), the Costa Rican Bar Center of Arbitration and Mediation (CAM) and the Center of Conflict Resolution of the Federal Association of Engineers and Architects (CRC-CFIA). Furthermore, the Costa Rican Bar Association is also a member of the Centro Iberoamericano de Arbitraje (CIAR), an arbitral institution catering for small and medium enterprises with a distinctive Spanish-American focus.

Practitioners in Costa Rica tend to access the arbitration market not at the outset of their career, but after some years of professional experience in other fields. Namely, 42.86% of the local Respondents reported having practiced as lawyers for more than 15 years before they were involved in their first arbitration, and for 14.29% of them it took from 10 to 15 years to receive their first arbitration case. Other Costa Rican Respondents, however, reported a comparatively faster access to arbitration: 14.29% of them were involved in their first arbitration after 3 to 5 years of practicing law and 28.57% accessed the arbitration market after 6 to 9 years of professional practice.

Costa Rican practitioners are typically involved both in domestic and international arbitration, although a relatively smaller proportion of their working time is normally devoted to the latter. Namely, 71.43% of the respondents reported spending “1-25%” of their working hours to international arbitration. Furthermore, 85.71% reported working, to varying degrees, on domestic arbitration.

Construction arbitration is another field that the majority of respondents reported having been active in over the past 5 years is construction: only 14.29% of them had no construction cases in this period of time. The Costa Rican Association of Architects and Engineers (CFIA) has recently updated its arbitration rules, which now include fast-track procedures, expert panel procedures, and special rules for international construction arbitration with the support of FIDIC. This development is likely to encourage the further diffusion of construction arbitration in Costa Rica.

Ecuador

Profile⁵⁶

The respondents group for Ecuador is composed of 8 men and 1 woman. Regarding their ethnicity, 55.56% of the respondents identified themselves as “White”, 33.33% as “American Indian or Alaska Native” and 33.33% as “Other”. All respondents primarily work in Ecuador. Also, all of them work at law firms, and 22.22% also reported having an affiliation with a university.

Seat

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law (AML) of 1997, with different provisions for domestic and international cases. The statute is inspired in some respects by the UNCITRAL Model Law, but with some significant differences. The General Organic Code of Proceeding (GOCP), in force since 2016, also contains norms applicable to arbitration.

Arbitration seems to be a popular mechanism for the resolution of commercial disputes in Ecuador. On the basis of their professional experience, 88.89% of the respondents estimated that from 76% to 100% of the domestic commercial contracts concluded in Ecuador the past 5 years contained an arbitration agreement, and 11.11% estimated the percentage as being between 51% and 75%. As for international transactions, 77.78% of the respondents estimated that 76-100% of contracts between a domestic commercial entity in Ecuador and a foreign commercial entity contain an arbitration agreement, while the remaining 22.22% reported this range as being between 51% and 75%.⁵⁷ This result is consistent with the circumstance that Ecuador has many active arbitration institutions, such as the Arbitration and Mediation Center of the Quito Chamber of Commerce, the Arbitration and Mediation Center of the Ecuadorian American Chamber of Commerce and the Arbitration and Conciliation Center of the Guayaquil Chamber of Commerce.

The high frequency of use of arbitration is consistent with an overall positive attitude of the local business community towards this mechanism of dispute resolution. In particular, 85.71% of the respondents considered the attitude of business people as “Positive”, and even the remaining 14.29% described it as “Very positive”. Yet, according to the respondents, there is some room for improvement concerning the understanding of arbitration by business people in Ecuador: this variable was characterized as “Adequate” by 85.71% of the respondents, and as “Low” by 14.29% of them.

An external observer may initially assume that such high level of usage of arbitration correspond to a positive perception of Ecuador as a seat. This, however, is only partially true. When asked to evaluate the laws applicable to domestic arbitration in Ecuador, 57.14% of the local respondents deemed them to be “Supportive”, 28.57% described them as “Neutral” and 14.29% characterized them as “Unsupportive”. As far as the laws applicable to international proceedings are concerned, 28.57% of Ecuadorian respondents considered them to be “Supportive”, the same percentage considered them “Neutral” and 42.86% described them as “Unsupportive”.

⁵⁶ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Augustin Acosta Cárdenas, Juan Manuel Marchán, Heidi Laniado Hollihan.

⁵⁷ These results are significantly higher than the Latin American average: regarding domestic arbitration, 26.49% of Latin American respondents estimated that the proportion of contracts containing an arbitration agreement was 0 – 25%; 35.06% answered 26 – 50%; 26.10% answered 51 - 75% and 12.35% answered 76% - 100%. Concerning international proceedings, 14.54% of the respondents answered 0 – 25%, 20.92% answered 26- 50%, 34.66% answered 51 - 75% and 29.88% answered 76 - 100%.

Therefore, there is a non-negligible minority of respondents who seem to detect some problematic aspects in the regulatory framework applicable to arbitration in Ecuador, especially with regard to international cases.

Along similar lines, the level of understanding of arbitration on the part of legislators in Ecuador was generally considered low: 28.57% of the Ecuadorian respondents described it as “Very Low”, 57.14% as “Low” and 14.29% as “Adequate”. Even more notably, none of the respondents characterized the attitude of legislators as positive: 14.29% described it as “Very Negative”, 42.86% qualified it as “Negative” and the remaining 42.86% regarded it as “Neutral”.

The respondents expressed similar views also with respect to the local judiciary. When asked to describe the level of understanding of arbitration on the part of judges, 14.29% considered it to be “Very Low”, 42.86% described it as “Low” and 42.86% answered “Adequate”. The attitude of judges was characterized as “Very Negative” by 14.29%, “Negative” by 28.57%, “Neutral” by 42.86% and “Positive” by 14.29%.

The aforementioned results suggest that, despite its overall popularity, arbitration in Ecuador faces some obstacles, mostly in connection with the local legislative framework and the attitude of local courts in supporting arbitration and enforcing awards. This is confirmed by the circumstance that, when asked to suggest five seats for international arbitration, only 12.50% of the Ecuadorian respondents indicated their home jurisdiction.⁵⁸ Several non-mutually exclusive explanations can be put forth for the results at hand. Let us consider some of them.

A first aspect of the Ecuadorian legal framework that may potentially be perceived as problematic by arbitration practitioners is the recognition and enforcement of international awards. Historically, it was up to the party seeking recognition and enforcement to demonstrate that all relevant conditions are met. This mechanism did not sit well with Article V(1) of the New York Convention, which puts the burden of proving the existence of a ground for refusal on the party resisting recognition, rather than on the one resisting it.⁵⁹ The new legal framework introduced in 2016, however, may to a certain extent alleviate these concerns.

A second relevant aspect is the backlash that arbitration has recently suffered from in Ecuador, especially in the wake of some high-profile and controversial investor-State arbitrations and most notably of the *Chevron* arbitration.⁶⁰ As a result of a widespread wave of criticism against investment arbitration, the Commission for the Citizens’ Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitration System on the Subject of Investments” (CAITISA) was created, with the purpose of examining and evaluating BITs and other international agreements. Subsequently, Ecuador denounced the ICSID convention and the BITs it had concluded with 25 other States. Furthermore, the Ecuadorian Constitution was amended in 2008⁶¹ and the new Article 422 was introduced, prohibiting the conclusion of

⁵⁸ The five preferred seats of arbitration most frequently indicated by Ecuadorian respondents were the United States of America, Chile, France, England, Wales and Northern Ireland and Panama.

⁵⁹ Rodrigo Jijón-Letort, Juan Manuel Marchán, Javier Jaramillo-Troya and Camilo Muriel-Bedoya, ‘Ecuador’ in Global Arbitration Review, *The Arbitration Review of the Americas 2018*, 130.

⁶⁰ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877.

⁶¹ For further discussion: Aikaterini Argyrou, Valeria Poppa, ‘A Case Study on Chevron v. the Republic Ecuador Arbitration Proceedings: Their Impact on Ecuador’s National Investment Arbitration Policy’, <http://ssrn.com/abstract=2704921>

treaties which contain a consent to arbitration.⁶² These changes in the local legal framework⁶³ may explain why the survey respondents did not generally have a positive opinion as to the legislators' understanding and support of arbitration. However, it should also be noted that the primary objective of the criticism was the use of arbitration in investor-State disputes, rather than in commercial settings involving private parties only.

A third reason possibly contributing to explain the respondents' views is the tension between the private autonomy underlying arbitration, on the one hand, and the Ecuadorian constitution, on the other hand. According to local commentators, Ecuadorian courts have in some cases invoked the Constitution to prevent arbitrators from hearing certain cases, or to impose certain decisions on arbitral jurisdictions.⁶⁴

In sum, the respondents did detect some problematic features, hindering the development of arbitration in Ecuador. Yet, despite these aspects, Ecuadorian arbitration seems to enjoy an overall high level of success and popularity for the resolution of commercial disputes. Let us consider the procedural reality of the phenomenon at hand, in order to understand it in further detail.

Procedure

In Ecuador, institutional arbitration seems to be more usual than its *ad hoc* counterpart. According to their professional experience, 85.71% of the respondents estimated that no more than 25% of the domestic proceedings commenced in the past 5 years in Ecuador were conducted on an *ad hoc* basis. As for international proceedings, along similar lines, 71.43% of the respondents estimated that between 0 and 25% of arbitrations commenced in the past 5 years were conducted on an *ad hoc* basis.

Arbitrating a dispute in Ecuador is generally more expensive than litigating the same dispute in courts. More specifically, 57.14% of the respondents considered arbitration to be "Much more expensive", and 42.86% considered it to be "Slightly more expensive" than litigation. On the other hand, they considered that arbitration is also faster than litigation in local courts: 85.71% of the respondents considered arbitration to be "Much faster" and 14.29% considered it to be "Slightly faster".

In light of these results, arbitration in Ecuador seems to be particularly suitable for relatively complex, high-value disputes. This hypothesis is confirmed by the respondents' views as to which factors make the use of arbitration desirable. Two of the main reasons that would make respondents recommend the inclusion of an arbitration agreement in a contract that a party is entering are "The technical, legal or commercial complexity of the transaction underlying the

⁶² Javier Jaramillo, Pérez Bustamante & Ponce and Universidad San Francisco de Quito and Camilo Muriel-Bedoya, 'Ecuadorian BITS' Termination Revisited: Behind the Scenes', Kluwer Arbitration Blog, May 26 2017, <http://kluwarbitrationblog.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/>. Also: Maria Gabriela Sarmiento, Status quo of Investment Arbitration in South-America The cases of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Peru and Venezuela, 12 January 2016, 8.

⁶³ As far as the legal framework concerning investor-State dispute resolution is concerned, it must also be noted that recently Ecuador enacted the "Incentive for Public-Private Partnership and Foreign Investment Act" (PPP). The PPP recognizes local and international arbitration as a possible dispute resolution method,⁶³ but Article 20.2 requires the exhaustion of administrative remedies before arbitral proceedings can be commenced. See Javier Jaramillo, Pérez Bustamante & Ponce and Universidad San Francisco de Quito and Ricardo Montalvo, Coordinating Ministry of Production, Employment and Competitiveness of Ecuador, 'The New Ecuadorian PPP Act: A New Opportunity for Foreign Investment? Some Caveats Regarding Arbitration', Kluwer Arbitration Blog, February 19 2017, <http://kluwarbitrationblog.com/2017/02/19/the-new-ecuadorian-ppp-act-a-new-opportunity-for-foreign-investment-some-caveats-regarding-arbitration>.

⁶⁴ See *supra*, Jijón-Letort, Marchán, Jaramillo-Troya and Muriel-Bedoya, 130.

contract means that it is best resolved by an individual with specialized expertise” and “The party you are advising wishes to keep confidential all information relating to the transaction or any potential dispute”. Both situations were considered by 65.99% of the respondents as a “Strong reason to propose arbitration and by 11% of the respondents as “Some reason to propose arbitration”.

The respondents’ opinions as to the attitude of Ecuadorian courts when interpreting the validity and scope of arbitration agreements were mixed. When asked to evaluate the strictness of their local courts in interpreting the validity of arbitration agreements, 12.50% of the Ecuadorian respondents answered “Very liberal”, 25.00% answered “Liberal”; 25.00% answered “Neutral”; 25.00% answered “Strict” and 12.50% answered “Very Strict”. As for the interpretation of the scope of agreements, Ecuadorian courts were characterized as “Liberal” by 37.5% of the respondents, “Neutral” by 25.00% of the respondents, “Strict” by 12.50% and “Very strict” by 25.00%.

Mediation also seems to play an important part in dispute resolution in Ecuador, especially at an early stage of the case, before the parties commence arbitral proceedings. In domestic arbitrations seated on the Country, 85.71% of the respondents reported that in 76% to 100% of the arbitrations they worked over the past 5 years the parties attempted mediation before arbitration. 14.29% of the respondents stated that such was true for a proportion of 26-50% of the proceedings they worked on over the same period of time.

Market

The demographics of the sample indicate a young group of professionals, involved with arbitration early on in their legal career: 33.33% of the respondents qualified to practice law in the 2010s, 44.44% of the respondents qualified to practice law in the 2000s, 11.11% qualified in the 1990s and only 11.11% qualified in the 1980s. Besides, for almost half (44.44%) of the respondents it took only from 0 to 2 years after qualifying as a lawyer to be involved in their first arbitration; for 33.33% of the respondents, it took from 3 to 5 years; 11.11% received their first arbitration case after 6 to 9 years of qualifying to practice as a lawyer and 11.11% had their first case after more than 15 years.

Arbitration seems to constitute a great part of the respondents’ workload. In terms of hours worked, more than half of the respondents (55.56%) devoted from 51% to 75% of their working hours to arbitration. Furthermore, 33.33% of the respondents took on from 10 to 15 new cases per year over the past 5 years, which is a significant inflow of new arbitration work; another 33.33% took on from 5 to 9 cases in the same period of time and the remaining 33.33% took on from 1 to 4 cases.

Arbitral institutions were indicated as an important source of appointment as arbitrator: half of the respondents who also serve as arbitrators reported having been appointed by arbitral institutions.

The respondents’ practice seems to focus mainly on domestic commercial cases: 22.22% of the respondents stated that they did not work on any international commercial arbitrations over the past 5 years, 33.33% reported devoting from 1% to 25% of their working hours to international commercial arbitration and the same percentage declared that they dedicate from 26% to 50% of their hours worked to this field. By contrast, only 11.11% of the respondents reported dedicating 51% to 75% of their working time to international cases.

It is significant that the majority of respondents reported dedicating a certain amount of their working hours to investment arbitration. More specifically, 44.44% of the respondents devoted from 1% to 25% of their hours worked to the field, 33.33% devoted from 51% to 75% to it and 11.11% spent from 76% to 100% of their hours working on investment cases. Only 11.11% of the

respondents reported not working on investment arbitration at all. This result is consistent with the circumstance that, as already mentioned, Ecuador was a party to many investment cases over the past few years.

Mexico

Profile⁶⁵

The respondent group for Mexico is composed of 20 individuals (15 men and 5 women). 90.00% of the respondents work at a law firm, with 2 operating as sole practitioners, and 1 combining work at a law firm with in-house work at a company. 50.00% of respondents also serve as arbitrator. 90.00% of respondents were located in Mexico City, and 10.00% in Monterrey.

Seat

Mexico has a prominent place within contemporary international commercial arbitration because of its long involvement in the North American Free Trade Agreement (NAFTA), one of the most important investment arbitration treaties. Because of this, it might be expected that Mexico will have a well-developed arbitration community, building off the recognition that arbitration will have achieved within Mexico through NAFTA. Results from the survey, however, indicate a more complex picture, in which Mexico does indeed possess a developed and sophisticated community of international and “high end” arbitration practitioners, but with ordinary domestic arbitration remaining significantly less developed.

As might be expected given its long-standing engagement with arbitration, Mexico’s legal framework for arbitration is strong, with an arbitration law based on the UNCITRAL Model Law. In addition, Mexico is party to the New York, Panama and Montevideo Conventions. It is not currently a party to the ICSID Convention, but is party to 32 bilateral investment treaties, as well as NAFTA and other multilateral treaties. Consistent with this formal structure, respondents to the survey overwhelmingly view Mexico’s legal framework regarding arbitration positively, with 87.50% of respondents describing the laws applicable to domestic arbitration in Mexico as supportive of arbitration (25.00% selecting Very Supportive), and 87.50% saying the same about the laws applicable to international arbitration (31.25% selecting Very Supportive).

Nonetheless, an initial indication that some difficulties exist with arbitration in Mexico, despite the formal legislative support it has received, appears in the fact that when Mexican respondents were asked to identify five States that they would recommend as the seat for an international arbitration, only 56.25% of Mexican respondents selected Mexico, making it only the fifth most preferred seat among Mexican respondents. While this does not mean that Mexican respondents were recommending that Mexico be avoided, it does display at least a muted support for the current state of arbitration in Mexico.

These reservations about Mexico as an arbitral seat are repeated at the international level, as when non-Mexican respondents to the survey were asked the same question only 6.56% recommended Mexico, making Mexico only the 19th most recommended State. Indeed, even when only non-Mexican respondents from Central and South America are considered, a region in which Mexico has a recognized economic and political importance, only 14.46% of respondents recommended Mexico, making Mexico 12th overall, and 7th among States in the region.

Nonetheless, while these results indicate the existence of widespread reservations about Mexico as a seat of arbitration, including in Mexico itself, it is important to emphasize that other results from the survey do not indicate that these reservations derive from significant problems

⁶⁵ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Orlando Federico Cabrera Colorado, Héctor Anaya Mondragón, Gabriela Alvarez Avila, Carlos Leal-Isla Garza, Carlos Loperena.

with arbitration in Mexico, but rather from the lack of what might be called an “arbitration culture” in Mexico.

As is often the case, for example, Mexican legislators are described by Mexican respondents as having a relatively low understanding of arbitration, with 56.25% of respondents describing that understanding as either Low or Very Low (6.25% selecting Very Low), and only 12.25% describing it as High (none selecting Very High). Nonetheless, this lack of understanding of arbitration amongst Mexican legislators does not appear to be coupled with an actual antagonism towards arbitration, as only 12.25% of respondents described Mexican legislators as having a Negative view of arbitration (none selecting Very Negative). Only 37.50% described legislators as having a Positive, and none Very Positive, but 50.00% described legislators’ view of arbitration as Neutral.

Similarly, when Mexican respondents were asked the same questions about Mexican judges, 37.50% of respondents described them as having a Low or Very Low understanding of arbitration (6.25% selecting Very Low), with only 6.25% of respondents selecting High and none Very High. Again, however, while only 25.00% of respondents described Mexican judges as having a Positive view of arbitration, and none Very Positive, only 18.75% described them as having a Negative view of arbitration, and none Very Negative. Instead, the majority of respondents, 56.25%, described Mexican judges as having a Neutral view of arbitration.

Finally, when Mexican respondents were asked the same questions about business people in Mexico, their responses again display a lack of engagement with arbitration, rather than any hostility towards it. 50.00% of respondents described the understanding of arbitration of business people in Mexico as Low (none selecting Very Low), and only 12.50% as High. Yet while only 37.50% of respondents described Mexican business people as having a Positive view of arbitration (none Very Positive), only 6.25% selected Negative (none Negative). Rather, the majority, 56.25%, described Mexican business people as being Neutral towards arbitration.

There is, then, a consistent narrative that emerges from the survey results of Mexico as a jurisdiction in which arbitration has simply not been widely embraced at more than a formal level. There is little understanding of arbitration outside the realm of arbitration specialists, but there is also no significant hostility towards it. Rather, despite Mexico’s long and high-profile engagement with arbitration as a result of its involvement in NAFTA, arbitration as a mechanism for resolving ordinary commercial disputes simply has not been embraced.

Further support for this picture can be seen in the fact that only 31.58% of Mexican respondents reported a belief that the majority of commercial agreements entered into in Mexico during the past 5 years between domestic Mexican companies contained an arbitration agreement (5.26% estimating over 75%), and only 47.37% stated the same about contracts between a Mexican company and a foreign company (15.79% estimating 75%). While the estimate regarding domestic contracts is only slightly lower than survey-wide (38.45% of respondents survey-wide, with 12.35% estimating over 75%), the estimate regarding international contracts is notably lower (64.54% of respondents survey-wide, with 29.88% estimating over 75%). This again supports a picture of a lack of an “arbitration culture” in Mexico, even amongst the larger companies that are more likely to be involved in international transactions.

Nonetheless, Mexico’s involvement in NAFTA does seem to have had one significant effect through the development of a strong and internationally-active group of “high end” commercial arbitration practitioners. It is, for example, notable that while Mexico itself was only the 5th most preferred arbitral seat amongst Mexican respondents, the four more strongly preferred jurisdictions are a list of the world’s leading arbitration centers: France (81.25%), the United States of America (81.25%), England, Wales and Northern Ireland (68.75%) and Switzerland (68.75%). Similarly, those respondents who serve as arbitrator reported internationally-active

arbitrator practices, with 30.00% reporting receiving the majority of their appointments in arbitrations seated abroad.

As a result, while the evidence from the survey indicates that arbitration within Mexico remains less developed than might be expected given Mexico's economic importance and its recognition with the arbitral community, it has developed a set of highly regarded and internationally active arbitration practitioners. This core of expert practitioners, however, has not yet managed to convince Mexico as a whole that commercial arbitration is something to be embraced.

Procedure

As is often the case, Mexican respondents reported arbitration as being significantly faster than litigation, with 87.50% describing it as either Faster or Much Faster than litigation in Mexico (50.00% selecting Much Faster). However, again in line with results in most jurisdictions, the majority of respondents also reported arbitration as being more expensive than litigation, with 68.75% describing it this way, including 43.75% describing it as Much More Expensive.

Nonetheless, it is important to recognize the comparative nature of respondents' description of the speed of arbitration in Mexico (i.e. compared with litigation in Mexico), as respondents do not actually report that arbitration in Mexico is notably quick. Indeed, when asked to describe the average time taken from the request for arbitration to delivery of the final award in domestic arbitrations in which they had been involved in the past 5 years, no Mexican respondent gave an average of less than 6 months, and only 46.15% less than 12 months. The majority of respondents, that is, stated that in their experience an average domestic arbitration in Mexico has taken over 12 months to complete. Similarly, 25.00% of Mexican respondents reported the international arbitrations in which they had been involved in the past 5 years taking on average less than 12 months, with 37.50% reporting an average of over 24 months.

Some of this delay to arbitral proceedings in Mexico can be seen as arising from delays in the production of awards by arbitrators, with only 23.08% of respondents reporting that on average awards in domestic arbitrations in which they had been involved in the past 5 years were produced within 3 months of the end of hearings, and none saying this about international arbitrations. Indeed, 38.47% of respondents reported awards in domestic arbitrations on average taking longer than 6 months to be delivered, with 62.50% of respondents reporting the same for awards in international arbitrations. Therefore, over the last few years arbitral institutions have adopted measures encouraging the prompt issuance of awards covering all of the issues disputed between the parties.

Enforcement of awards in Mexican courts is also reported to be slow, with only 16.67% of respondents reporting that in their experience enforcement of a domestic award has on average taken less than 6 months, and only 58.33% reporting less than 12 months. Similar results were reported for foreign awards, with only 7.69% of respondents reporting an average of less than 6 months, and only 46.15% reporting less than 12 months. Indeed, 30.77% of respondents reported enforcement of a foreign arbitral award on average taking 25-36 months.

Market

35.00% of Mexican respondents reported becoming involved in their first arbitration within 2 years of entering legal practice, with 55.00% doing so within the first 5 years. Many countries that are developing as arbitral jurisdictions show a significant variation in terms of initial involvement in arbitration, with practitioners who qualified more recently reporting engagement with arbitration earlier in their careers than those who qualified in earlier years. Notably, this trend is not evidenced amongst Mexican respondents. Rather, Mexican respondents who reported becoming involved in their first arbitration within two years of entering legal practice qualified as lawyers across the period from 1993 to 2009, while those

who first experienced arbitration within 5 years qualified across the period from 1992 to 2009. Significantly, the beginning of both of these periods roughly corresponds with the coming into force of NAFTA on 1 January 1994, further suggesting that Mexico's involvement with NAFTA did create opportunities in Mexico for involvement in arbitration. Nonetheless, the even spread evidenced in these results also supports the view suggested above that Mexico is not actually developing as an arbitral jurisdiction, but rather has already developed a concentrated elite of international-level practitioners, with arbitration failing to be embraced more broadly.

Consistent with this interpretation, only 30.00% of respondents reported arbitration becoming their primary field of work in under 5 years (including 10.00% reporting under 2 years), with 60.00% reporting a period of over 10 years (including 40% reporting over 15 years). There is no correlation between those who experienced arbitration early in their careers and those who reported arbitration becoming their primary practice relatively quickly. This again indicates that arbitration remains a relatively niche field in Mexican legal practice, such that even new entrants into arbitration practice will usually have to spend several years building a career in the field, rather being able to take advantage of the opportunity to "enter on the ground floor" of a thriving arbitral community.

Also consistent with the picture of Mexico as currently lacking a broad-based embrace of arbitration, Mexican respondents also reported very low rates of domestic *ad hoc* arbitration, with 87.50% estimating that 0-25% of domestic arbitrations in Mexico were conducted *ad hoc*. Similar results were reported for international arbitration, with 81.25% of respondents estimating 0-25% of international arbitrations were conducted *ad hoc*.

Nonetheless, despite the reportedly low levels of *ad hoc* arbitration in Mexico, Mexican arbitral institutions seem to play a less central role in the development of arbitral careers than is the case in many other countries. Specifically, while in many countries most arbitrators reported receiving their first appointment as arbitrator from an arbitral institution, this was the case for only 30.00% of Mexican respondents. Similarly, while institutions often play a central role in delivering ongoing appointments to arbitrators, only 40.00% of Mexican arbitrators reported receiving more than 25% of their appointments from an arbitral institution.

Overall, the evidence from the survey is that arbitration remains a "work in progress" in Mexico. Strong formal foundations have been laid in terms of domestic legislation and international treaties, and leading Mexican practitioners have active international practices, testifying to international recognition of their expertise. However, embrace of arbitration beyond these "elite" levels of the field remains tepid, challenging both the ability of local practitioners to specialize in arbitration as a career, and the effectiveness of Mexico as an arbitral seat.

Peru

Profile⁶⁶

The respondent group for Peru is composed of 24 individuals (21 men and 3 women). 45.83% of the respondents work at a law firm, with 41.67% operating as sole practitioners. In addition, 20.83% are affiliated with a university, 1 with an arbitral institution, and 1 with a business organization. 83.33% report serving as arbitrator.

Seat

Peru currently exhibits both an example of the successful development of arbitration within a Latin American jurisdiction, and the problems that can arise from the flexible nature of arbitration and the limited judicial supervision necessary for arbitration to operate effectively. While the survey provides evidence of an active and professionalized arbitration community within Peru, the use of arbitration by criminals and corrupt individuals within Peru has created a degree of backlash against arbitration.⁶⁷ Nonetheless, the indications from the survey are that the negative effects of these cases has not undercut the largely positive features of arbitration in Peru.

Arbitration in Peru is regulated by Legislative Decree 1071, based on the UNCITRAL Model Law.⁶⁸ Peru is also party to the New York Convention, the Panama Convention, the ICSID Convention and 33 Bilateral Investment Treaties. Consistent with this picture, Peruvian respondents were overwhelmingly positive about the legal framework applicable to arbitration in Peru. 90.92% described the laws applicable to domestic arbitration as Supportive or Very Supportive (72.73% selecting Very Supportive), and 95.25% said the same thing about the laws applicable to international arbitration (66.67% selecting Very Supportive).

Evidence of the acceptance of arbitration within Peru extends behind the legal framework, however, as 73.91% of respondents reported a belief that over 50% of domestic commercial contracts entered into in the past 5 years included an arbitration agreement, with 39.13% believing this was true of over 75% of domestic commercial contracts. Indeed, no respondent believed that 25% or fewer of domestic commercial contracts entered into in the past 5 years included an arbitration agreement. Consistent with this belief, 91.30% of respondents reported that 76-100% of the domestic commercial arbitrations in which they had been involved in the past 5 years had been based upon a predispute arbitration agreement.

Even more prominently, 91.30% of respondents reported a belief that the majority of commercial contracts entered into between a domestic commercial entity and a foreign commercial entity in the past 5 years contained an arbitration agreement, with 60.87% selecting 76-100%. Again, no respondent believed that fewer than 25% of such contracts contained an arbitration agreement. As with domestic commercial arbitration, 72.22% of respondents indicated that 76-100% of the international commercial arbitrations in which they had been involved in the past 5 years had been based upon a predispute arbitration agreement.

⁶⁶ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Alvaro Silva, Sandro Espinoza Quiñones, Fernando Cantuarias, Carlos A. Matheus López, Mario Castillo Freyre.

⁶⁷ FERRERO COSTA, Eduardo, "La solución no es seguir regulando el arbitraje porque los infractores seguirán buscando la forma de violar la ley." Jan – Mar 2017. Available at <http://www.amcham.org.pe/publicaciones/articulos.php?art=107>.

⁶⁸ MATHEUS LÓPEZ, Carlos. "Introducción al Nuevo Decreto Legislativo que Norma el Arbitraje." Nº 38, 2009. Available at <http://revistas.pucp.edu.pe/index.php/iusetveritas/article/download/12200/12765>.

Perhaps unsurprisingly, given the apparent engagement of Peru with arbitration, Peruvian respondents described Peruvian business people as having a relatively high level of understanding of arbitration, with 45.45% describing it as High or Very High (3.94% selecting Very High), and only 22.73% selecting Low (none selecting Very Low). In addition, Peruvian business people are reported as viewing arbitration positively, with 95.46% of respondents describing Peruvian business people as having a Positive or Very Positive view of arbitration (22.73% selecting Very Positive).

As is often the case, respondents described Peruvian legislators as having a relatively low understanding of arbitration, with 54.55% of respondents selecting Low or Very Low (4.55% selecting Very Low). However, given the recent connection of arbitration with corruption and criminality, it is notable that legislators are nonetheless described as having a relatively neutral view of arbitration, with 45.12% of respondents selecting Neutral, 31.82% Positive or Very Positive (9.09% selecting Very Positive) and 18.19% Negative or Very Negative (4.55% selecting Very Negative). This suggests that while there has been enough of a backlash against arbitration to result in the introduction of some legislative measures, the broad adoption of arbitration in the Peruvian business community has prevented Peruvian legislators from over-generalising the problems that have developed in individual cases.

Given the current difficulties arbitration in Peru is addressing, it is notable that when asked to recommend 5 seats as the seat of an international commercial arbitration, 91.30% of Peruvian respondents recommended Peru, making Peru the most recommended State amongst Peruvian respondents (the United States of America being second with 78.26%).

However, while arbitration in Peru may be active, results from the Survey indicate that Peru has not managed to attain significant recognition abroad as an arbitral seat. When only non-Peruvian respondents to the Survey are considered, Peru is recommended by only 6.67% of respondents as one of the 5 preferred seats for an international arbitration, ranking it only 19th among States included in the Survey and 6th amongst States in South and Central America. Results improve somewhat if only non-Peruvian respondents from Central and South America are considered, with 15.72% recommending Peru, making it equal 11th overall, and equal 6th amongst States in South and Central America. However, when only respondents from outside Central and South America are considered, only 1.45% of respondents recommend Peru, making Peru equal 29th overall, with only 4 individuals recommending Peru, one from the Dominican Republic, one from Cuba, and 2 from the U.S.A.

These results indicate that while Peru cannot be said to have gained any sort of leadership position in the region, it has at least gained a level of recognition within the region. However, this regional recognition has yet to be translated into any broader level of international recognition, an interpretation further supported by the fact that 85.71% of Peruvian respondents who reported having worked as an arbitrator in the past 5 years also reported not having served as arbitrator in a single arbitration in that period in which Peru was not the seat. Similarly, Peruvian respondents also reported low levels of involvement in international commercial arbitration as practitioners, with 41.67% of respondents reporting no involvement at all, and 58.33% reporting that international commercial arbitration represented only 1-25% of their time spent on arbitration. No respondent reported spending more than 25% of their arbitration workload on international commercial arbitration.

Procedure

Indicative of the apparent high level of development of arbitration in Peru, Peruvian respondents reported a large difference between procedures adopted in arbitration and those used in litigation in Peruvian courts. Notably this was true even for domestic arbitration, where parallels in procedure are usually much more common. 77.27% of respondents reported

that there were Few Shared Procedures or No or Almost No Shared Procedures between domestic arbitration and litigation (31.82% selecting No or Almost No Shared Procedures). 84.63% of respondents reported the same for international arbitration (53.85% reporting No or Almost No Shared Procedures). This level of divergence between procedures used in arbitration and those practitioners will be familiar with from court litigation indicates a substantial level of development and professionalisation of arbitration in Peru, sufficient for arbitration to have developed its own identity rather than merely serving as an adjunct to court litigation.

As is often the case, Peruvian respondents reported arbitration in Peru as notably faster than litigation in Peru, with every respondent selecting either Faster or Much Faster, and 90.91% selecting Much Faster. In turn, however, and again as is often the case, respondents also described arbitration in Peru as more expensive than litigation, with 77.27% describing it as either Slightly More Expensive or Much More Expensive, including 50.00% selecting Much More Expensive.

Nonetheless, this positive view of the speed of arbitration in Peru seems to reflect more the relative slowness of Peruvian courts than it does any particular speed on the part of Peruvian arbitration. Indeed, 63.64% of Peruvian respondents reported that on average the domestic arbitrations in which they have been involved in the past 5 years have taken 13-24 months to be completed, with 9.09% reporting an average of less than 6 months. Similarly, 70.00% of respondents reported an average of over 12 months for international arbitrations, with 20.00% reporting an average of 25-36 months.

This said, the survey indicates that the delays do not seem to arise from the speed of work undertaken by Peruvian arbitrators, as Peruvian respondents reported Peruvian arbitrators as being relatively quick in delivering awards after the completion of hearings. 90.91% of respondents reported that in the domestic arbitrations in which they had been involved in the past 5 years, the award was received 3 months or less after the completion of hearings. In international arbitrations, 40.00% reported receiving the award in 3 months or less, and 100.00% in 6 months or less. By way of comparison, survey-wide only 70.15% of respondents reported an average of 3 months or less in domestic arbitration, and only 68.99% reported an average of 6 months or less in international arbitration.

One component of delay that appears to significantly impact on arbitration in Peru relates to the appointment of arbitrators, rather than to the speed with which arbitrators work, indicating an insistence by parties on competing for the time of a relatively small group of expert arbitrators, particularly in international arbitration. 57.15% of respondents reported the availability of arbitrators as a Significant or Serious cause of delays in international arbitrations (28.57% selecting Serious), with a further 19.05% describing it as an Average cause. While arbitrator availability appears to be less of an issue in domestic arbitration, it is still an issue, with 36.36% of respondents describing it as a Significant or Serious cause of delays (9.09% selecting Serious), and a further 45.45% describing it as an Average cause.

The interaction between arbitration and Peruvian courts is also particularly worth noting, as it appears to demonstrate some impact of the recent controversies affecting arbitration in Peru. Encouragingly, Peruvian respondents actually provide a relatively positive picture of the relationship of Peruvian judges with arbitration, with 40.91% describing Peruvian judges as having a High or Very High understanding of arbitration (4.55% selecting Very High), compared with only 22.73% selecting Low (and none selecting Very Low). Even more encouragingly, 63.64% of respondents reported Peruvian judges as having a Positive or Very Positive view of arbitration (22.73% selecting Very Positive), with only 18.18% selecting Negative and none selecting Very Negative.

Nonetheless, there is evidence that Peruvian courts have reacted to the controversies affecting arbitration in Peru through enhanced monitoring of arbitration agreements, although in a way that arguably reflects their level of understanding of and support for arbitration. 56.52% of respondents report Peruvian courts as being either Strict or Very Strict in their interpretation of the existence of arbitration agreements (13.04% selecting Very Strict), while 30.44% described Peruvian courts as Liberal or Very Liberal in the same respect (4.35% selecting Very Liberal).

These results initially appear to be inconsistent, however they become more coherent when respondents are categorized as either “Core” (listed in Chambers, WhosWhoLegal or Legal500), or non-“Core”, reflecting their degree of prominence in arbitration in Peru. When only non-“Core” respondents are considered, 69.23% describe Peruvian courts as Strict (53.85%) or Very Strict (15.38%), while only 15.38% selecting Liberal, and none select Very Liberal. In turn, when only “Core” respondents are considered (43.48% of Peruvian respondents), 50.00% selecting Liberal or Very Liberal (10.00% selecting Very Liberal), while only 40% describe courts as Strict or Very Strict (10.00% selecting Very Strict).

Similar results are obtained with respect to the strictness of Peruvian courts regarding the scope of arbitration agreements, with 47.83% of respondents describing courts as Strict or Very Strict (8.70% selecting Very Strict), and 39.13% describing courts as Liberal or Very Liberal (8.70% selecting Very Liberal). However, when only “Core” respondents are considered, 60.00% select Liberal or Very Liberal (20.00% selecting Very Liberal) and only 30.00% select Strict (none selecting Very Strict). In turn, when non-“Core” respondents are considered, only 23.08% select Liberal and none select Very Liberal, while 61.53% select Strict or Very Strict (15.38% Very Strict).

One explanation for these results, which would be consistent with the concerns that have recently arisen regarding arbitration in Peru, is that Peruvian courts exhibit greater tolerance of and trust in arbitration at the higher end of the practice, where sophisticated parties are most likely to be involved on both sides of the dispute, and are most likely to be represented by reputable arbitration professionals. However, they are more restrictive when other types of cases appear before them, examining arbitration agreements closely to ensure that consent to arbitration genuinely exists.

Market

One particularly notable feature of arbitration in Peru, reflecting the level of official acceptance arbitration has gained, is the prominence that public sector arbitration plays in the workloads of Peruvian respondents, with 70.83% of respondents reporting some level of involvement, and 27.50% reporting that it constituted the majority of their arbitration work (16.67% reporting that it constituted 76-100% of their arbitration work). Construction arbitration is also an important field, with 83.33% of respondents reporting some level of involvement, and 29.17% reporting that it constituted the majority of their arbitration work (12.50% reporting that it constituted 76-100%).

As would be expected in a developed arbitration community, Peruvian respondents indicate that arbitration is sufficiently common in Peru that Peruvian practitioners can specialize in arbitration, rather than merely undertake arbitrations as a supplement to court-based practices. Indeed, 70.83% of Peruvian respondents reported that arbitration is their primary field of practice. Similarly, 45.83% of respondents reported first becoming involved in arbitration within 5 years of qualifying as a lawyer (20.83% within 2 years). Notably, 72.73% of these respondents received their legal qualification prior to 2000, indicating the long-term nature of Peru’s active engagement with arbitration.

Nonetheless, it is also notable that 64.70% of respondents who reported arbitration as their primary field of practice reported that it took over 10 years for arbitration to become their primary field of practice. This suggests that while it is indeed possible for Peruvian practitioners

to specialize in arbitration, development of a self-sustaining arbitration practice takes a considerable amount of time, and there are only limited opportunities for new practitioners to enter and specialize in arbitration immediately.

Trinidad and Tobago

Profile⁶⁹

The Respondents' group for Trinidad and Tobago is composed of 8 respondents (7 male and 1 female). The group is diverse in terms of both professional background and ethnicity: namely, 50.00% of the respondents work at law firms, 25.00% are sole practitioners, 25.00% works at companies, 12.50% works at universities and 12.50% are active in "Clinical Legal Education".⁷⁰ Regarding ethnicity, 12.50% of the respondents identified themselves as "Asian", 12.50% as "Black or African American", 37.50% as "White" and 37.50% as "Other". Answers for "Other" were: "Eurasian", "Caribbean Mixed" and "Asian/White/Arab Mixed".

Seat

Arbitration in Trinidad and Tobago is regulated by the Arbitration Act No. 5 of 1939, amended by Act No. 22 in 1981 and Act No. 36 in 1997. The same regulatory framework, generally based on English law, applies both to domestic and international arbitration. In addition, the international obligations arising out of the New York Convention are implemented by the Arbitration (Foreign Arbitral Awards) Act 1996. As far as other types of alternative dispute resolution are concerned, mediation is regulated by the Mediation Act No 8 of 2004.

When asked to evaluate the laws applicable to domestic arbitration in Trinidad and Tobago, the local Respondents expressed mixed opinions: 42.86% of them characterized the laws as "Neutral", 28.57% described them as "Unsupportive" and 28.57% qualified them as "Supportive". The laws applicable to international arbitration were evaluated in comparatively better terms: 42.86% of the respondents characterized these laws as "Supportive", 42.86% as "Neutral" and 14.29% as "Unsupportive". A possible explanation for this difference in results is that, while the regime applicable to domestic and international arbitration is largely the same, The Foreign Arbitral Awards Act 1996 generates the perception of a friendlier framework for international proceedings.

The mixed opinions concerning Trinidad and Tobago's laws may be due to a perceived lack of understanding of arbitration, on the part of the local legislators. Namely, when asked to describe the level of understanding of arbitration on the part of the legislators of Trinidad and Tobago, 14.29% of the respondents qualified it as "Very low", 57.14% described it as "Low" and 28.57% characterized it as "Adequate", while none of them described it as "High" or "Very high". The attitude of legislators was not described in positive terms either: 16.67% of the respondents characterized it as "Very negative", 50.00% qualified it as "Negative" and 33.33% described it as "Neutral".

Despite these perceived problems, arbitration appears to be used in Trinidad and Tobago, for both domestic and international dispute resolution. 42.86% of the respondents estimated that "76-100%" of the contracts between domestic commercial entities entered in Trinidad and Tobago included an arbitration agreement. Furthermore, 28.57% of the respondents estimated a proportion of "26-50%" of domestic contracts including an arbitration clause, and 28.57% offered an estimate of "0-25%".

Generally speaking, Respondents estimated that international agreements entered into the past 5 years with one of the parties being from Trinidad and Tobago included arbitration agreements

⁶⁹ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Steve Rajpatty.

⁷⁰ The Respondents were allowed to select more than one option, so as to accurately reflect their professional profile.

more frequently than domestic contracts. 42.86% of the Respondents considered the proportion of international contracts entered in the past 5 years that included an arbitration agreement as “76-100%”, while 14.29% gave an estimate of “51-75%”, 28.57% answered “26-50%” and 14.29% answered “0-25%”. Such differences of estimates among respondents might be explained in light of their professional backgrounds and roles in arbitration. Most importantly, however, the results show that arbitration is far from being unknown in Trinidad and Tobago, and is used quite frequently for the resolution of commercial disputes.

However, according to the local Respondents, there is still room for improvement and promotion of the arbitration culture: 42.86% of the Respondents characterized the level of understanding of arbitration on the part of business people in Trinidad and Tobago as “Low” and 14.29% as “Very Low”; 28.57% described it as “Adequate” and only 14.29% qualified it as “High”, while none of them answered “Very high”. The attitude of business people was also not portrayed in predominantly positive terms: 14.29% characterized it as “Very Negative”, 28.57% as “Negative”, 42.86% as “Neutral” and 14.29% as “Positive”.

Regarding the costs of arbitration, 57.14% of the respondents considered that it is more expensive to submit a dispute to arbitration than litigating the same dispute in State courts: 28.57% considered it to be “Slightly more expensive” and 28.57% considered it to be “Much more expensive”. However, other Respondents from Trinidad and Tobago expressed a different opinion: 14.29% of them answered that “Costs are the same” and 28.57% considered that arbitration is “Slightly cheaper” than litigation in courts.

As far as the speed of arbitration is concerned, 42.86% of the Respondents affirmed that the arbitration is “Much faster” than court litigation, 28.57% affirmed that it is “Slightly faster”, 14.29% answered that the two mechanisms of dispute resolution have “The same speed” and 14.29% considered arbitration “Much slower”. In comparison with the survey-wide results, a higher proportion of respondents of Trinidad and Tobago considered that arbitration and litigation have “The same speed” (6.88% of Respondents survey-wide), or even that arbitration is “Much slower” (1.15% of Respondents survey-wide). These results should not be read as entailing that, according to the local Respondents, arbitrating in Trinidad and Tobago is slower than litigating – the results predominantly indicate that arbitration offers a certain advantage over court litigation, in terms of speed. However, the comparative advantage of arbitration over court litigation, in terms of speed, was not perceived as strongly by the Respondents of Trinidad and Tobago, in comparison with Respondents located in other American jurisdictions.

The Countries that Respondents from Trinidad and Tobago most frequently recommended as seats of international arbitration were England, Wales and Northern Ireland (85.71% of the answers), Trinidad and Tobago and Canada (both with 57.14% of the answers), United States of America (42.86%)

Procedure

When asked to describe the procedural reality of arbitration in Trinidad and Tobago, 71.43% of the respondents stated that domestic arbitration has “Some shared procedures” with State court litigation. Furthermore, 14.29% of the Respondents argued that arbitration and litigation have “Many shared procedures”, and 14.29% stated that arbitration and litigation have “Effectively the same procedures”.

In Trinidad and Tobago, arbitration agreements seem to be challenged less often than the Survey-wide average. Over the past 5 years, the percentage of Respondents from Trinidad and Tobago that did not experience any challenge upon the validity of an arbitration agreement was 57.14% for domestic arbitration and 71.43% for international arbitration. In the Survey-wide results, only 36.64% did not experience any challenge in domestic arbitration and 50.41% gave the same answer with respect to international arbitral proceedings. The same result holds true

with respect to challenges concerning the scope (rather than the validity) of agreements to arbitrate. In Trinidad and Tobago, 85.71% of the respondents did not experience this type of challenges over the past 5 years in domestic cases, while only 37.35% of the Survey-wide respondents gave the same answer. In addition, for international arbitration, none of the Respondents based in Trinidad and Tobago reported experiencing challenges based on the scope of the agreement.

A possible explanation for the low rate of challenges to the scope and validity of agreements to arbitrate may be that the courts of Trinidad and Tobago are generally regarded as rather liberal in interpretation. When asked to describe the attitude of their local courts in interpreting the validity of arbitration agreements, 42.86% of the Respondents from Trinidad and Tobago answered “Liberal”, 14.29% answered “Very liberal”, 28.57% answered “Neutral” and only 14.29% answered “Strict”, while none of them answered “Very strict”. As for the attitude in interpreting the scope of arbitration agreement, 42.86% of the Respondents described the courts of Trinidad and Tobago as “Neutral”, 28.57% described them as “Liberal” and 14.29% described them as “Very Liberal”. Only 14.29% of the respondents described them as “Strict” in this respect.

The arbitration-friendly attitude of the judiciary is confirmed by the results concerning the perceived level of understanding of arbitration on the part of judges in Trinidad and Tobago: 14.29% of the respondents considered it to be “Very high”, 14.29% characterized it as “High”, 42.86% characterized it as “Adequate” and 28.57% characterized it as “Low”, while none of them qualified them as “Very low”. The attitude of judges was characterized as “Very Positive” by 28.57% of the Respondents, “Positive” by 14.29%, “Neutral” by 42.86% of the Respondents and as “Negative” by 14.29% of them.

Ad hoc arbitrations are far from uncommon in Trinidad and Tobago, especially in domestic cases: 42.86% of the respondents estimated, based on their professional experience, that the proportion of domestic arbitrations seated in Trinidad and Tobago that were commenced over the past 5 years and have been conducted on an *ad hoc* basis was “76-100%”. There are however, local institutions offering administration services, such as the Dispute Resolution Center founded by Chamber of Industry and Commerce in 1996.

Market

Most of Respondents located in Trinidad and Tobago are active not only in arbitration, but also in other fields of legal practice. In terms of hours worked, 62.50% of the Respondents devoted “0-25%” of their time to arbitration; 12.50% devoted “26-50%” of their working hours to arbitration, and 25.00% devoted “51-75%” of their time to this mechanism of dispute resolution. 87.50% of the respondents took on 1 to 4 new arbitration cases per year over the past 5 years.

The arbitration market in Trinidad and Tobago seems to be focused on domestic cases, rather than international disputes. Namely, 62.50% of the respondents did not work on international cases over the past 5 years. By contrast, 50.00% of the Respondents reported an involvement in domestic commercial cases, and 75.00% of them stated that they worked on construction arbitration over the past 5 years.

Turks & Caicos Islands

Profile⁷¹

The group of respondents from the Turks & Caicos Islands is composed of 5 individuals (4 male and 1 female), all from the island of Providenciales. Given the small size of the sample, the results should be interpreted as very general indications of some basic trends concerning arbitration in this jurisdiction.

Seat

Arbitration at the Turks & Caicos Islands is regulated by Arbitration Ordinance 7 of 1975 (Ch. 4.08). This Statute is largely based in the English legislation pre-dating the Arbitration Act 1979, and as such does not necessarily reflect the currently prevailing transnational trends or the contents of the UNCITRAL Model Law.

Despite the lack of recent reforms in the legal framework applicable to arbitration, the respondents from the Turks and Caicos Islands did not express a generally negative opinion concerning their local laws. When asked to evaluate the supportiveness of the legislation applicable to arbitration in this jurisdiction, with respect to both domestic and international arbitration, 40.00% of the respondents answered "Supportive", 40.00% answered "Neutral" and only 20.00% answered "Unsupportive".

In light of these results, it seems that the diffusion of arbitration in the Turks & Caicos Islands is not hindered by specific problems in the local arbitration statute. By contrast, a significant problem seems to exist with reference to the perception of arbitration on the part of local business people. When asked to evaluate the level of understanding of arbitration on the part of business people, 80.00% of the respondents answered "Very low" and the remaining 20.00% answered "Low", while none of them expressed a positive opinion. As for the attitude of business people towards arbitration, 60.00% of the respondents described it as "Neutral", 20.00% qualified it as "Positive" and 20.00% qualified it as "Negative". In sum, a more effective promotion of the arbitration culture within the local business community seems to be particularly needed in the Turks & Caicos Islands.

Mixed opinions were expressed concerning the level of understanding of arbitration on the part of legislators in the Turks & Caicos Islands: 80.00% of the respondents qualified it as "Neutral" and 20.00% described it as "Negative".

As far as judges the Turks and Caicos Islands are concerned, their understanding of arbitration was characterized as "Adequate" by 60% of the respondents, "High" by 20% and "Low" by 20%. Furthermore, their attitude was characterized as "Positive" by 80% of the respondents and as "Negative" by only 20% of them.

Procedure

In order to understand what aspects of arbitration may encourage parties in the Turks & Caicos Islands to use this mechanism of dispute resolution, it is useful to compare it with proceedings in State courts. Arbitration seems to offer an advantage over litigation in the courts of the Turks and Caicos Islands, in terms of speed: 40.00% of the respondents argued that arbitration is "Much faster" than litigation, another 40.00% qualified it as "Slightly faster" and only 20.00% stated that arbitration has "The same speed" as litigating a case in Turks & Caicos national courts.

⁷¹ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: David Stewart, Conrad Griffiths QC.

In terms of costs, the respondents from the Turks and Caicos Islands expressed mixed opinions: 60.00% of them qualified arbitration as “Much more expensive” than litigation, 20.00% argued that “Costs are the same” and the remaining 20.00% stated that arbitration is “Much cheaper”.

Interestingly, according to the survey results, domestic arbitration in the Turks and Caicos Islands is not always based on an agreement concluded before the dispute has materialized. In fact, when asked to estimate what percentage of the arbitrations they worked on over the past 5 years was passed on a pre-dispute agreement, 60% of the respondents answered “0”. Furthermore, 20.00% of the respondents reported domestic arbitration as being based on a pre-dispute agreement in “1-25%” of cases, and only 20.00% stated that the domestic arbitrations they worked on were based on a pre-dispute agreement in “76-100%” of cases.

The validity of arbitration agreements does not seem to be challenged often in arbitrations seated in the Turks and Caicos Islands. In domestic arbitrations, only 25.00% of the respondents experienced such challenges in cases they worked on over the past 5 years. In international arbitrations, 40.00% of the respondents reported experiencing the same type of challenge over the past 5 years. A possible explanation for the relative rarity of challenges concerning the validity of arbitration agreements is that local courts are not considered particularly strict in this respect: namely, 60.00% of the local respondents described them as “Liberal” in the interpretation of the validity of arbitration agreements, 20.00% characterized them as “Neutral” and only 20.00% qualified them as “Strict” in this respect.

The same conclusions also hold true for challenges to the arbitration agreement based upon its scope (rather than validity): only 25.00% of the respondents experienced them at all over the past 5 years, and only for a minority (“1-25%”) of the cases they worked on in this period of time. The courts of the Turks and Caicos Islands were regarded as liberal in the interpretation of the scope of agreements, with 80.00% of respondents describing them as “Liberal” and 20.00% qualifying them as “Neutral”.

Ad hoc arbitration exists in the Turks and Caicos Islands, but the respondents expressed mixed views as to how frequent it is: 60.00% of the respondents stated that no more than “0-25%” of their arbitrations over the past 5 years were conducted without the involvement of an administering institution. By contrast, the remaining 40.00% of the respondents the proportion of ad hoc arbitrations that they worked over this period was between 76% and 100%. Results for both domestic and international arbitration were the same.

Market

For 80.00% of the respondents located in the Turks and Caicos Islands, arbitration is not the primary field of work. More specifically, no respondent devotes more than 50.00% of their working time to arbitration: 60.00% of them reported devoting “0-25%” of their working time to arbitration cases, and 40.00% of them stated that arbitration accounts for “26-50%” of their time.

The part-time nature of the respondent’s involvement in arbitration is reflected in the number of arbitration cases they typically take per year: 80.00% of them reported taking up no more than 4 new cases a year, and 20.00% did not take any new arbitration case over the past 5 years.

While not large enough to justify an exclusive professional focus, the arbitration market of the Turks and Caicos Islands is rather diverse in terms of the type of cases the respondents reported dealing with. More specifically, 80.00% of the respondents reported being active in domestic cases, but 40.00% of them also reported having worked on international commercial arbitration

over the past five years. 20.00% of the respondents also reported an involvement in investment arbitration.⁷²

⁷² This result is consistent with the circumstance that various BITs concluded by the UK extend their effects to the Turks and Caicos Islands, and some of them have given rise to arbitration cases: see, e.g., the claim brought by an investor from the Turks & Caicos Islands, in *British Caribbean Bank Limited v. The Government of Belize*, PCA Case No. 2010-18.

United States of America

Profile⁷³

The respondent group for the United States of America is composed of 212 individuals (181 men, 30 women, and 1 who self-described as other). 64.15% of the respondents work at a law firm, 24.53% operate as sole practitioners, 5.66% are affiliated with an arbitral institution, 6.13% with a university, and 2 work in-house at a company. Responses were received from 44 states and territories, with the largest group of respondents, from New York, constituting only 18.78% of the whole. 65.09% of respondents reported working as an arbitrator.

Comments on specific states or territories will only be made below for those states or territories from which 5 or more respondents participated in the survey: Alaska, California, the District of Columbia, Florida, Georgia, Illinois, Minnesota, Mississippi, New Jersey, New York, Pennsylvania and Texas. Results from all states and territories are included in the overall United States of America results discussed below. Respondents were not asked questions about their specific state laws, courts, etc., and as a result while differences between respondents from different states might reflect different conditions in those states, this is not a conclusion that can be directly drawn from the results of this survey, but only indirectly implied with further research necessary.

Seat

As is the case with many aspects of U.S. law, arbitration in the United States is regulated at two levels, with the Federal Arbitration Act (FAA) regulating it at a national level, and separate state arbitration acts providing additional legislation at state level. Because of the doctrine of the supremacy of federal law, state laws that conflict with the FAA are preempted by it.⁷⁴ While this is a doctrine that applies across U.S. law, it has caused particular controversy in the context of arbitration because the U.S. Supreme Court has adopted a very broad interpretation of the preemptive effect of the FAA. As the FAA does not distinguish between commercial and non-commercial arbitration, the Supreme Court's approach to its interpretation, while often intended to assist commercial arbitration, has also directly limited attempts by some states to regulate the use of arbitration in the consumer context. The FAA is also distinctive due to its age, which far predates the UNCITRAL Model Law, and thus results in U.S. arbitration law at times diverging from the international standards the Model Law reflects, although some practitioners have argued that this has also allowed U.S. arbitration law to develop flexibly through caselaw, rather than requiring legislative action for significant changes to occur.

Nonetheless, U.S. respondents were very positive regarding the supportiveness of U.S. laws applicable to arbitration, with 90.71% of U.S. respondents describing the laws applicable to domestic arbitration as Supportive or Very Supportive (including 67.76% describing them as Very

⁷³ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Shawn Aiken, Paul Alston, Tracy Axelberg, Bill Bankston, Gary Benton, Gregory Bistram, Thomas Brewer, John Bulman, James Carter, Peter Collisson, Gregory Falls, Charles Faruki, Richard Faulkner, Nick Gaede, Sheryl Mintz Goski, Joan Grafstein, David Gunn, Grant Hanessian, Glenn Hendrix, Bob Hermes, Christopher Hohn, Kenneth Jackson, William Knoll, Mike Lampert, Kent Lawrence, Robert MacPherson, James Madison, Mitchell Marinello, Joseph Matthews, Jeffrey Pollock, Lewis Remele, Andrew Riccio, Larry Schiffer, Scott Silverman, Max Sprecher, John Tarantino, James Torgerson, John Warden, Jim Warren, Anne Marie Whitesell.

⁷⁴ This does not mean that all State laws on arbitration are pre-empted by the FAA, but only those that are found to be in conflict with it. In addition, where an arbitration involves insurance or reinsurance the McCarran-Ferguson act, in certain circumstances, causes "reverse pre-emption", resulting in certain state laws regulating the business of insurance pre-empting the FAA.

Supportive), and 86.66% describing the laws applicable to international arbitration as Supportive or Very Supportive (including 61.33% describing them as Very Supportive). Respondents from New Jersey diverged notably from U.S.-wide respondents on this question, as although 75.00% of New Jersey respondents described the laws applicable to international arbitration as Supportive, none described them as Very Supportive. In turn, while 60.00% of New Jersey respondents described the laws applicable to domestic arbitration as Supportive, only 20.00% described them as Very Supportive.

Less encouraging than this relatively positive view of U.S. arbitration law is the picture U.S. respondents presented of U.S. legislators, with 60.45% describing them as having a Low or Very Low understanding of arbitration (12.99% selecting Very Low), and 41.52% describing them as being Neutral towards arbitration, with 26.90% describing them as Positive, and the same amount describing them as Negative. Again, results varied between jurisdictions, with 54.55% of California respondents describing legislators as having a Negative attitude to arbitration (the remainder selecting Neutral), while 41.17% of New York respondents described legislators as having a Negative or Very negative attitude to arbitration (including 8.82% selecting Very Negative) and only 26.47% selecting Positive (and none selecting Very Positive). In the District of Columbia, all respondents described legislators as having a low understanding of arbitration (66.67% selecting Low and 33.33% selecting Very Low), while 50.00% described legislators as having a negative view of arbitration (including 20.00% who selected Very Negative). It is particularly notable that respondents from some of the U.S.A.'s most important arbitral jurisdictions have particularly negative views of legislators.

On the other hand, U.S. respondents were overall positive about the approach of U.S. courts to interpreting the validity of arbitration agreements, with 65.53% describing courts as Liberal or Very Liberal (including 26.21% who selected Very Liberal). A notable divergence from this result occurred with respondents from Florida, none of whom described courts as Very Liberal with respect to the validity of arbitration agreements, and only 22.22% of whom described them as Liberal, while 44.44% described courts as Strict and a further 11.11% as Very Strict. While it is not possible to draw direct conclusion between these results and the approach of Florida courts specifically, these results do potentially reflect the repeated disagreements that have arisen between Florida courts and Federal courts regarding the application of the FAA and its preemptive effects on state or federal legislation designed to control consumer and employment arbitration. Respondents from New Jersey presented a similar, although more moderate picture, with only 20.00% of New Jersey respondents describing courts as Very Liberal, and none selecting Liberal, while 40.00% selected Neutral.⁷⁵ By contrast, respondents from Georgia were particularly positive, with 50.00% describing courts as Very Liberal, and a further 25.00% describing them as Liberal.

Very similar responses were given with respect to the approach of courts to interpreting the scope of arbitration agreements, with 67.16% of U.S. respondents describing courts as Liberal or Very Liberal (including 21.89% who selected Very Liberal). Respondents from California and Mississippi were slightly more moderate than respondents U.S.-wide, as although 61.54% of California respondents described courts as Liberal, and 80.00% of respondents from Mississippi stated the same, no respondent from either state described courts as Very Liberal. Respondents from Florida again diverged from the national trend with only 33.33% of respondents describing courts as Liberal (including 11.11% who selected Very Liberal, while 44.44% described courts as Strict (although none selected Very Strict). In turn, New Jersey was again more moderate than

⁷⁵ Reviewers particularly highlighted the 2015 decision by the New Jersey Supreme Court in *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2015) as potentially raising concerns about the approach of New Jersey courts to arbitration agreements.

respondents U.S.-wide, with only 20.00% of respondents from New Jersey describing courts as Very Liberal, none describing them as Liberal, and 40.00% describing them as Neutral.

Enforcement of arbitral awards is also reported by U.S. respondents to be a relatively speedy process. 25.00% of respondents who had been involved in enforcing a domestic arbitration award in the past 5 years reported it taking on average 3 months or less, 59.62% reported it taking 6 months or less, and 82.70% reported it taking 12 months or less. Results for foreign awards are only slightly slower, with 18.75% reporting 3 months or less, 54.17% reporting 6 months or less, and 79.17% reporting 12 months or less. Respondents from California reported notably faster results than respondents U.S.-wide, with 42.86% of California respondents reporting domestic arbitration awards on average being enforced in 3 months or less, and 85.72% reporting 6 months or less. In turn, 50.00% of California respondents reported foreign arbitration awards being enforced in 3 months or less, and 75.00% reported 6 months or less. Respondents from Illinois reported similarly fast results for domestic awards, with 50.00% reporting an average of 3 months or less, and 100.00% reporting 6 months or less. Only one Illinois respondent reported involvement in enforcing foreign awards, but reported a period of 4-6 months. On the other hand, respondents from the District of Columbia reported slower results than respondents U.S.-wide, with no District of Columbia respondent reporting an average of 6 months or less for domestic awards, and only 33.33% reporting 12 months or less. Similarly, no District of Columbia respondent reported an average of 6 months or less for foreign awards, and only 40.00% reported 12 months or less.

U.S. respondents are relatively positive about U.S. judges overall with respect to arbitration, with 47.54% describing U.S. judges as having a High or Very High understanding of arbitration (including 10.38% who selected Very High), and a further 38.25% selecting Adequate. In addition, 74.86% of U.S. respondents described U.S. judges as having a Positive or Very Positive attitude towards arbitration (including 16.85% who selected Very Positive), with only 8.20% describing it as Negative, and none describing it as Very Negative. The District of Columbia is notably less positive in this respect, with 44.44% of D.C. respondents describing judges as having a Low understanding of arbitration and a further 44.44% describing their understanding as Adequate. Only 11.11% described judges as having a High understanding of arbitration, and none selected Very High. Nonetheless, despite the relatively negative view D.C. respondents held of judges' level of understanding of arbitration, 80.00% of D.C. respondents described judges as having a Positive view of arbitration. By contrast, while respondents from New Jersey also described judges as having a comparatively low understanding of arbitration (40.00% describing it as Low, and 40.00% as Adequate), they also described judges as having a less positive view of arbitration than was the case with respondents U.S.-wide (40.00% describing judges as Neutral, and a further 20.00% describing them as Negative).

While these results are not uniformly positive, they nonetheless present a picture of the United States as a modern arbitral jurisdiction in which both the applicable laws and courts are generally reliably supportive of arbitration. Indeed, confidence in the U.S. approach to arbitration is reflected in the fact that when asked to recommend 5 seats as the seat of an international arbitration, 93.78% of U.S. respondents recommended the U.S.A., making the U.S.A. the most-recommended seat amongst U.S. respondents. Reflecting language and cultural ties, second was England, Wales and Northern Ireland with 80.83%, while the U.S.A.'s immediate neighbor Canada was third, but with only 49.22%. Notably, the U.S.A.'s other NAFTA partner, Mexico, was 18th, with only 2.59%.

In terms of preferred seats within the United States, 11 cities received 1.00% or more of the “votes”⁷⁶ from respondents survey-wide: New York (66.26%), Miami (15.47%), Washington D.C. (5.18%), Chicago (2.47%), Atlanta (1.96%), San Francisco (1.87%), Houston (1.74%), Dallas (1.42%), Seattle (1.26%), Los Angeles (1.08%) and Minneapolis (1.08%).

Interestingly, in a reflection of California’s Pacific Rim location, while Australia was only recommended by 17.10% of respondents U.S.-wide, it was recommended by 53.85% of respondents from California, making it the seat 4th most recommended by California respondents. More intriguingly, 16.06% of U.S. respondents recommended the small Caribbean island of Bermuda, including 100.00% of respondents from Mississippi, 80.00% of respondents from Pennsylvania, and 40.00% of respondents from New Jersey. As Bermuda is not known for its prominence in international arbitration, this might be taken to indicate merely a reflection of the thought “If you have to arbitrate, why not do it on a beautiful island”, even though Bermuda is not known for its connection with arbitration, and also was not the first beautiful island in the Caribbean on the list of jurisdictions presented to respondents. However, several reviewers have suggested that this result might be best understood as relating to the prominence of Bermuda in insurance contracts. While arbitrations arising out of such contracts are often seated outside Bermuda, the connection between Bermuda and insurance, a field in which arbitration is common, may have raised the profile of Bermuda in the minds of many respondents as a potential arbitral seat.

Procedure

U.S. respondents reported that arbitration in the United States is faster than litigation, with 44.32% describing it as Slightly Faster, and a further 43.24% describing it as Much Faster. Nonetheless, respondents did not actually report arbitration in the U.S. as being particularly fast, with only 11.18% of U.S. respondents reporting that domestic arbitrations on average took 6 months or less, and only 4.00% stating the same about international arbitrations. Arbitration in the U.S.A. is, however, also not reported to be particularly slow, with 58.24% of U.S. respondents reporting the domestic arbitrations on average took 12 months or less, and 94.12% reporting less than 24 months. In turn, while only 27.00% of respondents reported that the international arbitrations on which they had worked in the past 5 years on average took 12 months or less, 73.00% stated that they took 24 months or less. A notable divergence from this latter result occurred with District of Columbia respondents, 88.88% of whom reported international arbitrations as on average taking 2-5 years, with 44.44% reporting an average of 3-5 years. This is at least partially likely to reflect a particularly high level of involvement of District of Columbia respondents in international investment arbitrations, which are usually far slower than commercial arbitrations, as 85.71% of District of Columbia respondents reported some involvement in investment arbitration, and 50.00% reported that investment arbitration constituted the majority of their arbitration work (35.71% reporting that it constituted 76-100% of their arbitration work).

U.S. respondents also reported arbitrators delivering awards relatively quickly in both domestic and international arbitration. 86.98% of respondents reported receiving the award on average within 3 months of the conclusion of hearings in domestic arbitrations in which they had been involved in the past 5 years, while 52.58% reported a period of 3 months or less for international arbitrations, with 76.29% reporting 6 months or less. Again, respondents from the District of Columbia reported slower results, although as the reported results are slower for both domestic and international arbitration this cannot be attributed exclusively to the involvement of D.C.

⁷⁶ Respondents were asked, but not required, to recommend a specific city. If a respondent recommended more than one U.S. city, that individual’s vote was split between the recommended cities. Two respondents simply recommended “California”, and so their votes were split between the two cities in California recommended by other respondents.

respondents in investment arbitrations. Nonetheless, while D.C. respondents reported slower delivery of arbitral awards than respondents U.S.-wide, reported timeframes for delivery of awards in domestic arbitrations remain relatively fast, with 40.00% of D.C. respondents reporting awards in domestic arbitrations being delivered in 3 months or less, and 80.00% reporting 6 months or less. On the other hand, this time potentially reflecting the relative slowness of investment arbitration compared with commercial arbitration, only 11.11% of District of Columbia respondents reported a period of 3 months or less for international arbitration, 22.22% reported 6 months or less, and only 55.55% reported an average of 12 months or less.

Notably, while the perceived speed of arbitration is often offset by a counteracting expensiveness, U.S. respondents overwhelmingly described arbitration as on average cheaper than litigation, with 49.19% describing it as Slightly Cheaper and a further 22.70% describing it as Much Cheaper.

Market

Unsurprisingly, as the U.S.A. is one of the world's leading arbitral jurisdictions, responses to the survey indicate the existence of a healthy market for arbitration professionals, with 54.03% of U.S. respondents stating that they became involved in their first arbitration within 5 years of qualifying to practice as a lawyer, including 25.59% who stated that they did so within 2 years of qualifying. While results did vary from state to state, reflecting a wide diversity of usage of arbitration across the United States, significant numbers of respondents across a range of states reported this sort of early engagement with arbitration.

Nonetheless, while opportunities to engage with arbitration may be available early in legal careers in the U.S., only 49.53% of U.S. respondents reported that arbitration was their primary field of practice, and of those respondents, the majority (54.29%) reported that arbitration only became their primary field of practice 15 years or more after they entered the legal profession, a further 11.43% stating that it took 10-15 years, and only 14.29% stating that it happened within 2 years of their qualifying as a lawyer. These results indicate that while arbitration may be common across the United States, it remains a relatively niche field, with most practitioners only spending a portion of their time on arbitration.

Notably, this trend was reflected even in the leading international arbitration jurisdictions of New York (while arbitration was the primary field of practice for 87.50% of respondents, it took over 10 years to become so for 48.57% of respondents, including 45.71% who reported 15 years or more) and the District of Columbia (while arbitration was the primary field of practice for 85.71% of respondents, it took over 10 years to become so for 50.00% of respondents, including 33.33% who reported 15 years or more). Results vary significantly in other states, with no respondent from Alaska reporting that arbitration was their primary field of work, only 25.00% of respondents from Minnesota, and only 20.00% from Mississippi. In turn, 100.00% of respondents from Georgia who reported that arbitration was their primary field of work reported that it took over 10 years for it to become so (including 80.00% who reported it taking 15 years or more). The same was true of 100% of respondents from Illinois who reported that arbitration was their primary field of practice (all of them reporting that it took 15 years or more to become so), 100% in Minnesota (all of them reporting that it took 15 years or more), 100% in Mississippi (the sole respondent in question reporting that it took 10-15 years), 100% in New Jersey (all of them reporting that it took 15 years or more), and 80.00% in Texas (60.00% reporting that it took 15 years or more). These results suggest that while it is possible to specialize in arbitration in a range of jurisdictions across the U.S.A., it is far more difficult to do outside the major commercial and legal centers.

Consistent with this picture of an active U.S. arbitration market, responses from the survey also indicate an active engagement by U.S. businesses with arbitration. When asked to estimate the proportion of domestic commercial contracts entered into in the past 5 years that they believed contained an arbitration agreement, 42.65% of U.S. respondents estimated 26-50%, with a further 26.07% estimating 51-75%. Responses were even more positive with respect to commercial contracts between a domestic entity and a foreign entity, with 60.67% of respondents estimating that over half of such contracts entered into in the past 5 years included an arbitration agreement, including 21.33% who estimated 76-100%.

Overall, U.S. respondents described U.S. business-people as having an adequate understanding of arbitration (49.45% selected Adequate, 21.98% High, 23.08% Low) and a positive attitude towards arbitration (51.67% selected Positive, 32.78% Neutral), responses did vary between jurisdictions. Respondents were particularly positive in Alaska, with 66.67% of Alaska respondents stating that business-people have a High understanding of arbitration (the remainder selecting Adequate). On the other hand, 50.00% of District of Columbia respondents described business-people as having a Low understanding of arbitration (40.00% selecting Adequate), and 33.33% described business-people as having a Negative view of arbitration (although 44.44% described it as Positive). Similarly, in Florida 44.44% of respondents described business-people as having a Low understanding of arbitration (44.44% selecting Adequate), and 66.67% described them as having a Neutral attitude to arbitration (only 11.11% selecting Positive while 22.22% selected Negative).

Uruguay

Profile⁷⁷

The sample for Uruguay is composed by 7 male Respondents and 2 female Respondents. All of them reported working at law firms; 22.22% also reported an affiliation with a University and 11.11% stated that they work with an international organization as well. Given the relatively small size of the sample, the survey results should not be interpreted as offering an exhaustive picture of arbitration in Uruguay, but rather some broad-stroke indications.

Seat

The laws applicable to arbitration in Uruguay do not seem to be developed in detail: arbitration is not regulated by a special statute, but by the general provisions of the General Code of Procedure (GCP).⁷⁸ A draft arbitration law is currently being discussed in Parliament, but has not been approved at the time of writing. It is perhaps because of this lack of a specialized regulatory framework that none of the local respondents expressed a positive opinion concerning the attitude of Uruguayan legislators towards arbitration: 37.50% of them described it as “Negative” and 62.50% described it as “Neutral”. Along similar lines, the level of understanding of arbitration on the part of Uruguayan legislators was not well evaluated, being described as “Very low” by 25.00% of the respondents, “Low” by 62.50%) and “Adequate” by only 12.50%.

Despite this lack of legislative attention and specialized regulation, however, the Uruguayan respondents did not seem to find their local laws particularly problematic: 44.44% of them characterized the Uruguayan laws applicable to domestic arbitration as being “Neutral”, 33.33% described them as “Supportive” and 11.11% qualified them as “Very supportive”, while only a minority of 11.11% considered these laws to be “Unsupportive”. The Respondents’ perception was even more positive, as far as the laws applicable to international procedures are concerned: 66.67% of them described them as “Supportive” and 33.33% qualified them as “Neutral”, while none of them characterized them in negative terms.

The above results suggest that, while arbitration is not particularly promoted by legislators in Uruguay, at the same time it is not hindered in a particularly serious way, and it is in fact able to provide significant advantages, as compared with State court litigation. When asked to compare arbitration with court litigation in terms of speed, 66.67% of respondents stated that arbitration is “Much faster” than litigation and 33.33% of them qualified it as “Slightly faster”. As for costs, the Respondents offered mixed views: 55.56% stated that arbitration is “Much more expensive” than court litigation, 22.22% answered that it is “Slightly more expensive”, 11.11% argued that “Costs are the same” and the remaining 11.11% considered arbitration to be “Much cheaper”.

One additional result of the survey reinforces the conclusion that the Uruguayan Respondents do not find their local laws particularly problematic. When asked to suggest five seats for international arbitration, the local Respondents often suggested Uruguay, which ranked fourth after the United States of America, England, Wales and Northern Ireland and France.

In sum, Uruguayan arbitration seems to offer some significant advantages over court litigation, especially in terms of speed, and it clearly has the potential for further diffusion in the future,

⁷⁷ ⁷⁷ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Soledad Diaz, Santiago Pereira Campos.

⁷⁸ There are, however, specialized provisions on arbitration in private-public partnerships. Law no. 18.786 and implementing Decree 07/2012 require that disputes arising out of certain types of private-public partnership contracts be resolved through arbitration: see Uría Menéndez, *International Arbitration Guide A Latin American Overview*.

especially if local legislators were to dedicate more attention to this mechanism of dispute resolution.

Procedure

According to the respondents, arbitration in Uruguay is characterized by a high degree of procedural diversity: the approach of different arbitrators may vary, ranging from inquisitorial to adversarial attitudes. Namely, when asked to describe the approach taken by arbitrators in domestic arbitration, 50.00% of Uruguayan respondents answered “Neutral”, 12.50% answered “Moderately inquisitorial” and 25.00% answered “Moderately adversarial”.

Another notable aspect of arbitration in Uruguay is that the GCP contains a default rule, whereby arbitrators decide cases according to equity, rather than applying norms of law, unless the parties provided otherwise. This feature, however, should not be interpreted as entailing that arbitration in Uruguay is somewhat less technical and formalised than State court litigation, as the default rule at hand rarely applies in practice. More specifically, the parties to contracts which include an arbitration clause generally also enter into a choice-of-law agreement, specifying the law applicable to the substance of the dispute. In fact, an agreement to arbitrate is a prerequisite for choice-of-law agreements in Uruguay: the parties are only allowed to select the applicable substantive law, departing from the law that would be applicable pursuant to the Uruguayan conflict of laws rules, if they also submit to the jurisdiction of an arbitral tribunal (rather than litigating in State courts).

The perception of Uruguayan judges’ level of understanding of arbitration was mixed: 55.56% of respondents considered it to be “Low” and the rest of the answers was divided between “Adequate” and “High” (22.22% each). However, there is no evidence of judicial hostility towards arbitration: when asked to evaluate the attitude of local judges *vis-à-vis* arbitration, 55.56% of the Respondents considered it to be “Positive”, 33.33% considered it to be “Neutral” and only 11.11% considered it to be “Negative”.

Mixed opinions were also expressed when the Uruguayan Respondents were asked to describe judicial attitudes in the interpretation of the validity of arbitration agreements. 33.33% of the respondents considered Uruguayan courts to be “Strict”, 33.33% described them as “Neutral”, 22.22% qualified them as “Liberal” and 11.11% characterized them as “Very liberal”. As for the attitude in the interpretation of the scope of arbitration agreements, the characterisation of Uruguayan courts was as follows: “Strict” according to 44.44% of the Respondents, “Neutral” according to 33.33% of them and “Liberal” according to 22.22% of them.

Market

Uruguay seems to constitute a promising market for arbitration, especially as far as international dispute resolution is concerned. When asked to evaluate which percentage of international contracts concluded between a Uruguayan commercial entity and a foreign counterpart include an arbitration agreement, 66.67% of the local Respondents answered “76-100%”, 22.22% answered “51-75%” and 11.11% answered “26-50%”. A possible explanation for this result is that the parties to an international commercial relationship may want to enter a choice-of-law agreement, so as to ensure predictability and avoid any doubts arising out of the need to conduct a complex conflict-of-laws analysis according to Uruguayan law. As already mentioned above, however, the Uruguayan legal system only recognized the possibility to select the applicable law if the parties conclude an arbitration agreement. Submitting to arbitration and waiving the right to litigate before Uruguayan courts, hence, may be particularly desirable for parties wanting to guarantee the enforceability of the provisions on applicable law in their contract.

An additional explanation for the high rate of arbitration clauses in international contracts is that foreign commercial actors may wish to avoid litigation in Uruguayan courts, possibly for fear of “home bias”. This theory is corroborated by the fact that the estimated rate of inclusion of arbitration clauses in commercial contracts is not as high, when the contract is “domestic” (i.e. concluded between two Uruguayan parties). In this different setting, none of the respondents argued that “76-100%” of contracts include an agreement to arbitrate, while 11.11% estimated a rate of “51-75%”, 44.44% answered “26-50%” and 44.44% answered “0-25%”.

Despite the potential of arbitration in Uruguay, the understanding and attitude of the local business community were described in mixed terms. The level of understanding of arbitration on the part of business people in Uruguay was characterized as “Low” by 44.44% of the respondents, and even “Very low” by 11.11% of them; on the other hand, 33.33% considered it to be “Adequate” and 11.11% considered it to be “High”. The attitude of business people was evaluated in better terms: almost half of the respondents (44.44%) considered it to be “Positive” and 55.56% considered it to be “Neutral”.

The Uruguayan respondents reported being particularly active in international arbitration: only 11.11% stated that they do not work on international cases, while 44.44% devoted from 1 to 25% of their working hours over the past 5 years to international disputes, 33.33% devoted from 26% to 50% of their time to the same type of cases and 11.11% devoted from 76% to 100% of their time to this field. This prominence of international arbitration is consistent both with the high rate of inclusion of arbitration clauses in international commercial contracts, and with the fact that Uruguay has been involved in prominent investor-State cases, such as *Philip Morris*.⁷⁹ In particular, only 33.33% of the Uruguayan Respondents declared that they never worked on an investment case, while 55.56% of them reported dedicating from 1% to 25% of their working hours to the field and 11.11% stated that they dedicate from 26% to 50% of their working hours to investor-State disputes.⁸⁰

Construction arbitration was also reported as a common field of arbitral practice, with only 11.11% of the Uruguayan respondents reported having never worked on it. This result is consistent with the existence of many infrastructure development projects being undertaken in Uruguay.

⁷⁹ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

⁸⁰ Article 25 of Law No. 16.906 on the promotion of protection of investment made by national and foreign investors states that disputes between the State and an investor that obtained a “Promotional Declaration” from the Government may be submitted to arbitration.

Venezuela

Profile⁸¹

The respondents' group for Venezuela is composed of 14 individuals (9 male and 5 female). 71.43% of them work in the Capital District of Caracas and 28.57% in the State of Miranda. Regarding the professional profile, the group is rather diverse: 71.43% of the respondents work at Law Firms, 28.57% work as sole practitioners, 21.43% work at universities, 7.14% work in the public sector entities and 7.14% work for a foreign company.

Seat

In Venezuela arbitration is recognized as a right by Article 258 of the Constitution. Apart from this basic provision, arbitration is regulated by the 1998 Law of Commercial Arbitration (LCA), which is based on the UNCITRAL Model Law and applies both to domestic and international arbitration.

The local respondents expressed an overall positive opinion concerning the legal framework applicable to arbitration in Venezuela. When asked to evaluate the laws applicable to domestic arbitration in this jurisdiction, 25.00% of respondents described them as "Very supportive" 50.00% qualified them as "Supportive", 16.67% characterized them as "Neutral" and 8.83% stated that they are "Unsupportive". Conversely, none of the Venezuelan respondents answered "Very unsupportive". As for the Venezuelan laws applicable to international arbitration, 25.00% of the local respondents considered them to be "Very supportive", 41.67% qualified them as "Supportive", 8.33% considered them "Neutral", 16.67% considered them "Unsupportive" and 8.33% considered them "Very unsupportive". In sum, the opinion is predominantly positive with respect to both domestic and international arbitration, but the Venezuelan laws applicable to the latter seem to be marginally more problematic.

The overall positive perception of the Venezuelan arbitration laws is confirmed by the fact that the majority of the Venezuelan respondents recommended their home jurisdiction as a seat for international arbitration. More specifically, when asked to suggest five arbitral seats, the jurisdictions most frequently mentioned were the United States of America (84.62%), France (76.92%), Spain (61.54%), Venezuela (53.85%) and Colombia (46.15%).

Interestingly, while the Venezuelan respondents did not describe their local arbitration laws in particularly problematic terms, they did not express a positive opinion about their national legislators at the same time. When asked to evaluate the Venezuelan legislators' understanding of arbitration, 26.92% of the local respondents described it as "Very low", 53.84% considered it "Low" and 17.95% considered it "Adequate". Notably, none of the respondents said that the Venezuelan legislators have a "High" or "Very high" understanding of arbitration.

This apparent contradiction between the positive perception of the Venezuelan laws and the perceived lack of understanding on the part of local legislators can be explained, considering that Venezuela is a Model Law jurisdiction. Therefore, while the legal framework complies with the prevailing transnational standards and is not particularly problematic, this does not necessarily correspond to a widespread knowledge and understanding of arbitration. In any case, this should not be interpreted as entailing any particular hostility towards arbitration: only 17.95% of Venezuelan respondents stated that their local legislators have a "Negative" attitude

⁸¹ Comments on this overview were received from the following reviewers, none of whom bears responsibility for the final content of the overview: Pedro Saghy, Irene Loreto, Alberto J. Rosales R., Diana Droulers.

towards arbitration, while 35.89% described the attitude of legislators as “Positive” and 44.87% characterized it as “Neutral”.

Additionally, one factor that is likely to have had an impact on the perceived attitude of Venezuelan legislators towards arbitration is the circumstance that Venezuela was involved in many investor-State proceedings, especially in the field of natural resources. Venezuela was a party to the ICSID Convention since 1995, but it denounced it in 2012. The State has a high record of ICSID cases, particularly due to nationalizations and expropriations undertaken by former President Hugo Chavez in the 1999-2013 period.

The Venezuelan respondents also expressed some critical opinions concerning the level of understanding of arbitration on the part of judges in their Country: 8.33% of them described it as “Very low”, 58.33% characterized it as low, 25.00% considered it “Adequate” and 8.33% qualified it as “High”. As for the attitude of Venezuelan judges towards arbitration, the local respondents offered different points of view: 8.33% said that the attitude of the judiciary is “Very negative”, 33.33% reported it to be “Negative”, 16.67% considered it “Neutral”, 33.33% described it as “Positive” and 8.33% characterized it as “Very positive”.

In a nutshell, the legal framework applicable to Venezuelan arbitration is friendly and generally adequate, but the Country seems to suffer from the lack of a widespread arbitration culture. If legislators and judges gained a better understanding of arbitration, the attractiveness of Venezuela as a seat of arbitration would be likely to increase.

Procedure

Arbitration in Venezuela seems to offer significant advantages over litigation before the local State courts. First of all, arbitration is generally perceived as faster than court litigation: 83.33% of the Venezuelan respondents considered it to be “Much faster” than litigation, and the remaining 16.67% described it as “Slightly faster”. Furthermore, the costs of Venezuelan arbitration do not seem to be disproportionate: when asked for a comparative estimate, different views were expressed, but none of the local respondents answered that arbitration in Venezuela is “Much more expensive” than court litigation. By contrast, 50.00% of them argued that it is only “Slightly more expensive”, 16.67% stated that the “Costs are the same”, 16.67% described it as “Slightly cheaper” and the remaining 16.67% even characterized it as “Much cheaper”. The diversity of the views expressed with respect to arbitration costs can partially be explained by the circumstance that the sample is composed of respondents with different backgrounds and professional roles, who are therefore likely to observe the phenomenon from a variety of perspectives and form partially divergent opinions.

For both domestic and international cases, Venezuelan respondents reported a predominance of administered arbitration over its *ad hoc* counterpart: all of the Venezuelan respondents reported that the percentage of arbitrations conducted on an *ad hoc* basis does not exceed the 0-25% range. The prominence of arbitral institutions is confirmed by another interesting data-point: among the respondents that have served as arbitrators, 62.50% received their first appointment from an arbitral institution. Among the many arbitral institutions, the main ones are the Center for Conciliation and Arbitration (RCCA) and the Arbitration Center of the Chamber of Commerce of Caracas (ACCC), both with head offices in Caracas.

According to the local respondents, arbitration in Venezuela is used rather frequently: 35.71% of them estimated that 26-50% of the contracts between domestic commercial entities situated in Venezuela include an arbitration agreement. Furthermore, 28.57% of them offered the even higher estimate of 51-75%, and 7.14% estimated that 76-100% of domestic commercial contracts in Venezuela include an agreement to arbitrate. Moreover, the use of arbitration seems to be even more frequent for international commercial contracts: 35.71% of the Venezuelan respondents considered that 76-100% of international contracts include an

arbitration clause, and another 35.71% estimated arbitration agreements to be present in 51-75% of international commercial contracts.

Arbitration in Venezuela is typically based on an agreement concluded before the dispute has materialized, rather than on a post-dispute submission agreement. Namely, 85.71% of the respondents estimated that 76-100% of the domestic arbitrations they worked on over the past 5 years were based upon a pre-dispute arbitration agreement. As for international arbitral procedures, 58.30% of the respondents estimated that 76-100% of the arbitrations they worked on over the past 5 years were based upon a pre-dispute agreement, whilst other respondents offered lower estimates.

Regarding the strictness of the local courts in interpreting the validity of arbitration agreements, Venezuelan judges were described as “Very Strict” by 42.86% of the respondents, “Strict” by 7.14%, “Neutral” by 14.29%, “Liberal” by 28.57% and “Very liberal” by 7.14%. The local respondents were also asked to evaluate the strictness of Venezuelan courts in interpreting the scope of arbitration agreements: 35.71% answered “Very strict”, 21.43% answered “Strict”, 14.29% answered “Neutral” and 28.57% answered “Liberal”. By contrast, none of the respondents answered “Very liberal”. In sum, while the survey results demonstrate the existence of different points of view, a significant portion of Venezuelan respondents seem to consider their local courts rather strict in the interpretation of the scope and validity of the agreements to arbitrate. A possible explanation for this perception is that, pursuant to Article 3 of the LCA, certain matters are not arbitrable, when the dispute is “contrary to public policy rules”; this is quite a broad provision, which could potentially limit the operation of arbitration agreements. Along similar lines, article 47 of the Venezuelan Conflict of Laws statute also prohibits arbitration when the dispute involves “essential principles of Venezuelan public policy”.⁸²

Market

At first glance, the Venezuelan arbitration market seems to be hard to access for young professionals: 42.86% of the respondents reported waiting for more than 15 years after qualifying as a lawyer, to have their first arbitration case. This result is notable as it indicates that almost half of the respondents practiced in a different field of law for more than a decade, before being involved in arbitration. However, it must also be noted that other Venezuelan respondents reported a comparatively faster career path: for 21.43% of them it took 6-9 years to be involved in arbitration, for 14.29% it took 3-5 years and for 14.29% it took 0-2 years.

A possible explanation for this diversity of personal experiences is that career progression patterns in Venezuelan arbitration may have evolved over time. From this point of view, it must be considered that some of the respondents reported qualifying as a lawyer only recently, while other ones have been practicing since the 1960s. More specifically, the youngest respondent first qualified to practice as a lawyer in 2014; as for the rest of the sample, 14.28% of the respondents first qualified to practice as lawyers in the 2000s, 35.7% qualified in the 1990s, 21.43% qualified in the 1980s, 7.14% qualified in the 1970s and 14.28% qualified in the 1960s. A possible explanation, hence, is that arbitration has been developing and expanding in Venezuela over several decades, thus making it easier for young professionals to access this field of legal practice now, as compared to the past. This theory is corroborated by the circumstance that the study of arbitration in Venezuelan universities has increased significantly over time, triggering a diffusion of the arbitration culture among younger legal practitioners and the business community in general.

⁸² Andres Jana, *International Commercial Arbitration in Latin America: Myths and Realities*, *Journal of International Arbitration*, V. 32, Issue 4, pp. 413-446, p.428.

When asked to estimate what percentage of their working hours they devoted to arbitration over the past five years, 42.86% of the respondents answered 0-25%, 7.14% answered 26-50%, 28.57% answered 51-75% and 21.43% answered 76-100%. Hence, the Venezuelan arbitration market seems to be composed of both arbitration specialists, who dedicate the vast majority of their working time to this mechanism of dispute resolution, and other professionals, for whom arbitration is a part-time field of practice.

In terms of the types of arbitration that Venezuelan practitioners most commonly engage in, almost half of the respondents (42.86%) reported never working on international commercial arbitration. 35.71% of the respondents devoted 1- 25% of their arbitration work to international cases, 14.29% devoted 26- 50% of their time to this type of cases and 7.14% worked on international arbitrations for 76-100% of their time. Domestic arbitration, instead, seems to be a particularly common field of practice: only 7.14% respondents did not work on domestic arbitration.

Concerning the level of understanding of arbitration on the part of business people in Venezuela, 83.33% of the respondents deemed it as “Low” and 16.67% considered it just “Adequate”. The attitude of business people towards arbitration, however, was evaluated in better terms: 75% considered it “Neutral”, 16.67% considered it “Positive” and 8.33% considered it “Very positive”. These results confirm the overall picture of Venezuela as a jurisdiction where arbitration has the potential to expand further in the future, if arbitration is effectively promoted.