Notes for my MIAS Presentation of Sept 24, 2015
A General Overview of Arbitration in Latin America

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Preliminary

- Arbitration in Latin America is as diverse as Latin America is
- Although we share the same system of Law or legal background (Roman Law, Spanish-Portuguese Law, and French Law) we do not necessarily react or act in the same ways
- LA is composed of 22 countries. Geographically it starts on the South border of the Rio Grande to the extreme southern tip of the Western Hemisphere, Cape Horn.
- LA embraces countries in the Continent and also Islands in the Caribbean such as Cuba, the Dominican Republic and Haiti
    - The total population is around 600 million. The biggest countries are Brazil with approx. 220 million people, Mexico 120 million, Colombia 50 million, the smallest, Uruguay 3 million.
    - Brazil has the biggest area: 8 Million Km2, Argentina 2,780, Mexico 1,964, Peru 1,285, Colombia 1,138. The smallest is El Salvador, 21Thousand Km2, and the islands in the Caribbean.
    - LA has total GDP of 9 Trillion. Brazil has the biggest share with 3 Trillion, followed by Mexico that has a GDP of 2 Trillion
    - They share a common past. Most of the countries had and have today native population (Mexico, Guatemala, Peru). The natives in these last three countries were very developed when Columbus arrived to these shores

- After the Columbus discoveries the region was divided in two by a Pontifical ruling (*Bula*) of Pope Alexander VI, and the Treaty of Tordesillas signed by Spain and Portugal in 1494. Brazil was given to the Portuguese, and the rest to Spain.
- Portuguese and Spanish are dominant today, but in some areas the native languages still prevail.
- Arbitration came to America with the Spanish and Portuguese conquest. The Emperor Charles the V ordered in 1528 that the arbitration rules of Castille be applied in the "Western Indies" as LA was then called.
- The same occurred in Brazil when Charles' son, Philipp the II, who then was the king of Spain and Portugal, ordered through the *Ordenanzas Filipinas* that arbitration be used as a method of resolving disputes in the Portuguese territories
- The Spanish tradition originated in Roman times, and later in the XIII Century arbitration was included in he *Siete Partidas* published by King Alphonse X the Wise, Alfonso X El Sabio (theres is a very good English translation)
- Arbitration in Colonial times existed. I did research on this matter, with the support of the College of Law of FIU and professor Manuel Gomez and Mathew Mirow, and found cases as early as 1550 and during Colonial times.
- Arbitration was muted under the influence of the Napoleonic Codes. Arbitration was allowed put not endorsed or promoted in the XIX century, and the first half of the XX Century. The parties had to sign a *Compromiso* after the dispute had arisen.
- There are two different worlds in arbitration, commercial arbitration and investment arbitration

Commercial Arbitration

- Since the 1990s Latin American countries have modernized their arbitration laws. The UNCITRAL Model Law has been followed by several countries
- Almost all countries have adopted the NY Convention and the Panama Convention
- Some countries have different rules for domestic arbitration and for international arbitration, such as Chile and Colombia. Other countries have the same statute for both types of arbitration such as Peru, Venezuela, Mexico, Brazil, the DR (2008)
- Domestic arbitration is strong, especially in Peru and Colombia. Colombia is an exception, it has a specially long tradition in domestic arbitration, as a general rule, arbitration is not confidential in Colombia, awards are published
- International arbitration with Latin American parties is in the rise. The ICC registered 791 new cases for 2014. 130 of those cases involved Latin American parties. Brazil has the majority of cases, followed by Mexico
- The biggest portion of the cases was disputes in Construction and Energy.
- **Constitutional Injunctions:** New statutes and the Courts have slashed the Constitutional injunctions against arbitration. The Mexican case, acts of authorities, arbitrators are not authorities because the are appointed by agreement of the parties. There was a notable exception in the case of the Castillo Bozo brothers: Miami award, injunction in Venezuela
- **Enforcement:** resistance when government entities are a party to the arbitration
- **Seats:** good seats: Lima, Bogota, Mexico, Santiago and… Miami
- **News from some specific countries (I cannot include all):**

- **Peru** (2008) has the most advanced arbitration laws and arbitration has a very well developed practice and very extended arbitral community.
    - State entities must select arbitration to resolve disputes with private parties.
    - The basic principles of arbitration are well established: competence-competence, autonomy of the arbitral clause, precautionary measures may be issued by State or Government Courts and by the arbitral tribunal, but once the arbitral tribunal has been appointed it take control of all matters
    - Freedom to agree with the parties on the procedural rules
    - Restricted causes for annulment
- **Brazil** amended its Arbitration Laws (1996) in 2015
    - It specifically authorizes Government entities to agree on arbitration.
    - Parties may go to Court to request provisional measures
    - Arbitral Letter
    - May appoint arbitrators that are not in lists of arbitral institutions
    - Statute of limitations, the tolling of the statute of limitations is stopped with the filing of the request for abitration
    - Foreign arbitral awards must approved by the Supreme Court of Justice
- **Argentina** did not have an arbitration Law although it had signed the NY and Panamá Conventions. But in July 2015 Argentina promulgated a new Civil and Commercial Code. This Code, and within the rules of contracts, the Code includes rules for the Contract of Arbitration. The new provisions are in line with the UNCITRAL Model Law.
    - There is however a confusing and ill drafted provision concerning the causes for nullity actions. It says that nullity actions may be started

based upon the causes indicated "in this Code". And there are no provisions for nullity in the new Code but in the Codes of Civil Procedure. CCP are provincial Codes and not a Federal or National Code.

  - The same provisions says that nullity actions before State Courts cannot be waived if the Award is contrary to the "legal order"

- **Mexico** is a pro–arbitration country. What is strikingly interisting is the program put in place by the Peña Nieto Government to open the energy sector including oil and gas
  - The Constitutional reform
  - The promulgation of new laws
  - The fields and the underground oil continue to belong to the Mexican State, but the State may enter into all forms of contracts to explore and develop the fields
  - These contracts may include arbitral clauses
  - There is one exception, "the administrative rescission" or administrative termination, that is not subject to arbitration
  - However, the consequences of the termination, such as compensation and other matters, may go to arbitration
  - Ad-hoc arbitration under the UNCITRAL rules. President of the arbitral tribunal appointed the Chairman of the Permanent Court of Arbitration
  - The Hague has been selected as the place of arbitration
- **Venezuela**
  - Pro-arbitration. The Venezuelan Constitution includes arbitration in the system of justice and order to promote arbitration. The

Constitutional Chamber of the Supreme Tribunal is pro-arbitration, domestic and international, including investment arbitration

- Backwards: The Castillo injunction and the difficulty in enforcing awards against Government entities
- Forward: Remarkable and wrong: On Sept 16, 2015, the 7th Superior Court of Caracas set aside a preliminary award issued by an arbitral tribunal concluding that it did not have jurisdiction because the arbitral clause (inserted in the By-Laws of a corporation) did not include the type of dispute initiated by plaintiff… The Superior Court stated that the pro-arbitration principle of the Constitution prevailed and the award had to be set aside… The Court's decision is absurd because of the competence-competence principle, it is for the arbitral tribunal to decide if it had or not jurisdiction

Investment Arbitration

- BITs: almost all LA countries have signed and ratified BITs with the notable exception of Brazil that has signed a few but has not ratified any
- Almost all countries adhered to the Wasington Convention ICSID, with the notable eception of Brazil and Mexico.
- Bolivia (2007), Ecuador (2009), and Venezuela (2012) separated from the ICSID Convention. Does not meen much, the BITs provide for other fora
- Mexico is a member of Nafta
- Central America and DR are members of CAFTA
- Mercosur: Investment protocols have not been ratified
- 25% of ICSID cases come from LA. Argentina and Venezuela are the biggest users
- **Argentina**
  - The crisis of 2000

- Argentina has defended itself intensively and boldly
- Resistance to pay
- Agreement in 2014 with several winners, big discounts
- Criminal investigation in the case of Marsans. It involves the lawyers of Air Comet, Teinver, the Burfford fund. King & Spalding is mentioned

- **Ecuador**
  - Ecuador departed from ICSID on 2009 (Bolivia had done it in 2007)
  - The Texaco case
  - Several new cases

- **Venezuela**
    - Venezuela has been asked to appear 49 times before ICSID arbitral tribunals
    - Venezuela departed from ICSID in 2012. But BITs provide for the ICSID Additional Facility, UNCITRAL and in others the ICC as possible fora
    - The Exxon-Mobil case: the award was for $1.6 Billion in favor of the Exxon-Mobil subs (to deduct what was paid in ICC arbitration, around $746 Billion). Venezuela has requested the annulment of the award. The Panel sitting for the annulment has suspended the enforcement of the ICSID award. The same was done by a NY Court. Claimant argued for 8.7% discount rate, and Respondent for 19.8%. The Arbitral Tribunal chose 18%. The same rate was used in ICC case
    - The Conoco-Philips case: bifurcation, the liability phase (completed) and the compensation phase (active at this time). The majority of the Tribunal, Keith and Fortier, declared Venezuela liable and concluded that, "Venezuela had not negotiated in good faith": Venezuela offered "book value" and not "fair market value" as required by the Venezuela-Netherlands BIT. The third arbitrator, Abi-Saab, dissented saying essentially that book value was a valid offer and could not be characterized as bad faith. They are in the phase of fixing the compensation. Venezuela is disrupting the proceedings with repeated challenges to the arbitrators and requesting revisions of the decisions
    - Gold Reserve: @715 million plus. Claimant argued for a 8.22% discount rate and Respondent for a 16.5% to 23.8% discount rate. The Tribunal accepted Claimant's calculation of 8.22% but made a reduction of 162 million because "the country risk was too low" in Claimant's calculation

- Tidewater, boats in lake Maracaibo, discussion of legal (value of the property) and illegal expropriation (reparation in kind or all damages). Equity Risk of 6.5% and 14.75 as country risk.
- Zurich Flugghafen. Discount Rate for Equity Risk of 14.4% and country risk of 7.9%
- The Garcia Armas family, based on the Spain-Venezuela BIT. Very interesting case of dual nationals, the claimants were Spanish and also Venezuelans. The arbitration is governed by the UNCITRAL rules. The decision on jurisdiction concluded that in spite of having Venezuelan citizenship the arbitral tribunal would hear the case
- Venezuela has had some victories: the Venoklim case (now in annulment), the Gambrinus case, and maybe Highbury