

ARBITRATION DISPUTE BOARDS AND EXPERTS - WHERE ARE WE NOW?

Richard Bailey

Goodman Derrick LLP – 17 October 2019



Universidad de
los Andes

30 años



Introduction

In this talk I will be covering 3 issues:

1. Issues in international arbitration.
2. Dispute Boards and the success or otherwise in South America.
3. Recent experience of experts in the English Courts.

Arbitration is just one of many forms of Alternative Dispute Resolution employed to resolve complex commercial disputes outside of court and is particularly commonly used for complex commercial transactions and cross border trade and commercial agreements.

Arbitration is generally accepted as the leading form of ADR although in construction Dispute Boards and forms of adjudication are becoming more and more common place.

Arbitration

A quick history lesson



Pioneers

The first pioneers of arbitration were the UK and United States of America where it appeared in the Jay Treaty of 1795 to resolve issues from the Treaty of Paris in 1783. Used to resolve the Alabama Claims in 1872



First international arbitration involving South America

1895 Between the USA and UK over Venezuela



Key events

1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

1985 UNCITRAL Model Law on International Commercial Arbitration

1996 the Washington Convention (ICSID)

International Arbitration and South America

Statistics

- **ICC Statistics**

ICC statistics, the number of Latin American parties in ICC Arbitration rose from 170 in 2005 to 393 in 2015 (+131%), while the number of arbitrations seated in Latin America increased from 20 to 66 in the same time span (+230%).

- **Increasing number of arbitration**

In 2017, Latin America saw an uptick of almost 8% in terms of the number of cases. More specifically, Brazil jumped to 7th place in worldwide case rankings after a case management team was established in Sao Paulo 2017.

- **International Arbitration in South America**

In 2018, the top five countries with parties represented in cases are the United States (210), France (139), Brazil (117), Spain (110), and Germany (95).

Issues in International Arbitration

Trends

● BREXIT

It has been confirmed that post BREXIT there will be no changes in the UK Arbitration Act 1996 and of course the UK will remain a signatory to the New York Convention and if anything the UK's support for International Arbitration will group with plans to grow both the LCIA and Scottish Arbitration Institute

● Arbitration Funding

This is a real growth area in International Arbitration. There are an increasing number of players coming into the market offering litigation funding not just for a single arbitration but buying up the rights to entire portfolios of claims from contractors around the world. The international arbitration system is now playing catch up with these funders and the recovery of costs.

Issues in International Arbitration

Trends

- **Cyber Security and Data Protection**

Increasingly the issue of cyber security and data protection have become increasingly important issues to address. Over the last 10 to 15 years there has been a rapid increase in data and the attempt by parties to obtain information via hackers. Also there is the issue of GDPR which has been of global significance and global effect despite being only of European application.

- **Arbitration Efficiency**

This is one of the more difficult of areas practice as costs in arbitration are increasing far above inflation due to many pressures on the arbitral process. The ICC has introduced fast track arbitration for low value arbitrations with a sole arbitrator and the arbitration to be completed within 6 months of the formal commencement. The ICC expedited procedure.

Dispute Boards

Success or failure



National recognition

Chile, Brazil and Peru have lead the way in implementing DB's into local and national law.



Use on major projects

DB's have become global recognised and seen as a highly effective method of dispute resolution.



FIDIC

Now an integral part of the FIDIC forms.

Trends in experts

An English View

- **English Courts view of experts**

The English courts and to an extent English Arbitrators have taken a proactive view to control experts and to force them to accept that the experts primary role is to the tribunal.

- **Experts as advocates for the parry**

There has been a trend in international arbitration towards experts acting as advocates for the party they are acting for rather than being impartial.

- **Negative impact of acting as advocate for a party**

One of the most important aspects for the tribunal is to fully investigate the facts and that does not change whether you take a common law or civil law approach to the arbitration.

GOODMAN DERRICK LLP

Richard Bailey
Goodman Derrick LLP
10 St Bride Street
London EC4A 4AD
United Kingdom
T: +44 (0) 20 7421 7921
M: +44 (0) 7971 418 051

rbailey@gdlaw.co.uk

www.gdlaw.co.uk

Services

Construction & Engineering
Corporate and Commercial
Data Protection
Dispute Resolution
Employment
Heritage Property
Intellectual Property
Licensing
Private Client & Family
Real Estate

Sectors

Advertising
Automotive
Charities
Hotel and Leisure
Financial Institutions
Media
Real Estate
Recruitment
Retail
Sport
Technology



CHADWICK & REYMOND
ABOGADOS

 MOLLER &
PÉREZ-COTAPOS.
innovando desde la experiencia

caa

 ECHEVERRÍA
IZQUIERDO
Montajes Industriales

PARRAGUEZ & MARÍN

sacyr
Desafíos
cumplidos



Universidad de
los Andes

30 años