INSIDE ARBITRATION: SPOTLIGHT ON CHRISTIAN LEATHLEY HEAD OF THE LATIN AMERICA GROUP AND A REAL-LIFE "ENGLISHMAN IN NEW YORK"

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Legal Briefings

Christian Leathley is an English solicitor and New York attorney, who became a partner in 2012. Since then, he has worked in our London and Madrid offices, before relocating to New York in 2015. Two years ago, he was appointed Head of our US International Arbitration Practice. Throughout his career, Christian has focused on arbitrations involving Latin America – both commercial and treaty cases. We asked him about building a practice, the changing landscape of investment treaty arbitration, and being a real-life "Englishman in New York".

HOW DID YOU COME TO FOCUS ON LATIN AMERICAN ARBITRATION?

After law school I travelled to Spain, where I learned enough Spanish to spend time in Madrid during my training contract. I returned to London and qualified in 1999, just before the Argentine financial crisis that marked the real beginning of the Latin American arbitration boom. Argentina had responded to the crisis by removing the peso's peg to the US dollar. That radically devalued the currency, and slashed the revenues of many foreign investors in Argentina. The investors

brought claims under Argentina's investment treaties with their home states. The rest, as they say, is history.

At the same time, the New York Convention was beginning to be ratified in enough Latin American countries, and there was enough foreign investment in those same countries, that I could see the investment arbitration trend coming. I also saw that there was a lot of commercial arbitration in the region.

Against that background, I consciously focused my career on Latin American work. I was lucky to be in a minority of Spanish-speaking, English mother tongue lawyers. I spent time in the Latin American arbitration group of Wilmer Hale, where I worked on a number of these cases. I also wrote a book on resolving disputes in Latin America, which was a useful springboard.[1]

YOU HAVE WORKED ON INVESTMENT TREATY CLAIMS SINCE THE EARLY 2000S. HOW HAS THE PLAYING FIELD CHANGED IN THAT TIME? WHAT ARE YOUR VIEWS ON THE PROS AND CONS OF TREATY CASES?

Herbert Smith Freehills represents both states (Costa Rica, The Kingdom of Spain, and more) and investors, so I have seen these cases from both sides.

Historically, just a handful of firms did investment treaty cases, and they developed a deep expertise. Now, everyone is pitching for this work; the field has expanded enormously.

The cases themselves have expanded too; both in number and in length of time. A treaty claim can run for five to ten years, and cost the parties millions of dollars. The rise of third party funding has also played a part. Although funding can be empowering for investors with genuine claims, it has also led to some more opportunistic claims, which are concerning for both states and their populations.

There is a pool of experienced treaty arbitrators, but many of them are overly busy. In recent years, we have seen more and more arbitrators on treaty claims who are less busy, but may lack the relevant experience to be making important decisions on matters of state responsibility. Both are concerning, and need to be addressed.

However, treaty arbitration still has many advantages. It gives investors a powerful tool for controlling state interference. This can be particularly useful in Latin America, where the rule of law is not consistently observed. Treaty claims tend to arise particularly in the energy, natural resources, and infrastructure sectors, all of which are particularly susceptible to pendulum swings from left to right in Latin America. Traditionally, swings to the left have led to behaviours that trigger treaty claims. Treaty arbitration is a way to hold states accountable.

WHY DO YOU THINK OTHER REGIONS HAVEN'T SEEN THE RUSH OF CLAIMS THAT LATIN AMERICA HAS? IN PARTICULAR, ASIA?

In my view, the relatively larger number of treaty claims in South and Central America stems from historical state behaviour there, including the prevailing level of institutional corruption. Protection for natural resources tends to be much stronger in Latin America than in other regions. However, that protection is not so extreme that the rule of law is perceived as being altogether absent. As a result, investors have tended to enter the region with a reasonable level of expectation they will be treated fairly and can rely on rule of law. Where that has not been the case, it has created a "perfect storm" climate for treaty claims.

ONE OF THE BIGGEST CRITICISMS OF INVESTMENT TREATY ARBITRATION HAS BEEN LACK OF TRANSPARENCY. AS A MEMBER OF UNCITRAL WORKING GROUP II ON TRANSPARENCY IN ARBITRATION, DO YOU THINK PROGRESS HAS BEEN MADE?

We are definitely seeing greater transparency. A recent case in which I acted for Costa Rica was live-streamed on the internet, and I got emails daily from people who had watched and wanted to comment. I think it's great for states and their publics to see these cases in action; it should really help to address some of the concerns. Critics argue that it can also lower the level of debate, but in my view, the pros far outweigh the cons.

YOU REPRESENTED CHEVRON IN AN ARBITRATION THAT IT CLAIMS WAS A SHAM TO EXTRACT MONEY IN THE FORM OF AN "AWARD". IS THIS A SIGN OF THINGS TO COME IN INTERNATIONAL ARBITRATION?

This is an extraordinary case. The claimants concocted a claim against Chevron at a fraudulent arbitration centre, the head of which was later arrested for forgery in connection with the sham award and has recently resulted in criminal convictions for the arbitrators and representatives of the fraudulent centre. Fortunately, we have not seen many sham cases to date, but there have been a few, and we know that there are more of these fraudulent institutions out there. It is a worrying development, which leaves parties vulnerable to exploitation of the worst kind. Fraudulent claimants can simply concoct a claim, institution and award, and rely on the New York Convention's presumption of enforceability. Even where the fraud is eventually revealed and enforcement refused, the respondent will have been forced to spend time and (significant) money defending itself and resisting enforcement.

YOU HAVE RECENTLY BEEN APPOINTED HEAD OF THE US INTERNATIONAL ARBITRATION TEAM, HAVING TAKEN OVER FROM LARRY SHORE IN 2017. WHAT IS YOUR VISION FOR THE TEAM?

Larry built incredibly strong foundations here in New York and the practice has continued to grow and thrive. We have a steady stream of active cases for investors, states and commercial parties, as well a number of cases in the pre-arbitration phase. We have a good stream of client work out of China, working with our Energy team there. We also have strong working relationships with our European offices including Paris, London and Madrid.

I am lucky to work with a very strong team that includes native Spanish speakers from Latin America, as well as Brazilian Lusophones, all with great arbitration credentials. We have a strong US attorney base, a great axis with Asia (including two Singaporean lawyers), and an Arabic-speaking team led by my partner Amal Bouchenaki.

The team has more than doubled in the time I've been here; we now have 18 lawyers. Language capabilities include English, Spanish, French, Arabic, Italian, Mandarin, Japanese and Portuguese.

My aim is for the team to be a "go-to" Latin America practice for international arbitration. With our experience of the region, language skills, and appreciation of what clients need and want in the region, we are getting closer.

YOU ARE AN ENGLISH LAWYER, FOCUSING ON SPANISH LANGUAGE CASES, NEW YORK-QUALIFIED AND PRACTISING IN THE US. TELL US ABOUT THIS COMBINATION OF CULTURES, AND WHAT YOU THINK IT BRINGS TO YOUR PRACTICE.

Latin American work has been a part of my life all my career. I have developed some really deep relationships with people who have lived through the development of arbitration in the region. Although I am English originally, I feel very much part of the Latin American arbitration community, and have a genuine affection for the region. In my experience, people see that and respect it. It is a wonderful region to work in. It presents natural challenges, but I feel very lucky to be able to spend a large amount of time with fantastic people.

"***Larry built incredibly strong foundations here in New York and the practice has continued to grow and thrive***"

Practising in the US bears no resemblance to the UK. The legal culture is entirely different. Despite the US/UK "special relationship" the Americans and Brits have very different ways of approaching the practice of law. There is no one way better than the other – but seeing the difference strikes me on a daily basis. I think we have the best of both worlds in our team, which prizes both technical legal skill and all-roundedness. Our combination of cultures makes us appealing to clients.

Professionally, New York is an obvious place for us to base our Latin America practice. The time zone makes sense, and there are so many natural synergies with the Latin American region. The arbitration community here is extremely international, even by comparison to London.

Personally, I love the energy of New York. From the food, to the culture, the museums, to the people, it feels like you're in the world's capital. It's a fascinating, fun city; I'm very happy to live and work here.

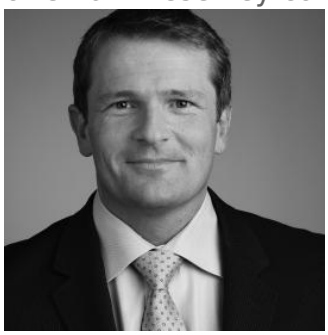
Footnote:

[1] International Dispute Resolution in Latin America: An Institutional Overview; Leathley, Christian; Kluwer Law 2007

More Inside Arbitration

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



CHRISTIAN LEATHLEY
PARTNER, NEW YORK

+1 917 542 7812
Christian.Leathley@hsf.com
