

INSIDE ARBITRATION: SPOTLIGHT ON FLORENCIA VILLAGGI

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Legal Briefings

Florencia Villaggi is a senior associate in our International Arbitration group, specialising in Latin American work. An Argentinian national, she qualified and practised in her home country for six years, before winning a UK Government scholarship to pursue a Master's degree in London. Although she finished the degree, she didn't feel finished with London, and looked for opportunities to stay longer. She applied for an internship at Herbert Smith Freehills, which turned into an associate role. The rest, as they say, is history.

After six successful years in our London office, Florencia has recently relocated to New York, where she will continue her focus on Latin American arbitration. She tells us about her perspectives as an expat lawyer, the history of LatAm arbitration, and the arbitration landscape in Latin America today.

WHAT DOES IT BRING TO YOUR PRACTICE TO BE WORKING OUTSIDE YOUR REGION OF FOCUS?

It's been a great challenge to be out of my comfort zone, working in a second language and a different legal system. It has definitely had an impact on my practice, and made me more creative and productive. Being in an international city like London or New York allows you to interact with people from so many different backgrounds, and has really increased my awareness of different people, cultures and approaches. Being at Herbert Smith Freehills, which is so focused on diversity, has helped as well. The fact that we are a global firm has given me a genuinely international perspective on the Latin American arbitration market, and exposed me to international best practice in my work. Importantly, I have also gained an understanding of the common law system, which is a huge advantage for my work in arbitration. My move to New York was a natural one, given its status as a hub for LatAm disputes work. I'm thrilled to be joining our team there.

WHEN WE THINK OF LATAM ARBITRATION, WE RECALL THE RAFT OF INVESTMENT-TREATY CASES AGAINST ARGENTINA IN THE EARLY 2000S. WERE YOU AWARE OF THOSE CASES AT THE TIME? HOW DID THEY INFORM YOUR UNDERSTANDING OF INVESTOR-STATE DISPUTE RESOLUTION AND ITS IMPACT ON THE POPULATION OF THE HOST STATE?

Yes, I was very well aware of those cases. My firm in Argentina was involved in a number of ICSID claims and I represented investors in some of those cases. Everyone working in international law in Argentina was aware of those cases. But I'd say that the general population of Argentina wasn't really aware of the facts, importance and number of cases against Argentina at the time. This was happening in the context of a profound economic, political and social crisis with very high unemployment rates; the ICSID cases were not the main news in the media really. Later on, there was a lot of media attention focused on claims by the so-called vulture funds, holders of defaulted Argentine bonds which did not agree to the restructuring, rather than the ICSID claims. Those funds tried to seize the Argentine frigate Libertad in the courts of Ghana. They also filed a claim in the New York District Court, which ordered Argentina to pay the total price of the bonds plus 9% interest. For some investors, this amounted to a return of over 1500%. This really caught the public's attention and there was a strong opposition to paying the vulture funds. However, when the government changed in 2015, the new government had as one of its main objectives to attract foreign investment to the country again and therefore settling the cases with foreign investors was a key priority. Argentina finally settled the vulture fund cases for 50% (which still was a huge return for the investors) and paid out investors on some of the ICSID awards. This was heavily reported in the media in 2016 and the population was generally supportive. People were hopeful that these settlements would promote investment to boost the economy, which was going through a recession.

WHAT ARE THE ATTITUDES TO ISDS IN ARGENTINA TODAY, AND IN LATIN AMERICA MORE BROADLY?

Historically, one third of ICSID's cases were against Latin American states. Venezuela, Bolivia and Ecuador (the most frequent ICSID respondents after Argentina) reacted by renouncing the ICSID Convention, and terminated a large number of their bilateral investment treaties (BITs). Despite being the most common respondents in ICSID cases, Argentina chose not to take that path.

A few years ago, a group of Latin American countries, led by Ecuador, called for an alternate arbitration centre under the rubric of the Union of South American Nations (UNASUR) to resolve investment disputes. However, that has not yet seen the light of day.

Now, the landscape is changing again. Only 15% of ICSID's current cases are against a Latin American state. Cases against European countries have risen to 40%. Ecuador's new government has announced that it will renegotiate its previously terminated BITs with 30 countries, using a new model treaty that provides for arbitration. Colombia has entered into 14 new BITs in the last few years. Mexico signed the ICSID Convention in 2018, and its recent trade deal with the EU includes a version of investor-state arbitration.

WHAT TRENDS ARE YOU SEEING IN LATAM COMMERCIAL ARBITRATION?

It's largely energy disputes, together with cases that arise from the "car wash" corruption scandal that rocked Petrobras, the main construction companies in LatAm and even Brazil's government. The aftermath of the "car wash" investigation has resulted in arbitrations all over Latin America at present.

Most LatAm arbitrations are ICC cases, with seats largely in Miami or New York, as well as in London, Geneva, Paris, with some in Latin American jurisdictions. Most of the LatAm countries are now Model Law jurisdictions, and their courts are increasingly arbitration-friendly. As a result, we are seeing more and more cases seated in the region. 25% of ICC's current case load has some connection to Latin America; Brazilian and Mexican parties are among the ICC's top ten users.

YOU MENTIONED ENERGY DISPUTES - WHAT TRENDS ARE YOU SEEING THERE?



South and Central America are extremely rich in energy reserves, so it's not surprising that energy disputes predominate. Venezuela has the largest proven oil reserves in the world, for example, and Brazil and Mexico are the world's 11th and 12th largest oil producers. Argentina recently discovered the world's second largest reserve of shale gas.

YPF, the Argentinian state oil company, has secured US\$ 30bn from several multinationals to help it explore the shale reserve. In our experience, projects on that scale frequently give rise to disputes. Similarly, Mexico has seen a rise in sentiment against private investment in its energy industry; indeed the new administration was elected on an anti-private investment platform. We could well see disputes arising there too.

Disputes won't be confined to the oil and gas sector, however. Latin American governments are actively promoting investment in renewable energy, including by Asian investors. Latin America has seen significant investment in renewable energy in recent years, exceeding US\$80 billion over the period 2010-2015 (excluding large hydropower projects). For the first time in 2015, in addition to Brazil, both Mexico and Chile joined the list of the top 10 largest renewable energy markets globally. Brazil has one of the largest renewable energy programmes in the world (involving production of ethanol fuel from sugar cane, which provides 18% of the country's automotive fuel). By 2025, Argentina is aiming for 20% of its electricity to be produced by renewables by 2025. Such initiatives will involve construction on a massive scale, which could give rise to disputes. There may also be disputes with suppliers, and disputes if current tax incentives for investors are withdrawn or amended. Some of these disputes may be referred to investor-state arbitration, if there are applicable treaties that still provide for ISDS. Others may be resolved by commercial

HERBERT SMITH FREEHILLS RECENTLY SPONSORED THE GLOBAL POUND CONFERENCE SERIES, WHICH SURVEYED 4,000 USERS OF DISPUTE RESOLUTION SERVICES IN 28 COUNTRIES. THE SURVEY SHOWED A CLEAR DEMAND FOR NON-ADJUDICATIVE WAYS TO RESOLVE DISPUTES, INCLUDING MEDIATION. WHAT ARE LATIN AMERICAN ATTITUDES TO MEDIATION, EITHER TOGETHER WITH, OR INSTEAD OF, LITIGATION OR ARBITRATION?

In my experience, Latin American clients are open to alternative dispute resolution. This stems partly from the fact that their national courts can be very slow; it's not unusual for a case to run for three to five years in the courts. Arbitration is better, but can still be time consuming and costly. We have a saying in Argentina that "a bad settlement is better than a good trial", which really sums it up!

In Argentina, the state supports alternative dispute resolution to reduce the number of cases coming to the courts. In many Latin American jurisdictions, it is mandatory to refer a case to mediation or conciliation before you can take it to the courts. There is a culture of mediation, and mediators can be certified by the state. In Argentina, Mexico, Peru and Colombia, you can enforce a mediated settlement as a judgment.

Despite this, there is still plenty of room for improvement. Particularly when it comes to high stakes international disputes, still only a handful of those cases are resolved by mediation. It would be good to see the institutions that work in the region promoting mediation as a way of finally resolving complex international disputes. With increased promotion, better model clauses, and a bigger pool of experienced mediators, we could start to see better results from mediation of international disputes in the region.

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KEY CONTACTS

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



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