COMMERCIAL DISPUTES

Following on from last month’s Specialist Advocate feature on Commercial Disputes, Lawyer Monthly speaks to Luis González García of Matrix Chambers.

Luis specialises in international law and international arbitration. Most of his work involves the settlement of international legal disputes in the field of foreign investment, international trade, commerce, contracts with UN bodies, and state sovereignty over natural resources, petroleum and energy.

As a professional with a wealth of experience in international arbitration, what role does international arbitration play in the commercial sector as a means of dispute resolution?

International arbitration plays a crucial role in the management of legal risks of cross-border transactions and investment in particular in the context of industries such as oil and gas, shipping, intellectual property, sport and international organisations. International arbitration plays a crucial role in these fields because private corporations and, in my experience, even states do not trust the courts and legal system of their international dealings. There is a perceived risk that domestic courts do not have the expertise required to resolve complex commercial transactions and, in many instances, parties simply do not trust the courts and legal system of their contracting party. Definitely, the feature of international arbitration that corporations, states and international organisations find most attractive is the enforceability of awards in most countries around the world.

In your opinion, how robust is the current regulation supporting international arbitration?

I think it’s fairly robust. Without a doubt, the 1958 New York Convention and the UNICITRAL Model Law in International Commercial Arbitration have accelerated the acceptance of arbitration by the domestic courts in almost all parts of the world. Arbitration should not be too formalistic. That’s why I’m in favour of limited regulation and more flexibility to allow arbitral practice to develop specific issues. This flexibility also helps to the development of international arbitration, where the Government to comply with international law.

What would you say are the particular challenges of advising on international arbitration cases that involve states, government-owned companies and United Nations bodies?

If the dispute arises out of a contract, a major challenge is to determine the nature of the contract, i.e. public or private. One needs to advise the client on the existence and consequences of a possible overlap of legal remedies before different domestic and international tribunals. Even if the contract provides for arbitration, it may be that the dispute is not arbitrable under the law of the contracting state. There may be questions involving private international law, the role of public international law and local law on the question of breach of contract, and potential aspects of sovereign immunity and arbitration under international law. Depending on the nature of the dispute, there may also exist a complex interplay between the contractual rights and broader labour, human rights and environmental norms.

How did you come to specialise in international law and international arbitration?

Our firm is a London-based practice that advises on international law and dispute resolution issues. I represent and advise both private and public entities in connection with disputes concerning international commercial arbitration.

In your opinion, what is the role expected of an international lawyer specialised in commercial arbitration in today’s global legal market?

I think globalisation is changing the role of both, the public international law specialist and the commercial lawyer. All lawyers involved in international commercial disputes must become aware of the increasing and challenging interaction between commercial law and public international law. The understanding of investors’ rights under investment treaties and human rights law is now required to advise on the conduct of multinationals and their observance of human rights and anti-corruption practices.

What is behind an investment dispute?

What is behind an investment dispute can well be a dispute about taxation, imposition of new health standards, bank restructuring, environmental pollution, termination of a concession contract, the expropriation of land, regulations by public bodies or actions of the local judiciary against an investor, to name a few. The process is conducted in the following way. The investor simply submits a notice of claim to the foreign government, which triggers the process of constitution of the international tribunal and the proceedings to follow. As a result, the claimant meets the criteria under the treaty he will challenge the actions of the state before an international tribunal which will determine if that claim has violated its international obligations and, if so, under the appropriate compensation in the form of an award.

What is investment treaty arbitration in essence? How are investment arbitration processes structured?

Investment dispute arbitration is a dispute between a state and an investor over the existence and consequences of a possible overlap of legal remedies before different domestic and international tribunals. The investor must defend all claims and win on all of them. That’s very challenging. But my 16 years in working for states has turned out to be tremendously helpful in my cases acting for investors because I can anticipate almost all of my opponent’s defences before I file the claim. I believe this knowledge acquired of representing states puts me in a good position to present my client’s case in a more efficient, credible and persuasive manner LM