The Fifth Meeting of the Latin American Corporate Governance Roundtable

8 - 9 October, 2004

Address by
Mr. Mariano A. Fabrizio, Partner,
Pastoriza & Eviner Abogados
Argentina

Session 4: Improving the Variety and Capacity of Mechanisms for Adjudicating Disputes

A Short Presentation on the Development of Alternative Dispute Resolution Mechanisms in Argentina

Mariano A. Fabrizio

After listening to all previous presentations supported by the participants to the "Fifth Meeting of the Latin American Corporate Governance Roundtable" organized by the OECD, I took advantage of being one of the very last participants to present, in Session Nbr. 4, on how to improve the variety and capacity of mechanisms for adjudicating disputes, and slightly adjusted my presentation taking into account all valuable remarks and information supported so far, directing the same into a somehow more "roundtable-oriented" presentation.

Throughout the day, different participants supported remarkable presentations surrounding, not surprisingly, the following structural topics: **(i)** the need for training; **(ii)** the need for a legal "involvement"; **(iii)** the convenience of "assisting" the judicial power; **(iv)** the key role of shareholders; and last, but not least **(v)** the key role of multilaterals.

These several concepts have deep impact when addressing the status of the so-called alternative dispute resolution mechanisms (or ADR´s) in the business and legal arenas of most Latin American countries.

Focusing on the main and most common ADR´s, arbitration and mediation, and avoiding remarks on many similarities with the rest of Latin American countries, I shall briefly present on **(i)** the current legal status of ADR´s in Argentina (including recent reforms and practical experience); and **(ii)** several changes or courses of action that may be adopted to increase the use of ADR´s in settling corporate disputes.

I. Current Legal Status of ADR´s in Argentina

Arbitration was brought into Argentina's legal system a long time ago, in our original Code of Commerce, which set forth the application of arbitration as a means of resolving corporate conflicts unless the express agreement to the contrary of the relevant players. However, in the early 1970´s, Argentina enacted the so-called Argentine Business Companies Law (v.g., law 19,550) derogating and replacing all corporate regulations enacted so far (including, of course, said arbitration rules) with a new regulatory frame which, in the case of ADR´s, disregarded their use and submitted corporate conflicts to a somehow troublesome, and already over-loaded, ordinary jurisdiction.

Nonetheless, arbitration continued to be an alternative in the corporate and other arenas, as the institute was, and still is, ruled by our Federal Code of Civil and Commercial Proceedings, but within an extremely restrictive background and lacking a general arbitration law setting forth a comprehensive set of rules. However, most legal scholars strongly criticize the ruling of arbitration by the Federal Code of Civil and Commercial Proceedings on the basis that, in their opinion, **(i)** arbitration is not a judicial proceeding; **(ii)** arbiters are not judges; and **(iii)** the *laudus* is not a judicial sentence. I shall not entail in analyzing or challenging these arguments.

However, the legal society slowly started to visualize a niche for a more practical and efficient use of ADR´s in Argentina, as a means of assisting a somehow over loaded and troublesome judicial system. A big step forward was the enactment of Law 24,573, providing for certain compulsory mediation proceedings which precede almost every law suit in our country.

In the corporate arena the process was slightly enhanced with the enactment of Resolution 4/01 by the Buenos Aires Public Registry of Commerce, which expressly allowed the inclusion of arbitral clauses in by-laws of certain types of corporations.

But the big milestone was still pending, and availing of these very first steps, real and significant progress was made through enactment of Decree 677/01 by the National Branch of the Republic of Argentina (so called "Public Offering Transparency Act"), aimed at supporting a strong and trustworthy framework for the public offering of securities in Argentina. Within its several provisions, the Public Offering Transparency Act entailed an indirect amendment of the Argentine Business Companies Law and in what is the subject matter of this presentation, ADR´s, it set forth compulsory submission to arbitration proceedings of all corporate conflicts by companies trading stock in Argentine stock exchanges (though the choice of arbitral forums remained optional for the shareholders and/or investors of such companies). This was of course aimed at supporting a speedy and efficient framework for the resolution of corporate conflicts having an impact on public markets.

Related regulations also set forth the requirement for self-regulated markets to create their own arbitral courts, being the most important one the arbitral court of the Buenos Aires Stock Exchange (*"Bolsa de Comercio de Buenos Aires"*), which, although created in the 1960´s, enhanced its position and reputation and handles a constantly increasing number of arbitral cases. Just as an example, this arbitral court handled, during 2003, a stock of more than 55 arbitral cases, most of such cases involving, directly or indirectly, corporate conflicts.

Within the scope of corporate conflicts that, according to this new regulation, must be submitted to arbitration proceedings we find, inter alia, **(i)** conflicts arising out of the relationship among the corporation and its shareholders; **(ii)** corporate actions set forth in the Argentine Business Companies Law; **(iii)** impugnation of resolutions passed by the boards of directors and shareholders´ meetings; **(iv)** liability actions; and **(v)** shareholders´ conflicts.

However, the picture is not complete yet. Argentina needs to continue working towards an effective spreading on the use of ADR´s to the private arena, as the above referred recent reforms only encompass, at least on a compulsory basis, public companies.

II. A Fertile Ground for ADR´s

Despite the slow growth of ADR´s in Argentina, and in most Latin American countries, it is easy to grasp the many advantages of ADR´s as a means of resolving corporate conflicts and the fertile ground for their development.

Amongst others, ADR´s provide for economy, secrecy, speed and efficiency, appreciated features that serve to good and efficient corporate governance.

We've heard that the over loaded Latin American judicial system needs "assistance" from other players of the legal society. This does not mean that the entire judicial system should be left aside, not even replaced by other alternatives, even when these alternatives indeed prove to be more efficient in terms of associated costs and timing, for the handling of certain cases. But it is absolutely feasible to compensate the load when administering justice, bringing ADR´s actively into the judicial scenario.

But we've heard so far that we still need to work hard in developing the use of ADR´s, taking immediate action to **(i)** conveying knowledge thereof to the legal society; **(ii)** enact self-sufficient comprehensive regulations; **(iii)**

enhance the key role of shareholders; and last but not least, **(iv)** enhance the key role of multilaterals and financial investors.

We've heard that there is still an important lack of knowledge in the different players, this being the reason why we need to urgently start working in this sense, so as to convey knowledge and understanding on ADR´s and their practical use, particularly in the corporate sector. Therefore, strong publicity and training are key pending tasks.

Self-sufficient regulations are also needed. As we have seen in Argentina, and with similarities all over Latin America, regulations on ADR´s are still few and atomized towards different sectors, and hence oriented towards those sectors only. A general, comprehensive, self-sufficient set of regulations is needed. In our country, there are many projects that might be developed successfully.

Shareholders need to assume their role as key players in this sense, and we hence need to convey the message that good corporate governance might avail from the benefits of ADR´s as a means for resolving conflicts within an efficient, secret and economic background. It is the sense that most corporate players do not care about this point when drafting governing documents, as they deem it, when things are doing good, not to be relevant.

Last, but not least, multilaterals and other financing entities need to keep on playing their key role in corporate governance, as they can excerpt pressure to their prospective clients when analyzing their investments, in the sense that the adoption of good corporate governance is of the essence. In this regard, it is important to know that multilaterals not only approach public companies but private companies as well. We've seen that almost all Latin American countries have approached ADR´s in a public companies-oriented fashion, but spreading ADR´s to all corporations will allow then to benefit from good corporate governance practices.

As we can easily see, there is fertile ground to develop practical and efficient use of ADR´s as a part of good corporate governance practice, but there is still a lot of work to be done.