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Commentary

Interview: Ricardo Rincon of Miller & Chevalier Discusses Anti-Corruption Efforts In International Arbitration

[*Editor's Note*: *Ricardo Rincón is a consultant in the International Department of Miller & Chevalier in Washington, D.C. Rincón is admitted in Colombia and currently pursuing admission to the D.C. Bar. He received his legal training in the United States, Spain and Colombia. Drawing on his multicultural and cross-border experience, Rincón advises clients on international disputes, corporate compliance and internal and government investigations related primarily to anti-corruption and anti-money laundering laws and standards. He has a strong background in dispute resolution, including extensive experience representing and advising clients in cross-border litigation and international arbitration. His profile can be found at www.millerchevalier.com/professional/ricardo-rincon.*]

Mealey's International Arbitration Report spoke with Ricardo Rincón about his professional background and emerging trends in international arbitration.

Mealey's: What is your professional background and how did you become involved in international arbitration?

Rincón: Since my law school days in Colombia, I have been drawn to criminal matters and cross-border disputes. I spent more than four years working as a law clerk at a leading local law firm that specialized in criminal law. Additionally, I was selected by the Colombian government for an internship at the Colombian Embassy in The Hague, where I assisted with cases before the International Court of Justice and the International Criminal Court.

I started my professional career as an attorney in Colombia, as an associate in Baker & McKenzie's dispute resolution team. We worked on domestic litigation matters before several types of courts, including constitutional, administrative, commercial, some special proceedings in criminal matters and also domestic and international arbitrations. I had the chance to represent both private entities and state-owned or government parties. I also coordinated the firm's *pro bono* practice, which led me to be involved in several impact projects related to the protection of human rights.

Since the beginning of my career, I have focused on the energy sector. I had experience in commercial arbitration matters, but I wanted to dive deeper into the corporate issues around anti-corruption and compliance because I really enjoyed working on criminal matters. I went to Spain and completed an advanced degree in anti-corruption, organized crime and terrorism. There was a trend throughout Latin America focusing on the importance of corporate compliance. The interest in FCPA [Foreign Corrupt Practice Act] cases and U.S. enforcement of FCPA matters was growing, and I was eager to get involved and gain that international perspective, not only from the dispute side but from the anti-corruption compliance side. That is when I received an interesting offer from an Australian multinational company to serve as an ethics and compliance manager for LatAm. It quickly shifted into working as manager of all Americas. It was fascinating because I supplemented my law firm experience on dispute resolution with compliance experience relating to anti-corruption and economic sanctions. As a result, compliance played an important role in the business, presenting a fantastic opportunity for me.

After working for this company, I decided to pursue my LL.M at Cornell Law School, and I focused my studies on international arbitration and white-collar crimes. During my LL.M, I actively participated in efforts conducted by the Anti-Corruption Institute, a nonprofit organization and think tank on international anti-corruption matters. In particular, I participated in one of its most prominent, anti-corruption projects to date, the creation of the International Anti-Corruption Court (IACC). The IACC is a proposed international court that would strengthen the enforcement of criminal laws against corrupt leaders with the campaign to create the IACC led by Integrity Initiatives International.

After completing my LL.M, I received an offer to join Miller & Chevalier, a U.S.-based law firm, which was a very interesting place for me because they have a long history of being top tier in investigations in LatAm in corruption, sanctions and other high-focus compliance areas. But Miller & Chevalier also has a really impressive team focused, more broadly, on international matters. When [International Arbitration practice lead] Margarita R. Sánchez joined, she started building out the firm's arbitration team, and my profile just made sense. The breadth and depth of our team is impressive, and it is unique because we blend our expertise providing high-level international arbitration knowledge with our experience in anti-corruption and sanctions compliance, both of which our clients often need in order to navigate complex cross-border issues. Providing this full-service experience for our clients is important to us.

Mealey's: What are the most important international trends you're seeing now?

Rincón: The first big topic is disputes in the energy industry. The hot topic now is developing energy sectors and new market behaviors, such as those involving liquid natural gas. The Russia-Ukraine conflict and Russia's invasion have significantly impacted global market dynamics, including in the imports and exports areas. A good example is the rising price of liquid natural gas, which has added pressure on the global energy market and may lead to future international disputes.

Second, hydrogen is also a key topic. After COP28 [Conference of the Parties to the UN Framework Convention on Climate Change], there has been a general consensus that green hydrogen will very likely replace fossil fuels in certain parts of the economy. But issues arise when an industry expands to incorporate developments such as the use of hydrogen. For example, several Latin America governments are already investing substantial resources in hydrogen technology. This will likely harm the traditional sector of the energy industry and may generate a number of disputes within this growing section of the industry. That is likely something we will see, and it is a popular discussion topic among experts in the energy sector.

A third sub-topic on this same point concerns climate change. Big markets and international organizations such as the IFC [International Finance Corporation] are interested in investing in large pieces of land for reforestation projects. Reforestation, for example in Brazil, is now an interesting trend. International organizations, development banks and multinational corporations are waiting to mobilize large international climate funds. The key question is who is going to use this money and which third parties or companies will execute these projects. Market strategies for investing resources in countries such as Brazil often entail engaging high-risk third parties for major projects involving public and international funds—raising significant compliance and anti-corruption concerns. Under these circumstances, corruption and dispute risks are high.

Now, looking at corruption as a whole, both in terms of allegations and consequences, I think that on the one hand, companies will need to keep focusing on conducting due diligence and investigations *before* arbitration to prepare adequately for potential corruption allegations. The importance of performing an internal investigation, plus the preliminary preparation for the dispute is something that has to be aligned and coordinated. On the other hand, the nuance I see that will be challenging is the enforcement of the awards in cases that have dealt with corruption allegations. This is a post-arbitration issue and concerns how each jurisdiction responds to this issue.

One case we should talk about is P&ID v Nigeria. In this matter, the U.K. High Court set aside a roughly $11 billion award by a tribunal due to corruption allegations[1]. Overall, what I see is that common-law jurisdictions are taking a more proactive approach

when addressing corruption allegations and setting aside the awards. In the United States, there is a case from April 2023, Equicare Health Inc. v. Varian Med. Sys.[2], where the District Court for the Northern District of California, relying on Section 10(a)(2) of the FAA, which permits a district court to vacate an arbitration award where "there was evident partiality or corruption in the arbitrators." 9 U.S.C. § 10(a)(2), vacated an arbitration decision due to the perceived bias of an arbitrator.

In my view, civil law jurisdictions tend to take a more cautious approach. It will be interesting to see how civil law jurisdictions treat this – if they will set aside the award, or if they are going to keep the award and defer to local administrative or criminal authorities to address any corruption allegations.

A case that we can use as an example is the Alstom v. ABL (2016) award in France. This case involved corruption allegations in China, and French courts were more hesitant to set aside the award. The Paris Court of Appeal annulled the arbitration award in May 2019, but the French Cour de Cassation later reversed this decision in September 2021[3] and referred the case to the Cour d'appel de Versailles that finally confirmed the exequatur on March 2023[4]. The French Courts made clear that there is a particularly high standard to prove corruption allegations.

Indian courts have taken a more nuanced approach. They consider the severity of the corruption allegations, as well as the impact on public policy. As you can see, there is a wide range of approaches at play, and it will be interesting to see how that affects the efficiency of international arbitration.

Another topic I have been seeing involves the intersection of business and human rights and international arbitration and the use of *amicus curiae* briefs as a way for NDPs [non-disputing parties] such as NGOs to participate in international arbitrations. Now, corruption allegations are also being raised in *amicus curiae* briefs to support said participation. One example is Eni v. Nigeria.[5] It will be interesting to see if this trend continues and whether arbitrators continue to permit this practice.

Mealey's: How realistically can an arbitration tribunal examine corruption allegations, in your view? Should they be deferring to local law enforcement and prosecutors?

Rincón: From my perspective, the role that an arbitrator takes also involves a duty to ask questions when corruption is raised. When a corruption concern is raised, the arbitrator should ask questions and follow up as necessary. This is particularly true if one party is unable to provide a clear answer for a particular topic.

Arbitrators cannot and should not ignore corruption allegations. Arbitrators should probe these issues, and if appropriate, refer the allegations to local authorities.

Mealey's: Are the standards for vacatur under the Federal Arbitration Act (FAA), 9 U.S.C § 1 *et seq*., flexible enough for courts and arbitrators to examine corruption allegations?

Rincón: The Federal Arbitration Act provides for vacatur in cases of corruption, fraud or undue means. It is important to keep this in mind and remember the Biden administration's emphasis on corruption as a national security interest. Thus, blending corruption with national security interests in the U.S., or public policy elsewhere, provides reasonable grounds for its use as a basis for vacating.

Mealey's: Will addressing corruption negatively impact the efficiency of arbitration? And how would you explain those delays to a client?

Rincón: International institutions can play a key role in resolving varying approaches to certain issues. ICC has a guideline and publication to this effect and provides guidance to address corruption issues. Hopefully, this type of guidelines will become a global standard.

For your second question, there is a duty for all lawyers in any litigation or dispute resolution matter to explain to the client that a dispute is long and can be costly. Arbitration has been marketed as a solution to these issues, but I think clients are already sophisticated and understand that at the end of the day it could be more complicated. When there are corruption allegations, I think that the clients are the first ones interested in addressing that issue because there could be additional consequences. Putting the commercial or economic issues aside, you are also dealing with potential criminal liability.

Mealey's: There has been some political pushback to international arbitration. Do you think some of the human rights issues in countries where international arbitration disputes originate could be harming its public image?

Rincón: From the U.S. perspective, there are acts such as the Global Magnitsky Act under which sanctions are filed over human rights violations. Given the potential increase in reports of human rights violations, we anticipate that we will see more of these issues litigated in international disputes.

For me, at least, this administration has been clear that corruption is a national interest and clear on its interest in enforcing the Global Magnitsky Act on human rights. It is generating significant dialogue in the international area and all parties are focused on embracing broad human rights protections.

This interview has been lightly edited for clarity.

Endnotes

1. Federal Republic of Nigeria v. Process & Industrial Developments Limited, Nos. CL-2019-000752 and CL-2018-000182, [2023] EWHC 3320 [Comm], England and Wales High, KBD, Dec. 21, 2023.
2. Equicare Health Inc. v. Varian Med. Sys., Inc., 21-mc-80183, N.D. Cal., 2023 U.S. Dist. LEXIS 74818.
3. Cour de cassation, civile, Chambre civile 1, 19-19.769, 29 septembre 2021
4. Cour d'appel de Versailles 21/06191, 14 March 2023.
5. Eni International B.V., et al. v. Federal Republic of Nigeria, No. ARB/20/41, ICSID. ■

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