



THE SLOW MARCH TO CUBA

Europe's lawyers have been exploiting business opportunities in Cuba for two decades, while their counterparts in the US see a nation shut off from what could be its principal trading partner. David Thorley takes the view from both sides of the Atlantic

Law firms in Miami are always loath to slip behind the competition in pursuing business opportunities, but a series of false dawns in the supposed opening of Cuba to US business have wearied even this focused group of people.

“Getting ready for what?” asks Victor Alvarez, who heads White & Case LLP’s Latin America practice. Every now and then, he adds, “we dust off our plans and then nothing changes. I think the current attitude is: we’ll be ready when there’s a reason to be ready.”

Whether or not this is that moment remains a moot point. Nonetheless, changes in government both in the US and Cuba over the past couple of years have sparked new optimism about the possibilities for a détente between the countries. And there is concrete evidence for the optimists: in April, President Barack Obama further relaxed US sanctions on travel to Cuba and financial transactions with the country.

The new rules only apply to Cuban Americans living in the US. They may now visit Cuba as often as they wish (having previously

been restricted to once every three years) and they have also seen an increase in the amount of money they may send home. Obama also lifted restrictions on US telecoms businesses applying for licences to operate in Cuba – seen by many as a key change for allowing more investment on the island – and on scheduled commercial flights to Cuba (at the moment only charter flights run) for Cuban Americans with relatives there.

Equally, since succeeding his brother to Cuba’s presidency, Raúl Castro has also taken steps to liberalise the economy from the Cuban side, allowing access to mobile phones and computers, licensing taxis and redistributing unused farmland. That said, the military still controls large chunks of the Cuban economy, with several hotels and real estate projects, in particular, under its command.

And for all Obama’s tinkering, he is firm that the embargo will remain in place until, “a post-Fidel government begins opening Cuba to democratic change.” This is not to say that the US and Cuba do not have a commercial relationship already. Medical, food and agricultural



Victor Alvarez



Angel Calleja



José María Viñals

supplies can all be traded and, in 2008, Cuba's trade with the US was worth over US\$700 million, making the country its fifth-largest trading partner. US-supplied agricultural products accounted for 30 per cent of Cuba's imports in the sector; but the licensing process to enable dealing in medical supplies is more complicated, and so that market fares less well.

José María Viñals, a partner with Eversheds' Madrid office who advises the firm's European clients on matters relating to Cuba, says that food imports from North America account for "cargo vessels arriving every two or three days, full of goods". Of course, he adds, "this could be improved if the US government increased the number of goods that may be imported."

Europe's headstart

Viñals and his colleagues in Spain see the contrast between the US-Cuba trading relationship and that of Cuba to the rest of the world at first hand. He has been working with the country since the mid-1980s, when Eversheds began accompanying clients to Cuba, and is now one of two lawyers from the firm handling Cuban matters, with a third who spends part of his time working from Havana.

Eversheds, he says, works on a number of financing deals in Cuba's banking and oil and gas markets, as well as being active in the tourism and real estate sectors, working especially on hotel refinancing deals. More recently, he explains, the practice has seen another development, in that "for two years we have been starting to work for Cuban companies, which means Cuban companies with mixed capital: 51 per cent controlled by the Cuban state and the remainder by the Cuban company."

Also in Madrid, Garrigues partner Angel Calleja says his firm, too, has developed a significant practice in Cuban business, though he finds that "legal work related to Cuba over recent years has never flowed in a regular or consistent manner: there have been periods of

great interest and activity coexisting with more calm moments." He says the firm's Cuban practice group advises clients on deals in various sectors of the country's economy including oil and gas, construction and infrastructure, new energies, hospitality and leisure. Meanwhile, some work flows through the UK – Norton Rose's development bank clients in Europe do some work on the island, for example.

The conditions for foreign investors entering the country, says Viñals, are not as forbidding as some may think. He concedes that the country's naturally interventionist bent means that "it is very important

for companies to get legal protection." But the government, in Viñals' view, at least recognises the need to provide investors with this reassurance.

For one, he says, "Cuba has a tradition of fulfilling and enforcing arbitration agreements. The island has a chamber of commerce in Havana, and its arbitration court has heard many disputes from Spanish companies." He also draws attention to the country's protection treaties on finance and its double taxation treaties. Cuba has bilateral investment treaties in force with 38 countries including, in Europe, Spain, France, Germany and the UK, and in Latin America, Argentina, Chile and Mexico.

With US competition somewhat hampered, Spanish lawyers, says Calleja, are well-placed to work in the country, not least because of the civil code links to its former colonial owners. "There are obviously peculiarities derived from the public sector's weight in the island's economy," he says. "From a strict business standpoint this is, however, not different from the situation entrepreneurs face in many other world markets."

But this is not to say Cuba does not present the lawyers who are able to do business there with some stern tests. "Challenges lie, as in most projects, in accommodating international contracting standards, legal security and investment protection into the peculiarities of the Cuban legal system," explains Calleja. "A significant part of our work

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has to do with analysing the local advice, and lining it up with strict international standards.”

And, of course, the tentacles of the US policy towards Cuba entwine Europe’s relations with the island. In 1996, the US’s Helms-Burton Act strengthened the embargo and extended its reach to apply to foreign companies trading with Cuba, as well as imposing sanctions on foreign companies dealing in properties which were US-owned before expropriation by the Cuban government.

Helms-Burton brought US legislation into direct conflict with the EU’s own rules on Cuba – and indeed, the EU has adopted rules requiring its member states not to give effect to Helms-Burton – but in fact the parties’ settlement of the issue has amounted to little more than an agreement to disagree: both statutes remain in force. Canada and Mexico have also both passed measures to counteract Helms-Burton, but it still makes its presence felt in those countries. For example, Cuba’s largest foreign investor is Toronto-based Sherritt, and the company’s CEO, Ian Delaney, and his family are barred from travelling to the US under the act.

Viñals says, “The Cuban embargo is very important for foreign investors, and for lawyers, even when representing European clients – we need to have a legal opinion of Cuban laws as well as making an analysis of whether the company has interest in the US, which may be endangered by the investment.” Nonetheless, his overall view is that “people going to Cuba need to be aware of its particular economics and legal complexity, but they should also know that there are many possibilities, and that when the embargo is lifted it will be in a position to grow very fast.”

US: constant vigilance

It is not only Spanish companies and their counsel who are starting to imagine life after the embargo. They do, however, have the advantage over their US counterparts of regular contact with the country. In Miami, although Cuba’s potential is as plain to see as from Europe, the experience is starkly different. With Havana less than an hour away by plane, says Victor Alvarez, “it is one of those cruel ironies for us as an emerging markets firm to be unable to engage; with Cuba so close, it’s difficult to rationalise.”

And in spite of the gradual relaxation of some of the trading rules, the vast majority remain in place, with stiff penalties for infringements:

up to 10 years in prison, US\$1 million in corporate fines and US\$250,000 in individual fines. “As a firm we have to be extremely careful,” says Alvarez.

And it seems the consensus in Miami is that the situation is unlikely to change quickly, giving rise to a sense of eternal waiting. Alvarez, who has Cuban parents, says, “It’s been one of the staples of my life: the status quo. Things just don’t change between the US and Cuba.” He says the only way Cuba can be opened is incrementally, explaining, “Obama understands that if he moves too quickly he won’t get anything done, because there will be a provocative action to slow it down. We can’t move too quickly because if we do it is too destabilising to them.”

But even so, since the fall of the Berlin Wall, there has been a prevailing sense that Cuba’s opening would not be far behind, and Miami firms in particular have been poised to act for some time, setting up task forces to ensure that when the time comes they are well informed and ready to move. Many of Miami’s lawyers learned long ago not to overestimate the significance of developments in Cuban-US relations. “The great art here in Miami for Cuban American lawyers is the art of patience,” says Alvarez.

Cuban-born Carlos Loumiet of Hunton & Williams takes a view which is only moderately more optimistic, finding that political bluster often hampers meaningful legal progress: “We monitor what’s going on there; we monitor what the law allows. But I think it’s fair to say that most major law firms find loud political views getting in the way of what we are trying to do, which is private legal work.

“Most of the law firms that we know are already monitoring what’s going on in Cuba, and are aware of what the possibilities are and are providing guidance to clients on what is required,” he adds. Another Cuban-born lawyer, George Harper, of the Miami-based firm Harper Meyer, finds his professional relationship with Cuba characterised by this vigilance: “You try to stay prepared. You read the changes in the law. You think about how the new laws apply. We have been doing that for almost 20 years.”

Of course, a significant section of the Florida community – legal and otherwise – has deep personal and political ties to the island – for those of Alvarez and Loumiet’s generation, it is still the country, and broadly the same government, from which their parents fled to protect their livelihoods. Professionally, watching and waiting for so long



Carlos Loumiet



George Harper



Larry Pascal

without being able to do serious business is clearly frustrating, but personally the motives are much broader. Says Loumiet, “Any lawyer likes to practise his profession and if there are professional opportunities that’s great too, but I think that most lawyers have a desire to try to be able to help in some way.” And he is not alone in this view: “It’s easy to be in Miami and pontificate about what’s right and wrong,” says Alvarez. “But the issue in Cuba has to do with the conditions in which people are living, which are just wrong, and I want to move past this pretext to an idea of what the Cuban regime means for the people living there.”

And this personal and historical contact still has repercussions for any opening of Cuba to trade with the US. One continual sticking point is that Cuba still has not settled any of the thousands of property claims filed from the US over Castro’s confiscation programme of the early 1960s. Four decades later, these claims are fraught with emotional as well as practical difficulties, says Augusto Maxwell of Akerman Senterfitt, who focuses on contested land ownership. He explains that the existence of pre-revolutionary records which establish a property’s past ownership cannot tell the whole story of whether claims will (or indeed can) be settled. For one thing, “the majority of structures on the island would qualify as unsafe structures,” in addition to which, as Maxwell found when tracing his own grandparents’ house on the island, the properties are often now home to a dozen or more ordinary Cubans. “These experiences have brought me to a more grounded and realistic view of the claims issues in Cuba,” he said.

As in so many aspects of Cuba’s opening, compromise seems to be the only solution, as Loumiet proposes: “The way I see it unfolding is that there will have to be some built-in right of first refusal or an option for former owners who, if they are willing, could provide some of the necessary capital to make the country start working again.”

From elsewhere in the US, the perspective is a little less fraught. In New York, some lawyers are seeing burgeoning interest from potential investors in the island. Talbert Navia is the co-head of Chadbourne & Parke LLP’s Latin America practice and does a great deal of fund formation and private equity investment work across the region. He advises clients with Cuba-focused funds, and says private equity clients are increasingly paying attention to the island, with the recent change in telecoms regulation particularly piquing their interest.

From Dallas, Larry Pascal (who is also Cuban American) says his firm, Haynes & Boone, has taken a small step further down the track to preparation, and is beginning to work out how best to organise its approach to the country. The firm is in the process of setting up a Cuban practice group, which – though it is still in its embryonic stages – will include members of the firm’s Latin American practice, based in the US and Mexico, as well as its regulatory lawyers. This last group, he says, is at least beginning to develop a niche working in the narrow space that US-Cuban relations will allow. He explains, “Our

clients come to us for regulatory consolations. In particular, they are interested in registering trademarks in Cuba.” (Cuba introduced new laws on registering and protecting trademarks in 2002, to bring it into line with WTO requirements).

But, like Victor Alvarez, Pascal does not foresee Cuba’s opening as a “big bang” event. The steps to an open business relationship with the country, he says, are likely to be “more evolutionary.” And, like many of his colleagues in Miami, he sees the need for legal changes from Cuba, as well as in the US. “It will require improvements in terms of human rights and civil rights, and in terms of the independence of the judiciary, and the whole system will have to be developed to become compatible with international ways of doing business.”

Incremental steps, both from the US and Cuban legislatures, may be the only realistic approach to liberalising their relations, but inevitably some of those steps will make deeper footprints than others. One in particular appeals to lawyers: “What is most likely to trigger that change in Cuba is legislation on the freedom to travel,” says Loumiet. “Once that’s permitted, there will be business people going to Cuba and seeing the opportunities there, and I’m not sure how the governments will be able to control it.”

George Harper sees this step as having even more direct importance. He explains, “The cruise ships bring infrastructure; cruise ships bring hotels.” He continues, “If you think about what these companies will need, they need everything and there are companies that will go in there are need legal representation, so it’s going to be big. And it is not just exporters: there’s also shipping, freight companies. When Cuba opens up, I think the US is going to have a tremendous economic boom. Lawyers will expand their professional repertoire; they will adjust.”

Legislation to establish free travel to Cuba is already pending before Congress, although the bill’s opponents believe they have the support to defeat it. Many commentators feel the reluctance of US politicians to make concessions in the country’s sanctions against Cuba could be softened if the Cuban government were to make a goodwill gesture of its own. How likely this is under the continued Castro regime remains to be seen, but those lawyers, like Harper, Alvarez, and Pascal, who have travelled to Cuba and met members of that country’s bar, say its lawyers at least will be well qualified to handle any transition when the time comes.

“These guys are going to be particularly important players, in that they are the only ones that understand how it’s been working,” says Alvarez. He foresees Cuban lawyers, who until now have all worked exclusively for the Cuban state, making alliances with firms internationally – a move that will help foster the process of bringing the two country’s legal systems into closer compatibility. “They’re very educated people and I don’t think it would take long once the first steps are taken for them to become particularly good business people,” adds Harper. Like Alvarez at White & Case says: when there’s a reason to be ready, Cuba’s lawyers too will be ready.

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