Kluwer Arbitration Blog

# Colombian Arbitration Week 2022 Recap: International Arbitration and the Political Situation in Latin America

Ana María Buitrago (Constitutional Court of Colombia) · Wednesday, October 5th, 2022

In the first edition of the Colombian Arbitration Week, the first panel discussed international arbitration in the context of the changing political situation in Latin America. This panel addressed, among other issues, the constitutionalization of arbitration and the impact of new governments in the region on arbitration matters.

**Constitutionalization of arbitration and the existence of a dualist or monist regime**

Rafael Rincón (*Partner, Zuleta Abogados*) started the discussion by asking which were the constitutional challenges in Colombia, Mexico, Chile, and Peru, and how could they potentially impact international arbitration.

On this issue, Lucía Olavarría (*Partner, QA Legal*) pointed out that, in Peru, the constitutionalization of arbitration has been remarkable. She noted that, since 1993, the Constitution recognizes arbitration as equivalent to the judiciary. Such recognition, for instance, limits judicial intervention in arbitration. She also mentioned that constitutional jurisprudence limits the cases in which a constitutional action can be lodged against an award.

Despite these benefits, Lucía mentioned that problems have arisen in Peru concerning the legal reasoning included in arbitral awards as any defect in the reasoning of the award may be considered a substantive error, leading to the review of the merits of the decision.

Concerning Colombia, Daniela Páez-Cala (*Associate, Baker McKenzie*) explained that, under Colombian arbitration laws, two authorities are competent to resolve appeals against an international award, the Supreme Court and the Council of State. She argued that this problem could be resolved by amending the law and determining a single competent authority to hear the appeal.

She added that the Supreme Court and the Council of State have interpreted grounds for the annulment of an award differently, which creates legal uncertainty.

She also referred to the admissibility of constitutional actions against international awards and pointed out that the Constitutional Court has determined that this action (*acción de tutela*) can be submitted to challenge international awards. Notably, she said that the grounds under which a

constitutional action may be granted are broader than those in an annulment action, and may allow the judge to review the merits of the award. She also said that, although this may put the country at a disadvantage as a seat of international arbitration, the latest decision of the Constitutional Court in 2019 is closer to sustaining that an annulment proceeding is the only remedy against an international award as opposed to a constitutional action.

René Irra (*Partner, Cuatrecasas*) stated that Mexico has a monist regime of arbitration, under which a constitutional action cannot be filed to challenge an international award. In his opinion, if the parties decided to withdraw from the judiciary to resolve their disputes by arbitration, this decision must be respected.

However, this does not mean that judges do not influence these matters. He pointed out that the Mexican judiciary is aware of the purpose of arbitration, and defends and protects it. Since 2014, the Supreme Court has stated that an award can only be annulled if the decision is arbitrary, openly unfair, or capricious. Only in such case could a judge set aside the award under public policy grounds. However, he also mentioned that the challenge in Mexico is the application of this deference to arbitration by local courts, who may not be familiar with this criteria.

Andrés Jana (*Partner, Jana & Gil*) expressed that the problems of arbitration that arose years ago in Latin America are still present. Particularly, he focused on the challenge of the harmonization of the legal cultures behind international arbitration and domestic law.

He explained that this problem has manifested in two ways. First, in Latin America, arbitral awards are entretained by courts based on domestic arbitration criteria for idiosyncratic reasons that an international user is not interested in. The challenge then is to improve the application of international arbitration standards in a uniform and consistent manner. Second, the constitutionalization of arbitration and the use of constitutional proceedings as a remedy *parallel* to annulment.

**Are reforms to international arbitration in the region foreseeable given the political situation?**

Rafael Rincón raised the question of whether the political situation in Latin America will lead to reforms related to bilateral investment treaties, or if it was possible to foresee the limitation or restriction of arbitration in certain strategic industries.

Daniela Páez-Cala pointed out that, in Colombia, it is still difficult to predict whether there will be a change in international arbitration with the arrival of President Gustavo Petro. In her opinion, while this could be a government that is less receptive to international arbitration, the facts so far show the opposite. For example, regarding investment arbitration, President Petro has not expressed his intention to denounce or renegotiate investment protection treaties, and any potential modifications to free trade agreements would be to trade provisions rather than to investment protection chapters.

René Irra pointed out that, although Mexico is not in an ideal scenario, they are in a better position than the one expected with López Obrador’s government. In particular, he said that while the government’s position has impacted foreign investment, no negative attitude towards the protection of investments has been taken. In this regard, he added that there have been no modifications to the

regulation of international arbitration nor a change in the position of domestic courts.

Lucía Olavarría referred to the current political situation in Peru and pointed out that the arbitration crisis in the country is not recent, and did not arise as a result of President Castillo's election. In fact, in her opinion, this crisis arose during the *Lava Jato* investigation and the accusations of corruption in public procurement. She considers that the country has been plunged into a lack of governance since 2018, which in turn had detrimental effects on investments in Peru. She pointed out that, between 2020 and 2022, Peru has been the country in the region with the highest number of ICSID claims.

Regarding the current government, she pointed out that there is indeed an attitude against arbitration. Legislation to modify arbitration has been introduced, but it has not been successful.

In the case of Chile, Rafael also raised the issue of the recent intent to reform the Constitution in the country and the changes that could be envisaged in arbitration. Regarding the impact of the constituent process, Andrés Jana pointed out that, during the draft of the new Constitution, there was a great deal of discussion as to whether lawsuits could be filed in investment cases. Additionally, Andrés pointed out that in Chile there is an ongoing debate on free trade agreements, particularly on investor-state dispute settlement mechanisms. Concerning the Trans-Pacific Partnership, there has been a political discussion because the new government has taken a critical position on this matter with the idea of renegotiating the exclusion of the investor-state dispute resolution mechanism.

**Potential new disputes**

In comparison with the Peruvian case, in the last four years of government, Mexico has already faced half of the claims it had historically faced before President López Obrador's regime. In René Irra's opinion, the main reforms that the President has promoted will possibly lead to an increase of cases mainly in renewable energy and the hydrocarbons sectors.

Regarding the Peruvian case, Lucía pointed out that each case would need to be analyzed to determine the reasons that gave rise to disputes. However, the cases brought before ICSID do coincide with Peru's political situation. Also, in terms of strategic industries, she mentioned that most of the disputes are in the construction, infrastructure, and hydrocarbons sectors.

As regards Colombia, Daniela pointed out that if President Petro's government plan is implemented, it is possible to conclude that measures could affect the hydrocarbons and energy sectors. For example, the government's plan shows that it seeks to eliminate tax benefits applicable to these industries, as well as to stop fracking projects and new licenses for the exploration of hydrocarbons. The State is also seeking to have a larger role in the supply and regulation of electricity.

**Conclusions**

Based on the above, it is fair to conclude that the political situation in Latin America may have a substantial effect on international arbitration. For instance, the situation in Peru leads us to

conclude that the crisis in arbitration has taken place long before the new government took office.

The situation in Colombia shows how there have been multiple interpretations on the grounds to seek for the annulment of awards, as well as the constitutional protection that exists through a constitutional proceeding.

The situation in Mexico reflects the consequences of the actual government on arbitration. Lastly, the Chilean government has taken a critical position regarding the exclusion of the investor-state solution mechanism in international investment treaties.

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This entry was posted on Wednesday, October 5th, 2022 at 9:29 am and is filed under Colombia, Constitutional proceeding, Latin America, political reform, regulation
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