Kluwer Arbitration Blog

Colombian Arbitration Week 2022 Recap: New Challenges and Perspectives of Arbitration in Colombia

Miguel Posse (National Legal Defense Agency of the State of Colombia) · Thursday, October 6th, 2022

The first Colombian Arbitration Week was launched last week in Bogotá. The closing event comprised a panel discussing new challenges and perspectives of arbitration in Colombia. The discussion was moderated by Anne Mürrle (*Partner, Mürrle Asesores*) with the following panelists Cristina Mejía (*Partner, Baker McKenzie*), José Miguel Mendoza (*Partner, DLA Piper*), David Araque (*Partner, Gómez Pinzon*), and Juan Felipe Merizalde (*Partner, Adell & Merizalde*).

Diversity and Arbitration

Cristina proposed a discussion on the relevance and scope of diversity in international arbitration, including matters such as why users and actors of arbitration should seek diversity and which steps should be taken to achieve it.

She pointed out that, while definitions of diversity may vary, this issue is commonly seen as a matter of inclusion and equality. Yet, the conversation may be taken to deeper layers that show, for instance, that a more diverse panel of adjudicators can give more legitimacy to the decision itself. Alternative dispute resolution relies heavily on the trust that different parties place in arbitrators' findings. Hence, trust is necessary for arbitration to achieve its objectives effectively.

She referred to ongoing discussions on arbitral diversity and legitimacy such as claims raised recently by Jay Z against the American Arbitration Association (AAA), where the rapper raised concerns about the lack of diversity in the institution's list of arbitrators. One of the main arguments presented by Jay Z on diversity relied on how the American Arbitration Association misleads consumers into thinking that arbitration is an impartial and fair mechanism for dispute resolution, although, given the non-diverse list, the mechanism is neither impartial nor fair.

To achieve diversity, several initiatives have been promoted, two of which were discussed in the panel. First, "The Pledge." In 2015, members of the arbitration community created this initiative to increase the number of women appointed as arbitrators to achieve a fair and diverse representation. The question that arises here is whether all those efforts translate into actual results. ICC's 2020 statistics in this regard reflect 355 nominations of female arbitrators, which represents 23% of all nominations and an increase from the 319 nominations submitted back in 2019.

Second, Directive No. 022 of 31 October 2018 issued by Bogota's Mayor, which provides that all

arbitrations relating to the district must have a woman appointed as arbitrator, was also discussed. This mandate has been highly questioned by arbitrators as to the justification and basis of this mandate. As Anne Mürrle pointed out, to many, an appointment of a woman as an arbitrator should not be based on the fact that she is a woman, but on the conviction that she is the right arbitrator for the case.

Cristina Mejía also argued that diversity enriches the discussion of the tribunal and that it should not be seen merely as a matter of gender because a "diverse panel" refers also to different cultures, and ethnicities, among others.

Corporate Arbitration

José Miguel Mendoza discussed the development of a discipline in Colombia known as "corporate arbitration." He pointed out that corporate disputes are in high demand in Colombia. In the last ten years, more than 3,200 lawsuits have been filed before the Colombian Superintendence of Corporations from which more than 1,500 rulings have been issued.

He also added that, with the clear need shareholders, companies, and directors have for judicial decisions of good quality, combined with the fact that the Colombian judiciary is currently overwhelmed with a large number of claims, it is noteworthy that Bogota's Chamber of Commerce currently provides a forum for resolving corporate disputes with specialists' support.

The first challenge that emerges from this new forum for corporate disputes is to determine what is its scope of application. As the term "corporate arbitration" is not defined in any local law, it is unclear where to draw the line between the arbitration of corporate disputes and traditional arbitration. For instance, it is unclear whether there should be separate lists of arbitrators.

To José Miguel, although there are still traumas and frictions that must be solved, specialization in this discipline would allow a more fluid dialogue. Nevertheless, this specialty is considered a breakthrough step to position Colombia as a leader in the resolution of corporate conflicts.

Constitutionalization of Arbitration

David Araque discussed constitutional decisions in Latin American countries and their significant implications in arbitration. Different from other jurisdictions, in countries in the region, these proceedings could have a particular impact due to the interpretation and application these countries have on fundamental rights as a direct source of law.

For example in Colombia, the Constitution refers to the "*acción de tutela*", a constitutional action that has as a purpose to avail immediate protection of a fundamental right. The issue that instantly crops up is whether this remedy is appropriate to challenge an international award based in Colombia or when Colombian law is applicable.

The discussion on this matter starts with the idea that an award cannot be reviewed or modified on its merits. However, by way of the *acción de tutela*, judges have been granted the power to review decisions issued in arbitration proceedings, which clashes with arbitration core principles.

Regarding awards issued in international arbitration, the Colombian Constitutional Court has determined that the *acción de tutela* is appropriate only in exceptional circumstances. In this context, it is clear that the *acción de tutela* is admissible against an international award. While this may be positive to protect fundamental rights, it could lead to undue judicial interference in arbitration.

Furthermore, David discussed that this action could be used to prevent the enforcement of the award as a tactic of parties opposing the decision of an arbitral tribunal. This may also negatively impact Colombia's image as a friendly arbitral seat to international arbitration.

Colombia's challenges in international arbitration practice

As pointed out by Juan Felipe Merizalde, from the perspective of practitioners and the country as a whole, Colombia faces a series of challenges in international arbitration.

On the one side, he explained three challenges that Colombian lawyers face:

First, what he calls the "domestication of international arbitration." Colombian practitioners who are used to litigation under Colombian rules of procedure and get involved, as arbitrators or counsel in international arbitration proceedings, may be reluctant to use the benefits of international arbitration, for example, designing a tailor-made procedure. This could lead them to prefer domestic rules that are unreasonable for the specifics of an international dispute.

Second, young practitioners face multiple difficulties to practice international arbitration. This starts at an early stage, considering that many law school programs in Colombia currently lack robust preparation on international arbitration matters. This limitation transcends afterward to the professional environment, for instance, several laws and arbitral rules in Latin America prohibit arbitrators to have as a secretary someone who works at their firm.

Third, there is a commercial challenge for lawyers and firms doing international arbitration in Colombia. By way of example, clients from Colombia and other countries in Latin America, whenever they find themselves involved in international arbitration, will seek support from lawyers in the United States and Europe rather than local firms.

Regarding the challenges Colombia faces as a country, currently various controversial proposals relate to measures in strategic sectors such as pensions. Regarding pensions, an important example is the recent ICSID award in the case *BBVA v. Bolivia*, in which Bolivia was ordered to compensate BBVA for a significant amount of US$ 105 million as a result of measures in this industry. (*See* the discussion of this case here).

To Juan Felipe, this does not mean that countries, particularly in a moment of political transition, cannot adopt regulatory measures. But it requires States such as Colombia to be careful and diligent in the process of developing and applying new measures that can ultimately prevent investment disputes or offer strong justifications for these disputes.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, October 6th, 2022 at 9:30 am and is filed under Colombia, Constitutional proceeding, Corporate disputes, Diversity, Latin America
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.