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A Year of Legal Developments for International Arbitration in Latin America

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2015 has witnessed numerous interesting legal developments in the field of international arbitration in Latin America, although these have been wide-ranging in nature and have not always followed the same path. While some jurisdictions have taken legislative steps to introduce or consolidate pro-arbitration legislation in accordance with internationally accepted standards, others, perhaps influenced by negative experiences in the field of investment arbitration, have issued more restrictive rules. This different approach is most clear in the context of arbitration involving States or State entities.

Brazil: important amendments in the region's giant Arbitration Act

On 26 May 2015, Brazil amended its 1996 Arbitration Act. Rather than a new law, the reform is a refined text reflecting the pro-arbitration jurisprudence of the courts and practice since 1996. As discussed in prior posts, the most noteworthy change is the possibility, now clearly spelled out, for public entities to participate in arbitration. Later in the year, Brazil adopted its first judicial or extra-judicial mediation law, creating a framework for this amicable dispute resolution technique between private entities, public entities or private entities and the public administration. Further, 2015 marked the adoption of a new Civil Procedure Code which will impact: the regulation of mediation and conciliation chambers; the "*carta arbitral*" – the means of communication used between the arbitral tribunal and the judiciary; and the confidentiality attributed to arbitration.

Aligned with these legal changes, the courts also keep demonstrating a pro arbitration attitude. A good example of this was the decision of the *Superior Tribunal de Justiça*, which extended to arbitral awards, a procedural rule imposing a fine in case of non-compliance with judicial rulings. A second example is the decision of a São Paulo court, which extended the scope of an arbitration agreement to non-signatories given that exceptional circumstances existed; namely, the scope was extended to parties that provided a full guarantee and took ownership of the negotiation, but did not sign the arbitration agreement.

Finally, after fifteen years since it last signed a bilateral investment treaty (although Brazil never ratified any of them), 2015 is marked by the signing of a the first of a new generation of investment protection treaties, the Cooperation and Facilitation Investment Agreements – namely with Angola, Mozambique and Mexico. Although they do not foresee the use of any investor-state dispute settlement system, these treaties seem to be a sign of Brazil's willingness to resume its investment

policy.

Argentina: renewal of the oldest arbitration regime in the region

In August 2015, Argentina's new Civil and Commercial Code entered into force, at last incorporating arbitration provisions inspired by the UNCITRAL Model-Law. Although many of the principles contained in the Model Law were already applied by Argentinean courts, the passing of the new Code finally brings Argentina in line with other jurisdictions and marks a departure from the old regime, which still required a "submission agreement" in order to activate an arbitration agreement and which proved a frequent source of problems.

Bolivia and Ecuador: a step back in respect of State arbitration

2015 also saw the passing of new legislation in Bolivia and Ecuador, evidencing a more restrictive approach to arbitration, mainly in cases involving the State. Bolivia's new arbitration and investment law, passed in June 2015, combines both very positive developments (such as the possibility to request arbitral interim measures) with some less encouraging provisions, such as the limitation of arbitrability–disputes concerning natural resources, public services, administrative contracts (except contracts for the provision of goods or services by companies with no address in Bolivia) and matters affecting "public order" are no longer arbitrable. The law also includes a very innovative investment protection chapter, which aims at creating a domestic investment protection scheme under Bolivian law, both for national and foreign investors. This development seems to be driven by Bolivia's intention to support an alternative forum and rules to ICSID (from which it withdrew in 2007). However, there are still many doubts as to how this mechanism will work in practice.

Ecuador amended its Arbitration Act in May 2015 and introduced a new requirement in the proceedings for the enforcement of foreign awards against the State, which imposes on the enforcing party the burden of proving that the award is in accordance with the Constitution and the laws of the State (a prior post dealt in detail with these amendments).

Mexico and Colombia: mixed signals

As part of its Energy Reform, which allows private investment in the energy sector for the first time in almost 80 years, Mexico passed a new Hydrocarbons Law in August 2014. The Law provides for arbitration as the main method to resolve disputes arising from hydrocarbon contracts, but contains an important exception: the administrative rescission of a contract is excluded from arbitration (exclusion which does not affect any right to access to arbitration recognized to foreign investors in international treaties to which Mexico is a party). The Model Production-Sharing Contract terms, issued in 2015, maintain this exclusion, attributing disputes arising out of this category of contract termination exclusively to Federal Courts.

In 2015, Mexican courts also clarified that arbitrators are not an authority in respect of the Amparo Proceedings, an extraordinary judicial action for the protection of constitutional rights common to many Latin American jurisdictions. This ruling confirmed that the only recourse against arbitral awards in Mexico is the annulment action. In this manner, Mexico follows the trends of other jurisdictions such as Peru or Chile, which have restricted the use of Amparo proceedings in respect of arbitral awards.

Over the last few years, Colombia has developed as an arbitration friendly jurisdiction after the

passing in 2012 of a new UNCITRAL Model Law based arbitration act. These developments include a ruling of 6 August 2015 by the Constitutional Court of the country of August 2015, which rejected the challenge of an international award issued in Bogota against a State-owned company. However, other recent events have cast some shadows upon this view: on the one hand, recent judicial decisions have shown a restrictive approach to the enforcement of foreign awards under the New York Convention; on the other, a Presidential Decree issued in November 2014 requires public servants to justify every time they intend to insert arbitration clauses into public contracts, following a declared attempt to reduce arbitration in respect of State entities.

Peru: deepening the trend of submitting public contracts to arbitration

Since 1997, Peruvian law makes it mandatory for parties to public contracts to submit disputes arising therein to arbitration. In 2014, Peru amended its public contracts law to introduce the possibility to also refer such matters to dispute boards. A Regulation developing this mechanism is expected to be published soon. Peru's initiative follows that of Honduras, which in 2013 issued a Decree providing for the inclusion of mandatory dispute boards in disputes arising out of State contracts.

Finally, 2015 also saw **Chile**'s passing of a new investment protection act, which provides for a specific regime and protections for foreign investors, as explained in more detail in a prior post. However, the new act fails to provide any investor-state dispute settlement mechanism.

International arbitration continues to grow in Latin America. The latest statistics published by the ICC confirm that in 2014, Latin American parties represented almost 17% of parties to ICC arbitration worldwide, which is confirmatory of a clear trend that has been developing over the last few years. The legal developments discussed in this article contribute, in most cases, to the standardization in the use of arbitration in the region and, while certain jurisdictions still show some signs of reticence, particularly when the State is involved, it is becoming more and more clear that international arbitration is the only realistic dispute resolution option for international projects and contracts of a certain size.

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