Kluwer Arbitration Blog

2018 In Review: Arbitration Postcards from Latin America

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In this post the Kluwer Arbitration Blog's Latin American editorial team (Associate Editor Gloria Alvarez and Assistant Editors Daniela Páez and Enrique Jaramillo) joins us in an adventure to reflect on the Blog's 2018 coverage of arbitration developments in the region.

First, it is worth recapping the environment and circumstances that make Latin America ripe for international arbitration development and innovation: not only does Latin America serves as home to thought leaders of the arbitration community, it has also been intimately involved in shaping international arbitration. Written submissions, oral advocacy and taking of evidence are some of the areas where Latin American disputes spice up international arbitration. Moreover, Latin America nations embody a strong civil procedure education and seek to protect their sovereign resources and powers, both of which have undeniably shaped the way the international community understands and digests international arbitration, especially the reception to arbitration of the judiciary in national courts (see for example Comissa v Pemex).

In terms of economic opportunities, Latin America continues to experience an energy revolution.

Around a quarter of Latin America's energy supply comes from renewable sources, including hydropower and bioenergy. An extraordinary example is Costa Rica, which currently generates more than 99% of its electricity using five different renewable sources. Bolivia and Ecuador's recent denunciations of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (***ICSID Convention***), Brazil, Mexico and Colombia's hydrocarbons strategies, and the US-Canada-Mexico trade negotiations are some of the political changes that have also impacted Latin American arbitration practice. In this context, an interesting development is the impact of the Belt Road Initiative and the role of Chinese Investments in Latin America.

In the last six years, incubators and accelerators for debate have emerged and their strategy has given birth to an active arbitration community. For example, CBAr, ALARB, the ITA Americas Workshop forum, and the ICC Miami Conference. Other innovative and original activities comprise the IASC Arbitration School, Arbitrator Intelligence LatAm Campaign: Entra a la Cancha! and the ICC Brazilian Arbitration Day. In 2019, Costa Rica will celebrate its 10th edition of the International Arbitration Congress: CAI Costa Rica In addition, the Young ITA Mentorship Programme, the Young ICCA Mentoring Programme and ICC YAF Latin American Chapter have opened the door for young practitioners from all over the world, including Latin America. Further, the ICC continues with its strong commitment of regional coverage; in only one year their new Sao Paulo Office has registered 40 new cases. Paris and London-based arbitration law firms are also hubs dealing with Latin American matters. New emerging fora have been actively promoting the debate, for example the CERSA Conferences on Topical Issues in ISDS: Latin America and The Arbitration Station has recently produced a podcast episode called The LatAm Holiday Special, which discusses regional developments.

Focusing now on 2018, there is no doubt that this past year involved a number of important developments in commercial and investment arbitration.

Investment Arbitration: Mexico is Playing for Keeps

In July 2018, Mexico ratified the ICSID Convention and the instrument formally came into force in August 2018. Mexico's addition to ICSID enhances the country's obligations to protect foreign investment in Mexico and reflects its commitment towards international arbitration as a means to resolve investor-state disputes.

In November 2018, Mexico and its North American partners signed the United States-Mexico-Canada Agreement (***USMCA***) during a G-20 summit in Buenos Aires. Before the USMCA enters into force, the treaty still has to follow domestic procedures for its ratification, which under Article 76(I) of Mexico's Constitution, means approval by the Senate. The USMCA eliminates investor-state arbitration between the U.S. and Canada, while allowing investor-state arbitration between the U.S. and Mexico. However, USMCA's provisions are more restrictive than those found in NAFTA's Chapter Eleven. Specifically, the USMCA orders investors to file claims in national courts first, and then wait 30 months before initiating arbitration. This restriction would not apply to investors with a contract with the government relating to a "covered sector", *e.g.* oil and gas, or power generation. USMCA's substantive provisions also differ from NAFTA's in significant ways, by providing that the "most favored nation" (***MFN***) clause cannot be used to import substantive or arbitration provisions from other treaties.

Ecuador Wants to Get Back in the Saddle

As of June 2018, all Bilateral Investment Treaties (***BITs***) between Ecuador and other states officially expired. Due to their survival clauses, they continue to protect certain pre-existing investments for a number of years into the future. This state of affairs is the result of the country's somewhat historical crusade against investor-state dispute settlement (***ISDS***), which also included its denunciation of the ICSID Convention. Ecuador's new administration, however, has endeavored to reinstate protection to foreign investment through the promotion of a new Model Bilateral Investment Agreement (***BIA***). As observed by one of our authors, the BIA differs from the former BITs on a number of issues ranging from the definition of covered investment, restrictions on violations to fair and equitable treatment (***FET***), exclusion of indirect expropriation, and the proposed forum for investor-state disputes.

Argentina Adopted a New International Commercial Arbitration Act

In July 2018, Argentina passed the Ley de Arbitraje Comercial Internacional. One of our authors discussed Argentina's decision to adopt the UNCITRAL Model Law with some modifications. For example, the Argentinian Arbitration Act takes a conservative approach in terms of the form of the arbitration agreement and requires that the agreement be in writing, excluding the possibility for it to be concluded orally or by any other means. Another author of the Blog highlighted that the Act provides for a broad interpretation of the meaning of 'commercial', which includes every relationship, contractual or not, completely or mostly governed by private law. It further orders that, in case of doubt, the commercial characterization of the relationship should prevail.

Furthermore, in late 2018, the Blog reported that a friendly-arbitration judgement was handed down applying the new Argentinian Arbitration Act.

Brazil Continues to be the Most Active Arbitration Jurisdiction in Latin America

At the beginning of 2018, one of the Blog's authors warned us to keep an eye on the *Abengoa* case. In May 2018, our authors reported to the Blog on the Rio de Janeiro Statute Decree No. 46.245/2018. This Statute provides that all entities owned by the State of Rio de Janeiro may participate in arbitral proceedings.

Brazil also continued to be active at the legislative level, entering into a Cooperation and Facilitation Investment Agreement with Chile which offers, among others, a set of substantive investment protections and arbitration as the mechanism to resolve disputes (covered on the Blog here and here).

The judiciary was also active and gave some clarity regarding the debate on the 'extension' of arbitration agreements. KAB reported that the Brazilian Superior Court of Justice (***SCJ***) recently considered the issue in disputes involving groups of contracts between the same parties. The SCJ ruled in favor of the 'extension' of the arbitration agreement contained in the main contract to its ancillary contracts in a multi-contract bank loan operation.

Lastly, the Blog discussed a recent judgement from the Appellate Court of São Paulo, which ruled on a matter related to a franchising contract. In this case, the Court dismissed the formal requirements of arbitration clauses in consumer contracts. Our author highlighted the importance of this decision about the formal requirements of arbitration clauses in franchising contracts and concluded that it reflects a more liberal approach in favor of arbitration agreements.

Uruguay Enacted its First Ever International Commercial Arbitration Act

In July 2018, 14 years after its first attempt to pass a commercial arbitration law, Uruguay's Congress enacted its first International Commercial Arbitration Act. Similar to Argentina's reform discussed above, this Act largely incorporates UNCITRAL Model Law's provisions. This is a major development for the country, given that arbitration, prior to the Act's enactment, was governed by the provisions of the General Procedure Code of the country. Our authors expressed their optimism and predicted the favorable impact on domestic and international arbitration in Uruguay.

Conclusion

The developments discussed here reflect on the openness to and standardization of the use of arbitration in Latin America. We are sure that Latin America will continue to experience growth in the international arbitration sphere in 2019 and beyond.

We take this opportunity to encourage our readers to participate in the discussions and to submit their contributions at kluwerarbitrationblog@outlook.com.

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