Kluwer Arbitration Blog

2019 in Review: Latin America and Commercial Arbitration

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2019 was a lively year for international arbitration in Latin America – especially in the international commercial arbitration arena, which is the focus of this post. Contributors to Kluwer Arbitration Blog reported mostly on favorable developments on arbitration-related legislation, case law and other initiatives. The year, however, ended with a regrettable situation in Peru, where arbitrators were incarcerated due to the criminal authorities' determination that common arbitral practices can be deemed corrupt.

Before recapping specific jurisdictions' developments, it is worth referring to a positive initiative that impacts international commercial arbitration throughout Latin America: the issuance of the Guide on the Law Applicable to International Commercial Contracts in the Americas (the "Guide") which was approved by the Organization of American States ("OAS") on February 21, 2019. As explained by José Antonio Moreno Rodriguez here, the Guide has several objectives: support efforts by the OAS Member States to modernize their domestic laws on the subject, provide assistance to contracting parties in the Americas and their counsel in drafting and interpreting international contracts, as well as to serve as guidance to judges and arbitrators, who may find the Guide useful both to interpret and supplement domestic laws.

Brazil maintains its status as one of the most active jurisdictions in arbitration

At the beginning of 2019, we reported on the many reasons why Brazil is an arbitration-friendly jurisdiction. Throughout the remainder of the year, positive developments at different levels were shared. In May 2019, given the recent mining-related disasters that the country experienced in the last years, the Blog reported on a case study on how to determine damages in large proportion disasters in Brazil through 'class arbitration.' This is certainly a new source of disputes in Brazil where arbitration could be an attractive option for parties involved in these major disputes. This blog was authored by the late Luiz Olavo Baptista, one of the founders of arbitration practice in Brazil, and recognized professor, arbitrator, and jurist throughout Latin America.

The Brazilian judiciary level continued to be active this year. As reported here, on May 15, 2019, the Brazilian Superior Court of Justice rejected the argument that transmission of an arbitration agreement via subrogation violated public policy and gave full effect to a foreign arbitral award resulting from a transmitted arbitration agreement.

Brazil also had many developments at the legislative level. The Blog's contributors reported (here, here and here) on three new legislation developments regulating arbitrations involving federal and state public entities. First, the São Paulo State Decree No. 64,356/2019 now provides that all entities owned by the State of São Paulo may participate in arbitral proceedings. The Federal Decree No. 10,025/2019 was also enacted to allow and regulate arbitration in public contracts in the port, road, rail, waterway and airport sectors. Finally, Federal Law No. 13,867/2019 was enacted and went further to uphold the possibility of submitting to mediation and arbitration disputes related to expropriations for public utility.

For further information on arbitration in Brazil, see here and here

Colombia faces contradictions on the 'finality' of arbitral awards

In the past years, Colombia has tried to build its reputation as a pro-arbitration jurisdiction. The country implemented the UNCITRAL Model Law and the New York Convention some years ago and all applications for recognition and enforcement of international arbitral awards have been granted to date. However, we reported in 2019 that the Constitutional Court rendered a decision that may have some repercussions on Colombia's image as an arbitration-friendly jurisdiction.

On August 6, 2019, the Constitutional Court issued a decision on a constitutional injunction (the "*Acción de Tutela*") submitted by a state-owned company against an international arbitration award rendered in Colombia. The moving party alleged that the arbitral award had infringed its fundamental rights to due process and access to justice, and as a result, could not be enforced. Even though the Court did not allow the *Acción de Tutela* to proceed against that specific award (given that the set-aside proceedings were not exhausted by the moving party), the Court recognized that it is possible for a person to bring an *Acción de Tutela* against an international award rendered in Colombia. Additionally, the Court held that the specific admissibility requirements that must be fulfilled for the *Acción de Tutela* to prevail, are only applicable if the award is partially governed by Colombian law. If the law applicable to the arbitration award is foreign, those requirements would not apply. The Court did not provide any reasoning for that particular finding and its practical implications will be something to look out for in the upcoming year.

On the other hand, on October 25, 2019, the Council of State, the highest judicial authority for administrative law matters, issued a decision finding that an *Acción de Tutela* does not proceed against an arbitral award. The Council of State's reasoning is that there is no "third instance" in arbitral proceedings because there is no legal recourse beyond an application to set aside an award.

Hence, Colombia is currently facing a contradiction between the case law of both courts on the possibility of filing an *Acción de Tutela* against arbitral awards. Even though neither case is a *erga omnes* binding precedent (they only bind the parties to the specific dispute), it is possible that within the next year either the Constitutional Court or the Council of State will have an opportunity to incorporate their corresponding reasoning in decisions that are binding for all courts and administrative authorities (through *Sentencias de Constitucionalidad* or *Sentencias de Unificación*).

Mexico and Central America: positive developments albeit political changes

It was reported earlier this year that the so-called "AMLO" (President Andrés Manuel López Obrador) regime has not negatively impacted Mexico's arbitration panorama. Rather, specialists consider that commercial arbitration will continue to increase due to the fact that foreign direct investment will continue to grow in Mexico and, as a result, there are more sophisticated foreign parties investing in Mexico that prefer having arbitration clauses in their commercial contracts. We will keep an eye on whether this tendency continues during the second year of government of President López Obrador.

In Central America, one country stands out for positive developments in favor of international arbitration: Costa Rica. First, Costa Rica continues to promote itself as an attractive seat for the region (as discussed here). The International Center for Conciliation and Arbitration ("CICA" for its initials in Spanish) celebrated its 20th anniversary this year. CICA also announced the entering into a historic agreement with Arbitrator Intelligence through which CICA became the first Latin American arbitral institution that will use the Arbitrator Intelligence Questionnaire to promote diversity, accountability, and transparency in international commercial arbitration. CICA also launched its new rules of arbitration, which will be in force starting in February 2020.

Argentina: will positive decisions keep coming with the Fernández administration?

While some uncertainty has arisen out of the latest presidential election results, we reported on a favorable jurisprudence-related development earlier this year on an appeals decision which confirmed the validity of arbitration agreements contained in adhesion contracts. Under the Argentine Civil and Commercial Code, the definition of "objective arbitrability" excludes a wide variety of legal issues such as adhesion contracts "regardless of its purpose". While case law had been inconsistent on the interpretation of such provision, on June 6, 2019, the Commercial Chamber of Buenos Aires confirmed the lower court's decision that the provision should be interpreted in the light of its purpose rather than of its wording, and declared valid an arbitration agreement contained in an adhesion contract.

With the new administration taking office in December 2019, we expect to report next year on any impacts the Fernández regime might have on arbitration in Argentina.

Venezuela's judicial representation causes inconsistent decisions in the international community

Given the *sui generis* political situation in Venezuela, the state's judicial representation in commercial and investment arbitrations has faced inconsistent decisions around the world. Earlier this year, we reported that on March 19, 2019, an ICC tribunal (seated in Paris), hearing a breach of contract claim brought by Petróleos de Venezuela S.A. ("**PDVSA**") against Petróleos Paraguayos ("**PETROPAR**"), issued a procedural order staying the arbitration proceedings following a request from PETROPAR to stay the proceedings considering that Guaidó's government should have the opportunity to submit its position in the arbitration.

However, this decision in favor of the Guaidó administration is inconsistent with what investment arbitration tribunals (see for example, the *Favianca v. Venezuela* case) and U.S. courts have ruled throughout this year (see, a detailed analysis here). In a nutshell, while the U.S. recognized Guaidó

as the legitimate President of Venezuela, the courts acknowledged that the Guaidó regime does not have meaningful control over Venezuela or its principal instrumentalities, and therefore it had no impact over issues relating to enforcement actions against the state.

Peru's criminal authorities undermine the international arbitration system

As mentioned before, the year ended with an unfortunate event for Peru, following the incarceration of renowned arbitrators due to corruption allegations. As explained here, in the midst of the criminal investigation of the Odebrecht corruption scheme, the criminal authorities deemed common practices of international arbitration, such as the participation in case management conferences, the determination of the tribunals' fees based on the amount in dispute or the complexity of the issues in dispute, as "bribery evidence".

On a brighter note, this situation triggered the support of international arbitration's leading institutions such as the International Bar Association, the International Chamber of Commerce, the Spanish Arbitration Club, and others. These players joined forces to show their discontent with the criminal authorities' determinations, and the adverse implications this precedent could have for international arbitration in the region.

Conclusion

Overall, Latin America faced developments favorable to international arbitration, specially within their domestic regimes. The arbitration community must keep their efforts to connect and educate the legislative and judiciary systems around Latin America to strengthen this area of the law. An example of such a legislative efforts, is Ecuador's and Colombia's announcement of the amendment of their arbitration acts. We expect to report on both developments as they advance to a debate and approval process at the countries' respective legislative bodies next year.

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