Kluwer Arbitration Blog

2020 Review: Latin America and Commercial Arbitration

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Corruption, annulment of arbitral awards and court intervention mark the main developments for 2020 in Latin America. Our contributors this year reported on the most important judicial decisions and legislative measures impacting the legal framework of various jurisdictions in the region.

A new 'hot topic' arising from the COVID-19 pandemic is the interplay between arbitration and insolvency. This has led to the creation of a new arbitration platform Arbinsol, as well as a new IBA Arbitration Committee group, which will issue a toolkit for arbitrators and counsel to provide a framework for identifying the various issues that might arise when a party to an arbitration is subject to insolvency proceedings, and which will be accompanied by a series of National Reports. In this regard, Lucila Marchini provided an overview of the current legal framework in Latin American jurisdictions.

Below, we will discuss the most relevant developments in the region.

While Mexico faces a tumultuous regulatory battle, commercial arbitration appears unaffected

During late 2019 and the first quarter of 2020, Mexico's regime issued a series of decrees to modify renewable energy regulations which adversely impacted national and international companies operating in Mexico. As Fernando Pérez-Lozada anticipated earlier this year, these measures subsequently led to the companies' recourse to local courts for temporary injunctions against the government measures, as well as threats of investment claims against the country.

Despite the regulatory battle between private companies and the Government, it appears that commercial arbitration remains unaffected. In fact, Sylvia Sámano Beristain, Secretary General of the Arbitration Center of Mexico (CAM) reports that disputes relating to energy and oil and gas have actually increased in the center. Ms. Sámano also shared with our team that CAM plans to amend its Arbitration Rules of 2009 to offer an updated framework that meets all the current trends of the arbitration practice including the participation of tribunals' secretaries, expedited procedures, and third-party funding.

Important developments in the arbitration landscape in Chile

On April 2, 2020, Chile's legislative body enacted an Emergency Law to regulate how courts and arbitral tribunals would function during the state of emergency declared by President Piñera. This law grants arbitral tribunals the power to suspend hearings unless due process is affected; it also allows a party to rely on an impediment attributed to a situation caused by the pandemic to excuse its non-compliance with a procedural deadline. Pablo Correa and Liat Tapia discuss whether the provisions of the Emergency Law apply to international arbitrations seated in Santiago. Specifically, the authors analyze whether the suspension of evidentiary terms would apply to arbitrations where the evidence is not submitted during a specific procedural phase but it accompanies the parties' written submissions.

Macarena Letelier Velasco, Executive Director of the Center for Arbitration and Mediation of Santiago (CAM Santiago) shared her views on the arbitration landscape in Chile. Impressively, CAM Santiago is the only center in Latin America that has its own Rules on the use of Dispute Boards; it implemented a remote work system in response to the COVID-19 pandemic; provided the local community with 1,000 online, pro bono mediations for cases with disputes not higher than US$ 100,000, and very recently launched a book compiling Chilean arbitral jurisprudence from 2002 to 2020.

Finally, on September 14, 2020, the Chilean Supreme Court entered a final judgement in case *CCF SUDAMERICA SPA* resolving a complaint appeal (*recurso de queja*) against a lower court's rejection of an appeals recourse against a domestic arbitral award. In this case, the parties agreed in their arbitration agreement that an appeal and certiorari recourses would be admissible against the final award. Once the award was issued, the losing party brought an appeal which the Appellate Court of Santiago dismissed. However, the Supreme Court later reversed the decision. Cristián Conejero, Juan M. Rey Jiménez de Aréchaga and María Jesús Hadwa discussed this decision which, on the one hand, endorses the basic premise that consent is the cornerstone of arbitration, but on the other hand, ignores basic principles of international arbitration, *i.e.* the finality of arbitral awards and the fact that annulment is the sole remedy against arbitral awards.

In Colombia, the Council of State stands out for its review and annulment of awards

Three important decisions stand out for commercial arbitration in Colombia. The first refers to the *Ruta del Sol II* case whereby a domestic arbitral tribunal declared a concession contract null and void due to corruption in its procurement; despite the fact that the concession contract had already been terminated through the parties' mutual agreement. On October 8, 2020, the Council of State (the "**Council**") upheld the validity of the award. Juan Sebastián Arias and Laura Lamo discussed the importance of the tribunal's determination for future cases in Latin America relating to public contracts procured through unlawful practices.

The second important precedent refers to the February 27, 2020 Council's decision on the *GECELCA* case. The Council annulled an international award due to the tribunal's failure to comply with the agreed arbitral procedure. During the arbitration, the tribunal denied the claimant to produce an expert report in response to the expert evidence the respondent filed with its rejoinder submission. The Council considered this to be a departure of the parties' procedural agreement, without considering the materiality of the tribunal's order on the underlying merits

decision. Alberto Madero and Manuela Sossa reported on this judgement which departed from previous standards set forth by Colombia's Supreme Court of Justice on the annulment of arbitral awards, and adopted a more expansive criterion to annul international awards based on procedural defects.

Finally, on a more positive note, on October 28, 2020, the Council rejected a *tutela* petition sought by the Refinería de Cartagena SA (Reficar) against a domestic arbitral award rendered against it. The dispute referred to a contract for the expansion of the refinery. In dismissing Reficar's petition, the Council pointed to the exceptional nature of this type of relief against arbitral awards.

Achieving transparency continues to be a priority for Peru's arbitration community

In recent years, arbitration users began to raise queries concerning the legitimacy of arbitration because of the lack of publicly available information, especially with respect to arbitrators and their accountability. Some of these queries arose from the uncovering of bad practices and acts of corruption associated to the *Lava Jato* investigation. As a result, the National and International Arbitration Center of the Lima Chamber of Commerce (the "LCC Arbitration Center") developed transparency mechanisms to guarantee the legitimacy of arbitration such as the *"Faro de Transparencia"* initiative (discussed here). The Transparency Lighthouse is a publicly accessible digital platform aimed at providing public access to key pieces of information with regard to arbitrations administered by the LCC Center (including the arbitrators' information).

Additionally, on January 24, 2020, Peru enacted the Emergency Decree No. 020-2020, (the "**Decree**") which amended the Arbitration Act to provide protections to any arbitration in which the Peruvian Government is involved. Rafael Boza reported earlier this year the content and risks of this new legislative development over commercial arbitration in the country. The recitals of the Decree state that the Arbitration Act is "not well suited" for arbitrations in which the state is a party, and declare that the purpose of the amendments is to "assure transparency." Among others, the Decree (i) bans *ad-hoc* arbitration in cases in which the state is a party; (ii) hints the possibility of a state arbitral institution; (iii) requires that a judge granting provisional measures (an attachment or injunction) obtains security for such remedy (thereby making it harder for a private to obtain interim relief against a governmental entity); and (iv) limits the capacity of individuals to serve as arbitrators.

Brazil continues to be active in arbitral developments

As one of the most active jurisdictions in Latin America, Brazil did not disappoint this year. First, Pedro Guilhardi and Amanda Bueno Dantas reported on a judicial decision favorable to the secrecy of arbitral proceedings in Brazil. The dispute arose out of a summons from the state's tax authority against the Centro Brasileiro de Mediação e Arbitragem (CBMA) to exhibit documents concerning arbitrations proceedings it had administered. Albeit not relying on confidentiality protections inherent to arbitration, on February 12, 2020, the Regional Federal Court of the Second Region enjoined the tax authority from seeking disclosure of the Center's documents.

Second, on August 11, 2020, the Court of Appeals of the state of São Paulo annulled an arbitral award on the *Fazon* case on grounds that the chair of an arbitral tribunal had failed to timely

disclose his appointment to another arbitration by one of the parties. The arbitration started in 2015, and a final award in favor of the respondent was issued in February 2018. Before deciding the claimant's request for clarification, the arbitral tribunal issued a procedural order informing the parties, for the first time, that in August 2016, the chair of the tribunal had accepted an appointment as co-arbitrator by the respondent in a different proceeding. Guilherme Rizzo Amaral discussed the court's reasoning and potential implications for future judgements on this subject.

Finally, another development worth noting is Brazil's new Franchising Law (in force as of March 27, 2020) which expressly provides that franchising disputes may be subject to arbitration. This has brought a lively debate in the country (discussed by Caio de Faro Nunes and Victoria Romero here) of whether this express reference was necessary at all, and whether its scope now addresses the issue of arbitrability of adhesion contracts – given that franchise agreements can often take the form of adhesion contracts.

Venezuela – is the integrity of arbitration in danger?

On February 20, 2020, the Constitutional Chamber of the Venezuelan Supreme Court of Justice (the "**Court**") issued an interlocutory judgment ordering the Business Center for Conciliation and Arbitration (CEDCA) to stay an arbitration and to forward the arbitration file in order to decide on a request for "*avocamiento*" filed by one of the parties before the Court. *Avocamiento* refers to the Court's power to take over the review of a case from the lower judicial courts, or reassign it to a different court when certain exceptional circumstances are met.

As Luis Capiel and Alicia Larrazabal discuss here, the fact that the Court decided to stay the arbitration and could eventually take over the resolution of the case is troubling because the court could effectively seize the decision on the merits from the arbitral tribunal. Naturally, this development raised concerns from the Venezuelan Arbitration Association, which issued a statement condemning the decision; as well as from the IBA Arbitration Committee which sent an open letter to the President of the Caracas Bar Association expressing concerns that this decision may result in a "disquieting precedent" for arbitration in Venezuela.

To date, the Court's decision on the request for *avocamiento* is still pending.

Conclusion

As gleaned from this review, the developments for the region in 2020 mainly focused on decisions from the states' judiciaries and measures enacted by their legislative bodies. This has raised concerns regarding the intervention of courts in arbitration proceedings as well as their reasoning for annulment of arbitral awards.

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