Kluwer Arbitration Blog

2021 in Review: Commercial Arbitration Highlights in LatAm

Daniela Páez-Salgado (Senior Assistant Editor) (Herbert Smith Freehills) · Monday, January 17th, 2022

In 2021, Latin American countries continued to struggle with the adverse effects of the COVID-19 pandemic. Accordingly, legislative and jurisprudential developments on arbitration-related issues were also affected given that the governments were focused on reactivating local economies, vaccinating their citizens, and launching tax and labor reforms. In addition, presidential elections also marked political shifts for countries such as Ecuador, Peru, and Chile, thereby moving the focus on the new administrations' new policies.

Notwithstanding this, the private sector was still eager to promote the use of arbitration in the region. In fact, several arbitral institutions in the region launched new arbitration rules to 'catch up' with international arbitration rules and reflect the use of technologies in arbitration proceedings amidst the 'new normal'.

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

Proactiveness from local arbitral institutions

In June 2021, the Arbitration Center of the American-Peruvian Chamber of Commerce (AMCHAM Peru) published new Arbitration Rules, which entered in force in July 2021, replacing the 2013 Arbitration Rules. The rules incorporate provisions on the scrutiny of awards, multiparty and multiple-contract arbitrations, publication of awards, and the composition of arbitral tribunals. Likewise, the Arbitration Center of the American-Ecuadorian Chamber of Commerce (AMCHAM Ecuador) also launched new Arbitration Rules in July 2021, which replaced its 2010 Arbitration Rules. Among other changes, the new rules (i) include the possibility to consolidate two or more arbitrations under certain circumstances; (ii) set forth a procedure to appoint arbitrators absent an agreement between the parties; (iii) amend the procedure to challenge arbitrators providing for a ten-day term to challenge any arbitrator following the notification of the acceptance of the appointment; (iv) provide for the possibility to resort to the IBA Guidelines on Conflicts of Interest in International Arbitration and the IBA Rules on the Taking of Evidence in International Arbitration when appropriate; (iv) include the possibility to conduct the arbitration proceedings virtually; and (v) set forth the possibility to appoint an emergency arbitrator.

In addition, as Renata Steiner and Carlos Selias reported, in November 2021, the Center for Studies and Research in Arbitration from the University of São Paulo published a report on challenges to arbitrators in domestic proceedings in Brazil. The initiative analyzed data from ten challenges in

arbitral proceedings that the Câmara de Mediação e Arbitragem Empresarial – Brasil (CAMARB) administered, and has provided the Brazilian arbitral community with transparency on the standards applicable to arbitrator challenges in the country.

Paraguay and Uruguay similarly experienced developments in arbitration rules. On November 12, 2021, the Paraguayan Arbitration and Mediation Center (CAMP) issued new Arbitration Rules which now incorporate emergency arbitration proceedings, rules for expedited procedures, and procedures for multi-party and multi-contract arbitrations. Likewise, the Center of Conciliation and Arbitration of the Stock Market of Uruguay issued new Arbitration Rules, focusing on new procedural issues very much in line with modern arbitration rules and displacing the old rules contained in the Uruguayan Procedural Code. The rules now address (i) the issuance of Terms of Reference, the conduct of a case management hearing, and the issuance of a procedural calendar; (ii) the possibility to request interim measures before local courts, the arbitral tribunal, and an emergency arbitrator; (iii) submitting written witness statements and expert reports; and (iv) expedited procedure applicable to matters up to US$ 200,000, and other matters where the parties opt in.

Brazil: surprisingly active despite being one of the countries most impacted by the COVID-19 pandemic

In 2021, Brazil reported the highest number of legislative and judicial developments, confirming that it is a hot spot for arbitration disputes in the region. Our interview with Eleonora Coelho, President of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), revealed how Brazil is an attractive forum for Portuguese language arbitration disputes and how the Center has successfully increased the numbers of domestic and international disputes it administers in the last thirty years.

Unlike the rest of the region, Brazil did face a series of legislative and jurisprudential developments, which were reported in 2021:

- On January 23, 2021, the New Brazilian Insolvency Act entered into force, which for the first time, regulated the interaction between insolvency and arbitration. As Andre Luis Monteiro discussed here, the act adopts an arbitration-friendly approach clarifying that the commencement of a judicial reorganization proceeding or the issuance of a winding-up order (i) does not permit the trustee/liquidator to discharge the arbitration agreement, or prevent arbitrations from starting or continuing; and (ii) does not negate the arbitrability of claims made against the insolvent party.
- Thiago Marinho Nunes reported on a controversial decision dated March 2, 2021 from the Appellate Court of São Paulo, which found that Article 189(IV) of the Brazilian Civil Procedure Code, which provides for the confidentiality of court documents relating to arbitration proceedings, was unconstitutional. Although the decision may still be reversed in the future, its holding affects one of the essential features of commercial arbitration, i.e. confidentiality.
- In a case introduced by Maúra Guerra Polidoro earlier this year, the courts considered a party's request for a supplemental arbitral award, on the basis that a prior arbitral award was issued *infra petita*. The case arose from a request for emergency relief that a party filed to suspend ongoing arbitral proceedings before CAM-CCBC, until the First Corporate and Arbitration Conflicts Court decided if the supplemental award was necessary. While the first instance court rejected the petition, the appeals court granted it. The case is awaiting a final decision from Brazil's

Superior Court of Justice.

- On July 30, 2021, the 2nd Civil Court of the District of São Paulo hearing an annulment petition issued an interim decision partially staying enforcement of an ICC partial award on the basis of a conflict of interest allegation against Mr. Anderson Schreiber.[1)] The annulment action followed an arbitral award rendered in February 2021 in favor of CA Investments SA, a subsidiary of Paper Excellence B.V., in a dispute over the sale of pulp producing company Eldorado Celulose Paper, against respondent J&F Investimentos. The respondent sought the annulment of the partial award alleging that claimant's appointed arbitrator, Mr. Schreiber, failed to disclose the fact that his previous law firm shared the same office space with claimant's former counsel. Brazilian courts have yet to finally decide on the annulment. The outcome will certainly represent an important development for discussions over arbitrators' disclosure duties in the country, which we look forward to reporting on in 2022.

Ecuador's pro-arbitration wave: But is the Lasso Administration trying too hard?

The current regime of President Lasso has made a clear statement that it is willing to showcase Ecuador as a reliable jurisdiction for foreign investment. The first step taken this year was the country's re-accession to the ICSID Convention. This initiative was followed by the enactment of Regulations to the 1997 Arbitration and Mediation Law, which as Andrés Larrea reported, seek to limit judicial intervention, reinforce party autonomy, and promote Ecuador as a seat for international arbitration.

In addition, Hugo García and Bernarda Muriel reported that on November 23, 2021, in an effort to audit and reduce the costs the Ecuadorian government has spent in defending international lawsuits, the Office of the Attorney General launched the "Institutional Strengthening of the Attorney General's Office Project", an institutional framework for handling disputes brought against the state and state entities.

Despite the new administration's clear-cut efforts to turn away from the country's anti-arbitration policy of the last decade, Ecuador still faces challenges given that President Lasso does not have control over other institutions such the National Assembly. In addition, the government's pro-investment policy was recently questioned given the Constitutional Court's recent ruling on the Los Cedros case, where environmental permits granted to Canadian mining company Cornerstone were revoked based on environmental protection concerns.

Colombia: Council of State equates arbitrators to judges

In a decision from October 11, 2021, the Council of State of Colombia (the "**Council**") declared that arbitrators are state agents and the Judiciary may be held liable for jurisdictional errors incurred in arbitral awards. The decision arises from a claim filed against the Judiciary for damages arising from a jurisdictional error that a three-member tribunal allegedly committed. The first instance court dismissed the claim on the grounds that the Judiciary could not be held liable for any error attributable to arbitrators who are not state officers and could not be equated to judges. Although the Council upheld the lower court's decision, it did so on different grounds. The Council confirmed the dismissal of the claim because it found no evidence of the existence of a

jurisdictional error but it repudiated the lower court's reasoning. It held that arbitrators are agents of the state, and that the Judicial Branch is formally and materially accountable for the damages caused by jurisdictional errors contained in arbitral awards. In particular, the Council held that arbitrators may be equated to judicial agents for the purposes of liability for damages and that the Judiciary was entitled to seek reimbursement from them where it is held liable for errors committed in the course of arbitral adjudication.

Argentina: a positive note on the enforcement of foreign arbitral awards

During New York Arbitration Week, María Inés Corrá reported on a favorable decision from Argentina's Supreme Court, which rejected a lower court's unorthodox application of the grounds to deny the recognition and enforcement of foreign arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**NY Convention**").

Milantic Trans S.A. ("Milantic") (a Panamanian company) obtained a favorable award against Astillero Río Santiago (a public entity owned by the Province of Buenos Aires, "Astillero") in an arbitration seated in London. Milantic requested enforcement of the award before Buenos Aires courts and Astillero opposed the petition arguing that the construction contract containing the arbitration clause was invalid because it lacked the legislative authorization required from the government of Buenos Aires. The first instance court dismissed Astillero's objection and granted the enforcement. Astillero then filed an appeal only against the court's award of costs. Absent Astillero's appeal of the court granting the enforcement, the decision became final. The Court of Appeals, however, reversed the first instance decision sua sponte, based on the absence of a valid arbitration clause duly approved by law. The court based its ruling on Article V(2) of the NY Convention, which grants courts the power to review ex officio violations of international public order. The decision was upheld by the Supreme Court of Buenos Aires.

The case ultimately reached the Federal Supreme Court, which reversed the decision on the grounds that the power to consider ex officio the grounds for refusing recognition and enforcement of awards under the New York Convention cannot be exercised in violation of other essential principles such as res judicata, which are also part of international public order. This decision is clearly a good precedent for the country's practice on the enforcement of foreign arbitral awards.

Conclusion

2021 promised to be different from 2020, but in reality, not many things changed. With Latin American governments' ongoing focus on fighting the economic crisis the COVID-19 pandemic caused, and political changes in the region, arbitration-related developments fell short (when compared to prior years). However, this situation seems to have given arbitral institutions the opportunity to update their arbitration rules to meet internationally accepted practices.

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.

References

?1 The annulment action is under court secrecy, hence the decision is not publicly available.

This entry was posted on Monday, January 17th, 2022 at 8:00 am and is filed under 2021 in Review, Arbitration Institutions and Rules, Argentina, Brazil, Colombia, Conflicts of interest, Ecuador, Enforcement, 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.