

# Kluwer Arbitration Blog

## 2023 in Review: Commercial Arbitration Highlights in Latin America

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The uncertainties faced by investors and stakeholders in 2023 was intensified by the notable shift in Latin America's political regimes. The emergence of left-wing electoral victories echoed the political landscape of the 2000s, marked by ambiguity, volatility, and political risk.

In the realm of arbitration, several jurisdictions have undergone significant developments. Mexico and Chilean arbitration centers adopted new arbitration rules, Brazil remained a focal point for controversial legislative changes, and the Caribbean experienced growth in its arbitration practice. Bolivia, Chile, Colombia, and Argentina also reported positive strides in their arbitration policy. Particularly noteworthy are two favorable decisions from the Chilean Supreme Court and the Santiago Court of Appeals concerning international arbitration disputes.

We discuss below the most pertinent commercial arbitration-related developments in the region in 2023.

### Legislative and institutional developments

On June 7, 2023, Mexico enacted the National Code for Civil and Family Procedure, which will replace both the [Federal Code of Civil Procedure](#) and the thirty-two local codes of civil procedure across all Mexican states. The National Code's Third Book includes new provisions regulating arbitration (articles 533-549). Although the National Code does not adopt the [UNCITRAL Model Law](#), it does [incorporate some of its principles](#). Notably, it grants arbitral tribunals the authority to conduct arbitration proceedings as they deem fit, ensures equal treatment of the parties, and provides grounds for the recognition and enforcement of awards. Particularly, the National Code treats the referral to arbitration as a procedural defense (*excepción procesal*) available to defendants in court proceedings and allows parties to agree to arbitration even after the commencement of a judicial proceeding but before the definitive judgment. Mexico also hosted the first Mexico Arbitration Week that took place in Mexico City in May 2023. The event brought together over 120 attendees and more than sixty speaker, seeking to connect Spanish-speaking international arbitration professionals and promote Mexico as a prominent seat for international arbitration (reported [here](#)).

For its part, the Santiago Arbitration and Mediation Center (CAM Santiago) launched the [new rules on emergency arbitration](#), which were incorporated into the [2021 National Arbitration Rules](#). The amended rules came into effect on September 1, 2023 and constitute an unprecedented landmark in the development of Chile's arbitration institutions in conformity with modern international standards. Among its main innovations, the rules empower emergency arbitrators with broad authority over proceedings, allowing *ex parte* interim measures upon request.

As for the Caribbean region, Trinidad and Tobago enacted in July 2023 its [Arbitration Act 2023](#), which will significantly modernize the country's domestic and international arbitration legal framework. The Act promises to incorporate several innovative provisions and align the country's arbitration laws with international best practices. For example, it introduces the doctrine of separability, confirms arbitrators' power to grant interim reliefs, and strengthens judicial respect for arbitration agreements by featuring provisions that allow a court to stay legal proceedings to uphold an arbitration agreement (reported [here](#)). This development came at the right moment, because in a controversial decision by the High Court of Trinidad & Tobago in *National Infrastructure Development Company Limited ("NIDCO") v. Construtora OAS S.A.* (Claim No. CV2022-01832, Delivered: December 14, 2022, unreported, "NIDCO v. OAS"), the High Court reviewed the merits of an award issued against a Trinidadian corporation given that the arbitral tribunal made manifest errors of fact and law (reported [here](#)). Relevantly, the Court found that it should intervene where the decision was not merely erroneous but was premised upon fundamentally flawed and/or incorrect settled principles of law.

Unlike the High Court of Trinidad & Tobago's decision reported above, a judgment issued by the British Virgin Islands High Court of Justice on January 27, 2023 enhanced the long-established arbitration-friendly reputation of the British Virgin Islands Courts. In *AB Limited et al v. GH Limited*, Claim No. [BVIHCM 2021/0192](#), the High Court confirmed that it may refuse enforcement of arbitration awards when the arbitral tribunal renders an award against clear principles of the governing law, and contrary to positions of the parties' experts and the parties themselves (reported [here](#)).

The Institute for Transnational Arbitration (ITA) also focused on the Caribbean region this year, publishing the "[Final Report and Recommendations of the ITA Caribbean Task Force](#)", which analyzed commercial arbitration in the region and recommended the following: (i) Model Law implementation; (ii) capacity building among legal practitioners; (iii) judicial education and training in arbitration; (iv) assisting legal educators in the Caribbean; and (v) raising the profile of Caribbean arbitration in the Americas. We also reported on the [2023 edition](#) of the ITA Guide to Latin American Arbitral Institutions, which identified more than 170 arbitral institutions and presented various findings for thirty of these institutions in twenty different countries. The Guide surveyed several hot topics in international arbitration in addition to various topics covered by the [2011 edition](#), measuring the growth of arbitration over the last decade. The guide additionally highlighted concerns in arbitral institutions relating to the small number of international cases handled by regional arbitration centers and the need for increased diversity in the appointment of women arbitrators.

Following last year's collaboration with the [Latin American Arbitration Association \(ALARB\)](#), Kluwer Arbitration Blog [reported](#) notable webinars, including those organized by the United Nations Commission on International Trade Law (UNCITRAL) and the ALARB, which discussed topics on "[Dispute Resolution in the Digital Economy](#)." Collaborations with ALARB and reports on developments of the [Permanent Court of Arbitration](#) were also highlighted.

## Brazil: Regulatory Challenges in Arbitration

The leftward transition in Brazil with Luiz Inacio Lula da Silva's victory, did not impact foreign direct investment up to date. However, a constitutional action (“*Ação Direta de Inconstitucionalidade*“ or “ADI”) sought to regulate arbitrators' duty to disclose in commercial arbitrations, which can be considered a reminiscent effect of a controversial bill from the previous year (previously covered [here](#)). The ADI, as reported [here](#), seeks to establish binding standards that emphasize the arbitrators' absolute duty to disclose information. It aims to institute that a failure to disclose alone is sufficient to remove an arbitrator, even if the undisclosed fact would not amount to any breach of impartiality. This move has been perceived as potentially undermining the credibility and effectiveness of commercial arbitration in Brazil.

Brazilian courts also issued several noteworthy decisions. The Brazilian Superior Court of Justice's (STJ) decision in the [CC 185.702/DF](#) Case dated June 10, 2023 recognized its jurisdiction to decide conflict of competences between arbitral tribunals constituted pursuant to the rules of the same arbitral institution (reported [here](#)). In another decision dated May 9, 2023, the STJ addressed the extent of subrogation of rights by insurers. Specifically, in the [Special Appeal n. 1.988.894-SP](#), the STJ confirmed that an insurer was compelled to refer its claims to arbitration because it had previous knowledge of the arbitration clause inserted in a shipping contract and, as a matter of law, insurers subrogate the rights and actions of the insured. Also, on June 16, 2023, the STJ issued a relevant decision related to arbitration public entities in Brazil: in the [Special Appeal n. 1.905.505-SP](#), the STJ ruled not only on the possibility of participation by a regulatory agency in arbitration proceedings between a concessionary and the relevant state entity, but also on the limits of extending the effects of an arbitral award over a non-participating third party (reported [here](#)).

In separate 2023 decisions, the São Paulo Court of Appeals (TJSP) set aside arbitration awards, showcasing the need for more uniform and precise caselaw. For instance, in a decision dated May 24, 2023, the TJSP annulled a quantum arbitral award because one of the three arbitrators had failed to issue a dissenting opinion (reported [here](#)). In that arbitration, the chair and one of the co-arbitrators had previously agreed on the merits, but reached a deadlock on quantum. The other co-arbitrator dissented on the merits but abstained from voting on quantum. The chairman then cast his prevailing vote to issue the quantum award.

During this year, we also featured coverage of major annual conferences in Brazil, which dealt with issues regarding green transition, artificial intelligence, party autonomy, diversity, arbitration related to business contracts, and publication of arbitration awards, such as:

1. the Brazilian Arbitration Committee's 22<sup>st</sup> International Arbitration Conference held in Rio de Janeiro (reported [here](#), [here](#) and [here](#));
2. the XVII Rio de Janeiro International Arbitration Conference held in Rio (reported [here](#));
3. the 11<sup>th</sup> ICC Brazilian Arbitration Day held in São Paulo (reported [here](#));
4. the [Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada's X Arbitration Congress](#) held in São Paulo (reported [here](#) and [here](#));
5. the 6<sup>th</sup> Brazilian Arbitration Forum held in Paris (reported [here](#));
6. the [First ICC Arbitration Conference](#) and the [Third ICC Arbitration Conference](#), held in the South and in the North of Brazil (reported [here](#) and [here](#)).

## **Bolivia, Colombia, and Guatemala: important decisions issued in the region**

In Colombia, despite concerns over President Gustavo Petro's stance towards the oil and mining industries, an important ICC award reshaped risk allocation in the construction industry. As further explained [here](#), the dispute arose out of the expansion and modernization of a refinery in Colombia and is notable because the arbitral tribunal found the defendant liable for willful misconduct under New York law and *dolo* under Colombian law. In light of the defendant's move to vacate this award in US courts, we will continue to monitor this case during the course of 2024. Further, in June 2023, we conducted an interview of Gustavo Piedrahita, the Director of the Arbitration and Conciliation Center of the Bogota Chamber of Commerce. Our conversation with Mr. Piedrahita (available [here](#)) shed light on the main responsibilities of the center, the changes to its arbitration rules in 2022, as well as the services and initiatives undertaken to promote the use of arbitration in Colombia.

Bolivia faced an extraterritorial jurisdiction challenge, highlighting the need for clarity when foreign arbitration proceedings intersect with domestic legal systems. In a recent case (**Case 35140-2020-71-AAC**) brought before the Plurinational Constitutional Court of Bolivia ("Court"), the extraterritorial jurisdiction issue arose in relation to an order issued within ICC emergency arbitration proceedings seated in Santiago, Chile. Under the argument that Bolivian law had been chosen as the law applicable to the contract, a constitutional "*amparo*" action was filed in Bolivia against the decision issued by an Emergency Arbitrator (despite the fact that the seat of the arbitration was Santiago and, therefore, its courts had exclusive jurisdiction over any such challenge). As reported [here](#), the Court rejected the *amparo* petition because it was based solely on the applicable law of the contract, confirming that the Court does not have extraterritorial jurisdiction over acts committed by a foreign authority in another country.

In Guatemala, political protests, the election of Bernardo Arévalo and the "attempted coup" to declare the result void raised uncertainties. Bernardo Arévalo has promised to confront those who have ensured impunity and coopted the institutions for decades. As a result of the elections, prosecutors and most Congress members launched a slow-motion coup to try to block him from taking office. The coup led to different protests over the country over the course of 2023, which were repressed by the Guatemalan Attorney General's Office, who requested [arrest warrants](#) against activists, students, academics, human rights defenders, and a member of the Semilla Movement, the political party of President-elect Bernardo Arévalo.

Regarding the development of case law on arbitration, the Guatemalan Constitutional Court recently ruled that a dispute can be too complex for an arbitral tribunal to decide for the umpteenth time. As reported [here](#), the Constitutional Court was asked to decide the constitutionality of Article 3(3)(c) of the Guatemalan Arbitration Act, which provides that those matters in respect of which the law confers a "special jurisdiction" shall not be arbitrable (Case No. 448-2022, Constitutional Court of Guatemala, Decision of September 4, 2023). In the decision, the Court rejected petitioners' argument that Article 3(3)(c) creates procedural uncertainty, explaining that non-arbitrable matters under this subsection must be construed with arbitrable matters under article 3(1), which provides that parties may arbitrate matters relating to disposable rights. The Court further attempted to elucidate the rationale behind Article 3(3)(c), noting that "there are matters which, because of their nature, complexity and possible effects, shall be settled by judicial courts" rather than by arbitrators. Unfortunately, this decision turns the definition of whether a dispute is

arbitrable under Guatemalan law unpredictable and unreliable (for example, most commercial disputes, which are considered disposable matters, follow summary proceedings, which is a “special jurisdiction” or special procedure under Guatemalan law).

### **Chile: Upholding Arbitration-Friendly Practices**

On December 17, 2023, Chile rejected the second proposal for a new Constitution, prolonging uncertainty and highlighting the failure of the nation’s political system to channel social discontent into a new set of constitutional rules. Notwithstanding, Chile remains an arbitration-friendly seat in light of favorable decisions from the Chilean Supreme Court and the Santiago Court of Appeals regarding international arbitration disputes.

In a decision dated July 27, 2023 (reported [here](#)), the Supreme Court clarified the extent of control that Chilean tribunals can exert when reviewing the procedural rules applied in arbitration awards seeking recognition in Chile. *First*, the Supreme Court clarified that the enforcement of foreign arbitral awards falls within the broader category of recognition of jurisdictional decisions taken by foreign courts. In this context, it pointed out that when it comes to arbitral awards or any other foreign judgments, the recognition process does not constitute an instance for reviewing the relevant facts and rules governing the dispute. *Second*, the Supreme Court defined the concept of public policy, which, in context of the International Arbitration Act, must equate to the narrow set of rules and principles that are fundamental to Chilean law.

Similarly, on May 12 2023, the Santiago Court denied EP Petroecuador’s (Ecuador national oil company) petition to set aside a US\$63 million international commercial arbitration award (reported [here](#)). Among other findings, the Santiago Court clarified that:

- a petition to set aside an award is an extraordinary recourse to address egregious violations of narrowly defined grounds, and that the Court follows the principle of minimum intervention;
- the Court cannot review the tribunal’s findings on the alleged violation of joining disputes related to separate contracts in the same proceedings;
- a party’s dislike of the outcome of a dispute that was duly resolved and founded by an arbitral tribunal does not provide grounds to set aside an arbitral award; and
- to set aside an award, a violation must be extremely serious, such as an award being based on manifest and serious breaches of international public policy or due process.

### **Conclusion**

In 2023, Latin America grappled with a dual narrative of political shifts and significant developments in arbitration. Noteworthy institutional developments unfolded, with Mexico introducing the National Code for Civil and Family Procedure, Chile’s main arbitral institution implementing new emergency arbitration rules, and interest in the Caribbean’s enhancement of arbitration. Collaborative efforts, webinars, and conferences underscored Latin America’s commitment to advancing arbitration practices. Meanwhile, Brazil faced regulatory challenges in arbitration, exemplified by a constitutional action seeking to regulate arbitrators’ duty to disclose.

Bolivia, Colombia, and Guatemala navigated unique legal landscapes and decisions, and Chile

reinforced its arbitration-friendly stance. In summary, Latin America showcased a dynamic legal environment marked by political intricacies and strides in shaping the arbitration framework. We will continue to rely on our contributors to report how courts, institutions and other stakeholders continue to shape the practice of commercial arbitration in the region.


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