

Kluwer Arbitration Blog

Oil, Gas and Renewables: Hot Topics in Investing and Arbitrating in LatAm

Ana Paula Favretto (Clyde & Co) · Friday, February 23rd, 2024

Clyde & Co LLP partnered with [Jus Mundi](#) and Queen Mary University of London (“[QMUL](#)”) School of International Arbitration to bring together a number of speakers on the development of arbitration and practice of investment in the Latin American (“[LatAm](#)”) region.

The event kicked-off with a review of Jus Mundi’s [latest energy arbitration report](#) which highlighted [International Centre for Settlement of Investment Disputes \(“ICSID”\)](#)’s continued dominance as the leading arbitral forum for investor-state energy disputes globally. Although there was an absence of any LatAm arbitral institutions from the report’s ‘most selected’ ranking, Editor-in-Chief [Clémence Prévot](#) noted that the Arbitration Centre of Mexico and Arbitration and Mediation Centre of the Ecuadorian-American Chamber of Commerce registered an increased number of cases over the last two years. Overall, the report indicated arbitration remains the favourite method of dispute resolution for international energy disputes.

The first panel, moderated by [Carlos Carvalho \(Opus 2 and QMUL\)](#), with stakeholders [Rodrigo Bahia \(SLB\)](#), [Maddalena Sala \(European Energy S/A\)](#), [Igor Oliveira \(MOOVE Europe\)](#) and [Carlos Bellorin \(S&P Global and QMUL\)](#) discussed the obstacles hindering LatAm’s attractiveness to investors and the potential opportunities in the region.

The second set of panellists — corporate counsel [André Tan Oh \(Companhia Siderúrgica Nacional\)](#), public attorney [Nilo Sergio Santos \(Brazilian National Agency for Petroleum, Natural Gas and Biofuels\)](#), academic [Maria Fanou \(QMUL\)](#), expert witness [Alan Rozenberg \(Compass Lexecon\)](#) and institutional representative [Nicolás Gálvez Solís \(International Chamber of Commerce \(“ICC”\)\)](#) — guided by [Felipe Sperandio \(Clyde & Co LLP\)](#), provided the audience with valuable insight into resolving disputes in the region from different points of view.

The intersection of topics between the two panels demonstrated that certain trends inform both investment and arbitration in the region. This blogpost highlights some of the key themes that emerged from the event.

Red-Tape Continues to Play a Big Role

The discussion opened on a positive note, with Carlos Bellorin reporting on how regulators are collaborating with companies as they wake up to the need to remove barriers to support the energy

transition. Some new measures introduced include reducing corporate guarantees and improving fiscal terms.

Still, it was no surprise when Rodrigo Bahia highlighted how historical concerns regarding the complicated tax, labour, and litigation environments, coupled with regulatory uncertainty, still affect the region. Igor Oliveira added that one of the difficulties in developing energy projects is understanding timeframes related to planning permissions and licence applications, which can lead to expensive and disputed project cancellations. In the later panel, Nilo Sergio Santos gave the example of an entity being refused permission to drill, leading to problems in contractual fulfilment. Novel environmental restrictions issued by public acts can also impact concession contracts. These persistent issues continue to make the region costly and unattractive, Igor Oliveira explained.

Indeed, Alan Rozenberg's list of challenges to preparing LatAm valuations included the impact of political volatility, high inflation, complex tax regimes and soft currencies, which can be challenging to quantify.

Nonetheless, there are already potential improvements underway. Rodrigo Bahia made clear that policy coordination between federal and state governments will be essential for renewable practices to develop, noting [the impending tax reforms in Brazil](#), for example. Equally, companies are hungry for new technologies that can help them achieve sustainability. Igor Oliveira added how the digitisation of public administration in Brazil is a game-changer for the existing bureaucracy. In short and unsurprisingly, investors (and their counsel) continue to call for predictability and innovation in LatAm.

Arbitrating Against State-Entities: Special Considerations

Maria Fanou reminded us of “[El No de Tokyo](#)”, namely the opposition of LatAm countries against the adoption of a Convention contemplating an investor-state dispute resolution mechanism (in the context of the World Bank meeting in Tokyo in 1964). She explained that this was a ‘fair warning’ of an uneasy relationship between LatAm countries and the ICSID Convention. A few decades later, LatAm essentially became ICSID's biggest user by caseload. The overall contribution of the LatAm region is significant not only quantitatively speaking, but also from a qualitative point of view: cases involving LatAm contributed to the shaping of International Investment Law, but also to the so-called backlash against Investor-State Dispute Settlement (“ISDS”).

Nicolás Gálvez Solís set out how the ICC recognises and adapts its administrative considerations when states are called to arbitrate in its forum. Some of the challenges the ICC recognises to be typically faced by states and their entities (which are involved in approximately 35-40% of ICC energy cases) include:

- difficulty in retaining counsel, including bureaucratic barriers that increase time for appointments; and
- difficulties advancing costs due to budgetary restrictions which can lead to a slower procedure.

In addition, the ICC is conscious that the impact of an award may go beyond the walls of government buildings, potentially affecting millions. With a mind to this, in accordance with its Rules, a special session of the ICC court is constituted to scrutinise awards where a state is a party

to the proceedings.

André Tan Oh highlighted a further nuance: arbitrating against an entity which is *state-run* and publicly listed, versus fighting the administration *itself*. When dealing with the latter, questions of transparency and the extent to which the arbitration will be private come into play.

In the specific context of Brazil, despite having a thriving domestic arbitration market, investor-state arbitration is “*off the table*”, Nilo Sergio Santos recounted. International commercial arbitration is restricted by public law forbidding the adoption of foreign seats for disputes of certain types, such as public-private partnerships. The only real exception, Nilo continued, is in strategic purchases where only one supplier exists, such as for weapons and vaccines. This may act as an additional barrier to entry. For now, domestic arbitration remains the prevailing model.

This demonstrates how arbitration has been, and will continue to be, a key tool in dispute resolution domestically and internationally in LatAm.

Nascent Contractual Risk-Allocation

With such risks in mind, insurers, operators, contractors, and other parties are alert to the innate protections that contractual provisions can afford them. Big commodity players like [Petróleos Mexicanos](#) and [Petrobras](#) have updated their standard contract templates for field services whereby clauses for liability caps, exclusions and scope of (environmental) liability are now addressed differently. Rodrigo Bahia explained these put them ‘in line’ with the principles of the rest of the industry internationally which supports levelling the playing field for negotiations, even though the templates still present important concerns.

Rodrigo added that the enforceability of these clauses is yet to be tested. For example, implementing the international industry standard (allocating risks to the operator regardless of the negligence of the contractor) aligns with general practice, but may require existing civil law judicial systems to change their perception of how the law should be applied.

Despite this, dealing with well-established industry giants sometimes leaves no room to shift risks in negotiations. Procurement teams of large oil companies need to realise that service providers are not willing to absorb all the risks, Igor Oliveira explained. However, this may be industry-specific, with Maddalena Sala adding that her experience demonstrated that allocation of risks is easier in the renewable sector, perhaps because it is still developing.

When it comes to negotiating, the top-tip from both Igor Oliveira and Maddalena Sala was that in-person meetings are crucial to build trust and agree contracts in the region, which may not be considered necessary in other parts of the globe.

ESG and the Path to Renewables

With a number of environmental disasters having taken place recently, nations are watchful of any moves that could pose serious risks to their livelihoods. According to Carlos Bellorin, LatAm is divided on the issue of fossil fuels, especially in relation to the indigenous communities in

Colombia, Bolivia, and Peru. Igor Oliveira later added that society is sending mixed signals to the oil and gas industry— renewables are desirable, but there is still a demand for oil, plus revenues are needed to fund the transition. He queried whether we are “failing” the global south again.

It’s a balance. Rodrigo Bahia explained from an operator’s perspective that, whether or not the extent of a company’s ESG commitment will impact its ability to win a contract is still case-specific.

Maddalena Sala shared how the [European Energy S/A’s successful initiatives in the Ouro Branco wind park](#) had not only encouraged tourism to Pernambuco, Brazil, but also lowered the number of claims brought against the company. Therefore, ESG initiatives can clearly bring both social benefits to the locality, and economic advantages to the investor.

Conclusion

The discussion was well-rounded, but Brazil was the star of the show, with several speakers and those in attendance weighing-in on the country’s gravitas. There is no single clear path to the energy transition, but those involved have shifted their attention to this dilemma in the LatAm region. The strong intersection in themes between the panels demonstrates how LatAm has focal points that, if tended to and ameliorated, could help the region flourish as a dispute and investment hub for those betting on the energy transition.

A recording of the conference produced by the Arbitration Channel can be watched [here](#) .

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](#).

Profile Navigator and Relationship Indicator

Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels, derived from Kluwer Arbitration’s comprehensive collection of international cases and awards and appointment data of leading arbitral institutions, to uncover potential conflicts of interest.

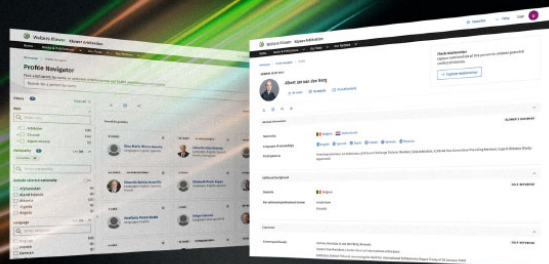
Learn how **Kluwer Arbitration** can support you.

Newly updated

Profile Navigator and Relationship Indicator Tools



Wolters Kluwer



Request your free trial now →

This entry was posted on Friday, February 23rd, 2024 at 8:04 am and is filed under [Arbitration](#), [Conference](#), [Energy Dispute](#), [ICSID](#), [Investment](#), [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.