Kluwer Arbitration Blog

2024 in Review: Latin America and Commercial Arbitration

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Despite the timid growth rate estimated at 1.9%, the lowest among all global regions, the year 2024 has been pivotal for commercial arbitration in Latin America, marked by significant legislative and institutional developments. Countries like Brazil, Argentina, Uruguay, Peru, and Costa Rica introduced reforms aimed at enhancing transparency and flexibility in arbitration practices. These changes reflect a broader trend towards modernizing arbitration frameworks in the region.

In Brazil, pioneering projects on reforms have sparked discussions about the balance between public accountability and confidentiality in class arbitrations, while also expanding the professional pool of arbitrators to include public notaries. In Argentina, the new foreign investment regime passed by the new administration promises to obtain large scale investment, through tax incentives and international arbitration as the dispute resolution method for handling issues arising from foreign investments. Meanwhile, Peru's new registration requirements for arbitrators and arbitration centers aim to promote accountability, despite concerns about potential bureaucratic hurdles. Costa Rica's new arbitration law has brought clarity to procedures for both domestic and international cases, aligning closely with the UNCITRAL Model Law and addressing the enforcement of foreign arbitral awards.

This article delves into the legislative and judicial milestones of 2024, highlighting the region's achievements and drawbacks.

Legislative and Institutional Developments

Brazil: Pioneering Reforms and Challenges

Although in 2024, Brazil's currency, the real, fell against the dollar by 21.7%, the worst performance of any major currency over this period, Brazil has remained at the forefront of legislative changes and institutional developments in arbitration. Notably, the introduction of Brazilian Bill No. 2,925 of 2023 has driven discussions about the publicity of class arbitrations involving corporations and their major stakeholders, pushing for greater transparency in multi-party disputes, as reported here. Additionally, a legislative reform now permits public notaries to act as arbitrators, reported here. However, this move has sparked debate about whether it risks

creating reverse discrimination, as the individualization of a particular and unique category of agents, among all others qualified for a particular practice, does not seem appropriate.

A growing emphasis on arbitration has also emerged, particularly in disputes involving exclusive jurisdiction agreements. The recent amendments to Article 63 of the Brazilian Civil Procedure Code granted an additional requirement for exclusive jurisdiction agreements to be enforceable in Brazil: the chosen local court must be connected to the location of the parties or the place of performance of the obligation, as reported here. Although pending further legislative clarification regarding its impact on international contracts, parties are now further encouraged to choose arbitration confidently to avoid risk of ambiguities.

Updates to the CIESP-FIESP rules also streamlined autonomous evidence gathering through arbitral proceedings and encouraged procedural efficiency, as reported here. Because of the (apparently) non-contentious nature of the autonomous production of evidence, there was doubt over whether these proceedings were (or should be) submitted to arbitration, whenever the production of evidence was connected to underlying contracts containing arbitration agreements. Accordingly, it became increasingly doubtful whether these proceedings fall under the objective scope of the arbitration agreement. The question was answered in 2023 by the Superior Court of Justice, where it decided that autonomous production of evidence proceedings, if absent any urgency, should be submitted to arbitration. Accordingly, the CIESP-FIESP released in September 2024 a specific set of arbitration rules for autonomous taking of evidence proceedings, the first of its kind.

Argentina: Attraction of Large-Scale Investments

In Argentina, the decrease in inflation and the foreign exchange anchor is starting to take effect in the economy, despite the cut in government expenses.

To sustain future growth, Argentina will focus on large scale investment among other strategies. For instance, Argentina's new foreign investment regime, established by Law No. 27,742 and Decree No. 749/2024, aims to attract large-scale investments in sectors like energy, mining, and infrastructure. As reported here, the regime's key features are tax and regulatory incentives, including protections against nationalization and tax stability, as well as the creation of a dispute resolution mechanism that allows investors to arbitrate issues arising from the investment, ensuring legal certainty for foreign investors.

Uruguay: More Flexibility Into Domestic Arbitration

On the political side, Uruguay showed as a model in 2024 for democratic stability in the region. The early favorite Álvaro Delgado was defeated by Yamandú Orsi, Uruguay's leftist opposition candidate, who became the country's new president in a tight runoff, ousting the conservative governing coalition.

On the legislative side, Uruguay's recent amendments to its General Procedural Code under Law No. 20.257 introduced more flexibility into domestic arbitration, including the ability to order interim measures. Among other modifications, the new law eliminated the mandatory signature of

an arbitral *compromis* with a notary public, granting the arbitration agreement automatic enforceability.

However, the revisions to the rules on challenging arbitrators raise significant concerns, as reported here. They limit challenges to facts known only after the arbitrator's appointment, effectively excluding the possibility of challenging arbitrators based on facts that occurred before their appointment but were unknown at that time. This limitation contradicts broader international arbitration practices, potentially undermining impartiality in domestic disputes.

Peru: Fostering Transparency and Legal Certainty

On the legislative front, the Legislative Decree No. 1660 introduced mandatory registration requirements for arbitrators and arbitration centers, aimed at enhancing transparency and legal certainty in Peru, as reported here.

This measure also helped parties better evaluate arbitrators' credentials and track records. However, critics argue that the new requirements could increase the proliferation of low-quality arbitration centers and arbitrator registries, which poses a significant risk to users and undermines public confidence in the process. The legislation has also faced some resistance from arbitration centers concerned about potential bureaucratic hurdles, as the registration requirements could delay proceedings and increase costs.

Costa Rica: Enhancing Clarity for International Cases

In August 2024, Costa Rica has unveiled its first green taxonomy, hoping to guide investors towards sustainable projects in a nation whose rich biodiversity is increasingly under threat.

As to the arbitration framework, Costa Rica's new arbitration law, introduced in 2024, brought significant clarity to arbitration procedures for domestic and international cases. By establishing clear guidelines on jurisdictional issues closely aligned to the UNCITRAL Model Law, the legislation seeks to eliminate ambiguities that previously hindered cross-border arbitrations, as reported here.

One of the law's key provisions addresses the enforcement of foreign arbitral awards, detailing the procedure to align with international standards. Additionally, the law introduces a provision that regulates the application of the arbitration clause to non-signatories, clarifying that any entity authorized to administer arbitrations in Costa Rica may act as appointing authority—instead of only referring to the Costa Rican Supreme Court, as it was previously the case.

Mexico–Amlo's Judicial Reform

On September 15, 2024, Mexico enacted a judicial reform proposed by former President Andrés Manuel López Obrador, aiming to enhance accessibility, transparency, and democracy in the judiciary, as reported here. The reform introduces significant changes, including reducing the

number of Supreme Court justices, implementing direct elections for judges and justices, and dissolving the Federal Judiciary's Council. However, it has drawn national and international scrutiny due to concerns about its potential inefficiencies and risks to judicial independence. Critics highlight the replacement of "career judges" with elected officials as a major setback, as it prioritizes democratic legitimacy over merit-based appointments, potentially weakening judicial expertise and impartiality.

These changes have generated uncertainty about the judiciary's ability to uphold the rule of law, prompting stakeholders to explore alternatives like arbitration. Nevertheless, the success of arbitration depends on the judiciary's ability to support the arbitration framework effectively, particularly regarding the enforcement of arbitral awards and interim measures.

As Mexico navigates this judicial transition, the interplay between its restructured judiciary and arbitration will be critical to maintaining the country's status as an attractive arbitration seat.

Judicial Perspectives

Chilean Courts: Upholding Arbitration-Friendly Practices

Chilean courts have continued to reinforce the country's pro-arbitration stance. In a landmark ruling of May 2024, as reported here, the Chilean Supreme Court addressed the international nature of multi-party arbitration, questioning whether proceedings lose their international character if the sole foreign party exits the case. By affirming that the subsequent exclusion of the sole foreign party does not alter the international nature of multiparty arbitration, the Court has strengthened the predictability of international arbitration seated in Chile.

Another significant ruling from the Chilean Court of Appeals, reported here, annulled an arbitral award in 2024 due to doubts about impartiality based on metadata of claimant's lawyer found in the award's pdf, highlighting the critical importance of safeguarding the integrity and impartiality of the arbitral process which must be reflected in every detail of the arbitral process.

Moreover, Chile continued to innovate in specialized areas of arbitration. For instance, intellectual property disputes gained traction as a significant focus. In a decision dated April 8, 2024, a sole arbitrator seated in Santiago de Chile ruled in an internet domain property dispute, revoking the domain "aramco.cl" because otherwise it would mislead the identity of the Saudi Arabian Oil Company, claimant in the proceedings.

Brazilian Courts: Growing Maturity of Brazil's Arbitration Framework

Judicial decisions in 2024 showcased the growing maturity of Brazil's arbitration framework, solidifying its position as a key player in international dispute resolution. These rulings reflect a judicial commitment to supporting arbitration while balancing procedural independence and fairness

The Brazilian Superior Court of Justice in a decision dated August 20, 2024, reported here, clarified that the Brazilian Code of Civil Procedure does not automatically apply to arbitration. It

reinforced the procedural independence of arbitration to judicial procedural rules, granting parties greater flexibility in tailoring their processes to meet the specific needs of their disputes.

The Brazilian Superior Court of Justice also addressed the long-standing debate surrounding public entities' participation in arbitration before the 2015 amendments to the Brazilian Arbitration Act (reported here). In *ETE Equipamentos de Tração Elétrica Ltda., CEBRAF Serviços Ltda. and Schneider Electric Brasil Ltda. v. União*, it reaffirmed the enforceability of arbitration agreements involving public entities in contracts predating the 2015 amendments. In its decision dated June 11, 2024, the Court confirmed that these arbitration agreements with public entities do not necessarily oppose public interest, and that the Federal Government has to act in good faith when entering into arbitration agreements.

The São Paulo State Court has also played a pivotal role in shaping arbitration practices through its handling of a significant volume of arbitration-related cases (reported here). According to a recent analysis made by the Brazilian Arbitration Committee ("CBAr") and the Brazilian Association of Jurimetrics ("ABJ"), most cases pertain to challenges against arbitral awards and enforcement of decisions, emphasizing the judiciary's role in supporting arbitration frameworks.

Bahamas and Curaçao Courts: Further Advancements

Arbitration frameworks in the Caribbean have also seen significant advancements. In the Bahamas, the case of *Gabriele Volpi v. Delanson Services Limited & Others* provided critical insights into the enforcement of arbitral awards, as reported here. The Bahamian courts demonstrated their commitment to upholding the narrow scope for challenges to awards and emphasizing the importance of party consent in arbitration.

In Curaçao, a notable case involving the enforcement of an arbitral award arising from a commercial aviation dispute underscored the island's evolving arbitration landscape, as reported here. The case's decisions (see here, here and here) addressed the high threshold required to lift attachments orders and the fact that interim measures on money judgments can be obtained even if the underlying claim has already been awarded in a foreign jurisdiction.

Ecuador Courts: Resolving Long-Standing Issues in Arbitration

Ecuador made significant strides in 2024 by resolving a decades-long debate on the recognition of foreign arbitral awards. The landmark decision issued by the Ecuador Constitutional Court in May 9, 2024 clarified that the Ecuadorian legal system does not require the recognition of a foreign award prior to its enforcement (reported here).

To reach its decision, the Court analyzed and found as follows: (i) the rules that establish recognition as a requirement for the later enforcement of a foreign award in Ecuador were repealed; and (ii) demanding a certificate of finality—or any other requirement that is not foreseen in the procedural legislation under which the award is issued—constitutes an unreasonable obstacle to enforce foreign arbitral decisions.

However, Ecuador's arbitration landscape was further impacted by the outcome of an April 2024

referendum on a proposed amendment to Article 422 of the 2008 Constitution. This article prohibits the state from executing international treaties that "yield sovereign jurisdiction" to "international arbitration" in "contractual or commercial" disputes between Ecuador and private parties. As reported here, the referendum sought to lift this restriction, allowing international arbitration as a means to resolve investment, contractual, or commercial disputes.

Approximately 65% of voters rejected this proposal, maintaining the constitutional ban on international arbitration in these matters. This outcome underscores the public opposition against a somehow politicized (and non-technical) view of international arbitration. The decision leaves Ecuador's legislative and jurisprudential framework in a state of uncertainty, raising questions about whether entering into a treaty providing for investor-state arbitration constitutes a prohibited "yielding of sovereign jurisdiction" and whether international arbitration, in general, is forbidden.

Conclusion

In conclusion, 2024 has been transformative for commercial arbitration in Latin America, with significant legislative and institutional advancements across Mexico, Brazil, Argentina, Uruguay, Peru, and Costa Rica. These legislative changes, coupled with judicial decisions and thematic discussions at regional conferences, reflect Latin America's ongoing efforts to strengthen its arbitration landscape. As the region continues to evolve, it is poised to set new benchmarks for global arbitration practices, fostering a more robust and reliable dispute resolution environment.

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