

2022 Year in Review: Commercial Arbitration in Latin America

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After struggling with the adverse effects of the COVID-19 pandemic, 2022 remained a period of transition for Latin America. New arbitration rules and protocols were adopted in jurisdictions such as Ecuador, Brazil and Mexico that reflected best practices born out of the limitations placed on arbitrations by the pandemic. Other jurisdictions such as Colombia, Chile and Argentina also reported favorable growth in arbitration policy.

We discuss below the most relevant developments in the region for the year of 2022.

Institutional developments

On January 1, 2022, the Center for Arbitration and Mediation of the Ecuadorian-American Chamber of Commerce ("CAM-AMCHAM Ecuador Center")'s new Arbitration Rules entered into force. These Rules follow an innovative approach, which allows for more flexible arbitrations and, at the same time, provides better service to parties. In our interview of Patricia Vera (Director of the CAM-AMCHAM Ecuador Center) earlier this year, Mrs. Vera discussed the benefits of the latest rules along with the implementation of the new Regulations for the Operation of the CAM-AMCHAM Ecuador.

Likewise, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) also launched new Arbitration Rules in November 2022, which replaced its 2012 Arbitration Rules. Among other changes, the new Rules (i) allow the CAM-CCBC to manage UNCITRAL arbitration proceedings; (ii) establish electronic filing as the default procedure for arbitration; (iii) allow arbitrators not listed in its pool of arbitrators to be appointed by the CAM-CCBC; (iv) require disclosure of third-party funding; (v) include specific provisions for joinder of additional parties, emergency arbitration, consolidation, allocation of costs; (vi) among others changes.

The Arbitration Center of Mexico (CAM) also released its new 2022 Arbitration Rules which became effective as of December 1, 2022. In sum, the rules: (i) introduce simplified arbitration procedures for small claims; (ii) confirm that hearings may be held in person, remotely, or hybrid; (iii) revise provisions on impartiality and availability of arbitrators; and, similarly to the CAM-CCB 202 Arbitration Rules, (iv) include specific rules on joinder and third-party funding.

In addition, starting this year, the Latin American Arbitration Association (ALARB) began reporting with Kluwer Arbitration Blog on important developments in the region. As part of this collaboration, we reported on a webinar held on June 7, 2022 which discussed the application of ALARB's 2021 Protocol for Remote or Virtual Arbitration Hearings.

Colombia, holding steady despite major political swift

For the first time, Colombia saw the arrival of its first left-hand President, Mr. Gustavo Petro. So far, the new regime has not sought to impact the existence or regulation of international arbitration in the country. The reason for this, might be President Petro's focus on other urgent projects such as the introduction of tax reforms, changes to the oil and gas industry, and renewed peace talks with the ELN guerrillas. Some of these issues were addressed in our coverage of the first Colombian Arbitration Week.

Notably, on November 15, 2022, Colombia's Supreme Court of Justice (the "Court") issued two favorable decisions for international arbitration. In the first decision, the Court recognized and enforced an award issued by the Society of Maritime Arbitrators of the State of New York. Given that the respondent party did not appear in the proceedings, the Court analyzed *sua sponte* whether any grounds to refuse recognition under Colombian's Arbitration Statute were present, found none applied and ordered the recognition of the award. (See *Tricon Dry Chemicals LLC v Agroindustrias El Molino de la Costa SAS*, Case No. 11001-02-03-000-2022-02145-00, Decision No. SC3462-2022, November 15, 2022). The second decision also dealt with the enforcement of a foreign award issued against a party who never appeared in the arbitration proceedings, but did appear in the recognition proceedings. The respondent party however did not raise grounds to resist enforcement. The Court nonetheless performed its own analysis of whether the award could be recognized and granted recognition. (See *Zurgroup SA v Importaciones y Exportaciones Fenix SAS*, Case No. 11001-02-03-000-2021-04294-00, Decision No. SC3650-2022, November 15, 2022).

Brazil: hot seat for controversial bill seeking to amend the Arbitration Act

In 2022, Brazil was in the hot seat due to a controversial bill which seeks to amend the Brazilian Arbitration Act (the "Bill"). Many national and international institutions, including the United Nations Commission on International Trade Law – UNCITRAL, helped raise awareness of the Bill's risks and disadvantages for arbitration in the country.

As previously covered here by João Gabriel Campos and Leonardo F. Souza, on July 6, 2022, Brazilian party leaders signed a Motion of Urgency to bypass the standard legislative process and called for a vote on the Bill. Because it creates unprecedented requirements for arbitrations, such as a new standard of independence and impartiality ("minimum doubt"), the Bill has been named the "anti-arbitration bill". The Bill will be called for a vote this year. We will be ready to report on the practical impacts of the Bill in case it's passed.

In addition to this controversial legislative development, Brazilian courts have also issued interesting decisions relating to commercial arbitration. As Gustavo Santos Kulesza reported, the São Paulo Court of Appeals' decision in the Vyttra Case dated August 22, 2022, may set a concerning precedent relating to successive motions for clarification and their effects on the 90-day deadline to file set aside proceedings in Brazil. This decision may open the door for an opportunistic losing party to file multiple motions for clarification with the purpose of delaying the 90-day deadline to initiate set aside proceedings.

In a separate case decided on August 24, 2022, the São Paulo Court of Appeals upheld an arbitral tribunal's decision to dismiss the arbitral proceedings without prejudice because the amount in dispute exceeded the limit established under the arbitration agreement concluded by the parties. (See Appeal n. 1107427-98.2021.8.26.0100, True Change Tecnologia Ltda. v. Outsistemas Software Em Rede S.A.; "True Case"). Once again, Brazilian courts endorsed the competence-competence principle, respecting the arbitral tribunal's authority.

Given that Brazil is one of the most active arbitration jurisdictions in Latin America, in 2022, we covered the country's two major annual conferences: the Brazilian Arbitration Committee – CBA's 21st International Arbitration Conference in Rio de Janeiro, as well as the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada's IXth Arbitration Congress in São Paulo. The conference panels dealt with issues regarding the Bill, arbitration of corporate disputes and publication of arbitration awards.

Chile and Peru: main subjects of significant political developments

Throughout the course of this year we closely followed the Constitutional Assembly's preparation of the new Constitution in Chile, and its impact on foreign investment, extractive industries and international arbitration. Marcelo Alarcon, Fernanda Streeter, Raquel Molina and Rodrigo Rivera warned about the impact the proposed Constitution's provisions could have on investment arbitration based on the Bolivian experience. However, to our surprise, the proposed Constitution was rejected in September 2022 and a project for the drafting of a new Constitution is now underway. This has left us with uncertainty as to what the new proposal will entail.

On a more positive note, close to the end of the year, on December 20, 2022, Chile's Supreme Court issued a favorable decision for the arbitration of corporate disputes. The Court affirmed the lower courts' dismissal of a claim brought by a corporation against its agent in court where the corporation's by-laws contained an arbitration agreement which was deemed to apply to the corporation's claim. (See "Tarascona Corporation con Breton Diéguez Oscar Alfonso y otro", Case No. C-8880-2013).

In the last decade, Peru has navigated through a political crisis of which the latest peak occurred on December 7, 2022 when former President Castillo announced he was dissolving Congress; which in turn proceeded to vote to impeach him. While under the Castillo administration there was a perceived 'anti-arbitration' sentiment, which was accompanied by threats of withdrawal from the ICSID Convention (which Pablo Mori and Micaela Ossio discussed here). Despite this sentiment and other proposed reforms to the current arbitration legal framework, the Government was unable to meaningfully impact commercial arbitration.

Argentina

Argentina in 2022 witnessed a mix of happiness in the sport field (having won the FIFA World Cup), but also deception in its political and economic

scenarios, where inflation increased to 92.40% in the month of November. In the arbitration field, however, Argentinean courts issued important decisions in support of arbitration.

For instance, on March 9, 2022, the Commercial Court of Appeals in the City of Buenos Aires ("Commercial Chamber") ratified the jurisprudence trend to apply a narrow interpretation to the grounds to set aside arbitral awards. The Commercial Chamber issued a judgment in which it decided, among other issues, that annulment of arbitral awards requires more than proof of an error in *judicando*, and a party must demonstrate the arbitral award has manifestly disregarded the law chosen by the parties without providing any justification for that disregard. (See *Cámara Comercial*, "Pérez Iturraspe, Teresa Manuela y otro c/ Aufiero Jorge Félix s/ Organismos externos", Expte. Nro. 10.795/2020),

Later, in June 2022, as Martin Cammarata, Tomás Krasnapolski and Marcos Palma reported, the Commercial Chamber ruled, in the *Sowitec Operation GMBH* case, that state courts may issue preliminary measures in connection with a dispute covered by an arbitration clause, even when the arbitration proceedings may eventually be conducted outside of Argentina.

Conclusion

2022 was a tumultuous year in terms of major political changes in Colombia, Peru, Chile and Brazil, all of which have brought instability and uncertainty to the region. With the exception of Brazil, the new administrations seem to be focusing on fulfilment of their political agenda, thereby evincing a backdrop of uncertainty regarding major legislative developments. Therefore, we will continue relying on our contributors to report how courts, institutions and other stakeholders continue shaping the practice of arbitration in Latin America.

******This article was written by our Dispute Resolution Lawyer, Aécio Filipe Oliveira, Daniela Páez-Salgado and Fabian Zetina. The text was published on the Kluwer Arbitration Blog on January 12, 2023. [Click here to check.](#)

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