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ARBITRATION GUIDE
LATIN AMERICA-WIDE | 2019

1.1 Prevalence of Arbitration

The prevalence of international arbitration as a method of resolving disputes in Latin America

In recent decades, Latin America has seen a massive shift in the way the region views and participates in international arbitration. Latin America has gone from an area of the world somewhat unfamiliar with the benefits and processes behind arbitration to being some of the most active advocates and participants. In 2017 alone, 365 parties from Latin America and the Caribbean participated in International Chamber of Commerce ("ICC") cases, accounting for 15.8% of all ICC parties that year.

Do domestic parties resort to the use of international arbitration in Latin America or is litigation (or some other method of dispute settlement) more favored?

The majority of the arbitration disputes within Latin America involve domestic parties, although many more foreign parties are beginning to participate. Of all the cases submitted to Latin American arbitral tribunals in the past years, more than three-quarters were between domestic parties as opposed to foreign parties. The recent growth in local arbitral institutions within Latin America, like the Centro de Conciliación y Arbitraje de Panamá, has also led to an increase in the use of arbitration instead of litigation. Interestingly, despite the increase in arbitral forums in many Latin American countries, the United States remains a key figure in venue selection for arbitrations arising out of Latin America disputes.

1.2 Trends

Looking to Latin America as a whole, although there has been exponential growth, international arbitration has not been around long enough in some countries (Bolivia and Peru, for example) to experience "trends." Instead, those trends would be classified as growth in the use and formalization of arbitration in the region.

Nevertheless, some countries within Latin America offer some insight into growing trends in international arbitration. For example, perhaps recognizing that one major component of the growth and use of arbitration in a particular country is the enforcement of an arbitral award, Ecuador and Mexico, within the past decade, have seen a growing tendency in favoring enforcement of foreign arbitral awards.

Looking to Brazil, two major developments have affected arbitration recently. First, the Brazilian Arbitration Law ("BAL") was amended to stabilize certain advances through case law that relate to arbitration and arbitral awards. Second, the new Brazilian Code of Civil Procedure has bettered communication between arbitral tribunals and domestic courts, allowing the arbitral tribunal to better obtain assistance from national courts when needed. It has also created a deference by national courts to arbitration, such that when a dispute is before a local tribunal and an arbitration clause is involved, the court will dismiss the action in favor of arbitration (unless, of course, the agreement is void or the tribunal determines that there are other issues with it).

Most recently, certain events in Latin America have raised concerns about the trends in arbitration. For example, Bolivia, Ecuador, and Venezuela denunciated the International Centre for Settlement of Investment Disputes ("ICSID") Convention in 2005, 2009, and 2012 respectively. Additionally, both Ecuador and Bolivia have withdrawn from many of their Bilateral Investment Treaties ("BITs"). For some, this could be seen as a trend against arbitration; others might see it as an opportunity to develop new protections for investors. In this sense, the concern of some countries in Latin America on what is perceived as outside forces that affect national sovereignty threatens to impede progress in the growth of international arbitration as a means of protecting investors.

1.3 Key Industries

Are there particular industries in Latin America that are experiencing significant international arbitration activity in 2018/19? If yes, which ones and why do you think these industries are experiencing more international arbitration activity than others?

Disputes related to infrastructure projects make up the vast majority of international arbitration disputes in Latin

America. This is principally due to the changes in national laws within various countries that favor the use of arbitration as it relates to these types of contracts. Through international arbitration, international companies feel more secure in executing these typically publicly financed large-scale national projects. And Latin American countries have tailored their laws, in some instances, to draw from a larger pool of international companies to execute these projects. For example, Brazil has seen many public-private contract disputes dealing with infrastructure investments go through arbitration. Additionally, Colombia passed a law permitting that disputes arising from public-private contracts may be submitted to arbitration if the case will be decided by the rule of law. This has also led to an increase in the amount of arbitration proceedings related to infrastructure.

1.4 Arbitral Institutions

Which arbitral institutions are most used for international arbitration in Latin America and why?

Local arbitral institutions have contributed greatly to the rise in international arbitration within Latin America. They have aided in forming alliances with the more recognized institutions, such as the ICC. These local arbitral institutions have also promoted the growth of arbitration in the region through conducting seminars, publishing in arbitration journals, working with local arbitral forums to promote arbitration, and pairing international arbitration leaders with local practitioners. Recognizing the potential for growth of international arbitration in the region, the ICC itself has created committees in fourteen countries within Latin America along with the *Grupo Latinoamericano de Arbitraje de la CCI*, which connects leading international arbitration practitioners in Latin America to talk about arbitration issues in the area.

Within Latin America, the most used arbitral institutions are the Court of Arbitration of the ICC in Paris, the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the International Centre for Dispute Resolution (ICDR). These are the most used *arbitral institutions for international arbitration*. In the context of investor-state arbitration, the ICSID plays a key role. The reasons for the popularity in their use are tradition, their caseloads that allow for more established and predictable case management, and their well-established and well-respected arbitration rules. While there are differences between their rules, their development comes from the fundamental principles of international arbitration, allowing consistency and predictability in their application. Consequently, these are the institutions that set the global trends in international arbitration, and it is no different in Latin America.

2. GOVERNING LEGISLATION

2.1 Governing Law

What national legislation governs international arbitration in Latin America, and to what degree is it based on the UNCITRAL Model Law?

In Latin America, the national legislation that governs international arbitration depends on the country. Each country has its own body of laws that governs arbitration within that nation. For example, in Peru, the Peruvian Arbitration Act controls, and in Mexico, the Commerce Code governs arbitration proceedings. While each country has its own set of laws governing arbitration, most have followed the 1985 UNCITRAL Model Law, incorporating some key aspects of the Model Law while modifying others to reflect the country's unique views towards international arbitration.

If national legislation is based on the UNCITRAL Model Law, does it diverge in any significant way from the Model Law?

Each country in Latin America diverges in some way from the Model Law when it comes to its own legislation over arbitration proceedings. For example, Ecuador has incorporated the spirit of the Model Law in its arbitration laws, but has employed simpler language in doing so, choosing in some instances not to use all the definitions and

rules on arbitration that are contained in the Model Law. Looking to the Brazilian Arbitration Law, Brazil treats domestic and international arbitration as two separate things, as opposed to the Model Law. More specifically, in Brazil, an international arbitration award does not have any immediate enforceable legal consequence, whereas domestic arbitration provides for the immediate enforceability of awards rendered in Brazil.

2.2 Changes to National Law

Have there been significant changes to the national arbitration law in the past year, or is there any pending legislation that may change the arbitration landscape in Latin America?

Individual countries within Latin America have seen recent changes to their national arbitration laws within the past few years that have greatly aided the expansion and growth of international arbitration within the region. Chile ratified the Apostille Convention, which has permitted a quicker and more cost-effective means of acquiring foreign documents. In addition, Argentina's recent case law declared an arbitration agreement in a consumer's contract null and void based on Article 1651 (b) of Argentina's Civil and Commercial Code. These two changes show the tug and pull between international arbitration and application of traditional domestic law that exists in Latin America as Latin America broadens its use of arbitration to resolve international disputes.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

The legal requirements for the enforceability of an arbitration agreement depend on the applicable law of the arbitration clause. However, most countries in the region follow a similar structure. First and foremost, the arbitration agreement must be in writing. Virtually every country follows this basic requirement. Moreover, some countries specify that the arbitration clause may be stated as a clause within a contract or as a separate, independent agreement. Another common requirement is the express and unequivocal intent of the parties to enter into the arbitration agreement. Finally, a few countries require the signature of both parties in order for the arbitration agreement to be enforceable. In some instances, laws in Latin America allow an arbitration clause to be applied to non-signatory third parties, if they were contemplated beneficiaries or stood in the place of a contracting party.

3.2 Arbitrability

Are there any subject matters that may not be referred to arbitration under the governing law of Latin America? If yes, what are they?

Generally, in Latin America, there are many subject matters that may be referred to arbitration. However, some matters are excluded from arbitration, such as: property of natural resources, agrarian disputes, tax matters, issues related to family law and civil status, criminal liability, and any other issue affecting the public interest. Notwithstanding, some countries in Latin America, like Ecuador, provide an almost carte blanche approach to what matters may be arbitrated. In Latin America, then, the interplay between national law and international treaties are crucial to understand what claims may and may not be referred to arbitration.

What is the general approach used in Latin America to determine whether or not a dispute is "arbitrable"?

To determine whether a dispute is "arbitrable" a party needs to look at the arbitration clause to determine what country's law is applicable, as well as what arbitral body's laws may govern a dispute. In this sense, Latin America is no different than any other part of the world. Then, depending on local laws, treaties, protocols, covenants, and other acts of international law that each individual country has signed and ratified, the scope of what claims are arbitrable will become clearer. As Latin America evolves and grows in the international arbitration space, the adoption of new arbitration laws also provides clarity in what disputes are arbitrable.

3.3 National Courts' Approach

What has been the approach of the national courts with respect to the enforcement of arbitration agreements?

Most national courts of countries in Latin American give deference to an arbitration agreement and its scope. However, as in any jurisdiction, waiver is always a concern when an individual or company relies on national courts to attempt to resolve what should be properly before an arbitral panel. In Ecuador, for example, courts typically decide not to hear a case if an arbitration clause exists. If parties agree that the arbitration clause should not apply, which is implied when a plaintiff files a petition in a court and the defendant does not oppose it, then courts will deem there has been a waiver, and will hear the case. Mexico, too, follows this non-intervention principle, which is codified in its Commerce Code. If a case is filed in court, the judge is required to refer the parties to arbitration, according to Article 1424 of the Commerce Code. Exceptions to the principle of non-intervention in Mexico include instances where the arbitration agreement is found to be void or incapable of being performed.

Are arbitration agreements usually enforced by Courts in Latin America?

Arbitration agreements are usually enforced in Latin America. The Latin American countries that have ratified the New York Convention and other international agreements have, as a consequence, become pro-arbitration, enforcing most judgments in favor of arbitration. Indeed, not dissimilar to other jurisdictions, some countries in Latin America hold that an arbitration clause forms a severable agreement, and, even if the rest of the contract is determined to be invalid, the arbitration clause may still be valid. This principle requires challenges to the validity of the contract as a whole—absent the arbitration clause—to be determined by an arbitral panel, and only the validity of the arbitration clause itself may remain subject to court challenge. Mexico follows the rule of separability, as set forth in Article 1432 in its Commerce Code.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

Are there any limits on the parties' autonomy to select arbitrators?

Parties are nearly always free to appoint any arbitrators they choose, absent contractual agreement otherwise. However, they must follow the rules of independence and impartiality. Most Latin American countries include provisions in their laws granting parties the right to designate the number and method of selecting arbitrators. Moreover, parties can also choose to subject themselves to the rules of an institution, such as the ICC, ICDR, etc.

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In Latin America, even in the absence of institutional rules, if the parties' chosen method for selecting arbitrators fails, there are default procedures in place to help facilitate the arbitration process. For example, the Peruvian Arbitration Act includes an article to appoint arbitrators in situations where the parties cannot agree to one or in case the method agreed by the parties fails. Bolivia also has a default procedure where, if the parties' chosen method of selecting arbitrators fails, the selection will be conducted according to the methods of the arbitration center that apply. As another option, Bolivian law has allowed for, in cases of disagreement between parties, an appointing authority, including a judge, to make the selection. A note of caution should be added when parties are dealing with bi-lateral or multi-lateral investment treaties that contain arbitration procedures for the resolution of commercial disputes. Some of those treaties require the appointment of a panel from a list of pre-determined arbitrators for certain claims.

4.3 Court Intervention

Can a court intervene in the selection of arbitrators and, if so, how? If it can, are there any limitations on a court's power to do so?

Some countries in Latin America provide procedures for a court to intervene in the selection of arbitrators. In Ecuador, for example, the parties involved in the arbitration can agree that a court will appoint the arbitrators. In Peru, although the law is not as clear, the parties may nevertheless agree on permitting the courts to intervene in the selection of arbitrators. Bolivia, on the other hand, takes a more restrictive approach to when courts can be involved in the selection process of an arbitrator. There, courts are only allowed to intervene in selecting arbitrators if the parties do not choose the arbitrators themselves or no other authority can carry out this task. What is largely consistent throughout Latin America is that the various countries' courts are limited by the national laws of that country as it relates to granting courts authority to intervene in the selection of arbitrators.

4.4 Challenge and Removal of Arbitrators

Are there particular provisions governing the challenge or removal of arbitrators? If yes, on what grounds?

Aside from the norms of impartiality and independence, Latin America, like many other regions of the world rely on the various arbitral institutions for guidance on challenges and removal of arbitrators. The ICC's Article 14, Challenge of Arbitrators, for example provides the right to challenge or remove arbitrators under certain circumstances. According to Article 14 Section 1, a party challenging the appointment of an arbitrator must submit a written statement to the Secretariat with specific facts relating to the challenge. Section 2 further states that in order for the challenge to be admissible, it must be submitted within 30 days from receipt by that party of the notification of the appointment or within 30 days from the date when the party making the challenge was informed of the facts. The ICC Court then decides on admissibility and merits of the challenge once the Secretariat allows the arbitrator and other parties to comment in writing. Latin American countries, with their own national arbitration institutions, have adopted similar schemes. Panamá for example, within the rules of the Centro de Conciliación y Arbitraje de Panamá, Articles 25 (Del Secretario del Tribunal Arbitral y Sus Funciones) – 28 (Fijación de la Causa) sets forth the time frames and methods of challenging or removing an arbitrator.

4.5 Arbitrator Requirements

What are the requirements, if any, as to arbitrator independence, impartiality and/or disclosure of potential conflicts of interest under the national law or under the rules of the principal arbitration institution(s)?

Laws relating to the independence and impartiality of arbitrators are prevalent in almost every Latin American country. These requirements are codified in each country's arbitration laws. In Brazilian Arbitration Law, Chapter III, The Arbitrators, contains Articles 13 and 14 which state that, "arbitrators must be independent and impartial and must disclose, before the acceptance of the appointment to act as arbitrators, any facts likely to give rise to justified doubts as to their independence and impartiality." Similarly, Bolivian law requires arbitrators to provide a Statement of Acceptance, Availability, and Independence once they have been chosen and accepted the role of arbitrator. Similar requirements exist in Panamá.

5. JURISDICTION

5.1 Matters Excluded from Arbitration

Generally, in Latin America, there are many subject matters that may be referred to arbitration. However, some matters are excluded from arbitration, such as: property of natural resources, agrarian disputes, tax matters, issues related to family law and civil status, criminal liability, and any other issue affecting the public interest.

Notwithstanding, some countries in Latin America, like Ecuador, provide an almost carte blanche approach to what matters may be arbitrated. In Latin America, then, the interplay between national law and international treaties are crucial to understand what claims may and may not be referred to arbitration.

5.2 Challenges to Arbitration

May an arbitral tribunal rule on a party's challenge to the tribunal's own jurisdiction (i.e., is the principle of competence-competence applicable in Latin America

The region of Latin America follows the principle of competence-competence when it comes to the issue of allowing a tribunal to rule on the question of its own jurisdiction. This principle states that an arbitral tribunal has jurisdiction to decide the issues concerning the existence, validity, and effectiveness of the arbitration agreement, as well as of the contract containing the arbitration clause. This principle includes an arbitral tribunal's authorization to rule on a party's challenge to the tribunal's jurisdiction. The decision should be made during the first hearing of the arbitral proceedings. Some arbitral institutions, however, allow a tribunal to defer ruling on its own jurisdiction until the final award.

5.3 Circumstances for Court Intervention

Under what circumstances can a court address issues of jurisdiction of an arbitral tribunal? If they can address jurisdiction, do the courts of Latin America show a general reluctance or willingness in intervene?

Courts typically can address the issue of jurisdiction of an arbitral tribunal if the parties have not implemented rules in the arbitration clause, or otherwise expressly stated, that a tribunal can determine its own jurisdiction. While the courts understand that the arbitral agreement is mandatory between the parties, the court still has authority to intervene, in certain instances. When an award is challenged or set aside based on lack of jurisdiction of the tribunal, the court must remind itself that the arbitral agreement is mandatory as between the parties but in some instances, it can provide clarity and guidance. If the issue is one of doubt or competence of the jurisdiction, the courts should decide in favor of the arbitration. However, if the judge finds that the arbitration agreement is void, he may continue with the case.

5.4 Timing of Challenge

When do parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal (as soon as a case has been filed for arbitration, after the constitution of the arbitral tribunal or only after an award has been rendered)?

Parties generally have the right to challenge the jurisdiction of the arbitral tribunal. While any challenge should be raised before the statement of defense is given, issues relating to jurisdiction may exist during the enforcement stage as well. In these cases, Article V of the New York Convention states that enforcement of awards may be refused if there is no valid arbitration agreement or the award provides for relief outside the scope of the arbitration agreement.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

What is the standard of judicial review (e.g., deferential or de novo) for questions of admissibility and jurisdiction?

The standard of judicial review as it relates to questions of jurisdiction and admissibility seems to be deferential treatment to the arbitral tribunals in Latin America. Because the region adheres to the principle of competence-competence, this lends itself to ruling in favor of arbitration and the decisions of the tribunals. As a result, jurisdictions like Brazil limit the ability for courts to assess the jurisdiction and competence of arbitral tribunals only after an award and a challenge by a party of the award.

5.6 Breach of Arbitration Agreement

What is the approach of the national courts toward a party who commences court proceedings in breach of an arbitration agreement? Is there a general reluctance or willingness of the national courts to allow such proceedings?

When a party commences court proceedings in breach of an arbitration agreement, the majority of the region gives deference to arbitration and will compel arbitration. In Ecuador, for example, the courts are under the duty to reject the case if an arbitration clause exists. If, however, both parties agree to waive the right to arbitrate, then the court can hear the case. In Brazil, the courts will dismiss court proceedings without ruling on the merits when there is an agreement to arbitrate.

5.7 Third Parties

Under what circumstances, if any, does the national law allow an arbitral tribunal to assume jurisdiction over individuals or entities which are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement? If it does, does it apply to foreign third parties or only domestic?

In Latin America, individuals or companies that are not a party to an arbitration agreement or not signatories to the contract containing the arbitration agreement may be, in certain instances, subject to the jurisdiction of an arbitral tribunal. These instances are typically limited and require some inferred agreement by the parties that a tribunal would have jurisdiction over the non-signatory or non-party. However, the region's arbitration laws and rules do not seem to directly address the inclusion of third parties into arbitration. One example of a Latin American country that provides for the inclusion of interested non-parties in certain arbitrations is Ecuador. Notwithstanding, most countries in the region remain silent on the issue.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Is an arbitral tribunal in Latin America permitted to award preliminary or interim relief? If so, is such relief binding or merely recommended? And what types of relief can be awarded?

Arbitral tribunals are generally permitted to award preliminary or interim relief if they think it is necessary to aid the effectiveness of the proceeding, protect assets, and ensure an award is not illusory. The types of relief include ones similarly found in Peru's Arbitration Act intended: "a) . . . to maintain the status quo; b) . . . to avoid damages to the arbitration process; c) to secure assets that may allow the enforcement of the award; and d) to preserve evidence." Arbitrators typically use the national courts to enforce the relief ordered, unless the parties agree themselves. In Mexico, the Commerce Code states that interim measures ordered by an arbitral tribunal are recognized as binding. Several other Latin American countries' laws provide for the same.

6.2 Role of Courts

Do the courts play a role in preliminary or interim relief in arbitration proceedings and, if so, in what circumstances? Can the courts in Latin America grant interim relief in aid of foreign seated arbitrations? If yes, what type of preliminary or interim relief can the courts grant?

The parties may request preliminary or interim measures from the courts and the courts may grant any measures it thinks appropriate in the case. In some Latin American countries, parties may only seek provisional measures before the arbitration has begun. In those cases, parties can seek relief without waiving the arbitral agreement. If the parties seek provisional measures during arbitration, they must request relief from the arbitral tribunal directly because not doing so would be seen as an impediment in the arbitral tribunal's jurisdiction. Notably, the extent to which a Latin American court will enforce an interim order from an arbitral tribunal seated in a foreign jurisdiction is fact and country specific. Where arbitral orders are as binding as court orders, such measures are likely to be enforced more readily than in countries where that is not the case.

Does national legislation allow the use of emergency arbitrators? If yes, are decisions of emergency arbitrators

binding or merely recommended and what type of relief is allowed?

Emergency arbitrator provisions, while still not very common in Latin America, have started to gain momentum, as Bolivia became the first Latin American country to include the provision. These emergency provisions include the requirements of an express agreement of the parties that the emergency arbitrator to be appointed is a lawyer, and that the filing of the request for emergency arbitrator is made before an arbitration center. Panama contains similar allowances and measures. What is crucial here, as in many instances in international arbitration, is what the parties have agreed to. This includes what institutional rules apply, many of which contain provisions for the appointment of emergency arbitrators. In instances where such institutional rules are references, the deference to the parties' agreement will more than likely prevail in Latin America, and a court is less likely to intervene.

Can the national courts of Latin America intervene in once an emergency arbitrator has been appointed?

Article 29, Emergency Arbitrator, of the ICC Arbitration Rules governs the appointment of emergency arbitrators. Once an emergency arbitrator has been appointed, national courts are not precluded from intervening in the proceedings. Section 7 of Article 29 states that parties are not prevented from seeking interim measures from a judicial authority and that an application for such measures does not constitute a waiver of the arbitration agreement. If a party seeks any measures from a judicial authority, the Secretariat is to be notified.

6.3 Security for Costs

Does the national law allow for the courts and/or the arbitral tribunal to order security for costs?

Most countries in Latin America allow for the courts and arbitral tribunals to order security for costs. For example, Bolivian national law empowers arbitrators to do so and Mexico's Commerce Code says that the arbitral tribunal may decide to request a security to cover any damages that may arise from interim measures. These principles and rules rely on the same premise as interim measures—to preserve the status quo and protect the enforceability of an award.

7. PROCEDURE

7.1 Governing Rules

Are there laws or rules governing the procedure of arbitration in Latin America? If yes, what are they?

Each country in Latin America has its own set of arbitration rules. Most countries have modeled theirs after the 1985 UNCITRAL Model Law. These rules lay out the procedure for arbitration in each country when the laws of that country apply. In addition, the procedure of the various arbitral institutions sets forth that an agreement would govern the procedure of an arbitration, be it foreign or domestic. Various other treaties also exist which govern arbitral procedure, including the Convention on the Recognition and Enforcement of Arbitral Awards (commonly known as the New York Convention), which gives effect to private parties' agreements to arbitrate and governs the enforcement of arbitral awards. There is also the Treaty on International Procedural Law ("TIPL") which provides that any decision or judgment issued by arbitrators in one country that is party to the agreement will have the same force in the territory of the other countries. The TIPL then goes on to list procedural requisites, such as "[t]hat the judgment was rendered by a court which is competent in the internationally accepted meaning of that word[.]" The combination of national law, institutional rules, and treaties come together to form an interconnected web of rules to govern the procedure in an arbitration.

7.2 Procedural Steps

In arbitration proceedings conducted in Latin America, are there any particular procedural steps that are required by law?

Latin American countries vary greatly when it comes to particular procedural steps that must be adhered to within an arbitration proceeding. For example, Peru and Ecuador both adhere to specific procedural rules in international arbitration, which focus on a determination that the parties indeed agreed to arbitrate, and the dispute falls within that agreement. In Ecuador, the procedural steps focus on requirements associated with what must be included in a statement of claim and the statement of defense. Evidence is required in Ecuador, and other countries, to be provided at the outset. This is, in many ways, a fundamental contrast to the common law mentality of providing evidence through discovery and presenting evidence at the end. There are also some Latin American countries such as Bolivia and Mexico, that do not require any procedural steps by law. However, at a very minimum, Bolivia and Mexico's laws provide that all parties are to be treated equally and have a full and fair opportunity to present their case.

7.3 Powers and Duties of Arbitrators

What powers and duties does the national law of your jurisdiction impose upon arbitrators?

When it comes to powers and duties of arbitrators, Latin American countries have similar requirements. For one, the region as a whole agrees that the primary function of arbitrators is to serve in an impartial capacity, while making sure to act within the confines of the arbitration agreement signed by the parties. Arbitrators' duties also include rules of confidentiality, as detailed in Peru's arbitration rules, for example. Essentially, all Latin America provides for established and universal duties on arbitrators, including impartiality and independence, following of due process, and allowing the parties an opportunity to be heard. One of the clearest examples of a violation of that duty is corruption through bribery and pay-offs, which is an issue in Latin American based arbitrations that has become a recent hot topic and concern among practitioners.

7.4 Legal Representatives

Are there particular qualifications or other requirements for legal representatives appearing in Latin America? If yes, are these specific to domestic matters or do they also apply to international arbitration? In other words, can legal representatives appearing in Latin America have qualifications other than domestic ones?

As for the specific requirements for legal representatives, many Latin American countries differ on this topic. Some countries maintain no restrictions on lawyers from other jurisdictions appearing in legal matters, while others are silent as to whether any requirements exist or do not exist in international arbitration. In contrast, several Latin American countries, like Panamá, impose restrictions on who can serve as arbitrators in domestic arbitrations.

8. EVIDENCE

8.1 Collection and Submission of Evidence

What is the general approach to the collection and submission of evidence at the pleading stage and at the hearing in Latin America (e.g., discovery, disclosure, privilege, use of witness statements and cross examination)? Are there any specific rules that apply to any of the above categories?

The general approach to collecting and submitting evidence varies depending on each country in Latin America. For example, in Ecuador, there are certain requirements during the pleading stage that must be followed. More specifically, in filing a statement of claim or a statement of defense, evidence to support those statements is

required. Nonetheless, if parties do not have access to all the evidence supporting their claim, they are not expected to include it but should state that they need certain evidence in their statements. Panamá follows a similar system. If parties in an arbitration in Latin America follow the Arbitration Rules of the ICC, the production of documentary evidence is a case management technique that the arbitral tribunal may rely on to control time and costs. The parties are also free to incorporate other rules by written agreement or agreement during the hearing (with the consent of the tribunal), such as the application of the International Bar Association Rules on the Taking of Evidence in International Arbitration.

8.2 Rules of Evidence

What rules of evidence, if any, apply to arbitral proceedings seated in Latin America? Are they the same rules of evidence that apply to domestic matters?

Each country has its own rules of evidence applicable to arbitral proceedings. For example, Article 1439 of Mexico's Commerce Code states that, "the parties shall – within the scheduled calendar – express all the facts on which their claim is based, disputed points, their respective initial submissions and provide the arbitral tribunal with all the documents and evidence they deem necessary to support their case." The Commerce Code does not, however, contain particular measures detailing the types of evidence that are admissible or rules as to how evidence should be taken.

The recent trend in Latin America has been to adopt a single framework of rules applicable both to domestic and international arbitration. In that sense, the majority of countries in the region maintain the same rules of evidence for domestic and international arbitration. One of these countries is Peru. The Peruvian Arbitration Act contains the rules of evidence that apply in arbitration, whether domestic or international. While the majority of Latin American countries appear to follow this dynamic, some have distinct rules of evidence for domestic and international proceedings. These countries include Chile, Colombia, Ecuador, and Cuba.

8.3 Powers of Compulsion

What powers of compulsion or court assistance exist for arbitrators to order the production of documents or require the attendance of witnesses (either before or at the hearing)? Is there a difference between parties and non-parties?

Latin American countries differ when it comes to the powers of compulsion and court assistance in ordering production of documents or requiring the attendance of witnesses. In Ecuador, a national court cannot be involved in the collection of evidence or attendance of witnesses because arbitrators retain full authority. But in Mexico, arbitral tribunals are permitted to turn to national courts for assistance in enforcing disclosure orders and witness attendance if the parties do not comply.

With regards to the treatment of parties and non-parties alike, some countries treat them the same while others have separate sets of rules. Bolivia, for example, has no rules treating parties and non-parties differently; no laws exist permitting the arbitral tribunal to force witnesses' attendance before the tribunal. It is usually left up to the party calling the witness to testify to make sure the witness shows up. Moreover, in countries like Panamá, orders of the tribunal are given the same force and effect as if having come from a judge. Failure to abide by those orders is the same as a failure to abide by an order of a Panamanian court. Notwithstanding, tribunals are normally reluctant to utilize compulsion of witnesses, and rely on parties to coordinate and provide witnesses necessary for the proceeding.

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

To what extent are arbitral proceedings or their constituent parts (e.g., pleadings, documents, the award)

confidential in Latin America? Can information in arbitral proceedings be disclosed in subsequent proceedings?

Some Latin American countries have express rules on confidentiality in arbitral proceedings while others make no mention, leaving it up to the discretion of the parties. For example, the Peruvian Arbitration Act explicitly states that arbitral proceedings are confidential, and there is no exception to this rule. In Brazil, the Brazilian Arbitration Law does not address confidentiality, but the parties may agree to rules of confidentiality which will then govern their proceedings. In Brazil, confidentiality is permitted by agreement unless the State is a party to the arbitration; in this case, under Chapter I, General Provisions, Article 2 of the Brazilian Arbitration Law states that the arbitral proceedings must remain public.

Whether information in arbitral proceedings may be disclosed in subsequent proceedings is usually dependent upon the rules of confidentiality within each country. In Ecuador and Bolivia, information disclosed in a confidential arbitration proceeding may not be used in a later proceeding. In Brazil, this analysis turns on the rules of confidentiality agreed to by the parties.

10. THE AWARD

10.1 Legal Requirements

What are the legal requirements for an arbitral award in Latin America (if any)? Are there any time limits on delivery of the award?

The most fundamental requirement when issuing arbitral awards is that the award be in writing and signed by the arbitrators. The majority of countries in Latin America also require that the award be supported by an analysis of the facts and law as applied to the case. Some countries also require that the costs, the date on which the award was rendered, and where it was rendered, be included. The legal requirements for issuing arbitral awards are set out in Article 1448 of Mexico's Commerce Code. Brazil's arbitration laws also state the legal requirements for arbitral awards under Articles 42 and 26, which are located in Chapter V, The Arbitration Award.

Time limits tend to be governed by the applicable national law and/or by the rules of the arbitral institutions themselves. By and large, however, these dates can be amended by agreement of the parties. Some countries have implemented time limits with respect to clarification or amendment of awards requested by parties. In Bolivia, parties have three days from notification of the arbitral award to request a clarification or amendment. In Brazil, Article 30, contained in Chapter V, The Arbitration Award, of the arbitration laws also permit parties to request a clarification of the award within five days of receiving the award.

10.2 Types of Remedies

Are there limits on the types of remedies that an arbitral tribunal may award (e.g., punitive damages, rectification, injunctions)? If yes, what are those limits and how are they prescribed?

Across the region of Latin America, punitive damages are generally not available as remedies in an arbitral award. These limits are prescribed through the substantive laws of each nation. Peru's Arbitration Act provides for the available remedies in arbitral proceedings and also permits parties to agree on remedies in their case as long as it complies with the public order. In Ecuador, remedies are also limited by the statement of claim and statement of defense.

10.3 Recovering Interest and Legal Costs

Are parties entitled to recover interest and legal costs and, if so, on what basis? What is the general practice with regard to awarding interest and shifting costs between the parties? In other words, doesLatin America normally follow a costs follow the event or costs sharing approaching?

Parties are usually entitled to recover interest and legal costs. However, the extent of recovery is largely dependent on the parties' agreement. For example, Article 73 "Asunción o disribución de costos" of the Peruvian Arbitration Act states that the parties' agreement shall be respected when allocating arbitration costs and fees. Article 73 further provides for prevailing party recovery, meaning that the losing party is charged with paying the other parties the costs. If parties choose to follow an institutional arbitration, recoverable fees and costs are determined by the institution. Brazil also follows a similar route, as Article 27 in Chapter V, The Arbitration Award, of Brazilian Arbitration Law provides that if the agreement or the chosen institutional rules allows for the recovery of fees and costs, then the tribunal can award fees and costs.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

On what grounds, if any, are parties entitled to appeal an arbitral award in Latin America? If yes, what is the procedure for appealing an arbitral award? If no, what recourse do parties have?

Parties are not typically entitled to an appeal of an arbitral award in Latin America. However, most countries have certain procedures for a party to seek the annulment or nullification of an award. These procedures are very specific and only permit annulments or nullifications in very limited instances.

Bolivian law, for example, allows for annulment of arbitral awards based on the following reasons: a) the matter was non-arbitral; b) the arbitral award is contrary to the public order; c) there are grounds for nullity or revocability of the arbitration clause or arbitration agreement; d) one of the parties' right of defense was affected; and e) the award manifestly exceeds the arbitrators powers as provided in the arbitral clause or the law.

The annulment petition is typically presented to the same arbitral tribunal, which then accepts or rejects it. If the annulment is accepted, the case is sent to a judge who will have thirty days to issue a resolution. An action to nullify an award is presented in a similar manner.

Another example is Brazil, where nullifications are allowed only for the following reasons:(i) the arbitration agreement is null and void; (ii) the persons who rendered the award could not have acted as arbitrators; (iii) the award does not comply with the requirements set forth in Article 26; (iv) the award exceeded the limits of the arbitration agreement; (v) the award does not address all of the issues submitted to arbitration; (vi) the award was made through partiality, extortion or corruption; (vii) the making of the award exceeded the time limit stipulated by the parties; or (viii) the award violated principles of due process, equal treatment of the parties, impartiality of the arbitrator and autonomy of the decision.

Parties may challenge an arbitral award on the aforementioned grounds by bringing such challenge before Brazilian courts within 90 days from the date of notification of the award.

11.2 Excluding/Expanding the Scope of Appeal

Can parties agree to exclude or expand the scope of appeal or challenge under the national law?

In most countries in Latin America, parties cannot agree to exclude or expand the scope of appeal. However, in certain instances, particularly when dealing with international arbitration, parties may modify the scope of appeal. In Peru, for example, the parties can agree to exclude challenges of an arbitral award, but they may not agree to expand the scope of appeal. Brazilian law does not allow for either exclusion or expansion of the scope of appeal, as awards may only be challenged according to a specific article of Brazil's arbitration laws.

11.3 Standard of Judicial Review

What is the standard of judicial review (e.g., deferential or de novo) of the merits of a case (if any)?

Because most cases in Latin America are final and not subject to appeal, there is no standard of judicial review of the merits of a case. Most countries in Latin America allow for challenges to arbitral awards, but the challenges are subject to strict scenarios that are explicitly set out in most of the arbitration laws in each country.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

Has Latin America signed and/or ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (with any reservations) or any similar enforcement conventions?

By 2003, the entire region of Latin America had signed and ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While countries such as Peru, Brazil, and Bolivia have all signed without any reservations, Ecuador ratified the Convention with the reservation that the laws of Ecuador would apply in determining what constitutes commercial matters.

12.2 Enforcement Procedure

What are the procedures and standards for enforcing an award in Latin America? Will an award that has been set aside by the courts in the seat of arbitration be enforced in Latin America? To what extent may a state or state entity successfully raise a defense of sovereign immunity at the enforcement stage?

Because the entirety of Latin America is a party to the New York Convention, this governs the recognition and enforcement of foreign arbitral awards. Article IV of the Convention states that the party seeking enforcement of a foreign award must provide the court with the arbitral award and the arbitration agreement. The party against whom enforcement is sought may object by providing evidence of one of the grounds listed for refusal of enforcement in Article V(1). The court can, on its own, refuse to enforce the arbitral award for public policy reasons.

Article VI of the New York Convention provides that when an award is subject to an action for setting aside in the country it is made, the foreign court can adjourn its decision on the enforcement of the award and require the other party to give security.

Some Latin American countries do not permit the state or state entities to raise a defense of sovereign immunity at the enforcement stage of an arbitral proceeding. The Peruvian Arbitration Act addresses this explicitly and states that in cases of international arbitration to which the state or a state-owned entity is a party, the state cannot invoke immunity to avoid its obligations under the arbitration agreement. Likewise, Mexico typically complies with arbitral awards rendered against it due to Mexico's high deference to arbitration, although assets of the Mexican government are not subject to attachment by courts.

12.3 Approach of the Courts

What is the general approach of the courts toward the recognition and enforcement of arbitration awards (including the standard for refusing enforcement on public policy grounds)? By which standards (if any) do domestic courts refuse to enforce foreign arbitral awards on public policy grounds (i.e., domestic or international public policy)?

The general approach of the courts in countries in Latin America to recognizing and enforcing arbitration awards sometimes depends on whether the award is a product of domestic or international arbitration. In Peru, the enforcement procedures regarding foreign awards are addressed in Article 74 "Normas aplicables" of the Peruvian Arbitration Act. Article 74 states that foreign awards will be recognized and executed in conformity with the New York Convention, the Inter-American Convention of International Commercial Arbitration, and any other treaty on recognition and enforcement of arbitration awards to which Peru is a signatory. In Brazil, a foreign award must be ratified by the Federal Court of Appeals (STJ). Parties requesting the recognition of an award must provide the original or certified copies of the arbitration agreement and the final award, which must both be in Portuguese. The STJ, applying the rules of the New York Convention, then decides whether the recognize the award. The STJ has typically favored the recognition of foreign arbitration awards.

Domestic courts in Latin America may refuse to enforce foreign arbitral awards on public policy grounds, particularly as it relates to constitutional violations. Violations of due process are among the most important reasons for refusing to enforce a foreign award. Some countries also refuse to enforce awards due to absence of an arbitration agreement, lack of acceptance of arbitration, or issues related to the nature of the dispute (some rights cannot be arbitrated in certain countries).

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