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Latin America Dispute Resolution Update

The Latest Developments in Cross-Border Disputes Involving the US and Latin America

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US Case Law Update

US Supreme Court Decides That Courts, Not Arbitrators, Must Resolve Questions Over Conflicting Contracts

In May 2024, the U.S. Supreme Court issued an important ruling on the "gateway" issue of whether a court or an arbitral tribunal will decide if a claim may be heard in arbitration (*i.e.*, whether the claim is arbitrable), where there are conflicting contracts at issue: one providing for arbitration and the other for court resolution.

Coinbase, Inc. v. Suski, 602 U.S. __ (2024), involved a dispute between a cryptocurrency exchange platform and its users. The users had executed two contracts with Coinbase, Inc.:

1. The Coinbase User Agreement, which contained a delegation clause providing that an arbitrator would decide all disputes concerning arbitrability.
2. The Official Rules for a "Dogecoin" sweepstakes, which included a forum selection clause providing that California courts "shall have sole jurisdiction of any controversies regarding the [sweepstakes] promotion."

In 2022, a group of users filed a class action in the U.S. District Court for the Northern District of California, alleging that the sweepstakes violated various California laws. Coinbase moved to compel arbitration based on the User Agreement's arbitration clause. The district court denied the motion, holding that the Official Rules' forum selection clause governed the dispute. The U.S. Court of Appeals for the Ninth Circuit affirmed that decision.

The U.S. Supreme Court held that, where parties have agreed to two contracts — one sending disputes over the arbitrability of claims to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts — a court (not the arbitrators) must decide which contract governs.

The court relied on the long-standing principle of U.S. law that "[a]rbitration is a matter of contract and consent," and therefore "disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes." Accordingly, the court held that "before either the delegation provision or the forum selection clause can be enforced, a court needs to decide what the parties have agreed to — *i.e.*, which contract controls."

Prior Supreme Court case law was inclined toward having arbitrators deciding questions of arbitrability. We previously discussed certain Supreme Court precedents addressing the question of whether courts or arbitrators should decide the "gateway" question as to whether a dispute must be arbitrated.

US Supreme Court Holds That Courts Must Stay, Rather Than Dismiss, Litigation Pending Arbitration

In *Smith v. Spizzirri*, 601 U.S. __ (2024), the U.S. Supreme Court unanimously ruled that when a district court finds that a claim in a lawsuit is arbitrable and a party has requested a stay of the lawsuit pending arbitration under Section 3 of the Federal Arbitration Act (FAA), the court must stay (rather than dismiss) the lawsuit.

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This dispute involved a lawsuit brought by delivery drivers alleging that an on-demand delivery company violated federal and state employment laws by misclassifying them as independent contractors, failing to pay minimum wages and provide sick leave. The respondents moved to compel arbitration under the FAA.

In March 2023, the Ninth Circuit affirmed the decision of an Arizona district court to dismiss (rather than stay) a lawsuit brought by a group of delivery drivers after the defendant company had successfully moved to compel arbitration.

Section 3 of the FAA provides that where an issue in a lawsuit is arbitrable, the court "shall … stay the trial of the action until such arbitration has been had." Despite this mandatory language, in the Ninth Circuit, there was a line of prior case law holding that where the claims are arbitrable, the lower court is entitled to dismiss, rather than stay, the action.

Relying on these precedents, the Ninth Circuit affirmed the Arizona court's dismissal. However, two circuit judges asked the Supreme Court to weigh in.

The Supreme Court reversed the Ninth Circuit's decision, holding not only that the word "shall" in Section 3 of the FAA makes a stay mandatory but also that the word "stay" cannot be interpreted to mean the "conclusive termination" of the proceedings through dismissal.

The Court noted that allowing for dismissal would "trigger the right to an immediate appeal where Congress sought to forbid such an appeal," and that the decision "comports with the supervisory role that the FAA envisions for the courts," which role the Court noted includes enforcing subpoenas, compelling testimony and "facilitating recovery" on the award.

The Supreme Court's decision benefits parties seeking arbitration, as it limits the ability of litigants to appeal a decision granting a motion to compel arbitration until the resolution of the arbitration, which would delay the arbitration and increase costs.

Federal Appeals Court: 'Professional Familiarity' Does Not Alone Demonstrate 'Evident Partiality' Sufficient To Vacate Arbitration Award

In the last few years, courts around the world have been asked to decide whether to enforce arbitration awards in the face of accusations by the losing party that the arbitrators failed to disclose professional relationships or interactions among themselves, the parties or counsel in the proceedings — nondisclosure of which allegedly affected their ability to render an impartial and nonbiased award.

In the United States, Section 10(a)(2) of the FAA provides a narrow basis for vacating an arbitration award "where there was evident partiality or corruption in the arbitrators." Parties have alleged "evident partiality" to bring challenges based on undisclosed relationships.

The U.S. Court of Appeals for the Eleventh Circuit in 2023 issued a decision in *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Pan*., holding that arbitrators' prior work on other tribunals with the same co-arbitrators and/or counsel did not meet the "evident partiality" standard and amounted to nothing more than "professional familiarity."

In the underlying dispute, an International Chamber of Commerce (ICC) arbitral tribunal seated in Miami issued a preliminary partial award against the nonprofit Grupo Unidos in a construction dispute between a consortium of European construction companies and the Panama Canal Authority following five years of hotly contested arbitration.

After alleging procedural defects in the awards against it and demanding additional post-award disclosures from the arbitrators, Grupo Unidos asked the ICC to disqualify all three arbitrators on the panel due to alleged conflicts stemming from the arbitrators' past service on unrelated tribunals with some of their co-arbitrators or with party counsel.

When the ICC International Court of Arbitration rejected those challenges, Grupo Unidos sought to vacate the award in the U.S. District Court for the Southern District of Florida, based in part on the ground of "evident partiality" under the FAA. The district court denied *vacatur*, reasoning that, because arbitrators are selected for their expertise and experience, and thus overlap frequently with other professionals in their field, none of the arbitrators' contacts at issue rose to the level of "a substantial or close personal relationship to a party or counsel"[1] sufficient to establish evident partiality.

The Court of Appeals affirmed, interpreting the "evident partiality" standard to justify *vacatur* of the award only if "either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."

The court clarified that "[t]he alleged partiality must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.'" Professional familiarity with co-arbitrators and counsel, absent evidence of "an

[1] *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Pan.*, Civil Action No. 20-24867-Civ-Scola, 2021 WL 5834296, at *4 (S.D. Fla. Dec. 9, 2021), *aff'd*, 78 F.4th 1252 (11th Cir. 2023).

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inappropriately close association between arbitrator and counsel," was insufficient to establish evident partiality.

Nevertheless, *Grupo Unidos* left open the possibility that "professional familiarity" can demonstrate evident partiality where it rises to a "close" or "substantial" relationship. Indeed, the court reaffirmed the obligation of arbitrators to disclose information "that might create an impression of possible bias" and noted that undisclosed business relationships and dealings between arbitrators, for example, warrant greater suspicion.

Notably, in *Grupo Unidos*, the record showed that the alleged professional relationships had not been disclosed in the early stages of the arbitration, but that the construction consortium had learned of the alleged grounds for their challenge while the arbitration was pending and raised their concerns to the ICC reasonably quickly thereafter.

U.S. courts typically will deem a party to have waived its objection if it fails to act promptly once it knows (or ought to know) of a conflict, potentially precluding any "evident partiality" challenge.[2] Courts may be reluctant to vacate under the FAA where the party only "discovered" a challenge after the final award was rendered.[3]

Even if unsuccessful, such challenges can greatly delay award enforcement and increase costs for all involved. Ultimately, this remains an area rife for abuse and has led to a growing tendency for arbitrators to overdisclose, thus creating even more grounds for challenges and arbitral delay.

US District Court Denies Partial Class Certification in Helms-Burton Matter

In early 1996, Congress passed legislation known as the Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act),[4] which creates a private right of action in favor of qualifying U.S. plaintiffs whose property was expropriated by the government of Cuba.

Partly in response to pushback from U.S. trade partners such as the European Union and Canada, then-President Bill Clinton exercised his statutory power to suspend Helms Burton's private right of action even before any Helms-Burton claim was capable of being litigated.

The suspension of the right of action continued until May 2019, when then-Secretary of State Mike Pompeo announced that the Trump administration would cease suspending the right of action.

As a result, certain parties that considered themselves eligible to bring Helms-Burton claims began bringing federal district court actions against corporations that, they claimed, had been "trafficking" in confiscated "property" to which those parties allegedly held a "claim." *See*, *e.g.*, *Echevarria v. Expedia, Inc.*, No. 19-22621-CIV, 2024 WL 3429106, at *1 (S.D. Fla. July 16, 2024).

Many of these claims were commenced in the Southern District of Florida, which includes the Miami metropolitan area. Among the plaintiffs who brought Helms-Burton actions in 2019 was Mario Echevarria. Echevarria alleged that his family once owned significant real estate in Cuba, which was confiscated by the Castro government and subsequently developed into tourist hotels.

On the basis that he held a claim to this property, Echevarria sued the hotel booking companies Expedia Group LLC, Hotels.com GP, LLC and Orbitz LLC, alleging that they had facilitated customer reservations at those hotels and thereby "trafficked" in confiscated property for purposes of Section 6082 of the Helms-Burton Act. Echevarria claimed damages, including statutory treble damages, as well as attorney's fees and costs.

Significantly, Echevarria sued not only in his name but also in the name of "similarly situated" plaintiffs. In particular, he moved to certify a class of plaintiffs for purposes of determining core liability issues under Fed. R. Civ. P. 23(c)(4), asserting that these issues are "fundamental to each class member's claim and that the evidence of these liability issues is the same as to all properties." The defendants opposed class certification, arguing that the case was not a suitable vehicle for class actions.

On July 16, 2024, the Southern District of Florida issued a decision denying class certification. As Judge Federico Moreno noted, the core liability issues consisted of "(1) whether all privately owned real property in Cuba on which were built hotels operated by Iberostar …, was confiscated before March 12, 1996; (2) whether Defendants benefitted from the commercial use of the trafficked hotels; (3) whether Defendants' trafficking was knowing and intentional; (4) whether Defendants obtained authorization from Plaintiff and Class Members to sell reservations at the Trafficked Hotels; and (5) whether Defendants compensated Plaintiff and the Class Members" for the reservations.

Against that background, the court held that class certification was not proper because the plaintiff had not met the burden of establishing that the proposed class is "adequately defined and clearly ascertainable."

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[2] *See, e.g.*, *Andros Compania Maritima S.A. v. Marc Rich & Co.*, 579 F.2d 691, 699 n.11, 702 (2d Cir. 1978) (denying *vacatur* motion, emphasizing that the party that discovered arbitrator conflict "could have [discovered those facts] just as easily before or during the arbitration rather than after it lost its case").

[3] *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) (*en banc*).

[4] We previously discussed lawsuits commenced under the Helms-Burton Act in our May 2020 and October 2019 issues.

The court also questioned whether the Fed. R. Civ. P. 23(a) requirements had been met. It noted that the plaintiff did not "sufficiently connect the dots to show there are numerous U.S. nationals who have valid claims based on the trafficking of Iberostar Hotels." It then analyzed each of the core liability issues proposed by the plaintiff and found that they were either too individualized as to undermine commonality or not central enough to constitute valid issues.

The court found it would not be appropriate to certify class treatment of particular issues (as may be done under Fed. R. Civ. P. 23(c)(4)). It held that "individual issues of ownership predominate over common liability issues … [and that] this individual inquiry will predominate even in an issues class." Moreover, the court held that the plaintiff had not shown that a class action would be superior to other methods of adjudicating the controversy.

This is the first decision concerning class certification under the Helms-Burton Act. Its impact can best be measured by considering what would have happened if class certification had been granted: There may well have been a surge of activity among putative class plaintiffs seeking to collect claims on behalf of groups of alleged victims of Castro-era asset confiscation.

As things stand, with the denial of class certification, such claims are less likely to be made. The denial further suggests the Act — which requires that plaintiffs indicate their particular connection with confiscated property in Cuba — is not necessarily an ideal vehicle for class claims.

Numerous individual Helms-Burton cases remain pending in the Southern District of Florida and beyond. Judicial decisions over the next few years will reveal the full extent of potential liability facing corporate defendants under this statute — as well as the statute's potential pitfalls for plaintiffs.

The *Echevarria* decision on class certification will likely be viewed as among the more important of these decisions.

IBA Modernizes Its Guidelines on Conflicts of Interest in International Arbitration

In February 2024, the International Bar Association (IBA) completed the latest update of its IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines). First adopted in 2004 and subsequently revised in 2014, the IBA Guidelines set forth the most widely used standards governing arbitrator disclosures.

The IBA Guidelines are known for establishing a "traffic-light system" categorizing conflict disclosures into Red, Orange and Green Lists — ranging from the most suspect relationships to everyday, professional contacts that need not be disclosed in any case.

- The Red List identifies waivable and nonwaivable potential conflicts that *must* be disclosed.
- The Orange List identifies potential conflicts that *should* be disclosed but will be considered waived if there is no timely objection.
- The Green List identifies situations that *would not* ordinarily require disclosure.

The IBA modernizes the conflict guidelines every decade to reflect the present reality of the global arbitration community and evolving standards in practice.

Taken together, the 2024 revisions:

- Could help curb belated challenges to partiality.
- Expand the disclosure obligations of parties.
- Capture a wider scope of "relationships" subject to possible disclosure under the Red, Orange and Green Lists.
- Account for an evolution in international legal practice and the expansive organizational structure of many global law firms.
- Flag as a possible conflict arbitrators' concurrent service on a different tribunal alongside counsel or co-arbitrators, or past service as counsel or appointment as expert in a matter involving a party or party affiliate.

These and other changes appear to address a growing concern for the number of post-award challenges alleging a failure to disclose arbitrator relationships. The line between the Orange and Green List categories, however — *i.e.*, the question of which past professional relationships become the subject of scrutiny, and when — continues to generate sustained debate.

Changes to General Standards Governing Disclosure Practices

- Under the revised General Standard 3, an arbitrator's decision to disclose certain facts or circumstances must be driven by the arbitrator's duty to investigate under General Standard 7(d), taking into account all facts and circumstances known to the arbitrator. If the arbitrator finds that a disclosure is necessary, but professional secrecy rules or other professional conduct standard prevent disclosure, the arbitrator should decline the appointment. However, General Standard 3(g) clarifies that an arbitrator's failure to disclose, in and of itself, does not necessarily mean a conflict exists or that a disqualification should ensue.
- Changes made to the commentary to General Standards 2 and 3 clarify that the test for disqualification is objective, while the test for disclosure is subjective — meaning that arbitrators should consider all known facts and circumstances when deciding whether to make a disclosure.
- Under the revised General Standard 4, a party is deemed to waive any potential conflict that is not raised within 30 days of when a party either becomes aware or could have become aware of the potential conflict had a reasonable inquiry been "conducted at the outset or during proceedings."
- General Standard 6 requires arbitrators and parties to consider a wider scope of relevant third parties and organizational structures with potential interest in the dispute when performing their obligations under the IBA Guidelines. For example, reference to an "arbitrator's firm" now include the "law firm or *employer*," and reference to a "party" now include its parent and subsidiary entities, as well as third-party funders and insurers with a "controlling influence" over the party. These are all relationships now possibly subject to arbitrator disclosure, depending on the circumstances. Similarly, when a state or state entity is a party to an arbitration, arbitrators may need to disclose relationships with regional or local authorities, government agencies or state-owned enterprises.
- General Standard 7 expands the obligation of the parties to inform arbitrators of "any person or entity it believes an arbitrator should take into consideration when making disclosures in accordance with General Standard 3," disclosure of which must now also specify the nature of the relationship to the dispute.

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Changes to the Orange List: New Potential Conflicts

- Past (three years) or concurrent appointment of an arbitrator as an expert for a party or affiliate in a matter, or appointment on more than three occasions by counsel or law firm.
- Past (three years) service as counsel in a matter involving a party or affiliate.
- Past (three years) assistance to counsel or law firm in mock trial or hearing preparations in an unrelated matter, on two or more occasions.
- Concurrent service on a different tribunal alongside counsel or co-arbitrators.
- Instructing the expert(s) in another matter, when acting as counsel. (Note that "contacts" between the arbitrator — acting as arbitrator — and an expert in another matter fall under the Green List.)
- Public advocacy for a position on the case via social media or online professional networking platform.

Changes to the Green List: New Situations Not Requiring Disclosure

- Arbitrator acting in another matter heard testimony from an expert appearing in the current proceedings

Reform in Mexico: What Comes Next?

Mexico's energy sector has experienced significant turbulence over the past decade, with a succession of legal reforms that alternately favored or hindered private energy producers and renewable projects, reflecting the shifting priorities of successive governments.

Following the inauguration of a new president on October 1, 2024, uncertainty lingers as to the future direction of energy policy.

Background

In 2013, then-President Enrique Peña Nieto succeeded where previous Mexican presidents had failed in overhauling the energy sector through constitutional reforms, which both gave the private sector a larger role and favored renewable energy projects.

In 2018, then-President Andrés Manuel López Obrador enacted a new set of changes to the Electricity Industry Law that sought to undo Peña Nieto's, by bolstering the state-owned power utility, CFE (Comisión Federal de Electricidad), over private energy producers.

Then-President López Obrador's reform was, however, immediately met with court challenges. In February 2024, Mexico's Supreme Court ultimately declared certain aspects of his reform unconstitutional, including the priority granted to the CFE over private enterprises. Further, as a result of a court order, the Ministry of Energy revoked two decrees from 2019 that had modified the operating rules for Clean Energy Certificates (CEL) and made them virtually worthless.

In the wake of this instability:

- Foreign direct investment in the energy sector during the first five years of then-President López Obrador's administration was 30% below the levels recorded in the preceding administration, according to official statistics from the Secretariat of Economy.[5]
- The Mexican Wind Energy Association noted that the lack of permits and the insufficient transmission infrastructure capacity in Mexico has led to 30 wind farms with 5,000 megawatts being unable to operate, despite the currently reported shortfall in supply. Halted investments are worth an estimated US$10 billion.[6]
- Moody's reported that Mexico faces high energy prices due to a shortage of new projects and growing demand. The lack of a favorable policy framework has slowed the development of new projects, leading to a significant increase in electricity prices.[7]

[5] "FDI in Energy Falls 30% With Q4," CE Noticias Financieras (May 16, 2024).

[6] "Stopped Investments in Wind Power Generation Sector Total $10 Billion Dollars: AMDEE," CE Noticias Financieras (May 27, 2024).

[7] "Mexico Needs Clear Energy Plan: Moody's," Mexico Business News (May 27, 2024).

A New Administration

During her campaign, President Claudia Sheinbaum announced a plan to invest US$13.6 billion in energy generation through 2030. The proposal included investments in wind and solar power, as well as the modernization of five hydroelectric plants. While this has been reported as a break with then-President López Obrador's petroleum-centric energy policies, the plan also contains funding for new traditional fossil fuel-based power generation plants.

President Sheinbaum has also said she would develop a National Energy Plan, with a 25-year horizon, to encourage investment in the electricity sector with a "balanced" participation between state and private investment, focused on the development of renewable resources and the promotion of electromobility.

Speaking soon after her inauguration, President Sheinbaum pledged to boost renewable energy production to make up 45% of the country's power generation by 2030 and to continue support for the state's energy companies. It remains to be seen whether President Sheinbaum's plans will be impacted by the lingering influence of the López Obrador administration.

A New Judiciary

In September 2024, after the ruling coalition secured a supermajority in the lower house of Congress, President López Obrador's sweeping judicial overhaul took effect. The reform will convert Mexico's judiciary — from the Supreme Court to district circuit courts — to elected positions as opposed to appointed positions, impacting more than 7,000 judicial posts.

Mexican voters will begin to cast their ballots for new judges as early as June 2025, which will likely impact at least half of Mexico's judicial posts.

The reform marked a major victory for President López Obrador just weeks before leaving office. While he argued that the overhaul would help rid the state of corrupt judges, critics of the bill argued that the reform would lead to the election of inexperienced judges, decrease political independence and undermine investor confidence. The judicial reform was one of several that President López Obrador pushed for during his final months in office.

President Sheinbaum had voiced support for the judicial reform before taking office. It is unclear whether she will attempt to pass new versions of former President López Obrador's energy reforms — which could succeed under the newly constituted judiciary bodies — or if instead, she will set a new stage for a more investor-friendly Mexico.

In Insolvency Proceedings, a Colombian Oil Company Obtains a Stake in Its Counterparty's Parent Company but Loses Its Billion-Dollar Arbitral Award

In June 2023, an ICC arbitration tribunal awarded over $1 billion in damages to Colombian state-owned entity Refinería de Cartagena S.A.S. (Reficar) in its contractual dispute against Colombian, Dutch and U.K. entities collectively referred to as Chicago Bridge & Iron Company (CB&I).[8]

The dispute arose from one of the largest industrial projects in Latin America, in which Reficar contracted with CB&I to modernize an oil refinery. Among other things, the tribunal found that CB&I breached its cost and schedule control commitments as well as its defects correction obligations under an engineering, procurement and construction (EPC) contract.

In September 2023, the parent company of the CB&I entities, McDermott International, Ltd. (McDermott), announced that it would initiate restructuring proceedings in the U.K. and Netherlands in an effort to discharge the ICC award debt.[9]

Reficar opposed the restructuring plans. Because McDermott is headquartered in Texas, Reficar strategically deployed an application pursuant to the U.S. statute 28 U.S.C. Section 1782, which allows parties to obtain discovery from U.S. parties for use in foreign proceedings.

Shortly after McDermott's announcement, Reficar petitioned the U.S. District Court for the Southern District of Texas to take document and deposition discovery from McDermott, seeking information relating to CB&I's worldwide assets.[10] In November 2023, Reficar filed a similar petition in the U.S. District Court for the Southern District of New York to take discovery from a secured creditor of McDermott that supported the restructuring.[11]

Meanwhile, CB&I proceeded with its restructuring proceedings in the U.K. and the Netherlands, which ultimately rendered the Section 1782 petitions moot.[12] On February 27, 2024, after a six-day trial, the Chancery Division of the U.K. High Court approved CB&I's restructuring plan over Reficar's objections.[13]

Under the approved plan, Reficar received a 19.9% stake in McDermott as well as a small cash payment, contingent on CB&I meeting certain EBITDA (earnings before interest, taxes, depreciation and amortization) milestones. Its ICC award debt was extinguished entirely.

Before the U.K. High Court, Reficar presented an expert report contending that extinguishing the ICC award would amount to denying recognition of an arbitral award in violation of the New York Convention. At trial, however, Reficar's counsel did not press the point, and the court dismissed the issue, noting that the report had been premised on an earlier iteration of the restructuring plan under which McDermott's "equity [would remain] unimpaired whereas Reficar, as the Arbitration award creditor, was having its debt released."

On March 21, 2024, Reficar's parent announced that CB&I's restructuring plan was also approved by the Dutch court, on substantially identical terms.[14]

This resolution represents a noteworthy example of an outcome in a situation where a party to arbitration proceedings is or also becomes subject to insolvency proceedings in one or more jurisdictions. The collective nature of insolvency proceedings (where the interests of individual creditors must give way to the collective benefit of the majority) stands in stark contrast to arbitration, and the tensions between these two systems continues to give rise to a number of interesting decisions.

[8] *Refinería de Cartagena S.A.S. v. Chicago Bridge & Iron Company NV, CB&I UK Limited and CB&I Colombiana SA*, ICC Case No. 21747/RD/MK/PDP, Final Award, ¶ 2500 (June 2, 2023).

[9] *In re Refinería de Cartagena S.A.S.*, 2024 WL 95056, at *3 (S.D.N.Y. Jan. 8, 2024) (citing McDermott Sep. 8, 2023, press release).

[10] Refinería de Cartagena S.A.S.'s Memorandum of Law in Support of *Ex Parte* Petition for Discovery in Aid of Foreign Proceedings Pursuant to 28 U.S.C. § 1782, No. 4:23-cv-3607 (S.D. Tex., Sep. 22, 2023).

[11] *In re Refinería de Cartagena S.A.S.*, 2024 WL 95056, at *1–3.

[12] The New York petition was granted in part in January 2024. *Id.* The Texas petition never reached final resolution.

[13] *In the Matter of CB&I UK Ltd*, [2024] EWHC 398 (Ch), Case No: CR-2023-005266, ¶ 1 (U.K. High Court (Chancery), Feb. 27, 2024).

[14] *See* Ecopetrol March 21, 2024, Market Disclosure; *see also in the Matter of CB&I UK Ltd*, High Court (Chancery), Case No: CR-2023-005266, ¶ 4 (explaining that the restructuring plans pending before the U.K. and Dutch courts are "inter-dependent, so that there needs to be approval of both for each Plan to take effect").

Arbitral Institutions Discuss Integration of Artificial Intelligence

The rapid evolution of artificial intelligence (AI) is prompting global discussions on how to regulate the technology. The Silicon Valley Arbitration & Mediation Center (SVAMC) and the American Arbitration Association - International Centre for Dispute Resolution (AAA-ICDR) have begun to tackle the integration of AI and arbitration.

In April 2024, the SVAMC published its Guidelines on the Use of Artificial Intelligence in Arbitration, touching on the limitations and risks of AI application. One chapter of the guidelines is directed at parties and party representatives, and focuses on the duty of competence in the use of AI and integrity of the proceedings. Guideline 2, for example, requires participants in international arbitration to "ensur[e] their use of AI tools is consistent with their obligations to safeguard confidential information."

Many publicly available AI tools do not maintain confidentiality when they record and store the users' data. Guideline 4 makes parties and party representatives responsible for any inaccuracies submitted in the arbitration as a result of the use of an AI tool and affirmatively requires parties to review the "output of any AI tool used to prepare submissions to verify it is accurate from a factual and legal standpoint."

Another chapter is tailored for arbitrators and covers decision-making responsibilities, respect for due process, and protection and disclosure of records. In particular, Guideline 6 prohibits arbitrators from delegating any part of their mandate and states that "[t]he use of AI tools by arbitrators shall not replace their independent analysis of the facts, the law, and the evidence."

The official commentary to the guidelines notes that the guidelines do not actually prevent arbitrators from using AI tools but rather warns that those tools "must not replace the human judgement, discretion, responsibility, and accountability inherent in an arbitrator's role."

In addition, the AAA-ICDR published commentary in November 2023 on how six principles — competence, confidentiality, advocacy, impartiality, independence and process improvement — support the use of AI in alternative dispute resolution. The commentary noted that "[s]ome principles may limit the uses of third-party AI tools," while "competence and other duties may equally require using AI and empirical frameworks."

For example, the first principle — competence — "requires legal professionals, arbitrators, and mediators to ensure they are proficient with AI technologies and understand the risks, benefits, usages, and ethical considerations." The AAA-ICDR continues to work on initiatives to apply AI in arbitration, including rolling out an AI-powered transcription service earlier this year.

Generative and predictive AI technologies are poised to shape the future of international arbitration. We expect that arbitral institutions and organizations will continue to consider ways to provide guidance and structure regarding the incorporation of generative and predictive AI technologies into arbitration.

ICC Releases 2023 Arbitration Statistics

On June 24, 2024, the ICC published its yearly statistical report on its 2023 arbitration and alternative dispute resolution activities, a landmark year for the ICC as it celebrated the centenary of its International Court of Arbitration (ICA).

The ICC once again led in the management of international commercial disputes. There was a 25% increase in the number of new arbitration cases filed in 2023 (890, including 20 cases where it acted as appointing authority) making 2023 the third-busiest year in the history of the Paris-based institution. Since 1923 and the establishment of the ICA, the ICC has administered more than 28,000 cases.

Other highlights include:

- The aggregate amount in disputes in new cases and for the total caseload pending at year-end amounted, respectively, to US$53 billion and US$255 billion in 2023.
- The average amount in dispute per case significantly diminished in comparison with 2022, from US$154 million that year to US$65 million in 2023. This could be explained by the record number of new cases administered under the ICC Expedited Procedure Provisions (189), a procedure with a discounted scale for arbitrator fees that provides for a streamlined arbitration that concludes with a final award within six months. The procedure automatically applies when the amount in dispute does not exceed US$2 million for arbitration agreements concluded on or after March 1, 2017, and US$3 million for arbitration agreements concluded on or after January 1, 2021.

Parties' Origins

Among the 2,389 parties from 141 countries involved in ICC arbitrations, parties from North America, Latin America and the Caribbeans accounted for 27.4% of the overall number of parties, securing the Americas as the second-largest region in terms of number of parties represented in ICC arbitrations, after Europe (40.4%) but ahead of Asia (24.4%) and Africa (7.8%).

In particular, the U.S., Mexico and Brazil were three of the six most represented nationalities in ICC arbitrations:

- U.S.: 259 parties
- Mexico: 111 parties (a 110% increase from 2022)
- Brazil: 80 parties

The three countries were also among the top 10 represented countries with regard to:

- The arbitrators' nationality (led by U.K. and French nationals).
- The applicable substantive law (led by the laws of England and Wales and Switzerland).
- The place of arbitration (France).

Languages Used

Among the 520 awards rendered in 2023, Spanish and Portuguese were among the four most used languages, together with English (which remains the dominant language, with 77% of awards drafted in English) and French (the use of which increased by 40% from 2022).

Industry Representation

Construction/engineering and energy, traditionally leading sectors in ICC arbitrations, continued to be the industries that generated the largest number of ICC cases in 2023, representing roughly half of the new caseload.

Other relevant sectors included:

- Industrial equipment and services.
- Transportation.
- Health, pharmaceuticals and cosmetics.
- Metal and raw materials.
- General trade and distribution.
- Telecoms and specialized technologies.
- Business services, financing and insurance.
- Entertainment.

Gender Diversity in Arbitrators

The ICC's ongoing gender diversity efforts in the realm of arbitrator selection are proving effective. In 2023, women arbitrators accounted for 30% of all confirmations and appointments at the ICC, a steady increase from 2022 (28.6%) and 2021 (24.3%).

While 41% of the appointments made by the ICA were of women arbitrators, leading the way in this regard, nominations by co-arbitrators and parties remained at lower levels, at 31% and 24%, respectively. It is worth noting, however, that those numbers are higher than in 2019, when they were 20% and 15%, respectively.

The 269 women confirmed and appointed in 2023 originated from 66 jurisdictions, which constitutes a record number of women arbitrators and countries represented in ICC arbitrations in the 100-year history of the ICA.

See the full ICC report for more details and data.

Latin America Dispute Resolution Update

Contacts

Julie Bédard
Partner / New York / São Paulo
212.735.3236
julie.bedard@skadden.com

John L. Gardiner
Partner / New York
212.735.2442
john.gardiner@skadden.com

Gregory A. Litt
Partner / New York
212.735.2159
greg.litt@skadden.com

Timothy G. Nelson
Partner / New York
212.735.2193
timothy.g.nelson@skadden.com

Jennifer Permesly
Partner / New York
212.735.3723
jennifer.permesly@skadden.com

Sharmistha Chakrabarti
Counsel / New York
212.735.2018
sharmistha.chakrabarti@skadden.com

Betsy A. Hellmann
Counsel / New York
212.735.2590
betsy.hellmann@skadden.com

Associate **Amanda Raymond Kalantirsky** contributed to this newsletter.