

## What covid-19 means for Latin American arbitration

23 April 2020



Aníbal Sabater

Covid-19 is creating challenges and uncertainty for international arbitration practitioners across Latin America, but it is also generating opportunities, says Aníbal Sabater, a partner at Chaffetz Lindsey LLP. What follows is an early attempt at analysis and prediction.

On 20 March, Luiz Enrique Mandetta, then Brazil's health minister, estimated that "by the end of April, [the Brazilian] health system will collapse," with contagions across Brazil and the rest of Latin America continuing for months.

For arbitration purposes, this will mean more delays and extension of deadlines in existing cases as participants fall sick or are confined as a result of prolonged lockdowns and social distancing measures. Expect also a continued push for remote hearings and deliberations, whenever feasible, as well as the postponement of site inspections, except for those few that, somewhat creatively, may be handled

electronically (if arbitral tribunals are willing to experience a site visit through their screens).

Generally, the new context will reward already cohesive and technologically advanced law firms (who will be able to work remotely for an extended period of time) over old school, more hierarchical peers.

Arbitral institutions, for their part, may initially see a drop in the number of new cases (as non-critical filings may be postponed until conditions improve), but this will likely be offset by the mid- and long-term uptick in cases predicted below. Two types of arbitration institutions, however, will suffer heavily.

First, among the constellation of regional arbitration centres across the Americas, several remain small and underfunded. These may lack the ability to operate during an extended lockdown – and see key users decamp for the larger international arbitration services providers.

Second, institutions whose business model relies heavily on running hearing centres are in for a dramatic drop in business. Some of this may be compensated in small part by offering digital hearing platforms at a charge, but if they do so, centres will be running into strong competition, as frequent users may acquire those platforms directly from software developers, without the need to pay an intermediary.

The crisis will also be a double-edged sword for Latin American cities such as Bogotá, Panama City, São Paulo and Santiago, currently on a quest to become major international arbitration seats. Users will surely keep an eye on the availability of counsel, arbitrators and courts in those cities, and their ability to timely address cases and sustain a vibrant and cohesive arbitration culture. Depending on how they emerge from the test by comparison with overseas locations, we may see a flourishing or a decay of the Latin American arbitration seat.

### **Economic crisis...**

On the coattails of the pandemic, Latin America's economy has gone from recession to outright crisis in a matter of days. No country or sector has been immune to the closure of business activities. Airline passenger traffic in Latin America, for instance, was down by at least 85% in March 2020. And oil-dependent economies such as

Mexico, Ecuador and Venezuela have been severely afflicted by the drop in crude prices that followed the outbreak of the pandemic.

The consequences are easy to predict: rampant unemployment, force majeure declarations, disruption of supply chains, lack of liquidity, lack of funding, cancellation of projects, etc. While capital markets and project finance practices are likely to hit pause for several months, an uptick in commercial arbitration cases can be safely expected, especially over transactions involving countries with major financial markets (Mexico and Brazil) or ongoing infrastructure projects (Peru and Colombia). As margins slim down or are wiped out, companies will display less tolerance for counterparty misbehaviour and more zeal in the prosecution of claims.

The expected commercial arbitration cases may well be unprecedented because of their sheer number, but not necessarily because of the novel legal issues they will present. For decades, arbitral tribunals have been disposing of project disruption claims and applying well-tested contractual provisions and legal principles to address them. Each case may present specific features, but there is a wealth of communal experience and knowledge that participants in the new cases will be able to tap into, which makes a “revolution in the law” unlikely. Where something closer to a revolution may take place is in the field of investment arbitration.

### **...compounded with political crisis**

Before covid-19, the political context in Latin America was already fraught. Bolivia and Chile were immersed in constitutional crises; there were sovereign default rumours in Argentina and Ecuador; Colombia, Ecuador, and Nicaragua were experiencing serious social unrest; liberal, pro-market policies had made a comeback in Ecuador, while Argentina and Mexico were returning to protectionist agendas; Brazil was still reeling from corruption scandals; Peru had become unstable; and Venezuela remained chaotic. None of those challenges has been resolved, and while the pandemic may relegate some of them temporarily, it will not be a source of stability. Be ready for extended periods of political – and also legal – uncertainty across jurisdictions.

Argentina showed to the world in 2002 what a catalyst for investment arbitration claims an economic and political crisis can be. Once a global pandemic is added to the mix, a new wave of investment claims seems likely, especially in light of recent governmental measures.

With globalisation suspended, each government has decided how to address the pandemic. On 14 March, Guatemala banned most flights to and from North America, stranding thousands of upset passengers. On 18 March, El Salvador announced a freeze on mortgage and credit card payments and a deferral of utility payments, which drew the ire of financial institutions and foreign investors. And on 7 April, Peru's officials warned that a congressional act suspending all road toll payments opened the door to ICSID claims. Examples will surely multiply in weeks to come.

The effects of covid-19 on Latin American investment arbitrations can already be felt, as Guatemala just asserted in federal court in Washington, DC, that the enforcement of the award in *TECO* (ICSID case no. ARB/10/23) should be stayed as the country cannot be deprived of resources necessary to fight the virus.

But we will start to appreciate the real impact in the mid- to long-term. Investors will first need to calibrate the legality, duration and effect of the measures adopted by governments to address covid-19; and even if investors settle on bringing treaty claims, they will need to exhaust cooling-off periods. Sooner or later, however, claims will be filed testing the system in unprecedented ways. Among other things, they will require tribunals to revisit the limits on the lawful use of state powers in times of crisis and the state of necessity defence.

These two topics gave rise to a number of awards in the limited context of the 2002 Argentinean crisis. At the time, claims focused primarily on Argentina's tariff and pricing measures affecting financial institutions and energy and utility companies. This time, however, an array of nations, measures, and industries may come under scrutiny. Also, unlike in previous geographically limited crises, everyone participating in the new set of arbitrations will have been directly affected by covid-19. Without limitation, this will bring new perspectives to the debate and a significant layer of nuance to arbitrator selection processes.

The anticipated wave of claims may also lead to a re-examination of investment treaties (especially in order to develop more precise standards for times of crisis) and renewed calls for an investment court where claims can be more consistently disposed of than in the presently decentralised arbitration system.

To sum up, our practice is in flux down to its fundamentals. Some of the current changes are likely transitory (it is hard to imagine that the number of virtual hearings

will remain as high post-covid-19 as it is now); but others will endure. These include, one, the realisation that arbitration can be kept going with less in-person activity; two, changes among key arbitration players at all levels; and three, most likely the emergence of a class of covid-19 case specialists.