The Arbitration Review of the Americas

2011

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Contents

Introduction

Introduction

Adriana Braghetta

President of CBAr

Overviews

Arbitration Under Expedited Discovery Procedures: What Are the Sacrifices?

Joseph E Neuhaus, James H. Carter (not use)

Sullivan & Cromwell LLP

Valuation of "Start-Up" Oil and Gas and Mining Projects

Laura Hardin, Chris Milburn

FTI Consulting

Obtaining Evidence for Use in International Arbitrations Through United States Courts

Catherine M Amirfar, Donald Francis Donovan, David W Rivkin

Debevoise & Plimpton

Country chapters

Argentina

Guido Barbarosch, Pablo F Richards

Richards, Cardinal, Tützer, Zabala & Zaeffere

Bermuda

Jeffrey Elkinson

Conyers

Bolivia

Andrés Moreno Gutierrez

Moreno Baldivieso Estudio de Abogados

Brazil

Arnoldo Wald

Escritório de Advocacia Arnoldo Wald

Canada

Markus Koehnen, Robert Wisner

McMillan LLP

Ecuador

Rodrigo Jijón-Letort, Javier Robalino Orellana

Pérez Bustamante & Ponce

Venezuela

Fernando Peláez Pier, José Gregorio Torrealba

Hoet Peláez Castillo & Duque Caracas

Introduction

Adriana Braghetta
President of CBAr

ICCA Rio 2010 showcased Brazil's progress in arbitration as well as in its economy. The conference gave Brazil the opportunity to represent Latin America's growing arbitration market. The arbitration world was shown not only the magnificent beauty of Rio's beaches but also the evolution of Latin American arbitration.

Participation in this year's congress surpassed all previous events: more than 800 delegates, of which 600 were from abroad. The figures speak for themselves and highlight the fact that all eyes are turning to Latin America. For a region that is new in the international arbitration realm, it has seen a resounding success.

In the first decade of the 21st century, Latin America has overcome the mistrust of the past and is now able to give arbitration a warm reception.

Along with the growth of the Latin American market and the increasingly pro-arbitration approach of Latin American courts, the region's emerging markets are facing challenges as they gradually adjust to the new global business climate.

The growth of the Latin American market and the increasingly pro-arbitration approach of Latin American courts

The 2009 ICC data1 show significant and constant growth in the Latin American market. Approximately 12 per cent of the 817 new cases filed in 2009 involved the region.

The Latin American cases deal with the following industries: energy, finance, construction, transportation, telecommunications, entertainment, chemicals, distribution services and others. Regarding the place of arbitration, São Paulo was chosen in 18 per cent of the cases, Paris in 11 per cent, New York in 11 per cent, Mexico City in 9 per cent, London in 9 per cent, Buenos Aires in 6 per cent, Santiago in 5 per cent, Rio de Janeiro in 5 per cent and Montevideo also in 5 per cent.2 As to the nationality of the parties, more than 50 per cent were from Brazil,3 followed by Argentina and Mexico. In more than 30 per cent of the cases Brazilian law was applied, followed by Argentinean and Mexican law. Of the cases, 47 per cent were conducted in English, 27 per cent in Spanish and 22 per cent in Portuguese.

Arbitration in Latin America has recently made strides in the field of cooperation between the arbitral tribunals and the judiciary. 'Arbitration friendly' decisions, so important for the development of arbitration and economic welfare, are more and more common. Recent news reports that decisions have stressed 'the eagerness of more engaged Brazilian judges to enforce arbitration agreements and respect the jurisdiction of arbitral tribunals'.4 Such evolution is essentially in favour of arbitration, and we can only hope to strengthen the cooperation between the judiciary and arbitral tribunals. Improvement of case law on important matters relating to arbitration is a new trend in the region and is hopefully establishing a uniform point of view promoting a very positive approach to arbitration.

Such a trend is clearly visible. In Brazil alone, the Court of Appeals for the states of Bahia5 and Rio,6 for example, have aligned themselves with the Supreme Court's pro-arbitration position.

In FAT Ferroâtlantica SL v Zeus Mineração Ltda and others, the parties had entered into a joint venture agreement for the research and exploitation of minerals in Brazil. They had also created a company incorporated in Brazil, FAT Brasil, to do the research and the exploitation. The joint venture agreement included an arbitration clause, which indicated that the International Chamber of Commerce (ICC) Rules of Arbitration would apply to disagreements, whereas the articles of incorporation of FAT Brasil stated that the Rules of Arbitration of the Brazil-Canada Chamber of Commerce should be applied to any arbitration. In both agreements, the place of any arbitration was to be São Paulo, Brazil. The Court of Appeal of Bahia addressed the issue of whether the presence of conflicting arbitration clauses in contracts belonging to a single economic transaction justifies judicial intervention at the outset of the arbitration. The Court of Appeal held that, since there is an arbitration agreement, such matters are to be handled by the arbitrators, not by the courts. Along with this decision, the court vacated an injunction intended to stay an arbitration proceeding.
The Court of Appeal of Rio de Janeiro faced the issue of the timing and admissibility of urgent measures before Brazilian courts. In Durval Biancalana da Silva e outros v DTP Participações e Investimentos SA and others, the dispute arose from a quota purchase agreement containing an institutional arbitration clause providing for the administration by CCBC - Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canada. The Court of Appeals rendered a decision interpreting the constitution of the arbitral tribunal as being the commencement of the arbitral proceedings. Such ruling abides by the 'competence-competence' principle, as well as the generally accepted moment of the constitution of the arbitral tribunal and follows the rules enclosed in the national arbitration statute, applicable both to domestic and international arbitration.

The CBAR - Brazilian arbitration Committee together with FGV - Fundação Getúlio Vargas have conducted relevant research on the compliance and enforcement of Brazilian arbitration law. 'Based on the premise that the institution of arbitration cannot survive without proper support and encouragement of the Judiciary, being therefore indispensable to have a cooperative relationship between arbitrators and judges, the question that must be asked and which prompted the undertaking of this research includes the following: How have Brazilian courts applied Law No. 9.307/1996? Have they given due support to the institute?'.7 The conclusion of the research is fairly positive, confirming a correct application of Brazilian arbitration law.8

In Mexico, the last twelve months have witnessed an important legal development in arbitration.9 The improvements are encouraging for their content and also because they show a very favourable attitude from the judiciary. Four important decisions should be highlighted: one Supreme Court decision from 2009 that provided detailed concepts of different modalities of arbitration, including voluntary arbitration;10 another Supreme Court decision that, although not directly discussing arbitration, ruled that it is wrong to open the possibility to file amparos against private decisions;11 a third decision that deeply considered the possibility of an ex aequo et bono arbitration and its nature;12 and a decision stating that the lack of motivation does not per se violate public order.13
In Colombia, one decision at least is worth mentioning:14 the appeal (recurso extraordinário) filed by Industria Y Distribuidora Indistri SA against SAP Andina y Del Caribe CA en Colombia.15 In this case, the claimant requested that an ICDR award be set aside. The judges ruled that the parties are free to choose the applicable law, which was Colombian law, and according to the applicable rules of arbitration and Colombian law, the award is final and binding. The decision also expressly mentioned provisions from the New York and the

Panama Convention.

In 2008, the Peruvian government enacted a particularly promising new arbitration law.16 In its modernity and incorporation of the majority of international arbitration principles, it embodies the promise of a proper application of arbitration rules.

A report on important news would not be complete without a comment about the recent annulment decisions in investment arbitration involving Argentina. Two cases are to be mentioned:17 Sempra Energy International v Argentine Republic (ICSID Case No. ARB/02/16), Decision on Annulment of 29 June 2010 (C Söderlund, President, DAO.Edward, AJ Jacovides). The Sempra ad-hoc committee annulled the award in its entirety based on the 'manifest excess of powers (article 52(1)(b) of the Convention) owing to the failure of the Arbitral Tribunal to apply Article XI of the BIT between the [US] and [Argentina]'; and Enron Creditors Recovery Corp and Ponderosa Assets LP v Argentine Republic (ICSID Case No. ARB/01/3), Decision on Annulment of 20 July 2010 (G Griffith, President, PL Robinson, Per Tresselt). The Enron ad-hoc committee annulled the findings on liability and damages by the tribunal, considering that it had manifestly exceeded its powers (article 52(1)(b) of the Convention) in failing to apply the proper law to the dispute.

Within commercial arbitration, Brazil, Mexico and Chile (indicated twice as a seat by the ICC)18 are becoming important jurisdictions for international arbitration in Latin America (Brazil and Mexico also because of the size of their economies). Although there are some divergent decisions in the region, which also happens in other regions, arbitration has flourished and the future is promising.

Latin America's emerging markets facing challenges

Deep and full comprehension of the arbitration system is yet to be consolidated throughout Latin America, mainly by lower court judges. Latin America's advance has started, highlighted by ICCA Rio's success, and international arbitration proceedings are in constant growth throughout the region.

Emerging markets full of promises and the promotion of international arbitration throughout the region

Emerging markets are all over the news. This is especially true when it comes to its economic recovery, since 'Latin America and the Caribbean is consolidating its recovery from the global economic slowdown, posting higher-than-expected growth in recent months. Mercosur stands out as driving the revival'.8 Brazil is the rising power in the region leading the economy with an expected growth rate of 7.6 per cent, followed by Uruguay at 7 per cent; Paraguay at 7 per cent; Argentina at 6.8 per cent and Peru at 6.7 per cent.9 The tide of capital is really changing and there is now a huge flow of capital being redirected into the emerging markets.19 Recent developments clearly show that Latin America is now looking beyond regional partnerships and, as a response, the world is turning its eyes towards this new driver of economic development for the coming years. British Foreign Secretary William Hague states that: 'Britain is to strike out with a new foreign policy centred on forging improved links with developing nations such as India and Brazil'20 and the The New York Times asserts that 'Economies in Latin America Race Ahead (...) [as countries in the region are] experiencing robust economic growth'.21

Along with a growing economy, Latin America is working on good initiatives to promote arbitration. Among various other initiatives, every year CBAr promotes - and has done so for the past nine consecutive years - international arbitration congresses and seminars in different cities in Brazil.

In Paraguay, for the third consecutive year, Diego P Fernández Arroyo and José Antonio Moreno Rodríguez organised an international arbitration congress22 that involved approximately 1,000 students and lawyers.

Several other initiatives were organised in Argentina, Colombia and Venezuela through arbitration committees and major institutions like ICC, AAA/ICDR, ITA and FIDIC. Chilean and Mexican arbitral institutions are also very proactive.

Challenges to be faced

Arbitration in Latin America is on the right track but the path is full of challenges. Numbers speak for themselves and highlight the countries leading international arbitration development in the region. Latin American arbitrators have also grown in numbers and gained international respect for their knowledge and quality. Such figures are excellent for the future prospects of arbitration in Latin America.

The region has outgrown the initial discussions on arbitration (validity of arbitral clauses, positive and negative effect, freedom to chose law and procedure, etc) and has reached the delicate stage of adolescence. This difficult age requires extra care. One example is the misuse of the courts to intervene in arbitration proceedings based on alleged constitution rights (such as amparos and mandados de segurança).

The wider knowledge of arbitration throughout the country and the region among lawyers, companies, law professors, students and judges is key factor to fostering arbitration and gaining proper support from the judiciary.

About the author

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She received a Law degree (1993), a Masters degree (2000) and a PhD (2008) from the University of São Paulo, Brazil.

Notes

1 Aproximated percentages and information provided by José Ricardo Ferris at the ICC Latin American Committe meeting held in Paris on 24 September 2010.

2 Toronto 3 per cent?; Miami 3 per cent?; Madrid 3 per cent, Zurich 2 per cent and others.

3 In many cases, more than two parties were involved in the same arbitration (multiparty proceeding).

4 Marcel Alberge Ribas, 'Brazilian Courts and Arbitration: Injunction in Review'. http://kluwerarbitrationblog.com/blog/2010/06/29/brazilian-courts-and-arbitration-injunction-in-review/

5 Pedro Maciel, 'Brazilian Court of Appeal Reverses Anti-Arbitration Injunction'. http://kluwerarbitrationblog.com/blog/2010/06/02/brazilian-court-of-appeal-reverses-anti-arbitration-injunction/

6 TJRJ Ap Cível no. 0063229-77.2010.8.19.0001. Rel Des Otávio Rodrigues DJ 12.05.2010, www.tjrj.jus.br/scripts/weblink.mgw?MGWLPN=DIGITAL1A&LAB=CONxWEB&PGM=WEBPCNU88&PORTAL=1&protp

7 Revista Brasileira de Arbitragem, no. 22, April/May/June 2009 (free translation).

8 More information: www.cbar.org.br/bib_pesquisa_fgv_cbar.html.

9 Francisco González de Cossío, "Arbitraje en México: Desarrollos en 2009-2010. Informe

para la Reunión del Grupo Latinoamericano De Arbitraje de la Cámara de Comercio Internacional París, 24 September 2010 (not published yet).

10 In op cit – Registro No. 166502, Novena Época, Primera Sala, Semanario Judicial de la Federación y su Gaceta XXX, Septiembre de 2009, p434. Tesis: 1a. CLXV/2009. Amparo en revisión 131/2009, 27.05.09.

11 In op cit – Amparo en revisión 2219/2009, 19.04. 10. Cóssio mentions the following passage: '... [es] una cuestión de carácter voluntario, ... el particular se somete … [con] carácter contractual, ... voluntariamente me someto, a una cuestión casi arbitral, en la que yo decido someterme a esa jurisdicción, y en la que jamás podría tener sobre estos aspectos el carácter de autoridad que me sancione, porque yo lo determiné con el libre arbitrio de mi voluntad.

... es cierto que el concepto de autoridad para efectos del juicio de amparo, es una institución que ha evolucionado a lo largo del juicio de amparo como lo habíamos señalado desde la ocasión anterior; sin embargo, ... abrir la puerta del juicio de amparo a actos de particulares [sería] ... un retroceso en la evolución del juicio de amparo … si lo abrimos a actos de particulares, en realidad estaríamos cambiando la esencia de nuestro juicio de amparo, cambiando su razón de ser, su naturaleza jurídica en el momento en que lo cambiáramos a una posibilidad de establecer la procedencia de un juicio de amparo contra particulares.'

12 In op cit – Registro No. 166511, Novena Época, Primera Sala Semanario Judicial de la Federación y su Gaceta XXX, Septiembre de 2009, p426, Tesis: 1a. CLXXI/2009. Amparo en revisión 131/2009. 27.05.09.

13 In op cit – Registro No. 166509, Novena Época, Primera Sala, Semanario Judicial de la Federación y su Gaceta XXX, Septiembre de 2009, p428. Tesis: 1a. CLXXIV/2009. Amparo en revisión 131/2009, 27.05.09.

14 We thank Fernando Mantilla-Serrano for selecting that decision.

15 Tribunal Superior Del Distrito Judicial de Bogotá, DC case number 11001220300020100015000, decision rendered on 10 March 2010.

16 www.limaarbitration.net/pdf/DL1071-Version-Oficial.pdf.

17 We thank Diego Brian Gosis for the information given on those two cases.

18 Bulletin de la Cour internationale d'arbitrage de la CCI – Vol. 19/N°1 – 2008, p11

19Economic Survey of Latin America and the Caribbean 2009-2010

www.eclac.org/cgi-bin/getProd.asp?xml=/prensa/noticias/comunicados/4/40264/P40264.xml&xsl=/prensa/tpl-i/p6

www.eclac.org/cgi-bin/getProd.asp?xml=/publicaciones/xml/4/40254/P40254.xml&xsl=/de/tpl-i/p9f.xsl&base=/de/

20 Telegraph online, 26/06/2010, www.telegraph.co.uk/news/newstopics/politics/william-hague/7856758/William-Hague-turns-to-Brazil-and-India-for

21 The New York Times online, 30/07/2010, www.nytimes.com/2010/07/01/world/americas/01peru.html. It is interesting to notice that Venezuela has ratified BITs with several countries in the past two years: one in May of 2008 with Belarus, and, more recently, one each in May and June of 2009 with Vietnam and Russia, respectively (Thanks to information given by Alfredo De Jesús O, Venezuelan Arbitration Committee).

22 Conferencia LatinoAmericana de Arbitraje, www.cedep.org.py/arbitraje.

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Arbitration Under Expedited Discovery Procedures: What Are the Sacrifices?

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Arbitration is sometimes said to be a quicker, simpler, and cheaper resolution to disputes than court litigation. Parties can be surprised, therefore, to find that large commercial arbitration can be every bit as time consuming and costly as litigation. Some commentators have noted that the increasing length of arbitration has pushed many parties back to the courtroom or to settlement, seeking to avoid the lengths and costs of the traditional arbitration process.1

In response to these concerns, numerous arbitral organisations now offer some form of expedited arbitration, which reduces the time limits of the arbitral proceedings and can impose other procedural limitations, as an alternative to traditional arbitration. The American Arbitration Association (AAA) offers expedited arbitration through its Expedited Procedures.2 Expedited proceedings have always been possible3 under the International Chamber of Commerce's article 32 of the Rules of Arbitration.4 In addition, the Stockholm Chamber of Commerce (SCC),5 the London Court of International Arbitration (LCIA),6 the Hong Kong International Arbitration Center (HKIAC),7 the International Institute for Conflict Prevention and Resolution (CPR)8 and the World Intellectual Property Organisation (WIPO)9 all offer some form of expedited arbitration. Although the procedures vary, all shorten the time limits for arbitral proceedings.

The WIPO, SCC and CPR Expedited Arbitration Rules are the most comprehensive of the procedures, creating a stand-alone set of detailed rules governing an expedited arbitration from initiation of the claim through appointment of arbitrator, production of evidence, hearings, and the award. The AAA Procedures are also fairly comprehensive and similarly provide time limits and procedures for every stage in the arbitration, although in somewhat less detail. HKIAC article 38 is significantly less detailed but still provides a limited set of procedures and an overall six-month time limit for the expedited arbitration.

In contrast, the LCIA and ICC articles on expedited arbitration only provide a mechanism for parties in regular arbitration to opt for shorter time limits. ICC article 32 permits parties to reduce time limits for any stage of the arbitration, while LCIA article 9 grants the LCIA Court the authority to abridge or curtail only the time limits for the formation of the arbitral tribunal.

Rapid dispute resolution is often valuable, especially in situations in which any delay can increase the damages suffered by one or both parties. Parties should exercise caution when entering into agreements for expedited procedures, however, and be fully aware of what they are sacrificing. These procedures favour expeditious resolution of the dispute over extensive motion practice, evidentiary inquiries and oral hearings. Because of the restricted scheduling and limited procedures, expedited arbitration is likely to have the most drastic effect on document discovery, which in significant cases can last up to six months or more in standard arbitrations.

As a practical matter, the stricter time limits imposed in expedited proceedings are a barrier to the often relatively extensive discovery to which parties may be accustomed in regular arbitrations and perhaps a complete barrier to discovery in any form. This may not deter parties who foresee the need for rapid resolution of a case to avoid further financial loss through spoilage, change in markets or change in circumstances. For such parties, it may be better that a dispute be settled quickly than that it be settled with precision.10 But while that proposition may appear to be broadly applicable when seen from the comfort of the cozy room in which optimistic parties are drafting a contract, once a dispute arises and has escalated to the point of adversary proceedings, the benefits of swift resolution often come to seem less important than the inconvenience of losing.

Indeed, there is some evidence that the expedited procedures have not garnered many actual users. Almost all of the procedures for expedited arbitration are opt in procedures. Only the AAA and HKIAC expedited procedures apply by default, and then only to claims under a dollar-value threshold.11 The ICC, WIPO, LCIA and SCC all require parties to explicitly express their intent to use expedited procedures either in their arbitration clause or when initiating arbitration.

The AAA has advised us that, although cases filed under the Expedited Procedures make up roughly 50 per cent of all AAA and ICDR commercial filings,12 these procedures are predominantly used in claims under US$75,000 to which the procedures apply by default (and as to which discovery would be limited in any event). Moreover, while hard data is not available, the procedures have rarely been used in large commercial filings, and parties that have previously opted in to the procedures in their arbitration clauses have at least on occasion agreed not to apply the expedited procedures when disputes arose.

It may be that Jan Paulsson was even more than usually prescient when he commented in 1994 that the then-new WIPO Expedited Arbitration Procedures might be heralded by critics only to 'fail at the box office'.13 It appears that the same might be said of expedited procedures generally. In any event, it is worth analysing closely the limitations placed on arbitrations under the various expedited procedures to determine what parties are actually sacrificing.

Characteristics of the procedures

Number of arbitrators, the appointment process and objections thereto Almost all of the procedures limit the number of arbitrators to one14 and simplify or abridge the appointment process, in many cases shortening the periods for party participation in the appointment process.

Upon initiation of an expedited arbitration, the AAA prepares a list of five arbitrators from its commercial arbitrator list. From this list, parties may agree to an arbitrator or, if they cannot agree, strike two names and submit their shortened lists to the AAA, which will make the final

selection.15 Similarly, the CPR, WIPO and SCC Expedited Rules provide a short time limit16 within which parties must agree to an arbitrator or forfeit their choice to the arbitral body to make a unilateral appointment.

Article 9 of the LCIA Rules provides only for shortening the time for the formation of the arbitral tribunal, which otherwise follows the standard formation procedures under the LCIA Arbitration Rules.17 The HKIAC and ICC also use this non-specific shortening to limit the arbitration.18

Parties in expedited arbitrations are also generally limited in the time to object to a proposed arbitrator. Parties have seven days (as opposed to the usual 15) to object to an arbitrator's appointment under the AAA and WIPO rules, and the CPR Expedited Rules. Under the HKIAC, ICC and LCIA rules, the parties' time to object to an appointment will be limited by the undefined shortened time periods that are determined by the parties or the arbitral organisation.

There is much to be said for shortening the periods of time for appointing arbitrators. It often takes four months or more to form a three-person tribunal in a substantial case. It is not easy to vet arbitrator candidates, particularly in an international case, but it is a procedure that can sometimes be expedited. That said, however, a party choosing expedited AAA, WIPO, CPR, HKIAC and SCC procedures in a big case will often give up something very valuable: the opportunity for a three-person tribunal. While some think three-arbitrator tribunals are more likely to compromise than sole arbitrators, in our view a panel of active arbitrators is, in general and all other things being equal, more likely to get it right than a single arbitrator three minds are better than one. Given the virtual absence of appeals on the merits, this is an important safeguard.

Time limits and overall time of arbitration

All of the procedures offer some form of shortened time periods in order to decrease the total time of arbitration. The approach taken varies from detailed limits on almost every stage of the arbitration, to a single overall time limit, to mere discretionary shortening of the various time limits of the arbitration or for the creation of the arbitral tribunal.

Under the AAA Procedures, respondents have the same amount of time 15 days to file a response to a request for arbitration as they do under the regular Commercial Arbitration Rules,19 but are limited to one seven-day extension of that period. Hearings, by default, do not take place for claims under US$10,000 and in other cases in which the parties agree,20 and in those cases the claim will be resolved on the basis of submission of documents. Hearings, if any, shall not exceed one day.21 An award must be made within 14 days of the confirmation of the arbitrator's appointment. Thus, the expedited procedures envision the possibility of an award as soon as 50 days after the submission of the request for arbitration or, if the AAA responds quickly to the request, even sooner.22

The WIPO Expedited Rules permit a similarly truncated schedule. Respondents are required to submit an answer and statement of defence within 20 days (instead of the usual 30 days) of the receipt of the arbitral request, and hearings must be conducted within 30 days of receipt of the answer. (There is no time limit on the beginning of the hearing in the ordinary procedures.) All proceedings must conclude within three months of the submission of the answer or of the establishment of the tribunal, whichever is later, and an award must be made within one month of the close of the proceedings. (Under the ordinary rules, the arbitration should be closed within nine months after the delivery of the statement of defence or the

establishment of the tribunal, whichever occurs later. The award should be made within three months thereafter.) As long as no extensions are permitted, this can result in a hearing in as few as 50 days, or more quickly if the parties agree to shorter time limits for the submission of the answer or the hearing is held promptly. The CPR and SCC approach differs slightly, setting a maximum allowable period for the total time of the arbitration. An award must be made in as short a period as possible but no later than six months from the selection of the tribunal under the CPR rules, and within three months of the date that the claim was transmitted to the arbitrator under the SCC rules. (Under the regular CPR Rules, an award must be made within seven months of the pre-hearing conference, which should take place within two months and 20 days of the service of notice of arbitration. An award must be made within six months of the case being transmitted to the tribunal under the SCC rules.)

The SCC shortens the time for the appointment of the arbitrator to 10 days, but leaves discretion with the tribunal for all other time periods. Once the arbitrator has been appointed, he or she must promptly establish a timetable for the arbitration. The CPR suggests that parties include a time limit for the appointment of arbitrators in their arbitration clause, but does not suggest any specific time. Once an arbitral tribunal is selected, the tribunal convenes a conference to determine scheduling of the arbitration.

Similarly, HKIAC article 38's only explicit time limit is the six months within which the award must be made after transmission of the arbitration claim to the tribunal. To achieve this, article 38 limits the memorials that parties may submit and urges that the dispute be decided on documentary evidence alone.

The ICC and LCIA rules, in contrast, provide only for discretionary shortening of time limits of the sort that is always available to parties in regular arbitration. The ICC allows parties to agree to shorten the various time limits under the regular ICC Rules, but allows the ICC to modify these time limits if it is necessary to ensure that the tribunal can fulfil its duties. LCIA article 9 allows the LCIA Court to abridge or curtail any time limit for the formation of the arbitral tribunal, for the service of the response and for any matters or documents missing from the original request. Neither of the procedures specifies a limit on the total time an expedited arbitration should last.

In the likely situation in which one party seeks swift resolution while the other prefers a more protracted proceeding, undefined time limitations might introduce new uncertainties that result in a second round of bargaining over the arbitral proceedings once a dispute arises under the original contract. It would seem that parties anticipating a need for more certainty, even under expedited procedures, might do better under procedures that set out clear time limits and guidelines.

Most parties, however, will not be able to predict what overall time limit, or what detailed procedural time limits, will best suit an arbitration months or years before that conflict arises. For them, it is perhaps better to agree only to expedited formation of the arbitral tribunal as provided by the LCIA and ICC procedures, at which point the arbitrator can facilitate agreement on a shortened schedule that reflects the needs of the party at that moment, rather than at the time of drafting.

Limitations on types of procedures

Although time limits provide goals for expedited arbitration, most expedited procedures also restrict the types of procedures available at arbitration to ensure that these time limits can

be met, such as by limiting the number of memorials and cross claims, providing more liberal rules for service of process or limiting the availability of oral hearings.

With the exception of the ICC article 32 and LCIA article 9 procedures, which provide only for the shortening of overall time limits or time for formation of the tribunal, all of the expedited arbitration rules discussed limit the types of procedures that normally would be available to parties in arbitrations. Most of the procedures limit the number and type of memorials to be submitted and discourage oral hearings. The AAA Rules utilise perhaps the most unorthodox time-saving device by permitting service of notice of the initiation of the arbitration by telephone, so long as it is followed by written notice.23

The SCC and WIPO require that the petitioner submit its statement of claim with its request for arbitration and that the respondent submit its statement of defence with its answer.24 (Under the SCC's regular rules, parties must submit the statement of claim and statement of defence after the tribunal has been constituted and on a schedule set by the arbitrator. Under the WIPO Rules, the statement of claim must accompany the request for arbitration, but the statement of defence may be submitted after the answer, within 30 days of receipt of the statement of claim or notification of the formation of the tribunal.) The SCC permits parties to submit a brief written statement in addition to the statement of claim and statement of defence.

The AAA, WIPO, CPR, SCC and HKIAC Procedures all allow for a decision made on written submissions and documentary evidence unless the parties request a hearing or the arbitrator deems one necessary.25 As noted, hearings, if they are to occur, are limited by the AAA to one day and by WIPO to three days. A CPR arbitral tribunal has discretion to determine the length and procedure of a hearing, if one is to be held. In contrast, expedited arbitration under ICC article 32 or LCIA article 9 proceeds under the rules for regular arbitration.

Submission of evidence, witness testimony and discovery

All of the expedited rules provide some form of procedure for exchange of evidence in advance of the hearing, either by rules specific to the expedited arbitration or by reference to the arbitral tribunal's authority under the regular arbitration rules. The detailed procedures provided in the WIPO Expedited Arbitration Rules and the SCC Expedited Rules explicitly grant the arbitrator the authority to order production of relevant documents or evidence.26

The AAA Expedited Rules require that parties exchange copies of all exhibits they intend to submit at the hearing at least two business days before the hearing, but they are silent on whether the tribunal may compel document production by the parties.27 The AAA's Commercial Arbitration Rules, however, vest the arbitrator with the power to compel production of evidence on his or her own initiative or at the request of a party and to order the identification of all witnesses to be called.28

The CPR Expedited Rules require that each party provide all the documents which it may use in the arbitration and permits parties to request the arbitral tribunal to order the production of additional specific documents that are essential to a matter of import in the proceeding for which a party can demonstrate a substantial need.29 This departs from the regular CPR procedures, under which parties are encouraged to agree on one of four modes of disclosure, ranging from disclosure of only those documents that parties will present at the hearing to complete disclosure of all documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.30

Other arbitral organisations similarly provide for some form of compelled evidence and document production. The ICC, LCIA and HKIAC articles for expedited formation or expedited arbitration are silent on discovery and production of evidence, but they permit the arbitral tribunal to compel document production under the regular rules.31

The most significant limitations on the exchange of documents and other evidence prior to a hearing are not in the available powers, but in the shortened time frame available for that process. Under the AAA and WIPO Procedures, hearings must begin within 30 days of the arbitrator's appointment. An award must be made within three months of the date on which the claim was referred to the arbitrator under the SCC Expedited Rules and within six months under HKIAC article 38. Document discovery in a significant case can often last six months or more in regular arbitrations. The result can be either an outrageously intense period for the party required to find and produce relevant documents with the resultant risk of error in over- or under-production or extremely curtailed opportunities to obtain discovery. While curtailed discovery can often be in the interest of one party or the other, it is difficult to predict whether your side is the one that will benefit from curtailed discovery in any given future dispute, and more significantly, whether the arbitrators will be persuaded to curtail discovery in view of the shortened time frames, or instead simply attempt to cram more discovery into less time. The result may be to make the costs and result of arbitration even more unpredictable than they otherwise are.

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In the face of increasing criticism of arbitration for becoming too much like the court-room litigation to which it is meant to be an alternative, it is unsurprising that arbitral organisations have developed expedited procedures that reduce the length, cost and complexity of regular arbitration. But substantial differences exist between procedures and the approach they take to expediting arbitration, and drafters should be aware of them.

For many parties, it is difficult to predict the nature of a future dispute before it arises. For them, predetermined time limits like those in the AAA, WIPO, CPR and SCC Expedited Rules, or even the overall limit on the length of arbitration as set forth in the HKIAC Rules, may hinder appropriate resolution of a dispute too complex to resolve quickly. In such a case, it may be better that the parties can get before an arbitrator quickly, but still have sufficient time to present and argue the underlying merits. The availability of emergency relief once an arbitral tribunal is constituted can often mitigate the concern for damage caused by delay of an arbitral award due, for example, to spoiling of food or change in markets. Moreover, the limitation on the size of the tribunal to a sole arbitrator can have an unpredictable but real impact on the outcome in a complex case.

The ICC and LCIA articles reducing time for the appointment of arbitrators offer the safest bet in this regard; both allow shortened time for appointment of arbitrators but still permit the tribunal and the parties to schedule a normal arbitration once the tribunal has been formed. This approach permits parties to conduct an extensive factual inquiry, including discovery, without feeling the pressure of a fast approaching hearing, if that is what the case merits.

On the other hand, for parties who anticipate only one kind of dispute arising under their arbitration clause, and who are familiar with the course of arbitration, sacrificing procedural remedies may be the most sensible option. These parties should closely analyse the differences between the AAA, WIPO, SCC and HKIAC procedures to determine which model suits their needs.

The CPR Expedited Rules sit somewhere between these two poles, imposing an overall limit on the length of the arbitration and initial time limits for service of notice and answers, but leaving the intervening time limits within the discretion of the arbitral tribunal. Although the six-month overall time limit decreases the practicability of discovery, the procedural flexibility may allow parties to pick and choose between the procedures they are willing to sacrifice and those they consider essential.

Arbitration exists to settle disputes expeditiously and with as little cost as possible. The various expedited procedures now available through large arbitral organisations offer an opportunity to do just that. Parties drafting arbitral agreements, however, would do well to measure the value of legal certainty against speed, and pay attention to the potentially large sacrifices that some expedited procedures require.

Notes

* The authors wish to thank Chris C Morley, a 2010 summer associate at Sullivan & Cromwell LLP, for his extremely able assistance in the preparation of this article.

1 Klaus Peter Berger, The Need for Speed in International Arbitration, 25 J. OF INT'L ARBITRATION 595, 595 (2008). See also Michael McIlwrath & Roland Schroeder, The View from an International Arbitration Customer in Dire Need of Early Resolution, 74 ARBITRATION 3, 10 (2008) (frustration with the length and expense of the arbitration process is increasingly cited as the rationale for favouring court resolution (or at least for no longer favouring arbitration)); Jan Paulsson, Fast-Track Arbitration in Europe, 18 HASTINGS INT'L & COMP. L. REV. 713, 713 (1994) (Arbitration has become too cumbersome, too expensive, and too legalistic—in sum, too contaminated by the habits of court litigation.).

2 Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures, Expedited Procedures (2010) (AAA Expedited Rules) (available at www.adr.org/sp.asp?id=22440). The international division of the AAA, the International Centre for Dispute Resolution (ICDR), has its own set of rules, which do not include separate expedited procedures, but parties can agree that the Expedited Procedures will apply to an international case.

3 Int'l Court of Arbitration, Note on Expedited ICC Arbitration Procedure, 13 ICC Int'l Court of Arbitration Bulletin 29, 29 (Spring 2002). The procedures famously were used in two complex arbitrations in 1991, resulting in awards made just 19 days after the claims were transmitted to the arbitral tribunals. Benjamin Davis, The Case Viewed by a Counsel at the ICC Court's Secretariat, 3(2) ICC INT'L CT. ARB. BULL. 4 (1992); Peter J. Nickles, et. al., Three Perspectives From the Parties' Counsels, id. at 9; Hans Smit, A Chairman's Perspective, id. at 15.

4 Int'l Chamber of Commerce, Rules of Arbitration, article 32 (1998) (ICC Rules) (available at www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf).

5 Arbitration Inst. Of the Stockholm Chamber of Commerce, Rules for Expedited Arbitrations (2010) (SCC Expedited Rules) (available at www.sccinstitute.com/filearchive/3/33895/Skiljedomsregler%20förenklade%20eng%202010%20-%20utan%20mode

6 London Court of Int'l Arbitration, LCIA Arbitration Rules, article 9 (1998) (LCIA Rules) (available at www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx).

7 The new HKIAC Rules for Administered Arbitration provide, in article 38, for a shortened time period for arbitration. HKIAC Administered Arbitration Rules, article 38 (2009) (HKIAC Rules) (available at www.hkiac.org/documents/Arbitration/Arbitration%20Rules/AA%20Rules.pdf).

8 International Institute for Conflict Prevention & Resolution, Global Rules for Accelerated Commercial Arbitration (2009) (CPR Expedited Rules) (available at www.cpradr.org/ClausesRules/GlobalArbitrationRules/tabid/422/Default.aspx).

9 World Intellectual Property Organisation, WIPO Expedited Arbitration Rules (2002) (WIPO Expedited Rules) (available at www.wipo.int/amc/en/arbitration/expedited-rules).

10 Paulsson, 18 HASTINGS INT'L & COMP. L. REV. AT 715 (expedited arbitration is designed for parties who consider time to be of the essence, and who are willing to accept the marginal reduction in legal security for greater speed and lower costs); Pierre Yves Tschanz, The Chamber of Commerce and Industry of Geneva's Arbitration Rules and their Expedited Procedure, J. INT'L ARBITRATION at 51, 57 (1993) (expedited arbitration is quicker, [and] it is therefore more high-risk and high-stake).

11 US$75,000 under the AAA rules and US$250,000 under the HKIAC rules, although parties may specify in writing that the expedited procedures will not apply to claims for less than that amount.

12 50 per cent in 2009 and 55 per cent in 2008. If no dollar amount is specified and the Expedited Procedures are not called for by the clause, they will apply only if the parties agree or one party seeks them and the AAA or ICDR makes an administrative decision to apply them based on comments received from the parties.

13 Paulsson, 18 HASTINGS INT'L & COMP. L. REV. at 715.

14 The AAA, WIPO, CPR, HKIAC and SCC expedited procedures provide for a single arbitrator unless the parties have agreed otherwise. The ICC and LCIA procedures do not alter the ordinary processes for determining the number of arbitrators.

15 In the ordinary case, the AAA provides a longer list of arbitrator selections (10 to 15) and does not initially limit the number of strikes a party may exercise. This sometimes necessitates a second list backed by the threat that the AAA will appoint the arbitrator with no further lists.

16 These are 15 days under the WIPO Rules and 10 days under the SCC Rules. Under the CPR Expedited Rules, parties may agree to a time for the appointment of a single arbitrator in the arbitration clause. If they are unable to come to an agreement within that time, or if they do not include this provision in their arbitration clause, the CPR staff will appoint a single arbitrator.

17 Article 9, Expedited Formation, permits parties in exceptional urgency, on or after the commencement of the arbitration, to apply to the LCIA for expedited formation of the arbitral Tribunal. LCIA Rules, article 9. Article 9 gives the LCIA Court complete discretion to abridge or curtail any time-limit under these Rules for the formation of the arbitral tribunal, including service of the Response and of any matters or documents adjudged to be missing from the Request. The LCIA Court shall not be entitled to abridge or curtail any other time-limit.

18 HKIAC article 38 states that the HKIAC Secretariat may shorten the time limits for the appointment of arbitrators. ICC article 32 permits parties to shorten the various time limits set out under the general arbitration rules.

19 AAA Commercial Arbitration Rules and Mediation Procedures, R-4 (2010) (available at www.adr.org/sp.asp?id=22440). The regular ICDR Rules provide for 30 days for a

statement of defence. ICDR International Arbitration Rules, Rule 3 (2009) (available at www.adr.org/sp.asp?id=22440).

20 AAA Expedited Rules, E-6.

21 Id.

22 See Table No. 2.

23 AAA Expedited Rules, E-3.

24 SCC Expedited Rules, articles 2, 5; WIPO Expedited Rules, articles 10, 12.

25 The AAA requires proceedings on documents for all cases under US$10,000 and in other cases in which the parties agree. AAA Commercial Arbitration Rules and Mediation Procedures, R-1(b). The WIPO rules allow for a hearing if either party so requests or, if neither party requests one, at the Tribunal's discretion. WIPO Expedited Rules, article 47. It shall be within the discretion of the arbitral tribunal to determine the need for a hearing. CPR Expedited Rules, Rule 13.1. Under the SCC Rules, a hearing shall be held if requested by a party and if deemed necessary by the arbitrator. SCC Expedited Rules, article 27. HKIAC article 38 states that the arbitral shall decide the dispute on the basis of documentary evidence only, unless it decides that it is necessary to hold one or more hearings. HKIAC Rules, article 38.

26 WIPO Expedited Rules, article 42; SCC Expedited Rules, article 26.

27 AAA Expedited Rules, E-5.

28 AAA Commercial Arbitration Rules and Mediation Procedures, R-21. Article 19 of the ICDR Arbitration Rules is similar.

29 CPR Expedited Rules, Rules 11.1, 11.2.

30 International Institute for Conflict Prevention & Resolution, CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Schedule 1 (2009) (available at www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx).

31 ICC Rules of Arbitration, article 20.1; LCIA Arbitration Rules, article 22; HKIAC Rules, article 23.3.

	AAA Commercial Arbitration Expedited Procedures	CPR Accelerated Rules for Commercial Arbitration	HKIAC Article 38	ICC Article 32	LCIA Article 9	SCC Expedited Rules	WIPO Expedited Arbitration Rules
Date rules become effective	June 1, 2009	August 20, 2009	September 1, 2008	1998	January 1, 1998	January 1, 2006	October 1, 2002

Opt In / Opt Out	By default, the AAA/ICDR manages all cases with claims under $75,000 under the expedited procedures. Parties may agree to submit claims larger than $75,000 under the expedited rules	Opt in	Article 38 applies to all claims under $250,000 unless the parties specify otherwise.	Opt in	Opt in	Opt in	Opt in
Number of Arbitrators	One	One, unless otherwise agreed	One, unless the arbitration agreement calls for three arbitrators	One or three	Article 9 does not alter the number of arbitrators, which is determined by the parties.	One	One
Appointment Process	The AAA submits a list of	Parties may stipulate a time	Article 38 provides only	Article 32 does not alter the	Except for shortening the	The parties have ten days to	The parties must appoint

	five arbitrators taken from its National Roster. The parties are encouraged to agree to an arbitrator from this list or, if they cannot agree, they strike two names from the list and submit to AAA appointment. The AAA may unilaterally appoint an arbitrator not on the list if the parties cannot agree.	for appointment in an arbitration clause. If they do not include such a provision or fail to select an arbitrator within the time period, the Appointing Authority will appoint a single arbitrator.	that the HKIAC Secretariat may shorten the time limits for the appointment of arbitrators under Articles 7.1, 7.2 and 8.2, which require parties to designate arbitrators within 30 days of recept of the request for arbitration, or 30 days from receipt of the other party's nomination.	regular appointment procedures which can take up to 30 days for a single arbitrator, or under Articles 7 to 12.	time limits for formation, which generally takes 30 days under the regular rules, Article 9 does not alter the appointment process.	jointly appoint the sole arbitrator, or the arbitrator shall be appointed by the SCC Board.	a single arbitrator within fifteen days of the commencement of the arbitration, or the WIPO Arbitration Center will appoint an arbitrator.
Time Limits	Parties are	The Statemen-	The award	Parties may	The LCIA	The parties	Requests for

	limited to one seven day extension for the response to the demand or for a counterclaim. Parties have seven days to object to the appointment of an arbitrator. The hearing must be scheduled within thirty days of the confirmation of the arbitrator's appointment, and generally shall not exceed one day. The award must be made within fourteen	t of Claim must be served on the Respondent within ten days after the notice of the arbitration and a Statement of Defense must be served within thirty days thereafter, or within sixty days where the case is sufficiently complex or when the claim exceeds $10,000,000. An award should be issued within three months	must be made within six months of the transmission of the arbitration claim to the arbitral tribunal. To achieve this, the HKIAC Secretariat may shorten the time limits for the appointment of arbitrators.	agree to shorten the various time limits under the regular ICC arbitration rules, although the ICC may lengthen these modified times if it finds it necessary to do so in order that the Tribunal can fulfill its duties.	Court may abridge or curtail any time limit for the formation of the Arbitral Tribunal, including service of the Response and of any matters or documents adjudged to be missing from the Request, but may not abridge or curtail any other time limit.	have ten days to appoint the arbitrator, and fifteen days thereafter to challenge the appointment. Parties are limited to one brief written statement in addition to a Statement of Claim and Statement of Defence, which must be submitted within ten working days. The final award must be made within than three months of the	arbitration must be accompanied by a statement of claim. Answers must be submitted within twenty days from the receipt of the arbitration request, and hearings must be conducted within thirty days of receipt of the Answer. Proceedings must conclude within three months of the submission of the Statement of Defense or the establishment

	days of the oral hearing or submission of final documents.	of the hearing.				referral of the case to the arbitrator.	of the Tribunal and an award must be made within one month of the closure of the proceedings.
Discovery Allowed	Rule E - 5 provides for exchange of exhibits, but does not mention discovery	At a party's request, the Arbitral Tribunal may order production of documents that are essential to a matter of import in the proceeding for which party can demonstrate a substantial need, but the request should be denied	Article 38 is silent on discovery, although the arbitral tribunal under the regular procedures may order a party to disclose documents or evidence in its control.	Article 32 is silent on discovery, although the arbitral tribunal under the regular procedures may order a party to disclose documents or evidence in its control. .	Article 9 does not alter the procedural rules for production of evidence. Article 22 grants the Tribunal the power to compel production of evidence or documents within a party's control.	Article 26 grants the Tribunal the power to order on its own authority or on request of a party to produce documents or other evidence which may be relevant to the outcome of the case.	Under Article 42, the Tribunal may order parties to produce relevant documents or evidence that the Tribunal considers necessary. Parties may also call witnesses, whose statements can may be submitted in written form if the

		if it will delay the hearing or impose substantial costs.					Tribunal so directs, and the Tribunal has the power to appoint expert witnesses.
Expected overall time of Arbitration	If parties respond quickly to complaints, an award could be given in as little as fifty days or less. However, the procedures do not specify an overall time limit.	An award should be made in as short a period as feasible but no later than six months from the selection of the Arbitral Tribunal.	The HKIAC Rules allow for shortened time limits for the appointment of arbitrators and does not specify an overall time limit.	Article 32 provides only a shortening of the time limits under the ICC's General Arbitration Rules, which do not specify an overall time limit.	Article 9 permits the LCIA Court to abridge or curtail the thirty day time periods allowed for the formation of the arbitral tribunal and submission of an Answer to the Request for Arbitration, and does not specify an overall time limit.	Most of the time limits contained in the Expedited Rules are discretionary, but the Rules require that an award be made not later than three months from the date on which the claim was transferred to the arbitrator.	Although the Rules potentially provide for close of proceedings within fifty three days of the initial request for arbitration, Article 56 requires that proceedings conclude within three months of delivery of the Answer, when

							reasonably possible, and an award be made within one month thereafter.

International Insitute for Conflict Prevention & Resolution, Global Rules for Accelerated Commercial Arbitration, Rule 11.2. (2009)

Arbitration Inst. Of the Stockholm Chamber of Commerce, Rules for Expedited Arbitrations, Article 26 (2010).

Parties have 15 days to respond to complaints under section R-4 of the AAA Commercial Arbitration Rules, seven days to pick an arbitrator, and seven days to object to the appointed arbitrator. For claims over $10,000, a hearing must be scheduled within 30 days of the arbitrator's appointment (no hearings are held for claims less than $10,000) and should last no more than one day. An award must be made within 14 days of the hearing. 50 days assumes that the respondent takes three days to respond to the claim and that both parties respond to the AAA arbitrator nominations within three days, although it is plausible that parties requiring very swift resolution might submit an Answer or a Challenge to the Arbitrator in even less time. 50 days also assumes that the arbitrator schedules a hearing on the last day of the 30 day period and takes all 14 days to make an award. With superhuman efforts by both parties, the AAA, and the arbitrator, a hearing could be held as little as four days after the complaint was made, and an award made that same day.

Article 11 requires an Answer and Statement of Defense to be filed within 20 days of the filing of the Request for Arbitration, Article 47 requires a hearing lasting no longer than three days to be held within 30 days of the filing of the Answer.

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Valuation of "Start-Up" Oil and Gas and Mining Projects

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The unprecedented fluctuation in energy and precious and industrial metals prices in the last five years has been a significant catalyst for the flood of resource extraction-related international arbitration cases during that time. Of particular note are the current international arbitration cases filed involving sovereign governments expropriating declared commercially viable oil and gas and mining concessions from their consortium partners, and disputes between majority and minority shareholders or joint venture partners in the development of such concessions.

In the face of these dramatic price fluctuations, a number of countries with undeveloped oil and gas resources such as Venezuela, Argentina, Equatorial Guinea, Algeria, Angola, Ecuador, Kazakhstan, Russia and others, have sought to adjust the terms of production sharing agreements.1 This has been accomplished in a number of ways including the imposed 'additional profits taxes' or 'windfall profits taxes' on profits above a certain level, nationalisation of the sector or type of business by increasing state participation or imposing further limitations or controls on private participation; and modifying the terms and conditions of the granting instruments.2 A similar trend has occurred in the mining industry where the price of resources had increased substantially, and sovereign governments who had issued mining licences sought to renegotiate, rescind or reassign those licences, or similarly applied some form of a windfall profits tax.3

Recent international arbitrations related to the alleged expropriation of resource development investments by sovereigns as well as disputes between joint ventures partners over development of oil and gas and mining concessions have highlighted an intriguing valuation issue: what is the appropriate method to value start-up resource development companies or projects which have very little or no production history? A number of cases filed in the past couple of years fit this profile, including: ConocoPhillips Company et al v Venezuela,4 Chinese Petroleum Company v Bolivian Republic of Venezuela,5 and Anadarko Algeria Company LLC (US) v Sonatrach (Algeria).6,7

Resource development companies are particularly susceptible to expropriation or disputes between development partners in the early stages of production. This is because the cost and risks of exploration and development licences for concessions such as oil and gas or mining resources are largely 'front-end loaded'. Once a project is declared commercially viable and the infrastructure is in place to produce the oil, gas or raw ore and transport it to market, the exploration risk has passed and most of the significant capital development

costs have already been incurred, presenting an opportune time for a state government or licence holder to attempt to renegotiate the terms of previous agreements.

This article will seek to explore the proposition of valuing early stages resource development projects or entities for the purposes of awarding damages in an international arbitration case. We will consider the concept of fair market value, and examine appropriate valuation methodologies to compensate an injured party in the context of an international dispute. We will also provide some discussion of a select number of decisions of past arbitration cases and the valuation approaches that were endorsed therein.

It is a widely accepted principle that any award to a claimant should, as far as is possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that wrongful act had not been committed.8 The right to reparation is a well established concept in international arbitration having its roots in the well-known, oft-referenced case involving Chorzów Factory before the Permanent Court of International Justice (PCIJ), in which the court held: 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'9 It is within the tribunal's discretion to determine the best way to reach this objective. Various measures of compensation have been awarded including; investment costs incurred, the amount of dividends that could have been received absent a wrongful act,10 variations of fair value which provide the benefit of hindsight to the injured party, and others. A full discussion of all of these approaches, however, is beyond the scope of this article.11 In this article we will focus on the most widely accepted valuation approaches for determining damages in cases involving resource extraction.

'Fair market value' is arguably the most well-known standard of value and is commonly applied in judicial and regulatory matters. It is also the standard of value which is sought in most commercial and investment treaty arbitrations. The American Society of Appraisers defines fair market value as: 'The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.'12

In a number of international arbitration cases the standard of fair market has been rejected where no expropriation was found and damage was done to productive assets. However, there are also a number of non-expropriation cases where arbitral tribunals elected to use the concept of fair market value in determining economic damages.

Assuming fair market value is the appropriate compensation being applied, the method or methods for assessing fair market value must be selected. There are three generally accepted methods of determining the fair market value of a business or a business opportunity as a going concern: the income approach, the market approach; and the asset or cost-based approaches.

Income approach

Under this approach the value of an asset or resource is determined based on the future economic benefits that it is expected to generate, taking into account the risks of achieving those economic benefits. The primary methodology under the income approach is the discounted cash flow (DCF) method. The DCF method involves estimating future after-tax

discretionary cash flows, on a year-by-year basis, and discounting the cash flow estimates to their present value, as at the valuation date, using an appropriate risk-adjusted rate of return.

This method is highly dependent upon the reasonableness of the forecasts employed. In valuing resource based businesses or assets, especially those with little to no historical financial results, it is very difficult to accurately forecast the future economic benefits. Thus, it is crucial that the valuator conducts an objective, detailed review of any forecasts or projections used in a DCF analysis to ensure they are reasonable and that the assumptions employed are appropriately supported.

Market approach

Under market-based methodologies, information from comparable transactions or other information from the marketplace is assessed to determine fair market value. For the results of this approach to be reliable, the market-based information must relate to comparable resource properties at comparable stages of development. Historical transactions involving the subject property may provide the best information as to the fair market value of a given resource property, although the details surrounding any such transactions must be assessed to determine whether they met the definition of fair market value. That is, to provide an indication of value a past transaction must have been (at a minimum) between willing and informed arm's length parties. Further, since value is determined at a point in time, any changes in market conditions (ie, price changes of the underlying resource) or changes in the resource itself (in terms of its stage of development or the confidence in the quantity or quality of the underlying resources) must be considered before a historical transaction is applied or used as a primary valuation approach.

Asset or cost-based approaches

Generally, under asset-based valuation approaches, value is determined solely on the market value of the assets of the business entity, net of its liabilities, without consideration of its capacity to generate future earnings. Under a cost-based approach, the costs incurred to develop the asset or resources are assessed as a measure of the value of the asset or resource.

Of the three principal valuation approaches detailed above, the DCF methodology is the most widely adopted because it emanates directly from the fundamental financial principle that the value of a business (or an asset or resource) is equal to the future cash flows produced by that business or asset, discounted to a present value at an appropriate rate of return which reflects the risks of realising the estimated future cash flows. Relating back to the concept of restoring the injured party to the position that they would have enjoyed absent the wrongful act, Jones, Tyler and Deutsch indicate that, '[c]ompensation that fails to make up for the loss of those future cash flows is inadequate.'13 In fact, an annual survey conducted by the Society of Petroleum Evaluation Engineers reveals that 90 per cent of the respondents which were made of up of producers, consultants and bankers, use the DCF methodology in evaluating investment opportunities, though the approaches to applying a discount rate varied widely.14 Further, according to International Valuation Standards,'[t]he method most commonly used by businesses for investment decision-making with the Extractive Industries is net present value analysis/discounted cash flow analysis (NPV analysis/DCF analysis).'15

This is not to imply that other valuation methods should not be attempted or should be summarily discarded. A proper valuation should consider each of the principal valuation approaches, discarding them only if they are not relevant to the specific circumstances of the business being valued or if sufficient reliable information to perform them is not available.

Divergent results from the application of two valuation methods in particular need to be re-examined and reconciled to determine the most accurate presentation of value. As Mark Kantor points out, '[v]aluation methods are often complementary. If the valuations reached by two methodologies are widely inconsistent with each other, that can be a strong signal that something is awry. If several valuation methods produce consistent results, arbitrators can take greater comfort from the valuations.'16

In general, however, provided that an oil and gas or mineral property has been sufficiently evaluated such that reliable data is available relating to expected future costs and projections of production and revenue, the DCF method of valuation will provide the most accurate indication of the future value of the investment. Other valuation methods in this respect have both significant limitations and impediments in their application. Valuation methods based on an asset-based methodology for example, which derive value from the replacement values or even book values of assets, do not properly represent the anticipated value and risks that the investors are likely to experience from the investment. Historical investments in a resource property may have no resemblance in fact to the anticipated future cash flows that are projected from this property.

Looking to a market-based valuation method, on the other hand, would provide a reasonable indication of the fair market value of a resource-based investment such as in oil and gas or mining. The difficulty with this method however, is that finding a publically available comparable sale or company which is truly comparable is notoriously difficult. Most often, a roughly comparable transaction can provide a sanity check, confirming that the values resulting from a discounted cash flow are reasonable, but again, the most accurate indication of future value, assuming realistic inputs is derived from the DCF method of valuation. When dealing with mining properties valuators must be familiar with the valuation standards for mineral assets that have been promulgated by internationally recognised organisations. The principal standard setting bodies for mining resources include the Canadian Institute of Mining Metallurgy and Petroleum (CIM), the South African Mineral Assets Valuation Working Group (SAMVAL) and the Australian Institute of Mining and Metallurgy (AusIMM). The valuation codes of these organisations are the CIMVAL Standards and Guidelines,17 the SAMVAL Code18 and the VALMIN Code19 (Australia). Generally, there is conformity among these three major international mineral asset valuation codes. The three generally accepted valuation approaches for mineral properties in the SAMVAL, CIMVAL and VALMIN standards are the methods indicated above (ie, income approach, market approach and asset approach).

According to these valuation codes in the formal valuation of a mineral property the approach selected depends on the stage of development of that property. The four main categories of development under the CIMVAL code include: 20

- exploration properties involve a mineral asset that is being actively explored for mineral deposits but for which economic viability has not been demonstrated;
- mineral resource properties are mineral properties which contain a mineral resource that has not been demonstrated to be economically viable by a feasibility study or prefeasibility study;
- development properties are mineral properties that are being prepared for mineral production and for which economic feasibility has been demonstrated by a feasibility study or a prefeasibility study but which is not yet financed or under construction; and

- production properties are mineral properties with an operating mine, with or without a processing plant, which has been fully commissioned and is in production.

Under the CIMVAL and SAMVAL the primary approaches are classified as to their appropriateness based on the above noted categories (ie, stage of development).21 The following table provides summary of the appropriate methodologies for the various stages of development of a mineral property per the CIMVAL standards:

Valuation Approach	Exploration Properties	Mineral Resource Properties	Development Properties	Production Properties
Income	No	In some cases	Yes	Yes
Market	Yes	Yes	Yes	Yes
Cost	Yes	In some cases	No	No

According to the CIMVAL, subject to the stage of development, the discounted cash flow methodology is ranked as a primary methodology, is very widely used and is generally accepted in Canada as the preferred method.22 According to the SAMVAL code the DCF method is identified as the most acceptable and most widely used approach for development properties, mining properties and economically viable dormant properties.23 Therefore, as is the case with oil and gas properties that are determined to be commercially viable, mining resources at the 'development property' stage for which economic feasibility has been demonstrated, but production has not yet started, the DCF method is deemed appropriate by the major international mineral asset valuation codes.

It is clear that applying the DCF valuation method to a start-up enterprise with little or no historical performance data is a challenging exercise and the results are only as reliable as the underlying data and assumptions. This is because the base year of a discounted cash flow is often derived from the considered combination of past performance and expectations of how the future will impact and influence the future cash flows. Some view DCF analyses based on companies with little to no historical performance data to be 'open to legitimate skepticism.'24 This is due to the fact that historical financials demonstrate what has been accomplished by a particular entity given the constraints of industry, business model, local geographical conditions, etc. A past record of historical profitability is often regarded as the best evidence that a company or investment is capable of generating a profit.

The preference for a proven track record has been clearly demonstrated, where historical performance has often been considered to be critical evidence that the projections on which a DCF analysis is based are reasonable. Tribunals have developed a concept of 'going concern', not only in the traditional accounting sense of a business which will continue to operate as a business (as opposed to having its assets liquidated on a piecemeal basis), but to mean additionally an entity that has several years of historical profitability.

> As noted in the Metalclad v Mexico25 decision: [w]here the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value. In Sola Tiles, Inc. v. Iran (1987) (14 Iran-U.S.C.T.R. 224, 240-42; 83 I.L.R. 460, 480-81), the Iran-U.S. Claims

> Tribunal pointed to the importance in relation to a company's value of its business reputation and the relationship it has established with its suppliers and customers. Similarly, in Asian Agricultural Products v. Sri Lanka (4 ICSID Reports 246 (1990) at 292), another ICSID Tribunal observed, in dealing with the comparable problem of the assessment of the value of good will, that its ascertainment requires the prior presence on the market for at least two or three years, which is the minimum period needed in order to establish continuing business connections.

The focus is thus to ensure that projections of future performance have been established with 'reasonable certainty'.26

It should also be noted that there are a significant number of cases where the DCF method of valuation has been rejected by arbitral Tribunals as speculative and uncertain based on the fact that the businesses being valued were start up operations. In the majority of these cases however, additional circumstances existed which caused the DCF calculation to be more speculative in the view of the Tribunals. Although we have not attempted to provide an exhaustive list of cases in this area herein, one such example is provided with the ICSID case27 Siag v The Arab Republic of Egypt which involved the expropriation of a hotel or resort property by the government of Egypt. In this particular case, as the investment was in a very early stage in that the hotel had not yet been constructed, all of the inputs needed to be estimated, and were subject to a significant amount of debate between the parties. The tribunal accepted the idea that the venture would eventually be a very profitable one 'with no hesitation', therein rejecting the adoption of the book value of the investment as an appropriate measure of compensation.28 The tribunal found significant the admission made by the claimants expert that the future cash flows can be calculated with a 'higher degree of certainty' for companies which have a proven track record of profitability, finding '[p]oints such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for 'young' businesses lacking a long track record of established trading.'29 The tribunal chose instead to apply a comparable sales approach based on an analysis of the sale of comparable properties, with several adjustments based on the specific circumstances of the case.

Another example where the DCF valuation was rejected occurred with the ICSID case PSEG vTurkey30 which was decided in January of 2007. In this case the DCF methodology was rejected by the tribunal in favour of repayment of the amounts invested by PSEG. PSEG, a US company, was granted an authorisation to conduct a feasibility study into the construction of a coal-fired power plant and an adjacent coal mine in the Turkish province of Konya. Although construction on PSEG's proposed coal mine and power plant never commenced, the company spent millions of dollars on an initial feasibility study, follow-up studies and several rounds of negotiations with government agencies. The tribunal rejected damages based on projected future cash flows on the basis that there was no established record of profits and performance.31 It should be noted that in this case there were other circumstances which also affected the evaluation of the future cash flows of the company including the fact that the contract was subject to 'adjustment mechanisms and other possible variations' which made it difficult to assess potential future profits.32

In Metalclad v Mexico, Metalclad had purchased a Mexican company for the purposes of constructing and operating a landfill in La Pedrera, Mexico. Metalclad had commenced construction prior to the disputed acts but had not completed construction and had not commenced operations. The tribunal found that a DCF analysis would be inappropriate

as ' the landfill was never operative and any award based on future profits would be wholly speculative'.33 Rather, the tribunal opted to base compensation on Metalclad's actual investment in the project.

Having reviewed a few examples of the instances where the DCF valuation method has been rejected based on the lack of historical profits data, it should be noted that there is also considerable support for applying a DCF valuation under these circumstances, and particularly in the case of a resource development company. Aswath Damodaran, noted valuation expert and professor of finance at the Stern School of management at the New York University, proposes that traditional valuation methodology can be applied to start-up companies if careful consideration is taken to providing reasonable inputs: 'while it is understandable that analysts, when confronted with the myriad of uncertainties associated with valuing young companies, look for shortcuts, there is no reason why young companies cannot be valued systematically.'34

Particularly with regard to the valuation of oil and gas and mining investments however, the concerns related to the lack of historical profits data may be less relevant. Several experts have suggested that the lack of historical production data should not preclude the application of the DCF method.35 There are a number of reasons for this. First, oil and gas and mining concessions that are starting up operations typically cannot be classified as new businesses in the traditional sense of the term 'start-up business'. They are generally new projects that are run by large and experienced multinational organisations (and consortiums of such entities) which have many years of profitable operations behind them.

Second, these organisations are very sophisticated in defining and evaluating the existing resources and reserves and accurately estimating the various costs and time required to extract the oil and gas or mineral resources in an efficient manner.

The estimation of hydrocarbon reserves is an especially important part of the equation for oil and gas companies as reserves are the one of the primary drivers of value for any oil and gas development venture. As per the Society of Petroleum Engineers, only those quantities of oil and gas anticipated to be economically recoverable from discovered resources should be classified as reserves.36 Additionally, there is an expectation that hydrocarbon deposits reserves will be developed and placed on production within a reasonable timeframe.37 Reserves can be classified into three types: 'proven', 'probable' and 'possible'.38 While 'proven' reserves are the most reliable estimation of recoverable reserves, it is also considered to be the most conservative estimate.39 Further, 'proven plus probable' reserves (P50 reserves) are considered 'best estimate (realistic)' estimations of total reserves.40 Further, many companies refer to 'proven plus probable' reserves (P50 reserves) as being the more useful estimate upon which to base investment decisions.41

Similarly, mineral resources are classified from lowest to highest level of geoscientific knowledge and confidence as either 'inferred', 'indicated' or 'measured'. Once various factors such as mining, metallurgical, economic, marketing, legal, environmental, social and governmental are appropriately considered mineral resources may be converted to 'proved mineral reserves' or 'probable mineral reserves'.42 When a property has been declared commercially viable with estimated proven and probable reserves, the risks with regard to the existence of these reserves are significantly reduced. A significant portion of development capital costs have likely already been incurred as well. Additionally, remaining capital costs and anticipated operating costs can be calculated with an acceptable degree of precision by the resource developers, based on past experience and geological and engineering analyses.

Fourth, and perhaps most importantly, a well developed international market exists for these products which will absorb the project's entire production immediately.43

Finally, frequently a significant portion of the infrastructure, capital and operating costs incurred as well as substantially all revenues received will be denominated in US dollars which serves to reduce a project's exposure to currency risk.

Contrast this with the start-up of a non-resource related commercial entity, for example a new software application company. During the start up phase, the costs, timing and resources required to develop and market the software cannot be estimated with an acceptable degree of precision. Furthermore, the market itself may not be established so that the price and volume of sales are unknown, making revenue forecasts very speculative. The value of such an entity would depend heavily on the technical attributes of the software product and the experience of the business owners and the relationships they have with established industry participants.

Given the above noted attributes of oil and gas and mining projects, there is a strong argument that provided a project has reached the point of economic viability (or with an acceptable degree of certainty would have reached this point absent the wrongful act), and provided the costs and revenues can be estimated with a reasonable degree of certainty, a DCF may be performed which would yield a reasonable determination of value. The remaining risks such as price risk, country risk (ie, political risk, disruption risk, etc), and any other risks specific to the region would have to be taken into account as well, as would also be the case for an entity with a proven track record.

At the time of this writing, to our knowledge the DCF approach has not yet been applied to value oil and gas and mining projects in the beginning stages of production in the context of international arbitration, for which public information is available. Considering the factors specific to resource development companies which make projections of expenses and production possible with 'reasonable certainty' after a property has been declared commercially viable, coupled with the fact that the DCF method is widely viewed as providing the most accurate valuation of the future cash flows of such properties, the application of the DCF approach may well be tested in the near future in currently pending international arbitrations.

Notes

1 'Expropriation, Nationalisation and Risk Management' Scot W Anderson; Cite some cases (CPC v Venezuela, Conoco Phillips v Venezuela, Exxon Mobil v Venezuela, Murphy v Equator, others).

2 'The New Latin American Oil and Gas Scene: Taking the High Road or the Low Road?' Elisabeth Eljuri And Carlos E Maduro Macleod Dixon Caracas, January 2009. www.whoswholegal.com/news/features/article/12774/the-new-latin-american-oil-gas-scene-taking-high-road-low-ro

3 Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v The Government of Mongolia Order on Interim Measures, 2 September 2008, and 'Arbitrators in UNCITRAL BIT arbitration order Mongolia to refrain from collecting windfall tax from Russian mining company while case is heard; funds to be put in escrow instead of remitted to government' Investment Arbitration Reporter, Volume 1, No. 11, 1 October 2008.

4 ConocoPhillips Company (US), Petrozuata BV (Netherlands) and ConocoPhillips Gulf of Paria BV (Netherlands) v Bolivarian Republic of Venezuela, ICSID case No. ARB/07/30.

5 Chinese Petroleum Company v Bolivian Republic of Venezuela.

6 Anadarko Algeria Company LLC (US) v Sonatrach (Algeria).

7 Arbitration Scorecard 2009: A listing of investment treaty arbitrations active in 2007-2008 in which at least $100 million was in controversy. Expanded for the Web. Focus Europe, American Lawyer Luke Eric Peterson, 1 July 2009; 'Venezuela faces Taiwanese claim at ICSID,' Global Arbitration Review, Sebastian Perry, 4 June 2010; ConocoPhillips 2006 Annual Report p47; 'Algeria: Anadarko looking for first oil from El Merk in late 2011' www.energy-pedia.com/article.aspx?articleid=136329; Anadarko Petroleum Annual Report 2009 p12-13.

8 Metalclad Corporation v The United Mexican States. ICSID Case No. ARB(AF)/97/1.

9 Case Concerning the Factory at Chorzów Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, no. 17, p29.

10 LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic. ICSID Case No. ARB/02/1

11 In an editorial in Petroleum World entitled 'Venezuelan oil assets expropriation, compensation and arbitration', authors Andrew B Derman and Emily A Miskel assert the following: 'The history of international law shows that the remedy for nationalization of investor property has consistently been full compensation based on market value. Prior to World War II, the standard of full compensation for expropriation was almost unquestioned in customary international law. In one study of 60 international claims Tribunals ruling on damages to foreign investors from 1840 to 1940, none of the arbitral panels held that the appropriate measure of compensation was less than the full value of the property taken, and many specifically affirmed the rule of full compensation. While the determination of full compensation associated an expropriation may be subject to debate, an arbitrary rule that book value or something other than fair market value is not the standard under international law. Full compensation has been held to mean prompt, adequate, and effective compensation in the amount of the full market value of an investment as a going concern.'

12 ASA Business Valuation Standards (Business Valuation Committee American Society of Appraisers, Herndon, VA, 2009), American Society of Appraisers p27.

13 'Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments', William H Knull III, Scott T Jones, Timothy J Tyler, Richard D Deutsch, p6.

14 Ibid, p27.

15 International Valuation Standards, (8th Edition), section 5.3.3.

16 Valuation for Arbitration: Compensation Standards Valuation Methods and Expert Evidence, Mark Kantor, p27.

17 Source: Standards and Guidelines for Valuation of Mineral Properties from the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties, February 2003.

18 Source: South African Code for the Valuation of Mineral Assets (the SAMVAL Code) prepared by the South African Mineral Assets Valuation Working Group dated August 2006.

19 Source: Code for the Valuation and Technical Assessment of Mineral and Petroleum Assets and Securities for Independent Expert Reports, The VALMIN Code, 2005 Edition.

20 Source: Standards and Guidelines for Valuation of Mineral Properties, Special Committee of the Canadian Institute of Mining, Metallurgy, and Petroleum on Valuation of Mineral Properties (CIMVAL). February 2003.

21 The VALMIN Code does not specify acceptable approaches.

22 Standards and Guidelines for Valuation of Mineral Properties, Special Committee of the Canadian Institute of Mining, Metallurgy, and Petroleum on Valuation of Mineral Properties (CIMVAL). February 2003, Table 2, p22.

23 South African Code for the Valuation of Mineral Assets (The SAMVAL Code), effective August 2006, p25.

24 'Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments' William H Knull, III, Scott T Jones, Timothy J Tyler & Richard D Deutsch, p7.

25 Metalclad Corporation v The United Mexican States, ICSID Case No. ARB(AF)/97/1, paragraph 120.

26 Valuation for Arbitration: Compensation Standards Valuation Methods and Expert Evidence. Mark Kantor, p. 79.

27 Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt, ICSID case No. ARB/05/15.

28 Award in matter Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt, ICSID Case No. ARB/05/15, June 1, 2009, p148.

29 Ibid, p159.

30 PSEG Global Inc and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v The Republic of Turkey, ICSID case No. ARB/02/5.

31 Case summary PSEG Global Inc et al v Republic of Turkey prepared in the course of research for S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008), p2.

32 Ibid p7.

33 Metalclad Corporation v The United Mexican States, ICSID Case No. ARB(AF)/97/1.

34 'The Dark Side of Valuation: Valuing Young, Distressed and Complex Businesses 2nd Edition.' Damodaran, Aswath, FT Press; 2nd edition (27 July 2009), p225.

35 See 'Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments' William H Knull, III, Scott T Jones, Timothy J Tyler, Richard D Deutsch, p8 note 13; and 'Key Damage Compensation Issues in Oil and Gas International Arbitration Manuela Abdalla p550.

36 'Petroleum Resources Management System', sponsored by Society of Petroleum Engineers (SPE), American Association of Petroleum Geologists (AAPG), World Petroleum Council (WPC), Society of Petroleum Evaluation Engineers (SPEE), 2007, Table 1, p24.

37 Ibid.

38 Ibid, pp28-29. Proven reserves are defined as oil and gas reasonably certain to be producible using current technology at current prices, under current commercial agreed terms and arrangements with local government. Proven reserves are also known as 1P reserves or P90 reserves indicating that they have a 90 per cent certainty of being produced. Proved reserves are those reserves that can be estimated with a high degree of certainty to be recoverable. It is likely that the actual remaining quantities recovered will exceed the estimated proved reserves. Probable reserves are defined as oil and gas reasonably probable of being produced using current or likely technology at current prices, with current commercial terms and government consent. Probable are 2P reserves or proven plus probable, or also can be referred to this as P50 or having a 50 per cent certainty of being produced. Probable reserves are those additional reserves that are less certain to be recovered than proved reserves. The P50 designation indicates that it is equally likely that the actual remaining quantities recovered will be greater or less than the sum of the estimated proved plus probable reserves. Possible reserves are reserves that have been classified as having a chance of being developed under favorable circumstances These are also referred to as P10 reserves which means having a 10 per cent certainty of being produced. - This is also known in the industry as 3P or Proven plus probable plus possible. Possible reserves are those additional reserves that are less certain to be recovered than probable reserves. It is unlikely that the actual remaining quantities recovered will exceed the sum of the estimated proved plus probable plus possible reserves.

39 'Definitions of Oil and Gas Resources and Reserves' The Companion Policy to National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities sets out, in Part 2 of Appendix 1, the reserves definitions derived from Section 5 of Volume 1 of the Canadian Oil and Gas Evaluation Handbook (COGEH).

40 'Definitions of Oil and Gas Resources and Reserves' The Companion Policy to National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities sets out, in Part 2 of Appendix 1, the reserves definitions derived from Section 5 of Volume 1 of the Canadian Oil and Gas Evaluation Handbook (COGEH).

41 'Oil and Gas Reserves: Communication with the Financial Sector,' Rob Arnott, Sustainable Development Programme, Oxford Institute for Energy Studies October, 2004, p7.

42 2007 SAMREC Code for Reporting of Exploration Results, Mineral Resources, and Mineral Reserves.

43 The future price of the resource, is one of the most significant, yet difficult variables in a DCF calculation to predict with reasonable certainty into the future. However, this issue is faced equally by start-up entities as with well established entities.

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Obtaining Evidence for Use in International Arbitrations Through United States Courts

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In recent years, a number of US courts including the US Supreme Court have grappled with the question of whether, and when, US courts should provide judicial assistance in obtaining evidence for use in foreign or international proceedings, including international arbitrations. In late May 2010, this question returned to the limelight when a federal judge sitting in New York compelled filmmaker Joseph Berlinger to produce, over Berlinger's strenuous objection, the raw footage from his documentary, Crude, related to the long-running US$27 billion environmental litigation against Chevron in Ecuador for use in litigation pending in Ecuadoran courts and in a related investment treaty arbitration.1 The judge in In re Chevron Corp allowed Chevron access to footage purporting to demonstrate in dramatic fashion allegedly unethical and illegal conduct on the part of the claimants' attorneys, and some have observed that this new evidence has the potential of drastically altering the course of the pending suits.

As part of its strategy, Chevron took advantage of a particular provision of US discovery law, embodied in 28 USC section?1782. Section?1782 provides a means by which US courts may order the taking of evidence from entities located within US borders in support of 'a proceeding in a foreign or international tribunal.' While section 1782 may provide a powerful tool for use in international arbitrations, US courts disagree as to whether arbitral tribunals are included within the definition of 'foreign or international tribunal[s]' to which courts may provide judicial assistance. The implications of this ambiguity for parties can be quite significant, as the process of obtaining evidence through the US court system can seriously upset the expectations of parties as to the cost and efficiency of arbitration.

While there is no clear consensus in US courts on the availability of section 1782 in support of arbitral proceedings, attorneys seeking discovery from US entities can take advantage of the guidance provided in a few recent decisions as to how parties can minimise the risk of costly US litigation over third party discovery, and how arbitrators can maintain control of the evidence-gathering process. The first part of this article discusses the background and history of section 1782 as it relates to international arbitration, up to and including the Supreme Court's 2004 decision in Intel Corp v Advanced Micro Devices Inc, 542 US.241 (2004). In the second part of the article we discuss the developments in case law since Intel that have dealt with the question of whether section 1782 applies to arbitral tribunals. The third part draws from existing case law to suggest strategies for how parties and arbitrators

can take steps to manage the ambiguity around section 1782 to promote the efficiency and fairness of arbitral proceedings.

Background and history of 28 USC section?1782

For over 150 years, US law has given federal courts authority to assist in gathering evidence for use before foreign tribunals. The current iteration of section 1782 came about in 1964, and as revised, reads in relevant part: (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation

The 1964 revision also provided that the court may act pursuant either to a letter rogatory or request issued directly by the court or tribunal, or pursuant to an application of a party. Most significantly, the 1964 revision expanded the types of foreign proceedings for which judicial assistance was available from 'any judicial proceeding pending in any court in a foreign country' to 'a proceeding in a foreign or international tribunal.'

According to the legislative history, the deletion of the word 'judicial,' and the substitution of 'tribunal' for 'court' was intended to ensure that 'assistance is not confined to proceedings before conventional courts,' but also includes 'administrative and quasi-judicial proceedings' as well as 'international tribunals and litigants before such tribunals.'2 The new section 1782 also repealed and replaced a statute (previously codified at 22 USC sections?270-270g) that had given the power to compel testimony to any 'international tribunal' in which the United States was participating, as well as to the agent of the United States before such a tribunal, while eliminating the restriction that it only applies to 'proceedings involving a claim in which the United States or one of its nationals was interested.'3

Decisions in the 1990s

Beginning in the mid-nineties, several district courts began to address whether or not the phrase 'foreign or international tribunal' included arbitral tribunals. In 1994, a New York district court concluded with little discussion that arbitral tribunals were within the scope of section 1782, but ultimately denied the request because the party seeking discovery had gone directly to the court without first seeking a ruling from the arbitrator.4 Several subsequent cases mostly took the contrary position, that section 1782 was not addressed to private international arbitrations at all. In 1996, a Pennsylvania court denied a discovery application from Mats Wilander and Karel Novacek, tennis stars who tested positive for cocaine after the 1995 French Open and sought discovery from the US doctor who administered the testing. The players wanted the discovery for purposes of their challenge before the Appeals Committee of the International Tennis Federation (ITF) and in an action before English courts.5 The court held that section 1782 did not apply to proceedings before a private institution such as the ITF, regardless of ITF's status as a 'domestic tribunal' under English law. The court also found it significant that neither the ITF nor English court procedures allowed for such discovery, and held that denial of the application was appropriate on the independent ground that section 1782 required that the discovery sought be discoverable under the law applicable to the foreign proceeding. Just a little over a month later, a North Carolina court, in an unreported opinion, granted an application for discovery in aid of a private arbitration in London.6 A few years later, two New York district courts denied section 1782 applications, after considering the legislative history in detail to hold that Congress intended the term 'tribunal' in section 1782 to include only 'official, governmental bodies exercising an adjudicatory function,' not private arbitral panels.7

In 1999, two courts of appeal entered the debate and concluded based on the legislative history that the use of the word 'tribunal' in section 1782 was not intended to reach commercial arbitrations between private parties. The Second Circuit, in National Broadcasting Co v Bear Stearns & Co, 165 F3d 184 (2d Cir 1999) (NBC), construed section 1782 in light of the repealed statute that it was intended to replace 22 USC sections?270-270g. It held that the 1964 revisions were intended to extend the scope of the repealed provisions to 'intergovernmental tribunals not involving the United States,' but found 'no indication' that the new statute was intended 'to reach private international tribunals' that were not founded upon an international agreement.8 The Fifth Circuit agreed, finding 'no contemporaneous evidence that Congress contemplated extending section?1782 to the then-novel arena of commercial arbitration.' Rep of Kazakhstan v Biedermann Int'l, 168 F3d 880, 882 (5th Cir 1999) (Biedermann).

The US Supreme Court's view

In 2004, the Supreme Court considered the scope of section 1782 in the case of Intel Corp v Advanced Micro Devices Inc, 542 US 241 (2004). In that case, the Supreme Court concluded that the European Community Directorate General for Competition, an investigative body, was a 'tribunal' within the meaning of section 1782. It interpreted section 1782 expansively in a number of ways. It held that the definition of an 'interested person' who may invoke section 1782 includes not only parties and the tribunal itself, but also a non-party to the foreign or international proceeding who 'possesses a reasonable interest in obtaining judicial assistance.'9 It also held that a proceeding need not actually be pending at the time that judicial assistance is sought, so long as an adjudicative proceeding is 'within reasonable contemplation,' and that there is no requirement that the evidence sought be discoverable under the applicable foreign law in order for the district court to order its production.10

The Supreme Court discussed a number of factors that it believed a district court should consider in deciding whether or not to grant the request, including that judicial assistance is more likely to be appropriate when the person from whom discovery is sought is not a participant in the foreign proceeding; that courts should take into account the nature of the foreign tribunal, the character of the proceedings and the receptivity of the tribunal to US court assistance; that courts should be reluctant to allow section 1782 to be used to circumvent foreign restrictions on discovery; and that courts may reject requests that are 'unduly intrusive or burdensome.'11 Although Intel did not involve a private commercial arbitration, the Supreme Court quoted a 1965 article by Professor Hans Smit, reporter to the advisory committee tasked by Congress with drafting what became the 1964 revision of 28 USC section?1782: 'The term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts.'12

Recent developments in section 1782 case law

As it turned out, the lower courts declined to construe Intel as resolving the debate when it comes to section 1782's availability with respect to arbitration tribunals.

About eighteen months after Intel, a district court sitting in Georgia held for the first time that the Supreme Court's decision had effectively overruled the holdings of the Second and Fifth Circuits in NBC and Biedermann, respectively.13 In Roz Trading, the district court considered the petitioner's request to compel the production of documents from the Coca-Cola Company for use in its private arbitration, under the auspices of the International Arbitral Centre of the Austrian Federal Economic Centre in Vienna (the Centre), against the government of Uzbekistan. The court held that, under the reasoning, although not the

holding, of Intel, the Centre was a 'tribunal' within the meaning of section 1782 and ordered Coca-Cola to produce the required documents.14 Roz Trading appeared to start a trend; in the following two years, another three district courts held that, after Intel, private arbitrations are 'tribunals' within the meaning of section 1782.15

The Fifth Circuit, however, disagreed. In 2009, it held in El Paso Corp v La Comision Ejecutiva Hidroelectrica Del Rio Lempa that, notwithstanding the Supreme Court's citation to Professor Smit's article in Intel, the question of section 1782's applicability to private arbitral tribunals was not before it, and that Biedermann therefore remained controlling precedent in the Fifth Circuit.16 In affirming the denial of the discovery applications, the Fifth Circuit seemed particularly disturbed by the prospect of creating a system under which discovery available in international arbitrations would be broader than that available to purely domestic arbitrations.17 The Fifth Circuit also expressed its hesitance to empower parties to seek ancillary discovery through US courts because it could 'destroy' arbitration's principal advantage of efficiency by allowing parties to 'succumb to fighting over burdensome discovery requests far from the place of arbitration.'18 District courts in Illinois and Florida since have followed suit to hold that section 1782 does not apply to arbitrations between private parties.19

While the Second Circuit has yet to revisit explicitly its NBC decision in light of Intel, it has considered whether there are distinctions to be drawn in the realm of private arbitration. Notably, on 15 July 2010, the Second Circuit directed Berlinger to comply with the district court's order requiring him to produce his raw footage in the Chevron case.20 While the Second Circuit's order itself contained no rationale delineating the basis for its decision (its opinion is forthcoming), it affirmed the decision below, in which the district court distinguished between arbitrations established by private parties and ones established by bilateral investment treaties (BITs) pursuant to UNCITRAL rules.21 Thus far, BIT arbitrations seem to be one of the rare areas where there is a consensus among the district courts that they fall within the definition of 'international tribunal' under section 1782. In In re Oxus Gold PLC, the court cited the Second Circuit's holding in NBC that arbitral panels 'created exclusively by private parties' were not 'tribunals' within the meaning of section 1782, but distinguished an UNCITRAL arbitration authorised under the KyrgyzstanUnited Kingdom BIT as falling within the meaning of section 1782.22

The district court in OJSC Ukrnafta went a step further to hold that the fact that a private arbitration was governed by UNCITRAL rules (even outside the BIT context) was sufficient to distinguish it from arbitrations such as those considered by NBC and Biedermann.23 In In re Arbitration in London, the court denied the discovery application in the context of an arbitration between private parties, stating 'a reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, a body operating under the United Nations and established by its member states, and purely private arbitrations established by private contract.'24 These decisions appear to be the result of a misapprehension by the courts that arbitrations between private parties proceeding under the UNCITRAL rules differ in any respect with those between private parties under institutional or other ad hoc rules. In other words, there is no basis for the courts' implicit assumption that the parties' decision to have UNCITRAL rules govern the conduct of their arbitration changes a 'purely private arbitration established pursuant to private contract' into something 'state-sponsored.' Whether that misapprehension persists in future cases remains to be seen.

In addition, a few courts have found that, where arbitral awards are subject to procedures allowing for judicial review, that factor mitigates in favour of allowing for section 1782 discovery. Two courts sitting in Florida and Connecticut have relied on the Supreme Court's statement in Intel that the Directorate General proceeding is within the ambit of section 1782 because it 'leads to a dispositive ruling [. . .] reviewable in court,' 544 US at 255, to conclude that section 1782 applies to private arbitrations that are subject to further judicial review.25 Neither of these decisions, however, directly engaged with the limited scope of judicial review of arbitral awards available under the New York Convention and national arbitration laws (in contrast to the direct court review of the Directorate General's findings discussed in Intel). Instead, the district court in Winning held that the choice of the English Arbitration Act 1996 (which permits judicial review of an arbitral ward 'for serious irregularity affecting the tribunal, proceedings or award,' and 'on a question of [English] law arising out of the award'), as the procedural law governing the arbitration did not limit court review to jurisdictional issues and thus provided for sufficient 'judicial review' in English courts to bring it within the ambit of section 1782.26 The district court in OJSC Ukrnafta, by contrast, relied on the fact that the governing UNCITRAL rules did not 'include a waiver of review by courts,' noting that there was a pending jurisdictional challenge in the Swedish courts and that 'either or both parties can seek review' of the panel's decision.27 This distinction makes little sense, however, as arbitral awards typically are subject to judicial review under national arbitration law and the New York Convention.

In sum, there is to date little consensus among US courts, even after Intel, as to when an international arbitration is a 'foreign or international tribunal' for purposes of section 1782. But among those courts that agree that arbitrations between private parties are not within the reach of section 1782 and there are district courts in multiple jurisdictions that do not accept this there is some sense that at least BIT arbitrations (and outside the Fifth Circuit, on the basis of a misunderstanding, perhaps UNCITRAL arbitrations as well) may bring in the requisite quasi-judicial or public character to fall under section 1782.

Strategies for attorneys in dealing with section 1782

For the time being at least, parties to an arbitration must contend with the possibility that a US district court, particularly one in the Second Circuit, may grant a request for judicial assistance under section 1782. Where courts are willing to allow it, section 1782 is a useful tool in obtaining evidence from nonparties that may be necessary to an arbitration. However, it also poses a substantial risk that peripheral litigation and American-style discovery may undermine the efficiency of the arbitration.

The courts that have held that section 1782 applies to private international arbitrations have not found that the 'nature' of the arbitral tribunal or 'the character of the proceedings,' Intel, 542 US at 264, would preclude expansive, US-style discovery. To the contrary, some district courts have interpreted Intel's rejection of a reciprocity rule, which would allow US court assistance only in cases where the foreign jurisdiction could reciprocate, as a presumption that an international arbitral tribunal would be 'receptive' to US judicial assistance.28 A recent district court opinion put this even more strongly, holding that a request under section 1782 should be granted unless there is 'authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782.'29

The Caratube decision provides some guidance as to how parties and arbitrators can influence the district court's consideration of an application under section 1782. In Caratube, the district court elected not to decide whether an ICSID arbitration pursuant to the

United StatesKazakhstan BIT was 'a foreign or international tribunal,' instead denying the petitioner's request based on the discretionary factors set forth in Intel, which are described above.30 The court observed that the rules chosen by the parties to govern their arbitration, in particular ICSID rules and the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), directed the parties to 'ask the tribunal to take whatever steps are legally available to obtain the requested documents.' Because the petitioner in Caratube had filed its request without first consulting the tribunal, and had done so less than a month before discovery was to close, the district court held that it was 'using section 1782 in an attempt to circumvent the Tribunal's control over the arbitration's procedures.'31 Therefore, even though the tribunal had not refused to admit any evidence that might be obtained, the court held that the applicant's actions justified denial of the request.32

Caratube is instructive because it demonstrates the kinds of 'proof-gathering restrictions' that may lead a US district court to deny a request for section 1782 discovery in aid of an arbitration. Parties can discourage US courts from granting expansive discovery by selecting rules that require the parties to direct any requests for third-party discovery to the tribunal, and that provide that such requests may only be submitted by the tribunal or with the tribunal's permission. As Caratube suggests, the provisions of the IBA Rules dealing with the taking of evidence from non-parties provide one means of accomplishing this.33

Arbitrators can also help to keep the use of judicial assistance within bounds. As a starting point, arbitrators can direct the parties to address any requests for third-party discovery to the tribunal, whether or not the parties have chosen the IBA Rules, pursuant to their authority under most rules to manage the arbitration process efficiently. If a party then files a request under section 1782 without complying with the tribunal's procedures, or over the arbitrator's objections, that will likely be sufficient to show that the party is attempting 'to circumvent the Tribunal's control over the arbitration's procedures,'34 which would justify denying the request.

In the event that a party nonetheless seeks to invoke section 1782 without leave of the tribunal, the arbitrators can communicate to the parties and the district court that the request is inconsistent with the rules governing the proceedings, the orders of the tribunal, or the goal of efficiency in international arbitrations in general. In extreme situations, they can even rule that the tribunal will not admit or consider any evidence obtained by means of an unauthorized court proceeding. While arbitrators are often reluctant to make a definite pronouncement concerning the admissibility of evidence that has not yet been identified, some courts have indicated that an unambiguous statement that the evidence sought would not be accepted by the tribunal could weigh strongly in favour of the district court denying the section 1782 request.35

Section 1782 is a potentially powerful tool for compelling non-party discovery in the United States for use in foreign or international proceedings. However, in the context of international commercial arbitration, it poses the risk that US courts will order non-party discovery that, while permissible under US law, is broader (and more costly) than the parties' expectations in an arbitration. While many district courts, and at least one Court of Appeals, have resolved this concern by holding private arbitrations fall outside the ambit of section 1782, there is as of yet no consensus on this point. Nonetheless, parties can protect their expectations by requiring that all requests for non-party discovery be ordered or approved by the tribunal before they are submitted to a court, and arbitrators can and should maintain control of the evidence-gathering process by evaluating such requests critically and by communicating to

the parties and to courts, as necessary, that evidence produced pursuant to requests that have not been approved by the tribunal will not be received.

* The authors would like to thank Debevoise associate Matthew Hackell for his able assistance in the preparation of this article

Notes

1 In re Chevron Corp, F.?Supp.?2d 2010 WL 1801526 (SDNY 26 May 2010),

2 S Rep 88-1580, at 7, 1964 USCCAN 3782, 3788 (1964).

3 Id at 3, 1964 USCCAN at 3784.

4 In re Technostroyexport, 853 F Supp. 695, 697 (SDNY 1994).

5 In re Wilander, No. 96 MISC 98, 1996 WL 421938, at *2 (ED Pa 24 July 1996).

6 In re Bushnak, No. 5:96-MC-41-BR (EDNC 29 August 1996).

7 In re Medway Power Ltd, 985 F Supp 402, 403-04 (SDNY 1997); In re Nat'l Broad Co, No. M-77 (RWS), 1998 WL 19994, at *7-8 (SDNY 21 January 1998).

8 Id at 190.

9 542 US at 256-57.

10 Id at 259, 261-63.

11 Id at 264-65.

12 Id at 258 (citing Hans Smit, 'International Litigation Under the US Code', 65 COLUM L REV 1015, 1026-27 & nn 71-73 (1965)). As was pointed out in David W Rivkin & Barton Legum's article, 'Attempts to Use Section 1782 to Obtain US Discovery in Aid of Foreign Arbitrations', 14 ARB INT'L 213 (1998), the 1964 legislative history itself did not refer to arbitral tribunals. But see Hans Smit, 'American Judicial Assistance to International Arbitral Tribunals', 8 AM REV INT'L ARB 153 (1997).

13 In re Roz Trading Ltd, 469 F?Supp?2d 1221, 1227-28 (ND Ga 2006).

14 Id at 1224-25.

15 In re Hallmark Capital Corp, 534 F?Supp?2d?951 (D?Minn. 2007) (private Israeli arbitration); In re Babcock Borsig AG, 583 F?Supp?2d 233 (D?Mass. 2008) (ICC arbitration; but exercising discretion to deny request); see also Comisión Ejecutiva, Hidroeléctrica Del Río Lempa v Nejapa Power Co, CA No. 08-135-GMS, 2008 WL 4809035 (D?Del 14 October 2008) ('In fact, the Supreme Court's decision in Intel (and post-Intel decisions from other district courts) indicate that Section 1782 does indeed apply to private foreign arbitrations'), vacated as moot, 341 Fed?Appx 821 (3d Cir 2009).

16 El Paso Corp v La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 Fed?Appx 31, 34 (5th Cir. 2009) (private Swiss arbitral panel proceeding under UNCITRAL rules not a 'tribunal' under Section 1782).

17 Id.

18 Id (quoting Biedermann, 168 F3d at 883).

19 In re An Arbitration in London, England, 626 F?Supp?2d 882, 885 (ND?Ill 2009); In re Operadora DB Mexico, SA de CV, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (MD Fla 4 August 2009).

20 Chevron Corp. v. Berlinger, Nos. 10-1918-cv, 10-1966-cv (2d Cir. filed July 15, 2010).

21 Chevron, F.?Supp.?2d at 2010 WL 1801526, at *6.

22 No. 06-82, 2007 WL 1037387 at *5 (DNJ 2 April 2007).

23 OJSC Ukrnafta v Carpatsky Petroleum Corp, No. 3:09 MC 265 (JBA), 2009 WL 2877156 at *4 (D Conn 27 August 2009).

24 626 F?Supp?2d at 885.

25 In re Winning (HK) Shipping Co, No. 09-22659-MC, 2010 WL 1796579, at *8 (SD?Fla 30 April 2010); OJSC Ukrnafta, 2009 WL 2877156, at *4.

26 2010 WL 1796579 at *9-10.

27 2009 WL 2877156 at *4. Compare Operadora DB Mexico, SA de CV, 2009 WL 2423138, at *9-12 (Section 1782 assistance is not available for an arbitration under ICC rules, because the panel's decisions would not be judicially reviewable).

28 See Chevron, F. Supp. 2d at 2010 WL 1801526 at *6-7 (rejecting argument that court should not grant petition while application to Ecuadorian court concerning its receptivity to evidence obtained is pending); OJSC Ukrnafta, 2007 WL 2877156 at *5 (granting application where there is 'no basis to believe that the Swedish arbitrator would not accept the documents or testimony obtained by this request'). But see Babcock Borsig, 583 F?Supp?2d at 241-42 (declining to grant request where ICC tribunal had not yet been constituted and therefore had not indicated whether it would be receptive).

29 In re Caratube Int'l Oil Co, F.?Supp.?2d 2010 WL 3155822, at *4 (DDC 11 August 2010).

30 Id at *3.

31 2010 WL 3155822 at *5-6.

32 Id at *6.

33 Id at *6; see also IBA Rules, article 3(9) (2010).

34 Caratube, 2010 WL 3155822 at *5; see Intel, 542 U.S. at 265

35 See, eg, Babcock Borsig, 583 F?Supp?2d at 241 ('[I]f there is reliable evidence that the foreign tribunal would not make any use of the requested material, it may be irresponsible for a district court to order discovery').

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Argentina

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The arbitration activity in Argentina throughout 2010 has been quite intense. There have been some interesting decisions from local courts backing domestic commercial arbitration but also relevant decisions in investor-state arbitration. The importance and significance of the ICSID awards related to investor-state arbitration in which Argentina has been involved, moves us to, once again, focus our review on those cases. In our last review we highlighted the outcome of the work carried forward by the office of the Attorney General of Argentina1 indicating that by the end of 2008 the withdrawn and suspended cases represented practically 50 per cent of the amounts claimed against Argentina and also that for the first time the defence based on the state of necessity was admitted by an ICSID panel in Continental Casualty Company2 (Continental case) following article XI of the USArgentina BIT,3 which contemplates the adoption of measures necessary for the maintenance of public order. In this review we would like to briefly comment on three aspects that we understand constituted relevant development of the investor-state arbitration in which Argentina is involved and shall have further effects, not only in future cases but also in the activity of the ICSID arbitration community.

Very recently two ad hoc committees issued annulment decisions in two cases concerning Argentina4 because the tribunals basically had considered that Argentina could not rely on the principle of necessity either under customary international law or article XI of the US/Argentina BIT. The committees considered that the tribunals incurred in manifest excess of powers.

Of both cases, the annulment committee decision in Sempra Energy International v Republic of Argentina5 (Sempra) is worth mentioning as it even considered as not applicable the Articles on State Responsibility, and in so doing has left certain open ends when analysing the applicable law to these cases.

The tribunal sitting to decide the Sempra case, contrary to the conclusions arrived at in Continental, stated that since the crisis invoked [by Argentina] does not meet the customary law requirements of article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under article XI given that this article does not set out conditions different from customary law in such regard.6

Against such award the Republic of Argentina, based on article 52(1) of the ICSID Convention, submitted in due time a request for annulment based on four out of the five grounds contained in that provision. The ICISID secretary appointed the ad hoc committee for the annulment process that finally arrived at the conclusion that the award in the Sempra case should be fully annulled on the grounds of manifest excess of powers. To arrive at such a conclusion the committee stated that the tribunal adopted article 25 of the ILC articles as the primary law to be applied, rather than article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law.7

The unanimous decision in the annulment proceeding of Sempra calls our attention to the application of the possibility of a stay of enforcement of the award established in article 52(5) of the ICSID Convention. Whenever Argentina has submitted a request for annulment, such request was coupled with a request to the ad hoc committee of a stay of enforcement that remains thereof provisionally stayed until the committee rules on such request. The continuance of the stay until the committee decides on the annulment proceeding is discretionary and might be granted by the committee when the circumstances so require.8 Such wording leaves quite open when and to what extent should the stay be granted. In the Sempra case the committee granted a stay of enforcement subject to certain conditions that were finally not met by Argentina and, thereupon, the committee, following the claimant's request, decided the termination of the stay of enforcement.

The outcome of the annulment proceeding in Sempra raises the question whether such a stay should always be granted whenever an annulment proceeding is pending or if it should be left still to the discretion of the committee, and if so, under which circumstances should a stay be continued.

Finally, on 10 August 2010 the ad hoc committee in Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic9 rendered an award in the second annulment proceeding requested by Argentina. In this case the ad hoc committee decided unanimously to reject Argentina's application for annulment, ending (for the time being) the dispute that started back in 1996. Within its members was Dutch Professor Jan Hendrik Dalhuisen.

It is worthy of note that Professor J H Dalhuisen rendered an additional opinion under article 48(4) of the ICSID Convention addressing the role of the ICSID Secretariat that, in his opinion, in this case has led to multiple complications and has delayed the final decision by many months. Professor Dalhuisen has raised quite a few issues on the role the ICSID Secretariat has had as support of the ad hoc committees and tribunals.

The annulment of the Sempra award

Argentina sought an annulment arguing that:

- the tribunal was not properly constituted;
- that it manifestly exceeded its powers;
- that it departured from a fundamental rule of procedure; and
- that the award failed to state the reasons on which it was based.

The ad hoc Committee arrived at the conclusion that the Sempra award shall be annulled only on the ground of manifest excess of powers. To arrive at such a conclusion, the committee began by reminding that consent is the cornerstone of investment arbitration and that such consent for arbitration is given in a large number of cases by the state by entering into bilateral investment treaties and by the investor by filing its request for arbitration. Therefore, it is the BIT itself that is the primary source of applicable law to the case.

The committee indicated that in its response, Argentina alleged that Sempra's treaty claims were precluded by article XI of the BIT, which provides:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential interests.

Thereafter, the committee went on to analyse the reasoning followed by the tribunal to state that the problem in the case is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity and, therefore, the rule governing such questions will thus be found under customary law,10 finding that the applicable law should be article 25 of the articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, that provided the elements to invoke a state of necessity. Such reasoning took the tribunal to completely omit the applicability of article XI of the BIT.

The committee considered that the application by the tribunal of article 25 of the Articles on State Responsibility constitutes a fundamental error in identifying and applying the applicable law indicating, within certain other considerations, that article 25 concerns the invocation of necessity as a ground for precluding the wrongfulness of an act while article XI does not preclude the right to enforce certain measures that, when taken, are neither wrongful or incompatible with international obligations.

It appears that in the opinion of the committee article XI of the US-Argentina BIT enforces new criteria on the meaning of necessity different from the general international law criteria that might be potentially broader, but whose limits and elements should be found in the treaty itself.

The annulment award also refers to the discussion regarding who should be the judge on whether the measures taken by a state were necessary, as article XI of the BIT does not define such issue. The tribunal concluded that, if it is the same state that took the measures the one who is called to make such judgment, that would deprive the treaty of any substantive meaning as the treaty provision would be self-judging. The committee understood that the issue falls within a review of the merits and, therefore, out of the scope of the analysis of an ad hoc committee.

As we can easily conclude, the issues are far from being solved and we will have new decisions to comment as the annulment decision in Sempra left wide open the discussion of the meaning of necessity within the application of certain BITs, as the US-Argentina BIT, that contains the wording of article XI and who has the authority to judge on the necessity of such measures.

Stay of enforcement under ICSID Rules

Under the Rules of the Convention any party may require the annulment of the award within 120 days after the date on which the award was rendered.11 To consider such annulment request the chairman of the Administrative Council appoints an ad hoc committee of three persons and such Committee might order, usually pursuant to the request filed by the applicant, to stay the enforcement of the award while it is pending the annulment decision.12 The Rule states that upon request of the applicant for annulment, the enforcement of the award shall be stayed provisionally until the Committee rules on such request and, upon deciding, the Committee might grant a continued stay if it considers that the circumstances so require.

It has been a practice of Argentina when filing the annulment proceeding to require the Committee the stay of enforcement of the awards until the annulment decision has been issued. Such requests have been granted provisionally and, thereafter, have been extended until the end of the annulment process in four cases,13 either because Argentina has submitted written declarations that it shall comply with the award in case the annulment

outcome resulted to uphold the award or other considerations that the Committees deemed relevant.

In the two other cases, Vivendi and Sempra, despite the rules not granting specifically the power to impose conditions to grant the stay of enforcement, the committees ordered Argentina to place bank guarantees as a demonstration that the awards would be complied with in case they were not annulled. As Argentina failed to provide such guarantees, the stay was lifted.

This very brief reference to the decisions of the ad hoc committees regarding a continued stay of enforcement moved certain authors to conclude critically that it appears there is a new understanding of article 52(5) discretion: a stay of enforcement will be continued unconditionally, unless exceptional circumstances require that certain conditions be imposed. The stay may but not necessarily will be lifted only where said conditions are not met.14

As we indicated above, in cases involving Argentina, the annulment committees found in many opportunities sufficient grounds for the awards to be annulled, awards that involved very important pecuniary payments. Given such results, and the important amounts involved, the current trend that might be observed in the decisions of the committees of deciding the stay of enforcement until a decision on the annulment is issued, seems to be quite realistic.

Hypothetically, in the event of an absence of stay of enforcement, claimants might be in a position to enforce the award and eventually collect any amounts under the award, obviously without any guarantee of reimbursement. In case the decision is to annul the award, what would then be the possibility for a state to get reimbursement from an investor?

A continued stay of enforcement of the award pending the decision of an ad hoc committee seems to be at this stage the most logical rule, unless there is an exceptional circumstance that would require otherwise.
Professor J H Dalhuisen Additional Opinion

It is still an outstanding challenge in investorstate arbitration to meet the demand for greater transparency in the ICSID mechanisms to solve the disputes submitted to the centre. As soon as investor's claims under the bilateral investment treaties began to be customarily filed before ICSID, there has been a real and widespread concern in states and authors about the independence and neutrality of arbitrators called to solve the claims submitted to their decision. Such concern has in the past been also an issue of debate in international commercial arbitration but appears to have been left behind in this field.

Besides different nationalities, international arbitration finds parties with cultural, legal and language differences and it is expected to provide a fair mechanism for dispute resolution. In that sense, one of the main objectives in creating ICSID was to provide an impartial international forum for the resolution of legal disputes between investors and host states and such objective should be maintained as a permanent aim.

Some areas have been under scrutiny in connection with demands by host states for greater transparency in investorstate arbitration. For example, confidentiality might be a significant advantage in the private arbitration context but confidentiality under ICSID arbitration, though prescribed by the convention, has been a serious objection by states. Also publication of all the awards (interim, partial, procedural, final, revision or annulment) issued by tribunals and ad hoc committees is an effective contribution to transparency providing states, parties and

scholars with precedents otherwise untraceable or very hard to find. Open hearings might also contribute to create major confidence in the different proceedings before ICSID that could also be coupled with the participation of amicus curiae. There has been considerable progress in those areas adapting to the needs of the environments with which governments have to deal with. Citizens throughout require increasingly more and more information about the management of public affairs and require credible explanations for the use of public funds. Nowadays there seems to be certain consensus that investorstate arbitration should be public and providing information is vital for its credibility.

However, the independence and neutrality of arbitrators called to solve the claims submitted to their decision is the key of its viability.

In this area of independence and neutrality we have to underline what we consider a major setback. The Additional Opinion rendered by Professor J H Dalhuisen, pursuant to section 48 (4) of the ICSID Convention, in the unanimous annulment award rendered on 20 August 2007 in the case Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (ICSID Case No. ARB/97/3 - Annulment Proceeding) makes a negative reference to the role of the ICSID Secretariat in providing assistance to the panel to arrive at a decision. Professor Dalhuisen understands that such assistance has in this case interfered with the work of the panel, making little favour to transparency requirements.

Professor Dalhuisen stated within other comments:

> 2. It is clear that the Secretariat wants to obtain for itself a greater role in the conduct of ICSID cases and in the process also wants to involve itself in the drafting of the decisions. So also in this case. I believe this in general to be outside the Secretariat´s remit [scope] and undesirable. 3. The role of the Secretariat in ICSID is substantially defined in Article 11 of the ICSID Convention and in Chapter V of the Administrative and Financial Regulations. It is a role of administration and support; it is clear that the Secretariat has no original powers in the dispute resolution and decision taking process. 4. As a minimum, the Secretariat is keen to do the recitals, but as the recitals in this case also show, by accommodating the Secretariat's involvement, they are becoming longer and longer. To do it properly, choices need to be made and it is hardly the task of the Secretariat to make them. What are the key facts and relevant arguments and how they should be presented in the final decision or award is for Arbitrators or ad hoc Committee Members to select and decide. 7. For the Secretariat also to draft part or all of the decisions and reasoning would appear wholly inappropriate, even if following basic instructions of Arbitrators or ad hoc Committee Members whilst the final version would naturally still be left to them for approval. This would not appear to be sufficient to legitimize the text. 9. In this case, the ICSID Secretariat even took the view that on its own initiative it could intervene to streamline the texts earlier agreed by the present ad hoc Committee and senior Secretariat members approached individual Committee Members informally with a view to amending the text. This naturally caused great stress in the Committee, raising many fundamental issues of propriety, independence, open and direct communication between Committee Members, and confidentiality. 10. It is relevant in this connection to note that a practice appears to have developed in ICSID whereby all communications, also those between the Chairman and ad hoc Committee Members (or Arbitrators as the case may be) are conducted through the Secretariat, but this is not the system of the Convention, quite apart from the question whether it gives the Secretariat subsequently power to intervene. 14. The need for this system to be respected is especially clear in a case like the present one where serious reputational

> issues are at stake. Privacy and secrecy are here of the essence to promote free communication whilst protecting ad hoc Committee Members (or as the case may be Arbitrators) but no less the persons whose reputation may be affected. It should be noted in this regard that the Secretariat, whilst receiving any of this information, appears to be under no similar secrecy obligation. 16. Another idea seems to be that the Secretariat is the voice of a jurisprudence constante which it is its task to advance and protect and which gives it an autonomous right of intervention. This is also profoundly mistaken and may be seriously prejudicial to the parties. In any event, it is far too early to assume the existence of such a jurisprudence and its status as law would be uncertain even if it existed. It may be recalled that in international law, there has never been a rule of binding precedent and this is so for very good reasons. 18. The Secretariat should not have a policy or view in these matters but respect the authority and independence of the Arbitral Tribunals and ad hoc Committees which must find the law on the basis of the facts as they present themselves to them. This does not, of course, rule out that earlier cases may have persuasive value but it is for the relevant Tribunal or ad hoc Committee to decide in each instance, taking into account the Submissions of the parties. 21. In sum, the Secretariat is not the fourth member of ICSID Tribunals or ad hoc Committees and is not an interested party in any other way. It also does not have powers of scrutiny in the manner of the ICC Court. Although in practice it acts as appointing authority - in the case of ad hoc Committees of all Members - these Committees do not thereby become the extension of the Secretariat. 22. The potentially close interconnection in the present practices of the Secretariat between furthering its own role and its powers of appointment requires scrutiny and these practices themselves greater transparency. It lifts the question of the independence of ad hoc Committee Members and Arbitrators appointed by ICSID to the institutional level within ICSID. What is particularly necessary is that any semblance of collusion between the Secretariat and the Arbitrators or Committee Members it effectively appoints is avoided. 24. To conclude, the key issue in this annulment case was foremost the issue of independence of Arbitrators in the Second Award, but it became also an issue of the independence of the Members of the Second ad hoc Committee and, in that context, of the privacy and secrecy of their deliberations and drafts. 25. What hovers over all of this is the potentially pernicious impact of the desire for (re)appointment in many, not least for financial gain, in which not only withholding from the parties relevant information, as was the subject of the decision of this ad hoc Committee, but also incurring the favour of the Secretariat, may be important issues in terms of independence. Recently, the world has been rightly dismayed at the complete lack of judgment in grasping senior bankers. Whatever the rights or wrongs in this case, it may serve as a serious warning, also for ICSID arbitrators.

The opinion rendered by Professor Dalhuisen must call the attention of all the ICSID arbitration community to engage in an urgent joint task to avoid in any way possible to cast any doubt on the independence and neutrality of arbitrators and ad hoc committees members. Each one of the involved actors must comply with the role that the rules established for each one of them avoiding to interfere with the duties set forth therein.

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The long aftermath of the political and financial suffered by Argentina from 2001 to 2002 is resulting in a continuous shift in the applicable set of rules to solve the cases brought before ICSID against Argentina. We still believe that international arbitration has been a satisfactory system available both for Argentina and investors to solve their disputes, but in the light of

the awards involving Argentine cases throughout the last year, it is urgent to stress the efforts to make the system reliable for all the parties involved.

The stay of enforcement while an annulment decision is pending might prevent situations that otherwise could turn unfair for states pursuing an annulment. However, independence and neutrality of arbitrators and committee members is an essential element of reliability. No effort should be saved to provide such assurance.

Notes

1 In charge of Mr Osvaldo César Guglielmino up to January 2010 and since then in charge of Mr Joaquín Pedro Da Rocha. 2 Continental Casualty Company v Argentine Republic (ICSID Case No. ARB/03/9). 3 Article XI of the BIT (Argentine Law 24,124) provides: This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential interests. 4 Enron Corporation and Ponderosa Assets, LP v Argentina (ICSID Case No. ARB/01/3) Award rendered on 22 May 2007. The ad hoc Committee rendered its decision on annulment on 30 July 2010. Sempra Energy International v Argentine Republic (ICSID Case No. ARB/02/16) Award rendered on 28 September 2007. The ad hoc Committee rendered its decision on annulment on 29 June 2010. 5 Sempra Energy International v Republic of Argentina, No. ARB/02/016, Award 185 (ICSID 28 September 2007). 6 Sempra Energy International v Republic of Argentina, No. ARB/02/016, Award 185 (ICSID 28 September 2007), para 388. 7 Sempra Energy International v Argentine Republic (ICSID Case No. ARB/02/16) Annulment Proceeding, para 208. 8 ICSID Convention Art. 52 (5). 9 (ICSID Case No. ARB/97/3). 10 Sempra award, para 378, cited by the ad hoc Committee. 11 Convention on the Settlement of Investment Disputes Between States and Nationals of other States, article 52 (1) and (2). 12 Convention on the Settlement of Investment Disputes Between States and Nationals of other States, article 52 (5). 13 CMS, Azurix, Continental and Enron. 14 There is nothing more permanent than temporary A critical look at ICSID article 52 (5) on the of enforcment in cases against Argentina, Maria Vicien-Millburn and Yulia Andreeva in Arbitration News, Newsletter of the IBA, Vol. 15, N° 1, p56.

Richards, Cardinal, Tützer, Zabala & Zaeffere

Bermuda

Jeffrey Elkinson

Conyers

While Bermuda does not make any claim to being an arbitration centre to rival those of London, Stockholm or Singapore, there are still many arbitrations that take place in Bermuda and occasionally some give rise to applications to the Bermuda courts to resolve issues in aid of the process. As a Model Law jurisdiction, Bermuda decisions have relevance in some 65 jurisdictions where the Model Law is in force.

The recent ruling from the Bermuda Commercial Court1 dealt with an application pursuant to article 11(4) of the Model Law seeking to appoint certain persons to act as the third arbitrator in a Bermuda law arbitration to which the Model Law expressly applied.

Article 11(4) states:

> Where, under an appointment procedure agreed upon by the parties, a. a party fails to act as required under such procedure, or b. the parties or two arbitrators, are unable to reach an agreement expected of them under such procedure, or c. a third party, including an institution, fails to perform any function entrusted to it under such procedure, then any party may request the court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.2

The relevant provision of the Arbitration Agreement provided:

> All disputes between or among any of the Parties arising out of or in connection with the Documents or any of them, including the formation, existence, interpretation, construction, breach, termination or invalidity of any contracts therein set forth, shall be finally settled by ad hoc arbitration in Bermuda in accordance with the Bermuda International Conciliation and Arbitration Act 1993 and the UNCITRAL Arbitration Rules in force at the date of this Agreement (as set out in Schedule 1 to this Agreement). The arbitral tribunal shall consist of three arbitrators, who shall be appointed in accordance with the said Rules.

The jurisdiction of the court was invoked to resolve the dispute which had arisen between the parties after each of them had appointed their party arbitrators. The party arbitrators could not agree a third arbitrator, who would inevitably act as chairman, and the issue then arose as to what mechanism should be used to resolve the issue of who the third arbitrator would be. The applicant in the court proceedings submitted that the Model Law empowered the court to appoint the third arbitrator as the party appointed arbitrators were unable to reach an agreement and submitted that the arbitration agreement did not contain 'other means for securing the appointment,' to use the language of article 11(4). The applicant had appointed a member of the Bermuda Bar as its arbitrator and he in turn then proposed three other members of the Bermuda Bar, one of whom could be the possible third arbitrator.

The respondent's position was that the arbitration agreement did in fact provide 'other means for securing the appointment' (referring to the UNCITRAL Arbitration Rules) so that there was no basis for an application to the court under article 11(4).

The applicant's notice to the court sought:

> An Order pursuant to Article 11(4) of the Second Schedule to the Bermuda International Conciliation and Arbitration Act 1993 appointing either David Kessaram, Andrew Martin or Delroy Duncan or some other fit and proper person to act as a third arbitrator to the arbitral tribunal in this matter

Bermuda was the seat of the arbitration and the law of Bermuda was the applicable law. There was no dispute on those matters. Mr Justice Ian Kawaley, the Commercial Court judge hearing the application, spent some time considering the application in circumstances where he was conscious that there was no appeal from his determination of the issue. He considered that the application turned on the construction of the arbitration agreement as read with the UNCITRAL Arbitration Rules (the UNCITRAL Rules). The main question that the judge focused on was whether the contractually agreed procedure for the appointment of the third arbitrator had broken down so as to confer jurisdiction on the court to make the appointment under article 11(4).

The starting point for the court was whether the parties had agreed to follow the UNCITRAL Rules with respect to appointing a third arbitrator. There being no issue that the arbitration agreement expressly provided for the UNCITRAL Rules to apply, the judge found that the UNCITRAL Rules did indeed apply to the agreement with respect to the appointment of a third arbitrator in the event that the party appointed arbitrators were unable to agree. The applicant sought to argue that it was not a commercially sensible construction of the arbitration agreement for the UNCITRAL Rules to apply. It is unclear from the judgment on what basis the applicant thought it was not commercially sensible for the Rules to apply. It may have been that the applicant thought that article 7(2) of the UNCITRAL Rules (providing for the request to be made to the secretary general of the Permanent Court of Arbitration at the Hague to designate an appointing authority who in turn would designate the third arbitrator3), set out a procedure that was too cumbersome and would take too long. In any event, the judge rejected the applicant's argument and expressed the view that the appointment procedure provided in article 7 is designed to ensure the independence of sole or third arbitrators. The judge even went on to comment that an opposed court application possibly takes longer than following the procedure under article 7(2). The judge was quite correct when he said this as typically the PCA responds to any request within 24 to 48 hours, usually with a response requesting the other party to comment on the request. Typically, that party is given one week to respond and the PCA will act within two or three days after receiving that response. The present cost of utilising the PCA as an appointing authority pursuant to the Rules is 750. Very much quicker and more economical than what occurred in this case.

As it was, the judge held that article 7(2) applied. The UNCITRAL Rules before the court were those UNCITRAL Rules in force prior to the new UNCITRAL Rules which only apply to an arbitration agreement concluded after 15 August 2010. Parties to an agreement after that date are presumed to be referring to the new UNCITRAL Rules unless they have specified another version of the UNCITRAL Rules.

The judge was critical of the 'old' article 7 in terms of its language and construction. The judge had been referred to the The UNCITRAL Arbitration Rules: a Commentary by Caron, Caplan and Pellonpaa (Oxford University Press, 2010) at page 180 which reproduces a different format of article 7 from that appearing in the official UNCITRAL text. Interestingly, the learned authors refer to an article 7(2)(c) instead of article 7(3). The judge preferred the textbook version as being more grammatically correct but it did not alter his view that the official version of article 7 of the UNCITRAL Rules was plain in its meaning. The judge carefully considered the punctuation used in article 7(2) and noted how article 7(2)(a) and (b) both clearly dealt with the situation where one party appoints their arbitrator and the other party fails to appoint its arbitrator. He considered that a full stop (or period) divided 2(a) and (b) from article 7(3) (or as the textbook refers to it, article 7(2)(c)). The judge held that article 7(3) unambiguously dealt with the situation where there had been two party appointed arbitrators who had not agreed on the appointment of a third arbitrator. The judge, in ensuring that he fully understood the intent of article 7(3), reviewed the French text of the Rules and satisfied himself that the operative part of the Rule was that where the party appointed arbitrators have not agreed on the choice of a third arbitrator, the third arbitrator 'shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.'

In the circumstances, the judge held that the parties had indeed agreed that the UNCITRAL Rules would govern the constitution of the tribunal. The arbitration agreement for the parties did not express the means of how the third arbitrator would be chosen but provided for 'other means for securing the appointment' where the two arbitrators had failed to agree. The judge held that the court did have jurisdiction and it was not ousted simply because of the existence of the procedure. As the judge eloquently stated, 'the court's prospective jurisdiction under article 11(4) only crystallises when the agreed appointment procedure is broken down, as occurred in the entirely distinguishable case of Montpelier Reinsurance Limited v Manufacturers Property & Casualty Limited [2008] BDA LR 244 where in that case the contractually agreed appointment procedure was held to have clearly broken down.'

One argument raised by counsel for the respondent underlines the importance to both the parties and the judge in getting the composition of the tribunal correct; article 34 (2)(iv) of the Model Law allows an arbitral award to be set aside by the court if the composition of the arbitral tribunal is not in accordance with the agreement of the parties. Citing the definitive text in this area,5 it was argued that the appointment of the third arbitrator by the appropriate body selected by the parties was not only a matter of convenience but went to the enforceability of any award rendered by the tribunal. By his determination of this issue at this time, neither party could, subsequent to any award being made challenged in a Bermuda court, raise any issue as to the correctness of the judge's decision under the principle of res judicata. It does raise the interesting question as to whether enforceability under the New York Convention could be challenged in another jurisdiction if the appellant was still of the view that the judge got it wrong. Depending on the enforcing country's legal system, it may be that the principle of res judicata would prevent any challenge to enforcement on the basis of article 34(2)(iv).

The judge, in refusing the application to the court to appoint the third arbitrator, set out his observations on the suitability of another member of the Bermuda Bar being appointed as tribunal chairman. The argument before him on that issue had centred on the various institutional rules that provided that the chairman should not have the same nationality as any party.6 The judge observed that the appointment of a fellow member of the Bermuda Bar

as the tribunal chairman raised the perception of a less than impartial tribunal and he offered up a suggestion that possibly a former judge of the Bermuda court would be acceptable if it was the case that a third arbitrator with experience of Bermuda law was required.

A copy of the ruling is available on the Bermuda government website at www.gov.bm.7
Bermuda taking its opportunities?

When Lord Hoffman in the West Tankers case8 referred that case to the European Court of Justice, he referred to the Front Comor, the cargo ship that collided into the jetty at an Italian oil refinery causing massive damage, as not just carrying a large amount of Italian oil as cargo, but the future of London's arbitration industry. Hoffman was referring to London's status as an arbitration centre and the possibility that it might have to exist without anti-suit injunctions. Hoffman added:

> if the member states of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration.

Arbitration does not exist in a vacuum and needs a supportive court system. The ability to enforce arbitral awards almost worldwide is through the court system. During the arbitral process, the courts can be called upon for aid such as the securing of witnesses or evidence. The courts are there right at the beginning, from assisting in the appointment of the arbitral tribunal as demonstrated in the recent court decision set out above and, as importantly, to ensure that parties abide by their promise to arbitrate and do not proceed to litigation. Without such an injunction, there is no 'policing' of the arbitration agreement. London has been a favourite choice for arbitration for many reasons, not least of which was that the English High Court has stood by to play a supportive role and when necessary assist the arbitral process by, for example, issuing an anti-suit injunction. Without this, the process can easily be undermined with a party going to a 'foreign' court and issuing proceedings in breach of the arbitration agreement. The European Court of Justice decision on 10 February 20099 confirmed that the English courts could not grant an anti-suit injunction as this conflicted with European Union Law, in particular Brussels Regulation 44/2001. The effect of this is that any proceedings commenced in the European Union in breach of an arbitration agreement cannot be restrained by the English High Court.

Bermuda, on the other hand, at first instance and on appeal, in the 'Megafon dispute'10 confirmed the availability of anti-suit injunctions and that the law as laid down by the English Court of Appeal in the Angelic Grace11 was good law in Bermuda. An article in GAR, in reference to the Bermuda decision, was headed 'Bermuda Makes Waves with IPOC Decision.' The underlying theme was that offshore jurisdictions such as Bermuda and British Virgin Islands would see a boom in those jurisdictions being seats for commercial arbitrations; that the English courts ran the risk of being somewhat marginalised and that some of the comparative advantages of English law and seat arbitration clauses might be reduced.

With the passage of time, this does not seem to have happened. Certainly there is no empirical evidence of growth of international commercial arbitration in Bermuda, and equally it does not appear to have in any way diminished the status of London as being one of the leading centres. Obviously, the whole mechanism of drafting arbitration clauses and international parties inserting them into their commercial arrangements and then a dispute

arising is something that does not happen overnight. Bermuda still has many advantages as an international commercial arbitration centre and it may yet be the case that what was hailed as the advent of a golden age of arbitration for Bermuda is something that will dawn in the not too distant future.

Notes

1 31 August 2010 Albert Theodore Powers and Anglo-Suisse Finance Limited v Sustainable Forest Holdings Limited and Fisher Capital Partners Limited Supreme Court of Bermuda 2010: No. 143.

2 For completeness, article 11(5) states: 'A decision on a matter entrusted by paragraph (iii) or (iv) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.'

3 The procedure for requesting the PCA to designate an appointing authority is to direct the request either by fax or by email to the secretary general and accompany the request with a copy of the arbitration clause or agreement establishing the applicability of the UNCITRAL Arbitration Rules; a copy of the notice of arbitration served upon the respondent, as well as the date of such service; an indication of the nationalities of the parties; the names and nationalities of the arbitrators already appointed, if any; the names of institutions or persons that the parties have considered selecting as appointing authority but which have been rejected; a power of attorney evidencing the authority of the person making the request; and payment of the non-refundable administrative fee of 750.

4 In that case, the agreed procedure for the appointment of the third arbitrator was that, failing agreement, each party appointed arbitrator was to nominate three candidates and could reject two of the three nominated by the other side. Of the two names that would then be left, it was intended that one of them would be chosen by a lot drawing procedure acceptable to the two party appointed arbitrators. The two party appointed arbitrators were not in agreement about the lot drawing process and so an application was made to the court under article 11(4).

5 Redfern & Hunter on International Arbitration, 5th edition at section 11.80 11.84.

6 ICC Rules, article 9.5: 'the sole arbitrator or the chairman of an arbitral tribunal shall be of a nationality other than those of the parties.' LCIA Rules, article 6.1: 'where the parties are of different nationalities, a sole arbitrator or chairman of the arbitral tribunal shall not have the same nationality as any party unless the parties who are of the same nationality as the proposed appointee all agree in writing otherwise.' ICDR Rules, article 6.4: 'in making such appointments, the administrator, after inviting consultation with the parties, shall endeavour to select suitable arbitrators. At a request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.' Article 6.4 of UNCITRAL Rules provides 'in making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.' Article 11.5 of the Model Law 'a decision on a matter entrusted by paragraph (3) or (4) of this article to the

court or other authority specified in Article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.'

7 See Attorney General and Ministry of Justice (Judiciary) section.

8 West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA and others [2007] UKHL 4.

9 Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc (see C-185/07).

10 LVFG Finance Group v OAO CT Mobile v IPOC International Growth Fund Ltd, Civil Appeal No. 22 and 23 of 2006, Bermuda Court of Appeal.

11 Aggeliki Charis Compania Maratima SA v Pagnan SpA (the Angelic Grace) [1995] 1 Lloyd's Law Rep. 87.

Bolivia

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After facing the most impacting inflationary process ever registered in the history of the modern world, Bolivia saw itself in the need of adopting a series of structural reforms that began with the approval of the controversial Supreme Decree No. 21060 in 29 August 1985. This measure would allow for the implementation of a new economic policy by means of the transition, from an exhausted state-controlled economy, towards a model of state, where free market would be the top priority characterised by a favourable openness to foreign investment.

Such reforms of structural order would be deepened throughout the 1990s through the implementation of the capitalisation process,1 which came to constitute the Bolivian privatisation model of public companies. This way, the country would consolidate the transit from an interventionist to a regulating state that, with this new economic policy, would assign all activities traditionally held by the public sector to the private sector.

The capitalisation had as its main purpose the restructuring of the energy, hydrocarbons, telecommunications, transportation and smelting sectors, looking to reduce the heavy bureaucracy, as well as the market index of political subordination in which the administrations of the companies of such sectors were subject to.

The legal sustenance of the capitalisation process was configured by Law No. 1544 of 21 March 1994, The Capitalisation Law, which authorised the conversion of the main state-owned companies2 to mixed economy partnerships,3 by means of equity contributions by domestic or foreign private investors, with the later issuance of ordinary shares representative of such contributions.

The capitalisation process of Entel SA

Naturally and since it could not have turned out in any other way, the National Telecommunications Company (Entel), which at the time was the first and sole long distance telephone operator, with a captive market of 80 per cent of the telecommunications in Bolivia; came to form part of the conglomerate of state companies that would be subject to the new capitalisation process.

The established legal framework provided that the domestic or foreign investor would be selected by means of international bidding process, and therefore, eight companies were preselected to participate: Bell Atlantic International, France Telecom, Stet International NV (STET), Telephone International of Spain, Korea Telecom, Marconi, MCI International and Sprint International.4

Out of the eight companies, only three complied with all requirements and qualified to submit their economic proposals pursuant to the bidding rules: Telephone International of Spain that offered US$162.5 million, MCI International US$303 million, with the main offer coming from Italian STET that offered US$610 million.5

STET won the bidding process and was awarded with 50 per cent of the ordinary shares of Entel,6 following the provisions set forth in the Capitalisation Law. As a result of the foregoing, on 27 November 1995, the state of Bolivia and STET signed a Share Subscription Agreement, instrument that would govern and set the rules for executing STET´s investment in Entel.

As a result of the capitalisation process: i) 50 per cent of the shares of Entel became property of STET, ii) 3 per cent of the shares were destined to the workers of Entel as compensation for pending unpaid social benefits, and iii) the remaining 47 per cent being transferred to Bolivian citisens, residents in the country, with the administration of this 47 per cent being assigned to two Pension Fund Administrators: Futuro de Bolivia S.A AFP and BBVA Previsión AFP SA.7

The nationalisation of Entel SA

In 2006, the Bolivian government headed by President Evo Morales, started the so called nationalisation of all capitalised companies. Aimed at reverting the capitalisation process of the 1990s, the nationalisations begun with the enactment of the Heroes del Chaco8 Supreme Decree No. 28701. This measure established the expropriation of the golden shares in all major Bolivian hydrocarbon companies, it established the expropriation of all necessary shares so that Yacimientos Petrolíferos Fiscales Bolivianos (YPFB)9 would control minimally 50 per cent plus 1 share in Chaco SA, Andina SA, Transredes SA, Petrobras Bolivia Refinación SA and Compañía Logística de Hidrocarburos de Bolivia SA.

After two years, within the framework of this constant and progressive nationalisation process, the Bolivian government decreed the nationalisation of the share package held by the Italian investor in Entel SA. These gave rise to differences between the state of Bolivia and STET, now ETI EUROTELECOM INTERNATIONAL NV (ETI),10 Dutch subsidiary of Telecom Italia NV that in turn was the holding company of Telecom Italia S.p.A.

The nationalisation of Entel ordered by virtue of Supreme Decree No. 29544 of 1 May 2008 provided that in compensation for nationalisation ETI would receive the value for its shares as indemnification, and therefore, a 60-day evaluation period was instated. Additionally, the decree ordered that the payment to be conducted to ETI would be the total after deducting any financial, tax, labour, commercial and regulatory liabilities of Entel. Based on the foregoing, in 2007, a special ad hoc commission11 was appointed to carry out a negotiation process between both parties. Negotiations failed and ETI did not receive any type of compensation from the Bolivian state.

ETI-initiated investment arbitration proceedings against Bolivia before ICSID

Faced with the expropriation measures set forth by the Bolivian government, and not being able to establish a pacific consensus regarding the indemnification that should have been made effective in favour of ETI, on 12 October 2007, ETI filed a request for arbitration before the general secretary of the International Centre for Settlement of Investment Disputes (ICSID).

The arbitration request was subsequent to a letter dated 27 April 2007, sent by ETI to the Bolivian state, arguing the violation of the standards of protection established in the Bilateral Treaty for the Protection and Promotion of Investments (BIT) signed between Bolivia and The Netherlands.

In accordance to information provided by government officials in national newspapers, the claim requested by ETI in this arbitration proceeding amounted to US$350 million.12

From ICSID to UNCITRAL: a major turnover in the ETI case

On 16 and 20 October 2009 respectively after two years of filing the request for arbitration before ICSID the minister of legal defence of the state13 acting on behalf of Bolivia and ETI, surprisingly agreed and executed an Ad hoc Arbitration Agreement14 whereby ETI would abandon the arbitration it had filed before ICSID and as such, both Parties would freely and willingly migrate their existing controversy to an ad hoc procedure under the rules of United Nations Commission for International Trade Law (UNCITRAL). The agreement included: i) the appointment of the same arbitration tribunal that had been appointed under the ICSID filing and, ii) a provision whereby the Parties expressly waived the possibility to challenge the tribunal´s jurisdiction over the controversy.15

The minister of legal defence would publically announce that Bolivia had won a very important battle in the arbitration against ETI now that the claimant had voluntarily agreed to withdraw its claim from ICSID. The minister would later state that this would serve as precedent, concluding that no foreign investor could initiate ICSID arbitrations against Bolivia, as this centre had lost jurisdiction due to Bolivia's denunciation of the Washington Convention.

The Bolivian defence strategy: the denunciation of the Washington Convention and withdrawal from ICSID

The Bolivian state was aware at all times that the escalated nationalisation program that would be repeated year after year and coincidently of 1 May16 of each year, would come paired with a series of international disputes with the affected companies. It was clear that all investors would procure timely and adequate compensations, in accordance to the protection standards contained in the 22 Bilateral Treaties on the Protection and Promotion of Investments (BITs)17 subscribed and ratified by the state of Bolivia, the same of which until today remain unharmed regarding its terms.

In this sense, and looking to reduce in a certain manner, the state's exposure to international arbitration forums, Bolivia adopted the decision as a first defence and safeguard mechanism to denounce the Washington Convention and to withdraw from ICSID. By executing this strategy, Bolivia for sought that the ICSID centre would lose jurisdiction in all possible international arbitrations that came about from the influx of the conducted expropriation measures.

Bolivia denounced the Washington Convention on 2 May 2007, and its ICSID withdrawal was made effective six months afterwards,18 on 3 November of the same year, after exhausting the cooling off period established in the said convention.

The fading of Bolivia's main ironclad defence

The government's discontent with the Agreements executed by the ex-minister of legal defence of the state in the ETI case resulted founded, and anticipated a new and substantially higher claim from the investor.

In November of 2009, ETI filed a claim for an alleged e700 million against Bolivia under the UNCITRAL rules. The current claim nearly quadrupled the original amount filed upon ICSID, besides requesting, an additional 10 per cent compound interest payment over the mentioned claim.

From the public statements that were made, the former minister sought that consenting to the withdrawal of the ETI case from ICSID would demonstrate one of the central points insisted by the Bolivian defence, however; it results evident that the ex-authority did not take

into consideration that objecting or challenging ICSID's jurisdiction in this case was, probably, one of the best strategies to prolong a sustainable defence.

Bolivia supported, as its main argument, that ICSID would lack jurisdiction in view of the fact that ETI´s acceptance to the invitation to arbitrate contained in the BIT was outdated and extemporary based on Bolivia´s denunciation of the Washington Convention.

Bolivia positioned as the central point of its defence, the impossibility to fulfil the bilateral and written consent ordered by article 25 of the Washington Convention, and as such; the ineludible requirement to access ICSID jurisdiction would not be complied with. The Centre would in turn, lack jurisdiction.

Due to the absence of case law or precedent on the effects of denouncing the Washington Convention, this argument could have been legally sustainable and even supported by certain arguments contained in the same Washington Convention, however; in our opinion, with both parties agreeing to conduct the arbitration pursuant to the UNCITRAL rules, the central defence strategy of the Bolivian state faded away irremediably.

The ad hoc agreements executed by the parties provoked the accelerated precipitation of time periods and different procedural stages of the arbitration process.

The true effect of the agreements translates in the streamlining of the process against Bolivia the same Arbitration Tribunal has been ratified and after having voluntarily waived the possibility to challenge the tribunal´s jurisdiction an eventual Award on the merits of the controversy would be issued with more celerity. The main defence of the state of Bolivia was defenestrated by the ad hoc arbitration agreements, due to the fact that the parties agreed to directly elucidate the merits in which ETI founded its international complaint.

With the ad hoc arbitration agreements, Bolivia lost valuable rights that enabled it, within the framework of the UNCITRAL rules, to object the jurisdiction of the tribunal. It also freely permitted ETI to raise the amount of its claim to new significant and alarming proportions.

Finally, it is clear that the ETI case by no means contributes to Bolivia's bastion of defence to reject ICSID jurisdiction.

The Bolivian defence may have forgotten, that pursuant to the ICSID Convention, each tribunal is independent and decides over its own jurisdiction. Notwithstanding the former minster´s opinion on the matter, international investors affected by the nationalisation measures of the Bolivian government will, without a doubt, try to access ICSID jurisdiction in order to obtain fair compensation for their expropriated investments.

As evidence of what was indicated above, Anglo-American Pan American Energy LLC (PAE), that suffered the nationalisation of its stock in the Bolivian oil & gas giant Empresa Petrolera Chaco SA, filed a Request for Arbitration before ICSID earlier this year.

It is clear in the ETI case, that the Bolivian government has not won any type of battle, very much in contrary; this case cannot be considered as a valid precedent or advancement to defenestrate ICSID jurisdiction, now that as previously stated, all 22 BITs executed by Bolivia remain unaltered in their content and validity.

Based on the foregoing, it is fair to say that the ICSID centre may still be available for affected investors, however, this assumption has yet to be confirmed by ICSID arbitration tribunals, and as we mentioned before, each tribunal is independent and decides over its own jurisdiction.

Notes

1 In the capitalisation, different from the pure and simple privatisation process, the total contribution made by the investor is to be destined to increasing the capital of the company involved in the capitalisation process, allowing for its restructuring.

2 The main Bolivian companies that were subject to the capitalisation process are: Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), Empresa Nacional de Electricidad (ENDE), Empresa Nacional de Telecomunicaciones (ENTEL), Empresa Nacional de Ferrocarriles (ENFE) and Empresa Metalúrgica Vinto.

3 The mixed anonymous partnership (SAM) is a type company that is regulated by article 424 of the Bolivian Commerce Code, and its capital stock results from the joining of the state's capital and the private capital.

4 La Capitalización de ENTEL, Ministerio de Capitalización, 1998.

5 La Capitalización de ENTEL, Ministerio de Capitalización, 1998.

6 Eventually and as a product of a series of internal restructurings, Entel would be converted into a stock company subject to the private regime mainly contained in the Bolivian Commerce Code. From that moment, the denomination of Entel would be Empresa Nacional de Telecomunicaciones S.A. ENTEL S.A.

7 La Capitalización de ENTEL, Ministerio de Capitalización, 1998.

8 In remembrance of the fallen during the war conflict between Bolivia and Paraguay that took place during the 1930s. It is precisely in the Chaco region where the biggest and most important hydrocarbon reserves are located.

9 Yacimientos Petrolíferos Fiscales Bolivianos is the State's company in charge of directing and managing the hydrocarbon activities of upstream and downstream.

10 Stet International NV passed to Telecom Italia NV, consequently latter became the titleholder of 50 per cent of Entel's stock through its subsidiary ETI EUROTELECOM INTERNATIONAL NV.

11 The Ad Hoc commission instated to negotiate the agreed purchase of ETI's stock in Bolivia was instituted in merit of Supreme Decree No. 29087 date 28 March 2007.

12 Periódico La Razón, Periódico La Prensa, 2007.

13 The minister was later on removed from office as a result of the agreements executed with ETI.

14 Later on complemented by means of the execution of a Complimentary Agreement.

15 Periódico La Razón, Periódico La Prensa, Periódico El Deber, Periódico Los Tiempos.

16 As it occurs in most places around the world, Bolivia commemorates Labor Day on 1 May in honour of the massacre that took place in the city of Chicago the year 1886.

17 The state of Bolivia has been conducting constant announcements regarding the renegotiation of the 22 BITs in which it has place its faith; however, as far as it's known, at the moment no BIT has been denounced or has been modified to eliminate ICSID as an alternative for affected investors.

18 Article 71 of the Washington Convention establishes that every contracting state has the right to denounce the Convention through a written notification directed to the depositary thereof, with the denunciation being effective six months after the notification.

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Brazil

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The practice of international arbitration in Brazil has been experiencing a vigorous and continuous growth over the last 14 years. One of the main reasons for this has been the large expansion of the Brazilian economy and trade openness during this period, in the context of globalisation and the increasing complexity of economic life.

This period of exceptional growth started at the beginning of the 1990s, with the liberalisation process implemented through a dramatic reduction of trade tariffs and barriers, monetary stabilisation and large privatisation programme, as well as delegation of public services to private agents by public utilities and public-private partnerships.

This process was responsible for increasingly higher inward foreign direct investment rates, mainly in areas related to infrastructure, such as telecommunications, electricity, transportation and sea ports (only in the last three years, Brazil received foreign direct investments in the total amount of US$108 billion, and US$40 billion is the amount expected for 2010).1

Those reforms established the grounds for the current booming of Brazilian economy. Nowadays, Brazil stands as the world's eighth largest economy according to statistics of the World Bank, and has experienced GDP growth rates of 6.1 per cent and 5.1 per cent in 2007 and 2008 respectively. After a slight retraction of 0.2 per cent in 2009, the Brazilian GDP rate is expected to increase 6.5 per cent in 2010 and 5 per cent in 2011.2 Future projections are even more positive. The discovery of the pre-salt oil reserves, the hosting of the 2014 Football World Cup and of the 2016 Olympic Games, and the implementation of the Programme for the Acceleration of Growth (known as PAC), have been generating a massive need for investments in infrastructure, whose amount is expected to reach US$700 billion between 2010 and 2013.

Other important factors have also been contributing to the continuous development of arbitration in Brazil. The Brazilian judiciary has been going through a crisis, being unable to address the excessive amount of cases filed every year. Currently, there are 70 million cases pending before the Brazilian courts (one for every three persons). The Superior Court of Justice has around 250,000 pending cases every year, and the Supreme Court decides 60,000 cases yearly, many of them repetitive. As a result of this scenario, it takes an alarming 10 years, on average, for a case to be finally decided by the Brazilian courts. Such a situation, as expected, has been extremely harmful for the effective access to justice enshrined in the Brazilian constitution and for the regular course of businesses.

As a reaction, the Brazilian judiciary and Congress have been struggling to find alternatives that might help the country to overcome this situation, with a project of a new Code of Civil Procedure and other legislative reforms in order to limit the number of cases that reach the higher courts. To that end, the Constitutional Amendment No. 45 of 30 December 2004, and other laws were enacted to create mechanisms such as the blockage of repetitive appeals

filed before the Superior Court of Justice regarding matters already decided upon, the rule of precedent with regard to subjects already decided on several occasions (súmula vinculante) and the need for general repercussion in order for an appeal to be admitted by the Supreme Court (repercussío geral).3

A programme for a better management of the judiciary has also been set, involving the establishment of 30 goals to be reached over the next five years. In the same sense, many scholars, members of the public administration and of the judiciary have been sustaining a reduction in litigation. In spite of these efforts, Brazilian courts still cannot respond to the necessities of an increasingly complex economic structure, which demands rapidity and specialisation of dispute resolution mechanisms.

In this context, alternative dispute resolution methods, such as arbitration, mediation and conciliation, have been gaining importance over the last years at all levels of Brazilian society. Many conciliation and arbitration centres have been created and out-of-court settlement has been further encouraged by state and federal courts. The Brazilian Chief Justice Cezar Peluso has recently highlighted the increasing importance of alternative dispute resolution, considering that state courts cannot solve all the disputes submitted to them in a reasonable time.4

Furthermore, benefiting from a favourable approach from Brazilian courts and the development of a competent legal community in the area, arbitration has been largely used to solve disputes of very different natures, such as small claims (mainly in consumer and labour areas) and complex contractual, industrial and corporate disputes involving construction, joint ventures, public utilities, capital market and public-private partnerships.

International arbitration in Brazil before the 1996 Arbitration Act

Despite the fact that Brazil has never adopted the Calvo doctrine, differently from other Latin American countries, arbitration in Brazil until the end of the 20th century was surrounded by much suspicion.5 This was mainly due to nationalistic ideas according to which arbitration could be contrary to Brazilian interests and limit the powers of its judiciary. In fact, as late as 1991, Justice Sálvio de Figueiredo Teixeira, from the Superior Court of Justice, stated that our legal system, unlike other legal systems, does not encompass arbitration, and privileges the monopoly of the State jurisdiction.6

Although the Brazilian Arbitration Act dates from 1996, the possibility of resorting to arbitration as a legitimate means for solving disputes was already provided for in the Portuguese Ordinations (applicable in Brazil until the 19th century) and in the first Brazilian constitution of 1824. Arbitration was also provided for in the 1850 Code of Commerce and Regulation 737 (that dealt with the acts of commerce), as well as by the 1939 and 1973 Codes of Civil Procedure. Nonetheless, it was only seldom used for disputes involving private law and international commerce. Until 1940, there were few decisions rendered by the Brazilian courts regarding the recognition of foreign arbitral awards, which amounted to only nine until 1980.7

Arbitration in Brazil remained of little use until 1996, especially due to some serious legal limitations to its applicability and effectiveness, such as the unenforceability of the arbitration clause, the need for judicial recognition of domestic arbitral awards and the requirement of a double exequatur of foreign arbitral awards, by which foreign awards had to be previously recognised by the judiciary of the seat where they were rendered before recognition was sought in Brazil.

The three pillars of international arbitration in Brazil

The three pillars of international arbitration in Brazil are:

- the enactment of the Brazilian Arbitration Act in 1996;
- the confirmation of its constitutionality by the Supreme Court in 2001;8 and
- the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 in 2002.9

The 1996 Arbitration Act eliminated the shortcomings of the previous regulation and, as a result, arbitration became increasingly known, studied and applied in Brazil, with major contributions of the Supreme Court and of the Superior Court of Justice, which adopted a very favourable approach towards arbitration and established important precedents on controversial issues, rendering some landmark decisions on the subject.10

Although a few troublesome issues still remain, such as the arbitrability of disputes concerning labour law and the validity of the arbitration clause incorporated by reference, Brazilian lower courts have also been adopting a pro-arbitration bias. A recent research indicated that from 2001 to 2007, out of almost 700 cases, only 14 arbitral awards were vacated most of them correctly by the state courts.11

Furthermore, recent practice has demonstrated a growing cooperation between arbitrators and judges. In this context, a particular example regards the complementary jurisdiction to pronounce and enforce interim measures under Brazilian law.12

Indeed, the development of arbitration in Brazil over the last 14 years corresponds to the evolution achieved by other countries in more than half a century. Nowadays, there are in Brazil approximately 130 published books and hundreds of articles on arbitration and two specialised journals, as well as approximately 100 arbitration institutions. Among the latter, around 10 are of international level. In 2009, the amount of cases administered by the main domestic institutions has increased 70 per cent in relation to 2008, reaching an overall amount of approximately 200 cases.13

These numbers are even more impressive when taken together with those of international institutions administering arbitrations seated in Brazil or involving Brazilian parties. The outstanding development of international arbitration in Brazil is well illustrated by its presence in proceedings administered by the ICC International Court of Arbitration.

The evolution of international arbitration in Brazil: the example of the ICC

The ICC administers approximately 70 per cent of all international arbitration proceedings involving Brazilian parties and seated abroad. The remaining 30 per cent are administered by other international institutions such as the AAA and the LCIA or correspond to ad hoc arbitrations. Some Brazilian institutions have also been administering some international arbitrations.

Until 1950, Brazil had a small participation in ICC proceedings with less than 10 cases involving a Brazilian party, either as claimant or respondent. These numbers rose to 44 cases between 1950 and 1992. Between 1995 and 1999, Brazilian participation increased significantly, with 50 new cases during this period.14 Nonetheless, it was from 1998 to 2008 that ICC arbitration experienced a true explosion in Brazil, reaching the overall number of 303 cases involving Brazilian parties in this period.15

As a result, arbitrations involving Brazilian parties rose from 26th place in the ICC ranking in 1994 to 4th place in 2006 and 2009,16 following the United States, Germany and France. Moreover, in 2009 Brazil has reached first place in the ranking among Latin-American countries, with more than 50 per cent of all Latin-American parties involved in ICC arbitration proceedings against around 12 per cent of Argentineans, 11 per cent of Mexicans and less than 10 per cent of Panamanians, Chileans, Colombians, Uruguayans, Dominicans, Venezuelans, Nicaraguans and Cubans.

Another example of the growing importance of international arbitration in Brazil is the number of ICC proceedings in which Brazilian substantive law is applicable to the merits of the dispute. During 2009, Brazilian law was applied in approximately 32 per cent of the cases involving a Latin-American party, Argentinean and Mexican law in approximately 13 per cent of the cases each, British law in around 8 per cent, Chilean, Venezuelan and the New York State law in around 5 per cent, and Colombian, Spanish, Cuban, Dominican, French, German, Swiss, Dutch, Uruguayan and the law of the American State of Delaware in less than 5 per cent of the cases.

There has also been an increase in the number of ICC arbitration cases conducted in Portuguese. In 2009, Portuguese was chosen as the language of arbitration in 24 per cent of the cases involving a Latin-American party (among which 2 per cent were conducted both in Portuguese and English), while Spanish accounted for 27 per cent of the language choice and English for 47 per cent (2 per cent being conducted both in English and Spanish).

The great expansion of international arbitration in Brazil is also represented by the number of ICC proceedings seated in the country. Indeed, from 1995 to 2008, 56 ICC arbitrations were seated in Brazil (47 of them between 2003 and 2008), more than a half of them in the city of Sío Paulo. Brazil is currently the main seat of ICC arbitrations in Latin America, representing approximately 55 per cent of all cases seated in the region.

On the other hand, in 2009, Brazil was chosen as the seat of arbitration in around 25 per cent of all ICC cases involving a Latin-American party, while Europe and the United States accounted for 35 per cent and 16 per cent, respectively. More specifically, Sío Paulo, which can be considered the international arbitration headquarters in Latin America,17 was chosen as the seat of arbitration in 18 per cent of these cases; Paris and New York accounted for 11 per cent each; London and Mexico City for 9 per cent; Buenos Aires for 6 per cent; Rio de Janeiro, Montevideo and Santiago for 5 per cent; Madrid, Miami and Toronto for 3 per cent; while Zurich, Geneva, Antwerp, Vienna, Hamburg, Houston, Cuiabá (Brazil) and Santo Domingo accounted for 2 per cent of the Latin-American cases each.

Finally, the boom of international arbitration in Brazil is also reflected by the number of Brazilian arbitrators acting in ICC cases. Over the last 10 years, 171 Brazilian arbitrators acted in ICC arbitration proceedings, accounting for almost 30 per cent of all co-arbitrators in cases involving a Latin-American party in 2009. The Argentineans were chosen as co-arbitrators in around 15 per cent of these cases; Mexicans in approximately 14 per cent; and North-American and British co-arbitrators in less than 10 per cent.

Legal aspects of international arbitration in Brazil

Under the Brazilian Arbitration Act, almost all kinds of disputes can be submitted to international arbitration. Parties are able to submit to arbitration any disputes involving alienable rights, including those pertaining to state entities and state-owned companies.18

In order to enter into an arbitration agreement, they must be legally capable according to the law of the country of their domicile.

Parties are free to choose, at their best discretion, the law applicable to the merits of the dispute, which can be Brazilian or a foreign law, the general principles of law, the usages or even the international rules of commerce (lex mercatoria). Otherwise, the parties may authorise the arbitrators to decide ex aequo et bono. In case the parties remain silent on this issue, the arbitrators shall apply the law of the place where the contract was signed (article 9 of Law Decree No. 4.657, of 1942).

The Brazilian Arbitration Act also gives the parties a large discretion to decide on other aspects of the arbitral proceedings, such as the language of the arbitration, the seat and the rules applicable to the proceedings, which can be institutional or ad hoc. These rules will determine, among other issues, the form of summoning the other party. Exceptions are given by the Brazilian laws on public utilities (contratos de concessío) and public-private partnerships (Law No. 8.987/95 and Law No. 11.196/05, respectively), which expressly provide for arbitration seated in Brazil, conducted in Portuguese and applying Brazilian law to the merits of the dispute, even though the arbitrators must not necessarily be Brazilian citizens.

Finally, the Brazilian Arbitration Act does not make any distinction between domestic or international arbitrations. It only defines that the nationality of the arbitral award is that of the place where it was rendered, a foreign arbitral award being the one rendered abroad and, therefore, subject to recognition proceedings in Brazil.

Recognition and enforcement of foreign arbitral awards

Foreign arbitral awards, in order to be enforced in Brazil, must be previously recognised by the Brazilian Superior Court of Justice (Brazilian highest court for non-constitutional matters), by means of a recognition procedure. Before a final decision is rendered, the court may grant interim relief under special circumstances.

The Brazilian system of recognition of foreign arbitral awards has proven to be strongly arbitration-biased. The analysis made by the Court is limited to formal grounds exhaustively enumerated by the Brazilian Arbitration Act and the New York Convention of 1958, and cannot regard the merits of the dispute submitted to arbitration.19

The Superior Court of Justice has been strictly applying these rules, remarkably contributing to the development of international arbitration in Brazil. From 2004 to 2010, the Court examined 25 requests for recognition of foreign arbitral awards, enforcing 17 of them (five requests were denied and the other three were dismissed).

In some of these decisions, the court has adopted a constructive interpretation in favour of arbitration towards hot topic issues such as the written and signature requirement; the concept of international public policy; and the enforcement of arbitral awards that are subject to annulment proceedings.

In this sense, in L'Aiglon S/A v Têxtil Uniío S/A20 the court was faced with a request for recognition of an arbitral award rendered under the auspices of the Liverpool Cotton Association. The contract was not signed by the respondent and contained only a reference to the Rules & Arbitration The Liverpool Cotton Association Ltd. The court noted that although, at first, the lack of signature of the arbitration agreement by the parties would prevent the enforcement of the award according to article II.2 of the New York Convention,

the respondent had not challenged the jurisdiction of the arbitral tribunal at any time during the arbitral proceedings, which evidenced its consent to it. Furthermore, the court observed that the resort to arbitration was a current practice in the industry at issue (cotton). For these reasons, the court recognised the award, thus admitting the tacit arbitration agreement.

In Thales Geosolutions Inc v Fonseca Almeida Representações e Comércio Ltda,21 the court implicitly admitted the concept of international public policy, stating that the mere fact that the arbitral award did not apply a specific provision of the Brazilian Civil Code does not violate public policy (ordre public) and, therefore, does not prevent the recognition and enforcement of the arbitral award.

In First Brands do Brasil Ltda. v STP Petroplus Sul Comércio Exterior S/A PPA,22 the Superior Court of Justice enforced an arbitral award rendered in the United States, despite annulment proceedings pending in Brazil. It is noteworthy, though, that the court has not yet decided on the possibility of recognising an arbitral award that has been set aside in the place where it was rendered, a matter that has already been admitted in certain countries, such as France and the Netherlands.

Finally, even if it is not yet recognised, a foreign arbitral award constitutes a legal fact and produces legal effects as such.23

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Starting in 1996, the practice of arbitration in Brazil benefited from an extremely favourable legal environment, a booming economy and a continuously increasing demand from economic agents that urge legal stability as well as rapid and efficient solutions to their disputes, rendered by specialists in a confidential environment.

Brazil developed at an unprecedented pace and achieved impressive results that put it side by side with more developed nations in the international arbitration field, in the opposite trend of some of its Latin-American neighbors.

Nevertheless, there is still much to be done. Some few controversial issues such as the arbitrability of labour disputes, as well as the validity of the arbitration clause incorporated by reference remain to be settled.

Still, Brazilian exponential growth and the increasing demand for construction contracts, joint venture investments and corporate governance for the next years shall provide large room for further application and development of arbitration in Brazil, which is actually a tool for the development of our country.

Hence, we can affirm with no hesitation that the 21st century is the century of international arbitration in Brazil, and the forthcoming years shall be even more exciting than the previous ones.

Notes

1 Data provided by the Brazilian Central Bank, available at www.bcb.gov.br/rex/IED/Port/ingressos/htms/index3.asp?idpai=invedir, accessed on 11 August 2010.

2 OCDE aumenta expectativa de crescimento do Brasil para 2010 e 2011, Folha de S. Paulo (newspaper), 26 May 2010, available at www1.folha.uol.com.br/mercado/740855-ocde-aumenta-expectativa-de-crescimento-do-brasil-para-2010-e-2011.sh accessed on 12 August 2010.

3 The rule of precedent is provided by article 103-A of the Constitution, included by means of the Constitutional Amendment 45 of 2004 and article 70, paragraph 1, of the Internal Regiment of the Supreme Court, included by the Regimental Amendment 34 of 2009. It is further regulated by Law No. 11.417 of 2006 and by Resolutions 381 and 388, both of 2008, of the Supreme Court. The requirement of general repercussion for the admission of the extraordinary appeal by the Supreme Court is contemplated in article 102, paragraph 3 of the Constitution, also included by the Constitutional Amendment 45 of 2004, as well as articles 543-A and 543-B of the Code of Civil Procedure, which were included by Law No. 11.418 of 2006. It is further regulated in the Internal Regiment of the Supreme Court by means of Regimental Amendments 21, of 2007, 44, of 2008, 29, of 2009, and 31, of 2009. The decision on repetitive appeals is foreseen in article 543-C of the Code of Civil Procedure, included by Law No. 11.672 of 2008.

4 See his speech of investiture as chief justice rendered on 23 April 2010, available at www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/discursoPeluso.pdf, accessed on 16 August 2010.

5 Bernardo Cremades, State contracts in Brazil: an international arbitration perspective, Revista de Arbitragem e Mediaçío, No. 9, Apr./Jun. 2006, p56-57.

6 Superior Court of Justice, 4th Chamber, decision on Special Appeal No. 15.231, Reporting Justice Sálvio de Figueiredo Teixeira, rendered on 12 November 1991.

7 Irineu Strenger, Contratos internacionais do comércio, Sío Paulo, Revista dos Tribunais, 1986, p249-253.

8 Federal Supreme Court, Full Session, Reporting Justice Sepúlveda Pertence, decision on Statutory Appeal upon Foreign Award 5206/ES of 12 December 2001, Revista Trimestral de Jurisprudência, No. 190, p908-1027, Oct./Dec. 2004.

9 The New York Convention was internalised through Decree No. 4.311 of 23 July, 2002. Brazil was the 131st country to ratify it and did not ratify the Washington Convention of 1965.

10 Until 2004, the Brazilian Federal Supreme Court had exclusive jurisdiction over requests for recognition of foreign arbitral awards. The Constitutional Amendment No. 45, of 30 December 2004, attributed this function to the Superior Court of Justice, which has jurisdiction over these proceedings since then. About this matter, see Arnoldo Wald, Patrick Schellenberg and Keith Rosenn, Some controversial aspects of the new Brazilian Arbitration Law, Inter-American Law Review, Miami, v. 31, No. 2, p223-252, 2000; and Arnoldo Wald, Arbitration in Brazil: Case law perspective, in Joaquim T de Paiva Muniz and Ana Tereza Palhares Basílio (coord.), Arbitration Law of Brazil: Practice and Procedure, Huntington, NY, Juris Publishing, 2006, pAPP B-1.

11 Research Arbitration and the Judiciary, available at www.cbar.org.br/PDF/Pesquisa_GV-CBAr_relatorio_final_1_etapa_2fase_24.06.09.pdf, accessed on 11 August 2010.

12 See, among scholars: Donaldo Armelin, Tutela de urgência e arbitragem, in Tutelas de urgência e cautelares Estudos em homenagem a Ovídio A. Baptista da Silva, Sío Paulo, Saraiva, 2010, p360; Carlos Alberto Carmona, Arbitragem e processo: um comentário à Lei No. 9.307/96, 3ª ed., Sío Paulo, Atlas, 2009, p268-?277 and?p312-335; Pedro A Batista Martins, Apontamentos sobre a lei de arbitragem, Rio de Janeiro, Forense, 2008, p218-224

and p242-268; Carlos Augusto da Silveira Lobo e Rafael de Moura Rangel Ney, Revogaçío de medida liminar judicial pelo juízo arbitral, in Ricardo Ramalho Almeida (Coord.), Arbitragem Interna e Internacional (Questões de Doutrina e de Prática), Sío Paulo, Renovar, 2003, p253-265; among others. For case decisions, see: Court of Appeals of the State of Sío Paulo: 3rd Chamber of Private Law, Reporting Judge Beretta da Silveira, decision on Interlocutory Appeal No. 472.438-4/1-00 of 27 March 2007; 9th Chamber of Private Law, Reporting Judge Viviani Nicolau, Decision on Interlocutory Appeal No. 472.947-4/4-00 of 06 February 2007; 5th Chamber of Private Law, Reporting Judge Roberto Mac Cracken, decision on Interlocutory Appeal No. 614.006-4/4-00 of 18 February 2009; 17th Chamber of Private Law, Reporting Judge Simões de Vergueiro, decision on Interlocutory Appeal No. 7377301-4 of 26 August 2009; 20th Chamber of Private Law, Reporting Judge Alvaro Torres Júnior, decision on Appeal No. 999.843/6 of 23 June 2008, Revista de Arbitragem e Mediaçío, No. 24, Jan./Mar. 2010, p236; 4th Chamber of Private Law, Reporting Judge Ênio Zuliani, decision on Provisional Measure No. 494.408-4/6 of 28 June 2007, Revista de Arbitragem e Mediaçío, No. 17, Apr./Jun. 2008, p274; among others.

13 According to information provided by the Arbitration Center of the Brazil-Canada Chamber of Commerce (CCBC), the Mediation and Arbitration Chamber of Sío Paulo (CMA) and the Arbitration Institute of the American Chamber of Commerce (AMCHAM), in Sío Paulo, the Arbitration Chamber of Fundaçío Getúlio Vargas (FGV), and the Brazilian Mediation and Arbitration Center (CBMA), in Rio de Janeiro; and the Brazilian Business Arbitration Chamber (CAMARB), in Minas Gerais.

14 CRISTIAN CONEJERO ROOS and RENATO STEPHAN GRION, Arbitration in Brazil: the ICC experience, Revista de Arbitragem e Mediaçío, No. 10, p93-139, Jul./Sep. 2006.

15 ICC Court of International Arbitration Bulletin, vol. 19, n° 1, 2008, p52. The information regarding the number of cases involving Brazilian parties in 2008 was provided to us by the ICC.

16 The ICC statistics regarding the year 2009 were recently provided by Mr Emmanuel Jolivet, General Counsel of the ICC International Court of Arbitration, and by Mr José Ricardo Feris, Counsel of the Secretariat of the ICC International Court of Arbitration for Latin America, respectively during the seminar Opportunités et risques juridiques en matière d'investissements au Brésil, and the Advanced Training on International Arbitration (PIDA), both held in the ICC headquarters in Paris from 14 to 18 June 2010.

17 GILBERTO KASSAB, Abertura do I Seminário Internacional de Mediaçío e Arbitragem da OAB/SP, Revista de Arbitragem e Mediaçío, No. 24, Jan./Mar. 2010, p26; ARNOLDO WALD FILHO, Sío Paulo: capital da arbitragem na América Latina, Revista de Arbitragem e Mediaçío, No. 23, Oct./Dec. 2009, p45. The city of Sío Paulo is already the financial center of Latin America and has experienced arbitrators and arbitration-specialised lawyers, as well as good legal translators and all the necessary infrastructure for the adequate conduction of the proceedings.

18 ARNOLDO WALD and ANDRÉ SERRíO, Aspectos constitucionais e administrativos da arbitragem nas concessões, Revista de Arbitragem e Mediaçío, No. 16, Jan./Mar. 2008, p11; ARNOLDO WALD and JEAN KALICKI, The settlement of disputes between the public administration and private companies by arbitration under Brazilian Law, Journal of International Arbitration, vol. 26, No. 4, 2009, p557; SELMA MARIA FERREIRA LEMES, Arbitragem na Administraçío Pública: fundamentos jurídicos e eficiência econômica, Sío

Paulo, Quartier Latin, 2008. For case decisions, see: Superior Court of Justice, 2nd Panel, Reporting Justice JOíO OTáVIO DE NORONHA, decision on Special Appeal No. 606.345 of 17 May 2007, Revista de?Arbitragem e Mediaçío, No. 14, Jul./Sep. 2007, p241; Superior Court of Justice, 1st Chamber, Reporting Justice LUIZ FUX, Decision on Writ of Mandamus No. 11.308/DF of 09 April 2008, Revista de?Arbitragem e Mediaçío, No. 21, Apr./Jun. 2009, p286; Superior Court of Justice, 3rd Panel, Reporting Justice ARI PARGENDLER, decision on Special Appeal No. 954.065 of 13 May 2008, Revista de?Arbitragem e Mediaçío, No. 22, Jul./Sep. 2009, p282.

19 Superior Court of Justice, Special Chamber: Reporting Justice FERNANDO GONÇALVES, Decision on Challenged Foreign Award No. 3035/FR of 19 August 2009, Revista de Arbitragem e Mediaçío, No. 27, Oct./Dec. 2010; Reporting Justice JOíO OTáVIO DE NORONHA, decision on Challenged Foreign Award No. 611/US of 23 November 2006, Revista de Arbitragem e?Mediaçío, No. 13, Apr./Jun. 2007, p260; Reporting Justice GILSON DIPP, decision on Challenged Foreign Award No. 507/GB of 18 October 2006, Revista de Arbitragem e?Mediaçío, No. 13, Apr./Jun. 2007, p251; Reporting Justice FELIX FISCHER, decision on Challenged Foreign Award No. 866/GB of 17 May 2006, Revista de Arbitragem e?Mediaçío, No. 12, Jan./Mar. 2007, p256; Reporting Justice FELIX FISCHER, Challenged Foreign Award No. 760/US of 19 June 2006, Revista de Arbitragem e?Mediaçío, No. 12, Jan./Mar. 2007, p264; Reporting Justice CARLOS ALBERTO MENEZES DIREITO, decision on Challenged Foreign Award No. 856/GB of 18 May 2005, Revista de Arbitragem e?Mediaçío, No. 6, Jul./Sep. 2005, p228.

20 Superior Court of Justice, Special Court, Reporting Justice CARLOS ALBERTO MENEZES DIREITO, decision on Challenged Foreign Award No. 856/EX of 18 May, 2005, Revista de Arbitragem e Mediaçío, No. 6, p228, Jul./Sep. 2005.

21 Superior Court of Justice, Special Court, Reporting Justice JOSÉ DELGADO, decision on Challenged Foreign Award No. 802/EX of 17 August, 2005, Revista de Arbitragem e Mediaçío, n° 7, p196, Oct./Dec. 2005, with my comments.

22 Superior Court of Justice, Special Court, Reporting Justice JOíO OTáVIO NORONHA, decision on Challenged Foreign Award 611/US of 23 November, 2006, Revista de Arbitragem e Mediaçío, No. 13, p260, Apr./Jun. 2007.

23 See in this sense: Court of Appeals of the State of Sío Paulo, 25th Chamber of Private Law, Reporting Judge ANTÔNIO BENEDITO RIBEIRO PINTO, decision on Appeal No. 1.117.830-0/7 of 26 February 2008, Revista de Arbitragem e Mediaçío, No. 17, Apr./Jun. 2008, p200.

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Recent developments in Canadian arbitral law continue to re-enforce a long term trend in favour of arbitration and a high degree of judicial deference to the arbitral process.

Canada has ratified the United Nations Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (New York Convention) and was the first country to implement the UNICITRAL Model Law on International Commercial Arbitration (Model Law). In Canada's decentralised legal system, jurisdiction over arbitration-related matters is divided between the federal government and the 10 provinces. For international arbitrations, all of these governments have adopted the Model Law, albeit with minor variations. With the exception of Quebec, each of Canada's provinces has a separate statute for domestic arbitrations. All the laws of the various jurisdictions are remarkably similar, rendering the complexity more apparent than real.

The only significant gap in Canada's arbitration treaty structure is the ICSID Convention. Canada remains the only developed country that has not yet ratified the ICSID Convention. The federal government took major steps towards ratification on 13 March 2008, when the Settlement of International Investment Disputes Act entered into force.1 However, the government is still awaiting passage of implementing legislation in a few holdout provinces before taking the final step of ratification.

Judicial deference to the arbitral process

Substantive deference

Since implementation of the Model Law, Canadian courts have demonstrated a 'clear shift in policy' in favour of arbitration over court proceedings. On at least two occasions, the Ontario Court of Appeal has stated that any ambiguities in the interpretation of arbitral legislation or agreements should be resolved in favour of arbitration.2 Canadian courts regularly implement article 8(1) of the Model Law which requires a stay of a judicial proceeding in favour of arbitration where one party wishes to enforce the arbitration agreement.3

The Supreme Court of Canada's 2007 decision in Dell Computer Corp v Union des consommateurs4 confirmed that the international principle of compétence-compétence is part of Canadian law. The principle calls for deference to arbitrators to resolve challenges to their jurisdiction. It is well-established in Canada that courts should grant a stay of litigation under the Model Law where it is 'arguable' that the dispute falls within the terms of a valid arbitration agreement and should refuse a stay only in 'clear' cases.5

In the Dell Computer case, the Supreme Court of Canada refined the distinction between 'clear' and 'arguable'. It found that, in exceptional circumstances, the courts can decide the threshold issue of the scope and validity of the arbitration agreement when an important question of law is raised and only cursory reference to the evidence is needed. The Supreme Court added that the issue must not be raised for the purpose of delay. 6 Although some may see this as a departure from the trend of judicial deference to arbitration, in practice

courts have emphasised the Supreme Court's caveat that it is only in exceptional cases that the court should determine jurisdiction. A recent trilogy of decisions by the Ontario Court of Appeal illustrates this.

In Dancap Productions Inc v Key Brand Entertainment Inc,7 the Court of Appeal granted a stay of litigation when faced with a broadly worded arbitration clause in a shareholders' agreement covering a dispute regarding proposed management agreements. The court noted that determining the scope of the arbitration agreement required 'a thorough review of the parties' complex contractual discussions' and refused to stay the arbitration.

In contrast, the Court of Appeal did not stay pending litigation in Patel v Kanbay International Inc, despite the existence of an arbitration clause in a shareholders' agreement between the parties.8 In that case, however, the dispute was over a wrongful dismissal and negligent misrepresentation in the employment context. The court relied on UNCITRAL's analytical commentary to the Model Law and noted that employment disputes were deemed to fall outside of the scope of international 'commercial' arbitrations.

In Jean Estate v Wires Jolley LLP,9 the court considered whether an arbitration clause in a contingency fee agreement was voided by the public policy set out in the Solicitors Act that requires such agreements to be 'fair and reasonable.' A majority of the court held that the issue of public policy was a pure question of law and should therefore be answered first by the court. The majority went on to hold that referring disputes about contingency fees to arbitration did not violate public policy and that 'simply because the Solicitors Act refers to a Superior Court judge as having the jurisdiction to protect clients' rights, this does not mean that disputes arising between a solicitor and a client may not be submitted to arbitration.'10 The court did, however, go on to state that the arbitrator must make his or her decision in accordance with the substantive statutory rights contained in the Solicitors Act. This final direction was somewhat unusual in that the Model Law does not give the court the power to make a stay conditional on the arbitrator following its directions. Despite this ambiguity in its reasoning, the end result of the Jean Estate case demonstrates Canadian courts' continued support of international arbitration in a wide range of commercial contexts.

Procedural deference

Once an arbitration is under way, the Model Law gives the arbitral tribunal wide discretion to craft the process to be followed in a manner that it sees fit.11 Moreover, the Model Law does not give courts any right to review procedural decisions as opposed to awards that dispose of a substantive issue in dispute.12 This principle was recently affirmed by the Ontario Court of Appeal in the case of Inforica Incn v CGI Information Systems and Management Consultants Inc,13 where the court declared that the motions judge had no authority to reverse an arbitrator's order for security for costs.

While international tribunals have broad powers to craft their own process, they cannot issue default awards in the same manner as domestic courts. Where the respondent defaults, most arbitration rules give the claimant the option of proceeding with the arbitration by paying the respondent's share of the arbitration costs or withdrawing its claim in favour of litigation. If the claimant chooses the latter course, it has effectively accepted the respondent's waiver of its right to arbitrate.

As the Alberta Court of Appeal recently confirmed in a case considering the ICC arbitration rules, a defaulting respondent cannot stay litigation after the claimant has accepted its

repudiation of the arbitration agreement.14 This decision helps to prevent strategic use of the arbitration clause to create inefficiencies in dispute resolution.

Limitation periods and the enforcement of arbitral awards

The drafters of the New York Convention and Model Law deliberately left the limitation periods governing the enforcement of awards to the discretion of individual states.15 In Yugraneft Corporation v.Rexx Management Corporation,16 the Supreme Court of Canada affirmed that arbitral awards are subject to limitation periods. The Court observed that the New York Convention, although silent on limitation periods, stipulates that enforcement of arbitral awards shall be 'in accordance with the rules of procedure of the territory where the award is relied upon.'17 The court found that the Alberta Limitations Act is such a 'rule of procedure' and therefore applicable to the enforcement of arbitral awards.

The court rejected the argument that arbitral awards are akin to a domestic judgment, finding instead that they fall within the broad category of 'remedial orders.'18 In Canada, this means that international arbitral awards, like foreign judgments, are subject to a limitation period of two years from the date of discovery of a claim for enforcement rather than the renewable 10-year limitation period for domestic judgments.19 This conclusion is consistent with the Supreme Court of Canada's comments in Dell that international arbitration amounts to 'an institution without a forum and without a geographical basis' that is 'part of no state's judicial system.'20 Consequently, they cannot form part of Canada's judicial order in the same manner as domestic courts.

While this finding might be thought to be unhelpful for the enforcement of arbitral awards, the Supreme Court came to the assistance of parties seeking to enforce awards with two additional findings in Yugraneft. First, the court held that a limitation period will not begin to run until the three month period provided by the Model Law for the respondent to apply to set the award aside has lapsed. This is because the award does not have the requisite finality if it is open to being set aside by a local court.21

Second and more importantly, the court held that the limitation period will only run as of the date that the claimant knew or ought to have known that the non-payment 'warrants bringing a proceeding.'22 The court found that 'recognition and enforcement proceedings would be warranted in Alberta once an arbitral creditor had learned, exercising reasonable diligence, that the arbitral debtor possessed assets in that jurisdiction.'23 In other words, the clock will not run against an arbitral creditor who has no reason to know that the debtor possesses assets in Canada. Given that it can take years to discover the jurisdictions where the debtor's assets are hidden, this clarification of when the limitation period begins to run brings welcome certainty to the enforcement of arbitral awards.

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While courts' deference to international arbitral tribunals has its limits, the overall trend of developments in Canada has solidified their autonomy and independence. Recent decisions of the Ontario Court of Appeal send a clear message that, with limited exceptions, litigation subject to arbitration agreements will be stayed, arbitral procedures will be respected and arbitral awards will be enforced.

Notes

1 c8, SC (2008).

2 Automatic Systems Inc v Bracknell Corp (1994), 18 OR (3d) 257 (Automatic Systems); Canadian National Railway Co v Lovat Tunnel Equipment Inc [1999] 174 DLR (4th) 385 (Ont. CA).

3 See Automatic Systems, ibid.

4 Dell Computer Corp v Union des consommateurs, [2007] 2 SCR 801 (Dell Computer).

5 Dancap Productions Inc v Key Brand Entertainment Inc, 2009 ONCA 135 at paragraph 34 (Dancap Productions); Dalimpex Ltd v Janicki (2003), 64 OR (3d) 737 (CA); Gulf Canada Resources Ltd v Arochem International Ltd (1992), 66 BCLR (2d) 113 (CA).

6 Dell Computer, supra 4 at paragraphs 84-86.

7 Dancap Productions, ibid, paragraph 40.

8 Patel v Kanbay International Inc 2008 ONCA 867 at paragraphs 17, 13.

9 Jean Estate v Wires Jolly LLP, 2009 ONCA 339 at paragraph 58 (Jean Estate)

10 Jean Estate, supra 9 at paragraph 73.

11 Model Law, article 19(2).

12 Model Law, article 34(2).

13 Inforica Inc v CGI Information Systems and Management Consultants Inc, 2009 ONCA 642. Although this case was decided under the domestic arbitration statute, the Model Law is not materially different on this point.

14 Resin Systems Inc v Industrial Service & Machine Inc, 2008 ABCA 104.

15 For a further discussion, see W Gray and R Wisner, 'The Russians Are Coming, But Can They Enforce Their Foreign Arbitral Award?' (2009) 47 CBLJ 244.

16 Yugraneft Corporation v Rexx Management Corporation, 2010 SCC 19 (Yugraneft Corporation).

17 Ibid, at paragraphs 15-23.

18 Ibid, at paragraphs 42-44.

19 Note that there are variances between the limitation statutes in each province.

20 Dell Computers, supra 4.

21 Yugraneft Corporation, supra 16.

22 Section 3(1)(a)(iii) Limitation Act, RSA 1980, c L-15 (Alberta).

23 Ibid, at paragraph 61.

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Ecuador

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The Law on Arbitration and Mediation (LAM) enacted on 4 September 19971 repealed the previous Law on Commercial Arbitration that was in force since October 1963 and several other legal provisions that could be deemed opposed to the new regime.2

Later, the LAM was amended in order to strengthen arbitration in Ecuador.3 The following amendments to the LAM are worth pointing out:

- The possibility of challenging the validity of an arbitral award is clearly defined through a procedural nullity action (acción de nulidad) which cannot be considered an appeal within the same proceeding.
- The President of the Provincial Court of Justice is allowed thirty days to decide on the acción de nulidad filed against an award.
- In case a party to an arbitral agreement is sued before the judicial system, the judge will have to decide upon the existence and validity of such arbitral agreement as a pre-trial matter by means of the principle of judicial economy (see article 8, LAM).

It is safe to say that arbitration has had relative success in Ecuador. Probably the reason for such success is the fact that arbitration has proven to be an alternative to the judicial system that allows for a speedy and impartial process. The inherent flaws of the judicial system have contributed to this relative success. However, it is relative because statistics show that from the universe of legal conflicts, very few are resolved through arbitration, although the number is rising.4

There is still much work that needs to be done to raise the awareness of alternative dispute resolution (ADR) mechanisms in Ecuador in order to further develop and spread the use of arbitration for regular conflict resolution.

One of the major setbacks for the advancement of arbitration in Ecuador is the widespread lack of experience in the field generally, which becomes evident when drafting arbitration clauses and agreements. Oftentimes this provides great difficulties for arbitral tribunals that cannot declare they have jurisdiction over certain subject-matters. Other difficulties arise from lack of knowledge concerning the differences between the arbitration and the judicial systems.

The arbitration regime in the 2008 Constitution

Ecuador has undergone serious changes in its legal system. On 28 September 2008, the Ecuadorian people approved in a referendum the new Constitution drafted by the National Constituent Assembly (2008 Constitution).

Similar to its predecessor, the 2008 Constitution recognises the existence and validity of ADR mechanisms, expressly including arbitration (see article 190, 2008 Constitution).

However, unlike the 1998 Constitution, the 2008 Constitution imposes certain conditions and requirements for arbitration to be viable.

For example, it expressly states that arbitration may only be used for resolving disputes that could otherwise be resolved through a settlement agreement between the parties. Legal issues that cannot be waived or renounced by the parties may not be subjected to arbitration.5 This requirement of arbitration ratione materiae is already included in the LAM, and embodying it in a constitutional provision is useless or, at least, unnecessary.

The relevant constitutional provision also deals with arbitration with the State or its instrumentalities. The wording in the provision lacks clarity. Article 190 says:

> In matters of public contracting, arbitration at Law will be available, provided that there is a prior favorable opinion from the Attorney General of the State, pursuant to the conditions set forth in the legal framework.6

This provision requires an opinion from the Attorney General of the State (AG) before commencing any arbitration. Furthermore, in conjunction with the provisions of the AG Law,7 his opinion is necessary before an arbitration clause is agreed in all cases. Therefore, article 190 of the 2008 Constitution expands the requirement of an ex-ante opinion by the AG to all arbitration clauses and agreements, not only to those entered among the parties ex-post the controversy, as the LAM requires.8 Hence, the AG practice and construction of such constitutional provision is that he must issue his opinion ex-ante the execution of any arbitration clause to be concluded with a state-owned entity, regardless of whether the dispute has already arisen or not.

Constitutional control of arbitration

Subsequent to the 2008 Constitution, a debate commenced in Ecuador on the possibility for judicial intervention in arbitration beyond the exceptional cases set out in the Arbitration and Mediation Law. In particular, the Constitution establishes the extraordinary action for protection.9 This is a constitutional motion to revise final judgments where constitutional rights have been infringed. In other words, the constitutional motion is admissible against final decisions, thus endangering the res judicata effect that characterises arbitral awards.

It should be noted that the Constitutional Court has not yet resolved any of the actions for protection brought so far (directly against arbitral awards).10 There are arguments buttressing each side.11

Local statistics: arbitration processes commenced per year

The statistics of the arbitration claims filed in the most important dispute settlement centers of Ecuador are as set out in the table below:

	2007	2008	2009	2010
Quito Chamber of Commerce	66	61	118	75
Ecuadorian - American Chamber of Commerce	5	4	10	8
	10	7	19	14

Quito Construction Chamber				
Quito Construction Chamber	15	10	3	2

International arbitration and foreign investment protection

Ecuador has undergone some drastic changes in this field, so this section will vary considerably from the previous article.

In the context of investment treaty arbitration, it must first be noted that Ecuador has withdrawn from the ICSID convention. The announcement was made in July 2009, and the withdrawal became effective January 2010.12 For additional information on Ecuador's withdrawal from ICSID please see the Ecuadorian chapter on international arbitration in the previous issue of Global Arbitration Review of the Americas. Although this notice from Ecuador does not affect the consents provided for in contracts with ICSID dispute resolution clauses in BITs executed by Ecuador,13 the message that Ecuador has sent the world and the parties to the ICSID Convention is clear: it does not like international arbitration.14

Additionally, there is a strong political decision to withdraw from several bilateral investment treaties through which Ecuador gives its consent to international arbitration.15

Actually, the Constitutional Court has been issuing a series of decisions declaring that the dispute settlement provision of bilateral investment treaties16 (BITs) are unconstitutional (ie, the Ecuador-UK and Ecuador-Germany BITs). This is done as part of a major scheme to withdraw from those treaties because they are considered to be the illegitimate cession or waiver of sovereign powers, namely, the power of Ecuadorian courts to exercise their jurisdiction within the territory of Ecuador.

The Constitutional Court has issued decisions on the BITs with China, Finland, Germany and the United Kingdom. The decisions are based on article 422 of the 2008 Constitution, which establishes in the relevant part:

> It shall not be possible to enter into international treaties or instruments in which the Ecuadorean State waives sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the State and private individuals or corporations.

The Constitutional Court does not seem to consider that article 422 establishes a (i) prohibition to enter into new treaties and, (ii) such prohibition is related to treaties in which Ecuador waives sovereignty in contractual and commercial disputes. Therefore, in our opinion, current treaties are not against the 2008 Constitution because (a) the prohibition is for future treaties, and does not apply to existing ones; and, (b) the prohibition refers to contractual and commercial disputes, while the BITs are generally related to investment disputes within the independent and separate discipline of International Investment Law.

In order to withdraw from the BITs, the Constitutional Court is declaring that the BITs are unconstitutional because they contain provisions that provide for international arbitration for the settlement of investment disputes with foreign investors, disregarding the jurisdiction of the domestic court system.

At the time of this article, the National Assembly International Law Committee has already issues internal reports suggesting the withdrawal of the China, Finland, Germany and the United Kingdom BITs as a whole, but no decision has been taken by Ecuador to actually denunciate them. It is expected that a final decision to withdraw from these treaties will come soon.

The general procedure for withdrawing from the BITs is as follows. The National Assembly International Law Committee issues a recommendation to all the other legislators in the sense that they should approve the withdrawal from each BIT. After voting on the matter, the National Assembly will approve the withdrawal from each BIT and the President of the Republic will send the notice of withdrawal the other Contracting Party in each BIT. Recent developments in negotiation and renegotiation procedures for public contracts indicate that Ecuador is willing to submit disputes with foreign investors arising from specific contracts to international arbitration under UNCITRAL rules, having Santiago de Chile as the seat of arbitration. The Attorney General has already approved this type or arbitral provision as required by the Constituion.

Also, the recent draft Production Code proposed by the government to reactivate the economy contains some interesting provisions on settlement of investment disputes. Article 35 of the latest Draft establishes that conflicts that arise from an investment may be resolved through arbitration, but the arbitration clause must be included in an Investment Contract. The arbitration agreement would have to meet some legal requirements in order to be valid, but it is quite evident that the government understands that there is a need for having disputes with foreign investors resolved through international arbitration. Special care will surely be needed when drafting these contracts.

It is also worth mentioning that Ecuador is a party to the World Trade Organization17 and more than once it has applied state-to-state arbitration as set forth in WTO treaties.18

Pending cases against Ecuador

Presently, as we have learned, Ecuador has ten pending international arbitration cases pertaining to investment as set out on the next page.

Enforcement of international arbitral awards in Ecuador

On 19 August 1961, Ecuador ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 1958 New York Convention (NYC).19 At the time of ratification, Ecuador submitted the reservation on reciprocity as allowed by article 1.3 of the NYC.20 We still do not have any cases in Ecuador relating to enforcement of awards issued under the NYC.21

On 30 January 1975, the Inter-American Convention on International Commercial Arbitration, or Panama Convention (PC), entered into force, and was ratified in 1978.22 It is a second tool for enforcing foreign arbitral awards. The PC was executed by the Organization of American States (OAS) member countries and, therefore, its application is limited to arbitral awards pronounced in one of the OAS member countries that entered into the PC.23 The PC applies to arbitral decisions resulting from disputes of a commercial character.24 Article 4 of the PC provides that recognition and enforcement of arbitral awards that meet the requirements and limitations of the Convention must be recognised in the same manner as national or foreign judgments are recognised and enforced.25

Claimant	Respondent	Date of registration	Rules	Subject matter

RSM Production Corporation	Ecuador	13 May 2010	UNCITRAL	Mining
Repsol	Ecuador	12 Jun 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Burlington	Ecuador and Petroecuador	4 Jun 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Perenco	Ecuador and Petroecuador	2 Jun 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Murphy	Ecuador	15 Apr 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Occidental	Ecuador	13 Jul 2006	ICSID	Cancellation, petroleum contract
Ulysseas	Ecuador	n/a	UNCITRAL	Breach and violation of investment guarantees
Globalnet	Ecuador	n/a	UNCITRAL	Breach and violation of investment guarantees
CGC	Ecuador	n/a	n/a	Breach of contract

Chevron	Ecuador	23 Sept 2009	UNCITRAL	Denial of justice
Chevron	Ecuador	6 Dec 2006.	UNCITRAL	Denial of justice

On May 198226 the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, or the 1979 Montevideo Convention27 (MC) came into effect in Ecuador. In addition to the coverage provided by the MC to judgments and awards pertaining to other matters, it also applies to enforcement of foreign arbitral awards relating to commercial issues. The MC, just as in the PC, is that it only applies to judgments and awards issued in OAS member countries. The MC's intention is to cover judicial judgments and awards issued in civil, commercial or labour proceedings in one of the member States.28

As far as local norms are concerned, the LAM does not have a specific system for recognition and enforcement of foreign awards but, rather, it gives them the same treatment as the process for enforcing local judicial judgments passed in last instance. Article 42 of the LAM states that () awards issued in an international arbitration proceeding shall have the same effects and shall be enforced in the same manner as awards issued in a national arbitration proceeding. According to article 32 of the LAM, that procedure for enforcing arbitral awards will be the same as for enforcing local judgments passed in last instance, that is, through a judicial order. The LAM sets forth the judge's duty to recognise and enforce foreign awards through a judicial order, without the possibility of applying any other procedure.

Therefore, we believe that the LAM provides a mechanism that is more expeditious and direct than those provided in international conventions, which can be applied to international arbitration awards in Ecuador. The judicial order procedure is commenced by the judge who allows a very short period of time for the debtor to pay what is due or otherwise to designate property for attachment and subsequent auction. This proceeding does not admit any opposition from the debtor, while the NYC does.29 For this reason, the LAM presents an alternative that could be more expeditious to enforce awards before the lex fori. According to the foregoing, it can be argued that the exequatur procedure for enforcement of international arbitral awards is not necessary in Ecuador.

When analysing the law applicable to enforcement of awards in Ecuador, a distinction should be drawn between awards rendered by ICSID tribunals as opposed to those rendered by UNCITRAL or ICC tribunals.

Although Ecuador withdrew from the ICSID Convention effective in January 2010, there are still a few ICSID arbitrations ongoing and clauses in effect. Therefore, ICSID awards are binding and final for the contracting parties. Furthermore, the enforcement process provided for in the ICSID Convention remains effective for those cases and treaties in which Ecuador has given consent prior to the notice of withdrawal effective since January 2010.30

ICSID awards do not require an exequatur, that is, a judgment by a local court that a decision issued by a foreign judicial court or arbitration tribunal should be executed before local tribunals in order to be enforced because it does not contradict the Ecuadorian legal system. In other words, domestic courts are not entitled to review the awards rendered by ICSID tribunals, but only to enforce them.

Hence, the enforcement of an ICSID award in Ecuador will be made as if it was a final judgment of a court in that state.31 Needless to say, an ICSID award entails crucial benefits for the investor: local courts are not empowered to revise the award; consequently, enforcement of ICSID awards may be more expeditious than enforcement of other international awards.

As regards the ICSID Convention, articles 53 and 54 have specific provisions that make it a special and unique self-contained system. Many practitioners choose ICSID based on these provisions, which are one of the most relevant improvements of the ICSID Convention regarding other arbitral organs and procedures. These provisions mandate that ICSID awards may only be reviewed under the rules of the ICSID Convention; the parties recognise the award, and any contracting State enforces the pecuniary obligations awarded as if they were res judicata from any domestic tribunal. Pursuant to a plain construction of the ICSID and Vienna Conventions, Ecuador courts may not review an ICSID award, but only allow its enforcement as if it were a domestic final judicial decision.

If that is not the case and a domestic court (for public order or constitutional reasons) allows a review, the award may be enforced in any other contracting state of the ICSID Convention, and such enforcement may not be opposed by Ecuador. In other words, the fact that there is a domestic procedure aimed at reviewing the award does not preempt any other contracting state or its judiciary to grant the enforcement.32

Therefore, in Ecuador, an international award not protected by a specific treaty providing for its own enforcement mechanism (ie, the ICSID Convention) has to be enforced by applying the LAM and, thus, by filing the proper petition to the judiciary in an enforcement process,33 in which the merits of the arbitration cannot be discussed or revised unless they contravene public policy and due process, as set forth in the Code of Civil Procedure34 and the New York and Panama Conventions.35 Once the international award has gone through the enforcement process without going through a review on the merits of the case, it is fully enforceable.

Since the current Government took office, Ecuador has become one of the principal sponsors of an international political campaign that seeks to transform the current international dispute settlement for foreign investment disputes.36 Furhtremore, Ecuador is in favour of a Latin-American self-contained dispute settlement mechanism, which is still under analysis.

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In 2010, arbitration in Ecuador has undergone serious material changes, the effects of which may not be fully foreseeable to date.

On the local arena, arbitrators and practitioners will expect developments on whether there is room for a constitutional revision of local arbitral awards.

On the international arena, recent constitutional decisions, together with the congressional process in place at the time of this article, may affect BITs arbitral provisions or its entirety. This, together with the fact that Ecuador is no longer a contracting State to the ICSID convention, is requiring Ecuador and investors, to foresee and develop new arbitral clauses and mechanisms.

We believe that these changes will lead arbitration and its users through complex and uncertain, yet interesting times.

Notes

1 Later on, the LAM was amended on 25 February 2005 and was codified on 14 December 2006.

2 Article 1505 of the Civil Code, as applied by the Supreme Court of Justice, established that submitting a dispute to international arbitration constituted illicit object.

3 See supra note 1.

4 Arbitration statistics are provided below.

5 Article 190 of the Constitution establishes that [a]rbitration, mediation and other alternative dispute resolution procedures are recognised. They shall apply in accordance with the law on matters when, due to their nature, it is possible to compromise.

6 See Section 2 of Article 190 of the Constitution.

7 See Article 11 of the Organic Law of the Office of the Attorney General of the State, published in Official Register issue 312, dated April 13, 2004. See also LAM, Art. 4.

8 Section a) of Art. 4 of the LAM.

9 Section a) of Art. 4 of the LAM.

10 In the Misle case the Constitutional Court has reviewed a decision taken by the Provincial Court regarding a nullity action of an arbitral award. In other words, the Court has reviewed a pure judicial decision, but not the underlying arbitral award. See Constitutional Court of Justice, Judgment 06-10-SEP-CC of February 24, 2010.

11 Accordingly, in 2009 the Organic Code of the Judiciary was enacted. The Code which is also an organic law- provides that arbitration is part of the State's bodies for the administration of justice and that arbitrators exercise jurisdictional duties. Thus, awards can misguidedly be considered equal to judicial rulings. See Organic Code of the Judiciary, Article 17, which says: [t

12 Please visit the ICSID webpage at URL: http://icsid.worldbank.org/ICSID/, search for the News Releases section and access the post dated July 9, 2009 titled Denunciation of the ICSID Convention by Ecuador.

13 See Art. 25 (1) of the ICSID Convention.

14 Robalino, Javier. Enforcement of Foreign Awards Against Sovereigns in South America- the Cases of Argentina and Ecuador in Enforcement of Arbitral Awards Against Sovereigns, by Doak R. Bishop, 442. New York: JurisNet, 2009.

15 President Correa's speech to Congress on August 10, 2009 contained a strong message against bilateral investment and commercial treaties. See a press article at the following URL: http://www.asambleanacional.gov.ec/20090810235/noticias/rotativo/discurso-del-presidente-de-la-republica-econo

16 See the article by Global Arbitration Review at the following URL: https://www.globalarbitrationreview.com/news/article/28642/ecuador-champing-bits/

17 Protocol of Adhesion to the WTO, published in Official Register issue 852, dated December 29, 1995.

18 Ecuador has participated fifteen times in the WTO Dispute Resolution System, three times as claimant, three times as defendant, and nine times as a third party. See www.wto.org/spanish/thewto_s/countries_s/ecuadoir_s.htm#disputes.

19 Legislative Resolution published in Official Register issue 293, dated August 19, 1961

20 Id. The Legislative Resolution establishes that Ecuador [r]atifies the execution of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, taking into account that Ecuador, on the basis of reciprocity, will apply such Convention to recognition and enforcement of arbitral awards pronounced in the territory of another contracting state only when such awards involve litigations arising from juridical relations deemed to be commercial by Ecuadorean law.

21 The final award in Occidental Exploration and Production Company v Ecuador (also known as OXY 1), was subject to a revision process under the NYC in London (lex arbitri). However, it was not examined under Ecuadorean law because the parties reached a compromise. Source: www.bittium-energy.com/cms/content/view/6944/1/

22 Supreme Decree No. 3019, published in Official Register issue 729, dated December 12, 1978.

23 See articles 7 and 9

24 Article 1 of the PC establishes that an agreement between the parties whereby they undertake to submit to arbitral decision the differences arising or having arisen between them with relation to a commercial business is valid. The respective agreement shall be included in a written document signed by the parties or in an exchange of letters, telegrams or telex communications. See also declaration included in the ratification instrument dated August 6, 1991, published in Official Register No. 729, dated December 12, 1991, related to state-owned entities.

25 Article 4 of the PC provides that arbitral judgments or awards that cannot be challenged according to the law or applicable procedural rules shall have the force of res judicata. Their enforcement or recognition may be demanded in the same manner as judgments pronounced by national or foreign ordinary courts according to the procedural rules of the country where they are enforced and to what is established by international treaties in this respect.

26 Executive Decree No. 853, published in the Official Register issue 240, dated May 11, 1982

27 This convention was executed in Montevideo, Uruguay, on 8 May 1979. Source: http://untreaty.un.org/unts/60001_120000/22/28/00043359.pdf

28 Article 1 of the MC establishes that [t]his Convention shall apply to judicial judgments and arbitral awards issued in civil, commercial or labour proceedings in one of the member states unless at the time of ratification one of them has made an express reservation to limit it to judgments pertaining to convictions on equity matters. Likewise, any of them may declare, at the time of ratification, which it also applies to resolutions culminating the proceeding, those issued by authorities that exercise some jurisdictional function, and to criminal sentences as regards indemnities of damages deriving from the offense. The rules of this Convention shall apply as regards arbitral awards on everything not set forth in the Inter-American Convention on International Commercial Arbitration executed in Panama on January 30, 1975

29 See Article 5 of the NYC.

30 See articles 25 (1) and 72 of the ICISID Convention. See also supra note 12. Ecuador withdrew from the ICSID Convention on July 7th of 2009 and such withdrawal became effective six months later (January 2010), as per the ICSID Convention. See http://icsid.worldbank.org/ICSID/

31 Id

32 Id

33 Id

34 See Article 32 of the LAM. See also Article 414 of the Code of Civil Procedure, codified through Law No. 2005-010, published in Official Register issue 46, dated June 24, 2005, which states: Foreign judgments shall be enforced if not contrary to Ecuadorian public law or any local law and if in keeping with international treaties and conventions as in force. In the absence of international treaties and conventions, in order for foreign judgments to be enforced not only shall they not contravene public law or Ecuador's local laws, but also the following shall be stated in the pertinent letters rogatory: a) that the judgment was passed as res judicata in accordance with the laws of the country where it was issued; and b) that judgment was passed in relation to a personal action.

35 See Michael Reisman et. al, International Commercial Arbitration, University Casebook Series, New York, 1997, at 691

36 See press article at the following URL: www.hoy.com.ec/noticias-ecuador/ecuador-propondra-nuevo-sistema-de-arbitraje-durante-su-presidencia-en-unasu

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Venezuela

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Venezuela is a member of the most relevant conventions on international arbitration, including the New York Convention, the Panama Convention, the Washington Convention, and furthermore, the Commercial Arbitration Act 1998 is based on the UNCITRAL Model Law. At first sight, the mentioned circumstances should make Venezuela a friendly forum for international arbitration. In practice, there have been some relevant international cases in the Venezuelan arbitration centers, and this paper is aimed to describe the corresponding rules of the arbitral institutions, their practical approach to the administration of the cases, the behaviour of Venezuelan arbitrators when conducting the arbitral proceedings, and the approach of local courts towards arbitration.

The Venezuelan arbitral institutions: rules and practice

The most relevant arbitral institutions in Venezuela are the Arbitration Centre of the Caracas Chamber (CACC), and the Business Centre of Conciliation and Arbitration (CEDCA). The arbitration rules in both institutions have been prepared by highly reputed Venezuelan arbitration practitioners and academics, who have stressed the need for modern arbitral proceedings.

The CACC, closely related to the ICC, last revised its arbitration rules in 2005. The modifications were based on the experience of the previous five years of application of the former rules and basically focused on the following aspects:

- The rules of 2000 established a closed list of arbitrators, which prevented the parties from the appointment of arbitrators who were not included in the list, no matter they experience or academic background. The new rules of 2005 modified this aspect, and currently the parties are allowed to appoint arbitrators who are not in the list of the CACC, including foreign arbitrators, which favours international arbitration cases in Venezuela.
- With the intention of accelerating the proceedings, the rules of 2005 reduced the time for the appointment of arbitrators given to the parties from 15 to 10 days.
- The drafting of the terms of reference now requires a proactive role of the parties, who are required to prepare a draft of this document for the arbitral tribunal, which is in charge of the drafting of the final document.
- Given the high inflation rates in Venezuela in recent years, the new rules established the cost of the arbitration in tax units, which value is yearly updated by the government. This allows predictability of costs.
- The inclusion of provisions regarding multiparty arbitrations with regards to the appointment of arbitrators and payment of costs.

According to the statistical information provided by CACC, the centre has administered approximately 150 cases between 1998 and 2010, and 8 per cent of them qualify as

international commercial arbitrations. Other noteworthy information is that approximately 12 per cent of the arbitral awards rendered by CACC tribunals have been challenged and within those, only 3 per cent have been annulled by local courts.

Although younger, CEDCA has acquired a well earned reputation for administering arbitration proceedings efficiently, with approximately 60 cases. The arbitration and conciliation rules of CEDCA included some useful provisions with regard to controversial issues that have rendered a positive outcome. The most relevant particularities of the rules are:

- The possibility to grant interim measures of protection before the constitution of the arbitral tribunal by arbitrators specially appointed by the board of directors of CEDCA for this particular purpose.
- The arbitration proceedings include a phase where the parties are encouraged to participate in a conciliation hearing in order to analyse if there is a possibility of settlement. If that possibility exists, and with the parties' agreement, there will be a conciliator appointed to assist them in the process, which does not paralyse the arbitral proceedings. Actually, 32 per cent of the cases at CEDCA have finalised with a settlement reached through the intervention of a conciliator.
- The method for the selection of arbitrators consists in a list of possible arbitrators prepared by each party in order of preferences. The parties have the right to reduce up to 30 per cent of the candidates included in the list of the other without giving any reason. The selection of the arbitrators will be under the following rules:

- in those cases where the parties choose more than three of the same prospective arbitrators, the parties will choose the members of the tribunal by mutual agreement;
- if only the same three candidates are chosen, they will compose the arbitral tribunal;
- when only two arbitrators are chosen by the parties, those candidates will be appointed and will appoint the third arbitrator,
- if only one of the candidates is chosen by all parties, he or she will be appointed and the parties will choose the other two arbitrators from the list of the other,
- in those cases where the parties do not agree on any arbitrators, each of the parties will appoint one of the candidates included in the list of the other party, and the appointed arbitrators will designate the third member of the tribunal.

This method has proven to raise the level of trust of the parties in the members of the arbitral tribunal, since its members will be those where the lists are coincident.

Before the rendering of the award, the arbitrators are obliged to provide the final draft for the consideration of the parties and the executive director of CEDCA, who are entitled to make non-binding comments in writing on the merits and on formal aspects of the draft award, which will be also exposed in a special hearing called for that purpose.

There is also a 'fast proceeding' for those disputes not exceeding US$50,000 and with no more than two individuals or companies acting as claimant and as a respondent. This is also available for other disputes by agreement of the parties.

Additionally, both of the mentioned arbitral institutions have excellent facilities and utilise new technologies, including emails notifications and video conferencing.

Venezuelan arbitrators and the conduct of arbitral proceedings

A reading of the lists of arbitrators of CACC and CEDCA will show that their members are more or less the same. However, the approach of each of the members of the lists to conducting an arbitration may vary with regards to the flexibility of the arbitral proceedings. The Commercial Arbitration Act and the rules of arbitration of the Venezuelan arbitral institutions do not regulate in detail how the arbitrators should conduct arbitral proceedings, giving them freedom to determine the applicable procedure when it has not been agreed by the parties.

As a civil law jurisdiction, with written judicial proceedings for commercial cases and a litigation culture, some arbitrators assume that arbitration must have a level of formality close to that of the judicial proceedings, and they even establish the Civil Procedure Code (applicable to ordinary litigation) as the main rule for critical aspects of the arbitration, such as the admission of evidence and its value, and unmovable time frames for the parties in order to produce evidence before the arbitrators.

Other groups of arbitrators will have other views on the formalities of the arbitral proceedings. Taking advantage of the powers vested upon them by the Commercial Arbitration Act and the rules of the Venezuelan arbitral institutions, this group will allow, and even encourage, the parties to indicate and produce evidence during the whole procedure prior to the rendering of the arbitral award. The intention of this wide flexibility is to establish, as far as possible, the reality of the dispute. In any case, despite the approach of the arbitrators towards the flexibility of the proceedings, in Venezuela they are bound by the Constitution to grant procedural guarantees to the parties to the arbitration. In arbitrations with a 'formal' approach, the procedure agreed by the parties in the terms of reference will provide for a time for the parties to oppose to the evidence filed by the other party. Where the proceedings are conceived with a 'flexible' approach, the parties will control the evidence in a case by case basis. When there has not been given an opportunity for the parties to oppose to the evidence or any other request from the other party, there is a possible breach of the guarantees of due process that may make the award null and void.

Local courts and arbitration

The interaction between arbitrators and judges has been one of ups and downs in Venezuela. When the parties to the arbitration are private entities, there should not be any exceptional wrong intervention from the judiciary, but the case may be different when one of the parties is the government or a government agency or corporation.

The Commercial Arbitration Act does not establish any exceptional intervention from the judiciary. Local courts are obliged to collaborate with the arbitrators during the arbitral proceedings by enforcing any interim measure they have ordered or with the taking of evidence when it is so requested by arbitral tribunals, but experience has demonstrated that the role of the courts and judges has been more of controlling than collaborating with the arbitration.

As per the control of the legality over the arbitration, the courts will have jurisdiction to hear the challenges to arbitral awards when the seat of the arbitration is within the Venezuelan territory through the application for judicial review. A noteworthy comment is that the Constitutional Chamber of the Supreme Tribunal of Justice has been asserting that the challenge to arbitral awards is only possible through the request to have the award declared null by the court. In Venezuela, there have been doubts about the possibilities of using the constitutional injunction (amparo constitucional) to challenge the arbitral award. In a recent case,1 the Constitutional Chamber confirmed a judgment rendered by a Superior Court

where a constitutional injunction was rejected on the basis of the argument that the amparo is available for the parties only when there are no ordinary judicial remedies, and this is not the situation in arbitration, where the parties have the remedies provided for in the Commercial Arbitration Act for the request of the nullity of the award.

The enforcement of arbitral awards, either national or international, will be subject to the special procedure for the enforcement of final judgments, and in the particular case on international arbitral awards, exequatur is not required. The petition must be addressed to the first instance commercial court with the corresponding certified copy of the award, which should be translated into Spanish if originally written in another language. The party against whom enforcement is sought will be able to stop it only on the basis of similar grounds to those established by the New York Convention.

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Although there could be additional issues to those identified above when one of the parties to the arbitration is the national government and or a government agency or corporation, local courts deal in an acceptable manner with arbitration between private parties when judicial intervention is required.

During the last decade, arbitration has been increasingly rejected by the Venezuelan government as a dispute settlement mechanism for public matters. In 2007, the government enacted legislation related to the migration to 'mix corporations', that is to say corporations constituted with a maximum of 40 per cent foreign equity. The association agreements executed between foreign corporations and PDVSA for the exploitation of the Orinoco belt and the profit sharing agreements providing that all the activities and anything related to such regulations should be submitted to the laws of Venezuela, and any controversy arising out of them to the Venezuelan jurisdiction. The arbitration law permits Venezuelan public corporations to submit to arbitration if the conditions precedent requested for such purpose are met but as a result of these regulations these agreements for the 'mix corporations' will be subject to Venezuelan jurisdiction.

Similar dispositions were enacted in the regulations for the restructuring of the cement industry resulting from the nationalisation of the foreign corporations within this sector, submitting all the activities and anything related to such regulations to the laws of Venezuela and any controversy arising out of them to the Venezuelan jurisdiction. Most recently, in 2009, the Venezuelan government enacted the Regulations of the Public Procurement Act, including an absolute calvo clause, which prevents the national government and almost any other public entity from entering into arbitration agreements in work, goods and service provision contracts.

However, it is possible to assert that institutional arbitration is well established in Venezuela, accepted and used by private parties in normal circumstances. The most relevant institutions, CACC and CEDCA, offer modern arbitral rules which allow arbitral proceedings to flow without major inconvenience, and have developed a high quality service for the administration of cases.

Finally, Venezuelan arbitrators are qualified to deal with complex cases, and some of them are appointed as arbitrators in international cases under the rules of the ICC, AAA and other foreign arbitral institutions on a regular basis. Although they have different approaches to the conduct of arbitral proceedings, they usually take care of the rights of the parties with

regard to due process, and it is up to the parties to choose carefully the kind of arbitrator they want to be involved in their case, according to the circumstances.

Notes

1 Constitutional Chamber of the Supreme Tribunal of Justice, Judgment No. 462 , rendered on 20 May 2010 in the case of Gustavo Yélamo.

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