The Arbitration Review of the Americas

2014

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Global Arbitration Review is delighted to publish The Arbitration Review of the Americas 2014, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports ***The European, Middle Eastern and African Arbitration Review*** and ***The Asia-Pacific Arbitration Review***, The Arbitration Review of the Americas provides an unparalleled annual update – written by the experts – on key developments.

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Introduction: United States

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Even by the standards of recent years, the US Supreme Court has been highly active in the most recently completed term, rendering key decisions in American Express v Italian Colors Restaurant (enforcing a class arbitration waiver notwithstanding the fact that litigating claims under the antitrust laws on an individual basis would be prohibitively expensive, thus reinforcing the Court's earlier ruling in AT&T Mobility v Concepcion) and in Oxford Health Plans LLC v Sutter (holding that a tribunal's determination whether an arbitration agreement contemplates class-wide arbitration is entitled to respect from courts as long as the tribunal arguably construed the agreement in so holding, thus considerably curtailing the Court's earlier Stolt-Nielsen ruling). The Court's coming term promises to be no less remarkable, considering its grant of certiorari in BG Group plc v Republic of Argentina on the reviewability of an arbitral determination declining to enforce as futile a BIT requirement that claimants seek relief over a minimum period of time in a host state court prior to instituting investment arbitration. Lower federal courts meanwhile tackled numerous controversial issues, including the availability of public policy as a ground for denying enforcement to arbitration agreements and the availability of judicial assistance to arbitral tribunals in evidence-gathering under 28 USC Section 1782. Finally, the uncertainty that the Supreme Court recently created over the continued viability of 'manifest disregard of the law' as an annulment ground under the FAA has the lower courts going in different directions on the issue.

In investment arbitration, the US continued its respondent's 'winning streak' when a NAFTA tribunal in Apotex Inc v United States dismissed all the claims asserted there on jurisdictional and admissibility grounds while ordering the claimant to pay the US's legal fees and arbitral expenses.

Arbitrability has surfaced as a big issue, partly through judicial decision (see CompuCredit Corp v Greenwood, holding claims under the Credit Repair Organizations Act (CROA) to be arbitrable), but mainly through legislative and regulatory action. The Dodd-Frank legislation, which renders unenforceable mandatory arbitration agreements between financial professionals and consumers in home loans and other credit agreements, as well as the purchase of securities, has been supplemented by a regulation of the Consumer Finance Protection Bureau (CFPB) rendering such agreements unenforceable in consumer mortgage contracts. The CFPB meanwhile has launched an important study of the use of arbitration in contracts for consumer financial products. In addition, a new version of the Arbitration Fairness Act bill has been formulated. Responding in particular to the American Express case mentioned above, the new version would extend the unenforceability of pre-dispute arbitration agreements beyond consumer, employment and civil rights claims to

also include antitrust claims. However, as long as the Republican Party controls the House of Representatives, the bill has little chance of passing.

Work on the American Law Institute's Restatement of the US Law of International Commercial Arbitration progresses. The first two chapters submitted to a vote (chapter 1 on definitions and chapter 4 on post-award relief) have been approved by the ALI and are beginning to be cited by counsel and courts. Work on chapter 2 (enforcement of the arbitration agreement) is well underway.

Finally, a new New York International Arbitration Center (NYIAC) opened its doors in 2013. Although the NYIAC does not administer arbitrations, it does provide arbitration hearing facilities. More generally, it will operate as a forum for all constituencies within the arbitration community in the New York area, while publicising the attractiveness of New York as an arbitration venue. At the same time, the ICC is opening in New York, in cooperation with the US Council for International Business (USCIB), an office of the Secretariat of the ICC Court.

Canada, too, has an exciting new institution in the form of Arbitration Place in Toronto. The LCIA enjoys space in the Arbitration Place while, for its part, the ICC has established a memorandum of understanding, under which Arbitration Place provides facilities for the conduct of ICC Court of Arbitration operations in Toronto in exchange for the ICC's promoting the use of Arbitration Place as a hearing venue.

Legislatively, the Uniform Law Conference of Canada (ULCC) is examining the possibility of updating its Uniform Commercial Arbitration Act and Uniform Arbitration Act to reflect the most recent amendments to the UNCITRAL Model Law, though no final report or text has yet emerged. Also under consideration is Canada's accession to the ICSID Convention, which Canada signed in 2006 but has not yet ratified.

Meanwhile, Canadian courts have issued recent decisions potentially significant for international arbitration. Most notable is the Canadian Supreme Court's 2011 ruling in Seidel v Telus Comm Inc, in which the Court decided, 5-4, that the plaintiff consumer's claim under British Columbia's consumer protection legislation so implicated the public interest as to render the claim non-arbitrable, notwithstanding the inclusion in the contract of a mandatory arbitration clause. The plaintiff was thus free to pursue her claim in court on a class action basis. However, Seidel's long-term significance for international arbitration is unclear, especially in light of the fact that it was a purely domestic case and in view of the Federal Court of Appeals' subsequent decision in Murphy v Amway Canada Corp, holding claims under Canada's Competition Act to be arbitrable. Meanwhile, in 2012, the Canadian Supreme Court ruled in Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd that a defendant's filing of a statement of defence in court, prior to moving for dismissal on the basis of an arbitration clause, did not constitute waiver of the right to arbitrate, at least where the statement of defence invoked the arbitration agreement.

Turning to investment arbitration, in 2011, the Ontario Court of Appeal issued an important ruling in Mexico v Cargill Inc on the standard of review applicable to a judicial challenge to the exercise of jurisdiction by a NAFTA tribunal. The court ruled that the question of whether the tribunal had jurisdiction to award a certain category of damages was subject to a standard of 'correctness' and did not call for deference to the arbitral tribunal. On the other hand, the court took pains to give the notion of 'jurisdictional issues' for these purposes a narrow interpretation. (The Supreme Court of Canada denied leave to appeal.)

Finally, this introduction would be incomplete if it ignored the recent merger of firms active in international arbitration in the American and Canadian markets. Recent years have witnessed, among others, the merger of Norton Rose with Fulbright & Jaworski and the three-way merger of US-based SNR Denton, Canada-based Fraser Milner Casgrain and Paris-based Salans.

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Introduction: Latin America

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Latin America has proven to be fertile ground for all interested in arbitration. Honouring traditions inherited from the Spanish and Portuguese, the centralisation of power has been woven into Latin American society through the creation of a rigid social order that requires every possible problem to be included in some form of legislation. The excessive formality of Latin American legal systems has made them inflexible, placing too much importance on form and not enough on the effectiveness and appropriateness of solutions available to people immersed in conflicts.

Arbitration has provided a response to the imbalance between the increasing demand for justice and the shortcomings of the court systems, and the need to find quick solutions with the cooperation of those involved in situations of conflict. It is common knowledge that the development of arbitration in the commercial field has been promoted throughout the continent by chambers of commerce. Although similar procedures have been established in every country, there are variations that should be taken into account when relating experiences in the region. One might say that the common objective underlying all initiatives in our region is the addition of other options to the traditional methods of conflict.

Once change was underway, the adhesion to the New York Convention and the Panama Convention followed and the adoption of the UNCITRAL Model Law followed in many countries, and so the legal framework fell into place. It is fair to say that the region has favoured a dispute resolution culture favourable to investment by renewing the arbitral laws and including arbitration in investment treaties, be they bilateral or regional.[1]

One of the vehicles that escorted this change into the culture was institutional arbitration. The question of 'what came first, the chicken or the egg?' must be asked in the case of legal framework and institutions. Did they promote the legal framework, or did the legal framework promote them? As mentioned, chambers of commerce abetted the creation of such institutions.

As the Inaugural Survey of Latin American Arbitral Institutions (the Survey) demonstrates, local and regional arbitral institutions have contributed to the impressive growth of arbitration in Latin America and will play a critical role in dispute resolution going forward.[2]

> The era of Latin American arbitral institutions has arrived. Building on a strong legal framework, arbitral institutions have emerged throughout the region. Parties large and small, from Latin America and beyond, have increasingly turned to these institutions, as well as international institutions, to resolve their disputes.[3]

We may add that they have also proven to be a great source of information and publications.

Each country has founded the bases of their framework for institutions to be created and function. Some have more controls than others,[4] but all share the same general objective: to give an impulse to the arbitration community, serving as the nucleus not only for case management but also to cooperate with other institutions that have the sole purpose of helping arbitration flourish by promoting the study and use of it throughout the region. There seems to be no common public policy in the region in respect to arbitration in general or institutional arbitration in particular; however, the goal of increasing confidence in arbitration procedures seems to be on everyone's list.

The surveys conducted by the School of international Arbitration at Queen Mary, University of London, have provided significant insights into international arbitration, and how and why its use has developed in recent years. In this study, in relation to the choice of an institution, the most important factor is neutrality or internationalism (66 per cent), followed by reputation and recognition (56 per cent). The arbitral rules of the institution and the law governing the substance of the dispute exert equal influence at 46 per cent.[5] No Latin American institutions are mentioned in the study, but that doesn't mean that the seat of the arbitration is not in Latin America.

In the international arena, we see the number of commercial arbitration cases involving Latin American parties grow every year,[6] thus fuelling the race to conquer the territory not only to attract cases towards certain international institutions, but also to divert them towards other venues as the seat of the arbitration. I suggest this is due to the recent creation of various associations dedicated to selling their jurisdiction disguised as cities as the best seat for arbitrations. We see initiatives in Miami, New York and Madrid, among others.

One of the major challenges, now that the table has been set, is to inform the business communities that commercial arbitration in most of Latin America now reflects the modern international arbitration practice, with adequate laws and judicial support, and thus it is safe to consider the possibility of arbitrating in the region.

The fastest changes in arbitration trends this year come in the form of investment arbitration. The signature of ever-increasing numbers of bilateral investment treaties and the cases brought forth under these have sparked and spiced legal discussions throughout the world. If Latin America is to join the world of international trading nations, it must abide by the same rules.

International investment arbitration, which deals with a limited range of recurring legal issues and in which certain states repeatedly appear as parties, has had it's share of legal and political discussions throughout the continent.

Of the 43 ICSID cases received from January until 30 June 2013, 12 cases are from Latin America, and of the 145 arbitrators, 31 come from Latin America. In fact, 27 per cent of all ICSID cases are from Latin America.[7]

The key feature of the ICSID and, more specifically, of the vast majority of BITs currently in effect, is that they recognise that the international investment regime must grant certain minimal conditions to investors in order to promote their investment in a foreign territory. However, traditional investors in Latin America are being substituted with ventures from other parts of the world, which also introduced new rules for dispute resolution.

On 6 July 2009, the World Bank received a written notice of Ecuador's denunciation of the ICSID Convention. On 24 January 2012, the World Bank received a written notice of denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) from Venezuela.[8]

The States of the Bolivarian Alliance for the Americas (ALBA), founded in 2004, is an international cooperation organisation mainly associated with socialist and social democratic governments, created in order to achieve regional economic integration based on social welfare. Its members are Bolivia, Cuba, Ecuador, Nicaragua, Dominica, Saint Vincent and the Grenadines and Venezuela. In April 2013, they met in Ecuador to discuss how their interests are affected by transnational companies.

The subscription of a declaration which 'supports the establishment and implementation of regional bodies for the solution of investment disputes', ensued, justified by 'recent developments in various Latin American countries concerning disputes between states and transnational corporations, have shown that decisions that violate international law and the sovereignty of states persist, due to the economic power of certain companies'.

Therefore, the states gathered in Guayaquil decided to call to action the Union of South American Nations (UNASUR), another international organisation in the region composed of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. UNASUR has announced that it is probable that it will open its own investment arbitration centre this year if its establishment is approved in the July meeting of the foreign ministers of the organisation. Obviously, this is an effort to limit the reach of the ICSID Convention which is currently administering a considerable amount of disputes involving Latin American countries.[9]

In our contradictory world, we see countries such as Venezuela retiring from arbitration in the ICSID Convention, yet signing on to Mercosur, which provides that their dispute resolution be arbitration through the Olivos Protocol.

While not disputing the significance of Bolivia's, Ecuador's and Venezuela's withdrawal from the ICSID Convention, we nonetheless continue to take an optimistic view of Latin American arbitration over the coming months and years. Just because the ICSID Convention is losing favour does not mean that commercial arbitration is as well. For many investors, even those with cost and timing concerns, arbitration remains the only dispute resolution mechanism. International companies do not want to find themselves in a potentially hostile national court.[10]

Countries such as Mexico, Colombia, Peru and Chile continue to see high levels of inward investment, although the major regional destination for many investors is clearly now Brazil, from where companies are taking the lead in expanding regionally, as well as seeking out opportunities in Europe, Africa and elsewhere.

One of the measuring sticks I find most useful is publications. Yes, the number of arbitration events in the area has risen and many cities have hosted international events,[11] but what of the papers written and publications? We have, as an example, the Revista Internacional de Arbitraje.[12] Latin American lawyers are participating in publications of all those international institutions dedicated to arbitration, and there are certainly more books than ever being published in Spanish. Gone are the times when one had to know English to read about arbitration.

Cases continue evolving and arbitration mechanisms are written in contracts and treaties. Conferences in Latin America, plus the ones held in other venues but dedicated to the area, are no longer dedicated to promoting arbitration, but now discuss the techniques of successful arbitration.

Issues still arise around the length and cost of arbitration proceedings, as well as the behaviour of arbitrators. But enforcement is increasingly less of an issue, as is judicial interference. Trends in arbitration are the same around the world. Third-party funding, time and costs, interim measures and everything you can see in arbitration programmes the world over can also be found in this region.

One might say we have two arbitration stories: the progressing commercial arbitration stemming from contracts; and the more complicated issue of investment arbitration, which stem from treaties. They are two different stories in which some of the same tools are applied in order to process them, yet their paths vary and their futures seem to go in different directions.

Notes

1. ITA, The Inaugural Survey of Latin American Arbitral Institutions, 2011, p7.
2. ITA, The Inaugural Survey of Latin American Arbitral Institutions, 2011, p12.
3. ITA, The Inaugural Survey of Latin American Arbitral Institutions, 2011, p3.
4. Decreto 1829 del 27 de Agosto de 2013, Colombia.
5. Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration, 2010, p17–20.
6. ICC Statistical Report, ICC Dispute Resolution Library, p5.
7. ICSID, Caseload Statistics 2013/2 p25.
8. ICSID, https://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp
9. Mariano Tobias de Alba http://kluwerarbitrationblog.com/blog/2013/05/21.
10. www.ibanet.org/Article/ 78296258-3B37-4608-A5EE-3C92D5D0B979
11. Such as ICCA in Rio de Janeiro in 2010, IFCAI in Caracas in 2013, IBA Arbitration Day in Bogotá in 2013.
12. Published by Legis.

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Arbitration and Enforcement in the United States

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Summary

It is practically conventional wisdom in the international arbitration community of academics and practitioners that there is a high degree of voluntary compliance with international arbitration awards, and failing compliance, enforcement by national courts. While the limitations of available data make quantitative conclusions difficult with respect to the validity of this point, the studies that have been done tend to be in support. For example, data from a seminal 2008 study suggest that 81 per cent of arbitrations are resolved without the intervention of national courts, through voluntary compliance and negotiated settlement agreements.[1] For those awards that are taken to court, records of enforcement proceedings under the New York Convention show that courts refuse enforcement in only approximately 10 per cent of cases.[2] When enforcement is combined with voluntary compliance, it has been estimated that 98 per cent of international arbitration awards are paid or otherwise carried out.[3]

The United States is no exception to this indication of a tradition of strong enforcement.[4] Despite criticisms in recent years spurred by the high-profile annulment of a $185 million arbitration award by the US Court of Appeals for the DC Circuit in Republic of Argentina v BG Group PLC[5] – and the invocation by some US courts of a handful of domestic doctrines, such as personal jurisdiction and forum non conveniens, to refuse confirmation and enforcement[6] – it remains the case that US courts and laws are friendly to arbitration and that parties which have chosen to arbitrate their disputes experience predictability, efficiency and finality in the US legal system.

Indeed, in recent months, the US Supreme Court has granted certiorari review for the upcoming term of the DC Circuit's decision in BG Group;[7] its decision will serve to clarify US law on arbitrability and may allay concerns about the US approach to the finality of arbitral decisions. In addition, in several important decisions during the past year, US courts have taken a strong stance toward the enforcement of arbitration awards under the New York and ICSID Conventions and the Federal Arbitration Act (FAA), emphasising the finality of awards and affirming the limited scope for judicial review. These decisions, analysed in detail below, confirm the strong support for international arbitration in the United States.

No 'second bite at the apple': enforcement under the Federal Arbitration Act and the New York Convention

The New York Convention, which governs the recognition and enforcement of foreign arbitral awards, provides seven defences to recognition and enforcement:

- invalidity of the arbitration agreement;
- lack of notice to the losing party;
- the dispute is outside the scope of the arbitration agreement;
- improper composition of the tribunal or improper arbitral procedure;
- ineffectiveness of the award;
- non-arbitrability; and
- public policy.[8]

Chapter 2 of the FAA implements the New York Convention as US law. Under the FAA and US jurisprudence, a domestic arbitration award may be vacated only on limited grounds, which largely focus on considerations of basic fairness:

- the award 'was procured by corruption, fraud, or undue means';
- evident partiality or corruption in the arbitrators';
- misbehaviour by the arbitrators that prejudices the rights of a party, such as unreasonable refusal to postpone a hearing or refusal to hear material evidence;
- the arbitrators exceeded their powers;[9] and, at least in the past
- on account of a 'manifest disregard of the law'.[10]

The consistent approach of US courts has been to construe the grounds for refusing to enforce an award under the New York Convention and the FAA narrowly, reflecting the deference that US courts give to arbitral decisions in practice. Recent decisions, albeit arising in different contexts, continue this approach.

Acting Within The Arbitrator's Powers To Weigh The Evidence: Johnson Controls V Edman Controls

In Johnson Controls v Edman Controls,[11] the US Court of Appeals for the Seventh Circuit expressly reminded the parties that they may not 'try for a second bite at the apple' in court after losing in arbitration.[12] Johnson Controls, a Wisconsin manufacturer of building systems and HVAC equipment, entered into an agreement awarding Edman Controls the exclusive rights to distribute Johnson products in Panama, which Johnson knew Edman planned to distribute through its Panamanian subsidiary, Pinnacle.[13] Johnson breached the agreement by offering to sell its products directly to Edman's primary client in Panama – indeed, its supervisors instructed managers in Latin America to 'keep Edman away from Johnson' – and Edman brought arbitration claims against Johnson.[14] The arbitrator dismissed for lack of jurisdiction Edman's claim for tortious interference with Pinnacle's contractual relations, but found that Edman had independently suffered damages by virtue of Johnson's breach of the obligation of good faith and fair dealing, and that Johnson was unjustly enriched by capital investments Edman made to establish Johnson's presence in Panama.[15]

Johnson moved to vacate the award under section 10(a)(4) of the FAA on the basis that the arbitrator exceeded his powers by finding, contrary to Wisconsin law, that Edman had standing to bring claims on behalf of Pinnacle. The US District Court for the Eastern District of Wisconsin denied the motion to vacate and granted Edman's motion to confirm, and the Seventh Circuit affirmed. The Seventh Circuit explained, first, that Johnson's argument that the arbitrator had granted Edman standing to assert Pinnacle's claims was factually wrong; instead, because the arbitrator had found that Edman had standing to assert claims only for its own damages, his decision was consistent with Wisconsin law.[16] Second, because the scope for judicial review of arbitral awards is so narrow – as the court explained, awards will not be overturned even where the arbitrator 'committed serious error', or the decision is 'incorrect or even whacky' – the arbitrator's determination that Edman itself was injured could not be disturbed.[17] The court explained that the arbitrator had properly looked at the evidence – that Pinnacle performed downstream services for Edman, and that Pinnacle's profits provided a critical indicator of the value of the arrangement to Edman – and came to a conclusion that Edman had its own claim to damages. According to the court: 'This was precisely what he was authorised to do, and even if some might question his conclusions, that is no reason to set aside the award.'[18]

Collateral Estoppel, Proper Notice And Public Policy: Yukos V Samaraneftegaz

In Yukos SARL v OAO Samaraneftegaz,[19] the US District Court for the Southern District of New York refused an attempt to invalidate an award on grounds of collateral estoppel, lack of notice under article V(1)(b) of the New York Convention and public policy under article V(2)(b) of the New York Convention. Yukos sought enforcement of an arbitration award in its favour issued by the International Chamber of Commerce (ICC). Samaraneftegaz argued that the court should grant preclusive effect to a Russian court's refusal to enforce the award, and challenged the award on the grounds that it did not receive adequate notice of the arbitration proceeding and that enforcement would violate US public policy by condoning an alleged tax evasion scheme perpetrated by Yukos.

The underlying dispute revolved around two loans that Yukos had extended to Samaraneftegaz in the amount of approximately 2.4 billion Rubles, which Samaraneftegaz did not repay.[20] The loan agreements submitted all disputes to arbitration under the auspices of the ICC, and Yukos initiated arbitration proceedings in 2006.[21] The ICC sent the initial notices of the arbitration – including the request for arbitration, the due date for Samaraneftegaz's answer, and Yukos' appointment of its arbitrator – to Samaraneftegaz's corporate address, and Samaraneftegaz did not dispute receiving them.[22] Some months later, Samaraneftegaz's management company, ZAO Yukos Exploration and Production (Yukos EP), contested the ICC's jurisdiction; thereafter, the ICC sent all notices and a copy of the award to Yukos EP's address.[23] The one exception was that, in October of 2006, it sent the revised terms of reference, setting forth the procedural history of the arbitration and identifying Yukos EP as Samaraneftegaz's representative, to Samaraneftegaz's corporate address.[24] 5 Samaraneftegaz did not sign the revised terms, and it never filed any written or oral submissions on the merits.[25] On 15 August 2007, the tribunal issued an award in Yukos' favour, ordering Samaraneftegaz to pay back the loans with interest, and awarding Yukos fees and costs.[26]

A month before the award was issued, Samaraneftegaz's sole shareholder, Neft-Aktiv, sued Samaraneftegaz and Yukos in Russian court in Samara to invalidate the loans, arguing that they were sham transactions intended to conceal the fact that they were an illegal transfer from Samaraneftegaz to Yukos, returned via loan.[27] In 2012, the Russian court invalidated the loans and all appeals were denied.[28] Meanwhile, Yukos sought enforcement of the ICC arbitration award with the Arbitrazh court in Samara. However, in February of 2011, the court refused enforcement on the grounds that Samaraneftegaz was 'not given notice of the important stages of the progress of the [arbitration]' because 'notice to Yukos EP was not notice to Samaraneftegaz' – and because enforcing the award would violate Russian public policy.[29]

The US District Court enforced the award, emphasising that Samaraneftegaz bore a heavy burden of proof in opposing enforcement. Most importantly, the district court rejected Samaraneftegaz's argument that enforcement of the award would violate US public policy by condoning Yukos' alleged tax evasion scheme. The court explained that Samaraneftegaz was not permitted to relitigate the legality of the loans because its 'failure to contest the validity of the loans before the ICC is a result of its own choice', and it was 'bound by a valid arbitration clause to contest this issue before the arbitrators'.[30] However, instead of doing so, it had initiated a proceeding in Russia to invalidate the loans 'in a transparent attempt to circumvent a forum that it considered unfavourable'.[31] The court explained that, under such circumstances, 'to refuse to enforce a valid award... would run counter to the strong public policy in favor of arbitration'.[32] The court also cited precedent holding that the public policy exception to enforcement must be narrowly construed, and found that Samaraneftegaz had

'failed to identify a well-defined and dominant [US] public policy' in favour of policing foreign tax fraud.[33]

The district court also rejected Samaraneftegaz's argument that it should apply preclusive effect to the arbitrazh court's determination that Samaraneftegaz had not received adequate notice of the arbitration. The court explained that, instead, it was required, under article V(1)(b) of the New York Convention, to determine whether the arbitration procedures comported with US due process standards.[34] The court found that, because Samaraneftegaz received five initial notices and the terms of reference, which contained a complete update on the proceedings and alerted Samaraneftegaz to the fact that the tribunal had deemed Yukos EP to be its representative, 'Samaraneftegaz's absence was due to a decision not to appear, rather than lack of notice'.[35] According to the court, the ICC's efforts to send notice to Yukos EP were, in any event, sufficient to satisfy due process because it reasonably believed that Yukos EP was acting as Samaraneftegaz's representative.[36]

Also Noteworthy

In two other noteworthy enforcement decisions, the US Court of Appeals for the First Circuit in Doral Financial Corporation v García-Vélez[37] and the US Court of Appeals for the Fifth Circuit in Bain Cotton Company v Chesnutt Cotton Company[38] affirmed denials of petitions to vacate arbitral awards under the FAA on the basis of alleged discovery abuses by the arbitrators.

In Doral Financial, the dispute was over severance compensation for García-Vélez's termination from his position as president of Doral's consumer banking division. Doral claimed that it owed no severance because García-Vélez had breached the non-competition clause of his employment contract by accepting a top position at the Miami branch of a bank with which Doral competed in Puerto Rico. During a break in the arbitration hearing, and long after the discovery period had closed, Doral applied to the tribunal to issue third-party subpoenas on García-Vélez's employer, which had merged with its Puerto Rican holding company. The tribunal denied the applications as untimely – reasoning that Doral had known of the witnesses it sought to subpoena since the beginning of the proceedings due to its collateral litigation with García-Vélez's employer – and issued an award in García-Vélez's favour. The US District Court for the District of Puerto Rico denied Doral's petition to vacate the award on the basis of misconduct by the tribunal in refusing to hear material evidence.

The Fifth Circuit affirmed. Emphasising that its permitted review was 'extremely narrow and exceedingly deferential' – so much so that 'arbitral awards are nearly impervious to judicial oversight'[39] – the court held that the arbitrators had given Doral adequate notice of the schedule of the proceedings, to which Doral had agreed, ample opportunity to present its position regarding the subpoenas, and numerous other procedural safeguards. The court also found that it was uncertain whether the information sought was accessible to Doral and that nothing in the record indicated that García-Vélez had in fact violated the non-competition clause. That is, 'all that Doral [had] to offer in support of its position on appeal is the hunch that the subpoenas would have potentially yielded relevant information for its case', and the court could not vacate an arbitral award 'based on sheer speculation alone'.[40] Finally, the court declined to second-guess the tribunal's rejection of Doral's contentions that García-Vélez made misrepresentations during the arbitration about the merger.

In the second decision, Bain Cotton, Bain argued that the arbitrators ignored its requests for discovery and then condemned it for failing to provide proof supporting its claims.[41] The

underlying dispute was over the delivery of cotton, and Bain sought additional forms showing the number of acres planted on a specified date and what type of crop was planted.[42] The arbitration panel sent an e-mail message to the parties requesting that Chesnutt provide the forms or other verifiable proof of the actual yields, and indicating that, if the information was not produced, it might conclude that the withheld information was prejudicial to Chesnutt.[43] Although Chesnutt was unable to produce the records, Bain did not request an oral hearing and it did not appeal the award against it, although appeal was permitted under the American Cotton Shippers Association (ACSA) arbitration rules.[44]

The US District Court for the Northern District of Texas denied Bain's motion to reopen the case and to vacate the award, reasoning that the parties had agreed to binding arbitration in order to shorten the procedural and evidentiary hurdles encountered in litigation and to lower costs, which made the court disinclined to disturb the award even if the parties had not received the full measure of discovery and procedure they would have obtained in court.[45] The Fifth Circuit affirmed, explaining that the 'appeal presents a quintessential distinction between arbitration and litigation, especially in the scope of review', and that, regardless of whether it or the district court disagreed with the arbitrators' handling of Bain's discovery requests, their actions did not rise to the level required to vacate the award under the FAA's 'narrow and exclusive' grounds.[46]

Final judgments: confirmation and enforcement under the ICSID Convention

Two recent decisions demonstrate that US courts are also committed to fulfilling their obligation to enforce ICSID awards. Under the ICSID Convention, pecuniary obligations imposed by an award are required to be enforced by signatory states 'as if [the award] were a final judgment of a court of that State'.[47] The US implementing statute, the Convention on the Settlement of Investment Disputes Act of 1966,[48] provides that 'the pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states', and that the FAA does not apply to enforcement of ICSID awards.[49]

In Blue Ridge Investments v Argentina, Blue Ridge filed a petition in the US District Court for the Southern District of New York to confirm a $133.2 million ICSID award that it had purchased from CMS Gas Transmission, arising out of Argentina's suspension of adjustment of gas tariffs during its economic crisis of the late 1990s. The district court rejected Argentina's arguments that it was immune from jurisdiction under the US Foreign Sovereign Immunities Act (FSIA)[50] and that Blue Ridge, as an assignee, could not seek recognition and enforcement of the award. As to sovereign immunity from jurisdiction, the court found that Argentina had waived it by consenting to arbitration under the ICSID Convention and that the FSIA's arbitration exception to foreign sovereign immunity, which provides for jurisdiction in actions to confirm an arbitration award made pursuant to an arbitration agreement to which the foreign state is a party, was also applicable because the exception does not require that the confirmation action be brought by the party that entered the arbitration agreement with the foreign state.[51] The District Court also rejected Argentina's argument that recognition and enforcement of an ICSID award cannot be sought by an assignee on the bases that the ISCID Convention contained no such limitation and that, under New York law, state court judgments are assignable.[52] Finally, the court rejected Argentina's arguments that the petition was barred by res judicata because Blue Ridge had not acted to restore a prior confirmation petition,[53] and that the petition was time-barred under New York's one-year statute of limitations for lawsuits seeking to confirm an arbitral award. As to the latter

argument, the court determined that the applicable limitations period under New York law was 20 years, for actions on out-of-state money judgments.[54]

On appeal, the US Court of Appeals for the Second Circuit agreed that Argentina had waived sovereign immunity from jurisdiction and that the arbitration exception to immunity was applicable. As to the waiver, the appeals court explained that, by joining the ICSID Convention, including its enforcement provisions, Argentina must have contemplated enforcement actions in other contracting states.[55] As to the arbitration exception, the court explained simply that every court to consider the question had concluded that awards issued pursuant to the ICSID Convention fell within the exception, and that it agreed with this determination.[56]

In Duke Energy v Peru, the US District Court for the District of Columbia confirmed and entered judgment on an ICSID award in the amount of nearly $3 million in Duke Energy's favour. The original award was for $18 million plus interest and resulted from a tax assessment by the Peruvian authorities that the tribunal determined had breached a legal stability agreement; Peru thereafter paid $21 million. In the confirmation petition, Duke Energy claimed the additional $3 million on the basis of a 2008 change in the Peruvian tax code that raised the applicable interest rate. The district court confirmed the award, rejecting Peru's repeated attempts – first in a motion to dismiss and then in a subsequent motion to deny confirmation – to argue that the amendment to the tax code was inapplicable and that remand to the tribunal was required to clarify the applicable interest rate.[57]

Conclusion

As described above, despite recent concerns, US courts continue to take a deferential approach in favour of enforcement of international arbitration awards. US courts routinely dismiss challenges to enforcement under the FAA and the New York and ICSID Conventions, rejecting arguments from disappointed parties that the arbitrators exceeded their powers when they plainly did not, failed to give adequate notice of the proceedings when the losing party simply chose not to participate with knowledge of the proceedings, or engaged in misconduct by denying belated requests for discovery. Courts have also rejected a variety of attempts by states to delay or avoid enforcement of treaty arbitration awards against them. In these decisions, US courts have emphasised the finality of arbitral awards and the deferential review permitted to them of determinations committed to the arbitrator.

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Notes

1. Loukas Mistelis and Crina Baltag, ***Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices,*** 19 Am. Rev. Int'l ARB. 320, 331 (2008).
2. Rory Brady, 'Comments on a New York Convention for the Next 50 Years', in ***50 Years of the New York Convention*** 708, 709 (Albert Jan van den Berg, ed 2009).
3. Margaret L Moses, ***The Principles and Practice of International Commercial Arbitration*** 217 (2012) (citing Michael Kerr, ***Concord and Conflict in International Arbitration,*** 13 (2) Arb. Int'l. 121, 128 n.24 (1997)).
4. The US has historically been seen as a pro-arbitration, pro-enforcement jurisdiction by virtue of its accession to and implementation of numerous multilateral treaties governing confirmation and enforcement of foreign arbitral awards, including the New York, Panama and ICSID Conventions. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) [New York Convention];

Inter-American Convention on International Commercial Arbitration (1975) [Panama Convention]; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (2006) [ICSID Convention]. US courts take a narrow view of the defences to enforcement provided under these Conventions and the limited scope for judicial review of arbitral awards provided under the Federal Arbitration Act (FAA), 9 USC section 1 et seq.

5. 665 F.3d 1363 (DC Cir 2012).
6. See, eg, Pelagia Ivanova, ***Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards under the New York Convention,*** 83 BU L Rev 899 (2003). The US Court of Appeals for the Fifth Circuit recently joined other circuits in holding that a petition for confirmation of an arbitral award pursuant to the New York Convention may be dismissed for lack of personal jurisdiction. See ***First Investment Corporation v Fujian Mawai Shipbuilding, Ltd,*** 703 F.3d 742 (5th Cir 2013).
7. See Supreme Court of the United States, Docket for ***BG Group plc v Republic of Argentina,***www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-138.htm- (petition for certiorari granted on 10 June 2013).
8. New York Convention, Art V.
9. 9 USC section 10.
10. See, eg, Gary Born, Rachael Kent and Leila Abolfazli, ***'Manifest Disregard After Hall Street',*** Kluwer Arbitration Blog (9 March 2009), www.kluwerarbitrationblog.com/blog/2009/03/09/manifest-disregard-after-hall-street/.
11. 712 F.3d 1021 (7th Cir 2013).
12. Id at 1022 ('Although arbitration is supposed to be a procedure through which a dispute can be resolved privately, with the narrowest of exceptions for court intervention, losers sometimes cannot resist the urge to try for a second bite at the apple. This is what happened here'.).
13. Id at 1022–23.
14. Id at 1023.
15. Id.
16. Id at 1026.
17. Id at 1025–26 (quoting Local 15, ***Int'l Bhd. of Elec Workers v Exelon Corp,*** 495 F.3d 779, 782–83 (7th Cir 2007)).
18. Id at 1026–27.
19. No. 10 Civ 6147 (PAC) (SDNY 6 August 2013).
20. Id at 2.
21. Id.
22. Id at 2–3.
23. Id at 3.
24. Id at 3–4.

25. Id at 4.
26. Id.
27. Id.
28. Id at 5.
29. Id at 4–5.
30. Id at 12–13.
31. Id at 13.
32. Id.
33. Id at 13–15.
34. Id at 6–8.
35. Id at 8–9.
36. Id at 10–11.
37. No. 12-1519 (1st Cir 31 July 2013).
38. No. 12-11138 (5th Cir 24 June 2013).
39. No. 12-1519, at 8 (quoting ***Wheelabrator Environtech Operating Servs Inc v Mass Laborers Dist Council Local*** 1144, 88 F.3d 40, 43 (1st Cir 1996) and ***Teamsters Local Union No. 42 v Supervalu, Inc,*** 212 F.3d 59, 61 (1st Cir 2000)).
40. Id at 12.
41. No. 12-11138, at 2.
42. ***Bain Cotton Co v Chesnutt Cotton Company,*** No. 5:11-cv-189-C, at 2–4 (ND Tex. 17 October 2012).
43. Id at 4.
44. Id at 5.
45. Id at 6.
46. No. 12-11138, at 2.
47. ICSID Convention, article 54(1).
48. 22 USC section 1650 et seq.
49. 22 USC section 1650a(a).
50. 28 USC sections 1330, 1332, 1391(f), 1441(d), and 1602–1611 (2000).
51. ***Blue Ridge Investments, LLC v Argentina,*** No. 10 Civ 153 (PGG), at 5–10 (SDNY 30 September 2012).
52. Id at 11–20.
53. Id at 21–27.
54. Id at 29–31.
55. Blue Ridge Investments, LLC v Republic of Argentina, No. 12-4139-cv, at 17 (2d Cir 19 August 2013).
56. Id at 18–19.

57. Civ No. 11-1602-JEB (DDC 14 September 2012); Civ No. 11-1602-JEB (DDC 19 November 2012).

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The Latin American Choice Between Monism and Dualism

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Summary

Introduction

There seems to be a consensus among scholars and law practitioners that international commercial arbitration has been gaining strength in Latin America in the past decades.[1] The participation of Latin American parties in international arbitration cases has noticeably increased, as shown by the annual statistical reports provided by the ICC International Court of Arbitration.[2] The chart below illustrates the growing participation of parties from Latin America and the Caribbean in cases administered by the ICC between 1997 and 2012:[3]

ICC statistical reports	
Year	Number of parties from Latin America and the Caribbean
1997	107
1998	95
1999	132
2000	121
2001	137
2002	175
2003	192
2004	192
2005	170
2006	203
2007	200
2008	185
2009	241
2010	297
2011	247
2012	292

In the last couple of decades or so, many Latin American countries have reformed their arbitration laws, some of them more than once. Most of the countries in the region have gone through that process hoping to enhance their institutions to adequately face the new challenges brought by globalised commercial relationships, particularly considering the steady rise of international arbitration as a means of resolving disputes within the context of international commerce. Such legal reforms played an important role in fostering the growth of international arbitration in the region.[4]

In an attempt to modernise their institutions, several Latin American countries have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on

International Commercial Arbitration, or based the reform of their legal frameworks on the UNCITRAL Model Law.[5] Among these countries are Costa Rica, Guatemala, Peru, Mexico, Paraguay, Chile, Nicaragua, Colombia, the Dominican Republic, Honduras and Venezuela.

Several Latin American jurisdictions have adopted a unique set of rules to govern arbitration, making no difference pursuant to the domestic or international nature of the dispute, such as Mexico, Venezuela and Brazil.[6] Some other countries, such as Peru, have also implemented one set of rules generally applicable to all arbitration procedures, but included a few exceptional provisions that apply only to international arbitration. Other countries have adopted a set of rules applicable solely to international arbitration, leaving domestic arbitration to a different set of rules, such as Costa Rica, Chile and Colombia.

Countries with a unique set of rules applicable to both domestic and international arbitration have a monist arbitral system,[7] while countries that have implemented different sets of rules to govern domestic and international arbitration separately have a dualist arbitral system.[8]

In several Latin American countries there seems to be an interesting interplay between having a monist or dualist system and the adoption of the UNCITRAL Model Law (or the application of its principles). Most of the monist systems in the region have adopted the UNCITRAL Model Law or have at least based their unique set of regulations on the principles of the UNCITRAL Model Law, as is the case for Mexico, Peru, Venezuela, Paraguay, Honduras, Nicaragua and Guatemala. Dualist systems in the region have adopted the UNCITRAL Model Law for international arbitration only and apply a different set of rules for domestic arbitration, as is the case for Chile, Colombia and Costa Rica.

Behind a country's decision to adopt one system or the other, there are usually concerns about the degree of autonomy and flexibility that would be granted to arbitral procedures.[9] In principle, one may say there is a tendency to choose a monist system heavily based on the UNCITRAL Model Law in those countries where autonomy and flexibility of arbitral procedures are recognised as important features for the effectiveness of arbitration.[10] Instead, countries heavily concerned with the protection of public order and with preference for considerably regulated procedures, may opt for dualist systems that will allow them to implement the principles and laws they consider appropriate for the resolution through arbitration of domestic disputes, while having another set of rules that meets international standards for non-domestic disputes.[11]

The Choice Of Monist Or Dualist Systems

Countries have dualist or monist arbitral systems for different reasons, be they practical, historical or even philosophical.[12]

In the case of Peru, for example, in 2008 the government decided that given the country's economic and foreign investment growth – particularly considering the agreement entered into with the United States of America (Acuerdo de Promoción Comercial) – Peru had to adopt a set of rules that facilitated the prompt solution of any disputes that may arise under the agreements or treaties Peru was a party to.[13] The result of this approach was the issuance of Legislative Decree 1071 of 2008 which, except for a handful of provisions, applies to both domestic and international arbitration indistinctively.[14]

Peru has not always had a monist system; previous Peruvian arbitration laws (25935 of 1992 and 26572 of 1996) provided for a dualist system. But with the enactment of Legislative Decree 1071, Peru adopted a unique set of rules applicable to arbitration, following the

modernisation processes that had already taken place in other countries such as Spain and Germany.[15] The reform also implied the incorporation into the Peruvian legislation of the amendments made to the UNCITRAL Model Law in 2006.[16]

Given the increase of international arbitrations seated in Peru, the differentiation between domestic and international arbitration lost relevance.[17] With the reform, Peru wanted to adapt Peruvian arbitral regulations to the international arbitration principles that were broadly recognised and had already been approved by the international community.

Peruvians decided that the UNCITRAL Model Law was suitable for both international and domestic arbitration. The fact that Legislative Decree 1071 implemented a unique set of rules based on the UNCITRAL Model Law to govern both domestic and international arbitration has apparently resulted in the reduction of local courts' intervention in overall arbitration.[18] To do so, among other things, Legislative Decree 1071 eliminated or reduced references to jurisdiction and process[19] to isolate the arbitral procedure from judicial intervention as much as possible.[20]

Chile is a good example of a very different choice. Domestic arbitration in Chile has been essentially governed by the Code of Civil Procedure and the Organic Code of Courts. Those provisions have suited the needs of domestic arbitration for years. Chile wanted to have a modern international arbitration legal framework but had no imperative need to reform the domestic system. Consequently, Chile adopted the UNCITRAL Model Law for international arbitration through the enactment in 2004 of Law 19.971, applicable only to international arbitration cases. Since then, both systems have coexisted.[21] Chile has a dualist arbitration system in place.

Colombia also has a dualist system. It recently approved the new Statute of National and International Arbitration (Law 1563 of 2012). This new statute adopted two separate set of rules: one governing only domestic arbitration and another governing only international arbitration. The international arbitration set of rules is mostly based on the UNCITRAL Model Law as amended in 2006. Colombia now has a modern international arbitration statute.

In 2002, there was an attempt to implement in Colombia a monist arbitral system that, in any case, had some exceptional provisions applicable only to international arbitration or to arbitrations that involved the state.[22] However, the bill did not have much support. Many argued the bill was structured around the contractual nature of the arbitral agreement.[23] But, pursuant to article 116 of the Colombian constitution, arbitrators are temporarily invested with the faculty of administering justice and thus arbitration has been characterised as being jurisdictional in nature. The alleged jurisdictional nature of domestic arbitration imposed an important difficulty in the establishment of one unique system applicable to both domestic and international arbitration.

Through out the years, and prior to the enactment of Law 1563 of 2012, the Colombian Constitutional Court issued some rulings that restricted or limited the autonomy and flexibility of domestic arbitration procedures.[24] This legalist perspective made it difficult for Colombia to have a monist system where the same rules apply to domestic and international arbitration.

Prior to the enactment of Law 1563 of 2012, the dual system in place in Colombia allowed for certain procedural loopholes that were not always properly addressed. Law 315 of 1996, which used to govern international arbitration in Colombia, was structured around just five provisions. Although Law 315 initially served its purpose, improvements were required. For

instance, local courts applied domestic arbitration provisions to international arbitration cases in situations where Law 315 did not establish a procedure to follow.[25] Extending the rules designed for domestic arbitration to international arbitration may lead to unpractical and unfortunate situations. Apparently this deficiency has been corrected by Law 1563 of 2012, given that article 64 of such law provides that international arbitration issues not expressly regulated shall be decided pursuant to the general principles that inspire international arbitration. In our view, this implies that domestic arbitration provisions should not be applied to international arbitration cases if such domestic arbitration provisions are not in line with the principles that inspire international arbitration.

In Costa Rica, arbitration and other alternative dispute resolution mechanisms are governed by Law 7727. This law has satisfied the needs of domestic arbitration users, and consequently there has been no real need to modifying Law 7727. However, from a practical standpoint, Law 7727 had prevented international arbitration from taking place in Costa Rica, among others, because, pursuant to Law 7727, arbitration must be carried out in Spanish, local procedural laws apply when required and arbitrators must be lawyers admitted to practice in Costa Rica.[26]

Seeking to provide an attractive seat for international arbitration and at the same time maintaining intact the current domestic arbitration provisions, Costa Rica enacted Law 8937 in 2011 to regulate international commercial arbitration in that country. To do so, Costa Rica adopted the UNCITRAL Model Law for international arbitration with the 2006 amendments.27 According to the Statement of Purpose of Law 8937, Costa Rica adopted the Model Law to harmonise its legislation with international standards.

The benefits of following this course of action, much like the Swiss system, allowed for domestic arbitration to adjust to local needs, while providing a modern international arbitration system attractive for the international community.[27]

Monism Or Quasi-monism?

Many Latin American countries have adopted monist systems.[28] Monist systems are defined as those in which one unique set of rules evenly regulates both domestic and international arbitration.

Mexico seems to fit this definition. Title 4, book 5 of the Mexican Commercial Code regulates commercial domestic and international arbitration seated in Mexico. The regulation contained therein provides no difference in treatment regardless of whether the arbitration is domestic or international.

However, the Mexican Commercial Code does provide a definition of international arbitration using internationality criteria. The fact that domestic arbitration is clearly differentiated from international arbitration may eventually lead to the applicability or inapplicability of certain provisions; for instance, the provisions contained in international treaties to which Mexico is a party to. But at least within the set of rules of title 4, book 5 of the Mexican Commercial Code, uniformity of provisions for domestic and international arbitration seems to be the rule.

Venezuela appears to fit the definition as well. The Venezuelan Commercial Arbitration Act applies to commercial arbitration in general without prejudice to any multilateral or bilateral treaty. The Arbitration Act makes no reference to or distinction between domestic and international arbitration. As a result, it has been interpreted that the Arbitration Act

applies indistinctively to domestic and international arbitration.[29] The Arbitration Act does not include internationality criteria or any differentiation related to domestic or international arbitration.

Peru is one of the Latin American countries that, since 2008, has been identified as having adopted a monist arbitral system. Though it is true that most of the provisions that regulate arbitration in Peru apply to domestic and international arbitration, it is also true there is a small set of rules that apply only to international arbitration.[30] For instance, article 13(7) of Legislative Decree 1071 provides that for international arbitrations the validity of the arbitration agreement and the arbitrability of the dispute will be assessed pursuant to the law chosen by the parties to govern the arbitration agreement, the law applicable to the merits of the case or Peruvian law.[31] With respect to the conditions an arbitrator should meet if acting as such, the law provides that the arbitrator does not have to be a qualified lawyer if acting as an arbitrator in an international arbitration case.[32] Provisions related to interim measures[33] and to the right to choose the substantive law,[34] to name a few, are also examples of regulations applicable only to international arbitration. The inclusion of these provisions in Legislative Decree 1071 has been generally justified based on the 'special nature' of international arbitration.[35]

Bolivia is in a situation similar to the one described for Peru. Law 1770 of 1997, which governs arbitration in Bolivia, provides a set of rules that apply to both international and domestic arbitration. However, articles 71 through 78 are applicable only to international arbitration. These provisions regulate issues such as the law applicable to the merits, the validity of the arbitration agreement and the arbitrability of disputes when the state of Bolivia is a party to the arbitration, the language of the arbitration and issues related to the selection of the arbitrators.

The above are just a few examples of some Latin American countries that have adopted, to a greater or lesser extent, a monist arbitral system.

Final remarks

Arbitral systems in Latin America have been evolving to respond to the changing needs of international businesses and to the recommendations and standards set internationally. The new adaptations are intended to provide appealing seats for international arbitration in Latin America.

Latin America has modernised its arbitral systems throughout the past few decades. Most countries have adopted the UNCITRAL Model Law to regulate international arbitration, and some have adopted the UNCITRAL Model Law for both domestic and international arbitration.

A monist or dualist system may impact the arbitration in different ways. For example, dualist systems require a very clear understanding of the applicable internationality criteria in every single case. Often a very straightforward answer will come up. But interpretations of the criteria may significantly vary depending on the specific circumstances of each case. This poses an additional risk. There may be grey areas where the international nature of the dispute is not clear. Parties may be forced to take their dispute to domestic arbitration to avoid further risks, losing the advantages of resolving their dispute through international arbitration (ie, tailor-made procedure, selection of applicable substantive law, foreign arbitrators, etc). Given that in monist systems the applicable procedure will not change as a result of the domestic or international nature of the dispute, such discussion

may be irrelevant in most cases. Parties would be, in principle, relieved of such burden. However, that may not necessarily be the case in countries where despite the unified procedure, there are some provisions applicable only to international arbitration.

The control exercised by local courts over arbitral awards may also vary from one system to the other. A dualist system could provide different grounds to challenge the validity of the awards depending on the domestic or international nature of the dispute; a monist system would establish the same grounds equally applicable to disputes domestic or international in nature. Many of the Latin American countries that have implemented monist systems have based their arbitration laws on the UNCITRAL Model Law. In the majority of those countries, the grounds to set aside an award (domestic or international) would be the ones established in the UNCITRAL Model Law.

In the context of monist and dualist systems and the extended application of the UNCITRAL Model Law in Latin America, I would like to finish these brief notes quoting an interesting question on whether the scope of application of the UNCITRAL Model Law should be revised:

> *1. Scope of application: the Model Law should include two options: a) monist regime for all arbitrations, or b) dualist system, whereby the law is only applicable to international arbitration. In my view, international arbitration practices are being adopted and welcome in domestic arbitrations in many countries, so they will eventually prefer a sole regime applicable to both, without any difference. In a truly monist regime, the nationality of arbitrators, for example, should not be an issue, as well as the grounds for setting aside of awards.*
>
> Further, in the dualist system option, the definition of 'international arbitration' should be revised. A possibility is to define international arbitration as an arbitration which object involves more than one state. The current definition is based on the contract, not on the arbitration, and a contract can evolve: one that starts as domestic can become international, and vice versa, if there is a change in the composition of the parties for example. In addition, the Model Law leaves the parties the option for them to expressly agree if the subject matter relates to more than one country, which is indirect. Article 3(c) should be modified to allow parties in an otherwise domestic arbitration to expressly choose to be governed by the international arbitration law (a sort of waiver of dualism).[36]

Notes

1. Cristian Conejero, ***El arbitraje comercial internacional en Iberoamérica: un panorama general,*** La Ley; Juan M Alcala and Joshua Briones, ***Arbitration in Latin America: A First Look at the Impact of Legislative Reforms,*** 13 Law & Bus. Rev. Am. 995 2007; José Enrique Briceño Berrú, 'Teoría y praxis del arbitraje comercial internacional en América Latina', Agenda Internacional, Año XVIII, No. 29, 2011.
2. Statistical Reports of the International Chamber of Commerce (ICC) International Court of Arbitration, ICC Dispute Resolution Library. The 2012 ICC Statistical Report, p1, says: '[…] which has led to the increasing involvement of parties from regions outside Europe, notably Latin America and South and East Asia in 2012'.
3. Statistical Reports of the International Chamber of Commerce (ICC) International Court of Arbitration, ICC Dispute Resolution Library.

4. CONEJERO, Cristian. La influencia de la ley modelo de la CNUDMI sobre arbitraje comercial internacional en América Latina: un análisis comparativo. Revista Chilena de Derecho. Vol. 32. No.1, 2005.
5. Cristian Conejero, 'La influencia de la ley modelo de la CNUDMI sobre arbitraje comercial internacional en América Latina: un análisis comparativo', ***Revista Chilena de Derecho,*** Vol. 32, No.1, 2005. Pontificia Universidad Católica de Chile.
6. José Enrique Briceño Berrú, 'Teoría y praxis del arbitraje comercial internacional en América Latina', ***Agenda Internacional,*** Año XVIII, No. 29, 2011.
7. Cristian Conejero, ***El arbitraje comercial internacional en Iberoamérica: un panorama general,*** La Ley; José Carlos Fernandez Rozas, 'El arbitraje comercial internacional entre la autonomía, la anacionalidad y la deslocalización', ***Revista Española de Derecho Internacional,*** Vol. LVII, 2005.
8. Id.
9. Alan Redfern and Martin Hunter, ***Law and practice of international commercial arbitration,*** Sweet and Maxwell, London, 1999.
10. REY, Pablo. El Arbitraje y los Ordenamientos Jurídicos en Latinoamperica: un estudio sobre formalización y judicialización. Vniversitas. Bogotá (Colombia) No. 126: 199-237, enero-junio de 2013.
11. REY, Pablo. El Arbitraje y los Ordenamientos Jurídicos en Latinoamperica: un estudio sobre formalización y judicialización. Vniversitas. Bogotá (Colombia) No. 126: 199-237, enero-junio de 2013".
12. Xavier Favre-Bulle And Edgardo Muñoz, 'Monismo y dualismo de las leyes de arbitraje: ¿Son todas ellas dualistas?', ***Arbitraje Internacional – Pasado, Presente y Futuro,*** Instituto Peruano de Arbitraje, Coordinadores Carlos Soto y Delia Revoredo, Lima, 2013.
13. The Whereas of Decree 1071 (which governs arbitation in Peru) establishes as follows: "El Congreso de la República, mediante Ley No. 29157, ha delegado en el Poder Ejecutivo la facultad de legislar, por un plazo de ciento ochenta (180) días calendario, sobre diversas materias relacionadas con la implementación del Acuerdo de Promoción Comercial Perú - Estados Unidos y con el apoyo de la competitividad económica para su aprovechamiento; entre las que se encuentran la mejora del marco regulatorio, el fortalecimiento institucional, la simplificación administrativa y la modernización del Estado; en tal sentido, se requiere brindar las condiciones apropiadas para agilizar la solución de controversias que pudieran generarse en el marco de los tratados y acuerdos suscritos por el Perú."
14. Xavier Favre-Bulle And Edgardo Muñoz, 'Monismo y dualismo de las leyes de arbitraje: ¿Son todas ellas dualistas?', ***Arbitraje Internacional – Pasado,*** Presente y Futuro, Instituto Peruano de Arbitraje, Coordinadores Carlos Soto y Delia Revoredo, Lima, 2013.
15. Fernando Cantuarias Salaverry and Roque J Caivano, ***La Nueva Ley de Arbitraje Peruana: Un nuevo salto a la modernidad,*** Revista Peruana de Arbitraje No. 7, p43-84.
16. Jorge Santistevan De Noriega, 'Inevitabilidad del arbitraje ante la nueva ley peruana' (DL No. 1071), ***Revista Peruana de Arbitraje,*** No. 7, p85-118.
17. Statement of Purpose (Exposición de Motivos) of Legislative Decree 1071.

18. Fernando Cantuarias Salaverry and Roque J Caivano, ***La Nueva Ley de Arbitraje Peruana: Un nuevo salto a la modernidad,*** Revista Peruana de Arbitraje No. 7, p43-84.
19. Jorge Santistevan de Noriega, 'Inevitabilidad del arbitraje ante la nueva ley peruana' (DL No. 1071), ***Revista Peruana de Arbitraje,*** No. 7, p85-118.
20. Id.
21. José Carlos Fernández Rozas, 'El Arbitraje Internacional y sus Dualidades', ***Anuario Argentino de Derecho Internacional. Asociación Argentina de Derecho Internacional, XV, Córdoba,*** Argentina, 2006.
22. Bill 85 of 2002 – Senate.
23. Second debate for Bill 85 of 2002 Senate. Gaceta 229/02. The Gaceta says: "El proyecto de ley desarrolla la naturaleza jurídica contractual de la institución, no solo por el surgimiento del pacto, sino porque en el arbitraje legal otorga a las partes sujetas al derecho privado un amplio margen de regulación del procedimiento."
24. See, for example, Decision C-713 of 2008 of the Colombian Constitutional Court.
25. See for example the decision issued by a Colombian court in the case ***Industria y Distribuidora Indistri SA v SAP Andina y del Caribe CA.***
26. Alberto Fernández López, 'Algunos criterios relevantes sobre el arbitraje en Costa Rica tras la Ley No 8937 de 2011', ***Arbitraje: Revista de Arbitraje Comercial y de Inversiones,*** edited by Evelio Verdera y Tuells and José Carlos Fernández Rozas (IproLex 2011 Volume 4 Issue 3) p797–811.
27. Law on International Arbitration Based on the UNCITRAL Model Law. Docket No. 17.593
28. Statement of Purpose Law on International Arbitration Based on the UNCITRAL Model Law, Docket No. 17.593, Asamblea Legislativa de Costa Rica, 9 September 2010.
29. Cristian Conejero, ***El arbitraje comercial internacional en Iberoamérica: un panorama general,*** La Ley. Conejero identifies the following Latin American countries with a monist systems: Argentina, Bolivia, Brazil, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic and Venezuela. He also classified Costa Rica in this group, but that was before the enactment of Law 8937 of 2011 which applies only to international arbitration.
30. José Enrique Briceño Berrú, 'Teoría y praxis del arbitraje comercial internacional en América Latina', ***Agenda Internacional, Año XVIII,*** No. 29, 2011.
31. For example, see articles 13(7), 22(1) and 47(9) of Decree Law No. 1071 of 2008.
32. Article 13(7) of Legislative Decree 1071.
33. Article 22(1) of Legislative Decree 1071.
34. Article 47(9) of Legislative Decree 1071.
35. Article 57 of Legislative Decree 1071.
36. Ana María Arrarte, ***The Baker & McKenzie International Arbitration Yearbook,*** 2012-2013.
    37 Dyalá Jiménez-Figueres, 'Are We Beyond The Model Law — Or Is It Time For A New One?', ITA, 23 May 2013 at Kluwer Arbitration Blog.

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The Valuation of Minority Interests in Forced Takings

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Valuation experts are often tasked with determining the value of an entire business enterprise, such as 100 per cent interest in the shares of a privately held company. While most dispute-related valuations in international arbitration involve the valuation of a 100 per cent interest or a controlling interest of less than 100 per cent, it is the valuation of minority interests that presents added complexity and requires special considerations.

Generally speaking, minority shareholders are unable to elect a majority of the board of directors, and depending on the nature of the relative shareholdings of other shareholders, may be subject to the will of majority shareholders (with some protections from various Corporations Acts depending on jurisdiction). Shareholder agreements can offer further protection to minority shareholders, but a lack of control can influence the value of the shareholding, and in some cases the effect on value can be material.

While it is the disputes involving controlling interests that garner the most attention due to the relatively higher values at stake of larger percentage ownership interests, minority interests should not be overlooked. This article examines the complexities and considerations faced by valuation experts in valuing minority interests in the context of forced takings in international arbitration.

Controlling interests v minority interests

The definitions of control and rights of shareholders will depend on the jurisdiction in which an entity is incorporated, and what corporate law statutes apply. A valuation expert should be aware of what percentage of shareholder votes are required for significant corporate actions, and the rights of majority and minority shareholders, as these considerations are relevant in determining whether a certain percentage shareholding represents a controlling interest or a minority interest.

For example, in Canada, the Canada Business Corporations Act (as well as the Provincial Corporations Acts) and income tax legislation generally define control and the rights of controlling shareholders. A controlling interest is defined as one having more than 50 per cent of the voting shares of a company. The rights and privileges of a controlling interest include:

- the ability to elect the majority of the board of directors, which allows for control through decisions that influence the strategic direction of the company;
-

the ability to appoint themselves or others in senior management positions, which allows for control through operational decisions of the company;

- the ability to determine the timing and quantum of dividends, which allows for control of one's return on investment;
- the right to determine the timing of the sale of the business, and the amount and form of consideration of the sale; and
- the right to liquidate the business and distribute the proceeds.[1]

The issue of control is not as simple as having more than 50 per cent of the votes. The ability to pass special shareholder resolutions required to enact 'fundamental changes' in the business are set out in the Federal and Provincial Corporations Acts.[2] These statutes provide for specific voting requirements in order to pass special resolutions, which may be two-thirds of votes or three-quarters of votes depending on the prevailing statute. A 'fundamental change' may be a significant change in the direction of a company, or a sale or liquidation of the business. The requirements to pass special resolutions and other terms of shareholder rights and privileges may also be provided for in a company's incorporation documents, in shareholders' agreements or in financing agreements.

In the United States, companies are free to incorporate in any state no matter the location of the headquarters or where business is conducted; however, more than half of all publicly traded companies in the US are incorporated in Delaware.[3] Under the Delaware General Corporation Law, the existence of a two-thirds vote requirement essentially gives 33.4 per cent shareholder ability to block certain activities of management and in some cases allow the 33.4 per cent shareholder to maintain an effective controlling interest.

For valuation assignments in international arbitration, it is important for a valuation expert to understand the statutory definitions of control and shareholder rights, if they are provided for in the relevant jurisdiction, and any case-specific factors that influence control. The existence of a shareholder agreement or a review of the articles of incorporation will also provide information that is relevant to the determination of restrictions or protections that are afforded to various shareholders.

Minority interest shareholders are not afforded the same rights and privileges enjoyed by controlling interest shareholders, and thus a valuation expert needs to consider whether adjustments should be made to the pro rata portion of the total value of an entire business enterprise when valuing a minority interest in the context under which the dispute arose. The two most common adjustments are:

- minority discount – a discount for the inability to control the strategic and operational direction of the company; and
- illiquidity discount – a discount for the lack of an immediately ready market in which to sell minority shareholdings, especially for privately held companies and thinly traded publicly held companies.

Definition of value

The starting point of any valuation exercise is to define the concept of 'value' being determined. In international arbitration cases, the standard of value is often referred to as 'fair market value'. Fair market value has different definitions in different parts of the world.

In Canada, the definition of fair market value that has been generally accepted by Canadian courts is:

> The highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of cash.[4]

In the United States, fair market value is defined by the American Society of Appraisers (ASA) 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.[5]

While the International Valuation Standards Council (IVSC) does not provide a definition for fair market value, it does provide a definition for 'market value' under its International Valuation Standards (IVS) Framework as:

> The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.[6]

The concepts outlined in these definitions all have common elements that are generally accepted by valuation professionals globally. These common elements are:

- a willing buyer and seller not under compulsion to transact;
- a knowledgeable buyer and seller at arm's length;
- an open and unrestricted market; and
- price expressed in terms of cash equivalents.

The other concept of value relevant to the valuation of minority interests is the term 'fair value'. In the context of valuation for dispute purposes (as opposed to financial accounting purposes), the term 'fair value' is not as clearly defined as fair market value and is subject to interpretation by courts and tribunals. Generally, courts in Canada and the United States have interpreted 'fair value' to mean fair market value without the application of discounts to reflect the fact that the shareholding being valued is a minority interest. However, the application and determination of fair value in specific cases is varied in terms of the quantum of discounts, if any, that are applied to the valuation of minority interests.

The IVSC provides a definition for fair value under its IVS Framework as:

> the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties.[7]

For valuation purposes, this definition of fair value requires the assessment of special advantages or disadvantages that each party will receive from the specific transaction; these

advantages and disadvantages are to be disregarded under the IVSC definition of market value since they are not generally available to market participants.

The concept of fair value is relevant in international arbitration since it allows courts and tribunals to examine the specific circumstances of the case, and to decide on a value that is just and equitable to all parties. As illustrated in the application of fair value in Canada and the United States discussed below, this concept provides courts room for broad flexibility in arriving at a value which they consider appropriate in each individual case.

Canada

In Canada, the issue of valuing minority interests and the concept of 'fair value' can arise from the following transactions or causes of action under the Canada Business Corporations Act (CBCA) (and certain Provincial Corporations Acts):

- shareholder dissent rights that may be triggered by specified corporate changes such as restricting the issue or transfer of shares, restricting businesses the corporation may carry on, amalgamating, or selling all or substantially all of the corporation's property; and
- compulsory purchase or 'squeeze-out' provisions that may be triggered by a takeover bid by the tender of 90 per cent or more of the shares of any class to which the bid relates.

The minority interests in the above circumstances are entitled to be valued and acquired at fair value (ie, pro-rata fair market value, with no deduction for minority interest or no premium for control). Under the CBCA, courts have the option to order that shares be purchased where there has been oppression of minority shareholder rights. Oppression remedies are triggered by corporate conduct that is 'oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer'.[8] Although the CBCA does not specify the standard of value for the valuation of minority interests in cases of oppression, the courts generally apply the concept of fair value, consistent with the appraisal rights noted above.

While the CBCA and Provincial Corporations Acts provide for valuations at fair value, the term 'fair value' is not specifically defined in these Acts. Generally, the fair value of a minority interest in dissent and oppression cases has been interpreted by Canadian Courts to mean fair market value without applying a discount to reflect a minority shareholding.[9] In the often cited case Domglas Inc v Jarislowsky, a case heard in the Supreme Court of Quebec relating to dissenting minority shareholders, the Court made the following comment with reference to the definition of fair value:

> Thus, a 'fair' value is one which is just and equitable. That terminology contains within itself the concept of adequate compensation (indemnity), consistent with the requirements of justice and equity.[10]

In the Domglas case, the Quebec Court of Appeal considered the question of the applicability of a minority discount and it was held that it was reasonable and correct to reject any discount.[11] In Canada, most courts have defined 'fair value' as the value that is just and equitable given the specific circumstances of each case. This provides Canadian courts with flexibility and room to judge the applicability of discounts related to the valuation of minority interests.

United States

In the United States, as in Canada, the issue of valuing minority interests commonly arises from minority shareholder oppression cases and cases triggering appraisal rights of dissenting minority shareholders. The definition and application of 'fair value' in these cases is complicated in the US, which will vary by state and the governing corporate statues adopted in each state. For example, the definition of 'fair value' provided for in the 1984 Revised Model Business Corporation Act (RMBCA), under shareholder appraisal rights, did not specifically mention the application of discounts to share valuation.[12] Revisions were made in 1999 to the RMBCA to specifically exclude minority discounts and marketability discounts in arriving at fair value.[13] However, not all states have adopted the 1999 amendments, and many states, such as New York, have statutes that reflect the 1984 RMBCA definition of 'fair value' which allow the courts to decide the appropriateness of applying specific discounts to value based on the facts of the case. Under the Delaware General Corporation Law, a minority shareholder is entitled to an appraisal of the fair value of the shareholdings by the Delaware Court of Chancery, under the appraisal rights available for merger or consolidation transactions.[14] In reference to the determination of fair value, the Delaware Court of Chancery is to exclude 'any element of value arising from the accomplishment or expectation of the merger or consolidation' and 'the Court shall take into account all relevant factors'.[15] Therefore, while the fair value concept is used in Delaware, the definition and determination of 'fair value' is left open for the court to decide if minority interest related discounts are applicable on a case-by-case basis.

A key distinction in the definition of 'fair market value' and what many courts interpret as fair value is the concept of a willing buyer and a willing seller under no compulsion to act. In cases of minority shareholder oppression where minority shareholders are 'squeezed out' by majority shareholder actions or in other cases of forcible taking, such as the expropriation of an asset or business by a government, the seller would not be considered as willing and likely are compelled to transact.

In the case McKesson Corporation et al v the Islamic Republic of Iran et al, heard in the United States District Court, District of Columbia,[16] it was found that the defendant had expropriated McKesson's 31 per cent interest in an Iranian dairy company and that Iran could be held liable in federal court for the expropriation under the Treaty of Amity and customary international law. The Court ruled that the plaintiffs were entitled to an award of damages equal to the 'full value of the property expropriated', which is 'usually "fair market value" where that can be determined'. In the determination of fair market value of this minority interest, the Court rejected the application of a minority discount and a lack of marketability discount. In arriving at this decision, the Court applied what it considered to be analogous domestic law that addressed the legal propriety of minority and marketability discounts in appraisal actions in the United States. It was noted that the overwhelming majority of courts in the United States have found that no minority or lack of marketability discount is appropriate in the valuation of minority interests in an appraisal action when being purchased by the majority shareholder or the corporation itself. In this decision, the Court also observed that:

> in a forced sale, discounts are inherently unfair to the forced-out shareholder who did not pick the timing of the transaction and thus is not in the position of a willing seller

and

> because allowing discounts create incentives for oppressive behavior, both discounts are particular disfavored where the stock trade is a result of such behavior.

While the Court acknowledged that these considerations involve interpretation of US domestic corporate law statutes, it found that the position of McKesson as a foreign shareholder facing an expropriating government was analogous to that of the oppressed or 'forced-out' minority.

International arbitration

In the ICSID case ADC Affiliate Limited et al v the Republic of Hungary,[17] one of the claimants, ADC Affiliate Limited, held a 34 per cent interest in a project company set up for a renovation and design project of Terminal 2 in the Budapest-Ferihegy International Airport. This arbitration arose from an alleged unlawful expropriation by the Republic of Hungary of the claimants' investment in and related to this airport project. The Tribunal concluded that the respondent did unlawfully expropriate the claimants' interest and awarded damages. The Tribunal accepted the discounted cash flow approach as an appropriate method to compute the fair market value of the expropriated investments of the claimants. In the valuation of the 34 per cent interest, the respondent argued that discounts for illiquidity and absence of control should have been applied. The Tribunal rejected the application of these discounts based on the following factors: the project company was a regulated entity with relatively stable cash flows, as opposed to a privately held company with erratic cash flows; and ADC Affiliate Limited, as a minority shareholder, had adequate shareholder protections in the agreements related to the project.

In the ICSID case CMS Gas Transmission Company v the Argentine Republic,[18] the claimant held a 29.42 per cent interest in a company (TGN) set up by the Argentine Republic for the transportation of natural gas. This arbitration arose from the alleged suspension by Argentina of a tariff adjustment formula for gas transmission applicable to the company in which CMS had an investment. The Tribunal concluded that the actions of the Argentine government did not constitute an indirect or 'creeping' expropriation, but resulted in the objective breach of the fair and equitable treatment standard. With respect to compensation, the Tribunal concluded that the standard of fair market value was the most appropriate in this case. In the valuation of the loss suffered by CMS on its minority interest in TGN, the Tribunal concluded that the discounted cash flow approach was the most appropriate in this case due to the following factors:

- the shares of TGN were not publicly traded;
- the market capitalisation in the Argentine stock market was illiquid and examining publicly traded natural gas transporters was not the most adequate method to value companies;
- TGN was an ongoing company with a record of profits;
- there was no significant evidence of comparable transactions and it would be speculative to determine compensation on that basis; and
- there was adequate data to make a rational discounted cash flow valuation.

In arriving at the valuation of CMS' minority interest as described in the public award decision, there was no discussion of whether a minority discount was applied. Interestingly in this case, the value of the shares was determined and awarded on the basis that CMS must

transfer the ownership of its shares in TGN to the respondent upon payment of the award, and the respondent was given up to one year after the date of the award to accept the transfer.

In the ICSID case Gemplus SA et al and Talsud SA v the United Mexican States,[19] the claimants together held a 49 per cent interest (Gemplus holding 20 per cent and Talsud holding 29 per cent) in a concessionaire set up by the Mexican government to create and operate a new national motor vehicle registry in Mexico. This arbitration arose from the claimants' allegations against the respondent of:

- unlawful expropriation;
- unfair, inequitable and arbitrary treatment; and
- failure to provide full protection and security in regard to their investment in the concessionaire.

The Tribunal concluded that the claimants' investments were unlawfully expropriated by the respondent, indirectly with the requisition of the operation of registry and directly with the revocation of the concession agreement. With respect to compensation, the Tribunal concluded that the claimants' claims derive only from their status as investors with minority shareholdings in the concessionaire. The relevant exercise to the Tribunal was the valuation of the claimants' lost investments in the form of their minority shares. With respect to the definition of value, the Tribunal referred to the Argentina bilateral investment treaty, which provides for the equivalent of the 'market value' of the shares, and the France bilateral investment treaty, which provides for the equivalent of the 'fair market value' of the shares. Some of the difficult valuation issues that the Tribunal contended with in this case include the following:

- The concession was intended by the respondent and the claimants to be a profitable investment, but the project never achieved the level of profitability contemplated by the concession's business plan. The Tribunal considered that it still retained a reasonable opportunity to make significant future profits until the time of the respondent's unlawful conduct.
- The Tribunal accepted that there was no 'open, public, active or other available market' for the claimants' shares in the concessionaire and that there was no comparable business as at the valuation date.
- The Tribunal rejected the use of the discounted cash flow approach by the claimants as an appropriate methodology, and accepted the respondent's contention that the status of the concession's business prior to and up to the valuation date was 'far too uncertain and incomplete to provide any sufficient factual basis for the DCF method'.
- In expressing its reservations of the claimants' use of the DCF method in this case, the respondent submitted that a prospective buyer of the claimants' shares would be acquiring a minority interest and, as such, would normally command a discount. The respondent further submitted that a fully informed arm's length purchaser contemplating the purchase of this minority interest would demand a 'very high discount'.
- The Tribunal also rejected the respondent's use of the asset approach and the use of declared tax values since neither of these approaches takes into account the concessionaire's most valuable intangible asset as at the valuation date, being the

reasonably anticipated future income stream from the concession agreement under the remaining term of 10 years.

- With respect to the underlying data, the Tribunal noted that it was a material consensus by the quantum experts that the accuracy of much of the underlying data used in the discounted cash flow approach was not in dispute, even though the use of the DCF method itself was disputed.

Having made the above considerations, the Tribunal applied a modified form of the income-based approach to value the claimants' minority shares in the concessionaire by reference to the concessionaire's 'reasonably anticipated loss of future profits' assessed at the valuation date.

Considerations in the valuation of minority interests

A valuation expert should first consider the type of business enterprise that is the subject of the valuation, whether it is a publicly traded corporation, a privately held company, a joint venture or partnership, or a government regulated enterprise. This will have an impact on the valuation methodology and the applicability of a minority interest. For example, using public stock market share prices and trading multiples to arrive at the value of a particular block of shares will in part already include an inherent minority discount since stock prices reflect the publically quoted price of one share, which is a non-controlling interest. However, shares of publicly traded companies if they are highly liquid may to some extent mitigate the perceived minority discount in stock market trading prices. As illustrated by the international expropriation cases above, the valuation of government-regulated entities set up for specific projects will have special considerations, such as whether there are any true comparable publicly traded companies or transactions, whether the entity generated stable historical positive cash flows or the reasonable expectation to generate future cash flows, and whether there are project agreements that provide protections for minority interests involved.

In addition to the ownership percentage being valued, a valuation expert should also understand the ownership structure and the rights and privileges of the shareholding interest. Documents such as articles of incorporation and shareholder agreements may provide information on restrictions or protections that affect various shareholders. The jurisdiction under which the company was incorporated will also have an impact on 'control', such as the provision of specific voting requirements to pass special resolutions that require more than 50 per cent of shareholder votes.

Understanding the cause of action and the dispute that gave rise to the valuation exercise is equally important. In cases involving shareholder dissent rights, compulsory purchase transactions, shareholder oppression and expropriation, shareholder interests are often considered forcibly taken. These transactions involve parties that would be considered unwilling 'sellers' under compulsion to transact. Depending on the jurisdiction and the cause of action, the valuation expert should clearly define the standard of value and understand the applicability of fair market value and fair value in the particular jurisdiction. The valuation of these minority interests should reflect a willing buyer and a willing seller not under any compulsion to transact.

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Notes

1. Canada Business Corporations Act, June 25, 2013.

2. Canada Business Corporations Act, June 25, 2013, Part XV. Ontario Business Corporations Act, December 31, 2011, Part XIV.
3. www.corp.delaware.gov/aboutagency.shtml
4. The Canadian Institute of Chartered Business Valuators, Introductory Business & Securities Valuation, 2009.
5. ASA Business Valuation Standards, 2009, p27.
6. IVS Framework, 2011, para 30.
7. IVS Framework, 2011, para 39.
8. Canada Business Corporations Act, June 25, 2013, para 241.
9. Canadian court cases which address fair value and the exclusion of minority discounts include: ***Brant Investments Ltd v KeepRite Inc,*** Court of Appeal for Ontario (CA 837/87); ***Ford Motor Company of Canada v the Ontario Municipal Employees Retirement Board,*** Court of Appeal for Ontario (C41312 & C41450); ***Sutherland v Birks,*** Court of Appeal for Ontario (C37495).
10. ***Domglas Inc v Jarislowsky,*** Supreme Court of Quebec (13 BLR135), as cited in ***Manning v Harris Steel Group Inc,*** Supreme Court of British Columbia.
11. Domglas, as cited in ***Irwin v DW Coates Enterprises Ltd,*** Supreme Court of British Columbia.
12. Model Business Corporation Act, American Bar Association, 1984.
13. Model Business Corporation Act, American Bar Association, 1999.
14. The Delaware Code, Title 8, Chapter 1 – General Corporation Law, section 262(a).
15. The Delaware Code, Title 8, Chapter 1 – General Corporation Law, section 262(h).
16. United States District Court, District of Columbia, No. CIV. A.82-00220(TAF).
17. ICSID Case No. ARB/03/16.
18. ICSID Case No. ARB/01/8.
19. ICSID Case No. ARB (AF)/04/3 & ARB (AF)/04/4.

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Summary

REPORT ON RECENT CASES IN ARGENTINA

In our contribution to last year's *The Arbitration Review of the Americas 2013*, we announced that in 2012 the federal government had submitted to the National Congress a Bill for the unification of the Civil and Commercial Codes, which contained a chapter on the Contract of Arbitration. The draft Contract of Arbitration regulation included some provisions that are common in modern arbitration, such as the autonomy and severability of the arbitration clause (article 1653), the arbitrators' jurisdiction to determine their own jurisdiction (Kompetenz-Kompetenz) (article 1654), a regulation on preliminary measures (article 1655) and a policy favouring arbitration (article 1656), among others.

Although there is a unanimous opinion of legal authors and commentators[1] among the arbitration community that our arbitration legislation must be updated through the adoption of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law)[2], in last year's comment we considered that the inclusion of the Contract of Arbitration chapter in the draft Unified Civil and Commercial Code would have brought some progress in relation to the current situation in certain arbitration areas.

However, what appeared at that time as an inevitable and quick process for the unification of the Civil and Commercial codes supported by the government turned to a slowdown, and it now seems like this ambitious process will be postponed for an indefinite amount of time. The reasons for the change of criteria have not been made public up to now.

In the meantime, we will continue to face the problems that arise from the application at the federal level of the outdated arbitration rules contained in the corresponding chapter of the 1967 National Code of Civil and Commercial Procedure (CPN).

Report on recent cases

As a recent example of those problems, we will comment on the recent developments of the Wallaby case[3], referred to in our contribution to the 2013 edition. This case is a typical example of the consequences brought about by the application of an old fashioned legislation, causing a considerable delay in the process and, once again, evidencing the need for urgent modernisation of the Argentine arbitration legislation.

We will comment the decision of the Commercial Appeals Court, Panel D, in Capozzolo, Enrique Santiago y otros c/ Inversora Lolog SA y otros (Capozzolo), where the court refused to revise a decision of the General Arbitration Tribunal of the Buenos Aires Stock Exchange that admitted the lack of legal standing of one of the defendants. The decision of the Appeals Court is based on a correct interpretation of the arbitration rules rejecting review of a partial award and limiting the intervention of a court to review the final award if it is subject to appeal.

We will also comment on the opinion rendered before the Supreme Court of Justice by the Solicitor General's Office[4] in Mobil Argentina SA c/ Gasnor SA recommending to uphold the decision of the Appeals Commercial Court (Panel D) that rejected the appeal and annulment submitted by Gasnor. The appellant, using language of the criticised Cartellone decision, argued that a waiver of recourses, such as that contained in the ICC Rules, collided with Argentine principles of public policy and turn out to be 'unjust', 'unreasonable' or 'arbitrary' to the point of compromising the state's public policy. The Commercial Court of Appeals rejected such arguments and the Solicitor General's Office has recommended to confirm the ruling.

Recent developments in Wallaby

We commented on this case before highlighting the fact that, despite an alleged 'principle' commonly cited by our courts indicating that arbitration agreements should be narrowly construed (ie, in case of doubt about the existence of an agreement to arbitrate, the jurisdiction of ordinary courts of justice should prevail), in this case, this interpretation principle was not followed as the court instead chose to follow an adequate contract interpretation doctrine.

In a services agreement, the parties included an arbitration clause stating that 'any controversy should be settled by an arbitrator appointed by mutual agreement or by an ordinary court of justice in the absence of such mutual agreement'. Once the conflict materialised, the parties failed to appoint the arbitrator by mutual agreement and, therefore, Wallaby appeared before a commercial court of law asking for the appointment of the arbitrator, as set forth in the arbitration clause.

The defendant objected to the plaintiff's request, arguing that in the event of failure of the parties to agree on the appointment of an arbitrator, the dispute-resolution mechanism established the direct jurisdiction of ordinary courts. Both the lower and upper courts supported the plaintiff's interpretation.

The decision called for the application of section 1198 of the Civil Code and section 218(2) of the Commercial Code, thus evidencing that general principles of contract interpretation should also be applied to arbitration agreements, therefore abandoning the principle that arbitration clauses should be narrowly construed.

As a result of such decision, the lower court judge summoned the parties to a hearing. In the absence of an agreement between the parties, the judge appointed an arbitrator who immediately accepted the nomination and called upon the parties to agree and execute the terms of reference[5].

The defendant, even then reluctant to participate in the arbitration process, failed to appear at the hearing. The arbitrator requested that the plaintiff and defendant file before the arbitral tribunal their views regarding the procedural steps and issues subject to arbitration that should, thereupon, be reflected in the terms of reference. For that purpose, the arbitrator called a new hearing to agree on the terms of reference stating that the arbitrator would decide in case of failure by the parties to reach an agreement. Once again, the defendant failed to appear and consequently the arbitrator himself wrote the terms of reference and procedural rules.

The defendant filed before the lower court a request for annulment of the activity carried forward by the arbitrator alleging that, based on article 739 CPN, in absence of an agreement between the parties, the terms of reference should have been issued by the Judicial Court and not by the arbitrator. The defendant added that failure to do so violated due process and the defendant's right to a proper defence. Moreover, the defendant stated that the original claim filed by Wallaby only requested the appointment of an arbitrator, but that such claim did not include the formalisation of the terms of reference, implying that a new claim should be filed. The lower court rejected the annulment request stating that there was no violation of defendant's rights.

However, the Appeals Court accepted the annulment request[6], stating that article 739 CPN indicated that, in absence of agreement between the parties, the terms of reference should also be defined by the court. Fortunately, in that same ruling, the court understood that the

claim filed by Wallaby requesting the appointment of an arbitrator should be understood as including the petition to define the terms of reference and ordered the lower court to do so, and, thereafter, required the arbitrator to start the arbitral process again. Furthermore, when parties do not agree on the arbitral proceedings, the CPN sets forth that the arbitrator must follow the rules of the ordinary judicial proceedings (article 751 CPN). That is, when the parties executed their contract, they intended to avoid state courts and judicial proceedings; however, they ended up in the worst possible scenario (ie, state court proceedings to start arbitration and arbitration with the same proceedings of state courts to resolve their disputes).

Although the parties chose to arbitrate their controversies, they have been litigating for approximately two years in state courts to start the arbitration proceedings.

From the background of the case and the arbitration clause, we understand that the parties neglected to take into account basic principles for the drafting of arbitration clauses – such as those of the IBA Guidelines for drafting arbitration clauses[7] – and paid for it.

In addition, had Argentina adopted a modern arbitration law, things would have been completely different. Under the UNCITRAL Model Law[8], when parties need to ask a state court to appoint the arbitrator as a last resource, the decision of the court is not subject to appeal (article 11, paragraph 5), and when the parties do not reach an agreement upon the arbitral procedure, the arbitrator conducts the arbitration as he or she considers appropriate (article 19, paragraph 2).

As we stated, infinite difficulties arise from the absence of modern and specific legislation on arbitration that should avoid the formalities, delays and expenses of ordinary litigation. The maintenance of the current federal Argentine arbitration legislation not only fails to comply with those objectives but, to the contrary, when faced with a reluctant party, the old legislation requires a duplication of efforts and discourages the use of alternative dispute resolution methods.

Capozzolo

Modern arbitration legislation provides for the interaction of the arbitration community (eg, arbitral institutions, arbitrators, attorneys, etc) with the state court system as a fundamental cornerstone for developing a healthy arbitration environment. Besides appointing arbitrators or providing the necessary imperium to enforce provisional measures or the award itself, court support for arbitration also involves abstaining from getting involved in an arbitration process whenever the applicable rules do not provide for their intervention. For instance, the UNCITRAL Model Law sets forth that in matters governed by this law, no court shall intervene except where so provided in this law (article 5).

The Buenos Aires Stock Exchange set up long ago (1963) a General Arbitration Tribunal for commercial matters. The Tribunal has its own set of rules and, for the purposes of this comment, provides that in an arbitration of law the award is subject to all the appeals that might be entered against a court judgment if such appeals have not been waived[9]. The appeal should be filed before the Arbitration Tribunal.

The rule does not indicate that such appeals can be submitted only against the 'final' award.

Although we had no access to the arbitration file, from the court decision[10] it appears that Talleres Metalúrgicos San Martín Tamet SA; Árbol Solo SA and Enrique Santiago Capozzolo entered a claim against Inversora Lolog SA and Juan Cruz Adrogué (Capozzolo).

The defendant appeared before the arbitration tribunal alleging the lack of legal standing in relation to Juan Cruz Adrogué. The argument was that Mr Adrogué executed the agreement that contained the arbitration clause in his capacity as legal representative of Inversora Lolog SA and, therefore, the claim was incorrectly directed against him as an individual. The arbitration tribunal issued an award that excluded Mr Adrogué by admitting his defence of lack of legal standing.

Capozzolo filed an appeal against the award but it was rejected by the Arbitration Tribunal; so the appellant entered a direct appeal before the Commercial Court of Appeals, requesting the Court to review such rejection and to accept the appeal.

The Commercial Court of Appeals indicated that the direct appeal lacked certain formalities that would allow turning it down but, nevertheless, made an analysis of the merits of the appeal, concluding that the plaintiff voluntarily submitted to an alternative dispute resolution process that 'does not admit a broad judicial revision as requested'. The Court affirmed that what might be subject to appeal is only the 'final award' and went on to say that a preliminary decision that does not end the arbitration process cannot be characterised as an award[11]. Interestingly, when the UNCITRAL Model Law allows state courts to intervene while the arbitration proceeding is pending, there is no stay in this proceedings (article 13(3) and 16(3)) and arbitrators can render the award.

The decision of the Commercial Court of Appeals should be welcomed as it correctly avoids interfering with the arbitral proceedings. The arbitration rules at stake indicate the proper time for Judicial Courts intervention.

The opinion rendered by the Solicitor General's Office in Mobil v Gasnor

In 2007, the Commercial Court of Appeals, Panel D, unanimously rejected an attempt by a local natural gas distribution company (Gasnor) to set aside an ICC Award rendered in favour of a natural gas producer (the Argentine subsidiary of Mobil Oil).

Gasnor not only sought the annulment of the ICC Award but also attempted to appeal the award on its merits, notwithstanding the clear language of article 28(6) of the ICC Rules (1998 edition).

Gasnor argued that a waiver of recourses such as that contained in article 28(6) of the ICC Rules is against Argentine principles of public policy when the final award might be qualified as 'unjust', 'unreasonable' or 'arbitrary' to the point of compromising the state's ordre public.

The language used by the appellant was identical to the language used by the Federal Supreme Court in an obiter dictum in the Cartellone decision[12], which aroused a myriad of criticisms as most specialists understood that the ruling meant a setback and a radical departure from the consistent criteria maintained for decades by the Supreme Court.

Cartellone, a major construction company, and Hidronor, a state enterprise, entered into an arbitration agreement that included a full waiver of any appeals and recourses against the award. The final award accepted the claim and ordered Hidronor to pay of the principal amount claimed by Cartellone plus indexation (inflation adjustment) and interest, at the rate agreed upon by the parties. The result of this calculation was considered unreasonable by Hidronor, who filed a request for annulment. The Federal Court for Civil and Commercial Matters, Panel III, dismissed the appeal in a ruling that correctly applied article 760 of the CPN[13].

Hidronor, invoking its condition as a state company (even though at that time it was under liquidation) filed an ordinary appeal before the Federal Supreme Court, which in turn accepted to hear Hidronor's challenge to the award, not only on the basis of annulment, but also as an ordinary appeal against the award just as a regular appellate court might do with an ordinary judgment. In doing so, the Federal Supreme Court disregarded the explicit waiver of appeals that the parties had included in their arbitration agreement, finding instead that any such waivers were subject to review by the courts.

What concerned the arbitration community is that the Federal Supreme Court also held that arbitral awards could be set aside by the courts not only for the grounds specified in articles 760 and 761 of the CPN (all of them directly or indirectly involving due process violations), but also if the awards were found to be 'unconstitutional, illegal or unreasonable'.

In Mobil v Gasnor, despite Gasnor's arguments reflecting the Cartellone doctrine, the Commercial Court of Appeals, Panel D, rejected the appeal and found:

- that the waiver of ordinary appeals included in article 28(6) of the ICC Rules was valid and binding in an arbitration agreement entered into under the ICC Rules, and that the will of the parties must be respected by the courts;
- that the Supreme Court dictum in Cartellone had been the subject of authoritative criticism from several quarters;
- that the appellant had failed to show that public policy principles had in fact been violated by the ICC award;
- that even though Argentine law indeed prohibits a priori waivers of annulment recourses, in the case under analysis, Gasnor had failed to show the actual occurrence of a violation of due process or an event of extra petita that would allow setting aside the award; and
- that the arbitral tribunal had jurisdiction to apply an Emergency Law passed by the Argentine Congress in 2002, even though that law was enacted after the arbitration agreement was signed.

Gasnor filed an extraordinary appeal in due course that was denied by the Commercial Appeals Court and subsequently filed a direct appeal before the Federal Supreme Court. The Supreme Court then requested an opinion from the Solicitor General's Office, which was rendered on 23 April 2013.

The assistant solicitor general assigned to the case reviewed the arguments set forth by Gasnor and summarised Gasnor's arguments as follows:

- the waiver of ordinary appeals agreed to by the parties in the arbitration clause is not applicable to a Supreme Court appeal (known in Argentina as an extraordinary appeal) because both the plaintiff and the defendant reserved their rights to file such an extraordinary federal appeal;
- arbitration agreement could not be construed to encompass the interpretation and application of laws that were passed after the arbitration clause was executed; and
- the award was arbitrary and affected Gasnor's constitutional property rights.

In her opinion, the assistant solicitor general sets out the subject under analysis and points out that the thema decidendum is whether or not the recourses filed against the award

should proceed, taking into account that the parties freely agreed to submit their dispute to arbitration; and that they had waived their right to file any recourses.

The Solicitor General's Office goes on to say that the mere fact that in their pleadings both parties had indicated that a federal question was present and had consequently reserved their right to appeal to the Supreme Court, such right was nevertheless subject to the waiver of appeals contained in the ICC Rules, to which they adhered. Therefore, even if there was a federal question at issue, the voluntary waiver of appeals was binding on the parties even with regards to the extraordinary federal appeal. As regards the scope covered by the arbitration clause, the assistant solicitor general stated that an arbitration agreement is, by definition, designed to solve future conflicts, to be decided according to the applicable law. As the Commercial Court of Appeals stated in its 2007 decision, it is therefore not 'unreasonable' to extend such scope to the application of certain emergency laws that were passed after the parties entered into such arbitration clause.

Finally, the opinion rendered before the Federal Supreme Court indicates that the 'doctrine of arbitrary judgments' followed by the Supreme Court, which allows litigants to reach the highest court even if there is no federal question at issue, is not purported to be a third instance but is deemed to cover exceptional cases with grossly unreasonable logic that results in the decision being considered as legally unfounded. In the case under analysis, there is only a discrepancy of the appellant with the Tribunal's decision, and it is the opinion of the Solicitor General's Office that the direct recourse should be dismissed.

We welcome the opinion of the Solicitor General's Office that reaffirms the principle that allows the parties to waive in advance all ordinary recourses and appeals (exception made of the annulment), and narrows the interpretation of the Cartellone obiter dictum referred to above.

Conclusions

The Argentine legal arbitration community fully expects a modernisation of the outdated arbitration legislation. Although the draft of the unified Civil and Commercial Code contained a Contract of Arbitration chapter with some provisions that are applied in modern arbitration, it seems that the interest in its quick approval has slowed down. Of course, this draft involves a huge amendment of Argentine law besides arbitration legislation. For the time being, no news is not good news.

As we analysed in the Wallaby, Capozzolo and Gasnor cases, Argentine arbitration legislation does not bring a clear-cut answer to common issues in arbitration. Nevertheless, Argentine courts still recognise admitted principles in arbitration.

Finally, the adoption of a modern legislation such as the UNCITRAL Model Law could help resolve most of the issues usually presented and position Argentina as an attractive site for arbitration.

Notes

1. Roque Caivano, La Obsolescencia De La Legislación Argentina Sobre Arbitraje Es Cada Vez Más Evidente, ***Journal of the Buenos Aires Bar Association,*** July 2012. Volume 72, Issue 1, p63–73.
2. www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
3.

Wallaby SA v Despegar.com.ar SA s/ordinario, Juzgado Nacional de 1a Instancia en lo Comercial No. 13. 09/09/2011 (La Ley AR/JUR/53303/2011), CNCom, Panel A, 02/25/2013, (La Ley AR/JUR/5845/2013).

4. For the purposes of this contribution, we are naming the Procuración General de la Nación as solicitor general although its duties are not exactly the same ones as the US solicitor general. The National Constitution states that it is an independent entity with the duty of defending legality and general interests of the community in combination with the rest of the national authorities. It defends legality before the Supreme Court of Justice.
5. CPN, article 740 indicates that the terms of reference should contain the date and name of the parties, the names of the arbitrators, the issues subject to arbitration and the amount of the fine payable by the party reluctant to comply with its obligation under the terms of reference.
6. CNCom, Panel A, 2013/02/25, ***Wallaby SA v Despegar.com.ar SA s/ordinario,*** (La Ley AR/JUR/5845/2013).
7. www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx.
8. See note 2, above. Although this law applies to international commercial arbitration, we take its provisions as an example of rules of modern arbitration.
9. General Arbitration Tribunal of the Buenos Aires Stcok Exchange, Arbitration Rules, article 63.
10. CNCom, Panel D, April 12, 2013, ***Capozzolo, Enrique Santiago y otros v Inversora Lolog SA y otros s/ queja.***
11. Idem
12. José Cartellone Construcciones Civiles SA c/ Hidroeléctrica Norpatagónica SA o Hidronor SA s/ proceso de conocimiento' – CSJN – 01/06/2004 – elDial.com – AA2145.
13. José Cartellone Construcciones Civiles SA v Hidroeléctrica Norpatagónica SA o Hidronor SA s/ Nulidad de Laudo – 28-08-2001, CNac Civ y Com Fed, sala III – Lexis No. 30000891.

Richards, Cardinal, Tützer, Zabala & Zaeffere

Bolivia

Brian Haderspock and **Andrés Moreno Gutierrez**
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Summary

The Future Of International Treaties In Bolivia: A Constitutional Dilemma

It is no secret that the current government administration has shown a firm attitude towards the re-foundation of Bolivia. The desire to re-enact a new constitution was successful; thus, on 25 January 2009, approximately 62 per cent of the Bolivian voters approved the new political constitution (the Constitution). The Constitution contemplates a specific treatment towards arbitration in foreign investment disputes over oil and gas related matters. It also determines what jurisdiction and law will apply to foreign investment disputes in general.

The above clearly denotes a contradiction with Bolivia's international context expressed in the 22 bilateral investment treaties signed prior to the Constitution, including other treaties that are not considered to be bilateral investment treaties (BITs). Consequently, and in accordance with the previously noted, the Plurinational Constituent Assembly inserted the Ninth Transitional Provision which reads:

> All international treaties in existence prior to the Constitution which do not contradict it terms will remain valid in our domestic legal system as Law. Within four years of the election of the new Executive branch, the State must denounce and, if necessary, renegotiate all international instruments that contravene the Constitution.

The foregoing refers to all international treaties that are in line with the constitution will remain and be adopted in the domestic legal system with a status of law, while those that contradict it must be denounced or renegotiated within the specified period of four years after the appointment of the executive branch, meaning until 6 December 2013.(President Evo Morales was elected into office in 6 December 2009.) It has been said that Bolivia will be denouncing 34 international treaties (some of which include BITs), which logically leaves the remaining subject to renegotiation or tacit approval.

The types of treaties contemplated in the Bolivian Constitution (CPE) include the following:

- International treaties on human rights: these are part of the Constitutional Bloc (article 410 CPE) and in accordance with article 256 (CPE), and are preferably applicable to the constitution when establishing rights more favorable to the subjects.
- The treaties of political integration that generate rules of community law: these also form part of the Constitutional Bloc and must be approved by a binding referendum.
- Treaties involving border issues, structural economic integration and monetary integration: these are to be affirmed by the referendum mechanism of approval. (These are found in a rank below the Constitution (article 257 and 410 CPE).)
- All other treaties do not require approval by referendum unless such a request is sought by 35 per cent of the Plurinational Legislative Assembly or 5 per cent of the voting population (article 259 CPE). Such treaties also have a rank below the Constitution (article 257 and 410 CPE). For reference purposes, BITs fit under this mentioned category.

Every BIT was signed prior to the reenactment of the Constitution, which means the executive branch is constitutionally obliged to denounce, renegotiate or leave the 22 BITs in place. That said, we must take into consideration the legal effects towards each decision.
Denunciation

It would be easier (but unfeasible) for the Bolivian government (executive branch) to make the decision to denounce the treaties that are contrary to the actual Constitution due to the fact that the principles behind the motives that may leave a treaty invalid are nothing but terminating and inflexible.

Article 255 of the Constitution highlights that the celebration of international treaties must respond according to the sovereignty and interests of the people, and must be governed, inter alia, by the following principles:

- independence and equality among states, non-intervention in internal affairs and peaceful settlement of conflicts;
- rejection and condemnation of all forms of dictatorship, colonialism, neocolonialism and imperialism;
- defence and promotion of human rights, economic, social, cultural and environmental, with rejection of all forms of racism and discrimination, respect for the rights of peasant indigenous peoples, cooperation and solidarity among nations and peoples, heritage preservation, management and regulatory capacity of the state; and
- harmony with nature, protecting biodiversity and prohibition of private ownership forms for the exclusive use and exploitation of plants, animals, microorganisms and any living matter, security and food sovereignty for all people, prohibition of importation, production and marketing of genetically modified organisms and toxic elements that can damage health and the environment, access to all the population to basic services for their welfare and development, preserving the right of the people to access to all medications, especially generics, protection and preferences for Bolivian production, and promotion of value-added exports.

Therefore, the executive branch has a wide range of pretexts or legal motives to consider a treaty to be contrary to the Constitution. However, under international rules, the Bolivian state would have a mandatory obligation to observe the denunciation procedure established in the respective treaty; article 260-I of the Constitution states: 'The denunciation of international treaties must follow the procedures established by the international treaty itself, the general rules of international law, and the procedures established in the Constitution and the law for ratification.' This provision also gives the possibility to apply the Vienna Convention on the law of treaties.

According to the Vienna Convention (VC), a state must apply what is set forth in the treaty in order to proceed with its termination or otherwise denunciation. Thus, according to the VC, a state cannot terminate unilaterally a treaty if it is not expressly permitted; on the other hand, a denunciation can only have effect if the treaties in question permits it under the rules set forth therein.

Renegotiation

The question is how to renegotiate a treaty and under what standards? If we take into consideration that any and every treaty that is contrary to Bolivia's interest can and must be denounced, what meaning would a renegotiation have? It is important to understand that a modification of the treaty in this case would not be equal to a renegotiation due to the fact that any modification to the terms of a treaty is most likely to be partial, while renegotiation, on the other hand, would imply redrafting the treaty and its terms from scratch. In other words, we'd be before a new agreement with substantial changes and a different scope.

That said, it would seem complicated to renegotiate efficiently the many treaties signed with the Bolivian state. First, on a multilateral level, the signatory states would have to comply and give their consent to initiate a renegotiation process on the terms of the treaty, which only affects one signatory state (Bolivia); hence, this would be practically impossible. Moreover, a bilateral agreement is less complicated and more likely to have a successful approach in renegotiating a prior agreement due to the obvious fact that the consensus is mutual. Even though the prospect of achieving a successful renegotiation of a determined treaty is bleak, the Bolivian state would be practically forcing the renegotiation on unilateral bases – that is to say, the signatory state wouldn't truly have the chance to renegotiate on a mutual interest level with the Bolivian government because what's on the table of negotiation is Bolivia's interest – and would consequently end up as an imposition to 'take or leave' Bolivia's unilateral proposition. Thus, the decision to leave would automatically conclude a posteriori in the decision to denounce the respective treaty.

Tacit approval

As mentioned above, the executive branch must execute the Ninth Transitional Provision of the Constitution before 6 December 2013. Failure to do so will lead to a tacit approval of the remaining treaties signed and entered into force prior to the reenactment of the Constitution, and so the said treaties will remain valid in our domestic legal system as law.

In the event that Bolivia's executive branch does not make the deadline and leaves the review of some treaties pending, the automatic consequence of tacit approval would most likely be ignored if and when the remaining treaties are still contrary to the countries interest. This would definitely generate a global discontent and cause an internal illegality due to the inobservance and incompliance with the Ninth Transitional Provision established by the Constitution. But we must assume and hope for the correct action and good faith of the current government.

As a final remark, one must acknowledge the delicate situation this generates for Bolivia. In a global context, international law regulates international relations among states, and so treaties, being sources of international law, generate conventional obligations towards each signatory state. Bolivia, therefore, has a complicated issue to approach: on one hand, the state must comply with its constitutional obligation; and, on the other, the state must try to maintain fluent relationships with each individual state. The importance of ending or renegotiating the many treaties signed by Bolivia must evidently be in good faith with mutual consent and understanding; the Bolivian state must not approach its peers with a hostile attitude as this shall only end in negative consequences for Bolivia and its international agreements to be subscribed in the future.

Finally, it should be noted that among the bills currently for consideration in Congress is the document of the 'Law on Celebration of International Treaties', which will govern the signing of conventions with other nations (bilateral) and multilateral agencies. The adopted text fulfils what is determined by article 258 of the Constitution, which states that 'the procedures for the signing of international treaties shall be governed by the law'. Another aspect worth noting is the need for the adoption of this new rule of law as it will enable the country to adapt all its international agreements to the provisions of the new Constitution.

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Brazil

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First step to change the Brazilian Arbitration Law

It is impossible to discuss the developments in international arbitration in Brazil during 2013 and not mention the commission created by the Brazilian Senate to modify the Brazilian Arbitration Law.

Recently enacted and even more recently confirmed by the Brazilian Supreme Court as being constitutional, the Brazilian Arbitration Law is currently being reviewed by a commission instated by the Brazilian Senate and comprised of one justice of the Superior Court of Appeals[1] and 16 lawyers, some of whom are already involved in the arbitration practice. Justice Luis Felipe Salomão is a career judge from Rio de Janeiro who ascended to the Superior Court of Appeals in 2008. Despite his relatively short term as a justice in the Superior Court of Appeals, Justice Salomão has rendered very important decisions regarding issues such as the disregard of the corporate veil (Resp. 1.180.714), jurisdiction of the judge in charge of the reorganisation of credits to rule on pending collection procedures (CC. 112.799) and the liability of banks to indemnify their consumers for fraud losses in deception crimes (Resp. 1.199.782).

The commission began modifying the Brazilian Arbitration Law (Law 9.307/96) in April 2013, which was originally enacted in 23 September 1996. Immediately after the enactment of the Brazilian Arbitration Law, in October 1996, the Brazilian Supreme Court began to decide the leading case in which the constitutionality of the Arbitration Law was confirmed only four years later. It was only after the constitutionality of the Arbitration Law was confirmed in December 2001[2] that arbitration in Brazil started to be regarded as an effective and enforceable means to solve disputes. Therefore, if Justice Salomão's commission delivers the draft by November 2013, the first step to modifying the Brazilian Arbitration Law will have taken less than 15 years from when its constitutionality was confirmed.

The short time between its enactment and the plans of the Senate to modify the Brazilian Arbitration is certainly not the consequence of an unsuccessful law. On the contrary, the Brazilian Arbitration Law, which was unequivocally inspired by the UNCITRAL Model Law, has enjoyed great success during the last 10 to 15 years. ICC statistics show a tremendous growth in international arbitration both involving Brazilian parties and with seat in Brazil since the enactment of the Brazilian Arbitration Law. The success of the Brazilian Arbitration Law was also confirmed by the results of research on court decisions of which the vast majority has been in favour of arbitration even when they are to vacate arbitral awards. Moreover, in research conducted by the Comitê Brasileiro de Arbitragem (CBAr) with the support of Ipsos, the users of local arbitration in Brazil mentioned the same old advantages and disadvantages of arbitration, which are the same almost all over the world and are unrelated to the Brazilian Arbitration Law.

Considering that it is a new law based on international standards and that there are no specific problems or concerns that would lead to a review in its early days, why has

the Brazilian Senate created a commission with the purpose of modifying the Brazilian Arbitration Law? There are many answers to this question and most of them are related to the political change Brazil is going through and the prestige quickly conquered by international arbitration in Brazil.

After the creation of the commission and the beginning of its work, what really matters is whether this commission will deliver a draft that will result in improvements to arbitration in Brazil. The risk of modifying the Arbitration Law is that unnecessary additions or changes may actually worsen it. Our hope is that, instead of suggesting changes to the core of the Arbitration Law, the commission focuses on issues that are particular to Brazil, such as arbitration in consumer-related disputes, arbitration involving the Brazilian government or its entities, and the confidentiality of the records of the arbitration institutions.

The commission is expected to deliver the draft of the changes to the Arbitration Law by November 2013. The odds of the changes being approved within the next year or so are low if it not made urgent. Regardless, the commission will be completed, and with it the first step to a new Brazilian Arbitration Law.

Confidentiality of the files held by the arbitral institutions

Recently Brazilian federal tax authorities issued notices to the largest arbitration institutions in Brazil seeking information on arbitral awards rendered and the amounts involved in the disputes. Tax authorities presumably want to use the information obtained to verify the information provided by the taxpayers involved in the arbitrations.

Although the most obvious targets to the tax authorities are the prevailing parties to the arbitration, the information sought by the tax authorities might be used to reach all parties, witnesses and arbitrators.

The arbitral institutions reacted differently to the notices delivered by the tax authorities. The Câmara FGV de Conciliação e Arbitragem (FGV), one of the first institutions to receive the tax authorities' notice, decided to simply inform the parties involved in the arbitration about the notice so that the parties would have the opportunity to take action and seek court orders to guarantee the confidentiality of the information regarding their cases. Other institutions decided to attack the order from the tax authorities and sought relief in court directly.

The Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá sought relief in court and obtained and injunction that allowed it to keep the files of the arbitrations confidential and out of reach of the fishing expedition of the tax authorities.

The injunction granted by 4th Federal Court of São Paulo is certainly an important one regarding the protection of arbitration in Brazil. It is based on the discretion of the arbitration procedures which is so important to most of the parties that choose arbitration to solve their disputes. It is important to note that the Brazilian courts will not assist any party to conceal information from tax authorities. They will, as the decision of the 4th Federal Court of São Paulo has evidenced, bar fishing expeditions in the arbitral institutions.

Notes

1. The Superior Court of Appeals (Superior Tribunal de Justiçal) is the highest non-constitutional court in Brazil, compared to the Brazilian Supreme Court, which is in essence a constitutional court.
2.

STF, Agravo Regimental na Sentença Estrangeira No. 5.206-7 (***MBV v Resil***), Rel. Min. Sepúlveda Pertence, Plenário, rulling sesstion on 12 December 2001, published in the Official Gazette on 30 April 2002.

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British Virgin Islands

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Summary

The existing legislation governing arbitration in the British Virgin Islands (BVI) is the Arbitration Act 1976 (the Act). The Act, which has never been amended or revised, is now considerably out of date; it is also limited in scope compared to more modern legislation and more suited as a framework for the conduct of domestic arbitration. However, now undergoing the consultation process is a new statute (the Bill), which, once enacted, will set out comprehensive legal provisions that will take into account modern principles and practices of arbitration.

The enforcement of foreign arbitral awards in the BVI is an important subject given the country's status as a key offshore financial centre and a key player in the global economy. The Act provides for the enforcement of the majority of such awards, including those made in pursuance of arbitration agreements in countries that are party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The Bill is set to introduce further refinements. Arbitration agreements involving the UK are enforceable under the Reciprocal Enforcement of Judgments Act 1922.

This article accordingly examines the current legislation, highlights the major changes that are likely to be brought about by the Bill and focuses on the enforcement of foreign awards in the BVI.

The Act

Overview And Jurisdiction

The Act governs both domestic and international arbitrations (as defined) and contains provisions relating to:

- the authority and powers of both the arbitral tribunal and the BVI courts;
- the conduct of the arbitration proceedings;
- making of awards (including provision for the award of interest and costs); and
- the appeal and enforcement processes.

The Act applies to written arbitration agreements, including those contained in an exchange of letters or telegrams, in which the parties have agreed to submit to arbitration present or future differences that are capable of being settled by an arbitral tribunal. Oral arbitration agreements are likely to be recognised at common law, but are outside the scope of the Act. The Act does not define those matters that are arbitrable, and the common law will therefore govern whether a dispute is capable of being resolved by arbitration or not.

Except where third parties agree to be bound, an arbitration agreement (and any award) will generally only affect the parties to it. There are English authorities to the effect that an award may, in certain circumstances, be relied on in a claim against a third party for an indemnity and the BVI courts are likely to follow those authorities.

The BVI courts are likely to follow the approach of the English courts in upholding the arbitration agreement if at all possible, so as to give effect to the intentions of the parties that their differences should be resolved by the arbitral process and not the courts. The liberal interpretation of arbitration clauses, thereby avoiding semantic arguments about whether the dispute 'arose out of' or was 'in connection with' or 'arose under' a contract, was forcefully espoused in England in Fiona Trust Corp v Privalov & Ors, an approach which has been endorsed in the BVI in Victor International Corporation and Victor (BVI) Limited v Spanish

Town Development Company Limited & Ors (BVI HCV 2007/0293). In summary, absent express words to the contrary, parties are to be taken to have intended that all their disputes should be arbitrated.

A question which frequently arises is whether applications to appoint liquidators, or claims by minority shareholders in relation to unfairly prejudicial conduct, fall within the exclusive jurisdiction of the BVI courts or are arbitrable. In Zanotti v Interlog Finance Corp (BVIHCV 2009/0394), the BVI court held that an arbitrator could grant relief in unfair prejudice proceedings. As far as winding up applications, an order appointing liquidators over a BVI company may only be made by the BVI court. In a very recent decision, in Artemis Trustees Limited & Ors v KBC Partners LP & Ors (BVIHC (COM) 2012/0137), the BVI court held that the position is different in relation to limited partnerships. The court held that, because a limited partnership, unlike a limited company, has no identity separate from the identities of its constituent members, and because winding up or dissolution of the partnership would have no effect on the rights and interests of third parties (again, unlike the winding up of a limited company), there was no legal obstacle to the making by an arbitrator of an order dissolving or winding up a limited partnership.

There is no express provision in the Act that the tribunal should rule on questions relating to its jurisdiction, and that the common law will prevail. Accordingly, a challenge to the actual existence of the arbitration agreement is likely to be a matter for the BVI court, while a challenge to its validity should be left to the tribunal: Premium Nafta Products Ltd & Ors v Fili Shipping Co Ltd & Ors [2007] UKHL 40 approved in the BVI courts in Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors (BVIHCV 2007/0293). A party may also resist enforcement of an award in the BVI on the grounds that the tribunal lacked jurisdiction.

Where a party commences court proceedings in respect of a dispute which falls within the arbitration agreement, the right to a stay of those proceedings in favour of arbitration depends on whether the arbitration agreement is domestic or international. A domestic arbitration agreement is a written agreement to submit to arbitration in the BVI, and in no other jurisdiction, the parties to which are (only) individual nationals of or residents in the UK or corporate bodies incorporated in or whose central management and control is exercised in the UK. The BVI court may stay proceedings commenced in breach of a domestic arbitration agreement if it is satisfied that there is no sufficient reason why the matter should not be arbitrated in accordance with the parties' agreement and that the applicant for the stay was, at the time the proceedings were commenced and remains, ready and willing to do all things necessary to the proper conduct of the arbitration (section 6(1) of the Act). In the case of an international arbitration agreement, the BVI court must stay the proceedings unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, or that there is, in fact, no dispute between the parties (section 6(2) of the Act). As regards both domestic and international agreements, the party seeking a stay must apply for it before delivering any pleadings or taking any other step in the proceedings.

Limitation

Limitation periods are governed by the Limitation Act 1961, which expressly extends to arbitrations and which provides for when arbitrations are deemed to be commenced for the purposes of calculating the relevant time limits. Contract and tort claims may not be brought after the expiration of six years from the date on which the cause of action accrued. The same time limit applies to common law actions on an award.

Conflicts Of Laws

The BVI courts apply common law conflict of laws rules. The choice of law for contract provides that a contract is governed by its proper law which, in the absence of an express or implied choice by the parties, is the law with which the contract has its closest and most real connection. To the extent that foreign law is contrary to the public policy of the BVI or to the provisions of any statute which has overriding effect, foreign law cannot be applied in arbitration proceedings in the BVI.

Under the relevant conflict rules, the BVI courts regard limitation provisions which extinguish a right as substantive, but legislation which bars the remedy not the right is regarded as procedural.

Selection Of The Tribunal

The provisions of the Act apply in the absence of express agreement by the parties, whether in the arbitration agreement itself or otherwise, as to the composition of the tribunal. The Act does not impose any limits on the parties' freedom to select arbitrators or umpires.

In the absence of a contrary intention, every arbitration agreement is deemed to include a provision that the reference is to a single arbitration (section 8). Similarly, where the reference is to two arbitrators, in the absence of a contrary intention, the agreement shall be deemed to include a provision that the two arbitrators will appoint an umpire (section 10).

Under section 12 of the Act, the High Court may appoint an arbitrator where:

- the reference is to a single arbitrator and the parties cannot concur in the appointment;
- the appointed arbitrator refuses to act, is incapable of acting or dies, and the arbitration agreement is silent as to what should happen in those circumstances;
- the parties or two arbitrators are at liberty to appoint an umpire or a third arbitrator but do not make the appointment;
- two arbitrators are required to appoint an umpire but do not do so;
- the appointed umpire or third arbitrator refuses to act, is incapable of acting or dies, the arbitration agreement does not provide for this circumstance and the parties or the arbitrators do not fill the vacancy;
- one party has served the other parties or the arbitrators (as the case may be) with a written notice to appoint or concur in appointing, but the appointment is not made within seven days after service of the notice; and
- the agreement provides for each party to appoint one arbitrator but one party has failed to make an appointment for seven clear days after service by the other party of a notice to appoint.

The extent to which the BVI court is able to interfere with the selection process itself is not set out in the Act and common law principles will apply.

The authority of the arbitral tribunal is irrevocable except by leave of the High Court, unless a contrary intention is expressed in the agreement (section 3).

Although there are no express provisions in the Act mandating arbitrator independence, impartiality or neutrality, the Act provides for revocation by the High Court of the arbitrator's authority in the event of impartiality (section 26) and for the removal by the High Court of an arbitrator who has misconducted himself or the proceedings (section 25). Common law principles will apply to the question of bias and the consequential inference of substantial injustice.

Save for the provisions highlighted in the previous paragraph, the Act makes no express provision as to the duties of the tribunal. At common law, those duties are likely to include the following (as a minimum):

- a duty to act fairly and impartially between the parties;
- a duty to comply with the rules of natural justice; and
- a duty to adopt procedures for the conduct of the reference that are appropriate in the circumstances of the case and that provide for a fair means to resolve the dispute between the parties.

Procedure

The parties are free to tailor the arbitration process to suit their needs. In the absence of a contrary intention, the Act is very limited in its deeming provisions. Section 14 of the Act provides that every arbitration agreement shall be deemed to contain the following provisions:

- that the parties to the reference and those claiming through them shall submit to be examined on oath or affirmation by the arbitrator or umpire; and
- that the parties will produce all documents in their possession or power which might be required or called for and will do all other things which the arbitrator or umpire might require.

Arbitrators and umpires may, in the absence of a contrary intention, administer oaths or take affirmations of parties and witnesses.

The Act is silent as to matters such as the holding of hearings, timetabling, the language of the arbitration, legal representation of the parties, and the liability of arbitrators or umpires for negligent acts or omissions or mistakes. It is likely, however, that a BVI court would hold that an arbitral tribunal should be immune from suit on the grounds of public policy.

Interim Remedies

The Act provides that any party to a reference may issue a writ of subpoena ad testificandum or duces tecum, and that the High Court may order such writs to compel the attendance before the tribunal of a witness wherever he may be in the BVI. Section 14 of the Act also provides for the High Court to have the following powers in relation to arbitrations as it does for the purpose of proceedings before it to:

- order security for costs;
- order discovery of documents or the administration of interrogatories;
- order the giving of evidence by affidavit or the examination on oath of any witness before an officer of the High Court or any other person;

- issue a request for the examination of a witness who is outside the BVI;
- make orders for the preservation, interim custody or sale of any goods that are the subject matter of the reference;
- secure the amount in dispute; and
- detain, preserve or inspect any property or thing, including authorising entry on land or into buildings belonging to or in the possession of a party or the taking of samples.

The High Court is also expressly empowered to grant interim injunctions or appoint a receiver. The BVI court may, in particular, grant an anti-suit injunction to restrain foreign proceedings commenced in breach of an arbitration agreement.

The award

Part IV of the Act contains provisions relating to awards, although these are of course subject to any contrary intention of the parties as set out in the arbitration agreement. The tribunal may issue interim awards (section 16), and may make orders for the specific performance of a contract (other than a contract relating to land or any interest in land (section 17)). Awards are final and binding on the parties and those claiming under them (section 18) and the tribunal may correct any clerical mistakes or errors in an award which arise from an accidental slip or omission (section 19).

The High Court may both increase the time for making an award (if any such time has been provided for) or indeed remove an arbitrator or umpire who fails to use all reasonable dispatch in proceeding with the arbitration or making an award. An arbitrator or umpire who is removed in these circumstances is not entitled to be paid.

There is no requirement under the Act for the award to be a reasoned one.

Challenging An Award

As set out above, an award may be set aside by the High Court where the umpire or arbitrator has misconducted himself or the proceedings and may also do so where the award has been improperly procured (section 25). The procedure for an appeal is to the High Court by way of case stated (a process modelled on the old English Arbitration Act 1950), which broadly speaking means that any point of law may be challenged, leaving questions of fact to the sole remit of the tribunal. A decision of the High Court under the case stated procedure is deemed to be a judgment of that court and a further appeal lies to the Court of Appeal of the Eastern Caribbean Supreme Court, with the leave of the Court of Appeal. The case stated procedure is also available in respect of an interim award or with respect to a question of law which arises during the course of the reference.

The High Court has power to remit the matters referred to it for reconsideration by the tribunal. Where an award is remitted, the arbitrator must make his award within three months of the date of the order unless the order provides otherwise.

The Act is silent as to the ability of the parties to exclude the right to appeal by agreement, but we take the view that the parties would be free to do so if they so choose.

Enforcement Of Foreign Awards

It is important to note that while the Act recognises the enforceability of awards under the New York Convention in the same terms as those applicable in relation to domestic arbitration, the BVI is not itself a party to the Convention. Accordingly, a BVI arbitration award

is not enforceable in a Convention state. It is likely that this will not remain the position indefinitely (see 'The Bill', below).

Pursuant to section 36 of the Act, the enforcement of Convention awards is mandatory, save in specific circumstances that mirror those set out in the New York Convention; for example, where the arbitration agreement is invalid, a party was unable to present its case, or where enforcement of the award would be contrary to public policy. Both foreign non-Convention awards and domestic awards can be enforced by application under section 28 of the Act, which provides that an award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order of the High Court to the same effect. Where leave is granted, judgment may be entered in terms of the award. Awards may also of course be enforced by action on the award at common law.

Enforcement of awards issuing from the UK is obtained pursuant to the Reciprocal Enforcement of Judgments Act 1922, which provides that the court may, if in all the circumstances it considers it just and convenient to do so, order the award to be registered and enforced in the BVI. The 1922 Act provides for certain circumstances in which registration should not be ordered, and these largely mirror the grounds for refusing to enforce a Convention Award, such as where the tribunal acted without jurisdiction, the award was obtained by fraud, was contrary to public policy, etc.

The decision of the Privy Council in Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] 1 WLR 1041 is highly likely to be followed in the BVI, so that an arbitration award may be used to raise a defence of issue estoppel in fresh proceedings between the same parties.

Confidentiality

Although the Act is silent on the point, there is an implied duty of confidentiality in all arbitration agreements as a matter of the common law of the BVI.

Remedies

The only express provision relating to the grant of remedies by the tribunal is section 17 (see 'The Award', above); however, save for this provision (and the matters discussed under the 'Overview and Jurisdiction', above) the tribunal may award any remedy or relief that could have been ordered by the High Court in civil proceedings. The tribunal's power to award punitive damages will depend on the width of the arbitration agreement, but as a matter of BVI law, punitive damages are only available in a small number of cases.

Costs

In the absence of express provision to the contrary, every arbitration agreement is deemed to include a provision that the costs of the reference and of the award are in the full discretion of the tribunal. However, any provision in the arbitration agreement to the effect that a party should bear its own costs in any event is void, unless the agreement relates to a pre-existing dispute (section 20). In the event that the tribunal fails to make a costs order, any party may apply for one within 14 days. The 14-day period may be extended by the court.

Both inter-party costs and the costs of the tribunal may be taxed by the High Court.

The Bill

One of the main issues the Bill seeks to address is in relation to the enforceability of BVI arbitration awards. The fact that the BVI is not a party to the New York Convention, and

the consequent non-enforceability of BVI awards outside the BVI, is seen as an impediment to the growth and development of the BVI as an attractive jurisdiction in which to conduct international arbitration, meaning that any growth is likely to be domestic only. The Bill will therefore go hand in hand with the extension of the New York Convention to the BVI, and the new Arbitration Act would be brought into force once the Convention had been extended.

The Bill's other principal effect is to recognise and adopt the UNCITRAL Model Law on International Commercial Arbitration and to give it the force of law in the BVI, subject to any necessary modifications and supplementary provisions.

The object of the Bill is expressly stated to be the facilitation of the fair and speedy resolution of disputes through the medium of arbitration, without any unnecessary delay or expense. The Bill is accordingly founded on three fundamental principles:

- that parties should be free to agree how their dispute should be resolved, subject to the observance of any safeguards that are necessary in the public interest;
- that the court should not interfere in the arbitration of a dispute, save as expressly provided for in the Bill; and
- that where the court does interfere, it should, as far as possible, give due regard to the wishes of the parties and the provisions of the arbitration agreement between them.

With the above principles at the forefront, the Bill makes express provision for the confidentiality of the arbitral process, for the rights, responsibilities and liabilities of the parties, for the power to appoint the tribunal and for the tribunal's power to rule on its own jurisdiction. The tribunal has the power to order interim measures and grant preliminary orders during the course of the arbitration proceedings. Part VII of the Bill declares the importance for the tribunal to be independent and to act fairly and impartially between the parties, and for it to apply appropriate procedures that avoid unnecessary delay or expense.

The aim of increasing the attractiveness of the BVI as an international arbitration centre is furthered by the establishment of a corporate body, known as the BVI International Arbitration Centre, which is expected to be the focal point for the provision of the necessary facilities for the conduct of arbitration proceedings in the BVI.

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Summary

Recent Decisions On Arbitral Jurisdiction: Stay And Appeal Issues

When considering arbitral jurisdiction in Canada, it is necessary to first understand the legislative framework pertaining to arbitration within the country. Canada is a federal state with legislation both at the federal level and within each of the 10 provinces and three territories that governs both international and domestic arbitration.[1] The numerous arbitration statutes share many similarities, including setting out when parties may seek the assistance of, or have recourse to, local courts. Each province and territory has adopted legislation for international commercial arbitration that incorporates the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (the Model Law). The federal government has also incorporated the Model Law, albeit with some slight modifications, for all domestic and international arbitrations under federal jurisdiction.[2] This broad adherence to the Model Law provides a significant degree of predictability for parties to international arbitrations in Canada.

Against this backdrop, two specific issues involving arbitral jurisdiction have received notable judicial consideration in the past year:

- the circumstances in which a party to an arbitration may seek the assistance of a local court to stay either court or arbitral proceedings where there are concurrent proceedings for a dispute in both fora; and
- the ability of a party to an arbitration to appeal a partial or full award.

As arbitration has become a more popular means of settling commercial and other disputes within Canada, these issues have seen increased judicial scrutiny. This chapter will begin by providing a brief overview of stays of proceedings and appeals from arbitral awards in Canada, followed by a discussion of recent Canadian court decisions and developments that address these issues. As it happens, those decisions and developments have come primarily from the western province of Alberta, though the relevant principles should be transportable to other Canada jurisdictions.

Arbitration in Canada

Provincial, territorial and federal legislation on domestic and international commercial arbitration within Canada looks to safeguard arbitral jurisdiction from inappropriate judicial intervention. In accordance with the Model Law, there are only certain limited situations where a local court may intervene in domestic or international arbitral proceedings. In general, these provisions have been interpreted narrowly, reflective of the 'virtues of commercial arbitration' that 'have been recognised and... welcomed by' the Supreme Court of Canada.[3]

While our courts consistently speak of the 'virtues' of arbitration, the appropriate role of the court in staying either arbitration or court proceedings where there are concurrent proceedings, and regarding appeals from arbitral awards, has been subject to debate. With respect to stays of proceedings, the Supreme Court of Canada has recently explored the situation where parties have agreed to arbitrate but legislation directs that the proceeding is not arbitrable. The Seidel v TELUS (Seidel) decision considered this interaction between arbitration agreements and statutory provisions excluding arbitration.[4] We reviewed the Seidel decision in *The Arbitration Review of the Americas 2012* in relation to its endorsement of the 'competence-competence' principle.[5] On the point of arbitrability, Seidel holds that

'whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum' where the party has commenced their court action.[6] In upholding the ability of parties to an agreement to select arbitration for the resolution of disputes, the Supreme Court in Seidel ultimately held that, absent clear statutory language preventing arbitration, the court will enforce arbitration clauses.[7]

This issue of arbitrability, and when a court action should be stayed in favour of arbitration proceedings, was recently examined by the Federal Court of Appeal in Rhodes v Cie Amway Canada[8] (Rhodes) and the Alberta Court of Appeal in Young v National Money Mart Company[9] (Young). In each case, the court's determination involved an assessment of the principles established in Seidel in the context of consumer protection legislation.

On the subject of appeals from arbitral awards, in August 2012 the Alberta Law Reform Institute (the official law reform agency for the province of Alberta)[10] issued a report for discussion entitled 'Arbitration Act: Stay and Appeal Issues', highlighting, inter alia, various issues involving appeals from arbitral awards.[11] Specifically, jurisprudence in Alberta on the test for leave to appeal an arbitral award under the domestic Arbitration Act (Alberta Arbitration Act)[12] has been unclear. Parties seeking leave to appeal an award have been faced with a statutory test under the Alberta Arbitration Act (section 44), along with a judicially created 'public interest' requirement. A question has also arisen as to whether there exists a more general residual discretion to refuse leave to appeal of an arbitral award even where the statutory test is met. The Alberta Law Reform Institute discussed these issues in its report for discussion and intends to publish its final recommendations on the issues sometime in 2013,[13] which may influence legislative change in that province. In the interim, the decision in Capital Power Corp. v Lehigh Hanson Materials Ltd[14] (Capital Power) by the Chief Justice of the Alberta Court of Queen's Bench brings greater clarity to the principles relevant to appeals from arbitral awards.

Stays and arbitrability

Rhodes V Cie Amway Canada

This case involved a proposed class action initiated by Kerry Murphy (Murphy) in the Federal Court of Canada against Amway Canada (Amway) for damages in the sum of $15,000. Murphy had registered with Amway as an independent business owner and alleged that Amway's business practices were contrary to certain provisions in the federal Competition Act,[15] including those prohibiting pyramid selling schemes,[16] and the provision of false and inadequate information to independent business owners. The operative agreement included an arbitration provision requiring that the parties submit certain disputes (such as the instant matter) to arbitration to be governed by the Ontario provincial Arbitration Act (Ontario Arbitration Act).[17] This arbitration agreement also contained a 'class action waiver' which, among other terms, stated that no party 'shall assert any claim as a class, collective or representative action if... the amount of the party's individual claim exceeds $1,000'.[18]

Shortly after the action was commenced, Amway brought a successful application before the Federal Court to stay the proceedings and compel arbitration. An initial jurisdictional issue for the Court, before deciding the substance of the stay, was whether the Federal Court or an arbitrator should decide whether the action ought to be stayed in favour of arbitration. On this point, the Federal Court held that, in light of the language of the arbitration agreement, any controversy regarding the 'class action waiver' ought to be decided by the Court. As to the substantive matter of whether the proceedings should be stayed in favour of arbitration,

the Court rejected jurisdiction over the class action claim for more than $1,000 and directed the claim to be heard by an arbitrator or alternatively for class member claims to be heard on an individual basis.[19] The precedent set in Seidel for staying arbitration in favour of a court action could not be relied upon because, unlike the statute in Seidel, the federal Competition Act did not clearly exclude arbitration of the dispute.[20]

Murphy appealed this decision to the Federal Court of Appeal on the issue of whether the Federal Court Judge's interpretation of the Competition Act concerning the arbitrability of the proposed class action claims was correct.[21] The Federal Court of Appeal upheld the lower court decision based on the clear language of the arbitration agreement, class actions such as Murphy's could not proceed before the courts and must be arbitrated.[22] The Federal Court of Appeal held, based on Seidel, that it was clear that express statutory language was required before the courts would refuse to give effect to the terms of an arbitration agreement. There was no such language in the Competition Act.[23] Murphy further argued the private and confidential nature of arbitration was manifestly incompatible with the Competition Act's public policy objective of promoting an economic environment without anti-competitive practices.[24] This argument was also rejected. The Court reasoned that there was simply no basis to conclude that matters under the Competition Act are by their nature in some way sacrosanct such that they cannot be determined by arbitration for public policy reasons.[25]

This case is also notable on another point. The Ontario Arbitration Act at section 7(6) states there 'is no appeal from the court's decision' in respect of a decision on whether to stay court proceedings in favour of arbitration. Despite the parties expressly incorporating the terms of this statute in their agreement, the Federal Court of Appeal found such agreement could not prevent it from exercising its jurisdiction to hear the appeal from the lower court. This conclusion was based on a right of appeal from the lower court being expressly set out at section 27 of the Federal Courts Act.[26] In short, the jurisdiction of the Federal Court of Appeal was 'not bound by the terms of' the Ontario Arbitration Act.[27]

Young V National Money Mart Company

In Young, the Alberta Court of Appeal considered the interplay between consumer protection and arbitrability. The context was section 7 of Alberta's Arbitration Act, which requires stays of court proceedings 'in respect of a matter in dispute to be submitted to arbitration under the agreement', and section 16 of the Fair Trading Act,[28] which reads:

> Despite any provision of this Act, neither a consumer nor the Director may commence or maintain an action or appeal under sections 13 to 15 if the consumer's cause of action under those sections is based on a matter that the consumer has agreed in writing to submit to arbitration and the arbitration agreement governing the arbitration has been approved by the Minister.

Young was a customer of National Money Mart Company with which he had entered into an agreement for various services, including short-term loans or 'fast cash advances'.[29] Young subsequently brought a representative action against National Money Mart for allegedly charging a criminal rate of interest on the loans. National Money Mart brought an application to stay the court proceedings because Young had agreed to pursue any disputes through arbitration.[30] The chambers judge refused to grant National Money Mart's application on the basis that the provincial legislature had clearly intervened to regulate arbitration clauses in consumer contracts through the Fair Trading Act. The minister had not approved the

arbitration clause in the agreement as required under section 16 of that legislation and therefore the agreement could not be used to prevent or stay any court action.[31]

The Court of Appeal upheld the chambers judge's decision. It acknowledged the power of a legislature to limit arbitration clauses and that it is 'incumbent on the courts to give effect to the legislative choice'.[32] The Court of Appeal quoted Binnie J from Seidel: 'The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause.'[33] The legislative choice engendered in the Alberta Fair Trading Act was to provide the minister with the ability to monitor consumer contracts and approve arbitration clauses that did not frustrate consumer protection.[34] That choice must be respected, even at the expense of the freedom of the parties to agree to determine disputes by arbitration.

Appeals from arbitration

Capital Power Corp V Lehigh Hanson Materials Ltd

In this case, Chief Justice Wittmann of the Court of Queen's Bench of Alberta addressed the law on leave to appeal arbitration awards under the Alberta Arbitration Act. The arbitration in issue began in 2011 when Lehigh Hanson Materials Ltd (Lehigh) commenced arbitration proceedings against Capital Power Corp (***Capital Power***), raising several matters with respect to the parties' supply and purchase obligations and the enforceability of restrictive covenants under an agreement.[35] Following a tribunal award, Capital Power initiated proceedings before the Court to either appeal the award or have the award set aside on a number of grounds.[36] The comments of Wittmann CJ in respect of the law on leave to appeal an arbitral award in Alberta are significant.

Wittmann CJ began his review by assessing section 44 of the Alberta Arbitration Act, which governs appeals and required leave in the absence of an appeal provision in the arbitration agreement. It states:

> 44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.
> (2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
> (b) determination of the question of law at issue will significantly affect the rights of the parties (3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.
> (4) The court may require the arbitral tribunal to explain any matter.
> (5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.
> (6) Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

Because the arbitration agreement between Lehigh and Capital Power did not provide for appeals, the Court first had to decide whether to grant leave to Capital Power to appeal the award under subsections 44(2) and 44(3).[37] Wittmann CJ then summarised the three issues raised.

First, '(b)y combined effect of s. 44(2) and s. 44(3) of the Act, leave may be granted in respect of a question of law, but only if that question of law was not expressly referred to the arbitrator for determination. In the context of the Arbitration Act, how should courts distinguish between unappealable mixed questions of law and fact, unappealable questions of law expressly referred to the arbitrator, and appealable questions of law?'[38]

Second, what is the meaning of a matter (under section 44(2)) that is 'important to the parties' and that 'significantly affects their rights.'?[39]

Finally, does the Court have any residual discretion to deny leave to appeal beyond those included in section 44?[40]

On the first issue, the Court held the correct approach is to look at each of the alleged errors by the tribunal for which a party is seeking leave to appeal and then determine whether there is an extricable question of law that could be subject to appeal.[41]

The second issue raises the question of whether an element of public interest is required as a prerequisite to obtain leave. While the language of section 44(2) appears fairly straightforward, this provision has been the subject of recent controversy because a significant line of Alberta case law has developed based on the interpretation that section 44(2) includes a requirement that an appeal must also be in the public interest.[42] This public interest requirement arises from a 1997 decision where the trial court reached the conclusion that some public interest or public issue had to be triggered in order to override the parties' agreement to restrict appeals from an arbitration agreement to questions of law.[43] Despite the lack of any reference to 'public interest' in the legislation, this view was adopted in some subsequent jurisprudence. Accordingly, in opposing Capital Power's application for leave to appeal the arbitral award, Lehigh contended the Court should consider 'whether the public interest in the matters at issue warrants an appeal'.[44]

This specific issue leads to the third, more general, issue of whether there is a 'residual discretion' to deny leave based on the language of section 44(2) of the Alberta Arbitration Act.[45]

In Capital Power, Wittmann CJ undertook a thorough review of the relevant case authorities. Based on these authorities, he concluded that he was:

> ...not satisfied that there is a sound basis in the statute for the weighing of the public interest as a critical factor in the analysis under s.44(2). What the Act requires, in both its general scheme and under s.44(2) specifically, is a very high standard when considering whether the importance to the parties of the matters at stake in the arbitration justifies an appeal. Mere pecuniary interest may not suffice, though I do not think it necessary to conclude that a pecuniary interest, no matter how significant, could not suffice on its own.[46]

Accordingly, the importance of the issues raised to the parties alone, even absent any broad public significance, was found sufficient to justify leave to appeal, provided other requirements are met. This decision was rendered on 18 July 2013, and because it involves

a significant point of law an appeal to the Alberta Court of Appeal remains possible. Pending such appeal, Capital Power appears to represent a definitive ruling that there is no public interest requirement imposed by section 44(2) of the Alberta Arbitration Act.

Wittmann CJ also considered the more general issue of whether courts retain a jurisdiction to refuse leave even where the statutory test is met. Specifically at issue were statements made in a recent trial-level decision holding that such a residual discretion 'is consistent with the goal of restricting appeals and ensuring that, before a party can appeal, the value to the parties of quick resolution, finality, and efficacy are balanced against the potential merits of the appeal'.[47] Wittmann CJ held that this interpretation ran afoul of the Alberta Arbitration Act for two reasons. First, the statute states that a Court 'shall' only grant leave to an appeal if the two conditions in section 44(2) are met and reading in an additional ground was contrary to the use of this imperative direction. Second, the Court was not convinced there was a reliable basis or authority from other Canadian jurisdictions that supported the Court having any residual discretionary authority to deny leave to appeal in this fashion.[48]

The decision in Capital Power should not be taken as indicative that obtaining leave to appeal from an arbitral decision should be readily granted. Indeed, the Court took pains to stress that, even without a public interest requirement for leave or any residual discretion with the Court to deny leave, Alberta jurisprudence sets a high standard to support leave to appeal arbitral awards in Alberta.[49]

Conclusion

Canadian courts continue to demonstrate a strong commitment to upholding arbitration agreements between the parties. Only narrow exceptions are to be permitted. Recent judicial developments strongly reinforce this commitment to the arbitration process while defining its boundaries. There will undoubtedly be further judicial refinement of the Canadian positions on arbitrability and on requirements to appeal arbitral awards on novel points or otherwise in the coming years.

All of the decisions reviewed above speak to the courts' deference to arbitration. This deference was evident in Capital Power where Wittmann CJ commented on the courts' respect for arbitral decisions and dissuaded any notion that leave to appeal an arbitral award should be routine. Indeed, the opposite is true in light of the courts' emphatic statement of the high standard for leave to appeal. This approach to appeals of arbitral rulings is consistent with other Canadian jurisdictions.

The findings in Rhodes and Young also speak to the freedom of parties to agree to arbitrate disputes and the courts' willingness to uphold such arbitration agreements, absent clear legislative provision to the contrary. As noted in both Young and Rhodes, there are several legislative schemes across Canada that may impact arbitrability and stays of Court actions in favour of arbitration. Some of these legislative schemes are not very well known, such as section 16 of Alberta's Fair Trading Act. The variety of statutes that could impact arbitrability underscores the importance of retaining local counsel to review arbitration agreements before they are finalised so as to avoid any surprises with respect to arbitrability, and once proceedings are initiated to ensure there are no hidden issues arising in the chosen forum. The decision in Rhodes also highlights a jurisdictional consideration where a combination of federal and provincial jurisdictions may be relevant to the terms of an arbitration agreement or the subject matter of a dispute. That is, a court of one jurisdiction may not be bound by a limiting provision in provincial or territorial arbitration legislation that is otherwise applicable.

Notes

1. For example, the province of Alberta has enacted the Arbitration Act, RSA 2000, cA-43, for domestic arbitration matters and the International Commercial Arbitration Act, RSA 2000, cI-5, for international commercial arbitration matters. Similarly, the province of Ontario has legislation in the Arbitration Act, 1991, SO 1991, c17, for domestic arbitrations and the International Commercial Arbitration Act, RSO 1990, cI.9, for international commercial arbitrations. The situation is the same in the territories with, for example, the Yukon enacting the Arbitration Act, RSY 2002, c8, along with the International Commercial Arbitration Act, RSY 2002, c123. Federally, international commercial arbitration is governed by the Commercial Arbitration Act, RSC 1985, c17, and there is no separate federal legislation to govern domestic arbitration matters because this statute applies to all matters were a federal entity is a party.
2. J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 2nd ed (Huntington, NY: Juris Publishing Inc, 2011) at 21-24.
3. ***Seidel v TELUS Communications Inc,*** 2011 SCC 15, at para 23 (***Seidel***).
4. Ibid.
5. Michael D Schafler, Tamela J Coates and Chloe Snider, 'Commercial Arbitration and the Canadian Justice System: Recent Decision of the Supreme Court of Canada,' (2011) *The Arbitration Review of the Americas 2012: A Global Arbitration Review Special Report 38.*
6. ***Seidel,*** supra note 3 at para 42.
7. Ibid.
8. ***Rhodes v Cie Amway Canada,*** 2013 FCA 38 (Rhodes).
9. ***Young v National Money Mart Company,*** 2013 ABCA 264 (Young).
10. See Alberta Law Reform Institute, online: Alberta Law Reform Institute www.law.ualberta.ca/alri/.
11. Alberta Law Reform Institute, Arbitration Act: Stay and Appeal Issues, Report for Discussion 24 (Edmonton: Alberta Law Reform Institute, 2012), online: Arbitration Act: Stay and Appeal Issues www.law.ualberta.ca/alri/docs/RFD24.pdf (ALRI Report).
12. RSA 2000, cA-43.
13. As of the date of writing, these final reccomendations are still forthcoming.
14. ***Capital Power Corp v Lehigh Hanson Materials Ltd,*** 2013 ABQB 413 (***Capital Power***).
15. RSC 1985, c34.
16. ***Rhodes,*** supra note 8 at para 5.
17. Ibid at paras 3-4, referencing the Ontario Arbitration Act, 1991, SO 1991, c17.
18. Ibid at paras 19 and 23.
19. Ibid at paras 12-14 and 38.
20. Ibid at paras 16-17.
21. Ibid at para 33.
22. Ibid at paras 38-39.

23. Ibid at para 60.
24. Ibid at para 42.
25. Ibid at paras 64-65.
26. RSC 1985, cF-7.
27. ***Rhodes,*** supra note 8 at paras 32 and 34.
28. RSA 2000, cF-2.
29. ***Young,*** supra note 9 at para 1.
30. Ibid at para 4.
31. Ibid at para 9.
32. Ibid at para 19.
33. Ibid at para 16 ***citing Seidel,*** supra note 3 at para 2.
34. Ibid at para 20.
35. ***Capital Power,*** supra note 14 at para 7.
36. Ibid at para 21.
37. Ibid at paras 6 and 23-24.
38. Ibid at paras 24-27.
39. Ibid at paras 28-37.
40. Ibid at paras 45-51.
41. Ibid at para 27.
42. ALRI Report, supra note 11 at para 62.
43. *See Warren v Alberta Lawyers Public Protection Association* (1997),44 56 Alta LR (3d) 52 (ABQB), at para 17.
44. ***Capital Power,*** supra note 14 at para 28.
45. *See Central Alberta Rural Electrification Assn (Contract Policy Committee) v Fortis Alberta Inc,* 2012 ABQB 653, at paras 97-125 (***CAREA***), which came to the conclusion there is such residual discretion following a review of authority from other jurisdictions.
46. Capital Power, supra note 14 at para 35.
47. Ibid at para 45 citing ***CAREA,*** supra note 45 at 112.
48. Capital Power, supra note 14 at paras 46-48.
49. Ibid at para 50.

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Cayman Islands

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With effect from 2 July 2012, the existing legislation governing arbitration in the Cayman Islands was repealed and replaced with the Arbitration Law 2012 (the Law). The Law brings in a modern statutory regime based largely on the UNCITRAL Model Law and the English Arbitration Act (1996 Act).

Before 2 July 2012, arbitration proceedings in the Cayman Islands were governed by the Arbitration Law (2001 Revision). That legislation continues to govern any arbitrations that were in progress on 2 July 2012.

The enforcement in the Cayman Islands of agreements to arbitrate in countries which are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and arbitral awards made in such countries, remain largely governed by the Foreign Arbitral Awards Enforcement Law (the Foreign Awards Law). That legislation incorporates the provisions of the New York Convention relating to such matters into Cayman Islands law.

Key features of the Law

In the Cayman Islands, arbitration has mainly been used as a mechanism for resolving disputes between parties located in the islands. Modernising the Islands' arbitration law and bringing it into line with international standards is seen as a way of making the jurisdiction more attractive for onshore clients who wish to have disputes resolved by confidential arbitration in a neutral offshore venue, where there are experienced legal advisers and other processional service providers readily available to assist with the proceedings.

The Law is founded upon three main principles:

- the fair resolution of disputes by an impartial tribunal without undue delay or expense;
- party freedom to agree how their disputes are resolved, subject only to safeguards deemed necessary in the public interest; and
- limits on the scope for court intervention in arbitration proceedings.

The Law applies to all arbitrations where the seat of the arbitration is the Cayman Islands (regardless of where the parties are based) and governs the conduct of the arbitration, challenges in the Cayman Islands courts and the enforcement of Cayman Islands arbitral awards within the jurisdiction.

An arbitral tribunal appointed under the Law has wide powers and is essentially able to award any interim or final remedy that a court could have granted if the dispute in question had been the subject of court proceedings. The Law gives the parties the freedom to tailor the arbitral proceedings according to their needs, but also provides default provisions which apply in the absence of agreement. There are certain mandatory provisions of the Law designed to protect the integrity of the arbitration process; for example, by ensuring that the

tribunal maintains its impartiality throughout the arbitration and does not have any conflicts of interest. The Law expressly recognises that arbitration proceedings are to be confidential and the limited grounds set out in the Law, upon which an arbitral award may be challenged in the Cayman Islands courts reflect the grounds in the New York Convention.

An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement (section 4(1)). An arbitration agreement must be in writing and contained in a document signed by the parties or an exchange of letters, facsimile, telegrams, electronic communications or other communications that provide a record of the agreement (section 4(3)). An arbitration agreement will also be deemed to exist where a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances calling for a reply and the assertion is not denied (section 4(4)).

Jurisdiction

The Law does not impose any restrictions on the types of dispute that may be referred to arbitration. Section 26(1) provides that any dispute that the parties have agreed to submit to arbitration may be determined by arbitration unless the arbitration agreement is contrary to public policy or the dispute is not capable of determination by arbitration under any other law of the Cayman Islands.

One example relevant to the Cayman Islands financial services industry, particularly in relation to investment funds, is the winding up of companies and partnerships. In Cybernaut Growth Fund, LP (Grand Court, Jones J, 23 July 2013) a petition to wind up and liquidate an investment fund (on just and equitable grounds) had been filed. The fund attempted to strike out or stay the petition on the basis that arbitration proceedings had been commenced in New York pursuant to an arbitration clause in the fund's partnership agreement. The Grand Court concluded that a petition to wind up a company and appoint a qualified insolvency practitioner as liquidator was a dispute that was non-arbitrable. The actual winding up order, being an order by which third parties would be bound, was beyond the scope of an arbitrator's contractual powers. Furthermore, the identity of the appointed liquidators was a matter of public interest, particularly if the business in question was regulated (as is often the case for investment funds registered in the Cayman Islands). Winding up orders, supervision orders and orders for the appointment or removal of liquidators all fall within the exclusive jurisdiction of the Court. The Grand Court took the opportunity to consider the English Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards [2012] Ch 333 in which Patten LJ suggested that an arbitrator could exercise considerable jurisdiction in relation to winding up disputes. The Grand Court expressed the view that this principle should be confined to cases in which the winding up petition includes a discreet claim between the parties to the arbitration agreement, and where the petition includes matters which could be disposed of as preliminary issues.

Where the respondent wishes to raise objections regarding the tribunal's jurisdiction, he must first do so with the tribunal. Under section 27(1), the arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement. A party may also resist enforcement in the Cayman Islands of an award made here on the ground that the tribunal lacked jurisdiction (section 72(3)).

Under section 9, where a party to an arbitration agreement institutes court proceedings in respect of any matter falling within the arbitration agreement, the other party to the arbitration agreement may apply to the court for an order staying the proceedings. The court must then grant a stay unless it finds that the arbitration agreement is null and

void, inoperative or incapable of being performed. A party which takes a step in the court proceedings to answer the substantive claim loses its right to apply for a stay of the proceedings (section 9(1)).

The court is also required to grant a stay in favour of foreign arbitral proceedings pursuant to section 4 of the Foreign Awards Law. This provision has been applied by the Cayman Islands courts (for example, INEC Engineering Company v Ramoil Holding Company 1997 CILR 230 and Cybernaut Growth Fund, LP).

The law of the Cayman Islands does not allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not parties to an arbitration agreement. In Unilever plc v ABC International 2008 CILR 87, the court granted injunctive relief restraining the defendant from initiating arbitration proceedings against various companies that had owned the entity, which was a party to an arbitration agreement with the defendant over a period of time. The court stated that the group enterprise theory is not a doctrine recognised by Cayman Islands law.

Limitation

Section 14(1) provides that the Limitation Law (1996 Revision) applies to arbitration proceedings as it applies to court proceedings. Under the Limitation Law, contract claims must be commenced within six years of the breach of contract and tortious claims must be commenced within six years of the date on which damage is suffered. Claims for the recovery of land must be commenced within 12 years of the cause of action accruing.

Conflicts of laws

The Cayman Islands courts apply common law conflict of law rules. The choice of law rule for a contract provides that a contract is governed by its proper law which, in the absence of an express or implied choice by the parties, is the law with which the contract has its closest and most real connection.

The application of foreign law in arbitral proceedings in the Cayman Islands is not possible to the extent that such law is contrary to public policy or to the provisions of any statute that have overriding effect.

Selection of arbitrators

The Law does not impose any limits on the parties' freedom to select arbitrators. The parties are free to agree on the number of arbitrators, the procedure for their appointment and the qualifications that the arbitrators must possess (sections 15(1) and 16(1)).

Section 16(2) sets out the procedure to be followed for appointing the tribunal where the parties have not agreed on a procedure or chosen a set of institutional rules which provides a procedure for the appointment of the tribunal. In an arbitration with a sole arbitrator, the arbitrator is appointed by a party to the agreement making a request to the person or appointing authority chosen by the parties; or, if no such choice has been made, to the person or authority designated by the court (the appointing authority). In an arbitration with two or more arbitrators, an odd number must be appointed either by the parties each appointing an arbitrator and then jointly agreeing to the appointment of a subsequent arbitrator, or jointly agreeing to the appointment of an odd number of arbitrators.

Where a party fails to appoint an arbitrator – or if the parties fail to agree on the appointment of an additional arbitrator within 30 days of a request to do so – the appointment is to be made by the appointing authority (section 16(3)). An application may also be made to the appointing authority for assistance with the appointment of the tribunal where one party fails to act in accordance with any agreed procedures, or the parties cannot reach agreement.

The matters to be taken into account by the appointing authority in the selection of an arbitrator include the subject-matter of the arbitration, the availability of any proposed arbitrator and any qualifications required by the arbitration agreement or otherwise by the parties. The appointing authority must also have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator (section 16(5)).

The court has only a limited role to play in the appointment process. Its function consists of designating an appointing authority where none has been chosen by the parties rather than making appointments directly.

Sections 18(1) and 18(2) provide that, both before and during his appointment, an arbitrator is under an obligation to disclose any circumstances that might reasonably compromise his impartiality or independence.

> (a) Pursuant to section 18(3) a challenge may be brought against an arbitrator where:
>
> (i) circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or
> (ii) he does not possess the qualifications to which the parties have agreed.

A party may not bring a challenge against an arbitrator which he appointed, or participated in the appointment of, unless the grounds for the challenge became known to the party after the appointment was made (section 18(4)). These provisions mirror article 12 of the UNCITRAL Model Law.

Procedure

Parties may tailor the rules of procedure to meet their needs, subject to the mandatory provisions of the Law. The duties of the tribunal in conducting arbitral proceedings are set out in section 28 and cannot be altered by agreement. The tribunal must act fairly and impartially, allow each party a reasonable opportunity to present his case and conduct the arbitration without unnecessary delay or expense.

The matters that the parties may agree upon, or failing agreement, which are to be determined by the tribunal in accordance with the Law, include the seat of the arbitration (section 30(1)), the language of the arbitration (section 31(1)) and the timetable for the submission of statements of claim and defence (section 32(1)).

The tribunal must determine whether to hold an oral hearing for the presentation of evidence (section 33(1)(a)). Unless the parties have agreed that no such hearing will be held, the tribunal must hold a hearing if requested by a party (section 33(2)). The parties must be given sufficient notice in advance of any hearing or any meeting of the tribunal for the purposes of inspecting documents, goods or any other property (section 33(3)).

Section 34 provides that, unless otherwise agreed, a party to an arbitration agreement may be represented in arbitral proceedings by a legal practitioner admitted to practice in the Cayman Islands or by any other person chosen by him. This would include a lawyer admitted to practice outside the Cayman Islands. Any lawyer coming to the Cayman Islands to participate in arbitration proceedings would need to obtain a temporary work permit from the Cayman Islands government.

Section 25(1) provides that an arbitrator is not liable for any consequences or costs resulting from any negligent acts or omissions in his capacity as arbitrator, or any mistakes of law, fact or procedure in the course of the arbitration proceedings.

Interim remedies

Section 43 gives the court certain powers that are exercisable in support of arbitral proceedings, including:

- in relation to security for costs;
- disclosure;
- compelling a witness to attend the court and give evidence or produce documents; and
- the power to secure the amount in dispute and to prevent the dissipation of assets against which an award may be enforced and the power to grant interim injunctions.

In urgent cases, the court may grant orders preserving evidence or assets on the application of a party, or proposed party, to arbitral proceedings. In non-urgent cases, the court may also grant other forms of relief, but only where the application has been made with the permission of the tribunal or the written agreement of the other parties to the arbitral proceedings. In either case, the court may only act if and to the extent that the tribunal has no power or is unable, for the time being, to act effectively.

All directions given by the arbitral tribunal may, with the permission of the court, be enforceable in the same manner as if they were orders made by the court. Judgment may also be entered in the terms of the directions given by the tribunal (section 38(5)) where permission is given.

Part VIII of the Law contains detailed provisions relating to the granting of interim relief by an arbitral tribunal based on articles 17 and 17A-17I of the UNCITRAL Model Law as amended in 2006. The tribunal need not seek assistance from the court before granting interim relief.

Under section 44, in the absence of an agreement to the contrary, the tribunal may grant interim relief prior to the issue of its award requiring a party to:

- maintain or restore the original position of the other party pending determination of the dispute;
- take action that would prevent or refrain from action that would cause harm or prejudice to the arbitral process;
- provide a means of preserving assets out of which the tribunal's award may be satisfied; or
- preserve evidence that may be relevant and material to the dispute.

Section 54 provides that the court is to have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether the seat of the arbitration is the Cayman Islands, as it has in relation to court proceedings. The court is therefore able to grant injunctive and other relief similar to that which the tribunal may grant.

In light of the principle of non-intervention by the court in arbitration proceedings set out in section 3(c), the court may only be willing to grant interim relief where the tribunal is unable to act itself. Instances such as this may include where the tribunal has not yet been appointed

or where relief is sought against a person who is not a party to the arbitration agreement. It is expected that the courts will follow the approach adopted by the English courts under the 1996 Act of recognising the arbitral tribunal as having primary responsibility for granting interim relief and only acting where the tribunal is unable to do so.

The Cayman Islands courts have, in the past, been willing to grant anti-suit injunctions to restrain foreign court proceedings where the Cayman Islands is the natural forum for the action and the commencement or continuation of the foreign proceedings is regarded as vexatious or oppressive (see, for example, In re Cotorro Trust 1997 CILR 1).

The Cayman Islands courts are not bound by the principle established by the European Court of Justice in Allianz SpA v West Tankers Inc, Case C-185/07, whereby courts in the member states of the EU may not issue anti-suit injunctions to restrain proceedings in other EU member states commenced in breach of an arbitration agreement. Accordingly, it would be open to the Cayman Islands courts to restrain foreign proceedings brought in breach of an arbitration agreement whether the proceedings have been commenced in the courts of a member state of the EU or another country.

Evidence

Unless the parties agree otherwise, the tribunal may conduct the arbitration in such manner as it considers appropriate. This includes the power to determine the admissibility, relevance, materiality and weight of any evidence (sections 29(2) and (3)). The parties may agree on whether they wish the tribunal to apply rules of evidence in the arbitration, or in the absence of such an agreement, the tribunal must determine whether to apply rules of evidence, such as under the International Bar Association Rules on the Taking of Evidence in International Arbitration. To the extent that the parties or the tribunal wish to have regard to the rules of evidence that apply in court proceedings in the Cayman Islands, the Grand Court Rules are not dissimilar to the former Rules of the Supreme Court in force in England prior to the commencement of the Civil Procedure Rules in 1999.

The parties are free to agree on the extent to which the tribunal is to have the power to order any party to provide disclosure of documents. In the absence of an agreement, the tribunal will have such power to make disclosure orders as it considers appropriate (section 38(2)(b)).

Content of award

The requirements as to the form and content of all arbitral awards are set out in section 63. The arbitral award must be made in writing and signed by the tribunal. The award must state the reasons upon which it is based, unless the parties have agreed that reasons are not to be stated, or the award is made for the purpose of recording a settlement that they have reached.

Where the tribunal consists of two or more arbitrators, the majority may sign the award if the reason for any arbitrator's signature being omitted is stated in the award. A single signature by each arbitrator on the final page is sufficient. Signed originals of the award must be provided to each party. The date of the award and seat of the arbitration must also be stated in the award.

Unless otherwise agreed, the tribunal may make more than one award at different times during the arbitral proceedings on different aspects of the matters to be determined. Such awards could include an award determining particular facts, an award relating to the existence or non-existence of particular conditions or an award relating to compliance or

non-compliance with a particular rule, standard or quality. Where the tribunal makes such an award, it must specify the issue, claim or part of a claim which is the subject matter of the award (section 56).

The Law does not impose a time limit on the tribunal for the making of its award but allows the parties to agree to do so (section 59).

Challenging an award

There are two grounds upon which a party may challenge an arbitral award made in the Cayman Islands.

First, a party may apply to the Grand Court of the Cayman Islands under section 75 to set aside an award on the grounds that:

- a party to the arbitration agreement was under an incapacity or placed under duress to enter into an arbitration agreement;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under Cayman Islands law;
- the party making the application was not given proper notice of the appointment of the tribunal or the arbitration proceedings or was unable to present his case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the composition of the tribunal was not in accordance with the parties' agreement or the Law;
- the making of the award was affected by fraud; or
- a breach of the rules of natural justice occurred in connection with the making of the award.

The court may also set aside an award if it finds that the subject-matter of the dispute is not capable of settlement by arbitration, or that the award is contrary to public policy.

Second, unless otherwise agreed, a party may, with the permission of the Grand Court, appeal on a question of law arising out of the arbitral award under section 76. Before it grants permission, the court must be satisfied that:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one that the tribunal was asked to determine;
- on the basis of the tribunal's findings of fact, its decision on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and
- it is just and proper for the court to determine the question notwithstanding the parties' agreement to arbitrate (section 76(4)).

On appeal, the court may confirm the award, vary the award, remit the award to the tribunal in whole or in part for reconsideration or, where the latter would be inappropriate, set aside the award in whole or in part (sections 76(7) and (9)).

The right to bring an appeal on a question of law under section 76 may be excluded by agreement between the parties but the right to bring an application to set aside an award under section 75 cannot.

The Law does not specify whether an application to set aside an award is to be determined by way of review or a rehearing, but the UK Supreme Court has determined that, in relation to the equivalent provision in the 1996 Act, the court is to conduct a rehearing on the question of the tribunal's jurisdiction (see Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763). This decision is likely to be influential in the Cayman Islands.

Before an application to set aside an award under section 75, or an appeal under section 76, may be brought, the party wishing to challenge the award must first have exhausted every available arbitral process of appeal or review (section 77(2)). The deadline for bringing an application to set aside an award or an appeal is one month from the date of the award, or from the date on which the applicant or appellant was notified of the results of any arbitral process of review or appeal (section 77(3)).

Foreign arbitral awards

The government of the United Kingdom extended the operation of the New York Convention to the Cayman Islands by way of a notification to the secretary general of the United Nations, which took effect on 24 February 1981.

The enforcement in the Cayman Islands of awards made in states which are parties to the New York Convention has been a straightforward exercise since the enactment of the Foreign Awards Law in 1975 and the Cayman Islands courts have readily enforced such awards under this legislation (see, for example, Tek Technologies Corporation v Dockery 2000 CILR 196). The grounds for refusing enforcement set out in section 7 of the Foreign Awards Law match those in the New York Convention.

Enforcement

Under the Law and the Foreign Awards Law, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and where permission is given, judgment may be entered by the court in the same terms as the award (sections 72(1) and (2) of the Law and section 5 of the Foreign Awards Law).

The decision of the Privy Council in Associated Electric and Gas Insurance Services Ltd v European Reinsurance Company of Zurich [2003] 1 All ER (Comm) 253, in which the court held that the principle of issue estoppel applies to arbitration awards in the same way as to court judgments, is highly likely to be followed in the Cayman Islands.

Accordingly, a party is precluded from contradicting the decision of an arbitral tribunal on any issue of fact or law that has been determined in a final and binding award in any subsequent arbitration or court proceedings between the same parties and any other parties claiming through them.

Confidentiality

Section 81 provides that the tribunal shall conduct arbitral proceedings in private and confidentially. Subject to limited exceptions, any disclosure by the tribunal or another party of confidential information relating to the arbitration is actionable as a breach of an obligation of confidence and the tribunal and all parties must take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the arbitration proceedings.

The exceptions to the obligation of confidentiality in section 81 include where disclosure is:

- expressly or impliedly authorised;
- required in order to comply with any enactment or rule of law;
- reasonably considered as necessary to protect a party's lawful interests;
- in the public interest; or
- necessary in the interests of justice.

Remedies

The parties are free to agree on the remedies that the tribunal may grant (section 57(1)). Unless otherwise agreed, the tribunal may award any remedy or relief that could have been ordered by the Cayman Islands courts if the dispute had been the subject of civil proceedings before such courts (section 57(2)).

Punitive damages are not awarded by the Cayman Islands courts and so, in the absence of an agreement to confer such power on it, an arbitral tribunal would not be able to award punitive damages.

Under section 58, the tribunal may award interest calculated in the manner agreed by the parties or, where there is no agreement, in the manner determined by the tribunal. Interest may be awarded on the whole or any part of an amount which the tribunal orders to be paid, in respect of any period up to the date of the award. Interest may also be awarded on amounts which the tribunal orders to be paid, including pre-award interest and any award of arbitration expenses, from the date of the award up to the date of payment. Unless the tribunal directs otherwise, its award carries interest from the date of the award at the same rate as a judgment debt.

Costs and tax

Unless a contrary intention is expressed, every arbitration agreement is deemed to include a provision that the costs of the arbitration shall be at the discretion of the tribunal (section 64(1)). If the tribunal does not make provision in its award with respect to the costs of the arbitration, any party may apply for a direction from the tribunal regarding such costs within 14 days of the delivery of the award, or such further time as the tribunal allows (section 64(2)). Costs will usually follow the event and the unsuccessful party will be ordered to pay the successful party's costs.

There are no income, capital gains, consumption or corporation taxes in the Cayman Islands, although stamp duty often applies to real estate transactions. Accordingly, it is unlikely that an arbitral award made in the Cayman Islands will have any local tax implications, unless it relates to the transfer of real estate or importation of goods into the Cayman Islands (in respect of which import duty is usually payable).

Investor state arbitrations

The United Kingdom extended the operation of the Washington Convention to the Cayman Islands with effect from 20 February 1967, pursuant to the Arbitration (International Investment Disputes) Act 1966 (Application to Colonies Etc.) Order 1967.

Summary

Financial services institutions and processional advisors are now increasingly incorporating Cayman Islands arbitration clauses into their agreements. It is hoped that the enactment of the Law will lead to more (carefully drafted) Cayman Islands arbitration clauses being

inserted within commercial agreements, which will lead to more international arbitrations taking place in the Cayman Islands.

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Colombia

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Summary

A new era

The enactment of the still relatively untested Law 1563 in July of last year – along with its entry into force in October – is the single most important event in the history of international arbitration in Colombia. It brought about the dawning of a new era; one in which international arbitrations can safely be seated in Colombia, foreign arbitral awards are more likely to be routinely recognised in the country, and international commerce and investment will no longer find a barrier in the uncertainty generated by a feeble system of resolution of disputes that was marked by the absence of solid legislation on the matter, and the deviation of national courts from essential arbitration principles that came with it. Law 1563 is the last piece of what was a faulty working puzzle that included a short and seemingly improvised international arbitration law (Law 315 of 1996), as well as the country's adherence to the following international conventions:

- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (the Montevideo Convention), approved by Law 16 of 1981;
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), approved by Law 39 of 1990 (it had been initially approved by Law 37 of 1979, which was struck down by the Supreme Court on 6 October 1988);
- Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention), approved by Law 44 of 1986; and
- Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention), approved by Law 267 of 1996.

Notwithstanding this seemingly favourable international arbitration regime, Colombian courts had struggled with establishing jurisdiction in actions to set aside awards, dealing with the waiver of the annulment recourse, applying the principle of Kompetenz-Kompetenz, interpreting the causes for denying recognition of foreign awards and other essential topics. Law 1563, tailored after UNCITRAL'S Model Law, drew from the country's past experience and created an international arbitration regime that should dramatically increase the number of international arbitrations in which Colombian companies engage, as well as the amount of international arbitrations that will be seated in the country. One factor of uncertainty remains regarding court intervention, which we will discuss at the end of this article; but first, we will describe the characteristics of Law 1563 and the innovations it brings.

Dualist, yet modern

Law 1563 maintained a clear-cut distinction between the rules concerning domestic arbitration and those that refer to international arbitration, which are contained in a separate section of the law (section one for domestic arbitration and section three for international arbitration). For the latter, as we said, the law in general terms reproduces the UNCITRAL Model Law, with a few amendments that were meant to adapt the arbitration regime to the particular needs of the country.

Maintaining a dualist system paradoxically will probably help arbitration in Colombia. The broad liberty afforded by the law to arbitrators is usually resisted by a significant portion of the legal community, including some courts. This wide discretion, however, is better received and deemed more acceptable in the setting of international arbitration, given the disparities that could exist between the legal systems of the parties, a situation that gives rise to the need for a high degree of liberty of the parties and arbitrators. This means, in our view, that

important rules of arbitration will be upheld more easily by the courts if they are limited to international arbitration, and are not necessarily applicable to domestic arbitrations. The latter are more judicial in style but, surprisingly, function quite uneventfully.

Scope of the law

The scope of Law 1563 is established in article 62 which provides that, with the exception of seven of its articles, it will exclusively govern international arbitrations whose seat is located in Colombia. Under Law 1563, an arbitration is international in the following events:[1]

- when the parties, at the time of the execution of the arbitration agreement, are domiciled in different states;
- when the place of performance of a substantial part of the obligations or the place with which the dispute has a closer link is situated outside the state in which the parties have their domicile; and
- when the dispute submitted to arbitration affects the interests of international trade.

Law 1563, partially following the UNCITRAL Model Law and also French law,[2] establishes four events in which an arbitration is international. Three of them (all but the first) provide for an arbitration to be international even if it takes place between parties domiciled in Colombia, provided that the international element established in the law is present (ie, the place of performance of a substantial part of the obligations or the place with which the dispute has a closer link is located abroad, or the interests of international trade are involved). This means that foreign companies, at least for situations that would be covered by one of these events, can act in Colombia via subsidiaries, as opposed to branches, without the formal incorporation of a company in Colombia necessarily rendering their disputes domestic for the purposes of arbitration.

After establishing the criteria for determining the internationality of arbitration, Law 1563 sets out the specific regulations that are applicable to such arbitrations, to which we will now refer.

Distinctive features of the international arbitration regime

Law 1563 establishes several rules for international arbitration that differ substantially from those that govern domestic arbitration:

(a) Law 1563 expressly provides that instruments of international law that are signed and ratified by Colombia prevail over the rules contained in the Colombian Code of Civil Procedure. In what can be considered a step further in creating an international setting for the solving of cross-border disputes, the law also states that its interpretation must take into account its international nature and, most importantly, provides that matters not regulated by it must be resolved by the application of the general principles from which the law is derived. This seemingly unimportant provision, in our view, plays a crucial role, for it precludes the application of domestic arbitration or procedural rules by way of analogy in cases where the international arbitration law is silent.

(b) The parties are free to agree on rules that are applicable to the substance of the dispute. This is an essential part of the law and affords the parties complete freedom to choose the law or rules (soft law) that will be applicable to the merits of the dispute. No link between the law that is chosen and the dispute or the parties is required.

(c) There is no requirement that the arbitrators be admitted to practise law in Colombia.

(d) Law 1563 provides for the possibility of a tribunal to issue both preliminary orders and interim measures. With regard to interim measures in particular, any measure issued by a domestic tribunal that is not specifically regulated in Colombian procedural law requires the posting of security by the requesting party. In the case of international arbitrations, the practice of interim measures or preliminary orders only requires the posting of security when the tribunal so deems necessary. The law also established the possibility of the tribunal requesting the performance of an interim measure by the courts, which increases the likelihood that the measure will prove effective.

(e) The recourses that may be filed against the award differ significantly depending on whether the tribunal that rendered the award was domestic or international. Annulment recourses against awards issued by domestic tribunals are decided by the Superior Tribunal of the judicial district to which the city where the award was rendered belongs. In case the controversy involves a state entity or one that performs public functions, the competent authority is the Council of State. Revision recourses against awards rendered by domestic tribunals or against decisions that decide annulment recourses filed against domestic awards are decided by the Civil Chamber of the Supreme Court or, in those cases where the controversy involves a state entity, they will be decided by the Council of State. Regarding international arbitration, on the other hand, Law 1563 determined that the competent authority to decide the annulment recourse is the Civil Chamber of the Supreme Court and, when a state entity is involved, the recourse will be decided by the Council of State, just as it is for domestic arbitrations. There is no revision recourse against awards that are rendered by international tribunals or against decisions that decide the annulment recourse against them. Also, in keeping with several arbitration regimes, Law 1563 allows parties to an arbitration seated in Colombia to waive the annulment recourse when all parties to the arbitration are domiciled outside of Colombia. In these events, the enforcement of the award in Colombia will require the prior recognition of the award, under the rules that are applicable to foreign awards. The granting of jurisdiction to the Civil Chamber of the Supreme Court for deciding annulment recourses in Colombia is a crucial step. This will provide the country with unified jurisprudence on the matter and will guarantee the parties that their challenges will be heard at the highest level. This provision in itself is a great leap forward for international arbitration in Colombia.

(f) Judicial intervention in international arbitrations is limited to those events expressly established in Law 1563. This is a revolutionary provision in a country where the extent to which courts can intervene in arbitration was not clearly regulated. These events are:

- the request of precautionary measures before ordinary courts, which procedure does not involve the withdrawal from the arbitration agreement;[3]
- when the parties have not agreed on the procedure for designation of the arbitrators, or when having agreed on it, it is not followed, the arbitrators will be designated by the competent authority;[4]
- when the parties have not agreed on the procedure to challenge the arbitrators' designation and the arbitration is not institutional in nature, the competent authority will decide on the challenge;[5]
- when the parties have not agreed on the procedure to be followed when an arbitrator is unable to perform his duties or fails to perform them for any reason, and the parties do not agree on the removal of the arbitrator, any of them is entitled to ask the competent authority to decide on the matter;[6]

- the request of performance before a competent authority of a precautionary measure ordered by the tribunal;[7]
- the request for collaboration of the competent authority in the collection of evidence;[8] and
- the recognition and enforcement of awards.[9]

(g) The grounds for setting aside the award also differ greatly when issued by a domestic or an international tribunal. In the case of domestic tribunals, article 41 of Law 1563 establishes the following nine grounds for setting aside the award:

- the nullity or unenforceability of the arbitration agreement;
- that the action is barred or in the event of lack of jurisdiction;
- the tribunal was not duly integrated;
- the appellant was not legitimately represented in court, or was unduly notified, only if the defect was not amended during the proceedings;
- a duly requested piece of evidence was not ordered or, when ordered, was not collected, as long as the defect was mentioned in the corresponding legal recourse filed against the tribunal's decision and the same was relevant to the ruling;
- in the event the arbitral award or its complementation, correction or clarification is issued after the expiration of the period fixed for the arbitration process;
- the award was issued in equity, when it should have been issued in law, on condition that this circumstance appears evident in the award;
- the award contains contradictory statements, or arithmetic or other errors in the resolution portion of the judgment or which influence on it, provided that these errors were pointed out to the tribunal; or
- the award rules on issues not subject to the arbitrators' decision when it grants more than was claimed or failed to decide on issues subject to the arbitration.

Grounds (a), (b) and (c) may be invoked only if the appellant alleged them before a tribunal during the arbitral proceeding. Ground (f) may not be alleged by the party that did not present it before the Tribunal prior to the expiration of the established term.

Grounds for annulment of an award rendered by an international tribunal seated in Colombia, on the other hand, are essentially those listed in article 34(2) of UNCITRAL Model Law on International Commercial Arbitration.

(h) In addition to the possibility of annulment of an award, Colombian law allows for the use of a constitutional action aimed at protecting individual constitutional rights known as fundamental rights. Procedural due process being one of the protected constitutional rights, a debate existed for many years as to the applicability of these actions to arbitration proceedings and even awards. The Constitutional Court finally established the following as general grounds for the admissibility of a constitutional action against arbitration tribunals or awards (whose ultimate result is the striking down of the award with the same effects of vacating an award):

- that the alleged violation under discussion is of obvious constitutional significance;
-

that the petitioner has exhausted all means of judicial defence, except in a case to avoid irreparable harm;[10]

- that the constitutional action is filed within a reasonable period from the moment that triggered the violation;[11]
- if it is a procedural irregularity, that it be determinant in the decision being challenged, seriously affecting the rights of the petitioner; and
- that the plaintiff reasonably identify the events that generate the infringement of the violated rights, which should have been invoked during the proceeding, if possible.

As additional, specific grounds for granting the protection of a fundamental right violated by an award or a tribunal, the Constitutional Court has established the following:

- when the panel that issued the challenged decision had no jurisdiction to do so;
- procedural defect – when the panel acted entirely outside of the established procedure, provided that the irregularity has directly affected the outcome of the decision;
- when the panel lacks evidentiary material, by act or omission, to support the decision;
- when the panel decides on the basis of unconstitutional or non-existent rules or there is an obvious and gross contradiction between the rationale and decision;
- when the panel was a victim of deception by others and that deception led it to make a decision that affects fundamental rights;
- when the ruling does not include factual and legal considerations on which to base the decisions; and
- direct violation of the provisions of the Constitution.

Therefore, the plaintiff must prove each and every one of the procedural requirements above, as well as at least one of the special grounds that may be invoked for an award to be annulled. The great majority of constitutional actions that are attempted against arbitration tribunals or the awards they render are unsuccessful.

Notwithstanding the foregoing, the question remains: if it is an international tribunal that is seated in Colombia, can there be an acción de tutela against the proceedings or even the award? Law 1563 specifically says that courts cannot intervene in matters other than those established in that law itself. A statute, however, does not pre-empt the Constitution, in Colombia or anywhere else. The question will have to be resolved by way of examining whether the specific features of international arbitration – those that differentiate it from domestic arbitration – are such that these actions could be considered inapplicable.[12]

Recent court decisions

Tutela Decision Against The Arbitral Proceeding Of ExxonMobil De Colombia SA V Representaciones Santa María S En CS

ExxonMobil initited arbitration proceedings against Representaciones Santa María due to an alleged breach of a lease agreement that was executed over a property where a fuel and oil station was being operated by ExxonMobil. During the course of the arbitral proceeding, Representaciones Santa María filed a constitutional action to end the proceedings on the grounds of lack of jurisdiction of the tribunal. The action was decided by the 33rd Civil Municipal Court of Bogotá, who rejected the claim. The decision was later overturned on

appeal by the 37th Civil Circuit judge of Bogotá, who granted the constitutional redress requested by Representaciones Santa María and declared the invalidity of all the arbitral tribunal's proceedings on the grounds that the tribunal lacked jurisdiction to issue a ruling in regards to the controversy. This decision was subsequently reviewed by Constitutional Court, who upheld the ruling issued by the 37th Civil Circuit Judge of Bogotá and declared that the arbitration tribunal lacked jurisdiction, thereby ending the arbitral proceedings. That decision is discussed in the paragraphs that follow.

The background of the case is related to the fact that Representaciones Santa María judicially requested the restitution of the cited property from ExxonMobil subsequent to the parties having executed a settlement agreement in virtue of which the termination date of the lease agreement was set, a request that was granted by the 39th Civil Municipal judge of Bogotá. Representaciones Santa María then decided to initiate an ordinary proceeding against ExxonMobil seeking the payment of the damages caused by the late restitution of the property. During this proceeding, ExxonMobil alleged the existence of an arbitral clause that excluded the jurisdiction of the ordinary court, a defence that was denied.

ExxonMobil then filed an arbitral claim before the Arbitration and Conciliation Center of the Chamber of Commerce of Bogotá to seek a declaration that the agreement should be in force until 1 March 2018. Representaciones Santa María alleged that the existence of a settlement agreement and the subsequent judicial order against ExxonMobil to carry out the restitution of the asset amounted to res judicata and that this fact, in itself, implied that the arbitration tribunal had lost jurisdiction over the matter. The arbitration panel held that the issue of jurisdiction would be ultimately decided in the final award, a possibility granted to arbitrators under Colombian law.

In view of the above, Representaciones Santa María filed a constitutional action alleging the violation of procedural due process, arguing that the arbitration panel was obligated to hold, from the outset, that it lacked jurisdiction to hear the case. Once the 37th Civil Circuit judge of Bogotá granted the constitutional injunction and declared the lack of jurisdiction by the arbitral tribunal, the Constitutional Court reviewed the decision and upheld it on the following grounds:

- the constitutional action complied with the requirements for filing a constitutional action against a judicial decision, since:
- it was of constitutional relevance as the violating of due procedure was alleged;
- it was not directed against a constitutional ruling;
- the immediacy requirement was met;
- the plaintiff could not file any other legal resource for asking to revoke the decision;
- it was demonstrated that the procedural abnormalities had an important impact on the accused decision; and
- the plaintiff clearly identified the facts that lead to the violating of the constitutional provisions, which was timely submitted to the arbitrators.
- the Court considered that the arbitral tribunal made a natural mistake when deciding that the issue of jurisdiction would be finally decided in the award; and
-

the Court considered that the tribunal lacked jurisdiction to issue a ruling in the case since the parties previously entered into a settlement agreement that established the expiration date of the lease contract.

In view of the above, the Court decided to confirm the ruling issued by the 37th Civil Circuit judge of Bogotá who granted the constitutional redress requested by Representaciones Santa María and declared the invalidity of the arbitral proceeding.

This Constitutional Court decision is relevant to arbitration practice in Colombia because it is the first time that a constitutional action has ended an arbitration proceeding that is underway and, in doing so, replaced the tribunal in deciding whether it has jurisdiction to hear the matter. This is of special constitutional significance, given that constitutional actions of this nature can only be brought in the absence of alternate legal remedies, unless they are used as a temporary remedy to avoid irreparable harm. In this particular case, Representaciones Santa María could have still won its argument in the final award or in the action to set aside the award. The Constitutional Court chose to ignore this fact, even in the absence of any argument by the plaintiff hat it would otherwise suffer irreparable harm.

From an arbitration perspective, the Court also breached the Kompetenz-Kompetenz principle. A possible alternative road could have been to order the arbitration panel to immediately rule on its jurisdiction; but the Constitutional Court decided not only that the ruling needed to take place immediately, but also that the Court would rule on the issue itself and not the tribunal. Some hope remains in the fact that the decision was adopted by a chamber of three justices (actions are decided in such chambers), and has one dissenting opinion. Considering that the Court is composed of nine justices, it could very well be the case that such a ruling is not issued again or is specifically overruled in one of the rare events in which the Constitutional Court decides arbitration-related constitutional action. But, as of today, the highest court in the land has ordered the end to an arbitration proceeding on the grounds that the tribunal lacked jurisdiction to hear the case.

Kompetenz-Kompetenz

The Colombian Superintendence of Industry and Commerce, acting as a judge in unfair trade practice matters, has been reluctant to show the deference required by article II, numeral 3 of the New York Convention, in those cases where the application of an arbitration clause to a dispute is at stake and which therefore call for a decision compelling arbitration, as well as the application of the principle of Kompetenz-Kompetenz. In an unfair trade practices case involving a distribution agreement between an American company and a Colombian distributor, the American company acting as defendant put forth the defence that the dispute was covered by the arbitration clause in the agreement and, therefore, the scope of the arbitration agreement had to be decided by the arbitration tribunal. The Superintendence decided that it was its duty as judge to determine whether the dispute was, in fact, covered by the arbitration agreement. The Superior Tribunal of Bogotá, acting as appellate court, failed to overturn this decision.[13] This practice is still common in Colombian courts, who usually understand that it is their duty and not that of the arbitration tribunal to establish whether a particular dispute falls under the agreement to arbitrate.

Redefinition Of The Scope Of The Autonomy Of The Arbitration Agreement In The By-laws Of Corporations – Rudy Kerckhaert Vs Metal Tek SA

2012 ended with a quiet revolution regarding the autonomy of the arbitration agreement. In a decision that has drawn far less attention than we would have expected,[14] the Superior

Tribunal of Bogotá, acting as an appellate court, declared the invalidity of a decision adopted by the shareholders of Metal Tek SA to amend the arbitration agreement contained in the by-laws. Arguing that the autonomy of the arbitration agreement made it, essentially, an autonomous contract, the tribunal held that the agreement to arbitrate contained in the by-laws of a company can only be amended by the unanimous vote of all the shareholders and not just the majority established in the by-laws or the law for adopting resolutions. By doing so, the tribunal stretched the scope of the autonomy of the arbitration agreement well beyond its traditional boundaries of the possibility of survival in the face of the annulment of the contract that contains it and the possibility to have it governed by a different substantive law. This also gave the corporate world a lot to think about; having 100 per cent of the shares present at a shareholders' meeting and getting a unanimous vote from them is a rare coincidence. This means that, if this theory is to flourish in the Colombian judiciary, arbitration agreements contained in the by-laws of corporations and partnerships will probably remain the same at the day of incorporation.

New Grounds For Setting Aside An Award

An additional recent development in arbitration in local courts in Colombia was the creation, by the Council of State, of an event of annulment of an award that is not established in the law. Further to its understanding of a ruling issued by the Court of Justice of the Andean Community on 26 August 2011 and clarified by a decision of 15 November 2011, the Council of State ruled in a decision of 9 August 2012 that it was mandatory for arbitration tribunals in Colombia (not specifying whether it was limited to domestic tribunals, but in the context of such a tribunal), to request a pre-judicial (pre-award) interpretation by the Court of Justice of the Andean Community, in those events where the Andean Law was applicable. Failing to request such an interpretation would result in the Council of State having the power to vacate the award on the grounds that such interpretation was not requested. According to the ruling, this power can be exercised by the Council of State by the request of one of the parties or of its own volition.

This is a significant development in arbitration in Colombia. In the past, arbitration tribunals had never been deemed to have this obligation under Andean Community Law, let alone under the prospect of the setting aside of the award. Several substantial questions remain. Not insignificantly will this interpretation be used by the Council of State in international arbitration tribunals seated in Colombia, notwithstanding Law 1563's specific wording in the sense that only annulment grounds established in such law will apply. If this interpretation is not applied to international tribunals seated in Colombia, would Colombia be infringing Andean Community Law by allowing international arbitration tribunals seated in Colombia to proceed without requesting such an interpretation, even though the case calls for the application of Andean Community Law? This new development is certain to generate a wave of jurisprudence in the coming years.

Notes

1. Article 62 of Law 1563
2. Silva Romero
3. Articles 71 and 90 of Law 1563 of 2012.
4. Article 73 of Law 1563 of 2012.
5. Article 76 of Law 1563 of 2012.

6. Article 77 of Law 1563 of 2012.
7. Article 88 of Law 1563 of 2012.
8. Article 100 of Law 1563 of 2012.
9. Articles 111 and 116 of Law 1563 of 2012.
10. Constitutional Court. Unification of Decisions Sentence SU-174 de 2007, 14 March 2007, Opinion of the Court delivered by Judge Manuel José Cepeda Espinosa. With respect to the arbitration process in particular, the Constitutional Court has stated that, provided the nature of single instance and because of the restricted nature of the extraordinary recourse of annulment and revision, is not always necessary to have previously attempted such recourses against the award because they are not necessarily suitable for guaranteeing the fundamental rights of the parties. The Constitutional Court thus determined that the judge in each individual case must establish whether the defence mechanism available to the plaintiff is suitable to protect the fundamental right whose protection is being sought.
11. This requirement is called 'immediacy'
12. Zuleta Eduardo
13. Tribunal Superior del Distrito Judicial De Bogotá, Sala Civil de decisión, Sentencia de 24 de enero de 2013, radicación 11108158.
14. Tribunal Superior del Distrito Judicial De Bogotá, Sala Civil de decisión, Sentencia de 5 de diciembre de 2012, Magistrada Ponente Dra. Liana Aida Lizarazo V, radicación 11001 31 99 001 2011 70495 01.

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Summary

Legal Framework For Arbitration In The Dominican Republic

Arbitration has been legislatively active in the Dominican legal system since 1884; articles 1003 to 1028 of the Code of Civil Procedure governed civil ad-hoc arbitration from 1884 until 2008. Commercial arbitration was first regulated in 1978 with the modification of article 631 of the Code of Commerce. Moreover, the latest constitutional reform in the country included an express reference to arbitration; article 2290 of the Constitution adopted on 26 January 2010 expressly acknowledges international arbitration as a means of dispute resolution for international commerce. It marks the first time the Constitution has provided a specific disposition for arbitration.

The Dominican Republic issued its first regulation for institutional arbitration in 1987 with the enactment of Law No. 50-87 regarding the Chambers of Commerce (the Law for Institutional Arbitration).1 This law constitutes the beginning of an incipient arbitration culture in the Dominican Republic as it created the Boards of Conciliation and Arbitration (BCAs) within the Chambers of Commerce. The BCAs were designed to administer disputes taken to arbitration and had the faculty to appoint arbitrators in disputes that arised between members of the corresponding Chamber of Commerce, or members and non-members, or members and the state. One of the most debated topics of the Law for Institutional Arbitration is the provision that arbitration awards issued by the arbitration panels administered by the BCAs constituted enforceable titles as they should not be submitted to the requirements for recognition and enforcement under the Code of Civil Procedure. This provision is still active and binding.

Although the Law for Institutional Arbitration served the purpose of initiating an arbitration practice in the Dominican Republic, it did not offer a complete legal framework as it failed to, among other provisions, provide for arbitration for non-member parties and international arbitration. Moreover, the Law for Institutional Arbitration did not regulate arbitration clauses and their autonomy, nor did it completely safeguarded the Kompetenz-Kompetenz principle.

With the execution of the Dominican Republic – Central America Free Trade Agreement (DR CAFTA), a more complete and cohesive regulation for commercial arbitration in the Dominican Republic was demanded. Henceforth, the first commercial arbitration law, No. 489-08 (the Law for Commercial Arbitration)[1], was enacted in December of 2008. This new law abolished articles 1003 to 1028 of the Code of Civil Procedure, but it did not modify the Law for Institutional Arbitration. Furthermore, due to the 'gaps' left by the Law for Institutional Arbitration, in 2009 a new legislation (Law No. 181-09) modified the Law for Institutional Arbitration and reinforced the current legislation for institutional arbitration. The main novelties of this new legislation are that it allowed arbitration for non-members of the corresponding Chambers of Commerce, reinforced the Kompetenz-Kompetenz principle and provided a rapid system to challenge arbitration awards (which, for institutional arbitration, still constitute enforceable titles per se), while limiting the intervention of judicial courts.

To date, only two Chambers of Commerce – those of Santo Domingo and Santiago – have created Centres for Dispute Resolution (as the BCAs were renamed in Law No. 181-09) and both centres have their own set of rules for arbitration. Consequently, the Law for Institutional Arbitration provides for administrated arbitration, while the Law for Commercial Arbitration provides for ad-hoc arbitration, international arbitration and the general rules of arbitration.

In addition to the Law for Commercial Arbitration and the Law for Institutional Arbitration, which constitute the current, legal framework for arbitration in the Dominican Republic, several international multilateral treaties and bilateral investment treaties executed by the Dominican Republic contain specific provisions regarding arbitration between states and states and individuals. Furthermore, there are specific laws that contain provisions regarding arbitration in certain sectors, such as the Consumer Protection Law No. 358-05, which regulates consumer arbitration and prohibits clauses that submit conflicts exclusively to arbitration in pre-formulated standard contracts; also the Labour Code (which provides for ad hoc arbitration in labour disputes) and the Sports Law No. 356-05, which creates a Sports Arbitral Tribunal, among others.

In addition, the Dominican Republic has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 2001[2] and the Inter-American Convention on International Commercial Arbitration since 2007.[3] The latter two international treaties allow the Dominican Republic to enjoy a uniform arbitration legislation that is connected with the main arbitration legislation of the world, especially given the nature of the Law for Commercial Arbitration, which was inspired by the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law, although the Dominican government has yet to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

General principles of the Law for Commercial Arbitration

The Law for Commercial Arbitration is based on the Spanish arbitration Law No. 60/2003 and the UNCITRAL Model Arbitration Law, as revised in 2006. The law is divided into nine chapters. The first chapter refers to the general dispositions of the law, including scope of application, disputes subject to arbitration, definitions and rules of interpretation, as well as the representation of the state. The second chapter is dedicated to the arbitration agreement, its form, definition and autonomy. Chapters three, four and five refer to the arbitral tribunal, its composition, jurisdiction and the procedural aspects of arbitration. Chapters six, seven and eight provide for the awards, the finalisation of the procedural aspects, the challenge of the awards and the recognition and enforcement of the awards. Finally, chapter nine establishes certain transitory dispositions necessary for the enactment of the law.

Herein, we will identify the relevant principles of arbitration included in the Law for Commercial Arbitration, especially the ones that support the application and understanding of the Kompetenz-Kompetenz principle in commercial arbitration, in the understanding that such principle constitutes the central figure in any efficient arbitration system.

Under the Law for Commercial Arbitration, the agreement to arbitrate must be in writing, reflected in an arbitration clause or in a separate and independent agreement. This independent agreement can be prior to the conflict or once the conflict arises. Article 10 of the Law for Commercial Arbitration sets forth that 'in writing' can also be reflected by e-mails, faxes, telegrams, letters or any other means of telecommunication that proves the existence of the agreement and is accessible for ulterior consultation. All these provisions are consistent with the New York Convention. Furthermore, the Law for Commercial Arbitration provides that an agreement to arbitrate will be considered valid if consigned in any written pleadings where the existence of the agreement is affirmed by one party and not denied by the other party. Finally, the Law for Commercial Arbitration provides that in international arbitration the agreement to arbitrate will be considered valid if said agreement complies with the requirements established by the law of choice of the parties. Consequently, these

provisions of the Law for Commercial Arbitration reaffirm the pacta sunt servanda principle included in article 1134 of the Civil Code, a principle that respects the decision of the parties to submit their disputes to arbitration, since mutual consent is one of the key elements of our civil law system.

The Dominican legal system provides for the severability of the provisions of an agreement. However, in order to emphasise on the importance of the autonomy and severability of the arbitration clause, the Law for Commercial Arbitration also includes provisions regarding autonomy and severability of the arbitration agreement. In this regard, article 11 provides for the autonomy and severability of the arbitration clause by affirming that the agreement to arbitrate is considered an independent agreement and consequently the potential inexistence, partial or total invalidity of an agreement that contains an arbitration clause does not necessarily imply the inexistence, inefficiency or invalidity of said arbitration clause. Nonetheless, this autonomy and severability is not applicable when a competent authority (a judicial court or any other competent tribunal) has annulled the agreement that contains the arbitration clause, and said decision has become enforceable and acquired the authority of a final order not open to recourse.

Even though the Law for Commercial Arbitration, the Law for Institutional Arbitration or any of the international treaties on commercial arbitration executed by the Dominican Republic do not expressly provide for the inclusion of non-signatory parties to the arbitration agreement in an arbitration process (third-party arbitration), from article 10 of the Law for Commercial Arbitration and article 11 of the New York Convention, both of which provide for the possibility for arbitration agreements not to be included in a contract nor in an independent legal instrument, it could be alleged that the execution of the arbitration agreement by the parties is not obligatory. Moreover, in arbitration, the general principle is the rule of consent, hence the consent of the parties is vital and can be expressed by different means. As a consequence, third-party arbitration is not prohibited, so it is possible for a party that did not execute an arbitration clause to intervene or become a party in any arbitration proceeding, if any of the ordinary causes set forth in the Civil Code arise, regarding the effects of contracts to third parties as an exception of the relative, bilateral effects of all contracts. The execution of the arbitration agreement is ad probationem, not ad validitem.

Considering the parties' freedom to contract and decide the rules applicable to their transaction, and being the dispute resolution mechanism one of the areas the parties can freely decide upon, it is important to take into account that the Law for Commercial Arbitration sets forth certain restrictions to the freedom of submitting certain disputes to arbitration. In this regard, article 3 clearly provides that conflicts involving civil status and family law matters, matters that concern the public order and any conflicts not susceptible of settlement may not be subject to arbitration.

The Kompetenz-Kompetenz principle

Before the enactment of the Law for Commercial Arbitration, the Supreme Court of Justice had acknowledged the Kompetenz-Kompetenz principle by means of a court order rendered on 13 December 2006 (La Bratex Dominicana v VF Playwear Dominicana), although in this order the court failed to refer to the New York Convention, which, once ratified by the Dominican Congress, was binding to all courts of law. As it is known, the New York Convention provides the Kompetenz-Kompetenz principle. In this case, the court acknowledged that ordinary courts lack competence to hear the merits of any dispute in which the parties had previously executed an arbitration agreement, therefore courts had

the procedural obligation to remit the matter to the corresponding arbitration panel. After the enactment of the Law for Commercial Arbitration, the Kompetenz-Kompetenz principle was officially inserted into the Dominican legal system, as with all countries with older arbitration cultures.

The obligation of judicial courts to comply with the agreement of the parties is the fundamental basis for the effectiveness of arbitration. Such obligation is the primary focus of the Kompetenz-Kompetenz principle. Hence, the Law for Commercial Arbitration (article 12) provides clear dispositions regarding the Kompetenz-Kompetenz principle, as it provides a strict prohibition for the parties subject to an arbitration clause to empower ordinary courts – in reference to the negative effect of arbitration clauses, in the sense that parties aren't allowed to resolve their disputes before ordinary courts, unless both parties agree to cease and desist from the arbitration clause. However, the obligation of judicial courts to declare their lack of competence due to the existence of an arbitration clause included in the Law for Commercial Arbitration is slightly undermined by a provision that establishes that in order for an ordinary tribunal to declare its lack of jurisdiction, one of the parties must present a plea in such regard. Under the Law for Commercial Arbitration, the tribunal is not obliged to declare its incompetence ex officio. The matter becomes controversial when the defendant fails to appear at court and a default judgment is rendered. Evidently, if the defendant fails to appear at court it would not be allowed to request the lack of competence of the ordinary court based on the arbitration clause. The law at hand does not provide in this scenario, as the only means by which a court may declare its lack of jurisdiction based on an arbitration clause is in the event that the defendant appears at court and presents a motion for lack of jurisdiction.

Furthermore, the law at hand provides that once the arbitral tribunal is appointed it can continue with proceedings and issue an award notwithstanding any open judicial process. Additionally, the law establishes the faculty of the arbitral tribunal of deciding on its own jurisdiction, including the exceptions regarding the existence or validity of the arbitration agreement or any other issues that may prevent the arbitral tribunal to enter into the merits of the dispute.

Another controversial topic of the Law for Commercial Arbitration is that it provides that the order rendered by an ordinary court that decides on a motion for lack of jurisdiction based on an arbitration clause can't be challenged by any of the parties. The purpose of this provision is to impede the extension of proceedings within ordinary courts and allow the parties to continue litigating before the corresponding arbitration tribunal, therefore the content and consequences of the prohibition of appellation appear to be 'pro arbitration'. Nonetheless, the law does not distinguish the case when the ordinary court accepts or dismisses the motion for lack of jurisdiction. Apparently, the law presumed that all motions of this nature would be accepted by the courts of law. As a consequence, if a judge denies a motion for lack of jurisdiction the Law for Commercial Arbitration appears to prohibit the parties, especially the defendant, to challenge this decision so as to allow an appellate court to correct the situation and remit the parties to arbitration. However, to date this issue has yet to be presented before a Dominican tribunal, hence no precedent exists on the matter.

Enforcement and challenge of arbitration awards

As per the provisions of the Law for Institutional Arbitration, arbitral awards rendered by the Centres for Dispute Resolution of the corresponding Chambers of Commerce are enforceable without the intervention of ordinary tribunals. On the other hand, ordinary awards

(those of ad-hoc arbitration) do not constitute enforceable titles and consequently require the recognition and enforcement authorisation issued by ordinary courts. As with the majority of laws for arbitration, the Law for Commercial Arbitration delegates certain functions to ordinary courts, besides deciding on the recognition and enforcement of arbitral awards. In this regard, the Court of First Instance (Trial Court) is competent to decide or aid in the following cases:

- the appointment of arbitrators, when applicable;
- assistance to the arbitral tribunal in obtaining evidence, including audition of witnesses;
- the adoption of interim measures; and
- the forced enforcement of arbitral awards.

The Court of Appeals is competent to decide on the annulment of an arbitral award and on the challenge of arbitrators or complete arbitral tribunals. As for foreign arbitral awards, the Civil and Commercial Chamber of the First Instance Court of the National District is the competent judicial authority to decide on the recognition of foreign awards.

Notwithstanding the above, and subject to the non-waiver of the parties of the possibility to challenge the award, in order for any party to request the annulment of an arbitral award, said party must initiate a petition of annulment before the Court of Appeals within the month of the notification of the award and prove one of the following situations:

1. that one of the parties to the arbitral agreement was affected by an incapacity at the moment of entering into the agreement, or that the agreement to arbitrate was invalid under the law of the arbitration;
2. a violation of the right of defence of one of the parties due to non-compliance with due process;
3. that the arbitrator or arbitral tribunal decided ultra petita;
4. that the designation of the arbitrators or the arbitral procedure was not executed in accordance with the agreement of the parties (except if the agreement of the parties was contrary to obligatory dispositions of the Law for Commercial Arbitration) or in the absence of agreement of the parties on these issues, that they were executed in disregard of the Law for Commercial Arbitration;
5. decisions on matters not susceptible to arbitration; and
6. that the arbitral award is contrary to public order.

However, the Law for Commercial Arbitration also provides that the Court of Appeals can appreciate ex officio the situations established in (ii), (v) and (vi), above, and that, when possible, any decisions of an award not affected by the situations described in (iii) and (v) continue to be valid.

To obtain the recognition of a foreign award, the requesting party must submit the original arbitral award and an original version of the arbitration agreement or the agreement that contains the arbitration clause to the competent court with a written motion of recognition. If any party wishes to dispute the administrative court order, it shall initiate a proceeding before the competent Court of Appeals. The Law for Commercial Arbitration allows the denegation

of recognition or execution of foreign arbitral awards for practically the same grounds set forth for the annulment of awards established above. All decisions regarding the judicial designation of arbitrators or the recognition of foreign awards will be rendered in an ex parte or administrative capacity through court orders, which allows for expedite proceeding.

Notes

1. Law No. 50-87, regarding Official Chambers of Commerce, dated as of 4 June 1987.
2. Resolution No. 178-01, issued by the Dominican Congress on 27 March 2001 and enacted on 10 October 2001.
3. Resolution No. 432-07, issued by the Dominican Congress on 10 April 2007 and enacted on 17 December 2007.

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Ecuador

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Summary

National And International Arbitration In Ecuador

Arbitration and mediation law: Guidelines for applicability

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law of 1997 (AML).[1] The Law provides for a dualist regime comprising detailed rules governing local arbitration and a few – albeit determinant – rules on international arbitration. Additionally, pursuant to the AML, other bodies of law, such as the Code of Civil Procedure (CCP), the Organic Code for the Judiciary (OCJ) and the Civil Code,[2] may be supplementary to it, provided that arbitration is conducted at law.[3]

With regard to international arbitration, article 42 of the AML categorically provides the following:

> International arbitration shall be regulated by treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador. Every natural or juridical person, public or private with no restrictions whatsoever is at liberty, directly or by reference to an arbitration regulation, to stipulate everything concerning the arbitration proceeding, including its establishment, discussions, language, applicable legislation, jurisdiction and seat of the arbitration panel which may be in Ecuador or in a foreign country.

The above norm sets forth the principle of pre-eminence of the free will in matters of international arbitration on the basis of which everything relating to the arbitration proceeding can be freely agreed by the parties, resulting in important consequences including the following:

- Parties may elect any norms to conduct an ad-hoc or a regulated arbitration proceeding. As a result, this attribution would mean that, in principle, the procedural norms for international arbitration chosen by the parties would not clash with local law unless they infringe norms pertaining to the public policy – not clearly defined in Ecuador. Despite this lack of definition, we consider that norms such as those relating to the due process (specified below) would be included in this category.
- AML provisions for local proceedings are not necessarily applicable to international arbitration, except restrictedly to the assumptions set forth in this paper.
- Ecuador does not have a law on international arbitration that might limit the prerogatives of article 42 of the AML with respect to the arbitration proceeding.
- Substantive non-procedural provisions in the AML could be important and applicable to international arbitration in certain circumstances.

It is therefore necessary to outline such assumptions wherein Ecuadorean law could be applicable to international arbitration. In principle, local law is important when it operates as lex arbitri, namely, when it is the law of the place where the arbitration is conducted. Lex arbitri is fundamental for certain questions that could arise before, during and after arbitration, especially provisions that might be deemed imperative or pertaining to the public policy. Although not intending to provide a restrictive list of such questions, it is clear that the rules comprised in Ecuadorean law might include at least the following aspects:

- creation and effects of the arbitration agreement;
- subjective and objective arbitration;

- recusation and excuse of the arbitrators;
- Kompetenz-Kompetenz principle;
- rules on the due process;
- preventive measures;
- judicial assistance;
- formalities for issuing the arbitral award;
- actions and recourses against the award; and
- jurisdiction of the courts.

International commercial arbitration: definition and scope

The AML does not have an explicit definition for international arbitration. It only mentions the requirements for a proceeding to be considered as such. Article 41 sets forth two kinds of requirements: one is subjective and another is objective. In the former case, the parties must establish in their agreement that the arbitration will be international. In our opinion, this agreement does not have to be specific because the mere adoption of regulations or other set of rules regarding international arbitration ought to be interpreted as the parties' positive decision that the arbitration must be international. In the latter case, it is necessary that the dispute be included at least within one of the following assumptions:

- if at the time of execution of the arbitration agreement the parties are domiciled in different states;
- if the place where a substantial portion of the obligations is to be performed or to which the issue under litigation is most closely related is situated outside the state in which at least one of the parties is domiciled; or
- if the issue being litigated relates to an international trade operation susceptible to compromise and not affecting or impairing national or collective interests.[4]

Characterising an arbitration proceeding as international is vitally important because by virtue thereof the parties may accede to the preeminence of the free-will principle set forth in the AML and mentioned in the preceding section, as well as to international instruments regarding this issue executed and ratified by Ecuador.

International conventions

According to Ecuador's legal system, international law is subordinated to the Constitution and prevails over and above any other domestic laws,[5] except with respect to human rights where international instruments may prevail over the Constitution if they stipulate more favourable rights to persons.[6]

With regard to international arbitration, Ecuador adopted the main international instruments on this subject quite early, including:

- the 1928 Havana Convention on Private International Law;[7]
- the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);[8]
- the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention)[9] – recently denounced;[10]

- the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention);[11] and
- the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[12]

International arbitration and foreign investment protection

There is a strong political decision to withdraw from several bilateral investment treaties (BITs) through which Ecuador gives its consent to international arbitration.[13]

Actually, the Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of BITs[14] are unconstitutional (ie, the Ecuador-UK and Ecuador-Germany BITs, among others). 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 Ecuadorean courts to exercise their jurisdiction within the territory of Ecuador.

The Constitutional Court has issued the aforementioned decisions 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 prohibition to enter into new treaties; and such a 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 the prohibition is for future treaties and does not apply to existing ones, and 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 writing, the International Law Committee of the National Assembly has already issued internal reports suggesting the withdrawal of several BITs and has approved the withdrawal of a BIT executed with Finland.

It is important to say that, despite the fact that the Constitutional Court has approved the withdrawal of several BITs, the National Assembly has rejected the request of withdrawal of the BITs executed with China, Chile, Venezuela, the Netherlands and Germany. Unfortunately, this initiative has not stopped and the government has started a campaign against the BITs. In fact, on 9 March 2013, during his usual Saturday talks with the people, President Correa urged lawmakers to address – as one of the items to deal with in their agenda – to withdraw from the 23 BITs Ecuador has signed, provided that they are detrimental to the national sovereignty.[15] Within the BITs for which withdrawal has not been yet approved by the National Assembly are the BITs signed with France, USA, Canada, Switzerland and Spain, among others.

Moreover, after the claims filed against Ecuador by oil companies Occidental and Chevron seeking payment of millions of dollars for damages inflicted to their investment, Ecuador is looking for new ways to protect foreign investors without relying on international treaties.

One of them is the Production Code approved by the government to reactivate the economy which contains some interesting provisions on settlement of investment disputes. Article 27 of the approved Code 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 mandatory applicable law will be Ecuadorean and there is a mandatory mediation phase that needs to be exhausted before arbitration commences. The arbitration agreement must meet some legal requirements in order to be valid, but it is quite evident that the government understands that there is need for having disputes with foreign investors resolved through international arbitration. At this moment, the Coordinating Ministry for Production, Competitiveness and Employment has signed, on behalf of the Ecuadorean state, eight investment protection contracts with Chinese and European investors, with a total investment amounting to US$2.5 billion.[16]

CAITISA

The government's counter-attack mentioned above started with a letter dated 5 October 2012 issued by the National Juridical Secretary on behalf of President Correa, addressed to ministers and public authorities and informing them that 'in future contracts to be executed by them, disputes must be submitted to the local courts and not to arbitral tribunals'.[17]

The letter does not differentiate between local or international arbitration, so we can infer it applies to any kind of arbitration clause that may be included in an administrative contract. Despite the foregoing, Ecuador's initiative 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, remains unaltered. The attorney general has already approved this type of arbitral provision as required by the Constitution in several contracts.

Executive Decree 1506 dated 6 May 2013[18] established the creation of the Commission for the Citizens' Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments (CAITISA). The objectives of CAITISA are to examine and evaluate:

- the execution and negotiation process of BITs and other agreements on investment signed by Ecuador, as well as the consequences of their application;
- the content and compatibility of those treaties with Ecuadorean legislation; and
- the validity and appropriateness of the actions and proceedings adopted and of the awards and decisions issued by the entities and jurisdictions that are part of the international arbitral system on the subject of investments which have taken cognizance of arbitral proceedings against Ecuador.

Furthermore, the CAITISA will be able to determine the legality, legitimacy and fairness of the decisions and to identify inconsistencies and irregularities that have caused or may cause impacts on the Ecuadorean state in economic, social and environmental matters.

In order to complete its tasks, CAITISA will have an eight-month period (extendable for an additional eight months) and broad access to 'the entire content of instruments for treatment of foreign investment and dispute resolution on the matter'. All public institutions are obliged

to provide CAITISA with the information it requests. Up to this date, CAITISA has not issued a formal declaration on any matter.

Pending cases against Ecuador

Presently, as we have learned, Ecuador has 13 pending international arbitration cases pertaining to investment.[19]

Enforcement of international arbitral awards in Ecuador

As far as local norms are concerned, the AML does not have a specific system for the 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 AML 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 AML, 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 AML 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 AML 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.[20] For this reason, the AML 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 the enforcement of awards in Ecuador, a distinction should be drawn between awards rendered by ICSID tribunals and awards rendered by UNCITRAL or ICC tribunals.

Although Ecuador withdrew from the ICSID Convention effective in January 2010, there are still a few ongoing ICSID arbitrations 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.[21]

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 Ecuadorean legal system. In other words, domestic courts are not entitled to review the awards rendered by ICSID tribunals, 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'.[22] 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.

However, since one of the tasks of the CAITISA is to determine the 'legality, legitimacy and fairness' of decisions issued by arbitral tribunals against the Ecuadorean state, we believe this power will affect the enforcement of foreign awards. We should bear in mind that any local judge who is aware of a negative ruling by the CAITISA will at least think twice before enforcing an award that condemns the state for violating the rights of investors.

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.[23] Furthermore, Ecuador is in favour of a Latin American self-contained dispute settlement mechanism, which is still under analysis.

In 2013, Ecuador has seen an increase of cases being litigated in several international fora and condemned by international tribunals to pay millionaire indemnifications to investors such as Occidental Exploration and Production Company and Burlington Resources Inc. Those decisions have given rise to a political reaction from the local government against international and local arbitration.

The issuance of an official letter by the National Juridical Secretary forbidding arbitration in administrative contracts and the creation of the CAITISA, among other things, have created a hostile environment against arbitration in Ecuador.

In spite of all the countermeasures taken by the government, a favourable aspect is that Ecuador is still accepting that all new contracts with foreign investors be subject to international arbitration in Chile and offering to enter into investment protection contracts.

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

Notes

1. Official Register 145, 4 September 1997. Codification was published in Official Register 417, 14 December 2006.
2. Official Register Supplement 46, 24 June 2005.
3. Article 37, AML: 'The provisions of the Civil Code, Code of Civil Procedure or Commercial Code and other related laws are supplementary and shall be applied on all matters not set forth in this Law, provided that arbitration at law is involved.' It is not possible to understand the objectives of the lawmaker's limitation because, in practice, supplementary norms also are – and should be – used in arbitration ex aequo et bono or in equity, especially if the Judiciary intervenes during any stage.
4. Article 41, AML. The terms 'if susceptible to compromise and not affecting or impairing national or collective interests' in the last assumption are the result of a hasty legal amendment in 2005 within the context of international arbitration claims that the Ecuadorean State was beginning to confront at that time. There is no case law providing clarity for its application. See such amendment in Law No. 2005-48, Official Register 532, 25 February 2005.
5. Article 425, Constitution: 'The hierarchical order for the application of norms shall be as follows: The Constitution, international treaties and conventions, organic laws, ordinary laws, regional rules and district ordinances, decrees and regulations, ordinances, agreements and resolutions, and other acts and decisions of the public powers.'

6. Article 417, Constitution: 'International treaties ratified by Ecuador shall be subject to the provisions of the Constitution. In the case of treaties and other international instruments on human rights, the principles pro human being, no restriction of rights, direct applicability and open clause established in the Constitution shall apply.' This principle has been developed further in article 5 of the Organic Code for the Judiciary, which states that: 'The judges, administrative authorities and officials of the Judiciary shall directly apply constitutional norms and those set forth in international instruments on human rights if the latter are more favourable to those established in the Constitution, even if not expressly invoked by the parties.' Organic Code of the Judiciary, Official Register Supplement 544, 9 March 2009.
7. Official Register Supplement 1201, 20 August 1960.
8. Official Register 43, 29 December 1961. Ecuador ratified the New York Convention resorting to the commercial and reciprocity reservations set out in article I(3).
9. Official Register 386, 3 March 1986. Note that this Convention only pertains to disputes relating to investments between contracting states and nationals of other states, as specified in its provisions.
10. On 3 June 2009, the President of the Republic delivered a request to the Legislative and Auditing Committee of the National Assembly asking it to denounce the Washington Convention, claiming that it infringes the interests of Ecuador and violates article 422 of the Constitution. The request was considered by the National Assembly on 12 June 2009. Subsequently, the President of the Republic issued Executive Decree No. 1823 on 2 July 2009, where he resolved: '(1) To denounce and, therefore, to declare the termination of the Convention on Settlement of Investment Disputes ICSID ...' Notice of the denunciation was served to ICSID on 6 July 2009.
11. Official Register 875, 14 February 1992.
12. Official Register 153, 25 November 2005.
13. Article 94, Constitution.
14. President Correa's speech to Congress on 10 August 2009 contained a strong message against bilateral investment and commercial treaties. See a press article at: www.asambleanacional.gov.ec/20090810235/noticias/rotativo/discurso-del-presidente-de-la-republica-economista-rafael-correa.html.
15. See the article by Global Arbitration Review at the following URL: www.globalarbitrationreview.com/news/article/28642/ecuador-champing-bits/.
16. President Correa's speech in his usual Saturday talk with the people on 9 March 2013. See a press article at www.planificacion.gob.ec/category/sin-categoria/page/2/.
17. Public information provided by the Coordinating Ministry for Production, Competitiveness and Employment.
18. Oficio No. T.1-C.1-SNJ-12-1134 issued by the National Juridical Secretary the 5th October 2013.
19. Official Register 958, 21 May 2013.
20. Source: www.pge.gob.ec/es/patrocinio-internacional/casos-internacionales-activos.html, last visit 04 July 2013.

21. See article 5 of the NYC.
22. See articles 25 (1) and 72 of the ICISID Convention. See also supra note 12. Ecuador withdrew from the ICSID Convention on 7July 2009 and such withdrawal became effective six months later (January 2010), as per the ICSID Convention. See //icsid.worldbank.org/ICSID/
23. Id.
24. See press article at the following URL: www.hoy.com.ec/noticias-ecuador/ecuador-propondra-nuevo-sistema-de-arbitraje-durante-su-presidencia-en-unasur-357247.htm

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Mexico

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Summary

DECISION ON ANTI-ENFORCEMENT INJUNCTIONS AND ACCESS TO JUSTICE

Decision On Anti-Enforcement Injunctions And Access To Justice

Preliminary considerations

Pursuant to the legal provisions on commercial arbitration regulated in the Commerce Code[1] and the Arbitration Rules of the ICC,[2] arbitral awards are binding to the parties and must be complied without delay. If they are not voluntarily complied, they must be enforced. Once an award is issued, it is considered to be definitive and binding under the applicable law or the arbitration rules, and must be enforced by the competent court of the place where the enforcement is requested. According to article 1461 of the Commerce Code and the international treaties signed by Mexico, such as the New York Convention[3] and the Panama Convention,[4] a party requesting enforcement has the fundamental right of access to justice and, with it, the right to request national or foreign tribunals the recognition and enforcement of an arbitral award, complying the requirements provided for in international treaties and not any other additional requirements.[5]

There is no court in any country that has the extraterritorial authority or jurisdiction to order another court in a different country to suspend a proceeding initiated for the enforcement of an award. It is the court of enforcement that holds the discretion to adjourn the decision on the enforcement of the award if there is an application for the setting aside or suspension made to a competent authority at the place of arbitration. Upon application of the party claiming enforcement, such court may order the other party to give suitable security.

This mechanism is recognised by the New York Convention and the Mexican Commerce Code, and effectively allows a party requesting the annulment of an arbitral award to oppose the enforcement of such award while the determination on annulment is pending, giving suitable security in the enforcement proceeding.

Therefore, it goes against the established provisions of international arbitration and is nonsensical for a party requesting annulment to also require the court at the seat of arbitration to grant an anti-enforcement injunction ordering a party from refraining to enforce a binding arbitral award before national or foreign courts.

Facts

Party A commenced arbitration against Parties B and C – state entities – for breach of contract. The Tribunal issued an award on liability and thereafter an award on quantification of damages (the final award), condemning B and C. These parties filed for the annulment of the final award before local courts (nullity claim) and requested the issuance of a provisional measure, ordering Party A to abstain from commencing a procedure for the recognition and enforcement of the final award before local and foreign courts.

On 11 December 2012, the district court ordered the admission of the nullity claim and issued a provisional measure directed at Party A (the anti-enforcement injunction) based on article 1478 of the Mexican Commerce Code. The District Court ordered Party A to 'abstain from initiating or continuing any action aimed at obtaining the recognition and enforcement of the award on quantification' in Mexico or elsewhere with the purpose to 'preserve the existing situation and the subject' of the annulment proceeding. Also, the district court ruled that there was no need for Parties B and C 'to provide security for the damages or losses which could be caused by the granting of the provisional measure' given that these parties are entities of the public administration and therefore exempt from providing such guarantee.

Party A initiated a constitutional proceeding against the decision issued by the District Court. The constitutional tribunal ruled in favour of the protection of Party A against the anti-enforcement injunction (the amparo decision). The amparo decision provided that the issuance of the provisional measure violated the right of 'access to justice' by preventing Party A to initiate or continue with a procedure for the recognition and enforcement of the arbitral award. The tribunal declared that the anti-enforcement injunction was illegal because it did not observe the general principles for the issuance of provisional measures and because it contravenes human rights and the principles of legality and legal certainty provided for in articles 14, 16 and 17 of the Mexican Constitution. Also, the amparo decision considered that the filing of the claim for recognition and enforcement does not impact the subject matter of the annulment proceeding given that both actions have autonomy.

Notwithstanding the previous reasoning, the constitutional tribunal ordered the District Court to annul the amparo decision and to 'issue another with the purpose of preserving the subject matter of the annulment proceeding but which does not restrict [Party A's] fundamental right of "access to justice"'. Given that the provisional measure was unconstitutional in the terms requested by B and C, the amparo should have been complete and not partial. There is no legal justification to order the District Court to grant another decision to preserve the subject matter of the annulment proceeding when it has already been settled that the terms in which it has been requested are incompatible with Party A's fundamental rights of access to justice.

In consideration of the previous, Party A partially challenged the amparo decision. The following issues are currently pending resolution before the review tribunal.

Legal issues that arise from this case

A Provisional Measure, Granted During An Annulment Proceeding, Is Illegal And Not Contemplated By The Provisions Of The Commerce Code

There are no legal provisions in the Commerce Code that allow a court to grant a provisional measure during the annulment proceeding of an arbitral award. This position may not be interpreted or inferred from the content of the provisions of the Commerce Code either.

In the discussed case, the provisional measure was granted according to article 1478 of the Commerce Code, which provides: 'The judge shall have full discretion in the adoption of the provisional measures referred to in article 1425.' Thus, article 1425 provides that: 'Even where there is an agreement to arbitrate parties may prior to the arbitral proceedings or during its conduction, request a judge the adoption of provisional measures.' From the wording of these provisions, it is evident that provisional measures may be granted in support of arbitration before the initiation of the arbitral proceeding to maintain the status quo of the arbitration and ensure that the arbitration is possible, and to preserve the subject matter of the dispute; or during the conduction of the arbitration in support to the arbitral tribunal. These articles do not contemplate the possibility to grant provisional measures once the arbitral proceeding has concluded. According to article 1449 of the Commerce Code, arbitral proceedings conclude with the issuance of the final award.

In the discussed case, the arbitration had already been conducted and the final award issued. Therefore, the District Court had no power to grant a provisional measure during the annulment proceeding in order to bar Party A from exercising its legal right to request the enforcement of the final award.

The District Court created a new legal situation that is not contained in the Mexican legal regime. Therefore, the review tribunal should confirm that there is no legal support to grant

another provisional measure in order to 'preserve the subject matter of the annulment proceeding', as this situation is not regulated in the Commerce Code.

The Position That National Courts In An Annulment Proceeding Have Priority Is Contrary To Mexican Law On Commercial Arbitration

Parties B and C have filed for the review of the amparo decision, with the contention that national tribunals must be allowed to analyse the validity of the arbitral award prior to its execution. They reason that the existence of a procedure for recognition and enforcement of an arbitral award, will necessarily lead to its enforcement, and that the procedure of recognition and enforcement deprives local tribunals of the jurisdiction to solve with regards to the annulment of the arbitral award. These parties argue that it is not possible to accumulate foreign proceedings and that without the provisional measure the Mexican judiciary will be prevented from analysing the validity of the final award prior to the foreign judges. Also, they have argued that national judges would not have the priority to solve the annulment of the award if leave for enforcement is allowed.

This position is contrary to the Mexican law on commercial arbitration. The review tribunal should recognise the following:

- Article 1461 of the Commerce Code, and articles 4, 5 and 6 of the New York Convention, allow a party to request the recognition and enforcement of the arbitral award in other jurisdictions. According to the New York Convention, the court requesting the enforcement of an award that has been annulled in another jurisdiction has the power of recognising that annulment.
- Foreign courts shall not analyse the validity of the arbitral award. This analysis may only be conducted by competent courts at the place of arbitration. Therefore, according to the provisions of the Commerce Code, New York or Panama Conventions, foreign judges may only recognise and execute the award, or refrain from doing so, if a cause for doing so is found.
- Accepting that the national courts must analyse the validity of the awards issued in their territory before they may be enforced in such country or abroad is contrary to human rights, the Commerce Code, and the New York and Panama Conventions, which oblige courts of a state to recognise and enforce arbitral awards issued by another state party.
- Allowing the district court to prevent Party A from enforcing the award, which is binding and has the nature of a final judicial decision, is contrary to the Commerce Code and articles III and V of the New York Convention and 4 and 5 of the Panama Convention.
- Party B and C are not without defence, given that they may argue article VI of the New York Convention and article 6 of the Panama Convention before a foreign judge, requesting that the decision on enforcement be stayed until the decision on the annulment action is issued.

Security To Stay Enforcement Pending Annulment Of An Award

Article VI of the New York Convention and article 1463 of the Commerce Code provide that the court of enforcement of the arbitral award may ask that the party requesting the stay of this procedure provides security, pending a determination on the annulment proceeding.

Notwithstanding the previous, in the case being discussed, the District Court ordered the anti-enforcement injunction and determined that it was not necessary for Parties B and C to provide security. In this situation, the government entity received a more favourable treatment than the one provided for in the applicable regulations.

Thus, the anti-enforcement injunction created an unequal ground whereby a party requesting the annulment of an arbitral award has all the rights and none of the burdens in prejudice to the party that has obtained a binding arbitral award, and is prevented from enforcing this decision with no security either.

Comments

The reasoning by the constitutional tribunal for annulling the anti-enforcement injunction was a first (but partial) step for the positive reinforcement that the Mexican state favours the recognition and enforcement of arbitral awards, both in its territory and abroad. The legal reasoning, followed by the constitutional tribunal, correctly interpreted the autonomous nature of both the annulment procedure and the recognition and enforcement procedure by concluding that depriving a party of its right to legal action is contrary to human rights and to the general principle of law of 'access to justice'.

Notwithstanding the above, the constitutional tribunal did not fully analyse the legal matters that arise from this case and incongruently ordered the District Court to issue another decision to protect the subject matter of the annulment proceeding.

The review tribunal should correct the partial analysis conducted by the constitutional tribunal in a consistent manner to the objectives of the provisions of arbitration of the Commerce Code (which incorporate the UNCITRAL Model Law provisions), the New York and Panama Conventions. The review tribunal must give full effects to these legal instruments and acknowledge that a court maintains the discretion to enforce an arbitral award even when annulment proceedings are occurring in the country where the award was rendered.[6]

The solution to be adopted by the review tribunal will be key to ensuring that Mexican courts are motivated by an interest in facilitating the recognition and enforcement of foreign arbitral awards, not preventing it. The stance that is ultimately followed by the review tribunal may strengthen the efficacy of international awards in a view to the objectives of the New York Convention and the needs of foreseeability and fairness in the scope of judicial review.

Notes

1. Article 1461 Commerce Code, 'Arbitral awards, irrespective of the country in which they are rendered, shall be recognised as binding and, after the filing of a petition in writing to court, they shall be enforced according to the provisions of this chapter.'
2. Article 28, ICC Rules of Arbitration: Article 28: Conservatory and Interim Measures:

   1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

   2. Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial

authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.'

3. Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (New York Convention).
4. Inter-American Convention on International Commercial Arbitration of 1975.
5. File with the request:

   the original of the award or a certified copy;

   the original or certified copy of the arbitral agreement; and

   an official translation of the award if it is rendered in a language other than the official language of the country in which its execution is being requested.
6. Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin', Journal of International Arbitration, (Kluwer Law International 2009 Volume 26 Issue 2) p267–292.

Panama

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Summary

Becoming a popular seat for international arbitration is a challenge for any country. There are practical reasons that the parties or counsel will take into consideration when drafting an arbitration clause and selecting the country where the seat of arbitration will be, such as logistics, suitable and available infrastructure (eg, hotels and conference centres), qualified personnel to assist the arbitral tribunal and, of course, qualified arbitral institutions. In addition to these practical considerations, there are legal considerations involved in this reasoning: the country to be chosen as seat of arbitration should have modern and arbitration-friendly laws, as well as courts that understand the relevance and importance of arbitration that will generally uphold awards rendered in such seat in accordance with the applicable rules. Of all the aforementioned elements, the one in which the state can exercise a more significant influence is the adoption and amendment of the national arbitration law. A country seeking to become a popular seat for international arbitration will likely begin by enacting a pro-arbitration law or adopting significant or necessary amendments to its current arbitration law, to send a positive message to the international arbitration community.

Many countries in Latin America have undertaken the task of becoming pro-arbitration jurisdictions, making this a state policy. In order to be more competitive, many countries in the region are adopting modern arbitration laws inspired on the 1985 UNCITRAL Model Law on International Commercial Arbitration, as well as updating their already modern laws on arbitration. It is not a coincidence that Colombia recently issued a brand new arbitration statute (Law No. 1563 of 2012) for both international and domestic arbitration, and that other countries in the region are undertaking the same task.

Panama is no stranger to the goal of promoting arbitration. It started by becoming a party to the main conventions on international arbitration, such as the Inter-American Convention on International Commercial Arbitration,[1] the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[3]

In 2004, the Panamanian Constitution was amended to recognise arbitration as a valid system for the resolution of disputes separately from the Panamanian courts, and to incorporate the Kompetenz-Kompetenz principle into the Constitution. Furthermore, these constitution amendments also included the express mention of the capacity of the government to be a party in arbitration proceedings without the need of an express authorisation, provided that an arbitration clause is included in the contract to which the government or any state-owned entity is a party.

However, before that, in 1999, Panama enacted its first modern law on arbitration, known as the Law Decree No. 5 of 1999 on Arbitration, Mediation and Conciliation (the current Arbitration Act).[4] This was Panama's first attempt to enact a modern legislation on arbitration (prior to the current Arbitration Act, arbitration was regulated by the provisions of the Judicial Code of Panama). However, despite being inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration, the current Arbitration Act contains some provisions that differ from the uniform international tendencies. For example, in Panama, if the parties do not agree otherwise or if the chosen rules of arbitration do not provide otherwise, the default rule is that the arbitral tribunal will decide the case ex aequo et bono or as amiable compositeur. The current Arbitration Act also provides that, in ex aequo et bono arbitration proceedings, the arbitral tribunal applies its 'free criteria' and the awards may not be motivated.

This is why, in an effort to continue pursuing the pro-arbitration avenue, to redress some of the confusing provisions of the current Arbitration Act that differ from international tendencies and to address some of the relevant and current issues being discussed in the international arbitration community, Bill No. 578 of 2013 has been presented to the National Assembly for the adoption of a new Arbitration Act (the Bill). The Bill is largely inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (the UNCITRAL Model Law), including some domestic adjustments and additional provisions.

This chapter discusses the key changes introduced by the Bill and the provisions that, in our opinion, should be amended before the Bill is passed.

What is new?

With the intention of focusing on cross-border issues and presenting a comparative overview of the Bill with regards to the current Arbitration Act, as well as with the UNCITRAL Model Law, we have identified the following main changes introduced by the Bill:

- amiable compositeur is no longer the general applicable rule;
- a broader scope of interim measures has been introduced;
- the concept of preliminary order has been introduced;
- procedures for the enforcement of interim measures have been simplified;
- court assistance for arbitral tribunals by taking evidence and enforcing international arbitral awards rendered in Panama;
- the reasoning of all awards is now mandatory;
- the arbitral tribunal can determine the applicable law without applying conflict of law rules;
- all provisions of the Bill have been interpreted in the light of general arbitration principles;
- the default number of arbitrators has been modified;
- the arbitral tribunal has broader powers to determine the language of the proceedings; and
- the delay for issuing the award has been modified.

Amiable Compositeur Is No Longer The General Rule

As mentioned before, the current Arbitration Act provides that if the parties do not agree otherwise, or if the chosen rules of arbitration do not provide otherwise, the default rule is that the arbitrators will decide the case ex aequo et bono or as amiable compositeur.

The Bill redresses this provision in order to follow the global tendency, which is to consider that the arbitrators can only act as amiable compositeur when expressly agreed by the parties.

Broader Scope Of Interim Measures

The Panamanian legal system has a limited number of interim measures (eg, attachment, suspension, measures to preserve evidence, etc). By adopting the definition of interim measures of the UNCITRAL Model Law, the Bill enlarges the scope of interim measures as defined in Panama and gives arbitrators broader powers in comparison to national courts.

Preliminary Orders As A New Concept

The Panamanian legal system does not include preliminary orders. This legal concept is introduced by the Bill following the definition given by the UNCITRAL Model Law. It could be considered that the power to issue a preliminary order would be a power invested only on arbitral tribunals and not on national courts.

Enforcement Of Interim Measures

The enforcement of interim measures issued by arbitral tribunals seating abroad is simplified by the Bill since it could be considered that the enforcement and execution of the interim measure could be requested without the previous issuance of a writ of exequatur by the Supreme Court of Panama.

Court Assistance In Taking Evidence

The Bill contains a provision applicable to both domestic and international arbitration proceedings, which obliges local courts to assist arbitral tribunals with the taking of evidence provided that it is within their competence and in accordance with the local rules on taking evidence. Local courts have only 10 business days to take the evidence and forward it to the arbitral tribunal. There does not seem to be a condition to go through a letter rogatory process for arbitral tribunals seating abroad requesting the assistance of local courts in taking evidence. This is a clear advantage that arbitral tribunals seating abroad have over foreign national courts, which should go through a letter rogatory process and comply with additional conditions in order to request assistance from local courts in taking evidence.

Enforcement Of International Arbitral Awards Rendered In Panama

Pursuant to the current Arbitration Act, the enforcement of arbitral awards rendered in international arbitration proceedings is subject to the issuance of a writ of exequatur by the Supreme Court of Panama, even in cases when the seat of the arbitration is Panama. The Bill has circumvented this process for international arbitration awards rendered in Panama by considering that their enforcement can be requested directly to local courts without prior issuance of a writ of exequatur.

Reasoned Awards As A General Rule

Unlike the current Arbitration Law, which seems to exempt ex aequo et bono arbitral tribunals from issuing reasoned awards, the Bill follows the wording of the UNCITRAL Model Law and provides that all arbitral awards shall state the reasons upon which they are based unless the parties have agreed that no reasons are to be given or the award contains the terms of a settlement by the parties.

Arbitral Tribunals Can Determine The Applicable Law Without Applying Conflict Of Law Rules

Contrary to the UNCITRAL Model Law, which provides that 'failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable', the Bill does not force the arbitral tribunal to apply conflict of laws rules and allows it to directly apply the 'rules of law' it considers appropriate. This liberal provision, similar to article 21 of the Rules of Arbitration of the International Chamber of Commerce, gives a larger freedom to arbitrators when determining the applicable law.

Interpretation Based On General Arbitration Principles

Article 6 of the Bill provides that all issues related to the Bill which are not expressly regulated therein, will be decided in conformity with the 'general principles of arbitration'. This wording represents a step further from the original wording of the UNCITRAL Model Law that mentions, in its article 2A, 'the general principles on which this Law is based'.

Default Number Of Arbitrators

Article 19 of the Bill provides that parties can freely agree on the number of arbitrators provided it is an uneven number. It also establishes that the default number of arbitrators shall be one unless otherwise agreed by the parties. Other exceptions to this rules are cases where the state or a state entity is involved, in which case the number of arbitrators should always be three. This provision differs from the current Arbitration Act that fixes the default number of arbitrators at three.

Broader Powers For The Arbitral Tribunal To Determine The Language Of The Proceedings

The current Arbitration Act provides that the language to be used in the arbitral proceedings will always be Spanish when both parties are Panamanians. In contrast, the Bill has adopted a more international approach, mirroring the UNCITRAL Model Law by establishing that, failing an agreement by the parties on the language, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

Delay For Issuing The Arbitral Award

The current Arbitration Act provides that, unless otherwise provided by the parties, the arbitral tribunal shall issue the award six months from the acceptance of the appointment by the last arbitrator, and that this period can be extended according to the will of the parties or to the applicable rules.

For domestic arbitrations, the Bill follows the tendency of the current Arbitration Act by establishing a delay to the issuing of the award. This delay is two months from the closing statements by the parties. This delay can be extended for another two months by the arbitral tribunal, depending on the complexity of the case.

For international arbitrations, the Bill follows the tendency of the UNCITRAL Model Law, which does not establish such delay and lets this be decided by the parties, the applicable rules or, failing such, the arbitral tribunal.

What remains to be done?

There are some provisions that could be amended before the Bill is passed, in order to solve some minor problems that arbitration is currently facing in Panama, as well as some foreseeable problems that could arise from the wording of the Bill. The main issues we have identified are the following:

- the potential availability of writs of amparo against arbitral decisions;
- possible difficulties in appointing arbitrators in ad-hoc proceedings;
- possible difficulties in challenging of arbitrators in ad-hoc proceedings;
- possible difficulties with interim measures; and
- a lack of provisions regarding joinder of additional parties and consolidation.

The Potential Availability Of Writs Of Amparo Against Arbitral Decisions

Although article 46 of the Bill establishes that parties cannot file any motions before local courts, the Bill does not expressly prohibit the filing of writs of amparo against arbitral decisions. Maybe the Bill represents the best opportunity to finally settle this issue, which has been troubling the local arbitration community for some time.

The writ of amparo – or action for the protection of constitutional guarantees – is an independent action seeking protection against orders from the authorities or public servants that violate constitutional guarantees. This action is conceived as an extraordinary remedy to be accessed whenever all other available remedies have been used.

The Panamanian courts have, on different occasions and with different results, discussed the issue of whether or not a decision from an arbitral tribunal could be subject to a writ of amparo, mainly because this action was conceived as a means to review decisions issued by public servants, and there has been much debate as to whether arbitrators should be considered public servants.

In addition, writs of amparo are mainly used by parties to attack preliminary arbitral decisions and 'torpedo' the arbitral proceedings. This could be seen as contrary to the Kompetenz-Kompetenz principle, which prevents the courts from reviewing preliminary decisions of arbitrators (mainly as they relate to their capacity to decide the dispute), and the availability of the writ to set aside (or annul) the arbitration award as a means to judicially control the final arbitration award once the arbitration proceedings have concluded, in addition to the judicial control of the final arbitral awards when its recognition and enforcement is sought.

Therefore, it would have been interesting for the legislator to expressly establish in the Bill that the writ of amparo is not available against decisions by arbitral tribunals.

Possible Difficulties In Appointing Arbitrators In Ad-hoc Proceedings

In its goal to reduce the interference of the judiciary in arbitration proceedings, the Bill does not establish a court or other authority for certain functions of assistance and supervision of the arbitration, especially regarding the appointment of arbitrators failing agreement by the parties. This would most likely become a problematic source when constituting a tribunal for an ad hoc arbitration. In this regard, the Bill only refers the parties to the rules of the chosen arbitral institution.

All these foreseeable problems could be avoided by mirroring the UNCITRAL Model Law and appointing (or even creating) a court or other authority for certain functions of assistance and supervision of the arbitration, especially considering the interest of Panama in becoming a popular seat of arbitration.

Possible Difficulties In Challenging Arbitrators In Ad-hoc Proceedings

As mentioned before, the Bill does not establish a court or other authority for certain functions of assistance and supervision of the arbitration. Therefore, the challenges of sole arbitrators in ad-hoc proceedings are decided by 'an arbitral institution, national or international, pursuant to its own rules within 15 days from the request'. We could foresee some practical problems with regards to this procedure taking into account the vague description of the institution that should decide the challenge.

Possible Difficulties With Interim Measures

With regards to interim measures issued by arbitral tribunals seating abroad, the Bill mirrors the grounds for refusing recognition or enforcement of such measures, which are included in the UNCITRAL Model Law. However, with regards to interim measures issued by arbitral tribunals seating in Panama, there is a general principle for the immediate recognition and enforcement by local courts of such measures without establishing any grounds for refusing their recognition or enforcement. This could represent a possible open door for the enforcement of interim measures that do not comply with even minimal conditions, such as respect for international public policy.

This provision could create unnecessary confusion and therefore, in our opinion, the Bill should be modified to establish clear limited grounds for refusing recognition or enforcement for all interim measures, irrespective of the country in which they were issued.

Lack Of Provisions Regarding Joinder Of Additional Parties And Consolidation

One of the most relevant issues in the arbitration community is the joinder of additional parties and consolidation of arbitral proceedings. It is no coincidence that this issue has been included in the Rules of Arbitration of the International Chamber of Commerce in force as from 1 January 2012.

Therefore, we consider that the Bill could be an opportunity for establishing clear rules that regulate this issue in Panama and avoiding future uncertainties in this regard.

Conclusion

As a service-based economy, Panama meets all the practical conditions for being a popular seat of arbitration: strategic geographic location, historic transit hub, 295 daily flights to 70 destinations in 31 countries, connection to five submarine fibre optic cables, a dollarised economy, suitable and available infrastructure and qualified bilingual personnel to assist the arbitral tribunal.

With regards to the legal conditions for being a popular seat of arbitration, the Bill is a step forward to confirm the pro-arbitration policy of Panama. Indeed, despite the existence of some issues that could be improved, the Bill, as a whole, represents a positive message from Panama to the international arbitration community.

Notes

1. Law No. 11 of 23 October 1975.
2. Law No. 5 of 25 October 1983.
3. Law No. 13 of 3 January 1996.
4. Law Decree No. 5 of 8 July 1999.

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Peru

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Summary

Peru has adopted free-market policies to promote private investment during the last two decades. Several changes in the Peruvian legal framework were made to implement those policies, which included: legislation to protect national and foreign investors; tax and employment law reform; modernisation of administrative agencies and administrative law reform; privatisation of state-owned companies; and free-trade agreements.

As a result of the new economic and legal environment in the 1990s, between 1990 and 2012, gross domestic product almost tripled, gross private investment grew by more than 416 per cent, exports grew by more than 1300 per cent and imports by more than 1300 per cent.[1] According to the World Bank, Peru will be one of the three fastest-growing economies in Latin America in 2013.[2]

In this context, structuring a strong arbitration system has been crucial to securing a reliable and independent dispute-solving mechanism for any participant in the Peruvian business world. The country's judiciary is considered to be one of the least independent systems in the world;[3] making arbitration even more significant.

Unfortunately, there are no official statistics on arbitration in Peru. However, the PUCP Arbitration Center, one of the principal arbitration centres in Peru, recently revealed that in 2010 and 2011 the number of cases they had administered grew by 77.5 per cent (after the centre was re-launched), and that from 2011 to 2012 the number of cases grew by 25 per cent.[4] These statistics, as well as the general perception of many practitioners, suggest the number of cases administered by arbitration institutions will continue growing in Peru. Ad hoc arbitration seems to be a less frequent choice nowadays (although there are no figures to corroborate this perception).

Arbitration in Peru is constantly evolving and improving. It is now possible to see tribunals presided by a foreign arbitrator in disputes to be solved under Peruvian law. For example, foreign arbitrators are appointed in cases in which the tribunal consists of a sole arbitrator and the parties are unable to agree on who to appoint. Also, arbitrators are organising more oral hearings to listen to the parties' positions (on matters of jurisdiction or merits), moving away from a predominantly written type of procedure.

After approximately 12 years of existence, in 2008, the 1996 General Arbitration Act (Law 26572) was replaced by Legislative Decree 1071, which introduced several improvements in order to secure independence of the tribunal by limiting judicial intervention, expediting the setting aside, recognition and enforcement procedures, and providing an efficient set of rules applicable unless the parties agreed otherwise.

The general perception of the new arbitration law is positive, and its application in the following years should consolidate it as a useful and efficient tool. Interpretation and adequate application of certain new provisions will be vital to succeed in creating a more hospitable venue for both national and international arbitration.

Peru is also a party to significant arbitration conventions, including the 1966 Washington Convention for the Settlement of Investment Disputes between States and Nationals of other States, as well as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Legislative Decree 1071: the Peruvian Arbitration Act

Arbitration in Peru is governed by Legislative Decree 1071, issued in 2008, which generally follows the UNCITRAL Model Law. The provisions of Legislative Decree 1071 are subsidiary to any applicable special law or international treaty.[5] The main rules governing any domestic or international arbitration with seat in Peru are summarised below.

Scope Of Application

Legislative Decree 1071 applies to both domestic and international arbitrations seated in Peru.[6] The law does not refer to 'commercial arbitration' as the UNCITRAL Model Law does. Legislative Decree 1071 also states that certain provisions (on subjects such as judicial cooperation, arbitration agreement and its extent, recognition and enforcement of interim measures, and recognition and enforcement of awards, amongst others) are applicable to arbitrations seated outside Peru.[7]

Matters That Can Be Submitted To Arbitration

In Peru, only disputes related to rights that can be freely surrendered or waived by the parties may be submitted to arbitration as well as all disputes authorised by laws or international treaties. Disputes related to rights that can be waived typically include disputes on contractual matters and commercial matters, and typically exclude criminal matters, legal capacity matters and family law matters. If a law or treaty authorises it, even disputes over rights that cannot be freely surrendered can be submitted to arbitration.[8]

Arbitration Against The State

All disputes related to contracts entered into by the state can be subject to domestic or international arbitration (the state includes the national government, regional governments, local governments, state-owned companies and any private law entity that acts with delegated powers of the state).[9] Disputes among state entities can also be subject to domestic arbitration.[10] This is an important provision that guarantees arbitration agreements will not be deemed void by courts under sovereignty arguments raised by the state because there is an express legal authorisation for the state and its various sub-divisions and agencies to arbitrate.

Types Of Arbitration

Arbitration can be ad hoc or conducted by an arbitration institution. If the parties have not designated an arbitration institution, the arbitration shall be ad hoc.[11]

Concept Of 'international Arbitration'

Following generally article 1 of the UNCITRAL Model Law, an arbitration is international when:

- the parties to an arbitration agreement have their domiciles in different states at the time of the conclusion of that agreement;
- the place of the arbitration (determined in, or pursuant to, the arbitration agreement) is situated outside the state in which the parties have their domiciles; and
- the parties are domiciled in Peru, and the place where a substantial part of the obligations of the legal relationship is to be performed or the place with which the subject matter is most closely connected, is outside Peru.

If one of the parties has more than one domicile, the domicile is that which has the closest relationship to the arbitration agreement.[12]

The Arbitration Agreement

Following closely article 7 of the UNCITRAL Model Law, the arbitration agreement must be in writing. It can be included in a contract or in an independent agreement. The agreement is in writing when its content is recorded in any form, whether the arbitration agreement or contract has been concluded by the conduct of the parties or by other means. It will be understood that the arbitration agreement is in writing when there is an electronic communication and the information contained therein is accessible so as to be useable for subsequent reference. The law adopts the definition of 'electronic communications' of the UNCITRAL Model Law. Also, the agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided the reference is such as to make that clause part of the contract. Legislative Decree 1071 also provides that in an international arbitration, the agreement to arbitrate will be valid if it complies with the law chosen by the parties to govern the arbitration agreement, the laws applicable to solve the dispute or Peruvian law.[13]

Extent Of The Arbitration Agreement

According to article 14 of Legislative Decree 1071, in application of the principle of good faith, the arbitration agreement extends to those parties whose consent to arbitrate can be determined by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement or to which the arbitration agreement is related to. It also extends to those parties who intend to derive rights or benefits from the contract. This provision has no parallel in the UNCITRAL Model Law and no precedent in the previous arbitration law. Because article 14 has no precedent in Peruvian arbitration legislation, its real scope and potential consequences for non-signatories should be clarified in practice and jurisprudence.

Representation Of Legal Entities

Unless otherwise agreed, the general manager or equivalent corporate officer is legally authorised upon its appointment as such to enter into arbitration agreements, to act as the corporation's representative in arbitration and to decide to exercise or waive the rights regulated by Legislative Decree 1071, including the substantive rights discussed in the arbitration.[14]

Independence Of The Tribunal And Extent Of Court Intervention

Following article 5 of the UNCITRAL Model Law, Legislative Decree 1071 establishes that no court shall intervene in the matters governed by the Legislative Decree except where so provided therein.[15] Additionally, to reinforce the independence of arbitration, Legislative Decree 1071 established that the arbitration tribunal is independent and not subject to any order or decision that may affect its vested powers.[16] No order or decision, except for a decision in setting aside procedure, may suppress the effects of an award.[17] Any judicial intervention directed to control an arbitral tribunal or interfere in the arbitration before the award is rendered is subject to liability. The main objective of these new provisions in Legislative Decree 1071 is to protect arbitration from any sort of intervention (from any authority including the judiciary). Judicial control is done ex post through the setting side application.

The Tribunal

Following article 10 of the UNCITRAL Model Law, Legislative Decree 1071 states the parties are free to determine the number of arbitrators. Failing such determination, the number of the arbitrators will be three. Nationality is not an obstacle to act as an arbitrator, unless otherwise agreed by the parties. State officers cannot be arbitrators. In domestic arbitration that must be solved according to the law (as opposed to arbitration in which the tribunal decides according to equity or good conscience), the arbitrators must be lawyers unless otherwise agreed to. There is no need for the lawyer to be a member of any national or international bar or association. In international arbitrations, being a lawyer is not a requirement to be an arbitrator.[18]

Appointment Of Arbitrators

The parties may appoint the arbitrators or delegate the appointment to an institution or a third party, who may consult with the parties any necessary information to comply with the appointment.[19] The parties are free to agree on a procedure of appointing the arbitrator or arbitrators or choose to apply the procedures of any institutional rules. However, the parties shall comply with the principle of equal treatment.[20] If the arbitration agreement favours one party in the appointment of arbitrators, such appointment procedure is void.[21]
In case the parties fail to agree on the procedure of appointing an arbitrator or arbitrators, the parties will have 15 days to appoint the sole arbitrator since the appointment is required; or in arbitrations with three arbitrators, each party will appoint an arbitrator within 15 days and the two arbitrators thus appointed shall appoint the third arbitrator. In case the parties fail to appoint the arbitrators according to this procedure, the appointment will be made by the Chamber of Commerce of the seat of the arbitration or the place of execution of the arbitration agreement if the seat has not been determined. In international arbitrations, in case the parties fail to appoint the arbitrators, the appointment is made by the Chamber of Commerce of the seat of the arbitration or the Chamber of Commerce of Lima.

Independence And Impartiality Of Arbitrators

Arbitrators must be independent and impartial throughout the arbitral proceedings.[22] The person who is proposed as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.[23] Once appointed, the arbitrator must disclose without delay any new circumstances that may give rise to justifiable doubts as to his or her ability to be impartial and independent.[24]

Challenges To Arbitrators

An arbitrator may be challenged only if circumstances that give rise to justifiable doubts as to his impartiality or independence exist, or if he does not possess qualifications agreed to by the parties or required by law. The parties can waive the reasons to challenge an arbitrator known to them, and in such cases they cannot challenge the arbitrator or apply for setting aside for such reasons.[25] A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.[26]

Process To Decide On A Challenge To An Arbitrator

The parties are free to agree on a procedure for challenging an arbitrator or agree to apply any institutional rules. Failing such agreement, Legislative Decree 1071 regulates the applicable challenge procedure. The challenge must be made as soon as the circumstances that give rise to the challenge are known. The party making the challenge must justify the reasons for

it and produce the corresponding documents. The challenged arbitrator and the other party may submit the statements they deem convenient regarding the challenge within 10 days of being notified. If the other party agrees to the challenge, a substitute arbitrator must be appointed. If the other party does not agree to the challenge and the arbitrator denies the reasons for the challenge or remains silent:

- in case of a sole arbitrator, the arbitration institution that appointed the arbitrator decides on the challenge. If no institution appointed the arbitrator, the corresponding Chamber of Commerce decides on the challenge;
- if the tribunal has more than one arbitrator, the other arbitrators decide on the challenge by absolute majority without the vote of the challenged arbitrator; and
- if more than one arbitrator is challenged on the same grounds, the corresponding Chamber of Commerce decides on the challenge.

The decision on a challenge is not subject to appeal.[27] If the decision dismisses the challenge, the challenging party may only contest the decision in the setting aside application.

Kompetenz-Kompetez Principle

Only the arbitral tribunal can rule on its own jurisdiction, including any objections to the arbitration with regard to the existence, nullity or validity of the arbitration agreement. The arbitration agreement that forms part of a contract will be treated as an independent agreement, therefore disputes subject to arbitration may be referred to the annulment of the contract containing the arbitration agreement without affecting the validity of the arbitration agreement itself.[28]

Interim Measures

According to Legislative Decree 1071, the arbitral tribunal may, at the request of a party, grant interim measures. An interim measure is any temporary measure issued before the award by which the arbitral tribunal orders a party to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent current or imminent harm or prejudice to the arbitral process itself, or refrain from taking action that is likely to cause such harm or prejudice to the arbitration process;
- provide means of preserving assets that shall be needed for a subsequent award to be satisfied; or
- preserve evidence that may be relevant and pertinent to the resolution of the dispute.

Unlike the derogated arbitration act of 1996, Legislative Decree 1071 recognises that parties are able to request interim measures prior to the commencement of the arbitration. In such cases, the request for interim measures will be filed with a civil judge whose jurisdiction over the matter ends as soon as the arbitral tribunal is appointed.[29] Court decisions on interim measures are subject to modification, substitution or termination by the arbitral tribunal, even if such decisions have a res judicata effect. Another major improvement of the new arbitration law is that it established that interim measures granted by arbitral tribunals in arbitrations with a seat outside Peru will be recognised (and enforced) in Peru provided that certain requirements are met.[30]

Evidence And Experts

The arbitral tribunal can determine the admission, relevance, production and weight of evidence and order parties to produce the evidence deemed necessary. Legislative Decree 1071 also states that the arbitral tribunal may rely on expert opinion on specific issues relevant to the dispute. Experts can be appointed at the tribunal's discretion or upon request by a party. Parties shall provide information or access to any documents that may be considered necessary.

The Award

Unless otherwise agreed to by the parties, the tribunal decides the dispute in one award or in as many partial awards as it deems necessary. The award shall state the reasons upon which it is based unless otherwise agreed to by the parties. The award is final, not subject to appeal and mandatory for the parties once notified. Arbitral tribunals may be entitled to enforce the award if agreed by the parties, unless public force is needed. In such scenario, the interested party may request the Civil Courts to enforce the award.

Grounds For Setting Aside

The application for setting aside is the only recourse against the award. The grounds for setting aside are that:

(a) the arbitration agreement does not exist or is not valid;

(b) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was not able to present his case;

(c) the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable arbitration rules, unless such agreement of rule is contrary to the mandatory provision of Legislative Decree 1071;

(d) the award deals with a matter that was not submitted to the tribunal's decision;

(e) in a domestic arbitration, the subject matter of arbitration is evidently impossible of settlement by arbitration according to law;

(f) in an international arbitration, the subject matter of arbitration is impossible of settlement by arbitration under the laws of Peru or the award is in conflict with international public policy; and

(g) the dispute was solved exceeding the deadlines the parties agreed to or stipulated in the applicable institutional rules.

Grounds (a), (b), (c) and (d) can be the subject of an application for setting aside only if they were raised during the arbitration by the affected party and were dismissed. In the case of grounds (d) and (e), the setting aside decision will only affect the matters that were not subject of the arbitration submission or that cannot be subject to arbitration, as long as they can be separated. If it is not possible to separate them, the award will be set aside in its entirety. Ground (g) can only be invoked if the affected party raised such violation during the arbitration and it is not contrary with its own conduct in the arbitration.

Judicial Procedure For Setting Aside

The Superior Court decides on the application for setting aside. The Superior Court has 10 days to admit the application which must indicate the grounds for setting aside. Once

admitted, the other party will be given 20 days to respond. In the hearing, the Superior Court may decide to suspend the judicial procedure for setting aside and grant the arbitral tribunal six months in which the tribunal may adopt any measures necessary to eliminate the grounds for setting aside. If the judicial procedure is not suspended, the court must decide in 20 days. Only if the Superior Court decides to set aside the award totally or partially, such decision is subject to a cassation recourse, which is an extraordinary remedy decided by the Supreme Court that can only be based on the failure or errors in applying the law. The application for setting aside the award only suspends the effects of the award when the party that applies asks for a suspension and submits a guarantee agreed to by the parties or established in the applicable arbitration rules. If there is no guarantee agreed to by the parties, the applicant must submit a letter of credit for the amount the party is ordered to pay in the award. If the payment of an amount is not ordered in the award, the arbitral tribunal or the Superior Court shall establish a reasonable amount for the letter of credit. Legislative Decree 1071 expressly forbids the Superior Court from ruling on the merits of the case while deciding on the request for setting aside.

Arbitration in the Peruvian Constitution

The fact that arbitration is regulated in the Peruvian Constitution of 1993 has been crucial to guarantee the independence of arbitration tribunals and to limit court intervention in reviewing awards.

Three articles in the Peruvian Constitution of 1993 refer to arbitration:

- According to article 62, contract disputes may be solved by local courts or by arbitration, pursuant to the agreement of the parties or the applicable laws.
- According to article 63, any public entity in Peru may enter into an arbitration agreement and solve the disputes that may arise with private counterparties in a domestic or international arbitration.
- According to article 139, in addition to the judicial branch, the only other forums that perform jurisdictional functions are the military courts and arbitration tribunals.

The constitution has recognised arbitration as a truly independent alternative mechanism for solving disputes that complements the role of local courts. In addition, several decisions of the constitutional tribunal have intended to limit the constitutional grounds for challenging awards in local courts through constitutional actions. The most recent María Julia decision,[32] referred to below, clarifies that constitutional actions against an award are only admitted in three exceptional circumstances. In practice, this makes the setting aside procedure the only possibility to challenge the award in most cases.

Relevant constitutional jurisprudence favourable to arbitration

Fernando Cantuarias Decision

In the 2006 Fernando Cantuarias decision, the Constitutional Tribunal recognised arbitration as a mechanism for solving disputes related to rights that can be freely surrendered by the parties, with absolute independence and with no intervention by administrative or judicial authorities.[33]

This decision was issued in a habeas corpus constitutional action initiated by the arbitrator Fernando Cantuarias to stop the criminal investigation that had been initiated against him by the public prosecutor, in the context of his membership in an arbitration tribunal, based on the accusations of one of the parties to the pending arbitration. Even though the Constitutional Tribunal did not found that the initiation of the criminal investigation had violated the

constitutional rights of the arbitrator, the court decided to lay out the principles that limit judicial intervention in arbitration. In its decision, the Court established that the power vested in arbitrators to solve disputes originates in article 139 of the Constitution and not in the agreement of the parties.[34] Therefore, no authority in Peru can interfere in an arbitration process.[35] The decision expressly reserved the right of Fernando Cantuarias to initiate the corresponding legal actions against any interference in its role as an independent rbitrator.[36]

María Julia Decision

Under Peruvian legislation, an arbitration award can be challenged through a setting aside application and exceptionally through a constitutional action or 'amparo'. Before the María Julia decision, the setting-aside application had turned into a previous stage for initiating an amparo action in which violations to constitutional rights by the arbitration award were discussed.

In the María Julia decision, the Constitutional Tribunal confirmed that arbitration cannot be understood as a mechanism that replaces the judiciary, nor as its substitute; instead, it should be understood as an alternative that complements the judicial system.[37] It also established that the application for setting aside will be, as a general rule, a sufficient and adequate process for protecting the rights of a party affected by an arbitration award.[38] The Court limited the grounds for challenging an arbitral award through an amparo action to three exceptional cases:

- when the award disregards a previous mandatory precedent of the Constitutional Tribunal;
- when the arbitration tribunal has decided a law is unconstitutional even though the Constitutional Tribunal declared it constitutional previously; and
- when the party initiating the amparo was not party to the arbitration agreement (a third party), and his or her constitutional rights are violated by the award.

The amparo action may only result in the annulment of the award but never in the revision of the award by the court.

Thanks to the María Julia decision, it is clear today that the application for setting aside generally excludes the possibility of later initiating a constitutional action against the award.
State Procurement Act

According to the State Procurement Act (Legislative Decree 1017), all disputes arising from contracts entered into by state entities to acquire goods and services must be solved through arbitration. These arbitrations are administered by the National Arbitration System of the State Procurement Agency. The president of the tribunal (or the sole arbitrator) must be a lawyer specialised in arbitration, procurement laws and administrative law. The award is only subject to the annulment proceeding (there is no appeal). The awards and decisions on challenges to arbitrators are public.
International arbitration involving the Republic of Peru

Thirteen arbitration cases have been initiated at the World Bank's International Center for Investment Disputes. Six cases are concluded and seven are pending.
Recognition of international awards in Peru

Peru is a contracting state to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) since

1988, with no declarations, notifications or reservations. Also, Peru has ratified the Inter-American Convention on Commercial Arbitration (Panama Convention) in 1989 and the Inter-American Convention of Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention) in 1980.

An international award is an award issued outside of Peru. The grounds for refusing recognition of the awards regulated by Legislative Decree 1071 are applicable when there is no treaty or when the regulated grounds are more favourable to the party that is applying for recognition of the award. These are identical to the grounds for refusal set forth in the New York Convention.

If the Superior Court decides in favour of the recognition of the award, such decision cannot be subject to appeal. Only if the recognition is refused, the interested party may file a cassation recourse, decided by the Supreme Court.

Enforcing international awards in Peru

Once the international award has been recognised by Peruvian courts, the interested party may file for enforcement of the award.[39] The judicial authority may refuse the enforcement only if the counterparty is able to prove compliance of the obligations set forth in the award or that the execution has been suspended because of a pending request to set aside the award.

The ruling issued in favour of the execution is subject to appeal; however, it will not suspend enforcement of the award.

Peruvian coordination system for responding to international disputes

Law 28933 enacted in 2006 created the State Coordination and Response System for International Disputes. The system aims to enable efficient coordination between state entities when an international investment dispute emerges. The coordinator of the system is the Ministry of Economy and Finance, and includes every state entity that has entered into investment contracts or investment treaties.

Each time an investor notifies a public entity of its intention to submit a dispute to arbitration, the public entity must inform the Ministry of Economy and Finance. Also, if the public entity intends to submit a dispute to international arbitration, it must inform the Ministry of Economy and Finance. The system also keeps track of all the contracts or treaties containing international dispute solving mechanisms, entered into by state entities.

A special committee (with representatives from the Ministry of Economy and Finance, the Ministry of Foreign Affairs, the Ministry of Justice and PROINVERSION, the Ministry of Foreign Trade and Tourism and a representative from the public entity involved in the dispute) represents the Peruvian government in connection with the relevant international dispute. The special committee evaluates negotiation possibilities and adopts negotiation strategies, requests technical information regarding the disputes and, if necessary, hires lawyers to represent Peru in the dispute.

Law 28933 also approved mandatory criteria for dispute resolution clauses in investment contracts entered into by the state. Such clauses must include:

- a six-month negotiation period before going to arbitration;
- chosen neutral systems for solving disputes;
- the costs allocation mechanism; and

- the obligation of the investor to notify the Ministry of Economy and Finance, in addition to its counterparty, to initiate the negotiation period.

Notes

1. Peruvian Central Bank. See estadisticas.bcrp.gob.pe/
2. World Bank, www.worldbank.org/en/region/lac/overview.
3. According to the Global Competitiveness Index, Peru ranked 125 out of 144 countries in regard to judicial independence. Klaus Schwab, World Economic Forum, The Global Competitiveness Report 2012-2013, p291.
4. PUCP Arbitration Center. blog.pucp.edu.pe/item/177031/algunas-cifras-del-centro-de-arbitraje-pucp-demuestran-nuestro-crecimiento
5. Article 1.
6. Article 1.1.
7. Article 1.2
8. Fernando Cantuarias Salaverry, "Article 2 Materias Susceptibles de arbitraje", Commentarios a la Ley Pervana de Arbitraje, Instituto Pervano de Arbitraje, Tomol, p8-16
9. Article 4.1.
10. Article 4.2.
11. Article 7.
12. Article 5.
13. Article 13.
14. Article 10.
15. Article 3.
16. Article 3.2.
17. Article 3.4.
18. Articles 19, 20, 21,22.
19. Article 22.3.
20. Article 23.
21. Article 26.
22. Article 28.1.
23. Article 28.1.
24. Article 28.2.
25. Article 28.4.
26. Article 28.5.
27. Article 31.
28. Article 41.

29. Article 47.
30. Article 48.
31. Article 43, 44.
32. María Julia decisión, No. 00142-2011-PA/TC.
33. Fernando Cantuarias Salaverry decision No. 6167-2005-PHC/TC. Par. 14.
34. Fernando Cantuarias Salaverry decision, No. 6167-2005-PHC/TC. Par. 11.
35. Fernando Cantuarias Salaverry decision, No. 6167-2005-PHC/TC. Par. 12.
36. Fernando Cantuarias Salaverry decision, No. 6167-2005-PHC/TC. Par. 48.
37. María Julia Case No. 00142-2011-PA/TC. Par. 22.
38. See ***María Julia decision,*** paragraph 20. Also Avendaño, Juan Luis and Velasquez Raffo, 'El Nuevo Precedente Constitucional sobre arbitraje, sobre la revisión judicial solicitada por terceros', Anuario Latinoamericano de Arbitraje, Aplicación del convenio arbitral a partes no signatarias, p195.
39. Article 68.

Venezuela

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Summary

Denunciation Of The ICSID Convention And The Easy Path

So far, Bolivia (2007), Ecuador (2009) and Venezuela (2012) have denounced the Convention on Settlement of Investment Dispute between States and Nationals of other States (the ICSID Convention). Although the ICSID Convention itself regulates the possibility of denouncing the ICSID Convention, different theories – which, in many cases, contain conflicting options – have arisen as regards the interpretation of the legal effects of denunciation of ICSID Convention.

A number of issues have been discussed by ICSID Convention commentators, but they have mainly focused on the formation and revocation of consent in relation to investors. Although some of the theories support the contractual nature of the offer for ICSID arbitration contained in bilateral investment treaties (BITs) and in free trade agreements (FTAs) or in domestic laws, others claim that consent to international arbitration is an irrevocable obligation.

The different theories can be divided into four groups, as follows:

- the contractual approach (ie, those that consider that the offer for ICSID arbitration can be revoked before it has accepted);
- those that consider it a firm offer;
- those that consider that it is not an offer but rather an international obligation derived from a unilateral act of state; and
- those that consider that the ICSID arbitration offer is irrevocable if it creates lawful expectations.

For our part, we agree on the contractual nature of the arbitration offer made by states to investors. However, from our point of view, the arbitration offer can be irrevocable in those cases where lawful expectations have been created among investors.

Moreover, the obligation on ICSID's jurisdiction is not only perfected when the investor accepts the offer, but rather when the BIT or FTA is ratified by both states. As from this very moment, each member state is obliged to reciprocally offer ICSID arbitration to the nationals of the other state.

So far, attention has focused on the possibility of revoking or not revoking the state's consent in relation to the 'direct beneficiary' of the offer (ie, the investor in the state–investor relationship). However, article 72 does not only refer to the investors' rights; in fact, article 72 also appears to refer to the obligations related to ICSID jurisdiction, perfected among member states before the ICSID convention denunciation.
Different theories

Contractual Approach But Revocable Offer

This theory, inspired in a clear-cut contractual perspective (offer-acceptance) and advanced by Professor Schreuer, does not confer much legal effect to the 'offer' that has not yet been accepted.

In fact, when referring to the interpretation of the word 'consent' in article 72, Professor Schreuer points out that, just as contracts are formed by an offer and a matching acceptance,

the irrevocability of the offer of consent can only take place once such offer has been accepted and consent has therefore been 'perfected'.[1]

Under this theory, article 72 refers to 'perfected consent'. Therefore, it would only operate to preserve the rights and obligations of investors in respect of disputes in which both the host state and the investor have consented prior to receipt of the notice of denunciation by the depositary.[2]

Some have criticised this theory stating that using contractual analogy leads to the mistaken conclusion of identifying the term 'consent' with the notion of 'common consent' (consent by both parties to the dispute) or 'arbitration agreement.' This identification results in a 'false analogy' because in the ICSID Convention the word 'consent' is used to refer to 'individual consent' as much as it is used to refer to 'common consent'.[3]

Firm Offer

Professor Gaillard, without directly rejecting Professor Schreuer's contractual approach, warns about the particular meaning that should be given to the word 'consent' in article 72. He contends that, regardless of denunciation of the Convention, the possibility of ICSID arbitration will depend on the wording used in 'the arbitration clause' contained in the applicable BIT or FTA.[4]

Mantilla-Serrano, following Gaillard's path, argues that article 72 refers to unilateral or individual consent and not 'common consent'. He points out that the contractual notions of offer and acceptance alongside article 25 of the Convention should not come into play because the binding force of the ICSID Convention after its denunciation is entirely governed by article 72 and not by article 25.[5]

International Obligation Derived From A Unilateral Act Of The State

Nolan and Sourgens, on the other hand, contend that state consent expressed in a BIT, FTA or domestic law cannot be considered as a mere offer to arbitrate, not even as firm offer, but rather as an 'independent international obligation'.[6]

Professor Hirsch, who had taken a similar view in the past, states that according to international law, also applicable to domestic legislations, the unilateral state consent to ICSID arbitration may be equivalent to an irrevocable unilateral act pursuant to international law and the doctrine of estoppel.[7]

This view is inspired on the general principle recognised by the International Law Commission stating that a unilateral declaration intended to produce legal effects to the state making the declaration cannot be revoked arbitrarily.[8] References made in SPP v Egypt,[9] Amco v Indonesia[10] and the dissenting vote in Siag & Vecchi v Egypt,[11] along with the International Court of Justice's decision in Nuclear Test all seem to support this theory.[12] But while some support this theory, others have criticised it.[13]

Contractual Approach But Irrevocable Offer, If It Has Created Legitimate Expectations

As pointed out by Professor Schreuer: 'Like any form of arbitration, investment arbitration is always based on an agreement.'[14] Just as with commercial arbitration, an arbitration agreement may exist or be entered into without the existence of a previous contractual relationship between the parties.[15]

Nevertheless, article 25 should not come into play when determining whether or not the obligations arising out of consent to ICSID jurisdiction remain in force after its denunciation. In this regard, we agree with some commentators who argue that this matter is fully governed by article 72.[16] But this does not mean that the contractual approach should not come into play when determining the formation of consent between states and investors.[17]

With the exception of mandatory arbitrations on specific subject matters, every arbitration (whether commercial or investment) presupposes an arbitration agreement.[18]

From our perspective, strictu sensu, a state's unilateral offer to arbitrate is part of a bilateral or multilateral negotiation process between states. Since the primary goal of that offer is to create an act not unilateral in nature, it should be considered to be definitely closer to being an act of a conventional nature because the fundamental purpose of that act transcends the unilateral framework in which it is created.[19]

Under international contractual principles, the offer not yet accepted can be irrevocable in some cases. Aside from the obvious cases,[20] in our view, what makes an offer irrevocable is the legitimate expectations that offer has created.

The offer to arbitrate is irrevocable, even when there is no express provision ratifying it or a fixed term for its acceptance; provided the investor could reasonably assume that the offer was firm and has relied upon it when making his investments. As pointed out by Paulsson: 'The respect for the legitimate and pre-established expectations is an essential requisite [to keep] healthy international relations.'[21]

The principle of 'legitimate reliance' is modernly considered one of the principles, not just of international law, but also of the regulatory activity of public entities which must act in good faith within a legally sound framework and comply with the legitimate expectations created in their citizens by their administrative or regulatory action.[22]

In short, the revocation of a state's unilateral consent is arbitrary and thus ineffective when that offer created legitimate expectations in the investors when making their investments.

In fact, a state can hardly contend that a law, whose main purpose is to promote foreign investments by affording them with protection through an offer to international arbitration, could not create any legitimate expectations in foreign investors who actually made their investments before the revocation of such offer.[23]

Rights and obligations

Article 72 does not only refer to the investors' rights; it also refers to the obligations related to ICSID jurisdiction, perfected among member states before the ICSID convention denunciation. We are under the impression that little attention has been given to this second states–state relationship. Although the content of each BIT or FTA should be carefully analysed in case of significant differences between both documents, most BITs or FTAs contain bilateral obligations (state–state) whereby a state undertakes before any potential denunciation of the ICSID Convention to offer ICSID arbitration to the nationals of another member state. This obligation on ICSID's jurisdiction is not perfected when the investor accepts the offer, but when the BIT or FTA is ratified by both states. As from this very moment, each member state is obliged to reciprocally offer ICSID arbitration to the nationals of the other state. It should be noted that it is not necessary for the investor to ask for ICSID arbitration in order for said obligation to arise or to be perfected. One thing is the fulfilment of an obligation; another thing is the origin of an obligation.

Moreover, the obligation to offer ICSID arbitration remains intact after the denunciation of the ICSID Convention for two reasons: it is enshrined in a treaty (BIT or FTA) that is independent of the ICSID Convention; and it is expressly stated so in article 72. Article 72 also represents an exception to the nationality requirements contemplated in article 25(1) of the ICSID Convention. If the obligation to offer ICSID arbitration to the nationals of another state was perfected before the notice of denunciation was given, then the state that denounced the ICSDI Convention or a national of said state could become a party to ICSID arbitration.

The state–state obligations arising out of consent to ICSID jurisdiction providing for ICSID arbitration and contained in BITs ratified by Bolivia, Ecuador and Venezuela with other states, and even with each other, are still enforceable by investors despite these countries' denunciations of the ICSID Convention.[24]

It is worth mentioning that the BITs entered into by Chile with Bolivia, Ecuador and Venezuela,[25] respectively, all provide as dispute resolution forums either domestic courts of the host state or ICSID arbitration at the investor's discretion. If the above interpretation does not prevail, then Chilean investors would be prevented from bringing their claims under arbitration and forced to submit their claims to Bolivian, Ecuadorian or Venezuelan courts, respectively.

Such a result would not only be absurd but would violate the legitimate expectations of Chilean investors who invested in these countries with the firm belief that future disputes would be submitted to a neutral forum such as international arbitration.[26]

The same thing can be said with respect to French and Peruvian investors. The Venezuela–France and Ecuador–Peru BITs also provide for ICSID arbitration or domestic courts as the only valid forums for resolving disputes.[27]

An even more absurd result would be produced in BITs providing for ICSID arbitration as the 'only' valid forum for resolving investment disputes. This appears to be the case with the Venezuela–Germany BIT.[28] An alternative interpretation proposes the use of the most favoured nation (MFN) clause present in other BITs as a mean to avoid such an unjust result.[29] However, the procedural use of MFN clauses is still a highly debatable issue among tribunals.[30]

It is also worth adding that the vast majority of BITs contain survival clauses of 10 to 15 years in benefit of the investments made before their termination or denunciation. Such an extension in their validity also includes ICSID arbitration.[31]

Consequently, any revocation of an offer to arbitrate that already created legitimate expectations in foreign investors must be considered arbitrary and invalid.[32] This means that future investors in Bolivia, Ecuador and Venezuela seem to be the ones really affected by the Convention's denunciation since no legitimate expectations have been created in them.

Only future BITs or FTAs entered into by Bolivia, Ecuador and Venezuela with other states will be affected by the ICSID Convention's denunciation.

Practical implications

It should be note that most BIT's and FTAs, besides the ICSID Supplementary Mechanism, contemplate alternative arbitration forums – such as UNCITRAL – in the event that ICSID arbitration is not available, whereas other treaties provide for a hierarchy of forums whereby some have priority over others (ie, the investor must first exhaust a particular forum to submit its disputes and can only make use of the remaining forums in the event of unavailability of

the first forum). The latter example is the case for the majority of BITs ratified by Venezuela.-[33]

In our opinion, the existing interpretation difficulties cannot be constructed as non-availability of ICSID arbitration. It is worth highlighting what was stated in the Nova Scotia v Venezuela case. Here, the meaning of 'availability' of the Supplementary Mechanism was analysed. The plaintiff argued that it meant 'ready for its immediate use' or 'something with good chances of success'. It supported its position by expert statements, such as those made by Professor Rudolph Dolzer, who came to the conclusion that the ICSID Supplementary Mechanism cannot be considered available when 'reasonable doubt' exists as to whether or not the parties can use it. The Court rejected the arguments put forward by the plaintiff and established that 'available' refers to the possibility of exercising the right to start an arbitration proceeding, whether under the ICSID regulations or under the Supplementary Mechanism Regulations.

As we can see, depending on how the treaty has been drawn up, resorting to some of these alternative forums could be a serious mistake if ICSID arbitration is actually available because they may lack jurisdiction. As is often the case, the easy path does not seem to be a good option, neither for investors that wish to avoid engaging in the aforesaid discussion,[34] nor for states that wish to avoid acquired international commitments.

Notes

1. See Schreuer, Malintoppi, Reinisch and Sinclair, ***The ICSID Convention: A Commentary,*** Cambridge University Press 2001, p1280, par 6. Also see Sander, Barrie, 'Venezuela's denunciation of ICSID: the consequences', ***Global Arbitration Review,*** Volume 7 Issue 2, 14 February 2012.
2. Id. The depositary of the ICSID Convention is the International Bank for Reconstruction and Development, also known as the World Bank.
3. See Garibaldi, Oscar, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy', TDM 1 (2009), www.transnational-dispute-management.com
4. Gaillard, Emmanuel, 'The Denunciation of the ICSID Convention', ***New York Law Journal,*** 26 June 2007, Vol. 237 No. 122.
5. See Mantilla-Serrano, Fernando, 'La denuncia de la Convención de Washington, ¿Impide el recurso al CIADI?', Revista Peruana de Arbitraje, No. 6, 2008, p214.
6. Nolan, Michael and Sourgens, F G, 'The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study', TDM, Provisional Issue, September 2007.
7. See Hirsch, Moshe, ***The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes,*** Martinus Nijhoff Publishers, 1993, p53-54.
8. Working Group Report of the International Law Commission, 58th Session (1 May to 9 June and 3 July to 11 August of 2006), par 4.
9. ***Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt,*** ICSID Case No. ARB/84/3.
10. ***Amco Asia Corporation and others v Republic of Indonesia,*** ICSID Case No. ARB/81/1.
11.

Waguih Elie George Siag and Clorinda Vecci v Arab Republic of Egypt, ICSID Case No. ARB/05/15.

12. ***Case Concerning Nuclear Test (Australia v France),*** Judgment of 20 December 1974, ICJ, Rep.1974.
13. In favor Tejera, Victorino, 'Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study', Investment Treaty Arbitration and International Law, edited by Ian A Laird and Todd J Weiler, JurisNet, LLC, New York, 2009, p109- 118. Against this position, see Suárez Anzorena, Ignacio. 'Consent to Arbitration in Foreign Investment Laws', Investment Treaty Arbitration and International Law, edited by Ian A Laird and Todd J Weiler, JurisNet, LLC, New York, 2009, p78-79. This author considers that the existence and the scope of consent to investment arbitration contained in a domestic investment law can only be determined in accordance with the framework under which it was issued, in other words, pursuant to domestic law and considers a 'fallacy of presumption' to characterize a domestic law as a unilateral obligation governed by international law.
14. Schreuer, Christoph, 'Consent to arbitration (updated 02/2007)', TDM 5 (2005), p1, www.transnational-dispute-management.com/article.asp?key=555.
15. Such is the case for commercial arbitrations arising out of, for example, tort cases to determine liability or damages. And that is the case for most investment arbitrations which arise to determine the potential international liability of a state.
16. Mantilla Serrano, Fernando. 'La denuncia de la Convención de Washington...', op cit, p214.
17. Against this view, see Mantilla Serrano, Fernando, 'La denuncia de la Convención de Washington...', op cit, p214.
18. Youssef, Karim, ***Consent in Context: Fulfilling the Promise of International Arbitration (Multiparty, Multi-Contract, and Non-Contract Arbitration),*** West Thomson, 2009, p55-56 citing Adam Samuel, ***Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and German Law,*** 1989, p96.
19. Mezgravis, Andrés, 'The Standard of Interpretation Applicable to Consent and its Revocation in Investment Arbitration', TDM 2 (2011), p13-14.
20. When the offer expressly provides for its irrevocability for a certain period of time.,/li>
21. Paulsson, Jan, 'El Poder de los Estados para hacer Promesas Significativas a los Extranjeros', TDM 1 (2009), p 21, www.transnational-dispute-management.com/article.asp?key=1301.
22. See ***Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan,*** ICSID Case No. ARB/05/16, Award, 29 July 2008. In this case, the Tribunal held that independent of article 6(1), it is also well established in international law that a state may not take away accrued rights of foreign investor by domestic legislation abrogating the law granting these rights. In contrast, see ***Ruby Roz Agricol LLP v Republic of Kazakhstan,*** UNCITRAL Award on Jurisdiction of 1 August 2013, where it was rejected the argument that the foreign investor had 'accrued right' to arbitration since the arbitration clause in the FIL calls for the right to arbitration to be

perfected by the investor's written consent, not by an investment or by a claim arising. Hence, the tribunal held that the offer is required to be accepted in writing before it was withdrawn. To support this argument, the Tribunal cited Schreuer, Christoph, 'The ICSID Convention: A Commentary: a Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', 2nd edition 2009, par 618.

23. See Mezgravis, Andrés and González, Carolina, 'Denunciation of the ICSID Convention: Two problems, one seen and one overlooked', TDM 7 (2012), p10. See also Mezgravis, Andrés, 'The Standard of Interpretation Applicable to Consent...', op cit, p31. The Spanish version can be found in Revista Internacional de Arbitraje. Legis, Número 13, Bogotá, julio-diciembre de 2010. Also in Revista Ecuatoriana de Arbitraje (2011).

24. See article 9(3) of the BIT between Ecuador and Venezuela, which provides for ICSID arbitration as the first venue. Therefore, the obligation arising out of consent to ICSID jurisdiction between Ecuador and Venezuela to provide for ICSID arbitration to the their respective nationals was perfected between the said States when the BIT entered into force (1 February 1995), that is to say, before Ecuador's and Venezuela's denunciation of the ICSID Convention. Therefore, it is covered by article 72 of the ICSID Convention. It is important to note that in 2009 the Ecuadorian President requested the National Assembly the denunciation of 13 BITs entered into by Ecuador with Germany, United Kingdom and Northern Ireland, Finland, China, Switzerland, Chile, Venezuela, Sweden, USA, Canada, the Netherlands, Argentina and France under the argument that the ICSID arbitration clauses were incompatible with the recently approved Constitution. Such request was later returned since it required the previous and binding ruling of the Constitutional Court which later ruled the unconstitutionality of the BITs with Germany, UK and Northern Ireland, and later China, Finland, Switzerland, Chile, France, Canada, Sweden, the Netherlands, USA and Venezuela. They were later returned to the National Assembly which we understand approved the termination of the BITs with Germany, UK and Northern Ireland, China, Finland and Switzerland. In this regard, see To the best of our knowledge, the BIT between Ecuador and Venezuela has not yet been terminated by Ecuador. See www.burodeanalisis.com/2011/06/06/denuncia-de-tratados-bilaterales-tambien-preocupa-a-la-ue/ In any event, it is important to notice that the majority of all of these BITs, including the BIT between Ecuador and Venezuela, contain a survival clause of 10 years for investments made before termination.

25. See article X.2.a and b of the BIT between Bolivia and Chile; article X.2 and 3 of the BIT between Ecuador and Chile, and article 8.2 of the BIT between Venezuela and Chile. We understand the BIT between Ecuador and Chile has not yet been terminated by Ecuador's National Assembly. In any event, article XI (2) of this BIT contains a 10-year survival clause protecting Chilean investments made before termination.

26. In this regard, see Sornarajah, M, ***The International Law on Foreign Investment,*** Cambridge University Press, Third Edition, p250 which states: 'Arbitration, in a neutral State before a neutral tribunal, has traditionally been seen as the best method of securing impartial justice to him [foreign investor]. Where an international treaty backs him up by creating an obligation on the host state to submit to any arbitral proceedings brought against it by the foreign investor, a major step could be said to have been taken towards investment protection.'

27. See article 8.2 of the BIT between Venezuela and France, and article 8.2 of the BIT between Ecuador and Peru.
28. See article 10.2 of the BIT between Venezuela and Germany.
29. Gaillard, 'The Denunciation of the ICSID Convention…' op cit, supra note 4.
30. Alschner, Wolfgang; Berdajs, Ana; and Lanovoy, Vladyslav, 'Legal basis and effect of denunciation under international investment agreements', Graduate Institute of International and Development Studies, Geneva, 2010, p38-39 and note 62.
31. See, for example, article 14.3 of the BIT between Venezuela and Netherlands providing for a survival clause of 15 years in respect of investments made before the date of termination, which in the case of Venezuela occurred on 30 April 2008.
32. In this regard, see Mezgravis, Andrés, 'The Standard of Interpretation Applicable to Consent…' op cit, p33-35 which states: 'For this reason, it is submitted that the purported revocation of the offer to arbitrate contained in article 22 of the Venezuelan Investment Law through the mentioned decision No.1541 of the Supreme Tribunal of Justice [ruling that article 22 does not contain a standing offer to ICSID arbitration] is clearly arbitrary and ineffective for those investors who made their investments in Venezuela before the publication of that decision. For investments made after the publication of the decision the matter is more complicated and debatable. There are two important reasons in support of the ineffectiveness of the revocation in such scenario: i) article 22 has not been repealed, and ii) the interpretation made by the Venezuelan Supreme Tribunal of Justice is not binding on ICSID Tribunals; in fact, the decision itself recognizes it.'
33. Out of the 25 ratified BITs (including the BIT with the Netherlands which was terminated effective as of 1 November 2008), the majority, that is, 16, contain dispute resolution clauses providing for a hierarchy of arbitral forums (ie, first ICSID, second ICSID Additional Facility and third UNCITRAL ad hoc arbitration) while only three BITs can be regarded as alternative within the investor's discretion (ie, BITs with Iran, Argentina and Russia, although the latter appears to require some level of cooperation from the host State). On the contrary, in Ecuador's and Bolivia's case, most BITs provide for alternative arbitration forums in the investor's discretion.
34. See: Mezgravis, Andrés and González, Carolina. 'Denunciation of the ICSID Convention…',op cit, p16.

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