The Arbitration Review of the Americas

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Summary

The biggest challenge facing international arbitration today is to make the process sufficiently rapid to reflect the growing pace of international commerce itself. Unfortunately, as disputes have grown more complex and have involved larger sums, too often international arbitration proceedings have become longer and more costly.

This chapter will examine some of the procedures that practitioners and arbitrators have developed to make the international arbitration process more efficient and effective. It will also present significant trend in international arbitration in the United States that may have the opposite effect.

SIGNIFICANT TRENDS IN INTERNATIONAL ARBITRATION PROCEDURES

Preliminary Dispositive Issues

International arbitrations generally do not contemplate the scope of motion practice that exists in American litigation. One disadvantage of international arbitration is that issues that may be dispositive of a case and appropriate for a motion to dismiss or summary judgment in court litigation may often be considered by arbitrators only after a full evidentiary hearing on all of the issues. In such cases, international arbitration may in fact take longer than domestic US litigation that could potentially be concluded on a summary basis.

Some arbitrators have begun to use recent changes to international arbitration rules to ameliorate this problem. The intent of these rules is not to permit broad or unnecessary motion practice, but rather to provide the opportunity to dispose of cases at an earlier stage when it may be appropriate and possible to do so. For example, the IBA Rules of Evidence encourage each arbitral tribunal to identify to the parties, as early as possible, "the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate." The AAA International Arbitration Rules are even more explicit, stating that the tribunal "may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct to the parties to focus their presentations on issues the decision of which could dispose of all or part of the case." The LCIA Rules give arbitrators the power to "take the initiative in identifying the issues and ascertaining the relevant facts and the applicable law(s) or rules of law", and they also reflect the general duties for arbitrators set forth in the English Arbitration Act "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense."

Such motions should not be overused in international arbitration. Arbitrators generally will not be pleased with a litigation-style, all-out approach. Nevertheless, when an issue may dispose of all or part of a case, such as a time limitation, the validity of a release, the application of res judicata or collateral estoppel or the application of law to undisputed facts, a party should seek to have arbitrators consider the issue at an early stage in the name of efficiency. Parties should not have to present all of the evidence on all of the issues only to have the arbitrators decide the case on an issue that could have been decided early, with much more limited evidence.

DISCOVERY

The availability of discovery depends on the law of the jurisdiction in which the arbitration is held and the applicable rules. Most international arbitration rules provide that the arbitrators may order the parties to submit or to exchange documents in advance of the hearing. For example, the UNCITRAL Rules provide that "[a]t any time during the arbitral proceedings the

arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine." The ICC Rules state: "At any time during the proceeding, the Arbitral Tribunal may summon any party to provide additional evidence." The AAA International Arbitration Rules state: "At any time during the proceedings, the Tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate." The LCIA Rules list among the powers of the arbitrators the ability "to order any party to produce to the Arbitral Tribunal, and to the other parties... any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant."

These rules reflect the common practice in international arbitration with respect to discovery. In short, some document discovery is generally permitted, even in arbitrations in Latin America where discovery is rarely permitted in litigation. The difficulty in every case is for the arbitrators to determine how much discovery is appropriate. Tribunals now frequently apply the principles of the IBA Rules of Evidence, which generally permit the parties to obtain documents necessary for them to prove their case, but avoid the possibility of fishing expeditions. The IBA Rules of Evidence provide that the parties shall first submit to each other and the Arbitral Tribunal the documents on which they intend to rely. Following such an exchange, any party may submit to the Arbitral Tribunal a request that the other side produce additional documents. The request to produce must be more detailed than an American litigation document request. It must contain:

A Discussion Of A Requested Document Sufficient To Identify It Or A Description In Sufficient Detail (including Subject Matter) Of A Narrow And Specific Requested Category Of Documents That Are Reasonably Believed To Exist.

The IBA Rules of Evidence also require the requesting party to include in its request certain additional information: (i) a description of how the documents requested are relevant and material to the outcome of the case; (ii) a statement that the documents are not within the possession, custody or control of the requesting party; and (iii) why the requesting party believes the requested documents are within the other party's possession. If the party to whom the request is directed objects to some or all of the requests, based on certain objections described in the IBA Rules of Evidence, then the Arbitral Tribunal will decide what requests to produce, if any, shall be enforced.

The ever-present use of electronic communication has made dealing with these discovery issues substantially more difficult. Even when discovery requests are narrowly and properly framed, they may still require a party to review and to produce thousands of email exchanges. This has complicated the arbitrators' task of determining, generally at a relatively early stage of the case, what discovery should be permitted and what should be denied as being irrelevant, excessive or improper for other reasons. The challenge for arbitrators now will be to exercise this control and to develop innovative techniques - for example, potentially by ruling that only documents fitting certain electronic search terms shall be produced - in order to allow discovery of relevant material without overwhelming the arbitration process.

PRESENTATION OF EVIDENCE

In order to make hearings more efficient, practitioners and arbitrators are increasingly using whichever techniques from civil law or common law procedures work best for that particular case. In particular, some of the following methods can significantly focus the presentation of evidence and shorten the duration of hearings:

Written direct testimony

Significant efficiency can be gained by requiring all witnesses to submit their direct testimony in writing in advance of an appearance at the hearing. This procedure permits the arbitrators and the parties to review the evidence in advance and to focus cross-examination and the arbitrators' questioning on the most relevant and important issues. It is important for arbitrators to hear directly from witnesses and to be able to judge their credibility and the weight to be given to their evidence. This may be achieved, however, by requiring that any witness submitting direct testimony be available for cross-examination at the hearing, as provided in the IBA Rules of Evidence.

The use of written direct testimony may significantly shorten hearings. While there may be some additional cost in the preparation of such statements, it is usually not significantly different from the time that would be spent in preparing the direct testimony if it were given orally. Admittedly, written direct testimony is often drafted by counsel, rather than by the witness. It lacks the spontaneity and candor that may be present in oral direct evidence. However, arbitrators can gain sufficient experience with a witness in cross-examination to enable them to make the necessary judgments as to credibility and weight.

Written direct testimony is not appropriate for every case. In some cases, it is more important for a witness to be able to speak directly to the arbitrators, particularly where there are complex facts or significant details that need to be understood. In each case, however, parties and arbitrators should consider whether the presentation of evidence would benefit from this procedure.

CONFRONTATION TESTIMONY

Confrontation testimony - simultaneous questioning of two or more witnesses on the same issues - has been used by some arbitrators with great success. Where one or more issues have great importance in reaching the final determination on the merits, such as what occurred at a particular meeting or expert opinions on the viability of product design, it can be significantly more efficient to hear the evidence on that issue at once. Rather than hear one witness on the subject several days after an opposing witness testified on the same subject, it may be better to hear the witnesses' versions of the events together. Such a confrontation allows arbitrators immediately to determine where the witnesses are in agreement and where they have differences. Through questioning both witnesses simultaneously about those differences, the arbitrators can more easily draw conclusions as to whose testimony is more credible, more persuasive or more supported by documents.

The conduct of such confrontation testimony requires signifi- cantly greater preparation than the usual hearing. It is important for the arbitrators to understand the evidence that has already been submitted prior to such testimony, so that they can intelligently question the witnesses on their areas of agreement and disagreement. Moreover, the structure of the questioning must be carefully arranged in advance with the parties, and the parties must have ample opportunity to ask their own questions, particularly of the other side's witness.
Meeting of experts

A related procedure, also suggested in the IBA Rules of Evidence, is the standard English procedure of requiring experts to meet to discuss their conflicting reports following their submission and prior to any hearing. The experts attend the meeting without counsel, and they are instructed to prepare a list of those issues on which they have been able to reach agreement. Such a meeting can frequently lead to agreement on a substantial number

of points and thus limit the testimony to be given at the hearing. Opposing experts are almost always professional colleagues. When forced to meet, they find it difficult to hold on to opinions espoused by the party that hired them if they are difficult to justify under the standards of their profession. An expert does not want to lose face to a professional colleague, and usually they do not want to leave without some areas of agreement. In some cases, the experts are able to reach agreement on so many issues that their appearance at the hearing becomes unnecessary.

SIGNIFICANT TRENDS IN US ARBITRATION LAW

Given the vast number of US courts decisions dealing with arbitration law, there are far too many issues to cover in a short chapter like this one. However, for the international practitioner operating in the Americas, one trend particularly worth noting is the impact on US international arbitration law of the arbitrability of consumer, employment and other public policy-related disputes. US law permits the arbitration of virtually any dispute, so long as there is a valid agreement to arbitrate - even one contained in a form contract. Therefore, many domestic arbitrations now involve claims by consumers, employees and others whose rights bear on the public interest.

As a result, courts have been increasingly active in supervising such cases to ensure their essential fairness to claimants. Courts have required increasingly strict standards of disclosure for arbitrators and have found conflicts of interest to exist where they did not before. Similarly, while in commercial and international cases it has been rare for a court to set aside awards, consumer and employment cases receive greater scrutiny and have more often been overturned. The doctrine of 'manifest disregard of the law', which is not found in US Federal Arbitration Act, has been applied with greater frequency in such cases in order to set aside arbitral decisions with which the courts have disagreed. So far, such decisions have generally been limited to the public policy areas, but it is possible that their logic may increasingly be applied to international commercial cases. If so, that would reflect a significant setback for international arbitration in the US.

The arbitrability of consumer and employment disputes has also led to the availability of class actions in arbitration. In signifi- cant part because of the expense and uncertainty of jury trials in civil matters in the US, many companies include arbitration clauses in their contracts with consumers, in public company articles of association and in other contexts where disputes about the company's relationship with groups of individuals are anticipated. In the 2003 decision in Green Tree Financial Corp v Bazzle, a plurality of the US Supreme Court held that, at least where the arbitration clause is silent on the issue, the arbitrators have authority under the Federal Arbitration Act to decide whether claims on behalf of a class can be pursued in arbitration as a class action.

A number of companies have responded to Bazzle by including in the arbitration clause a provision limiting or excluding class proceedings. However, companies that prefer arbitration as a means to resolve disputes should take note of recent US federal and state court decisions invalidating limitations on class actions contained in arbitration clauses. These recent decisions indicate that a US court may read a company's arbitration clause to require class action arbitrations, even if the clause contains no mention of class action arbitration, and even if the clause expressly excludes class arbitration. These decisions may pose particular problems and uncertainties for transnational businesses.

Until recently, the prevailing view had been that arbitration clauses prohibiting class action procedures would be respected. Recently, however, some courts have struck down class arbitration exclusions on the ground that they were unconscionable, either under state law or under the federal law principle that an arbitration agreement may be unenforceable if it prevents effective vindication of statutory rights.

The decisions, all arising in the context of consumer cases, have reasoned that class action exclusions would effectively insulate the defendants from liability for illegal conduct when arbitration costs would exceed the value of individual claims and plaintiffs otherwise lack sufficient incentives to seek redress. The First Circuit's April 2006 decision in Kristian v Comcast Corp, for example, applied this reasoning to hold that class exclusions prevented effective vindication of both federal and state consumer antitrust claims. The reasoning of these decisions could be read to suggest that all arbitration clauses applicable to a company's relationships with a sufficiently large group of persons must be viewed as allowing class arbitration, even if the unambiguous language of the parties' agreement prohibits them.

No US court has yet considered whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards would require a different result in an international arbitration to which the Convention applies. Some European countries do not recognize all aspects of class action judgments, so it is possible that a "class action arbitration" award issued in the US might be difficult to enforce in Europe.

It is too early to tell whether the recent decisions summarised here will be broadly followed, and the US Supreme Court has not addressed the issue of class action waivers in arbitration clauses. Because of the many monetary and financial advantages that claimants and their attorneys see in class action procedures, however, it is certain that claimants will continue to try to develop this law to multiply the number of 'class action arbitrations'.

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ICSID Arbitration in the Americas

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Summary

The Americas - and, in particular, Latin America - continue to provide headlines in the world of investor-state arbitration. About half of the 100-plus cases currently pending at the International Centre for Settlement of Investment Disputes (ICSID) involve claims against governments in North, Central, and South America. A number of the largest ICSID awards, including several rendered in the past year, have been against governments in the Americas. Substantial numbers of claims continue to be filed against governments in the Americas - including the first cases filed under the dispute resolution provisions of the Central America-Dominican Republic-US Free Trade Agreement (CAFTA-DR), which were recently invoked by investors for the first time. With populist leaders, historically unprecedented oil and mineral prices, and talk of nationalisation on the rise in several Latin American countries, it seems likely that the upward trend in the number of new investorstate disputes will continue. In the meantime, Canada appears finally on its way to completing the process under which the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) will enter into force with respect to Canada and Canadian investors. At the other extreme, Bolivia is the first nation to have withdrawn from the ICSID Convention; Ecuador reportedly intends to reject ICSID arbitration for future oil, gas and mining disputes; and Venezuela has threatened to take a similar path.

BACKGROUND

The notion that a 'visiting' investor can assert claims in international arbitration against the sovereign state which is 'hosting' the investment remains relatively new. Throughout much of the world, it had long been the case that an aggrieved investor's sole recourse was to prevail on its own government to exercise 'diplomatic protection', ie, to intervene (diplomatically or otherwise) on its behalf vis-á-vis the host state. As recently as 1970, the International Court of Justice held in the Barcelona Traction case that an aggrieved foreign investor had absolutely "no remedy in international law" that it could pursue in its own stead.[1]

The prevailing view in Latin America was similar, although with an important twist, known as the Calvo doctrine. Named for the 19th-century Argentine diplomat and lawyer Carlos Calvo, the Calvo doctrine emerged largely as a reaction to 'diplomatic protection' that was all too often accompanied by military threats and intervention (so-called 'gunboat diplomacy'). The Calvo doctrine posited that jurisdiction in international investment disputes lies with the country in which the investment is located, with no right of recourse by the investor to benefit from diplomatic intervention. The Calvo doctrine found its way into foreign investment contracts and even into treaties between Latin American and other States, where it became known as the Calvo clause. Though the Calvo doctrine was perhaps an understandable reaction to bullying (and worse) by the governments of many foreign investors, it is not surprising that many foreign investors were unsatisfied with the treatment they received in the host state's local courts.

In 1966, however, the ICSID Convention came into force, when it was ratified by 20 countries. Today, the ICSID Convention has been ratified by over 140 countries, including the vast majority of governments throughout the Americas. Notable exceptions include Brazil, Mexico, and Canada - although, as mentioned above, Canada appears to be on the way to completing the process whereby the ICSID Convention will be in force as to Canada and Canadian investors.[2]

The ICSID Convention in essence provides that a signatory state may 'consent' to arbitration claims being filed against it by an investor from another signatory state. That consent can

be manifested in a number of different ways, including investment treaties, investment agreements, and the local investment laws of the host states. Today, more than 2700 investment treaties are in existence. Numerous investment agreements also provide for investor-state arbitration. Although these treaties and agreements may provide for different fora (or a choice of fora) for such arbitration, the most common forum by far is ICSID, which operates under the auspices of the World Bank, with its seat in Washington, DC.

CASES FILED AT ICSID AGAINST GOVERNMENTS IN THE AMERICAS

Over the past decade, the number of filings at ICSID has increased dramatically. Only 14 cases had been brought at ICSID as of 1998. Today, about 250 cases have been filed. (It is estimated that more than 100 other investor-state cases have been filed in other fora, whose confidentiality rules often make the number more difficult to track than at ICSID, where registered cases are reported on their website.)

The vast majority of these cases are based on investment treaties, usually bilateral investment treaties (BITs), but also multilateral trade and investment protection treaties, such as the tripartite North American Free Trade Agreement (NAFTA), to which Canada, Mexico, and the US are parties, or the CAFTA-DR, which has been signed by the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, the US, and Costa Rica. (In October 2007, voters in Costa Rica - the only signatory that had not ratified the treaty - narrowly voted to approve CAFTA-DR in a national referendum.) Because Mexico has not signed the ICSID Convention, and because the Convention is not yet in force with respect to Canada, NAFTA claims may be heard at ICSID's Additional Facility, which has its own procedural rules that differ from the ICSID Arbitration Rules. NAFTA claims may also be brought on an ad hoc basis or at a different arbitral institution under the rules of the UN Commission on International Trade Law (UNCITRAL). About a dozen NAFTA cases have been filed under the ICSID Additional Facility Rules.

Approximately 40 per cent of all of the cases registered so far at ICSID have been against governments in the Americas. A very high number of those cases have been brought against Argentina. (There are currently over 30 cases pending against Argentina at ICSID, in addition to a dozen or so cases previously filed against Argentina that have since been resolved.) Most of the Argentine cases arose out of Argentina's economic crisis in 2001-2002, its resulting currency devaluation and the policies adopted by the government in response to the crisis. But even if one discounted the Argentine cases entirely, a quarter of the cases at ICSID would still be against governments in the Americas.

After falling slightly from 2005 to 2006, the number of cases registered at ICSID is up substantially in 2007. Through early October, there have already been more than 30 cases filed at ICSID. If the trend continues through the end of 2007, ICSID could have as many as 40 cases registered this year (about twice as many as in 2006). A third of the cases registered so far in 2007 are against governments in the Americas, specifically, Argentina, Costa Rica, Guatemala, Nicaragua, Paraguay, Peru, and Venezuela.

The newly registered cases involve a variety of subject matters, including debt instruments (Giovanni A Beccara et al v Argentina); a fish flour production enterprise (Tza Yap Shum v Peru); capital contributions to an enterprise (Alasdair Ross Anderson et al v Costa Rica); and a water services concession (Impregilo SpA v Argentina). They also include Railroad Development Corp v Guatemala, the first case at ICSID brought under CAFTA-DR. (A second case under CAFTA-DR against the Dominican Republic was apparently filed earlier this year

under the UNCITRAL Rules at the ICC.) They also include the first mass claimant arbitration filed at ICSID. Giovanni A Beccara is reportedly brought on behalf of 195,000 claimants, who allege US$4.4 billion in damages arising from Argentina's alleged default on payment of sovereign bonds. In the meantime, the Tza Yap Shum case is apparently the first arbitration filed at ICSID by a Chinese investor. Submitted under the China-Peru BIT, the case is another indication of the rapidly growing level of Chinese investment in Latin America.

CASES DECIDED AT ICSID INVOLVING GOVERNMENTS IN THE AMERICAS

The increasing number of ICSID cases, and of published decisions arising from such cases, have produced a growing and evolving body of ICSID jurisprudence. Although decisions by one arbitral tribunal are not binding on another, they are considered persuasive authority, and tribunals in investor-state cases have recognised "a duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors toward the certainty of the rule of law."[3]

JURISDICTION ISSUES

ICSID proceedings are often bifurcated into separate phases addressing jurisdiction and the merits. As the growing numbers of cases filed over the past decade have made their way through the process of arbitration, a first 'wave' of ICSID decisions arising from the Americas involved mostly issues of jurisdiction. For example, of all of the ICSID cases filed against Argentina, only seven have been concluded on the merits, while 20 have had decisions issued on jurisdiction.

There have been several discernible trends in rulings on jurisdiction. For example, a number of jurisdiction cases arising from the Americas involved investment agreements between the investor and host state that at least arguably provided for the exclusive jurisdiction of the domestic courts. With some claimants arguing that those provisions amounted to efforts to resurrect the Calvo clause and circumvent the investment treaties, tribunals have consistently rejected the use of such provisions as a bar to jurisdiction.[4] (However, at least one tribunal has suggested in dictum that an unambiguous waiver of treaty rights in an investment agreement would serve to waive jurisdiction.)[5]

Tribunals deciding jurisdictional issues in cases arising from the Americas have generally followed the larger trend of construing treaty definitions literally and, some would argue, broadly. Depending on the language of the treaty, the potential range of 'investors' who can bring claims against a host state is large. The ICSID Convention allows contracting states to treat an entity that is incorporated in the host state - but 'controlled' by an entity in the other state - to be treated as a 'national' of the other state. Thus, for example, in Aguas del Tunari, SA v Bolivia, the tribunal concluded that it had jurisdiction over claims by a Bolivian company against Bolivia under the Bolivia-Netherlands BIT, when the Bolivian company was "controlled" by Netherlands entities in its upstream ownership.[6] Conversely, tribunals have concluded that, under some treaties, they have jurisdiction to hear claims by non-controlling and indirect shareholders. Thus, in CMS Gas Transmission Co v Argentine Republic, the tribunal found it had jurisdiction to hear indirect claims by a minority shareholder, where the US-Argentina BIT at issue defined "investment" as including "every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party."[7]

The language of many treaties has proven sufficiently broad to allow investors to structure their investments through holding companies in particular countries, in order to be able to

invoke the protections of a BIT that might not be available if the investor held the investment directly in the host state. The importance to an investor of carefully considering the treaties available for a particular investment is underscored by two cases brought against Ecuador involving the same value-added tax. One company brought its claim under the US-Ecuador BIT and recovered an award of US$71.5 million.8 The other company brought its claim under the Canada- Ecuador BIT; however, the tribunal concluded that a provision in that BIT excluded tax cases from the tribunal's jurisdiction. The claimant in that case, therefore, recovered nothing.[9]

Although structuring investments through holding companies to invoke a particular BIT has been criticised as 'treaty shopping', the reality is that companies investing in the Americas (and elsewhere) are engaging in that practice. There are some steps that host states can take in an effort to limit the effects of 'treaty shopping', such as including waiver-of-jurisdiction clauses in their investment contracts (though it remains to be seen whether tribunals will follow the dictum of Aguas del Tunari and enforce such clauses) and the inclusion of denial of benefits provisions in their BITs. A denial of benefits clause, if properly drafted and invoked, may preclude a claimant from asserting jurisdiction based on a holding company in a country that has little or no connection to the dispute at issue.

MERITS ISSUES

Most investment treaties provide the investor with a variety of substantive protections, including, typically, guarantees that the state:

- will not expropriate property - directly or indirectly (eg, through regulation) - without compensation;
- will provide the investor with 'fair and equitable' treatment;
- will treat the investor no less favourably than its own nationals and no less favourably than required by international law;
- will not discriminate against the investor;
- will afford the investor 'full protection and security'; and
- will honour its contractual and other legal obligations owed to the investor (the so-called 'umbrella' clause).

In many of the recent merits decisions arising out of the Americas (as elsewhere), tribunals continue to struggle with regulations that adversely impact international investors - especially when those regulations serve compelling public interest or policy purposes. Although there are perhaps too few cases to announce a trend, it is interesting to note that several recent cases rejected expropriation claims based on such regulations, only to find that the regulations violated the guarantee of 'fair and equitable' treatment. For example, in LG&E Energy Corp v Argentine Republic, the tribunal rejected the claim for expropriation when Argentina had changed the legal and regulatory framework that had induced the claimants to invest in Argentina. According to the tribunal in LG&E: "The abrogation of these specific guarantees [contained in the original regulations] violates the stability and predictability underlying the standard of fair and equitable treatment."[10] Similarly, in Azurix v Argentine Republic, the tribunal concluded that the impact of various adverse regulatory actions against a water concession "was not to the extent required to find that, in the aggregate, these actions amount to an expropriation . . ."; however, the actions of the government, when

considered together, "reflect[ed] a pervasive conduct of the [government] in breach of the standard of fair and equitable treatment."[11]

The LG&E case is also significant for its recognition and application of the 'necessity' defence. Under the necessity defence, a state may be excused from its treaty obligations when the actions at issue were taken to safeguard an essential interest against a grave and imminent peril.[12] In LG&E, the tribunal concluded that the regulatory actions taken by Argentina were - at least for a limited period of time - justified by the severity of Argentina's financial crisis. The tribunal concluded that Argentina was not liable for damages during that period of time.[13] In this respect, the LG&E decision reached the opposite conclusion from the tribunal in a case decided the previous year. In CMS Gas Transmission Co v Argentine Republic, the tribunal concluded that Argentina's financial crisis did not satisfy the conditions of the necessity defence.[14] In LG&E, the tribunal held a separate damages phase and, in July 2007, announced its award in favour of the claimant in the amount of US$57,400,000.[15] Still, the case is more likely to be remembered for its recognition of the necessity defence than for its substantial award in favour of the claimant.

The LG&E and CMS decisions are reminders that, as ICSID's jurisprudence continues to evolve, there will be an increasing number of conflicting decisions. Another area where the decisions appear to be inconsistent involves the so-called 'umbrella' clause, in which the host states agree in the treaty to comply with any obligation they have undertaken with respect to investors and/or investments of the other state. Some claimants have argued that an umbrella clause can elevate a claim for breach of an investment agreement into a claim under an investment treaty. The first case to address that argument was SGS v Pakistan, which rejected the notion that a contract claim could be transformed into a treaty claim by virtue of an umbrella clause.[16] But several cases arising out of the Americas have taken the opposite view. In LG&E, the tribunal stated that the umbrella clause "creates a requirement for the host state to meeting its obligations toward foreign investors, including those that derive from a contract. Hence, such obligations receive extra protection by virtue of their consideration under the bilateral treaty."[17] But the tribunal in LG&E appeared to go even further by holding that Argentina's abrogation of guarantees to foreign investors contained within a statutory framework could breach the umbrella clause.18 In Enron v Argentine Republic, the tribunal reached the same conclusion. In awarding the claimant US$106 million, the tribunal determined that Argentina's failure to comply with the obligations it had assumed under its agreement with the investor and in its domestic regulations constituted a violation of the treaty's 'umbrella' clause, as well as its 'fair and equitable treatment' provision.[19] However, in the recent decision of the annulment committee in CMS v Argentine Republic, the committee annulled the tribunal's earlier finding that the umbrella clause could be applied to erga omnes obligations (such as unilateral commitments set forth in the state's regulatory framework), on the basis that the tribunal had not adequately stated the reasons for its finding. But in so ruling, the committee expressed scepticism that the umbrella clause could be applied to such obligations.[20]

Despite a number of awards against host states, it should be recognized that host states have also prevailed in their disputes with investors. For example, in several recent cases, Vieira v Chile,[21] Bayview Irrigation District et al v Mexico,[22] and MCI Power Group LC v Ecuador,[23] the tribunals sustained the respondents' objections based on jurisdiction. In Fireman's Fund Ins Co v Mexico[24] and United Parcel Service v Canada,[25] both NAFTA cases, the tribunal ruled in favour of the respondents on the merits.

OTHER DEVELOPMENTS

Few events in Latin America attracted more attention in the world of investor-state arbitration than Bolivia's withdrawal from the ICSID Convention. As a practical matter, the withdrawal does not mean that investor-state arbitration can no longer be brought against Bolivia at ICSID. Bolivia still has fully ratified BITs with ICSID clauses with countries such as Belgium and Luxembourg, France, Germany, the Netherlands, the UK and the US. Even after Bolivia's withdrawal from the ICSID Convention becomes effective (3 November 2007),[26] cases can still be brought against Bolivia at the ICSID Additional Facility, as well as other arbitral fora speci- fied in the BITs. Only a country like Brazil - which has neither signed the ICSID Convention nor ratified any of the 14 BITs it has signed - will avoid arbitration at ICSID.[27]

But Bolivia's withdrawal is emblematic of a tide of populism and nationalisation that has been spreading throughout much of Latin America over the past several years. Large-scale nationalisations are underway in Venezuela, Ecuador and elsewhere. After expelling its World Bank representative in April, it was reported in early October that Ecuador would no longer accept ICSID jurisdiction over disputes related to oil, gas and mining. (As this article goes to print, it is unclear how and to what extent Ecuador intends to accomplish that goal.) Similarly, President Hugo Chávez announced that Venezuela would be withdrawing from the World Bank and IMF, and has suggested that Venezuela might also withdraw from the ICSID Convention. In addition, Argentina is reportedly planning to ask the US government formally to recognise Argentina's right to declare its financial crisis in 2001-2002 as an emergency that excused Argentina from its obligations under the US-Argentina BIT.

Many of these events arise from social, political, and economic trends that have little to do with ICSID, and in many ways trace their roots to the historic revulsion in many Latin American countries against any perceived relinquishment of national sovereignty (the same revulsion that gave rise, more than 100 years ago, to the Calvo doctrine). But the first wave of jurisdictional decisions against Latin American governments - which were decided mostly in favor of claimants - may also have contributed to the perception that ICSID arbitration was systemically unfair to countries from the developing world. As Latin American countries become increasingly sophisticated - and increasingly successful - in defending ICSID cases, one can only hope that that perception is changing.

But in many countries in Latin America, hostility toward so-called 'neoliberal' policies and institutions appears unlikely to decline any time soon. It is almost inevitable that such hostility - and the policies that are born of it - will lead to an increasing number of ICSID arbitrations being filed in the coming years.

In the meantime, the number of arbitrations filed under NAFTA and other treaties against governments in the northern part of the hemisphere are increasing as well. That trend appears equally likely to continue.

Notes

1. Case Concerning the Barcelona Traction, Light and Power Co Ltd, (Belgium v Spain), 1970 ICJ Reports, 3 paragraph 78.
2. Although Canada ratified the ICSID Convention in December 2006, it has not yet complied with articles 68 and 69, which require parties to the Convention to implement its provisions within their territories, in compliance with their respective constitutional procedures. Under Canada's constitution, its provincial governments are responsible for the regulation of property and civil rights and courts

administration. The provinces of Alberta and Quebec have not yet taken the necessary steps to implement the ICSID Convention, and as Canada has not yet elected to exclude these provincial territories from the Convention's application upon written notice, as permitted under article 70, the Convention arguably does not yet apply to Canada or Canadian investors.

3. Saipem, SpA v Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ICSID Case No. ARB/05/07, paragraph 67.
4. See, eg, Aguas del Tunari SA v Bolivia, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/03 (AdT Decision); Azurix Corp v Argentina, Decision on Jurisdiction, 8 December 2003, ICSID Case No. ARB/01/12; Compañia de Aguas del Aconquija SA & Vivendi Universal v Argentina, Award, 21 November 2000, ICSID Case No. ARB/97/3. In the interests of full disclosure, Crowell & Moring LLP was counsel for the respondent in the Aguas del Tunari case.
5. AdT Decision, paragraph 118.
6. AdT Decision, paragraph 323.
7. Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8.
8. Occidental Exploration and Prod Co v Ecuador, Final Award, 1 July 2004, LCIA Case No. UN3467 (UNCITRAL). An appeal by Ecuador in the UK was rejected by the Queen's Bench in a decision that was affirmed by the Court of Appeal in London on 4 July 2007.
9. EnCana Corp v Ecuador, Final Award, 3 February 2006, LCIA Case No. UN3481 (UNCITRAL).
10. LG&E Energy Corp v Argentine Republic, Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1 (LG&E), at paragraph 133.
11. Azurix v Argentine Republic, Award, 14 July 2006, ICSID Case No. ARB/01/12, paragraph 332. By contrast, several earlier decisions agreed with the claimants that the state's regulatory actions amounted to expropriation - although these cases involved the denial or revocation of permits and licenses, without which the businesses could not operated. See, eg, Metalclad v United Mexican States, Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1; Tecmed v United Mexican States, Award, 29 May 2003, ICSID Case No. ARB/(AF)/00/2.
12. The necessity defence is articulated in article 25(1) of the International Law Commission's Draft Articles on State Responsibility as follows: "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."
13. LG&E, paragraph 267(e).
14. Award, 12 May 2005, ICSID Case No. ARB/01/8.
15. LG&E Energy Corp. v Argentine Republic, Award, 25 July 2007, ICSID Case No. ARB/02/1.

16. Decision on Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13.
17. LG&E, paragraph 170.
18. Id, paragraph 175.
19. Award, 22 May 2007, ICSID Case No. ARB/01/3, at paragraph 251-277.
20. CMS Gas Transmission Co v. Argentine Republic, Decision of the ad hoc committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ICSID Case No. ARB/01/8, paragraphs 86-100. Although the committee annulled this portion of the tribunal's earlier decision, it affirmed the overall award.
21. Decision on Jurisdiction, 21 August 2007, ICSID Case No. ARB/04/7.
22. Decision on Jurisdiction, 19 June 2007, ICSID Case No. ARB(AF)/05/1 (NAFTA).
23. Award, 31 July 2007, ICSID Case No. ARB/03/6 at paragraph 351-353.
24. Award, 17 July 2007, ICSID Case No. ARB(AF)/02/1 (NAFTA).
25. Award, 11 June 2007, UNCITRAL (NAFTA).
26. Article 71 of the ICSID Convention provides that "[a]ny Contracting State may denounce this Convention by written notice to the depositary of this Convention [i.e., the World Bank]. The denunciation shall take effect six months after receipt of such notice." The World Bank received Bolivia's notice on 2 May 2007.
27. Bolivia has also indicated that it may withdraw or revise its BITs. It should be noted, however, that most BITs contain termination provisions providing that any investment made before the date of termination will be protected for a number of years. For example, the U.S.-Bolivia BIT provides that any investment made before the date of termination will be protected for 10 years thereafter.

Argentina

Guido Barbarosch and **Pablo F Richards**
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Summary

In the 2007 edition of Arbitration Review of the Americas, we discussed the importance of court support to arbitration and elaborated on the then current situation in the Republic of Argentina. We mainly focused on certain statements of Argentine government officials referring to the CMS Gas Transmission v Argentina Republic case pending before ICSID, and on the government views on whether Argentina would undertake to carry out potentially adverse final awards.[1]

We also analysed a recent holding of Argentina's highest court on constitutional and federal matters, the National Supreme Court of Justice, in José Cartellone Construcciones Civiles v Hidroeléctrica Norpatagónica o Hidronor. The court stated in an obiter dictum that arbitral awards would always be subject to appeal whenever considered "unconstitutional, illegal or unreasonable".

This obiter dictum was construed by some legal scholars as a potential hazard to future ICSID awards, which on the view stated by the court might be subject to court supervision. Finally, we concluded that an official statement of the Argentine attorney general in the CMS case that Argentina will comply with section 54.1 of the ICSID Convention brought some hope that the country will respect its international commitments.

However, an anti-arbitration injunction filed by Argentina, which sought to interfere with an international arbitration, is proving otherwise. Argentina requested an interim measure before the Argentine Court of Appeals in Administrative Matters, 4th section (CNCAF), asking for the suspension of the arbitration proceedings in National Grid Transco plc (UK) v Argentina, being held in Washington, DC. On 3 July 2007, the CNCAF, in EN-Procuración del Tesoro v Cámara de Comercio Internacional (Argentina v ICC)[2] issued an interim measure ordering: (i) the panel of arbitrators - Messrs Andrés Rigo Sureda, Alejandro Miguel Garro and Eli Whitney Debevoise - to suspend the arbitration proceedings in the National Grid Transco case; and (ii) the claimant to abstain from moving forward with the arbitration proceedings.

Since the National Grid Transco case follows UNCITRAL rules, the eventual enforcement of the award differs from what is provided under ICSID arbitration. While in the former enforcement is governed by the 1958 New York Convention, which admits court supervision,[3] in the latter no such court supervision is allowed. That is, Argentine courts would probably have had the chance to control the award of the National Grid Transco case at the time of enforcement.[4]

After the anti-arbitration injunction was rendered, the panel of arbitrators informed the parties that they would not suspend the proceedings. Therefore, claimants shall have no interest to reverse the decision,[5] so the ruling shall remain as an unsuitable precedent. For instance, a potential enforcement of the National Grid Transco case in Argentina will have to face this precedent with a negative forecast for claimants.

The question examined here is not the right of Argentina as respondent to present its case or to resort to any remedy available under the arbitration rules and/or under the national legislation of the forum or in the country where recognition and enforcement of the award is sought. Rather the issue under analysis is Argentina's conduct, as it interferes through a local court with an international arbitration when, at the time the interim measure was rendered, both Argentina and the local court should have known that all local courts lacked jurisdiction over the case.

Argentina has signed over 50 bilateral investment treaties (BITs) and been sued in more than 29 international arbitrations (ICSID and others) and the National Grid Transco case will probably remain as a study case for the investor-state dispute resolution methods and its effectiveness. For the reputation of Argentine courts, it would be desirable that the decision rendered in the Argentina v ICC case is promptly reversed.

STATEMENT OF THE CASE

The Argentina v ICC decision states that National Grid Transco plc, a company incorporated in the UK, owned a participation in Transener, a leading company in the public service of the extrahigh- voltage electricity transmission system in the Republic of Argentina, and that National Grid Transco began an international arbitration arguing that the results of the enactment in 2002 of the Argentine emergency laws affected its investment in Transener and, as a consequence, breached the UK/Argentine BIT.

The UK/Argentina BIT refers to arbitration under the UNCITRAL arbitration rules when the parties do not reach an agreement on other types of arbitration (ie, ICSID or ICISD Additional Facilities) in a three-month period.[6] Under the UNCITRAL arbitration rules, National Grid Transco and Argentina appointed Debevoise and Garro as arbitrators, respectively, and those arbitrators appointed Rigo Sureda as chairman of the panel.[7]

On 20 December 2004, Argentina challenged Rigo Sureda, arguing that there were serious doubts regarding his impartiality or independence. The grounds for the alleged doubts were the links between Rigo Sureda and the Argentine attorney Santiago Tawil: the former acted as chairman in the Azurix and Siemens cases against the Republic of Argentina, where Tawil acted as attorney for the claimants; and in the Duke Energy International Peru Investments No 1 Ltd c/Republic of Peru case, Tawil was appointed arbitrator by claimants who were represented by Fulbright & Jaworski, a law firm where Rigo Sureda was senior advisor.

Neither National Grid Transco nor Rigo Sureda accepted the grounds for the challenge. According to article 12 of the UNCITRAL arbitration rules, the challenge should be decided by the appointing authority designated by the secretary-general of the Permanent Court of Arbitration (PCA) at The Hague. Thereupon, the secretary-general of the PCA designated the Court of Arbitration of the ICC to decide on the challenge.

On 2 January 2006 the Court of Arbitration of the ICC communicated to the parties its decision to reject the challenge submitted by Argentina. According to article 2.13 of the ICC Rules,

[d]ecisions Of The Court As To The Appointment, Confirmation, Challenge Or Replacement Of An Arbitrator Shall Be Final. The Reasons For Decisions By The Court As To The Appointment, Confirmation, Challenge, Or Replacement Of An Arbitrator On The Grounds That He Is Not Fulfilling His Functions In Accordance With The Rules Within The Prescribed Time Limits, Shall Not Be Communicated.

Argentina's reaction was to file an appeal for annulment of the decision. Argentina resorted to the local courts, based on section 760 of the Argentine Civil and Commercial Procedural Code (the Procedural Code), which allows an annulment proceeding against the final award of an arbitral panel.

Argentina requested the annulment of the decision of the Court of Arbitration of the ICC, arguing that the decision rendered was not only wrong but also that failure to communicate the reasons to reach that decision affected its constitutional rights of defence. In addition,

Argentina requested CNCAF interim measures ordering: (i) the panel of arbitrators to suspend the arbitration proceedings; and (ii) National Grid Transco to abstain from going forward with the arbitration process until a final court decision on the annulment is rendered.[8]

The CNCAF requested the Argentine Ministry of Foreign Relations to obtain from the panel a copy of the National Grid Transco case. The ministry, through the Argentine embassy in the US, addressed the request to the arbitral panel; but such request was not answered in two opportunities.

Therefore, in absence of a due response from the panel, CNCAF considered appropriate to issue the interim measures to protect the alleged violation of the constitutional rights of Argentina.

Surprisingly, CNCAF in its own decision argued that it could not analyse its own jurisdiction over the case, because the panel of arbitrators did not comply with the submission of the copy of the docket requested. Even more astonishing is the failure of CNCAF to request a copy of the arbitration docket to Argentina before deciding on the case. It did so on 17 July 2007, after issuing the anti-arbitration injunction.

Furthermore, the anti-arbitration injunction resolution declared applicable section 196 of the Procedural Code, which reads:

A Judge Must Not Order Interim Measures When The Case Is Not Of His Competence. However, The Interim Measure Ordered By An Incompetent Judge Will Be Valid Whenever It Complies With The Other Sections Of The Chapter, But This Will Not Prorogate The Jurisdiction. The Judge That Ordered The Interim Measure Will Deliver The File To The Competent Judge As Soon As Required.

The hearings in the National Grid Transco case were scheduled for 9 July 2007. A few days before, Argentina requested and CNCAF issued the anti-arbitration injunction. Their ruling stated that if the arbitration proceding continued and, thereafter, the award was issued, the request for annulment of the decision on the challenge of Mr Rigo Sureda would have been late and ineffective. Therefore, CNCAF found that Argentina had a right to the requested injunction, so that the decision on Rigo Sureda's challenge could be revisited in due time.

ANALYSIS

It is worth analysing whether the CNCAF had jurisdiction over the arbitral proceedings and commenting on some general issues related to the challenge of arbitrators. Since the AR v ICC docket does not contain enough information about the grounds on which Rigo Sureda was challenged, we will not include any comments on that matter.

In the Argentine/UK BIT, Argentina accepted to prorogate the jurisdiction of investor-state disputes to international arbitration.[9] Although some Argentine scholars have questioned Argentina's right to prorogate those disputes to international arbitration, we understand that a reasonable construction of the Argentine Constitution, international treaties, and national laws authorise said prorogation. However, it would exceed the scope of this analysis to expand on these issues.

Did CNCAF have jurisdiction over the appeal for annulment of the decision of the ICC under section 760 of the Procedural Code? Did it have jurisdiction to hear on an anti-arbitration injunction requested under section 195 of the Procedural Code?

The only possible answer to both questions is plainly, no. From the statement of AR v ICC decision and its docket, we know that the National Grid Transco case is being held in Washington, DC. Also, that National Grid Transco offered The Hague as the forum for the arbitration, but finally accepted Argentina's proposal of Washington, DC. Therefore, any need of assistance, control or supervision of national courts should have come from those of the agreed forum.

It is an accepted principle in an international arbitration (except in ICSID arbitration, which is considered a stateless arbitration), that "the law governing the arbitration (the so-called lex arbitri) is typically considered to be the law of the country where the proceedings are held and the award rendered".[10] And, "[t]he law governing the arbitration determines the relationship between the arbitral tribunal and national courts. It will, for instance, determine whether, and to what extent, judicial review of the award or court intervention during arbitral proceedings is authorized."[11]

It is also submitted that where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings.[12]

The New York Convention, ratified by Argentina in 1998, reinforces this position obliquely.[13] "Article V(1)(d) permits nonrecognition of an arbitral award if '[t]he composition of the arbitral authority or the arbitral procedure was not in accordance... with the law of the country where the arbitration took place'. Similarly, Article V(1)(a) permits non-recognition of an arbitral award if... the arbitration agreement was not valid under the curial law".[14] Thus, it is clear that US federal courts would have jurisdiction over any question raised on the National Grid Transco case arbitration proceeding.

Is Section 196 Of The Procedural Code, Which Authorises An Incompetent Court To Issue An Interim Measure When Urgency Advises To Do So, Applicable To International Commercial Arbitration?

Again, no is the only possible answer.

The CNCAF and Argentina should have known that the antiarbitration injunction issued by an Argentine court against an arbitration whose forum was Washington, DC would be futile, because the Argentine court does not have authority over the arbitrators. In the National Grid Transco case the panel of arbitrators refused to follow the order of the CNCAF.

Local courts decided otherwise in a similar precedent, Reef Exploration Inc v Compañía General de Combustibles.[15] The Court of Appeals in Commercial Matters (CNCom), Section D, allowed the enforcement of an award, even when a previous decision of CNCom, Section B, found that Argentine courts had jurisdiction over the matter being held in an AAA arbitration in Dallas, Texas.

Section B of CNCom issued a ruling over jurisdiction that resulted in a typical anti-arbitration injunction. The ruling ordered the AAA arbitration panel to decline its jurisdiction in favor of Argentine courts. The panel of arbitrators of the Reef case did not accept the order. When the time of enforcement of the Reef arbitration award arrived, Section D of CNCom argued politely that Section B's ruling would have a point only if the panel of arbitrators agreed on its terms.

Grigera Naón, referring to the Reef case, stated that "[t]he surrealistic facets of the situation are underlined by the obvious fact that their is no superior, overarching, Argentine, national or international court with authority to resolve a supposed conflict of jurisdictions between an Argentine court of law and international arbitral tribunal sitting in a different country".[16]

Additionally, the Federal Arbitration Act (FAA) is applicable in an international arbitration held in Washington, DC, whenever parties have not agreed on any procedural laws. Hence US federal courts have jurisdiction in any question raised in the arbitration proceedings whenever the rules chosen by the parties or national mandatory laws provide for court intervention.

Consequently, it was very clear at all times that CNCAF did not have jurisdiction over the matter or the appeal for annulment (section 760 of the Procedural Code). The argument invoked by CNCAF that section 196 would authorise an anti-arbitration injunction issued by an non-competent national court is absurd. Under such section, once CNCAF concludes that it lacks jurisdiction, its duty is to send the file to the competent court. Would the CNCAF send the Argentina v ICC case to a US court? In our opinion the CNCAF should have simply rejected the injunction, stating that it was not competent, and the defendant should have gone before the competent US court.

It is further noted that section 760 of the Procedural Code does not require participation of the counterpart in the appeal for annulment. This section, though likely unconstitutional, may be ultimately beneficial for National Grid Transco, who may argue at a future stage (the time of enforcement, if any, in Argentina) that it was not a party in the Argentina v ICC case and, therefore, was not bound by any decision taken in said procedure. This is the principle applied by CNCom, Section D, in the Reef case.

As we explained above, there is insufficient information in the docket to examine substantially the grounds for challenging Mr Rigo Sureda as chairman. However, what is clear under Argentine law is that national courts should abide by the choice of the rules and forum agreed to by the parties (in the National Grid Transco case, UNCITRAL Rules and Washington, DC).

We will briefly describe which procedure would have applied in Argentina in the absence of an agreement between the parties. The Procedural Code provides that an arbitrator could be challenged under the same rules applicable to the challenge of a judge. Such challenge should be filed before the arbitral panel, and if the arbitrator does not accept the grounds for the challenge, the lower court of ordinary jurisdiction should take the final decision on the matter (Procedural Code, sections 764 and 747), as said decision is not subject to appeal.

Therefore, had the National Grid Transco case been held in Argentina, even in that case CNCAF would not have competence to decide on the matter related to the challenge of the arbitrator. In the Argentina v ICC case, CNCAF missed the point because it misconstrued the law applying procedural rules established to question the award when the matter was the challenge of an arbitrator.

In addition, Argentina indicated the UNCITRAL Model Law as a secondary source of law to persuade CNCAF. Again, the UNCITRAL Model Law respects party autonomy and the procedure chosen by the parties (article 13(1)). When the parties have not chosen any procedure, and the questioned arbitrator does not accept the grounds for the challenge, the panel of arbitrators should decide on the matter (article 13(2)). Such decision might be reviewed before the competent court designated under article 6 of the UNCITRAL Model Law

but such review does not suspend the arbitration and the decision reached by the competent court is final (article 13(3)). Although Argentina has not yet adopted the UNCITRAL Model Law it is widely held throughout the arbitration community that this model law should be adopted.

As it results from this analysis, it is unlikely that CNCAF would have any say regarding the challenge of the arbitrator in any possible regular proceeding derived from the rules and forum agreed to by the parties.

CONCLUSION

In our last contribution to Arbitration Review of the Americas, we envisaged certain Argentine government acts that might have constituted a new policy towards arbitration, respectful of international duties even when Argentina was a party to such proceedings.

The analysis of Argentina v ICC case shows that the foregoing policy turned out to be not as firmed as desired. Both the conduct of Argentina in submitting an appeal to a local court in a matter that was clearly beyond its jurisdiction and the decision rendered by said court intending to interfere in an international arbitral proceeding have helped to fix the idea that Argentina lacks a policy of court support for arbitration.

Furthermore, it was also clear enough that the CNCAF lacks jurisdiction in a challenge of an arbitrator both under Argentine procedural law and under the applicable laws of the forum, Washington DC. The decision has provoked a sense of mistrust of the Argentine courts.

Argentina's conduct is questionable. Argentina obtained an anti-arbitration injunction but this interim measure was futile. The panel of arbitrators where the National Grid Transco case is pending refused to follow the order and consequently it seems that the decision will not cause any harm to National Grid Transco, at least for the moment.

Probably, the Republic of Argentina has not correctly assessed the gains and losses of the decision to file the case before the local courts. The Argentina v ICC decision did not add to its case, and was a serious setback to the Republic's image before the international community.
Notes

1. A final award would be the one rendered by the panel of arbitrators, as the ICSID Convention sets forth that "...each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State..." (section 54.1).
2. EN-Procuración del Tesoro v Cámara de Comercio Internacional, Lexis No 35010977
3. See article V of the New York Convention.
4. We do not ignore that if NGT seeks the enforcement of the award in a third country, the Argentine Courts may not have the chance to supervise the award.
5. NGT was not a part in the Argentine procedures.
6. See, article 8(3) of the UK/Argentine BIT.
7. Article 7 of the UNCITRAL arbitration rules.
8. Argentina invoked section 195 of the Procedural Code and article 26 of the UNCITRAL arbitration rules.

9. Supra, 5 note.
10. Reisman, W Michael et al, International Commercial Arbitration (Foundation Press, 1997), 172.
11. Idem, 691.
12. James Millar & Partners, Ltd. V. Withworth Street Estates (Manchester), Ltd., 1 ALL E.R. 796, 801-02, 809-10 (House of Lords Mar. 3, 1970), cited in Reisman et al, International Commercial Arbitration, 692.
13. Born, Gary B, International Commercial Arbitration in the United States (Kluwer Law, 1994), 163.
14. Idem.
15. Lexis no 20032229.
16. Grigera Naón, Horacio A, 'Competing Orders Between Courts of Law and Arbitral Tribunals: A Latin American Experience', 739 PLI/Lit 663.

Richards, Cardinal, Tützer, Zabala & Zaeffere

Bolivia

Ramiro Guevara and **Jorge Inchauste**
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Summary

BOLIVIA'S WITHDRAWAL FROM ICSID

p>On 2 May 2007 the International Centre for the Settlement of Investment Disputes (ICSID) received from the Bolivian Ministry of Foreign Affairs Bolivia's notification of its withdrawal ('denunciation') from the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As a result Bolivia formalised its prior statements of withdrawing from the ICSID and its rejection of international arbitration as a means of resolving controversies between foreign investors and the Bolivian government. This action by the Bolivian government is consistent with the policies of President Evo Morales and his cabinet, towards greater government control over Bolivia's natural resources.

Since its democratic election victory in January 2006, the Bolivian government has 'nationalised' the hydrocarbons sector by passing Supreme Decrees that grant the Bolivian state the ownership at the well head and grant the exclusive right to market natural gas and other hydrocarbons. This led to an aggressive renegotiation of former shared risk contracts to operating contracts with the foreign upstream hydrocarbons producers. The government also negotiated the transfer to the Bolivian state of the privatised refineries and is negotiating the transfer of shares in the hydrocarbons transportation companies. Many of these companies threatened to resort to international arbitration provided for under different bilateral investment treaties to resolve such disputes with the government. None of these companies actually filed ICSID arbitration claims.

This year the Bolivian government announced that it would seek the nationalisation of the privatised telecommunications company ENTEL; and issued a Supreme Decree creating a special government committee for this purpose. In response to these actions the controlling shareholders of ENTEL delivered a letter to the Bolivian government requesting amicable negotiations. Six months thereafter the controlling shareholders filed a request for arbitration before ICSID, which would be permitted under the bilateral investment treaty between Italy and Bolivia. The government has stated that it does not believe the international arbitration will prosper as it has already withdrawn from ICSID.

Our research has demonstrated that there is no precedent of any other country denouncing the ICSID Convention and thus, there is room for theoretical analysis, different interpretations and different conclusions could be arrived at with the same set of facts and elements of analysis.

According to article 71 of the Convention any contracting state (as defined in the Convention) may denounce the Convention by means of written notice and such denunciation shall take effect six months after the receipt thereof. In the case of Bolivia the denunciation took effect on 3 November 2007.

Article 72 of the Convention complements the statement contained in article 71 by stating that notice by a contracting state pursuant to article 71 shall not affect the rights or obligations under the Convention of that state or of any national of that state "arising out of consent to the jurisdiction of the Centre" (as defined in the Convention) given by one of them before such notice was received.

Another important element in the analysis is the fact that Bolivia has entered into a series of bilateral investment treaties (BITs) with several countries, the US among them. It is difficult to generalise about the different BITs as their wording varies as they relate to the treatment of

disputes among contracting states and investors of other states. However, most BITs follow a model similar to that of the US-Bolivia BIT as it relates to the treatment of disputes, as a result we shall analyse how that treaty is affected by Bolivia's withdrawal from the ICSID.

The US-Bolivia BIT states that disputes related to investments may be submitted to several dispute resolution procedures, including ICSID. In this case it is essential to examine carefully the actual drafting of section IX(3) which provides that the dispute can be submitted to binding arbitration before ICSID "if ICSID is available".

As a result the mere withdrawal from the ICSID facility does not preclude international arbitration from resolving disputes among foreign investors and the Bolivian government as international arbitration may still proceed through ad hoc arbitration pursuant to UNCITRAL rules.

The effects of Bolivia's denunciation of the ICSID Convention are limited by the ICSID Convention itself, which states that notice of denunciation by a contracting state shall not affect the rights or obligations under the Convention of that state or of any national of that state "arising out of consent to the jurisdiction of the Centre" (as defined in the Convention) given by one of them before such notice was received.

Two concepts are noteworthy in this text. The first one is that the denunciation does not affect the obligations of the denouncing state. It is, therefore, possible to deduce that, subject to the condition stated in the text following the initial statement, an obligation of the denouncing state under the Convention would be to allow applicable disputes to be resolved by means of arbitration before ICSID. This is because every right granted to one party to an agreement, carries with it the corresponding obligation to honour that right by the counterparty and vice versa. Thus, to the right granted in favour of investors in the denouncing state to make use of ICSID arbitration, corresponds the obligation, on the part of that state, to abide by such choice and, in turn, the obligation of the state gives rise to the right of the investors.

However, the right to make use of ICSID together with its corresponding obligation is subject to a condition, namely, that both right and obligation only arise to the extent that at least one of either the denouncing state or the investor have consented to ICSID jurisdiction prior to the denunciation. In light of this, two questions immediately arise: what constitutes consent to ICSID jurisdiction? And when was such consent granted?

On the first question, it is generally accepted that the inclusion in a BIT of a clause agreeing to ICSID arbitration as a method to resolve disputes can be construed as consent to ICSID jurisdiction on the part of the signatory states. However, it is just as generally accepted that said consent, in fact, is perfected only when an investor also chooses ICSID as the method to solve a dispute. Of course, it would be possible to argue that the text of the Convention clearly provides that the obligation clearly subsists when one of either the denouncing state or the investor has consented to ICSID jurisdiction prior to the denunciation, and that the execution of the BIT is therefore sufficient. But it would also be possible to argue that the BIT contains a series of choices of jurisdiction for the investor and that until it makes that choice the state's consent is only potential, but not yet perfected.

Assuming the two premises, BIT execution and one consent, are accepted, the date of the consent becomes easy to define as the date on which the BIT was ratified by the Bolivian government and came into force, all rights and obligations of the investors and of the state born after that date, would be protected even after the denunciation of the Convention.

Notwithstanding the above, the text of the BIT may itself create a problem that could lead to a circular argument, which would, in turn, complicate the possible interpretation of the consent issue.

As stated above, however, even if ICSID arbitration were unavailable, international ad hoc arbitration would not be precluded. As a result the Bolivian government would need to withdraw from and denounce the BITs that provide for international arbitration. The Bolivian government has yet to announce such action and it seems unlikely that it will proceed with such a diplomatically damaging strategy currently.

We note that even if denounced, BITs contain survival clauses protecting investors for a determined period, even after the treaty is denounced, and that investors remain protected by BITs for investments made or acquired before the end of such survival term. In the case of the US-Bolivia BIT the survival term is ten years. It is worthwhile to note that the survival clause does not mention the need for the existence of a dispute prior to the expiration date or that the investor must have availed itself of the right to arbitration prior to that date.

The question of how the effects apply to possible disputes arising from investments in Bolivia is subject to a decision on the question of jurisdiction by the arbitral panel, before which these questions may be presented. We believe that the issues affecting the availability of ISCID as a dispute solving mechanism, include the time frame during which the investments were made. In this sense we believe that there is practically no question that all existing investments would remain protected and could be subject to ICSID arbitration. Future investments, however may not be protected given the time and term constraints detailed above. We believe all investments made during a period between the date the denunciation notice of the BIT is filed and the anniversary thereof would be protected under the combined umbrella of ICSID and BIT survival clauses. Of course, this leaves open the questions as to what exactly constitutes future investments and as to what happens with ongoing investments. As with the case of existing investments, there is little doubt that eligible existing disputes would continue to be processed under ICSID. The possibility of filing future disputes under ICSID, however, would depend, first, on the eligibility of the underlying investment and on the decision on the jurisdiction issue and, second, on whether the filing for arbitration occurs within the protection period afforded by the BIT.

As a result of the above it is clear that the Bolivian government's intention to be liberated from the prospect of being subjected to international arbitration as a result of its nationalisation policy has not been completed as a result of its withdrawal from ICSID. One could easily argue that by withdrawing from ICSID it has only changed from a type of arbitration in which there is an institution that theoretically insures an impartial proceeding to an ad hoc arbitration where no such institution exists and the arbitrators and parties are free to decide on the form of the proceeding. Further ICSID arbitration could well be available for the claims that arise out of investments that were made prior to Bolivia's withdrawal from ICSID. We are certain that these and many other similar issues will be put to the test to the extent ENTEL's controlling shareholders proceed with their intention of subjecting the Bolivian government to ICSID arbitration as currently filed before ICSID.

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Brazil

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Summary

ARBITRATION OF CORPORATE DISPUTES

After some years of stagnation, in 2004, Brazilian companies resumed initial public offers on the São Paulo Stock Market (BOVESPA).[1] There were seven IPOs in 2004, nine in 2005, 26 in 2006, 56 between January and October 2007,[2] and many other companies have already presented requests for issuing stocks to the Brazilian Securities Commission (CVM).

Almost all the companies that began to trade on the BOVESPA since 2004 have undertaken to comply with levels of corporate governance that impose the inclusion of arbitration clauses in their by-laws. At present, out of the 434 companies traded on the BOVESPA, 113 companies have undertaken to submit conflicts concerning them, their controlling shareholders, officers and directors and members of the audit committee to arbitration. Some of these companies are the most traded, such as Petrobras, Banco do Brasil, Bovespa Holding, Cosan (sugar and ethanol producer), Embraer (aeroplane industry), TAM and Gol (Brazil's main airline companies), Cesp and Light (electrical sector) and Natura (cosmetics).

So far, no conflict has been submitted to the BOVESPA Market Arbitration Chamber, the institution to which all these companies have undertaken to submit the arbitrations. But it is certain that this is a new area in which arbitration will develop in Brazil, and scholars have already established a broad debate with respect to the subjective and objective effects of arbitration clauses included in companies' by-laws.

Below, we summarise the origin of this new trend and the concerns raised by Brazilian scholars on this matter.

HISTORY OF THE DEBATE

The concept of submitting corporate disputes to arbitration is not new in Brazilian Law. The Commercial Code of 1850 already provided that all the corporate disputes arising among shareholders during the existence of a company, its liquidation and winding up should be submitted to arbitration (article 294).

This provision was heavily criticised for obliging parties to submit themselves to arbitration, because, according to legal scholars, the concept of compulsory arbitration was incompatible with the Brazilian legal system of that time (it is still incompatible today). In 1866, this rule was revoked by Law No. 1.350, which still allowed parties to submit corporate disputes to arbitration, but on a voluntary basis.

Since then, for almost 150 years, the development of the use of arbitration in Brazil faced difficult obstacles. Although the legal system recognised arbitration as a method of dispute resolution, Brazilian courts concluded that arbitration clauses were not binding, because a party could not renounce the right of submitting a future dispute to the judiciary before even knowing what the object of such dispute would be.

In 1996, the Brazilian Arbitration Law entered into force, reflecting the modern principles that govern arbitration around the world and expressly asserting the enforceability of arbitration clauses. This statute is a milestone in the development of arbitration in Brazil.

Although, theoretically, parties could include enforceable arbitration clauses in companies' by-laws since then, it was not a common practice.

The situation only began to change in 2000, when BOVESPA adopted a new regulation creating special trading segments, according to the principles of corporate governance

applied by the companies (ie, level 1, level 2 and new market). According to the BOVESPA rules, a company can only have its shares traded in level 2 or in the new market segments if it includes an arbitration agreement in its by-laws. The rationale behind this regulation is that the higher the principles of corporate governance applied by a certain company, the higher the price that investors will be willing to pay for its shares.

In 2001, another stimulus was given to the inclusion of arbitration clauses in companies' by-laws. The Brazilian Corporations Law was amended by Law No. 10/303/01, with the addition of a third paragraph to article 109, expressly providing that by-laws could contain arbitration clauses:

The Corporation's By-laws May Establish That Any Disputes Between The Shareholders And The Corporation, Or Between The Majority Shareholders And The Minority Shareholders May Be Resolved By Arbitration Under The Terms Specified By It.

The BOVESPA regulatory requirement, together with the express provision in the Corporations Law, led to a broad adhesion to this practice. Nowadays, more than 25 per cent of companies traded on the BOVESPA already have arbitration clauses in their by-laws. All the companies that carried out IPOs since then, even when their stocks are not traded in level 2 or in the new market, included arbitration clauses in their by-laws.

Brazilian scholars do not challenge the arbitrability of corporate disputes as a whole, a discussion held in the past in other countries, such as the United States, where, until 1987 when the Supreme Court issued the opinion on Shearson/American Express Inc v McMahon, disputes related to the Securities Act could not be submitted to arbitration.[3] In Brazil, the debate concerns the subjective and objective effects of an arbitration agreement included in the by-laws.

THE INTERPRETATION OF ARTICLE 109, SECTION 3, OF THE CORPORATIONS LAW

One of the first issues raised by Brazilian scholars with respect to this subject was the correct interpretation of article 109, section 3, of the Corporations Law.

This provision states that "by-laws may establish" that disputes "may be resolved by arbitration [...]" A literal interpretation of the text could lead to the conclusion that by-laws could not contain an arbitration agreement that would compel parties to submit disputes to arbitration, but only recommend or maintain arbitration as an optional means of dispute resolution.

Such interpretation has been rejected by Brazilian scholars, because it would render the provision of the Corporations Law useless.[4] There is no sense in establishing an arbitration agreement if it is not binding. One of the main achievements of the Brazilian Arbitration Law was exactly the recognition that arbitration clauses were binding, therefore, such literal interpretation would constitute a step backwards in the development of arbitration in Brazil.

In addition, before the amendment of the Corporations Law, there was nothing to prevent shareholders from including a binding arbitration agreement in the companies' by-laws, thus such reading was not compatible with the Brazilian legal system.

It should also be noted that there are many other provisions in Brazilian statutes in which the word 'may' has been interpreted to signify obligation, not option.

PARTIES BOUND BY THE ARBITRATION AGREEMENT

After concluding that by-laws arbitration clauses would be binding, scholars argue with respect to what parties would be bound to submit their disputes to arbitration. The subjective effects of the by-laws' arbitration agreement is probably the most contended issue in this matter.

The essence of the discussion is whether a party that has not expressly conveyed its will to submit certain disputes to arbitration can be bound by an arbitration agreement included in a company's by-laws.

It is not disputed that the company and the shareholders that have agreed with the inclusion of the arbitration agreement in the by-laws are bound by the provision.

The problem is whether the arbitration agreement binds the shareholders that: (i) cast their vote against the inclusion of the arbitration agreement in the by-laws; (ii) attended the shareholders' meeting that approved such insertion, but declined to vote; (iii) did not attend the shareholders' meeting; and (iv) acquired the shares when the by-laws already contained an arbitration agreement. Some of the most authoritative scholars have completely opposite opinions on this issue. Paulo Salles de Toledo sustains that an arbitration agreement included in the by-laws of the company would bind all the shareholders, who, by holding the shares of such a company, would tacitly express their agreement with the arbitration agreement.[5]

Other scholars that sustain this position argue that, in a corporation, the vote of the majority of the shareholders reflects the corporate interest and, therefore, the minority shareholders must abide by it. They also claim that the inclusion of the arbitration agreement does not cause any harm to the shareholder.[6]

Modesto Carvalhosa and Nelson Eizirik do not agree with this position. In sum, they argue that arbitration agreements in by-laws only bind the shareholders who expressly convey their agreement with the arbitration agreement, because, otherwise, the by-laws would be providing for compulsory arbitration, which is not compatible with the Brazilian legal system.

The main arguments that support their conclusion are the following. First, the by-laws could not prevent shareholders from submitting their disputes to the judiciary, because the Brazilian Constitution states that the "law shall not exclude any injury or threat to a right from the consideration of the Judicial Power".

In addition to that, they argue that article 109 of the Corporations Law deals with the "inherent rights of the shareholders." Section 2 of article 109 of the Corporations Law states that "the means provided by law to shareholders to enforce their rights cannot be overridden either by the by-laws or by any general meeting."

In view of the Constitutional provision and the rule reflected in article 109, section 2, of the Corporations Law, the shareholder's right to have his dispute resolved by the judiciary could not be set aside by a shareholders' meeting deliberation and there could not be a presumption of a tacit renunciation of an inherent shareholder right.

THE BOVESPA MARKET ARBITRATION CHAMBER RULES

Although the debate with respect to the subjective effects of bylaws arbitration agreement has not yet settled, there might be a pragmatic solution to this matter.

Arbitrations deriving from arbitration agreements included in by-laws of companies whose shares are traded at BOVESPA will follow the rules of the Market Arbitration Chamber. Item 2.1 of these rules establishes the following:

These Rules Are Equally Binding On The Following Participants In The BOVESPA Special Listing Segments: (i) BOVESPA; (ii) The Companies; (iii) The Controlling Shareholders; (iv) The Senior Managers; (v) The Fiscal Council Members; And (vi) The Investors, Provided That They Have Voluntarily Consented To These Rules By Signing A Statement Of Consent, As Per Section 5.2.2 Of These Rules.

In addition to that, item 5.2.2 of these rules states:

An Investor May Adhere To These Rules, At Any Time, Through A Statement Of Consent To Be Entered Into With The Secretary's Office Of The Arbitration Panel Or A BOVESPA Member Brokerage Firm.

In view of the above-mentioned clauses, it is possible to argue that the shareholders who approve the inclusion of an arbitration agreement in the by-laws of the company, with reference to the Market Arbitration Chamber Rules agree that such arbitration agreement binds them and the company, but will only bind other present and future shareholders if they sign the statement of consent provided in item 5.2.2 of the Market Arbitration Chamber Rules.

Corporate disputes that can be submitted to arbitration The objective limits of the by-laws arbitration agreement have generated less debate between Brazilian scholars, who, after some hesitation, have agreed on the object of the disputes that can be submitted to arbitration.

The focal point of the debate is the rule reflected in article 1 of the Brazilian Arbitration Law, which establishes that the parties can submit to arbitration any dispute related to freely negotiable patrimonial rights. It should be noted that article 109, section 3, of the Corporations Law does not impose an objective limitation, establishing that "any disputes" can be submitted to arbitration.

One of the issues raised by scholars was whether the reference to patrimonial rights in article 1 of the Brazilian Arbitration Law would forbid shareholders from submitting to arbitration disputes related to political rights, such as the right to elect a member of the board of directors.

It seems there is no dispute that issues related to corporate political rights can be submitted to arbitration. First, because the correct interpretation of article 1 of the Brazilian Arbitration Law leads to the conclusion that parties can submit to arbitration any right they have the power to freely negotiate and renounce, as it is the case of corporate political rights. Second, because corporate political rights have a clear patrimonial value.

Brazilian scholars also raised some concerns with respect to whether corporate disputes involving rules of public order could be submitted to arbitration (for examples, claims alleging that certain acts practised by the company are completely null). Actually, this discussion goes beyond the niche of corporate disputes, because the issue arises in disputes of all kinds in Brazil and abroad.

The conclusion reached follows the domestic and international trend in this matter, according to which the mere fact that claimants or defendants raise arguments based on rules of public order should not interfere on the analysis of whether the dispute is arbitrable or

not. The objective arbitrability of the dispute depends on whether the object of the arbitration, the claim and the respective relief sought involves patrimonial rights that a party can freely negotiate and renounce.

The scope of the objective arbitrability with respect to corporate disputes is also difficult to establish because there are some rights and, consequently, some claims that a shareholder has standing to sue, which directly affects the rights of other shareholders (eg, a claim for nullification of a certain deliberation taken in a shareholders' meeting).

Modesto Carvalhosa and Nelson Eizirik address the issue thoroughly. First, they argue that the classic concepts related to bilateral agreements should not be applied to define the objective arbitrability of corporate disputes, owing to the associative nature of the relationship among the shareholders. Then, they mention that shareholders meetings may alter a deliberation previously taken, when they are null, in order to correct the defect of such deliberation.

Taking all of this into consideration, they consider it reasonable to sustain that all that can be validly deliberated by the company could be submitted to arbitration. According to this conclusion, a shareholder could commence an arbitration seeking the nullity of a certain deliberation of the shareholders meeting and, if successful, the consequences of the arbitral award would also affect rights of other shareholders.

CONCLUSION

As mentioned in the introduction, the insertion of arbitration agreements in companies' by-laws is something recent in Brazil. No dispute has been submitted to the Market Arbitration Chamber so far and, therefore, there are no judicial precedents on these matters.

However, the trend to adopt arbitration agreements in companies' by-laws shows that arbitration will prevail as the means of resolving corporate disputes in Brazil.

Endnotes

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Summary

RECENT DEVELOPMENTS IN CANADIAN ARBITRATION LAW

Canada's thriving arbitration law and practice continued to see exciting developments over the past year, including the longawaited signing of the ICSID Convention in late 2006.[1] One decision in particular, however, dominated the arbitration landscape in Canada in 2007: the Supreme Court of Canada's judgment in Dell Computer Corp v Union des consommateurs.[2]

Dell Computer reflects the large and liberal approach to arbitration which has been adopted by the Supreme Court of Canada and which is consistently recognised and applied by courts across Canada.

THE SUPREME COURT ARBITRATION TRILOGY

In Dell Computer, Canada's highest court had the opportunity to pronounce on a number of important questions of arbitration law and practice, including the applicability of an arbitration agreement in the face of a consumer class action, the scope of the Kompetenz-Kompetenz principle and the extent of the review to be undertaken by a court which is seized of an application to refer a matter to arbitration, and the nature and 'localisation' of arbitral tribunals. The decision is the third in what may be seen as a trilogy of recent Supreme Court judgments, all from Quebec and all dealing with fundamental issues of domestic and international arbitration.

The first of these decisions, Desputeaux v Éditions Chouette (1987) inc,[3] dealt with the issue of the arbitrability of intellectual property disputes, and the nature of arbitration agreements. Specifically, the Supreme Court determined in Desputeaux that a question of copyright ownership was arbitrable and was not precluded by the provisions of the Civil Code of Quebec (CCQ) and Quebec's Code of Civil Procedure (CCP), which provide that matters of the status and capacity of persons and other matters of public order may not be submitted to arbitration. The court underlined in this regard that public order was restricted to the effect of the decision, rather than the subject matter of the dispute.

The court took a clearly pro-arbitration position in Desputeaux and held that the scope of the arbitration agreement and the arbitrators' mission must be interpreted in a broad and liberal manner and that the arbitrator's mandate includes not only what is expressly set out in the arbitration agreement, but everything that is closely connected with that agreement as well.

In the second decision, GreCon Dimter inc v J R Normand inc,[4] the Supreme Court overturned a line of case law in Quebec, in which courts refused to recognise choice of forum or arbitration clauses in the context of actions in warranty. Although this was not an arbitration case, but rather one which related to the application of a forum selection clause, the court seized the opportunity to examine certain features of Quebec and Canadian arbitration law, including the importance of deferring to the contracting parties' choice with respect to the forum for resolving their disputes, whether this be a foreign court or arbitral tribunal.

The Supreme Court in Grecon underlined Quebec and Canada's international commitments relating to the recognition and enforcement of foreign judgments and arbitral awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and maintaining its pro- arbitration stance, emphasised the importance of recognising arbitration and forum selection clauses given that they provide international commercial relationships with stability and foreseeability. The court also examined the

nature of arbitration and choice of law clauses, explaining that the ouster of the jurisdiction of Quebec authorities will depend on the wording of the jurisdiction clause adopted by the parties, the mandatory and exclusive nature of that clause and a meeting of minds between the parties.

SUPREME COURT OF CANADA'S DECISION IN DELL COMPUTER

Background

The appeal in Dell Computer originated with a class action instituted following a pricing error on handheld computers posted on Dell's website in April 2003. Essentially, Olivier Dumoulin, a Quebec resident, filed a motion to institute a class action against Dell because the company refused to honour the lower prices for the handheld personal digital assistants that had appeared on the website. The company had incorrectly listed the products for C$89 and C$118 for certain models, whereas the actual prices were C$379 and C$549 respectively. Dell filed a motion to dismiss and requested that the matter be referred to arbitration on the basis of an arbitration clause contained in its online terms and conditions.

The Superior Court of Quebec dismissed Dell's motion and allowed the class action to be instituted. The court concluded that the jurisdiction of the courts of Quebec could not be ousted under article 3149 CCQ, contained in that code's private international law rules, which prohibits such exclusion in consumer or employment disputes where the employee or consumer is resident in Quebec.[5] In the court's view article 3149 CCQ applied, given the fact that the arbitration clause provided that arbitration would be administered by the National Arbitration Forum (NAF), an institution in Minneapolis.

The Quebec Court of Appeal upheld the lower court's decision agreeing that Dell's motion to refer the dispute to arbitration should be dismissed, although for somewhat different reasons.[6] Essentially, the court determined that the arbitration agreement, which had to be accessed through a hyperlink, consisted of an external clause that could not be set up against consumers (absent proof that the clause had expressly been brought to their attention or that they had otherwise gained knowledge of it).

Dell sought to appeal the matter to the Supreme Court and for the third time in recent years, Canada's highest judicial authority granted leave in an arbitration matter, reflecting its view that such matter was of such exceptional public and national importance as to warrant the court's attention. The majority of the Supreme Court held in Dell Computer that the matter should be referred to arbitration; the minority held that it should not.

THE MAJORITY JUDGMENT

In reversing the Court of Appeal's decision, and in referring the dispute to arbitration, the majority first dismissed the argument that article 3149 CCQ precluded the matter to be referred to arbitration, on the basis that the dispute lacked the 'foreign element' needed before that private international law rule could apply. In doing so, the majority determined that an arbitral tribunal was a neutral institution and that the existence of an arbitration clause was not enough to warrant the application of Quebec's private international law rules.

The majority also considered the issue of which authority, between the court and the arbitral tribunal, should be the first to decide on the validity or applicability of an arbitration agreement. This issue arose with respect to articles 940.1 and 943 CCP, based on articles

8 and 16 of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) respectively, which provide:

Where An Action Is Brought Regarding A Dispute In A Matter On Which The Parties Have An Arbitration Agreement, The Court Shall Refer Them To Arbitration On The Application Of Either Of Them Unless The Case Has Been Inscribed On The Roll Or It Finds The Agreement Null. The Arbitrators May Decide The Matter Of Their Own Competence.

In what is perhaps the court's most detailed examination of the New York Convention and Model Law to date, the majority looked to international law and commentary, as well as precedent and doctrine in Quebec, in deciding on the proper test to adopt. Among other things, the court considered and compared both the interventionist and deferential approaches to the Kompetenz-Kompetenz question, and concluded that the second, which called for a limited prima facie review and the referral of parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable, was gaining increasing acceptance around the world.

THE TEST

After her review of the relevant international and Quebec authorities, Justice Marie Deschamps, writing for the majority of the court, set out the following test:

First Of All, I Would Lay Down A General Rule That In Any Case Involving An Arbitration Clause, A Challenge To The Arbitrator's Jurisdiction Must Be Resolved First By The Arbitrator. A Court Should Depart From The Rule Of Systematic Referral To Arbitration Only If The Challenge To The Arbitrator's Jurisdiction Is Based Solely On A Question Of Law. This Exception Is Justified By The Courts' Expertise In Resolving Such Questions, By The Fact That The Court Is The Forum To Which The Parties Apply First When Requesting Referral And By The Rule That An Arbitrator's Decision Regarding His Or Her Jurisdiction Can Be Reviewed By A Court. It Allows A Legal Argument Relating To The Arbitrator's Jurisdiction To Be Resolved Once And For All, And Also Allows The Parties To Avoid Duplication Of A Strictly Legal Debate. In Addition, The Danger That A Party Will Obstruct The Process By Manipulating Procedural Rules Will Be Reduced, Since The Court Must Not, In Ruling On The Arbitrator's Jurisdiction, Consider The Facts Leading To The Application Of The Arbitration Clause. If The Challenge Requires The Production And Review Of Factual Evidence, The Court Should Normally Refer The Case To Arbitration, As Arbitrators Have, For This Purpose, The Same Resources And Expertise As Courts. Where Questions Of Mixed Law And Fact Are Concerned, The Court Hearing The Referral Application Must Refer The Case To Arbitration Unless The Questions Of Fact Require Only Superficial Consideration Of The Documentary Evidence In The Record.7

Thus, the majority accepted the deferential principle by which a challenge to an arbitrator's jurisdiction should generally first be referred to the arbitrator. It went on, however, to set out an exception where the challenge is based on an issue of law, in which case the court may first decide the issue. If the challenge is a fact-based one, the court should normally refer the issue to arbitration. If the challenge gives rise to mixed issues of fact and law, the rule set out by the majority provides that the matter be referred to arbitration, unless a merely 'superficial' consideration of documentary proof filed into the court record is required.

The majority concluded that in the case before it, the question of the validity and applicability should have been referred to arbitration, given that a number of the arguments raised required an analysis of the facts in order to apply the law to the case. Rather than refer that question to the arbitrator for determination, however, the majority went ahead and decided the issue for itself, concluding that there was nothing intrinsically abusive or unfair about an arbitration clause in the context of a consumer or class action dispute, and that the arbitration clause could be set up against consumers, given the hyperlink to the terms and conditions from the order page.

THE DISSENT

The dissenting judges disagreed that the dispute lacked the foreign element that would give rise to the application of Quebec's rules on private international law and dismissed the appeal on the basis that the matter could not have been referred to arbitration in light of article 3149 CCQ.[8] The minority agreed, however, that there was nothing inherently abusive about arbitration clauses in the consumer or class action context.

With respect to the issue of the degree of scrutiny that should be exercised by a court seized of a motion to refer a matter to arbitration, it appears as though the minority may have implicitly taken a similar approach to the majority, though without expressly using the question of fact or question of law decision. The minority simply stated that when seized with a motion to refer a matter to arbitration, a court should rule on the validity of the arbitration only if it is possible to do so on the basis of documents and pleadings filed by the parties without having to hear evidence or make findings about its relevance and reliability. It held in this regard that a discretionary approach favouring resort to the arbitrator in most instances would best serve the legislator's clear intention to promote the arbitral process and its efficiency, while preserving the core supervisory jurisdiction of the Superior Court.

The minority judgment also underlined that courts could still exercise some discretion when faced with a challenge to the validity of an arbitration agreement regarding the extent of the review they chose to undertake. Given that the issue in Dell Computer was one largely relating to the interpretation of various provisions of the CCQ, they held that the lower courts were correct to fully consider the challenge to the validity of the arbitration agreement.

THE ROGERS WIRELESS DECISION: APPLICATION OF DELL COMPUTER

The Supreme Court immediately applied the principles set out in Dell Computer to Rogers Wireless Inc v Muroff,[9] a decision heard and issued on the same date as Dell Computer. The Rogers Wireless case also dealt with the applicability of an arbitration clause following the institution of a class action proceeding. In that case, residents in Quebec sought authorisation to institute a class action against Rogers for allegedly abusive C$4 per minute 'roaming charges' billed to customers for the use of their mobile phones in certain areas in the United States. The dispute resolution clause in the relevant agreement not only provided that disputes would be referred to arbitration, but also expressly prohibited a consumer from commencing or participating in a class action. The class representative argued that this clause was abusive.

Applying the test set out in Dell Computer, the court concluded that the issue of whether or not the arbitration clause was abusive should have been referred to arbitration, given that a detailed factual inquiry would have been needed in order to determine whether or not the clause was indeed abusive. In the court's view, to allow a court to decide the issue would run counter to article 940.1 CCP and deprive the arbitrator of the jurisdiction to determine his or her own jurisdiction. As such, the court reinstated the Superior Court's decision to refer the issue to arbitration.

CRITICISM AND COMMENT

The Dell Computer decision has been criticised. Consumer activists, for instance, have argued that the case will jeopardise the future of class actions in Canada, and that the court in fact diverged from other recent Supreme Court jurisprudence which had expressed support for class actions in Canada.

Arbitration specialists have also expressed concern about the test set out by the court, questioning how the court's approach will play out in practice, and whether it in fact respects the deferential approach to arbitration endorsed by the court in this, and previous cases.

The practical effect of the court's decision on class actions will, at least in the short-term, be somewhat limited, particularly in two of Canada's provinces - Quebec and Ontario - which have enacted legislation precluding the waiver of the courts' jurisdiction, particularly in consumer matters. For instance, Quebec Bill 48 An Act to Amend the Consumer Protection Act (Bill 48) was assented to on the day of hearing of the Dell Computer case. That Act added a provision to Quebec's Consumer Protection Act, which prohibits any stipulation requiring a consumer to refer a dispute to arbitration, particularly if it deprives a consumer of access to class proceedings. Although the court in Dell Computer determined that that amendment had no retroactive effect, and therefore did not preclude the claim against Dell from being referred to arbitration, that amendment will now effectively prevent consumer claims in Quebec from being referred to arbitration. The decision will no doubt have considerable impact, however, across the country notwithstanding the above. Even though the matter was decided under Quebec law, it will be a key authority in other Canadian jurisdictions, where arbitration statutes are, like Quebec's rules, based on the Model Law and reflect the New York Convention.

The preclusion of class actions through the application of arbitration clauses will continue to be possible with respect to consumer disputes in those provinces that have not yet enacted legislation similar to that introduced in Quebec and Ontario. Further, such preclusion will also still be possible with respect to arbitration notices sent prior to the introduction of the legislative reforms in those latter provinces. Non-consumer matters and class actions can of course also still be submitted to arbitration.

Overall, the Supreme Court's decision can be seen as a further endorsement of arbitration as an effective and efficient way for resolving disputes in Canada. The court reiterated its confidence in private arbitration as a legitimate alternative to lawsuits, even at the expense of another form of legal proceeding - the class action. The Supreme Court's latest decisions continue to reflect the deferential approach toward arbitration which is accepted, endorsed and applied across Canada.

Endnotes

Mexico

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Summary

JUDICIAL PRECEDENTS IN ARBITRATION

Arbitration is more frequently being used as an effective alternative to dispute resolution. Following this trend, Mexico has been chosen as a seat of arbitration, and subject to proceedings related to setting aside and to recognising and enforcing private commercial awards, both domestic and international.

Since the implementation in Mexico of the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration as amendments to the Commerce Code (sections 1415 to 1463), most cases have reached local and federal courts. Thus, the judiciary has provided its interpretation as to assistance and control of arbitration. Recently, Mexico's federal courts have provided binding interpretation over procedural issues (that influence the speed of arbitration) related to setting aside procedures arising out from domestic commercial arbitration.

This article explains the approach of the Mexican judiciary when dealing with judicial proceedings to vacate awards that could also be applicable to the recognition and enforcement of private commercial awards.

BRIEF BACKGROUND

At the international level, Mexico is party to both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention), and the 1975 Inter- American Convention on International Commercial Arbitration (the Inter-American Convention).

Likewise, title IV of the Mexican Commerce Code regulates commercial arbitration (sections 1415 to 1461) and provides for substantive and procedural rules in commercial arbitration on the domestic level and other specific rules (sections 1424, 1425, 1461 to 1463) to be applicable for international arbitration.

The Mexican Congress modelled such provisions after the 1985 UNCITRAL Model Law. Thus, its underlying principles could provide assistance when construing provisions of Mexican commercial arbitration. Those rules, such as exceptional judicial intervention, flexibility and quickness of arbitration, restrictive causes for settingaside or recognising and enforcing an arbitral award, prohibition to review the merits of the case and pro-enforcement bias (especially in procedural aspects) are also applicable. These principles should underlie the Mexican proceedings.

The Commerce Code (sections 1457 to 1460 and 1461 to 1463, respectively) sets forth summary proceedings for both vacating and recognising and enforcing an arbitration award. Notwithstanding this, the Federal Code of Civil Proceedings (FCCP) governs these proceedings since the provisions of the Commerce Code expressly remits the parties to the rules for ancillary proceedings (incidentes) set forth in section 360 of the FCCP. These are assumed to be the most expeditious proceedings set forth by a Mexican procedural statute and, therefore, they comply with the speedy nature of arbitration.

Thus, according to the Commerce Code and its referral to the FCCP, the proceedings for vacating or enforcing and recognising an arbitral award need the following basic requirements:

A competent court. The filing could be submitted to either local or federal courts of the place of issuance of the award (in case of a setting-aside action or place of arbitration in Mexico) or of the defendant's domicile or in its absence of the place where assets are located (in case of recognition or enforcement actions).

- A written request to set aside[5] or recognise and enforce an award. This request must attach the original award or a certi- fied copy thereof and the document containing the arbitration agreement. Likewise, there must be a translation of documents into Spanish, as well as an apostille of documents if so needed. Furthermore, when filing on behalf of a legal entity it is necessary to evidence proper authority through a power of attorney.
- Service of process and response. Once the court admits the request, the brief will be served to the other party to produce its response within a three-business-day term. Within this term, the respondent must file all evidence to rely upon (including all documents) and produce all objections to documents attached thereto by plaintiff.
- Rendering of evidence and closing arguments. If the parties had announced proper evidence (not usually related to factual evidence) to be rendered before the court, then, a 10-businessday period would be granted. Otherwise, (or once the evidence stage has concluded), the court will set a specific date for a final hearing. Closing arguments will be filed at this hearing.
- Judgment and challenge. Subsequently, the court must enter a judgment within a five-business-day term. The court's judgment is not subject to an ordinary appeal or any other ordinary challenge (ie, motion to reconsider), but can only to be contested through a special constitutional action called amparo. This constitutional challenge is considered as an 'extraordinary' challenge. The basis for filing this constitutional challenge is the violation of fundamental rights provided by the Mexican Constitution. This constitutional challenge must be filed before the federal courts within 15 business days.

The procedure for recognition and enforcement of arbitration awards (which resembles the one for vacating the award) is depicted in the chart overleaf.

The procedure for setting-aside or recognising or enforcing an award was intended to govern 'ancillary' (incidentes) procedures under the FCCP. These ancillary proceedings normally relate to procedural items arising out of federal civil proceedings (lack of authority, forum non-conveniens, consolidation, etc).

The principal consequence of considering such proceedings as having an ancillary nature and not as independent or summary proceedings is that its judgment would have to be challenged by an indirect amparo. This is a two-stage constitutional procedure that includes a summary federal proceeding and a federal appeal (recurso de revision) that is filed before a federal district court and filed before a collegiate circuit court respectively. This way of challenge is more time consuming and hence, slows down the setting-aside or recognition or enforcement of arbitral awards. Such policy contravenes a pro-enforcement bias underlying commercial arbitration.

On the other hand, if the ancillary proceedings were considered as a summary and independent procedure, the challenge would be a direct amparo. This is a one-stage procedure filed before a collegiate circuit court, whose end is reviewing the constitutionality

of judgments. This resembles a federal appeal, whose cause of action is also an allegation of violation of constitutional rights.

Recently, the First Chamber of the Supreme Court following the trend set forth by the plenary session of the Supreme Court has resolved two landmark decisions. In a four-to-one majority voting, the First Chamber resolved that a two-stage procedure (indirect amparo) needs to be filed against the judgment arising out of a setting-aside action. This judgment seems to be contrary to a pro-enforcement bias and violate the essence of a quick and expeditious enforcement. Likewise, in its second unanimous vote, the First Chamber has clarified that rulings of the trial-court hearing the setting aside actions (also applicable to recognition and enforcement) cannot be reversed by the same judge and, therefore, a constitutional proceeding (indirect amparo) would also have to be filed. These last two precedents would certainly enlarge the timing for securing a binding and enforceable award contrary to a pro-enforcement bias that underlies commercial arbitration. These last two judgments join a couple more so rendered that could be questioned from the pro-enforcement bias perspective.

THE JUDICIAL APPROACH: RECENT PRECEDENTS

Kompetenz-Kompetenz

A year ago, the SCJ issued a landmark decision related to the Kompetenz-Kompetenz principle. According to article 1432 of the Commerce Code, the arbitral tribunal can decide about its own jurisdiction.[6] The first paragraph of article 1424 of Commerce Code complements the Kompetenz-Kompetenz principle by establishing:

The Judge Before Whom An Action Is Brought In A Matter That Is Subject Of An Arbitration Agreement Shall, When Requested By A Party, Refer To Parties To Arbitration Unless He Finds That The Agreement Is Null, Void, Inoperative Or Incapable Of Being Performed [...]

By general rule, the judge must refer the parties to arbitration in order to allow the arbitral tribunal decide its own jurisdiction. By exception, this will be decided by the court under the limited grounds set forth above. By the same token, Mexican law does not provide the kind of ancillary proceeding to resolve such issue.

Thus, the Supreme Court decided, by a binding precedent for lower courts, that a court that by way of action or complaint hears a case where the validity, existence, incapability or inoperativity of the arbitration agreement is called into action will hear the case and will not refer the parties to arbitration. Notwithstanding, it will not impede arbitral proceedings that are commenced or continued in parallel:

[...] When In The Terms Of Article 1424 Of The Commerce Code, A Dispute Over A Contract Within Containing The Arbitration Agreement Is Submitted To A Judicial Authority And At The Same Time Is Filed An Action In Order To Declare Its Invalidity, Ineffectiveness Or Its Impossible Execution, Agreement, Then It Shall Be Necessary A Previous Judicial Judgment Over Such Nullity Action. The Aforementioned Is Because On The One Hand It Shall Not Be Let Apart The Existence Of The Proper Judicial Control Over The Arbitration And, On The Other Hand, The Jurisdiction Of Arbitrators Arise From The Free And Autonomous Will Of The Parties. So If It Is Alleged, For Example, The Existence Of Any Vice On The Will In The Act Where The Authority Of The Arbitrator Is Granted, Such Nullity Action Must Be Previously Resolved By The Judiciary, Prevailing The Rights Of The Parties To Initiate The Arbitral Actions Related To The Dispute Over The Compliance, Existence And Validity Of The Contract That Contains The Arbitration Clause: In This Case The Arbitral Tribunal Conserves Its Exclusive Authority [...]"7

This judgment can affect arbitration since it invites parties to seek to avoid arbitration to commence a judicial action to challenge the arbitration clause itself and can convert an exceptional rule into a general one.

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

A 1993 binding judicial precedent establishes that this kind of proceeding can be challenged by an indirect amparo (two-stage) or indirect constitutional lawsuit. The main reasoning relies in its complexity and especially by having considered acts commenced 'out of trial'or to 'enforce' a judgment under Mexico's Amparo Law. Therefore, they are not independent proceedings or main commer-cial actions. The landmark precedent provides the following:

When it is challenged in a constitutional lawsuit a judgment ordering to enforce an arbitration award, the indirect constitutional lawsuit (amparo indirecto) must be filed before the District Judges, in accordance with Section 114-III of the Amparo Law, because of complexity of acts, namely, enforcing an arbitration award is not a single definitive judgment to be challenged through direct constitutional lawsuit (amparo directo), as mentioned under article 158 of such statute.[8]

Besides, as mentioned before, in proceedings for setting-aside or recognising and enforcing arbitration awards, a final judgment cannot be challenged by an ordinary appeal or any other ordinary challenge, but only by an extraordinary challenge: amparo proceeding. The underlying principle was to ensure a speedy process where the parties were not entitled to ordinary challenges to reverse procedural rulings.

However, it was common for practitioners[9] to file motions to reconsider or reverse procedural rulings during such procedures. Notwithstanding this, in October 2007, the SCJ set forth a binding precedent that reverses an isolated and not binding precedent that allowed the parties to file intermediate or interim motions to reconsider rulings. Now, it is clear that even simple procedural rulings have to be challenged through an indirect or two-stage amparo proceeding. Although correct from the technical point of view, the option to reverse an intermediate ruling would have helped the proceeding. This issue was resolved to try to move quickly in arbitration proceedings, but could probably result in the opposite in the long-run if the decision of the judiciary in an amparo proceeding is for remand (amparo para efectos).

Article 1463 Of Commerce Code Establishes That The Final Judgment Of A Proceeding For Recognition And Enforcement Of Arbitral Awards Cannot Be Challenged By Any Ordinary Appeal, Without Specifying To Which Ruling It Refers. However, This Does Not Implies That Reference Is Made Exclusively To The Ruling That Ends The Proceeding, But To All Court Rulings So Issued. If Arbitration Is An Alternative Means Of Resolution For Commercial Disputes In A Quick And Expeditious Manner, The Ancillary Proceedings For Recognition And Enforcement Of Arbitral Awards Must Follow The Same Quickness And Practicity. Otherwise It Would Be Illogical To Admit, On One Hand, That Arbitration Is A Simple And Quick Alternative For Solving Disputes And, On The Other Hand That The Ancillary Proceedings For Recognition And Enforcement Of Arbitral Awards Imply A Major Complexity On Its Processing, Which Could Happen If All Not Final Court Rulings Could Be Challenged By Any Ordinary Appeal.10

SETTING ASIDE AN ARBITRAL AWARD

The Plenary Session of the Supreme Court has recently resolved that the two-stage amparo lawsuit is the proper challenge against a resolution vacating the award. The case known as the Radio Centro- Monitor case is based on a commercial judgment arbitration between two Mexican radio broadcasters; Radio Centro was the losing party at the arbitration.

Consequently, Radio Centro filed an action to set aside the award. Finally, this party obtained a favourable commercial judgment vacating the award.

Monitor filed a constitutional challenge (amparo indirecto) and reversed the setting-aside finding. Then, Radio Centro filed a federal appeal (recurso de revisión) and obtained a declaration of the collegiate circuit federal court that recharacterised the amparo from indirect (two-stages) to direct (one-stage). Therefore the collegiate court re-heard (to judge the constitutional challenge again instead of acting as a federal appeal court), the case and declared that all challenges filed by Monitor against the original judgment rendered by the local court did not comply with several formal requirements and practically dismissed all grounds for challenge.[11] In normal circumstances this was the last resort, and, therefore, the final result would be for the award to be vacated for an improper argument that could place Mexico in a very adverse position as a proper forum for commercial arbitration.

Then, Monitor filed an exceptional (and certainly a creative interpretation for legal counsel in such case) direct amparo before the Supreme Court in order to decide if the collegiate circuit court acted correctly in recharacterising the issue as a direct amparo or should have acted as an appeal court. On 31 January 2006, this case was resolved by the Supreme Court that decided that the recharacterisation of the challenge was incorrect, namely, that the correct challenge in this case was the amparo indirecto. This case will be finally resolved as to the merits at the collegiate circuit court shortly.

Thus, the SCJ in a 6-5 vote issued resolved the following:

- An arbitration award is the final stage of an arbitration procedure, which should be considered as an action falling 'outside' the judicial process or 'out of trial', and that does not have definitive effects. Hence, the proper means to challenge is the indirect constitutional lawsuit set forth in article 114, section III of the Amparo Law.
- An arbitration award is a ruling that represents the final step of a difference derived from an agreement between parties who decided to be subject to a particular procedure and accept the obligation to comply with the corresponding ruling in an independent way. Therefore, this procedure is different from the judicial one provided by the government, and its decision cannot be deemed as a definitive resolution on the controversy, notwithstanding the fact that it cannot be challenged.[11] Subsequently and just a few months later, this criteria was revisited but this time not by the Plenary Session of the Supreme Court (11 Justices) but only by its First Chamber (five Justices). There were contradictory views of the collegiate courts that needed to be settled and that can be summarised as follows:[12]
- On the one hand, the Third and Thirteenth Civil Collegiate Circuit Courts of Federal District considered that an ancillary proceeding for setting aside an arbitral award is an autonomous procedure with a principal action and specific relief sought. Thus, they are not related to another one, ie, ancillary proceedings only refer to formal and procedural matters. Therefore, as an independent procedure, the final judgment must be challenged by direct constitutional lawsuit (amparo directo).
- On the other hand, the Second Collegiate Tribunal of Sixth District and Second and Sixth Collegiate Circuit Civil Courts of the Federal District consider that this ancillary proceeding for setting aside an arbitral award is an action falling 'out of trial'. Therefore, its final judgment is an act executed outside judicial process that can be challenged by indirect constitutional lawsuit (amparo indirecto).

Because of these contradictory positions and in order to establish a uniform interpretation[13] that could be applied by all lower federal courts, as the Amparo Act orders, the First Chamber of Supreme Court heard this action. Thus, it issued a binding criteria according to which the ruling that declares the setting-aside of an arbitral award does not constitute a definitive judgment for purposes of admissibility of the direct constitutional lawsuit because it has not been recognised nor enforced.

Therefore, if an arbitration award constitutes the final stage of a procedure issued as a judicial process, the final judgment of the ancillary proceeding about setting aside an arbitral award must be challenged in an amparo indirecto [two-stage] proceeding.[14]

This precedent does not contemplate that the only finality of the 'ancillary' processing is a quick proceeding and simple process formalities for setting aside and recognition and enforcement of arbitral awards; besides, these proceedings fulfil all the requirements to be considered as an authentic and independent summary proceeding, as seen before. Furthermore, this precedent allows a larger way of challenging it, in opposition to a speedy and expeditious arbitration principle.

The chart above depicts the proceedings for the setting-aside and recognition and enforcement of arbitration awards.

CONCLUSION

The Supreme Court of Justice has followed interpretations that do not ensure an effective and speedy resolution of actions to vacate awards and to recognise and enforce awards.

There should be legislative amendments to our law or a notlikely subsequent Supreme Court precedent revisiting its position and reversing such binding procedures in order to provide: (i) a direct amparo to be filed to both judgments in setting-aside and recognition and enforcement actions; (ii) the option to attach assets once a condemnation judgment is rendered; (iii) the option to challenge through interim motions to consider against procedural rules (recurso de revocación); and (iv) the implementation of an implicit recognition and enforcement when a party does not prevail in a setting-aside action (domestic arbitration). If these amendments are implemented, then a real pro-enforcement bias will be created and Mexico will remain a proper venue for commercial - both national and international - arbitration.

Notes

1. Luis Omar Guerrero Rodríguez (LLM LSE with merits 1996-97) is a senior partner in the commercial litigation dispute resolution department at the Mexico-City based law firm Barrera, Siqueiros y Torres Landa.
2. César Martínez Alemán is a senior associate at Barrera, Siqueiros y Torres Landa. He specialises in international commercial litigation, dispute resolution and IT law.
3. The authors would like to thank Ximena Suárez Enríquez for her assitance in the research produced for this article.
4. Although each procedure seeks different purposes we are outlining common features.
5. The grounds to set aside an arbitral award are limited to the statutory grounds set forth under article 1457 of the Commerce Code which are almost entirely identical to

the ones for recognising and enforcing an award. The party seeking that the award must be vacated bears the burden of proof.

6. Article 1432 of Commerce Code: "[...] The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement [...]"
7. Binding precedent (contradicción de tesis) 51/2005-PS between Sixth and Tenth Civil Collegiate Circuit Courts Tribunal of the Federal District. January, 11 2006.
8. Binding precedent (contradicción de tesis) 21/93 between Third and Second Civil Collegiate Tribunals on one hand and Fifth Civil Collegiate Tribunal on the other, all of them of Federal District. October 18, 1993.
9. See 'Incidente de reconocimiento y ejecución de laudo arbitral. Los acuerdos dictados durante el desarrollo de este, son impugnables mediante el recurso de revocación en materia mercantil' ['Ancillary proceedings for recognition and enforcement of arbitral awards. The rulings rendered during the proceedings are challenged through the revocation recourse in commercial matters']. Isolated precedent. Precedent I.7o.C.36 C, Federal Appeal [Amparo en Revisión] 284/2002. Seventh Collegiate Circuit Court in Civil Matters for the First Circuit, Page 1386. Cabo Urbano, SA de CV, 23 August 2002.
10. Binding Precedent (contradicción de tesis) 40/2007-PS between Fourth and Seventh Collegiate Tribunal both of Civil Matters of Federal District. 13 June 2007.
11. To review such filing see 'Recurso de Revisión Constitucional: Monitor v Radio Centro' published by Quijano, Cortina, López y de la Torre Abogados, Mexico 2006.
12. Federal Appeal 1225/2006. Radio Centro SA de CV, January 2007.
13. A binding precedent (contradicción de tesis) arises when two or more collegiate courts within or from different circuits have different resolutions over the same topic. Thus, the Supreme Court acting in Plenary Session or in Chambers decides the prevailing and binding interpretation.
14. Binding precedent (contradicción de tesis) between Third and Thirteenth Civil Collegiate Tribunal of Federal District and Second Collegiate Tribunal of Sixth District and Second and Sixth Civil Collegiate Tribunals of Sixth District. 19 September 2007.

Barrera Siqueiros y Torres Landa SC

Panama

Jorge Molina Mendoza
Icaza Gonzalez-Ruiz & Aleman

Summary

COMMERCIAL LITIGATION IN PANAMA

The Republic of Panama is a civil law jurisdiction with a welldefined set of legal rules and a specialisation in commercial litigation.

The judicial system is organised into four levels: municipal courts, circuit courts, superior courts (appeals courts) and the Supreme Court. The Supreme Court is divided into chambers, consisting of:

- the First Chamber, which hears extraordinary cassation appeals in civil and commercial cases;
- the Second Chamber, dedicated to criminal appeals;
- the Third Chamber, which hears contentious administrative disputes and labour law appeals; and
- the Fourth Chamber, also known as the General Business Chamber, which hears all matters related to the recognition of foreign judgments, as well as the granting of licences to practise as an attorney and motions for annulment of arbitral decisions.

The Supreme Court of Justice is composed of nine magistrates and in plenary meetings is competent to resolve questions of unconstitutionality, as well as to hear habeas corpus requests and review the constitutionality of the acts and omissions of state officials with jurisdiction in Panama.

The Panamanian court system has specialised jurisdictions for maritime disputes and family law as well as special courts handling copyright, industrial property, unfair competition, antitrust and, in particular, consumer protection. The remainder of conflicts in this area are resolved before the 14 circuit courts of ordinary jurisdiction in Panama City, which are competent to manage civil and commercial litigation for claims above US$5,000.

Although Panama's legal system is based on civil law, it has successfully adopted some procedural elements of US law. This is the case for the procedure in marine claims, the rules for which, (including the discovery rules) were taken from the US Federal Rules of Civil Procedure. Similarly these rules were adopted in antitrust, unfair competition and consumer protection claims. This tendency to adopt US procedure has reached the stage that as part of legislative reform class actions were introduced for consumer protection, environmental law, and stock market fraud and damages claims.

Ordinary civil and commercial claims have also integrated some US-style procedure such as injunctions and cross-claims but the remaining procedure is in written form and involves staggered phases. Although this does not speed up the process, the judicial system mitigates strong anti-formalist principles with a palpable presence creating a balance between formality and dynamism, with an eye on due process, which is a central principle of the Panamanian judicial system.

All matters regarding banking regulations, state intervention and the liquidation of banks are managed by the Superintendency of Banks, which is responsible for the supervision of the bank system in Panama. Claims arising among individuals about banking issues are heard by the ordinary courts provided the claim is not brought under the rules of consumer protection.

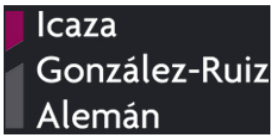
Panama courts, like those in all Latin American nations, suffer from a lack of state funding. Infrastructure can be antiquated and there may be too few staff for the correct and expeditious transaction of trials. Nevertheless, in the past few years, the Presidency of the Supreme Court has provided every court with computers and printers and just recently it has launched a website for public use where its judgments can be consulted.

Panama has a modern and dynamic General Arbitration Law (1999) whose main objective is to lead to the country being recognised as an international arbitration centre. To this end the Conciliation and Arbitration Centre has been set up under the aegis of the Chamber of Commerce, Industries and Agriculture of Panama, a private non-profit organisation. The Centre has reported a steady increase in resolved arbitral claims. The arbitral process itself is very simple and is mandated by law to take no more than six months to reach resolution.

Once an arbitration is finalised, the only way of contesting the award is a motion for annulment before the Fourth Chamber of General Business of the Supreme Court. On average, the Supreme Court takes between two to four months to resolve a motion for annulment. Added to the maximum six months permitted for arbitration, an arbitral cause must be resolved completely and definitively in less than a year.

The General Arbitration Law allows the arbitral process to be transacted in any language. Spanish is not mandatory.

In 2004, the Political Constitution of the Republic of Panama was reformed. In the reforms two important arbitral principles were incorporated: first, the doctrine of Kompetenz-Kompetenz (permission to allow arbiters to decide whether they have jurisdiction); second, the arbitral institution was raised to a level in which justice is administered. As a result arbitral contracts will be subject to due process and judicial guidance.



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Uruguay

Sandra González

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Summary

ARBITRATION IN URUGUAY

In Uruguay, arbitration is recognised and accepted as a means of domestic and international dispute resolution. Uruguayan law, international treaties ratified by the country and case law all recognise that the parties have the right to resolve their conflicts exclusively and definitively by one or several arbitrators.

Traditionally, arbitration was not a frequently used method of dispute resolution in Uruguay. This trend, however, has changed. Parties to domestic and international contracts today generally prefer to resort to arbitration. The reasons are varied: arbitration can be much quicker than court proceedings; and the parties can select arbitrators specialised in commercial and financial matters. This is particularly relevant in Uruguay, since there are no courts specialising in commercial matters.

Finally, in the area of government contracts, it is usual to agree to arbitration in order to preserve neutrality in resolving a dispute. Most of the major contracts with the government involving public works and services in the past few years have arbitration clauses.

The rulings of the Uruguayan courts have gone along with these tendencies, guaranteeing the free selection of arbitration by the parties as a method of dispute resolution.

DOMESTIC ARBITRATION

Uruguayan law fully admits arbitration as a method of conflict resolution. Articles 472 to 507 of the General Code of Procedure embody specific rules governing domestic arbitration. The code provides for the possibility that the parties - through a written arbitration clause included in a contract or a subsequent independent agreement - can submit any matter to arbitration, except those for which negotiation is prohibited.[1]

As formal requirements, the code calls for the parties to establish an arbitration clause and a commitment to arbitration. Absence of either of them renders any subsequent arbitration proceeding null.[2] Uruguayan law even expressly provides that at any stage of an alreadyinitiated court proceeding, the parties may submit their dispute to arbitration.

According to Uruguayan law, a valid arbitration clause is a written agreement whereby the parties stipulate that any disputes or disagreements arising between them shall be resolved by arbitration.[3] The commitment to arbitrate is an agreement - which must be documented in a notarised instrument or judicial minute or document - that will indicate (among other elements), the names of the designated arbitrators, the procedure to be followed and the points on which the arbitration award will be decided.[4] When the conflict or dispute arises, the parties will voluntarily have to make this commitment. If they fail to do so, one of the parties may demand that a competent court make the pertinent designation on behalf of the non-complying party.[5]

The parties in a domestic arbitration can choose the applicable procedure. The parties are free to choose the arbitration procedure in their arbitration commitment (ad hoc or institutional). If they say nothing, then the procedure of an ordinary judicial proceeding will be followed. As regards the rules governing the submission and presentation of evidence, the parties are also free to choose them and without such choice, common Uruguayan law shall be applied. Likewise, the arbitration commitment must also state whether arbitration is ex lege or equity, and without such stipulation, the law establishes that the arbitration will be in equity.

With respect to institutional domestic arbitration, Uruguay has the Centro de Conciliación y Arbitraje, Corte de Arbitraje Internacional para el Mercorsur de la Bolsa de Comercio de Uruguay [Trade Exchange of Uruguay, International Arbitration Court for Mercorsur, Conciliation and Arbitration Centre], which supervises both domestic and international arbitration proceedings.

Judicial control in domestic arbitration is expressly limited. The participation by courts in domestic arbitration is specifically limited by Uruguayan law to:

- in proceedings prior to arbitration: preliminary submission of evidence; preventive measures and procedures for formalising the arbitration commitment;
- during the arbitration proceeding: obtainment of evidence that requires public cooperation;
- after the arbitration proceeding has been terminated: decision on an appeal, if such an appeal is filed.

Challenging a domestic arbitration award is also limited. The only recourse that exists for challenging a decision made in a domestic arbitration proceeding in Uruguay is an appeal for nullity. This appeal is pertinent only if the arbitral tribunal:

- issued its award ex term;
- decided on points not covered by the arbitration;
- did not decide on points covered by the arbitration;
- refused to accept any essential and overriding evidence.

In line with the intent of the law to promote compliance with arbitration awards, Uruguayan law establishes that only in the first and last case will nullity affect the entire arbitration ruling. In the event that the arbitral tribunal should issue its ruling on points not covered by the arbitration, nullity shall affect only those points. If, on the contrary, the arbitral tribunal has not issued on points covered by the arbitration agreement, nullification shall not affect matters or questions that are independent of those points.

The appeal for nullity must be filed within five days from receipt of notice of the arbitration award and will be followed by a brief proceeding. The effects of the arbitration award will be suspended during the appeals process. Once a decision is made on the appeal, only clarifications and expansion thereon may be requested. The possibility of subsequent appeals does not exist.

INTERNATIONAL ARBITRATION

Uruguay ipso jure recognises international arbitration awards. The law stipulates that such awards may be enforced in Uruguay in accordance with treaties to which Uruguay is a signatory, or in accordance with Uruguayan law governing the enforcement of foreign judicial decisions when appropriate.

Uruguay ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, the 1975 Inter-American Convention on International Commercial Arbitration, and the 1979 Inter-American Convention on the Extra- Territorial Efficacy of Judicial Decisions and Arbitration Awards (the Montevideo Convention). Within the scope of the Mercosur, Uruguay ratified the 1992 Protocol of Jurisdictional Cooperation and

Assistance Governing Civil, Commercial, Labour and Administrative Matters (Las Leñas Protocol).

Currently, Uruguayan jurisprudence fully recognises the validity of arbitration agreements that fall within the scope of application of the New York or Panama Conventions. These conventions allow the parties bound by an international commercial relationship to agree to have any disputes arising between them submitted for resolution by arbitration. Similarly, Uruguayan case law recognises the freedom of the parties to elect the law that is applicable to the matter in international arbitration.

Uruguayan courts fully respect the differences in the regulation of domestic and international arbitration. Uruguayan jurisprudence has established respect for the differences in the regulation of domestic and international arbitration. Court rulings have made it clear that Uruguayan law governing domestic arbitration is not applicable for determining the validity and enforcement of an international arbitration award. Here one must resort strictly to the applicable conventions.

A decision of the Court of Appeals in 2003 established an important precedent in the matter of an arbitration proceeding between foreign parties that takes place in Uruguay.6 The court rejected the appeal for nullity and indicated that the formal requirements of Uruguayan law must be analysed flexibly in international arbitration proceedings. The party who challenged the award argued that it was not valid because the arbitration agreement had not been embodied in a notary public instrument, as required by Uruguayan law. The court concluded that "the subordination of the arbitration procedure to the law of the place where the ruling is made is a criterion that is clearly subsidiary in nature and in any light not applicable to the case." It also stated that to establish nullity on the basis of this argument of Uruguayan procedural law would ignore "the consequences of the ratification of the New York and Panama conventions".

The principle of respecting the different rules applicable to domestic and international arbitration proceedings initiated by this decision has been consolidated. In a ruling of May 2007, a Court of Appeals rejected an appeal filed against an award resulting from an arbitration proceeding held in Uruguay between foreign parties.

The court upheld the criterion that when the purpose of the proceeding is the challenging of an international arbitration award, "the statute law of the ratified conventions is applicable".7 The party claiming nullity of the arbitration award argued that there were violations of due process. The ruling indicated that the principle of respect for due process is embodied in the New York convention and for determining whether there has been observance of this convetion one does not have to resort to domestic legislation. The court expressly stated that "the domestic laws governing the matter are not applicable". In particular, the court specifically indicated that the causes for nullity stipulated for domestic arbitration awards by Uruguayan law were not applicable.

Uruguayan courts apply a narrow analysis over international arbitration awards. In this same ruling, the Court of Appeals said when Uruguay is designated as the seat of an international arbitration, the courts of the country "are exclusively competent for examining the forms and methods observed consonant with current and applicable international rules and legal provisions".

The court expressly established that international arbitration awards can be annulled only when there is a manifest, serious, concrete and specific violation of the international public

order. Along this same line of thinking, a prior ruling had established that the international public order exception must be interpreted in an especially restrictive manner.[8] The decision concluded that Uruguayan courts cannot analyse the merits or grounds of the matter submitted for arbitration. The court recognised that this aspect is subject to the law elected by the parties under the New York convention.

After many decades of legislative policy and doctrine running contrary to free will, Uruguayan jurisprudence was initially upset by the effects of ratification of the New York convention. With an antiarbitration tradition and strict regulation of legal conflicts, Uruguayan judges initially resisted the validity of arbitration clauses providing for arbitration abroad. Case law, however, began changing during the second half of the 1980s and started to recognise the validity of arbitration clauses under the New York convention with growing consistency.

With a better understanding of the New York convention, jurisprudence stopped demanding the application of Uruguayan law. A decision by a Court of Appeals in 1992 conclusively held that "upon agreeing to application of a foreign law, it is not the parties which seek to set aside the rules of the appendix to the civil code, but instead it was our country upon ratifying the New York Convention and adopting it as domestic law which changed them".[10] Subsequent decisions followed this criterion. More recently, a court also confirmed that the parties have the right to choose applicable law and that arbitration clauses are governed by the autonomy of will.

These decisions are very important because, together with other recent jurisprudence favourable to arbitration, it places Uruguay in a very good position as an attractive host country for international arbitration proceedings between non-Uruguayan parties. One of the most critical issues in the selection of a host country for arbitration is that the laws of that nation - which by definition is that which permits challenges in nullity to arbitration awards - show reasonable deference and do not look to ignore or cast aside on the basis of formalisms or by resorting to restudy the basis or grounds for the decision.

Uruguayan courts abide by the parties' decision regarding applicable law and rules of procedure for the arbitration. In the ruling commented upon just shortly before, the Court of Appeals ruled that in accordance with the terms of reference of the arbitration, the parties had agreed that the rules which would be applied would be those of the rules of arbitration of the International Court of Arbitration of the International Chamber of Commerce, that the award would be made in accordance with Argentine law and that the arbitrators would reserve the right to reject evidence in certain cases. It was on this basis that the court rejected the claim of the party challenging the award that other rules should apply to the admission of evidence. The ruling stated that this did not stem from the terms of reference.

The court concluded that the action of the arbitral tribunal fell strictly within what was stipulated in the terms of reference. It also concluded that the party claiming nullification of the arbitration award had signed those terms and rendered its agreement to the powers vested in the arbitrators, so could not challenge the award by arguing against those very same powers.

Finally, the decision of the Court of Appeals gave maximum respect to the international arbitration award by not allowing the parties to argue as ground for nullity elements not questioned - and therefore implicitly accepted - by them during the arbitration proceedings. In effect, the court held that a party cannot allege as grounds for nullity a circumstance which it had voluntarily waived in the arbitration process.

Uruguayan courts decline jurisdiction and refer parties to international arbitration. Even after the New York convention came into force, case law recognised in theory the possibility of referring the parties to arbitration abroad, but in practice avoided that result. One of the resources used was a criterion contrary to all comparative judicial decisions and legislation, called the 'strict interpretation' of arbitration clauses.

However, decisions increasingly favourable to arbitration have strengthened in recent years. Today, jurisprudence fully recognises the New York Convention. It no longer has any doubts as to its application to commercial contracts in general and has totally eliminated the strict interpretation criterion.

In 2004, a decision in the context of a distribution dispute admitted the validity of an arbitration clause and referred the parties to arbitration in Osaka, Japan, under the rules of arbitration of the Osaka Stock Exchange.[11] This case, involving an American affiliate of a Japanese multinational, opened the way to successive decisions in the same vein. A significant aspect of the decision in this case was that the dispute involved Uruguayan parties and an American affiliate independent from the Japanese parent, which years back had agreed to an arbitration clause. Despite the fact that the respondent American company was not a party to the distribution agreement that embodied the arbitration clause, the court found that the parties' allegations referred to the original agreement, so that there was a sufficient link to apply the clause.

Almost simultaneously, a labour court also referred parties to arbitration[12] in a case brought by a local manager against the affiliate of a Spanish multinational. This precedent was important in that it came from labour courts which had traditionally been reluctant to accept alternative dispute resolution mechanisms. But it was also important because it implied another major deviation from the earlier criterion of strict interpretation. Moreover, in this case the employment contract giving rise to the dispute did not include an arbitration clause. Such a clause had been included in a stock purchase agreement between the plaintiff and a company related to the employer, in the context of which the seller had accepted the management post in question as part of a package agreement. The labour court found that, notwithstanding the absence of an arbitration clause between the specific disputing parties, there was a sufficient connection because a standard employment contract had been attached to the stock purchase agreement. The court ordered the parties to resolve the labour claim by arbitration under the arbitration rules of the International Chamber of Commerce.

These decisions are in addition in step with the most current jurisprudence which submits to arbitration proceedings disputes deriving from agreements that do not contain an arbitration clause, but which are related to a principal contract which embodies an arbitration clause.

A year later, in 2005, in another case on distribution, a Uruguayan court also refused to assume jurisdiction[13] and referred an American company and its Uruguayan distributor to arbitration in Argentina under the rules of the Argentine-US Chamber of Commerce. This decision confirms the principle set out in the prior year's case and expressly rejects the arguments against lack of jurisdiction based on national laws governing international private relationships. The court ruled that "maintaining that the parties cannot agree to submit their disputes to an arbitration court because that would violate the rule set forth in article 2401 of the civil code is to deny arbitrational jurisdiction in the international sphere, which would appear to be inadmissible, inasmuch as the 1958 New York Convention, signed by our country, is fully in effect as of this date."

In abandoning so conclusively the strict interpretation principle, these rulings were an important step forward. Uruguay fell into line with the most current international jurisprudence: arbitration clauses should be interpreted with a 'broad criterion' that respects the will to arbitrate and which closes the gate to machinations that avoid such clauses.

Endnotes

Venezuela

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Hoet Peláez Castillo & Duque Caracas

Summary

DOES INTERNATIONAL ARBITRATION HAVE A FUTURE?

A review of recent developments

Arbitration is possibly the most widely accepted method of alternative dispute resolution as it has expanded rapidly in recent years. It is used around the world as an effective substitute to court litigation and specially to resolve commercial disputes. Unlike mediation, where a neutral third party attempts to assist the parties to resolve their dispute voluntarily, international arbitration is a binding dispute resolution mechanism. It must be agreed to by the parties either at the time of drafting an agreement or some time thereafter - usually after a dispute has arisen. We examine below recent developments and what the future has to hold.

ENFORCEMENT

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959 (the New York Convention) has greatly increased the ease of enforcing international arbitral awards, thus strengthening the international arbitral routine. As for the countries that are parties to the Convention, a review is strictly restricted to specific circumstances such as the incapacity of the parties, a void arbitration agreement, where parties were not given proper notifi- cation of the arbitral proceedings, where the award addressed matters beyond the scope of the agreement to arbitrate, and cases where enforcement would be contrary to public policy of the country in which recognition and enforcement is sought or the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

Recent signatories of the New York Convention include Brazil (2002) and the United Arab Emirates (2006). Some 138 countries and territories now follow the system. Brazil's recent ratification of the Convention was widely heralded as the dawn of a new era for arbitration in Brazil, coupled with their passing of a new Arbitration Act in 1996. The country is now an important player in world trade and the health of the Brazilian economy makes front-page news. Much of this is due to the removal of barriers to investment as a consequence of which international trade and foreign investment increased enormously. As with most Spanish speaking countries in this continent, the slowness of the court system does not escape Brazil. Many hoped that commerce would benefit immediately from the speed and flexibility offered by arbitration, but there is still a long way to go not just for Brazil but also for all Latin American countries. It remains to be seen whether in practice the Brazilian legal system will uphold international awards under the Convention, but this is otherwise a significant step forward for parties doing business in Brazil or with Brazilian entities.

The UAE, for its part, and in particular Dubai is also currently attracting significant foreign investment as part of its strategy to move away from an oil-based economy and to establish itself as the commercial centre of the Gulf region. A key part of this strategy seems to be attracting inward private investment. This move of the UAE will no doubt open the way for disputes to be settled in a neutral venue overseas, which was not an option before the ratification of the Convention.

INTERNATIONAL INVESTMENT AGREEMENTS

Wherever an area is capable of attracting overseas investment it will inevitably see disputes. The principal areas of investment dispute are infrastructure; energy, utilities, public services; trade and services. The Convention on the Settlement of Investment Disputes between

States and Nationals of other States 1965 (ICSID Convention) entered into force in October 1966, created the International Centre for Settlement of Investment Disputes (ICSID). The ICSID Convention establishes an international system for submitting investment disputes to conciliation or arbitration. It ensures that consent, once given, is binding; that procedures can be instituted and taken forward by a diligent party; and that arbitral awards can be enforced in any member country, subject only to limited international review mechanisms.

Bilateral investment treaties (BITs) often make international arbitration available directly to the investor and the host state. Several treaties with provisions on investment, such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), have been concluded with a view to bringing uniformity to international investment law. NAFTA entered into force in January 1994 between Canada, Mexico and the US. It created the world's largest free trade area and was designed to foster increased trade and investment among the parties. NAFTA encourages the use, whenever possible, of arbitration and alternative dispute resolution for settling commercial disputes. Chapter 11 of NAFTA governs investment and provides a right for redress against a state party where there has been an alleged breach of its terms. The central elements of chapter 11 are the minimum standard of treatment and expropriation provisions. State parties must treat covered investment in accordance with international law, including fair and equitable treatment. They must also compensate for the direct or indirect expropriation of covered investment. As in most BITs, chapter 11 allows for arbitration of disputes at the choice of the investor, either before ICSID or under the United National Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976.

In December 2006 Canada subscribed to the ICSID Convention. Canada is the second of the three NAFTA parties to sign the Convention besides the US, which signed it in August 1965. At the end of December 2006, 143 of the ICSID Convention signatories had also deposited their instruments of ratification to become contracting states, and the total number of cases registered with the Centre since its inception reached 222.

Venezuela, for its part, has signed and ratified 24 investment treaties, and ICSID appears as the dispute resolution mechanism in 23 of them, 19 of which refer to the Arbitration Rules of UNCITRAL.

ALBA COUNTRIES

During the V Summit of ALBA in Venezuela on 29 April 2007, the so-called ALBA countries agreed to jointly withdraw and denounce the ICISID Convention 1965. These ALBA countries are the members of the ALBA-TCP integration programme, which stands for 'Bolivarian Alternative for the Americas - Peo-ples' Trade Agreement for: Bolivia, Venezuela and Nicaragua' (Alternativa Bolivariana para las Américas - Tratado de Comercio para los Pueblos: Cuba, Bolivia, Venezuela y Nicaragua).

These countries are also called the 'Rebels of the Americas' and it was indicated during the summit that the above was being agreed in order to "guarantee the sovereign right of the countries to regulate foreign investment in their national territories." Bolivian President Evo Morales stated that ALBA-TCP member countries

Vigorously Reject Legal, Media, And Diplomatic Pressures From Certain Multinational Companies, Which Having Violated Constitutional Rules; Domestic Legislation; Contractual Agreements; And Regulatory, Environmental, And Labour Provisions; Resist The Application Of Sovereign Decisions Of The Countries By Threatening With Arbitration And Commencing International Arbitration Proceedings Against The States Before Institutions Such As ICSID.1

Various reasons have been put forward to support the above proposed withdrawal. It has been indicated that ICSID goes beyond any public international or domestic laws. Also, that proceedings are kept private although public interests are at stake and ICSID awards cannot be appealed. In addition, there has been some criticism as regards arbitrators being the decision-makers in some cases and then investors' legal representatives in other cases, which it is stated works against impartiality and shows the vulnerability of the system. Additionally, it is mentioned that a clear conflict of interest is generated where ICSID administers commercial disputes from litigating companies that are partially owned by the World Bank, which it is indicated is an entity that has been involved in the financing of a number of private commercial projects.[2]

The truth is that ICSID does not itself decide arbitration cases, and arbitrations often take place not in the home city of the institution (ie, Washington), but at a location designated by the parties or arbitrators. Arbitration cases are decided by arbitrators, and the parties participate in the appointment of arbitrators and can even decide in advance on the number of arbitrators and how they are to be selected.

A country that subscribes an international convention such as the ICSID Convention would no doubt have been aware of the contents and scope of the agreement prior to ratification. In the case of Venezuela, once ratified and published in the Venezuelan Official Gazette (Gaceta Oficial) the Convention became part of the domestic legislation. As such, the application of the Convention could not possibly go beyond domestic laws as it would be part of our domestic laws. In addition, the parties have the option to choose the proper law, which is the law that would govern and resolve substantive issues. This can be done in advance and anticipating the public interest issues at stake that would be covered by the agreement, as the Tribunal will decide the dispute in accordance with such rules of law agreed by the parties. In the absence of such agreement, the Tribunal is asked to apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. If by way of example Venezuela were the state party and no applicable law was chosen by the parties then Venezuelan law and international law rules would be applied to resolve the dispute. Clearly, in this scenario it could not be said that this would work against the interests of Venezuela.

It is correct that ICSID awards cannot be appealed. Nevertheless, ICSID awards can be annulled by a special ICSID ad-hoc committee, and there is also the possibility of requesting a review of the award by an application in writing addressed to the Secretary- General. As for the publicity of the proceedings, these can be kept public or private depending on the particular circumstances of the case and the decision of the parties. In addition, ICSID awards are published and can be accessed at www.worldbank.org/icsid/.

Not only can the parties participate in the selection of arbitrators but even when an arbitrator has been appointed the parties can also apply for his/her disqualification. This means that in those cases where it is an issue for any of the parties that the arbitrator has represented an investor in another case, this party could propose the disqualification of the relevant decision-maker. The same would apply where the arbitrator has provided legal advice to a state and this is an issue for any of the parties.

Cross-border contracts are always subject to the laws of multiple jurisdictions. This means that complicated legal issues will have to be dealt with by the ordinary courts if the parties have not decided on them before the dispute arises (ie, substantive law governing the

contract, the country or countries with jurisdiction to resolve the dispute, enforceability of any court judgment).

Possibly one of the most valued benefits of international arbitration is the parties' option to choose a neutral dispute resolution forum, such that no party need submit to the jurisdiction of the courts of another party's home nation. Some learned commentators consider that international arbitration can provide a better solution to international disputes than local or foreign courts because crossborder business disputes present unique challenges that can only be effectively dealt with by international arbitration. In a foreign court there might be the disadvantage of being subjected to foreign legal procedures, foreign customs, foreign language, and even prejudice and corruption. Also, litigating before a foreign court might mean taking a risk with a judge or jury probably unfamiliar with the particular business and almost certainly unfamiliar with the foreign law issues presented in the dispute.

Arbitration offers to the parties the option to decide who will resolve the dispute for them, which means that they can ensure that the arbitrators are fair and knowledgeable. This means that the parties retain the ability to select a decision-maker trained in the particular industry or technology in question and who may come from a neutral jurisdiction. All in all, we think that it would be hard to demonstrate that parties retain more power in ordinary court proceedings than in arbitration.

INVESTMENT PROTECTION IN VENEZUELA

In Venezuela, foreign and domestic investments and investors can now rely on the Act for the Promotion and Protection of Investments 1999 (LPPI). This Act provides a reliable legal framework which affords investments and investors a secure atmosphere by regulating the role played by the state in order to increase, diversify and complement harmonically investments to help reach our domestic development objectives.

AS LAID DOWN IN ARTICLE 22 OF THE LPPI:

Disputes between foreign investors from countries which have signed treaties or agreements on promotion and protection of investments currently in force with Venezuela, and those disputes to which provisions either of the Legal Framework of the Multilateral Investment Guarantee Agency (MIGA) may be applied, or of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (CIADI), shall be resolved through international arbitration according to the terms of the aforementioned treaties or agreements provided that said arbitration is provided for in said treaties or agreements without prejudice to the possibility, if applicable, to resort to court proceedings according to Venezuelan law.

Article 22 of the LPPI was reviewed by the Constitutional Chamber of the Supreme Court of Justice on 14 February 2001. The Court concluded that the provision contained in this article could not be relied upon as an authorisation to forgo public law rules in favour of arbitral institutions, therefore depriving local courts of the power to render decisions on eventual controversies that might arise out of the application of the LPPI.

This decision of the Supreme Court of Justice points out that alternative dispute resolution mechanisms, including arbitration, are expressly set forth in the Venezuelan Constitution. It is stated that they are part of the dispute resolution mechanisms that can be used to solve disputes between foreign investors from countries which have signed treaties or agreements currently in force with Venezuela on promotion and protection of investments. Also, to solve

the controversies to which the agreement that created the Multilateral Investment Guarantee Agency (OMGIA-MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) apply.

Whether or not the threat from the Venezuelan government to leave ICSID will materialise in the future remains to be seen. Meanwhile, there is no doubt that certain decisions from our Supreme Court of Justice appear to restrict the possibilities to resort to arbitration as an alternative dispute resolution mechanism. The most recent example of this is a decision rendered on 5 April 2006 by the Political Administrative Chamber of the Venezuelan Supreme Court of Justice. This is an important decision that modified the approach as regards arbitration clauses contained in agreements signed by the Venezuelan government or corporations whose majority stockholder is the Bolivarian Republic of Venezuela.

According to this decision, when it comes to agreements having (i) a public interest; (ii) a direct impact on national development; and (iii) a direct impact on the Venezuelan wealth which therefore represent a serious damage to the government, the controversy cannot be subjet to arbitration. Clearly, this decision shows the intention of the Venezuelan government to have any controversies related to Venezuela heard and solved by Venezuelan courts.

WHAT THE FUTURE HOLDS

The emergence of international arbitration has clearly been stimulated in particular by the growing processes of the globalisation of the economic activity. An important reason for the development in arbitration has been the increasing tendency for international business disputes to be resolved through the process of private arbitration. This is partly because enforcing a national court's judgment in another country can be extremely difficult. If an arbitral award is to be enforced in one of the countries that are parties to the New York Convention, enforcement will be much easier than enforcing a judgment from a foreign court.

Arbitration clauses are normally incorporated into cross-border agreements, generally choosing a neutral forum to resolve any dispute. Also, the proliferation of bilateral and multilateral investment treaties noted in the last few years has had a tremendous impact in the growth of arbitrations. In particular, a recent growth of arbitrations has been seen in eastern Europe and Asia. Singapore, Japan, China, Korea, Macedonia, Tajikistan, Turkmenistan, Moldova, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Belarus, Albania, Uzbekistan, the Russian Federation, Pakistan, India, Indonesia, Bangladesh, and Hong Kong have all entered into bilateral investment treaties with other states.

Over the past decade, the number of bilateral treaties has grown by about 1,000 to its present level of over 1,300. More than 800 have been concluded since 1987 by a growing number of countries. The amazing growth in the number of treaties is likely to continue as countries pursue further investment opportunities.

Almost all modern BITs include provisions for dealing with disputes between a party from one country and an investor from another country. The overwhelming majority of the bilateral investment treaties and multilateral treaties contain provisions to assist investors from one relevant signatory state to resort to arbitration in respect of any investment disputes with parties from another signatory state. Several of the treaties provide investors with a choice between resorting to ICSID arbitration or to arbitration on the 1976 Arbitration Rules of UNCITRAL, with the ICSID Secretary-General as the appointing authority of arbitrators. As for ICSID, the total number of arbitration cases has more than doubled during the last 5 years.

The number of BITs has grown significantly as states seek a more structured and secure investment environment. BITs now play an important role in the planning and development of international investment relations.

International arbitration can represent efficient, reliable and cost-effective dispute resolution. It is particularly advantageous in the international arena and is fast becoming the primary mode of dispute resolution for large cross-border transactions. This is because arbitration represents a reliable way for contracting parties to avoid litigation in the local courts of a potentially hostile and almost certainly unfamiliar jurisdiction in another party's country.

The entry of the former socialist states into the global markets and the emergence of new players (in particular smaller companies from eastern Europe, Asia and Latin America) born out of privatisation will continue having an impact in the growth of arbitration as they get fully integrated into the global market. They realise arbitration can be efficiently used in commercial disputes with other companies particularly on the international stage. This means we will continue to see arbitration clauses incorporated into crossborder agreements.

The rapid change to the public international law regime on investment protection has resulted in a body of arbitral decisions over the past five years. They address various issues of substance, including the scope of covered investment and extend of host state obligations. They present, in addition, important issues of procedure. Foreign investors need the stability and predictability to manage risk and increase value. The legal framework, including dispute settlement, is of paramount importance. Effective remedies preserve business corporation and allow redress is necessary. Therefore, perhaps a more detailed drafting of dispute resolution provisions by states parties to bilateral or multilateral investment treaties, investors or governments seeking some form of contractual commitment could help avoid situations such as unenforceable or inconsistent awards.

The future of international arbitration may well depend, at least in part, on the ability of arbitrators, signatories to arbitration agreements, and courts to maintain the integrity of the international arbitral process.

Notes

1. Our translation. See 'Paises del ALBA y TCP denuncian convencion del CIADI', available at http://www.minci. gob.ve/noticias_-_prensa/ 8/ 558/paises_del_alba.html; and 'Bolivia, Venezuela y Nicaragua deciden retirarse y denunciar el CIADI', available at http://www.cadtm.org/spip. php?article 6 9.
2. See 'Cancilleria oficializa la salida de Bolivia del CIADI', available at http://www.rree.gov.bo/notasprensa/ 007/ 007_ mayo/np1.htm.

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