The Arbitration Review of the Americas

2010

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Global Arbitration Review is delighted to publish *The Arbitration Review of the Americas 2010*, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports *The European and Middle Eastern Arbitration Review* and *The Asia-Pacific Arbitration Review*, *The Arbitration Review of the Americas* provides an unparalleled annual update - written by the experts - on key developments.

In preparing this report, Global Arbitration Review has worked exclusively with leading arbitrators and legal counsel. It is their wealth of experience and knowledge - enabling them not only to explain law and policy, but also to put theory into context - which makes the report of particular value to those conducting international business in the Americas today.

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Strengthening International Arbitration's Presence in the Americas

Despite the fluctuations to which the global economy has been subject in recent times, international arbitration continues to consolidate as an efficient means for resolving international disputes in the Americas. As one of the many key threads within the globalisation loom, arbitration has allowed different countries and legal communities to interconnect, both within the region and outside its limits.

Empirical growth indicators

A common language and understanding of arbitration seem to have developed within the region. With few exceptions, arbitration has turned into a well-accepted means for dispute settlement, actively encouraged by states' legislation frequently based in tested legal frameworks under international guidelines and treaties.

Several developments evidence the expanding role of international arbitration throughout the Americas.

The first notable development is the increasing presence of countries from the region on the list of signatories to the preeminent conventions governing international arbitration. More than half of the American countries have ratified the New York Convention.1 Six of these ratifications took place within the past decade,2 with the case of Brazil clearly standing out due to its impact on the development of commercial arbitration in the region.

On a similar path, 11 countries from the region have adopted, with slight changes, the UNCITRAL Model Law on International Commercial Arbitration (either in its 1985 or 2006 version).3 Additionally, the United States and 18 Latin American states have signed the Inter-American Convention on International Commercial Arbitration (the Panama Convention).4

Second, the growing relevance of international arbitration in the Americas may be seen in the number of disputes involving North, Central or South American parties that have been submitted to arbitration before arbitral institutions such as the International Chamber of Commerce's (ICC) International Court of Arbitration and the International Centre for the Settlement of Investment Disputes (ICSID).

The ICC has witnessed a significant increase in the number of arbitration requests before it, with 32 requests in 1956, 210 in 1976, 337 in 1992, 452 in 1997, 529 in 1999, and 599 in 2007.5 While approximately 240 parties involved in arbitration cases were from the Americas in 1998,6 that number climbed to 356 in 2007.7 In addition, parties from the Caribbean and Latin American countries increased its relevance. Throughout the total number of parties from the Americas registered in 2007, 56 per cent belonged to Caribbean and Latin American countries, with a strong presence of Brazilian and Mexican parties.8

Within the investment arbitration field, of more than 170 concluded cases before ICSID tribunals, over 50 involved parties from the Americas and more than 40 of these cases took place in the past decade.9 Additionally, of approximately 120 pending cases before ICSID tribunals, over 60 involve parties from the Americas, the majority of which commenced in the past decade.10 The geometrical increase of bilateral investment treaties (BITs) executed by states in the region and the signature of free-trade agreements (FTAs) such as NAFTA or DR-CAFTA have become crucial elements in this respect.

While specific situations could lead to distortions in the statistics (ie, Argentina accounts for approximately 25 per cent of all pending ICSID cases), investment arbitration is nowadays seen as an alternative to litigation before domestic courts and, accordingly, investors in the region increasingly consider resorting to it in critical scenarios.

Third, the Americas display particular growth in the number of arbitrators appointed either in institutional or ad hoc arbitrations. Today, it is unsurprising to see an arbitrator from the Americas sitting in an international arbitration panel either as chair or party-appointed arbitrator. Simply considering the example of the ICC, the total percentage of arbitrators from the Americas appointed under the ICC Rules in 1998 was only 12 per cent,[11] and this number almost doubled in 2007.[12]

Fourth, the use of Spanish[13] and more recently Portuguese has increased significantly in arbitration proceedings owing to the growing presence of international companies and arbitration disputes involving Latin American parties. Fluency in Spanish or Portuguese is nowadays considered a valuable skill within international arbitration teams located in Paris, London, or New York, and some of the most prominent specialists have started to study them. An increasing number of young professionals are, year after year, seeking internships in Latin American firms as a way to get acquainted with the market and its culture and, at the same time, develop these much-demanded language skills.

Latin America's evolution: from a hard look to a more friendly view towards arbitration

While North America continues to be arbitration's most prominent market, both in the number of cases and lawyers and arbitrators involved,[14] Latin America has significantly contributed in recent years to its explosion in the region.

Until the beginning of the 1990s, the Calvo Doctrine appeared as an almost indestructible barrier preventing disputes between foreign nationals and Latin American sovereign states from being settled through binding international arbitration. The 1990s marked a distinct shift in the up-to-then prevailing trend. Execution and ratification of BITs by Latin American countries helped to improve the investment climate in the Americas, and it effectively limited the influence of the Calvo Doctrine by providing either direct investor-state arbitration or allowing it after complying with certain domestic proceedings (soft Calvo clauses). Strengthening this path, the increasing execution of FTAs have provided further support to international arbitration's role as an appropriate means of adjudicating disputes.

Lawyers have taken due note of this more friendly arbitration environment. A quick look into many international law firms evidences the appearance of practice teams specialised in dispute resolution in Latin America. Moreover, some of the most experienced Latin American law firms in this area have started exporting their services beyond their traditional national boundaries, either acting as counsel or advising other firms in the region. Today, it is commonplace to see international arbitration road shows and beauty contests throughout the region, foreign professionals delivering lectures in local forums, and international law firms increasingly competing in local markets.

Further milestones reflect the importance that Latin America has gained in the field. To name just a few, local arbitral institutions and journals have grown at an impressive scale; academic interest on the subject has significantly increased, leading, for instance, to international commercial arbitration competitions - such as the one held last September in Buenos Aires among 24 Latin American university teams - and the selection of Latin American cities as the forum for holding international arbitration conferences, symposiums, and mock arbitrations

has also increased. The IBA arbitration days held in recent years in Mexico City and Sao Paulo, the ITA events that took place in Mexico City, Buenos Aires, and Sao Paulo, and the 2010 ICCA conference to be held next May in Rio de Janeiro, are clear examples of such a trend.

Specific drawbacks and challenges ahead

Arbitration in the Americas experiences its own problems and shares some common challenges with other regions. As in other fields, progression is not lineal, but follows a spiraling trend.

International arbitration is becoming an increasingly complex process. Though arbitration's goal is to provide efficient dispute resolution outside national courts, the rising costs of conducting arbitrations, including arbitrators' and counsels' fees, witness and expert travel expenses, along with the increasing complexity in matters such as document production, discovery and privileges, and the heavy workload affecting some arbitrators, have raised justified concerns on two of its most publicised features: speed and relatively low-cost procedures. International institutions and practitioners are well aware of these problems and have been consistently working on alternatives (ie, fast-track arbitration, etc) to avoid overloading arbitration with practices and problems typical of court litigation.

While issues that have recently attracted wide interest in other jurisdictions, such as those posed in Europe after the ECJ's decision in West Tankers, Inc[15] concerning anti-suit injunctions or the European Commission's Report and Green Paper on the review and application of Council Regulation (EC) No. 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters[16] have only raised marginal attention in the region, the Americas experience their own plights.

Within the United States, the Arbitration Fairness Act of 2009, intended to target advocates' cries for private individuals' protection from mandatory arbitration clauses, could pose significant obstacles, if passed.[17] The Act renders unenforceable arbitration clauses in agreements concerning consumers, employees and franchisees, or civil rights disputes, and largely overrules the principles of separability and competence-competence. Although meant as a shield for individuals from the dangers of fine print clauses, the Act poses an equal threat towards international commerce with US companies and would increase litigation and arbitration expenses.[18]

Moving south, countries such as Bolivia and Ecuador have recently adopted actions limiting arbitration, either by denouncing the ICSID Convention or introducing significant changes into their legislation or major contracts justified on sovereign grounds. These actions have caused experts to question whether they might indicate that a possible revival of the Calvo Doctrine is near. Other Latin American countries have raised concerns about the neutrality of the international investment arbitration system or have intended to limit its role by bringing those disputes to domestic forums. While such criticism could be interpreted as a backlash towards investment treaty arbitration, it should nevertheless encourage states, institutions and practitioners to seriously address the different concerns raised both by states and investors in order to help improve the system.

Difficulties that typically arise when states are parties to arbitration (or litigation) should not contaminate international commercial arbitration. Achieving a greater uniformity in arbitration regulation through the adoption of the Model Law and international guidelines or assuring wider compliance with international commitments (ie, the New York Convention)

and awards should be seen as permanent goals. All efforts in this respect, in particular those related to educating our students, lawyers, public officials, and judges, should be encouraged and praised.

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Dr Tawil is the co chair of the IBA's Arbitration Committee, an ICCA Council member, a member of the LCIA Court, the ICC's Latin American Arbitration Group, the ITA's Academic Council, the FIAA Executive Committee, among other institutions. He has published five books and over 120 articles in matters related to his fields of practice.

His professional activity is focused in administrative law, energy, public utilities and international disputes. He acts as chair, co-arbitrator, counsel or independent expert in arbitrations under the rules of the ICC, LCIA and ICSID.

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He received his law degree (1983), a masters degree (1986) and a PhD (1991) with the highest academic qualifications, all of them from the University of Buenos Aires.

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Arbitration in Latin America

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Arbitration in Latin America

Arbitration in Latin America has now ceased to be a mystery. The phenomenon of arbitration has been increasing both in the amount of cases and the number of institutions dedicated to managing cases.

Ten years ago the big boom was in commercial arbitration; the different legal provisions that were instated in each country, along with the appearance of national arbitration institutions, give us a clear picture of that fact. So much so that the Inter American Development bank financed projects in 12 countries starting in the late 1990s. Thus, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela were able to revise the laws pertaining to alternative dispute resolution and set up or strengthen institutions in order to manage commercial arbitration and mediation cases. Most of these institutions were created within existing entities such as chambers of commerce. The need to insure that internal laws did not conflict with proposed legislation brought about an interest of its own reflected in the inclusion of arbitration and mediation as material for seminaries and such.

It is not easy, nor is it proper, to include all Latin American countries in one general opinion. There is no such thing as Latin American arbitration. Each and every country has its own legislation, institutions and by-rules, and even the group efforts that have been made at the regional level have not given any uniform results.

There are many projects undertaken in the belief that a uniform approach to arbitration exists. But this is not the case. While there are countries whose legal system is very friendly to arbitration and have been party to the New York Convention for a long time, and whose court system may also be friendly, things are not so everywhere, nor is there constancy. A country like Colombia was pioneering in the field while Brazil did not show any interest and others were still timid about the subject. The passage of time has brought Brazil into the modern arbitration world and Colombia has begun to make steps in the same direction. Consequently, conditions of arbitration in different countries are not as clear as they used to be.

Commercial interests in the region vary over time and changes of governments and their policies. What may have been true of Venezuela a decade ago is no longer the case owing to a new government that has extremely different priorities, and thus even traditional commercial allies have been substituted by others. We need to question traditional paradigms if we are to meet today's challenges, including globalisation, new trade and investment methods and constant financial constraints. What worked in the past will not necessarily work in the future.

Sometimes it is conveniently forgotten that in commercial contracts parties consent to arbitration by including their arbitration clause in the contract. States, on the other hand, give their consent in their treaties. But consent is present either way you look at the situation. That the perception could be changed because of political reasons does not alter the fact that the treaty was signed and consent was given for that particular treaty, be it regional or bilateral, and the protection of investments that may come as a consequence of the treaty or that are in any way protected by the treaty continues to be valid.

As politics and enforcement of previous commitments change, so does arbitration. It must adapt to the new circumstances and so must all those who work within the boundaries. There seems to be an increasing visibility of the subject in every area, be it commerce, employment or investment. With the increased visibility has also come a division of perspectives, with the legal world looking one way and the political world looking another.

Investment arbitration is in vogue in Latin America. The number of investment arbitration cases has increased in the past years. We could try to analyse the reasons but they are many, some legal, some political and some commercial. The point is that they exist and arbitral proceedings have become increasingly complex and difficult in every sense. The reactions of the parties to arbitration procedures have also changed considerably. Investment arbitration cases have been used as political leverage by some regimes in their efforts to erase the line between state and government. The same can be said for the reaction of counsel to the parties. The firms that have arbitration teams have subsequently arrived at the conclusion that investment arbitration requires specialised attention and so have dedicated parts of their teams exclusively to arbitration. There is much ground to cover, and the proliferation of cases has influenced the escalation of fees.

We are at a loss to elaborate on the various criteria developed to distinguish the exclusive approach that must be given to investment arbitration in contrast to the principles of commercial arbitration. We do recognise that confidentiality, remedies and a series of other issues substantially differ from one to another, yet the relationship between them is not clear.

The quality and quantity of information that is available has also increased. Publications in Spanish and Portuguese have been created and translated into English. Specialised publications have also increased and information abounds on the internet on the subject.

The figures below give a good indication of the increase of cases in the big international institutions with a presence in Latin America. The ICC has published that 12.4 per cent of their cases last year were from Latin America, which gives us 200 cases in total with 115 Latin American arbitrators. ICDR states that 87 out of 703 cases had parties from Latin America and nine Latin American arbitrators were named. ICSID figures also show an increase in cases coming from Latin America.

In this year's General Assembly of the International Federation of Commercial Arbitration Institutions (IFCAI) there was general consent as to the growing number of cases that have come out of the world economic crisis at both the domestic and international level. There tends to be the belief that many cases have arisen from the crisis and the numbers may decrease when the crisis subsides. We believe that information on arbitration in the legal and business circles has assumed an important role in conflict resolution and that this role will, in the end, determine the increase or decrease of cases.

Arbitration is a wonderful legal tool to work with, but like any tool, if mishandled it can create more problems than it pretends to solve. The use of arbitration as a means to resolve

disputes and the possibility of problems arising is where the challenge lies for all those who handle arbitration cases from different angles, such as counsel, arbitrators and institutions. And we mustn't exclude the courts, even though they only interfere when asked to do so by the aforementioned.

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US and International Arbitration

Catherine M Amirfar, **Donald Francis Donovan** and **David W Rivkin**
Debevoise & Plimpton

Summary

Current Challenges in US and International Arbitration

The Federal Arbitration Act (FAA) and judicial decisions construing it reflect the United States's continuing commitment to its longstanding policy favouring the enforcement of domestic and international arbitration agreements and awards. In the international context, this policy is given effect by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in chapter 2 of the FAA.

One recent result of this strong pro-arbitration policy, and especially decisions expanding the scope of subject matter arbitrability to include public law disputes, is the increased use of arbitration provisions in consumer and employment contracts and other agreements between parties who may have unequal bargaining power, such as franchise agreements. As a general rule, these agreements have been enforced in the same way as in the commercial context. Some commentators and consumer advocates, however, have expressed concern that arbitration provisions in these kinds of agreements have the potential to be one-sided or otherwise inequitable, and legislation has been introduced in Congress with the stated purpose of excluding 'employment, consumer, franchise, [and] civil rights dispute[s]' from the scope of the FAA.[1] No such legislation has passed either house, but draft language in proposed bills has thus far failed to adequately distinguish between the consumer, employment, and franchise agreements that have given rise to the concern and general commercial contracts to which the concern does not apply.

The final result of the legislative activity remains uncertain, but the prospect of important revisions to the FAA is already having an impact. In July, the American Arbitration Association announced a moratorium on accepting new consumer debt collection arbitrations, noting that such cases 'require additional protections, due to, among other things, a high rate of non-participation by consumers'.[2] A few days before, the National Arbitration Forum agreed with the attorney general of Minnesota to do the same.[3]

Meanwhile, US courts continue to play an important role in developing and elaborating the US law of international arbitration. In this article, we discuss the most significant recent US decisions, dealing with:

- the fallout from last year's Supreme Court decision in Hall Street, which called into question the US doctrine of 'manifest disregard of the law';
- a recent Supreme Court decision confirming appellate jurisdiction in the case of interlocutory appeals from denials of motions to compel arbitration in a class of cases as to which there previously was doubt;
- decisions addressing contentions that specific arbitration agreements were unconscionable and hence unenforceable;
- a decision refusing enforcement of an agreement to arbitrate US statutory claims by application of dicta in the Supreme Court's 1985 decision in Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc; and
- a decision recognising the authority of an arbitral tribunal to order fee-shifting as a remedy for bad faith conduct of the arbitration even in the face of an express provision in the arbitration agreement providing that costs be shared equally.

The future of manifest disregard in US law

In last year's article, we discussed the Supreme Court's decision in Hall Street Associates, LLC v Mattel, Inc,[4] and in particular the dictum in that case calling into question the judicially created doctrine of 'manifest disregard of the law' as a ground for vacating awards under the FAA. Hall Street had argued that the Supreme Court's previous statement in Wilko v Swan[5] that an arbitral award could be vacated on grounds of manifest disregard of law meant that the grounds for vacatur set forth in section 10 of the FAA could not be exclusive. Rejecting the argument, the Supreme Court suggested that the courts that have interpreted the Wilko dictum as providing an additional, non-statutory basis for vacatur may have been in error. We predicted that, in light of the Hall Street decision, the lower federal courts would re-evaluate the doctrine and either reject the doctrine altogether or limit it to circumstances in which one of the statutory grounds for vacatur could be established.

This is precisely what has happened in all but two of the courts of appeals that, since Hall Street, have considered whether manifest disregard remains a valid basis for vacating an arbitral award. In Citigroup Global Markets v Bacon,[6] the Fifth Circuit became the first court of appeals expressly to reject manifest disregard of the law as a ground for vacating an arbitral award. The Fifth Circuit explained that its precedent had treated manifest disregard as a non-statutory basis for vacatur, but that Hall Street made clear that those cases were no longer good law.

Other circuits have followed the Supreme Court's suggestion that, as a doctrine, 'manifest disregard' may have 'merely referred to the section 10 grounds collectively, rather than adding to them' or was 'shorthand for [...] subsections authorising vacatur when the arbitrators were guilty of misconduct' or 'exceeded their powers.'[7] In Stolt-Nielsen SA v AnimalFeeds International Corporation,[8] the Second Circuit acknowledged that Hall Street had overruled its prior case law treating manifest disregard of law as a non-statutory ground for vacatur, but held that, 'reconceptualised as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA', the doctrine 'remains a valid ground for vacating arbitration awards.'[9] While the Supreme Court has granted certiorari in the case,[10] it did so on the question whether the arbitrators had exceeded their powers in ordering class arbitration, so the case should not provide an occasion for the Supreme Court to revisit its Hall Street dictum on manifest disregard.

In Comedy Club Inc v Improv West Assocsation,[11] the Ninth Circuit reached the same conclusion, holding that even prior to Hall Street it had been treating manifest disregard as an instance of arbitrators having 'exceeded their powers', an express statutory ground for vacatur under 16 USC section 10(a)(4). Similarly, a district court within the Seventh Circuit observed that there, too, manifest disregard was already limited to cases in which arbitrators 'exceeded their powers' as provided for in section 10(a)(4).[12]

The situation in the First Circuit is uncertain. In Ramos-Santiago v United Parcel Services,[13] a case to which the FAA did not apply, the First Circuit cited Hall Street in dicta as holding that 'manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]'. At least one district court within the circuit has applied that dictum to conclude that manifest disregard is no longer good law in the First Circuit.[14] However, in a case decided two months after Ramos-Santiago, the First Circuit vacated an arbitral award on grounds of manifest disregard of the law without any mention of that case or of Hall Street.[15]

Thus far, only the Sixth Circuit has held unequivocally that Hall Street did not require it to abandon manifest disregard as a ground for vacatur. In a recent, unpublished decision, the

Sixth Circuit, noting that the Hall Street court had not expressed a conclusion as to the meaning of the Wilko dictum, deemed it 'imprudent to cease employing such a universally recognised principle' when the Supreme Court had hesitated to reject it.[16] However, in another decision dealing with modification of an award, the Sixth Circuit acknowledged, in dicta, that Hall Street cast doubt on the continuing vitality of manifest disregard as a judicially created basis for vacatur.[17]

To the extent that Hall Street has and continues to cast doubt on the doctrine of manifest disregard as an independent, non-statutory ground for vacatur, it strengthens the view that but for issues of public policy, the Federal Arbitration Act contemplates no merits review of arbitral awards, and thereby strengthens both the effectiveness and the efficiency of the arbitration system.

Interlocutory appeal of motions to compel arbitration

A recent decision by the Supreme Court has clarified a rule of jurisdiction over interlocutory appeals of motions to stay litigation on the grounds that the subject matter is subject to an arbitration agreement. Section 16(a)(1)(A) of the FAA provides that an order denying a motion to stay litigation in favour of arbitration is immediately appealable, but the grant of such a stay, which permits an arbitration to proceed, is not. This provision reflects the FAA's strong policy in favour of arbitration, as it was included as a deliberate exception to the usual final-judgment rule of federal appellate jurisdiction in order to ensure that a party asserting a right to arbitrate a dispute did not need to go through litigation on the merits before having that right finally determined on appeal.

In Arthur Andersen v Carlisle,[18] the Supreme Court held that a non-signatory defendant relying on an arbitration clause by virtue of the doctrine of equitable estoppel, alter ego, or contract theories to similar effect had the right to appeal a denial of a motion to compel arbitration without making any threshold showing on the merits. The defendants in Arthur Andersen had moved the district court to stay the action under section 3 of the FAA on the grounds that principles of equitable estoppel demanded that the claims against them be arbitrated pursuant to an arbitration agreement with a co-defendant. The court denied that motion, and the Court of Appeals dismissed the appeal for lack of appellate jurisdiction. The Supreme Court reversed the decision, holding that jurisdiction 'must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order'.[19]

The Supreme Court's holding vindicates the policy of section 16(a)(1)(A) that a party's right to arbitrate a dispute should be finally determined before the party can be forced to litigate that dispute.

Allegations of unconscionability in arbitration agreements

In recent years, US courts have regularly addressed cases in which a party contends that it had significantly less bargaining power than its counterpart and that the arbitration agreement is invalid on the ground of unconscionability. In the international context, these cases arise primarily in the context of franchise agreements.

In three recent cases, federal courts have addressed unconscionability challenges to arbitration agreements at the outset of the case, notwithstanding their view that as a general matter, under the rule of First Options v Kaplan,[20] parties may commit jurisdictional issues (or, in US parlance, 'arbitrability' issues) to the arbitral tribunal as long as they do so 'clearly and unmistakably'.

In Awuah v Coverall North America, Inc,[21] the First Circuit concluded that by choosing AAA Rules, the parties had submitted to the arbitral tribunal the determination of whether an arbitration provision was unconscionable. The court nonetheless held that the parties opposing arbitration were entitled to have the court decide whether the terms of the arbitration agreement were so onerous as to make the arbitration remedy illusory. For instance, the court indicated that, if the costs of arbitration proved so high as to prevent the party from presenting its arguments to the tribunal, it would not deny the parties access to a judicial forum as well.

In Kam-Ko Bio-Pharm Trading Co, Ltd-Australasia v Mayne Pharma (USA) Inc,[22] the plaintiff filed suit notwithstanding an ICC arbitration clause. Reaching the unconscionability issue, the court held that that issue had to be assessed at the time of contracting. As the claimant had proposed the arbitration provision in the first place, and the cost of arbitration - the primary grounds for asserting unconscionability - was based on the amount of the claim and thus within his control, the court held that the agreement was not unconscionable and referred the parties to arbitration.

In IJL Dominicana SA v It's Just Lunch International,[23] a district court concluded that the arbitration provision of a franchise agreement was unconscionable. Specifically, the court held that the bars on punitive damages and class action procedures were unconscionable because they affected only the franchisee. Rather than deny the motion to compel arbitration, however, the court severed the unconscionable terms and referred the parties to arbitration without the restrictions.

Arbitration of statutorily created rights

In Thomas v Carnival Corporation,[24] after concluding that an arbitration agreement and a choice-of-law clause 'operated in tandem' to prevent an employee claimant from enforcing his rights under the Seaman's Wage Act, the US Court of Appeals for the Eleventh Circuit refused to enforce the arbitration agreement on the authority of dictum in Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc.[25] The case represents the first time that the much-discussed footnote 19 in the Mitsubishi decision has been applied to deny enforcement of an arbitration agreement in an international case.

In Mitsubishi, disagreeing with each of the federal courts of appeals that had previously addressed the question, the Supreme Court held that an agreement to arbitrate federal antitrust claims was enforceable. In reaching that result, the Court noted that Mitsubishi had conceded that the arbitral tribunal could hear the claims and that the record reflected that those claims had indeed been submitted to the tribunal. The Court therefore observed that the US courts would have 'the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed'.[26]

In Vimar Seguros y Reaseguros v M/W Sky Reefer,[27] the court later held that parties asserting non-waivable statutory claims should be referred to arbitration even when it was not yet clear whether those claims would be taken up by the tribunal, reasoning that a US court would have a later opportunity to hear the claims if the tribunal did not do so. Meanwhile, a number of federal courts of appeals held that arbitration agreements providing for arbitration in London should be enforced even though US securities claims would not be heard by those tribunals, reasoning that antifraud remedies available under English law provided an adequate substitute. See, for example, Roby v Corporation of Lloyd's.[28]

In Thomas, as in Mitsubishi, the court first held that the arbitration agreement encompassed the statutory claims - in Thomas, those claims were for unpaid wages under the Seaman's Wage Act, which incorporates a treble-damages penalty for late payments. The court then considered the effect of the choice-of-law provision, which required the arbitral tribunal to apply Panamanian law, 'notwithstanding any claims [...] which might be available under the laws of any other jurisdiction.'[29] In the face of that provision, the court concluded that an arbitrator would be barred from entertaining the Seaman's Wage Act claims, and it therefore held that the arbitration agreement was unenforceable as applied to those claims.

Thomas might be distinguished from Vimar on the ground that the choice-of-law clause expressly excluded the prospect that the tribunal might hear the statutory claims. Still, the thrust of the Vimar decision would have counseled in favour of allowing the tribunal to act in the first instance. Nor did the Thomas court consider, as had the Roby court, whether the remedies available under the chosen law would be equally effective in vindicating the objectives of the US statute. Perhaps the court's approach in Thomas is most readily explained by the source of the arbitration agreement in an employment contract, as to which US courts have demonstrated themselves willing to take a more skeptical approach to arbitration agreements that risk waiver of statutory rights.

Limitations on a tribunal's discretion to craft appropriate relief

The US Court of Appeals for the Second Circuit recently addressed the question of whether an arbitral tribunal has inherent discretion to award attorneys' fees in appropriate circumstances even in the face of a provision in the arbitration agreement providing that the parties should bear their own costs. Under US law, this is a question of whether the arbitrators exceeded their powers under an arbitration agreement in awarding a particular form of relief.

In Reliastar Life Insurance v EMC National Life Co,[30] the petitioner sought to enforce an award that included an award of costs and attorneys' fees because of its adversary's bad faith. The respondent objected to the award of costs and fees because the arbitration agreement provided that each party would bear its own costs and all other costs would be divided equally. Over a strong dissent, the court confirmed the award, holding that a broad arbitration clause gives the arbitrators wide discretion to order appropriate remedies, including attorneys' fees as a sanction for bad faith. The court reasoned that the costs provision reflected only an agreement on the sharing of costs 'in the expected context of good faith dealings'.

Relying on the consensual nature of arbitraton, the dissenting judge argued that an arbitral tribunal has no 'inherent' powers other than those granted by the arbitration agreement by which it exercises its authority. Thus, because the arbitration agreement at issue had a provision specifying how costs are to be allocated, the arbitrators had no authority to award costs contrary to the terms of that agreement, even if one of the parties failed to arbitrate in good faith.

Though not couched in those terms, the difference in approach between the majority and the dissent reflect their different emphases on the jurisdictional and contractual theories as the source of an arbitrator's authority. While the majority credited the parties' execution of a broad arbitration agreement to mean that the arbitral tribunal could exercise 'inherent' powers ordinarily exercised by arbitrators under similarly broad provisions, the dissent took precisely the opposite view, arguing that 'inherent' powers cannot exist because the powers of an arbitrator necessarily are cabined by the language of the specific agreement between the parties. Hence, general principles can be used to interpret the arbitration agreement only

where the agreement itself is silent, not to infer an exception or limitation to an express provision in the agreement. While this decision could be read narrowly to allow remedies in the rare instances where 'bad faith' has been demonstrated, the majority's holding is consistent with US law's pro-enforcement policy and should provide arbitrators comfort that they enjoy at least some discretion based on powers not specifically enumerated by the parties.

Endnotes

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Latin America Overview

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Summary

National Constitutions and International Arbitration in Latin America: A Dangerous Liaison

The relations between national constitutions in Latin American countries and arbitration have a very long history. Their roots can be traced back to the laws in force before their independence.1 In the first Latin American constitutions, arbitration was expressly envisaged as a dispute resolution method, particularly for international disputes of public law.

Several of the newly born Latin American countries recognised the principle of peaceful dispute resolution through arbitration at the level of a constitutional rule.2 Unfortunately, this favourable relation between constitutions and arbitration was, to a large extent, reversed for historical reasons and initial sympathy shifted to hostility towards international arbitration in the end of the 19th century. The most illustrative example of this change of attitude was the 'Calvo Doctrine' implemented in the region through a clause named 'clause Calvo', which emerged as a result of diplomatic impositions and an excess of interventionism exerted by developed countries. By means of this clause, aliens investing in or contracting with a state were obliged to relinquish their national protection and to resolve their disputes before the national courts of the host state without immediate access to international mechanisms of dispute resolution.3

This hostility was gradually put to rest with the adoption of international conventions related to recognition of international judgments and international arbitration such as the New York Convention in 1958, the Panama Convention in 1975 and by the adoption of modern laws following the UNCITRAL Model Law for International Arbitration of 1985.4 The enactment of such international conventions and the reform of national laws on arbitration, inspired by modern principles, gave arbitration a new and positive outlook in the region.5

However, national constitutions have again become important as there is an increasing trend in Latin American countries to directly use their constitutions in the field of international arbitration. The first section below ('The grounds and the mechanisms') describes the justification for this direct use and application of national constitutions to international arbitration, and then refers to the different mechanisms that have been implemented across the region to allow such application.

The second section of this article ('The necessity (or lack thereof)') examines whether there is any real need to directly apply national constitutions to international arbitration in the region and the consequences of doing so.

The grounds and the mechanisms

Traditionally, the interplay between national constitutions and international arbitration was limited to the incorporation of specific provisions recognising arbitration as mean to resolve international disputes.6 The rationale behind was that national constitutions represent the supreme law of the state and as such its sympathy towards arbitration should be reflected in such supreme law.

Indeed, for historical reasons, Latin American countries have shown a legal devotion towards their constitutions as they regard the constitution as the 'fundamental statute', inspired by the Kelsenian pure theory of law.7 Following this conception, every act of authority and law must be in conformity with the constitution. The main problem or risk stemming from this approach is to consider that national constitutions have replaced legislation as the primary source of law, which may create tensions between the distributive justice, which is generally

the role of constitutions, and the commutative justice, which is generally the role of national legislation.8

These tensions may explain why the trend to allow the direct application of constitutional provisions in international arbitration has risen and now appears as a phenomenon wider in its scope and and deeper in its consequences than the mere constitutional recognition of international arbitration in Latin America.9 One could say that the grounds to allow the application of national constitutions vary from one country to another and any attempt at generalisation would be at least inaccurate. However, certain aspects of constitutional law and its interplay with international arbitration have emerged in different countries with similar justifications and features.

Among these new points of contact between national constitutions and international arbitration, it is possible to identify different layers, including the constitutional protection of fundamental rights that may be affected in international arbitration, constitutional limitations or prohibitions imposed on states or state entities or instrumentalities to resort to arbitration, treatment of arbitrators as national judges on the basis of a constitutional recognition of the status of the arbitrator as that of a judge, and constitutional control of national laws on arbitration by state or constitutional courts.

Constitutional protection of fundamental rights

The birth of constitutional procedural law is a recent phenomenon in Latin America, whose main purpose is to provide specific mechanisms and remedies to protect fundamental rights in the different fields in which they may be exposed to violations, including judicial procedures.10 Thus, mechanisms such as the acción de amparo o tutela or recurso de protección have been implemented at the level of national constitutions with this purpose in mind.

In certain countries, this justification has led, by analogy, to allowing the constitutional protection of fundamental rights in arbitration when there are allegations that such rights have been violated. That was the case in Venezuela in Corporación Todosabor, CA v Häagen-Dazs International Shoppe Company, Inc, where the Constitutional Chamber of the Supreme Court of Justice ruled that it had the power to examine a foreign award through a extraordinary constitutional remedy called amparo constitucional.11 In this decision, the court decided that it could examine an award following the rules of the AAA in Miami, to preserve the national party's fundamental rights granted by the Venezuelan Constitution.

Another way of protecting fundamental rights constitutionally recognised is to allow the setting aside of arbitral awards in which such rights have been violated. Indeed, the enforcement of foreign awards has been exceptionally refused on the grounds that certain constitutional guarantees related to fundamental rights of individuals have been deemed as part of public policy in the enforcement country which must be respected by the judge of the exequatur. This was the case in a recent decision in Argentina that dealt with an ICC arbitral award. In the Odgen case, Odgen requested the enforcement of the award on costs, which exceeded the award on the principal claims in favour of N&M Eijo in Argentina and the first instance judge granted the enforcement, but pursuant to article 518 of the Argentinian Code of Civil Procedure. On appeal, the Buenos Aires Court of Appeals denied the enforcement on the basis that it was against Argentinian public policy.12 The court went on to hold that the disproportionate difference between the award on costs and the ultimate success on the principal claims was in clear violation of the constitutional guarantees of due process and the right of defence, in two ways: first, because the award lacked any reasoning to justify

an award on costs to Odgen whereas N&M Eijo had partially prevailed in their claims and, second, because to impose an award on costs on the prevailing party that exceeded the amount of its award on the principal claims would amount to a denial of the right of access to justice, a right constitutionally protected in Argentina.13

A similar finding is found in José Cartellone Construcciones Civiles SA v Hidroeléctrica Norpatagónica SA o Hidronor SA, though this time in the context of an annulment of an arbitral award.14 In this case, the Supreme Court set aside an arbitral award due to ultra petita and established, as an obiter, that an award may be set aside if it is against public policy and when it is 'unconstitutional, illegal or unreasonable'. In other words, the violation of a constitutional rule could be enough to set aside an award. Although this was a domestic case, the same reasoning was later on reproduced in a judicial decision ordering the suspension of an ICC international arbitration in Eriday v Entidad Binacional Yaciretá (the Yaciretá case).15 A further step has been taken by Argentinian authors who suggest that the Supreme Court could reject the enforcement of arbitral awards rendered in the context of ICSID investment arbitrations if they are contrary to the Argentinian Constitution.16

In an nutshell, the use of national constitutions to preserve fundamental rights is performed either directly, through constitutional mechanisms, or indirectly, through the setting aside of an arbitral award to the extent that a violation of the constitution amounts to violation of public policy.

Constitutional limitations or prohibitions on the state's ability to resort to arbitration

In a number of Latin American constitutions there is a prevailing principle that the state and its instrumentalities are only authorised to do what is expressly authorised by the law - the principle of 'strict legality'- which differs from the principle that governs private relations in which parties can do anything not otherwise prohibited by the law. On this basis, the state and its agencies or entities may have prohibitions or limitations under their national constitutions or laws as to their ability to resort to arbitration.17

A second path to achieve the same purpose has been to qualify the underlying transaction to which the state or a state entity is a party as a contract of public interest that cannot be validly submitted to arbitration, with the consequence that any dispute is to be decided by the national courts of the state or state entities.

Both mechanisms are part of a wider movement that points to the same goal: an increasing nationalisation of contracts executed by states and their instrumentalities and nationalisation of the disputes arising from them, to allow the national constitutions and the laws in conformity with them to govern the relations between states and the parties with whom they contract.18

A number of cases have reflected this approach. For example, in Brazil, Companhia Paranense de Energia - Copel v UEG Araucaria Ltda is one of the few reported cases adverse to international arbitration. A first instance judge from the State of Paraná in Brazil ordered the stay of an ICC arbitration conducted in Paris against a Brazilian state entity because the dispute (related to payments due for the construction and operation of an electrical plant) concerned non-disposable rights that fell outside the scope of arbitration as the state respondent was not able to validly submit to arbitration pursuant to Brazilian laws in light of the constitutional principle of strict liability.19

In the Yaciretá case,20 a similar order was issued by a judge of the Buenos Aires province on the grounds that the rights of the respondent - a bi-national Argentinian-Paraguayan

state entity - to participate in the drawing up of the terms of reference in an ICC arbitration was not been respected and that there were public interests compromised that justified the judicial intervention. Again in Argentina in Milantic Trans SA v Ministerio de la Producción - Astillero Río Santiago and other (the Milantric case).21 Milantric Trans SA obtained an award against the respondent, a state-owned company, for damages due to breach of a ship building contract and sought its enforcement in Argentina under the New York Convention. The Argentinian state party opposed the enforcement alleging, inter alia, that the award fell outside the scope of the New York Convention as the underling contract was not a commercial one. Initially, the first instance judge rejected the objections and granted enforcement of the award under the New York Convention. Regrettably, however, on appeal the La Plata Court of Appeals, whose jurisdiction was in principle limited to deciding on the costs related to the enforcement, overturned the first instance judge's decision and held that the New York Convention was not applicable to the present case as the underlying contract involved a state party and thus it could not fall under the definition of a commercial agreement.

In Venezolana de Televisión, CA v Elettronica Industriale SpA, an arbitral award was set aside on the grounds that the dispute came from a contract of public interest over which national courts had exclusive competence under Venezuelan law invoking provisions of the Venezuelan Constitution.22

All the reported cases have one element in common: the limitations, whether well founded or not, of state parties to submit to arbitration, which stem from the constitutional principle of strict legality, or the lack of arbitrability of a contract involving public interest.

Constitutional treatment of arbitrators as judges

Some reported cases show that arbitrators in Latin America are sometimes considered as judges as to their role, status and the nature of their decisions. The source of this equal treatment of arbitrators as judges is found in national constitutions.

The starting point is generally the same: Latin American constitutions often defined the courts of the state and it is understood that that definition, and in particular the reference to 'other tribunals established by the laws' which is found under certain constitutions, would encompass the arbitral tribunals.23 Under this scheme, the powers of arbitral tribunals would be seen as a derivation of the jurisdictional powers that a state vests upon national judges. Hence, the status of the arbitrators is aligned with that of judges, and extraordinary recourses of a constitutional nature that may proceed against judicial decisions can also be used against arbitral decisions. This has obvious consequences in the field of international arbitration.

This rule of equal or equivalent treatment for judges and arbitrators has led certain countries, such as Chile, to allow the use of a disciplinary action called recurso de queja, which even permits the setting aside of the arbitral award itself if the award was incurred upon a gross abuse or fault. This has been the traditional stance in respect of domestic arbitration, as the arbitral tribunal is considered as part of the tribunals of the state and is thus subject to disciplinary control as exercised by the Supreme Court by virtue of the constitution. Although this special constitutional recourse has not been used yet in any reported international arbitration case, the legislative discussion and comments related to the approval of the 2004 Chilean International Arbitration Act24 show that, when the law was under discussion during the phase of constitutional control, the Constitutional Court included an express indication that the law was approved without prejudice to the disciplinary powers that the

Chilean Constitution grants to the Supreme Court, thereby allowing the possibility of using the recurso de queja.25

In a relatively recent case in Argentina, the Supreme Court interpreted a provision allowing a national superior court to determine which specific court has competence to hear and adjudicate a case when two or more judges dispute such competence to also apply to arbitral tribunals. According to the Court, an arbitral tribunal's claim of jurisdiction on a matter in respect of which a court of law asserts exclusive jurisdiction is to be dealt with as if only courts of law were involved. Thus, a judge claiming jurisdiction to hear a case over which an arbitral tribunal equally asserts jurisdiction should send an inhibitoria to the arbitral tribunal as explained above. Should the arbitral tribunal reject the rogatory request to decline jurisdiction, it is for the superior court - in this case, the Supreme Court of Justice - to finally decide the issue. The arbitrators are prevented from continuing to hear the case until the superior court has decided on the 'jurisdictional' conflict. Such an approach clearly implies denying the arbitral tribunal the faculty to decide, without court interference, on its own jurisdiction or, should the arbitral tribunal affirm its jurisdiction, to hear and decide the case on the merits until the jurisdictional conflict has been resolved by the superior court.26

Finally, certain constitutional actions have been allowed against foreign arbitral awards as if they were national court decisions. Insofar as arbitrators are considered as judges, their decisions can be challenged by the same remedies at law as those permitted to challenge the decisions of national judges. In Venezuela, national courts have admitted a constitutional action named amparo directo against an arbitral award in the Venezolana de Televisión, CA v Electrónica Industriale SpA case.27

In Mexico, the amparo has only been admitted against judicial decisions that deal with the enforcement of a foreign award (amparo indirecto), but it has been suggested that the door is now open to exercise an amparo directo to challenge an arbitral award as a result of the recent and much discussed Radio Centro case.28

Constitutional control of national laws on arbitration

The constitutional control of national laws on arbitration has given rise to yet another point of contact between national constitutions and international arbitration. The control of constitutionality of laws allows superior or special constitutional courts to decide on whether specific provisions or bodies of laws are in conformity with national constitutions. Depending on each country, this control may be exercised in some cases ex ante (ie, prior to the enactment of the law), and in some cases ex post, subsequent to such enactment. Unlike the other mechanisms, there is little defence against this control and, in practice, it has generally served to strengthen and not weaken the legimitacy of arbitration statutes in Latin America.

In a number of recent cases, Latin American courts have used these powers to decide on the constitutionality of laws on arbitration. In Chile, there was an interesting ex ante control of constitutionality regarding the 2004 International Arbitration Act, whereby the Constitutional Court declared the Act in conformity with the Chilean Constitution, with an express caveat that article 5 of the same (which resembles article 5 of the 1985 UNCITRAL Model Law on International Commercial Arbitration) was without prejudice to the disciplinary powers of the Chilean Supreme Court, namely the power to declare a specific provision of the law unconstitutional in a specific case and the constitutional protection of fundamental rights of individuals.29 Fortunately, this has not given rise to any judicial decision extending the scope of judicial intervention.

In Brazil, Panama and Mexico specific arbitral provisions contained in national laws have been subject to ex post constitutional control. In Brazil, the Supreme Court declared, after five years of discussions, that the provisions contained in the Brazilian Arbitration Act of 1996 were constitutional.30 In Panama, the Supreme Court declared unconstitutional the precept that recognised the principle of competence-competence. It basically held that such principle affected the individual's right to access to the state's justice, thus violating their rights to their natural judge. As a result of this decision, the Panamanian Constitution was later amended and the principle was put in the Constitution itself.

In Mexico, the Supreme Court refused to declare unconstitutional the precepts contained in the Mexican Commercial Code that, in conformity with the UNCITRAL Model Law,31 gave the arbitrators broad powers and ample discretion to decide over the admissibility and the relevance, materiality and weight of evidence, without applying an evidentiary system legally pre-established for judicial proceedings.32

The necessity (or lack thereof)

This quick review clearly reveals that this new trend of applying national constitutions in international arbitration in Latin America is, in reality, a phenomenon of 'constitutional tutelage' related to constitutional rights of individuals in the arbitral process, state activity and the state's ability to resort to arbitration, the arbitrator who is treated as any other judge, and the laws governing or dealing with international arbitration.

So this begs an obvious question. From a constitutional standpoint, as Calamandrei has said so well, all constitutional declarations are futile without legal remedies that ensure their real application and functionality.33 The question is whether any constitutional declaration must necessarily and exclusively find its remedy in the constitution itself. If we admit this proposition, every question having a constitutional ingredient would render the constitution as the primary, immediate and direct applicable rule, leaving any other laws created to deal with that specific question without any relevance or applicability. Hence, when analysing the impact of constitutions over international arbitration in Latin America, the very basic question is if their application to international arbitration is really necessary.

The vast majority of Latin American countries have ratified the most important international conventions on international arbitration and implemented national laws inspired by the UNCITRAL Model Law. Therefore, a modern framework of arbitration has been created, consistent with principles generally accepted in the practice of international arbitration. There would be little sense, if any, in creating this modern and robust system favouring arbitration and giving predictability to its users if national courts could then do some of the things described earlier in this article 'in the name of the constitution'.

One may argue that the constitutional interference is due to the insufficiency or inadequacy of the arbitration legal system to protect certain principles and fundamental rights that have received constitutional protection. But I do not believe that this is necessarily the case. There is no indication that the arbitration legal regime in the region is unable to afford suitable solutions to deal with situations which could give rise to constitutional concerns.

The award rendered in a process where basic principles of material justice have not been respected, such as the right to a fair and equal trial, the right to be heard and the right to have the opportunity to present one's case, could be set aside according to the Model Law34 provisions, which have already been adopted by several Latin American arbitration laws. It has even been said that those rights are so fundamental that they could be deemed

as part of a transnational public policy that could be applied by national judges, even if there is no express legal mention.35 Consequently, it does not seem necessary to resort to standards of constitutional control if the arbitral regime already provides solutions to ensure the protection of these fundamental rights.

If a state or its instrumentalities invoke constitutional limitations under its internal or municipal law to resort to arbitration, an arbitral tribunal may consider those allegations to rule on its jurisdiction to decide the dispute, provided that the applicable law on the question of the jurisdiction of the arbitral tribunal (including the constitution) establishes this possibility. But this is not always the case. One should not forget that the question of the validity of the arbitration agreement (or subjective arbitrability) does not necessarily depend on the municipal law of the state raising the plea of lack of jurisdiction.

Further, the arbitral tribunal's decision on jurisdiction could be challenged or the award not enforced if a party considers that the state party is not capable of submitting to arbitration36 or that the dispute is not arbitrable,37 both grounds envisaged under most of Latin American arbitration statutes.

Finally, if the arbitrator is not independent or impartial during the arbitral proceedings, he or she can be challenged on these grounds and the award rendered by him or her attacked . The same happens if an arbitrator exceeds the scope of his or her arbitral mandate.38 Thus, it is not necessary to have recourse to constitutional remedies as the 'inhibitoria' or the 'amparo'.

In other words, if there are constitutional rights that could be affected by the arbitral proceedings, their protection can be sufficiently afforded by the mechanisms and remedies offered by the self-contained arbitration framework.

The constitutional protection paradox is that an unlimited protection of constitutional rights ends up affecting other constitutional guarantees such as the freedom of the parties who have agreed to submit to arbitration and the right of access to arbitral justice.

First, international arbitration is based directly on individual liberty and the parties' autonomy, which is in and of itself a constitutional guarantee. In Spain, the Constitutional Chamber of the Supreme Spanish Court decided in a very interesting decision of 17 January 2005 to reject the use of the constitutional amparo on this ground. In this decision, the Court held that:

> Arbitration is a heteronomous dispute resolution method founded in the autonomy of private persons, linked directly with liberty as a superior value (article 1.1 CE) (STC 176/1996, 11 November, FJ4); What, by express agreement of the parties, has been deferred to an arbitral proceeding, by virtue of the same express will is removed from the jurisdiction of the constitutional court through the exercise of an amparo action […] In respect of arbitration, it only projects its guarantees with the rank of fundamental rights to those phases of the arbitral proceedings for which the law has foreseen the judicial intervention of state courts, which includes among the most relevant, the referral of the parties to arbitration, the action to set aside and the enforcement of the arbitral award.39

Second, it has been held in Latin America that 'arbitration enters into the field of justice, more precisely in the idea of access to justice. It is a variation of the fundamental right of access

to the justice and effective judicial protection'.40 This is evident in countries like Venezuela, Costa Rica, Panama or El Salvador41 where the right of access to arbitral justice is expressly recognised in the constitutional text in the same way as the justice given by the state.
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The interplay between national constitutions and international arbitration in Latin America seems to be on the rise. However, in the majority of cases, the justification for applying national constitutions to a variety of issues arising in arbitral proceedings is more out of convenience than out of necessity.

To a large extent, this is understandable because constitutional mechanisms and remedies are widely known in the region and judges are often called on to enforce them. Constitutional law is a core course in all faculties of law and its presence in the Latin American legal reality is simply overwhelming. International arbitration is in many countries a new and imported institution and thus still perceived as a something alien or strange. The fear of the unknown leads practitioners and judges alike to resort to constitutional standards of control instead of using the specific standards contained in the arbitration framework.

It is probably utopian to think that the Kelsenian principle of constitutional supremacy will leave Latin American countries any time soon. But one may hold out some hope that in the years to come international arbitration will become more widely known and an increasing number of judges and practitioners will find that its self-contained system can provide affordable solutions for constitutional concerns.

Endnotes

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Discovery in Arbitration

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Summary

Non-party Discovery in the United States

Arbitral discovery from non-parties presents a fundamental problem. While information in the hands of non-parties is often critical to the effective resolution of a dispute, arbitration is a creature of contract and arbitrators, therefore, must rely on the power of the state to compel disclosure from non-parties.1 In the United States, state and federal statutes offer somewhat grudging assistance to non-party discovery in arbitrations. This article describes the scope of these state and federal statutes; discusses two critical splits in decisions among federal circuit courts of appeal that create a disparity in arbitral discovery power among US jurisdictions; and suggests four strategies for attorneys seeking to beat a course through this thicket.

Background: US law in aid of non-party discovery in international arbitration

In the US, three sources of authority create arbitral discovery power over non-parties: state law, 28 USC section 1782,2 and section 7 of the Federal Arbitration Act.3

State law

All 50 states and the District of Columbia have statutes that govern arbitration to some extent.4 Although state statutes may be useful in some international disputes (a possibility we discuss in more detail below), they are primarily intended to support arbitrations involving parties from the same state. Most of the statutes are based on the Uniform Arbitration Act (UAA) or the Revised Uniform Arbitration Act (RUAA).5 Both of these model statutes empower arbitrators to issue enforceable subpoenas for the attendance of witnesses and the production of documents and other evidence at a hearing,6 but the RUAA is the more discovery-friendly of the two. Unlike the UAA, it explicitly provides arbitrators with the power to subpoena witnesses for depositions or to produce records or appear at a 'discovery proceeding.'7 In addition, New York's arbitration statute permits 'any attorney of record' - and not only arbitrators - to issue subpoenas.8

28 USC section 1782 - US discovery in aid of foreign tribunals

28 USC section 1782 authorises federal courts to aid 'international and foreign tribunal[s]' seeking discovery from entities located within US borders. Until recently, most federal courts refused to grant arbitral discovery requests involving commercial arbitral tribunals on the grounds that they were not 'international or foreign tribunal[s]'.9 The Supreme Court's decision in Intel Corp v Advanced Micro Devices, Inc10 appeared to have reversed this trend.-11 Subsequently, several district courts granted foreign arbitral discovery requests,12 but the Fifth Circuit Court of Appeals recently ruled that Intel effected no change in the law and adhered to its prior decision that private arbitral tribunals were not within the scope of section 1782.13 The question remains unsettled.

In jurisdictions where use of section 1782 in support of foreign private arbitration is permitted, four features of section 1782 make it a robust tool for securing discovery from non-parties. First, the Supreme Court has held that section 1782 empowers courts to compel discovery from non-parties.14 Second, aside from expressly shielding privileged material, section 1782 contains no restrictions on the type or extent of pre-hearing discovery. 15 Third, its discovery powers reach the entire US, allowing parties to seek discovery in the district court of the district in which a person 'resides or is found.'16 Fourth, section 1782 permits a court to grant a discovery request even if it is or would be disallowed under the lex arbitri of the seat of the arbitration.17

For all that, though, there are two important limitations on section 1782 discovery: the seat of the arbitration must be located outside the US;18 and the statute does not create a right to discovery, but rather gives the courts discretion to aid foreign tribunals in what the courts consider appropriate circumstances.19

FAA section 7 - US discovery in aid of US tribunals

Section 7 of the FAA empowers arbitrators to issue a subpoena duces tecum to non-parties.-20 Arbitrators may summon 'any person to attend before them […] and in a proper case to bring with him any book, record, document, or paper which may be deemed material as evidence in the case.'21 Subpoenas issued pursuant to section 7 are enforceable in federal district courts.22

However, the scope of the section 7 discovery power remains uncertain. In particular, there are circuit splits regarding whether section 7 authorises pre-hearing discovery, and whether section 7 subpoenas are subject to the territorial limitations on subpoenas for judicial proceedings issued pursuant to Federal Rule of Civil Procedure 45.

Limitations on pre-hearing discovery of documents

Section 7 does not expressly authorise pre-hearing requests for document discovery. Four circuits have addressed the issue of implicit authorisation of pre-hearing discovery, producing three different approaches. The Eighth Circuit found that an authorisation of pre-hearing discovery is implicit in section 7's authorisation of at-hearing discovery. 23 The Second and Third Circuits found that section 7 only expressly authorises compelling witnesses to bring evidence with them to a hearing, thereby foreclosing pre-hearing discovery.24 The Fourth Circuit splits the difference between the Eighth Circuit's broad approach and the Second and Third Circuits' narrow approach, holding that section 7 authorises pre-hearing discovery only upon a special showing of need or hardship.25

Territorial limitations

The circuits have also split on the question of whether the territorial limitations of rule 45 of the Federal Rules of Civil Procedure should be read into section 7. Section 7 provides that arbitral subpoenas 'shall be served in the same manner as subpoenas to appear and testify before the court'.26 Rule 45 provides that subpoenas may issue only from the district court in the jurisdiction in which a hearing is to take place.27 The reach of these court-issued subpoenas is limited to 'any place within the district of the issuing court', any place within '100 miles of the place of [a] deposition' that is to take place in the district or 'any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court'.28

The Second and Third Circuits found that section 7 expressly incorporates rule 45's territorial provisions because rule 45 governs 'subpoenas to appear before the federal courts,' and section 7 provides that arbitral subpoenas 'shall be served in the same manner as subpoenas to appear and testify before the court' and the district court may compel attendance 'in the same manner provided by law for securing the attendance of witnesses […] in the courts of the United States'.29 The Eighth Circuit held that rule 45 did not apply to document subpoenas, because the 'burden of producing documents need not increase appreciably with an increase in the distance those documents must travel'.30 The court reserved the question of whether witness subpoenas must also conform to rule 45 for another day.31

Four strategies for maximising the effectiveness of non-party discovery

What is the significance of these circuit splits for practising attorneys? First, the site of the arbitration matters. An attorney involved in an arbitration with a seat outside of the US and

an attorney seeking discovery from a non-party for use in an arbitration sited in the Eighth Circuit's geographical jurisdiction (a part of the US midwest) will likely have more options for non-party discovery than an attorney who is seeking discovery from a non-party for an arbitration taking place in the Second and Third Circuit's jurisdiction (New York, Connecticut, Vermont, New Jersey, Pennsylvania and Delaware).

Second, some difficult questions are not adequately answered by any consistent line of existing case law. Can a non-merits hearing (eg, one held exclusively for the purposes of obtaining documents) before one or more of the arbitrators be scheduled as a basis for a subpoena duces tecum in the Second and Third Circuits? May an attorney or a tribunal seeking discovery in those circuits issue enforceable subpoenas returnable at a hearing in a jurisdiction other than the seat of an arbitration? Can the lawyer or tribunal try to take advantage of state discovery laws to circumvent the potential limitations of section 7? Is it ethical to issue discovery requests to non-parties that the attorney knows are or may not be judicially enforceable under existing law? Below, we offer some thoughts on these questions.

Scheduling a hearing for the purpose of obtaining documents

Arbitral tribunals sitting in jurisdictions that do not permit pre-hearing document discovery of non-parties (eg, the Second and Third Circuits), or in jurisdictions in which the question is not settled, can and do schedule special-purpose hearings in advance of substantive proceedings to assist parties in obtaining timely access to important documents. Such a hearing usually will involve rulings by the arbitrators on discovery disputes.

There is nothing wrong with this. Institutional rules generally give arbitrators broad discretion over the management of hearings,[32] and the Second Circuit has upheld the practice.[33] In a 2005 case, the court rejected an argument that a hearing scheduled for the purposes of obtaining documents was 'a thinly disguised effort to obtain pre-hearing discovery', even though it was not a 'trial-like arbitration hearing on the merits'.[34]

Thus, where the documents or information sought are demonstrably important, the requests are limited to those documents or that information, and the propriety of a pre-hearing subpoena is in genuine doubt, asking arbitrators to schedule hearings in a way that facilitates discovery is generally a good strategy.

Holding a part of a hearing in a jurisdiction other than the seat of arbitration

Just as attorneys may seek to achieve their discovery goals by moving a proceeding to a favourable point in time, similar advantages may be had by moving a proceeding to a favourable point in space - namely to the jurisdiction where the witness is or to a jurisdiction that allows pre-hearing discovery or out-of-jurisdiction discovery.

As with the special-purpose hearing strategy, the success of this approach will depend in a large part on the arbitrators' willingness to manage the proceedings flexibly to permit non-party discovery. They, rather than counsel, control whether such discovery will be permitted at all, and they must be convinced of its need.

Institutional rules generally allow arbitrators to hold proceedings in locations other than the seat for convenience, including the convenience of non-parties.[35] The language of section 7, however, creates uncertainty for this strategy because it only authorises a district court to enforce a section 7 subpoena if the court is within the district where arbitrators 'are sitting'.[36] There are no published cases addressing whether the term 'sit' refers solely to the single 'seat' of arbitration or to any place where the arbitrators choose to convene a hearing, and there are good arguments on both sides. The tradition of arbitrators sitting wherever it is

convenient is well-established. On the other hand, the parties' choice of the place to hold the arbitration carries with it a variety of consequences, including determination of the lex arbitri, which governs procedural issues such as discovery. If a party objected to another party's request to hold a 'discovery' hearing at a place other than the arbitral seat, courts may be reluctant to permit arbitrators to circumvent the lex arbitri originally bargained for by the parties.

Therefore, while moving proceedings to a location other than the seat of arbitration may be effective if done without the objection of any party, it may not be effective in the absence of consent.

Using state discovery law

As discussed above, some state laws are more attractive authorities for non-party discovery than the FAA.[37] If a state statute is more solicitous of arbitral discovery than section 7, can it be used in interstate and international commercial arbitrations? Courts have not yet answered this question directly.

State arbitration law generally governs intra-state arbitrations, while the FAA governs arbitrations involving interstate and international commerce. In the Supreme Court's most recent case addressing the preemptive power of the FAA, Doctor's Associates Inc v Casarotto,[38] the Court held that the FAA pre-empts state laws that 'undermine the goals and policies of the FAA'.[39] This rule demands only that state law be arbitration-neutral, that is, that state law must put arbitration agreements 'upon the same footing as other contracts'.[40] The Court suggested that state laws governing arbitral procedure will typically pass this test, because they affect 'only the efficient order of proceedings [...] [and not] the enforceability of the arbitration agreement itself'.[41] This indulgent attitude toward state authority may hold true even where the FAA clearly enumerates the scope of the powers it creates. For example, the Supreme Court has suggested that the grounds for vacatur enumerated in section 10[42] might be supplemented by authority granted by other statutes.[43]

Because state discovery statutes are 'procedural' and do not typically affect the enforceability of an arbitration agreement, they would appear to fall within the Doctor's Associates general exception to FAA preemption. There is very little reported authority on the subject,[44] and none post-Doctor's Associates.[45] Consequently, while it is not clear whether the FAA preempts state discovery statutes, until there are more authoritative rulings, attorneys should consider making use of state-authorised discovery, at least if approved by the arbitrators.

Issuing voluntary subpoenas

Without question, arbitrators and attorneys for the parties to the arbitration are free to make informal document requests of non-parties. Even non-parties who want to disclose information voluntarily, however, will often prefer to receive an official subpoena from arbitrators,[46] so that they know their disclosure accords with a formal, supervised process. Thus, attorneys and arbitrators must strike a balance between drafting their voluntary subpoenas in a way that gives them the requisite gravity and ensuring that they do not violate attorneys' ethical duty of fair dealing.

The ABA Model Rules of Professional Conduct prohibit a lawyer from knowingly making 'a false statement of material fact or law to third parties',[47] 'engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation',[48] and 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]'.[49] On the other hand, rule 3.1 provides that an

attorney can bring or defend a proceeding on any ground for which 'there is a basis in law and fact […] that is not frivolous.'50

Given the unsettled state of authority on the scope of FAA section 7 discovery for non-parties in many jurisdictions, a lawyer seeking to serve a discovery subpoena upon a non-party typically will have a non-frivolous argument for the subpoena's propriety and potential enforceability. Accordingly, in jurisdictions with unsettled law, arbitrators need not distinguish between voluntary subpoenas and mandatory subpoenas, but are free to draft official-looking subpoenas and make explicit reference to the FAA.

Rule 3.1 also provides that 'a good faith argument for an extension, modification or reversal of existing law'51 is a non-frivolous basis for a legal argument. Arguably, therefore, the rule may justify issuance of apparently binding subpoenas even in the Second or Third Circuits, where reversal of current law is the only hope for success. This strategy is not without risk, however, and it may be more prudent to structure voluntary subpoenas around 'request' language, not 'command' language, so as to avoid giving the impression that the recipient's compliance is compelled by the FAA. The same is true for subpoenas to non-parties beyond the geographical reach of rule 45.

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Exploring the intersections of federal law, state law and arbitral rules, we find uncertainty at every turn. Is there anything we can say with certainty? There are three things: non-party discovery is indeed possible, and less restricted than many attorneys believe; in the face of uncertain authority, practitioners will be well served by creative thinking; and it is wise to keep a close eye on new developments in the case law governing non-party arbitral discovery.

Endnotes

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Summary

ENDNOTES

CAFTA-DR Provides Strong Investor Protections But No Flurry of Cases

The free trade agreement among the United States, the Dominican Republic, and Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) (known as CAFTA-DR) was signed on 5 August 2004, and has now entered into force in all of the signatory countries. It includes a chapter (chapter 10) setting out minimum standards of protection for member country investors in each other's territories - including, importantly, an option for the investor itself to enforce those treaty protections directly in binding international arbitration against a host state. This is a powerful tool for CAFTA-DR investors in protecting their investments, and it means that host states must take the promised investor protections seriously.

When the CAFTA-DR was submitted for ratification in the United States and other countries, concerns were raised that these protections opened the door to wide-ranging legal challenges to national laws and regulations. Critics warned that dozens, if not hundreds, of cases would surely be filed upon ratification, and that all of the signatory countries were at risk. At least to date, however, in the five years since CAFTA-DR was signed and the four years since it was ratified in a majority of countries, those concerns have not been borne out.1 Only four cases have been publicly disclosed as filed. At the same time, cross-border investment has continued to expand and grow within the region.

As noted, the CAFTA-DR provides important legal protections to investors in the region. These are described in the first section below. The second section surveys the cases filed to date under CAFTA-DR's investor-state dispute resolution provisions.

Investment protections in CAFTA-DR

The investment chapter of CAFTA-DR (chapter 10) offers to protect investors from one CAFTA-DR country, and their investments, in the territory of any other CAFTA-DR country. Like many other modern international investment agreements, CAFTA-DR includes substantive requirements that govern the treatment of foreign investors, including prohibitions against expropriation without compensation, as well as guarantees of national treatment and most-favoured-nation treatment, fair and equitable treatment, and the free transfer of funds. Most importantly, CAFTA-DR allows investors to protect these rights by seeking recourse through neutral, binding international arbitration for alleged violations by the host government .

First, CAFTA-DR prohibits a host state from expropriating a foreign investment without compensation. While CAFTA-DR does not prohibit expropriation outright, it requires 'prompt, adequate and effective compensation' for the investor in the event of an expropriation.2 This requirement applies equally to direct expropriations (eg, the host government confiscates the investment) and indirect expropriations (eg, the government destroys the value of the investor's investment, even if it does not actually confiscate the investment). In addition, CAFTA-DR protects against 'creeping' expropriation, where the government, over time, implements a number of smaller measures that, taken together, substantially deprive the investor of the value of its investment.

Second, CAFTA-DR requires that a host government provide 'national treatment' to foreign investors (eg, treatment no less favourable than that provided to similarly situated domestic investors) and 'most-favoured-nation treatment' (eg, treatment no less favourable than that provided to similarly situated foreign investors).3 These two requirements mandate equality

in the conditions of competition, subject to certain limitations and carve-outs that are annexed to the agreement.

Third, unlike many other international investment agreements, CAFTA-DR includes 'pre-establishment rights'.4 Most international investment agreements only provide protection to investors after an investment has been made in the host country. Thus, in those cases, the host government is allowed to impose discriminatory provisions on a potential investment, such as prohibiting foreign investors from investing in certain sectors of the economy, or participating in a privatisation bid. CAFTA-DR, on the other hand, requires that the host government provide national treatment and most-favoured-nation treatment even with respect to the establishment of an investment.

Fourth, CAFTA-DR requires that a host government provide 'fair and equitable treatment' to investors in accordance with customary international law.5 This requirement incorporates a minimum standard of treatment under customary international law that sets a floor of protection. That is, it guarantees investors a certain minimum level of treatment, regardless of how the host country may choose to treat its own nationals.

Fifth, CAFTA-DR guarantees investors the right to transfer funds into and out of a host country without delay. A wide variety of transfers are protected, including not only the investment itself, but also profits, capital gains, interest, and even payments arising out of a dispute, among others.6

Sixth, CAFTA-DR prohibits performance requirements, such as requirements to export a certain percentage of production, engage in technology transfer, or use a certain level of domestic content.7 Similarly, CAFTA-DR prohibits any requirement that the investor appoint senior management or members of the board of directors that are nationals of the host state.8 These protections allow investors to freely operate and control their investments without undue interference from local officials.

Finally, CAFTA-DR provides a strong enforcement mechanism, which allows foreign investors to have their claims heard and redressed through neutral, international arbitration.-9 The CAFTA-DR governments consent in advance to resolve such disputes through international arbitration, allowing investors to bypass local courts with respect to covered claims against the government. And if an investor prevails, the government is obliged, as a matter of its international legal obligations, to recognise any award and to comply with it promptly. Although investment arbitration awards are usually paid by states without need for enforcement measures, investors are also able to enforce CAFTA-DR awards in courts around the world under various international treaties.

Cases brought under CAFTA-DR's investor-state dispute resolution provision

At the time of CAFTA-DR's signature and in various national debates over ratification, concerns were expressed that these strong CAFTA-DR investment protections would beget a flurry of new cases that would challenge a wide range of national laws and regulations. For example, one critic argued that by ratifying CAFTA-DR, governments would 'actually hand foreign businesses powerful rights that trump the interests or desires of local citizens'.10 Even very recently, another critic testified before the US Congress that:

> [CAFTA-DR] subjects US environmental, consumer and other public-interest laws to challenge by foreign investors empowered to demand US government compensation directly in foreign tribunals for domestic laws they deem to

> undermine their expected future profits. The investment chapter of the Central America Free Trade Agreement (CAFTA) expanded on the definition of foreign investments that were provided special protections and rights.[11]

CAFTA-DR faced similar vocal opposition in other signatory countries, and in particular, in Costa Rica.

These concerns simply have not been borne out. Public information indicates that only four disputes have been filed under the CAFTA to date. Each of these disputes is discussed below.

***Railroad Development Corporation v Republic of Guatemala*[12]**

On 14 June 2007, Railroad Development Corporation (RDC) filed for arbitration on behalf of itself and its majority owned Guatemalan subsidiary, which does business as Ferrovías Guatemala (FVG).[13] ICSID registered the RDC's arbitration request on 20 August 2007. RDC has alleged violations of CAFTA-DR article 10.3 (national treatment), article 10.5 (minimum standard of treatment), and article 10.7 (expropriation).

In 1997, RDC saw its bid approved to provide railway services in Guatemala. RDC agreed to invest US$10 million and, in turn, was awarded a 50-year right to rebuild and operate the Guatemalan rail system (which had closed in March 1996). The contract was signed in November 1997, and ratified by the Congress in April 1998. According to the tribunal's decision on jurisdiction, RD resumed commercial service between various cities, and cargo traffic increased through 2005.[14]

In June 2005, RDC, through its local subsidiary FVG, began a domestic commercial arbitration in Guatemala, alleging that Guatemala had failed to clear squatters from properties in the rail system.[15] In August 2006, the government adopted a resolution declaring that the RDC contract was injurious to the interests of the state.[16] In the CAFTA-DR arbitration, RDC alleges that the resolution resulted in Guatemala's failure to make payments under the contract or to remove squatters from the railway, and encouraged additional encroachments of railway property.[17] Finally, RDC alleges that Guatemala has blocked its attempts to have its concerns addressed in domestic courts.[18] In total, RDC is seeking US$65 million in damages.

On 29 May 2008, Guatemala challenged the international tribunal's jurisdiction by asserting that the tribunal did not have the power to issue an award because RDC's consent to arbitration was faulty. Guatemala argued that this objection must be considered on an expedited basis under article 10.20.5, which provides for an expedited review of certain objections to jurisdiction.

Guatemala argued that RDC's consent to arbitration was invalid because RDC/FVG were not permitted to seek CAFTA-DR arbitration while continuing to pursue local remedies in Guatemala, including through commercial arbitration and the local courts.[19] Guatemala argued that it had only consented to arbitrate CAFTA-DR disputes that were not being adjudicated through other fora.[20] Guatemala argued further that CAFTA-DR requires a request for arbitration to explicitly waive 'any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in article 10.16.'[21]

On 17 November 2008, the CAFTA-DR tribunal considered Guatemala's objections and determined that it has jurisdiction to hear RDC and FVG's claims under the Treaty. With

respect to Guatemala's objection that RDC has continued to pursue domestic arbitration seeking redress for certain government actions, the tribunal focused on whether the domestic arbitration claims concern the same measures as the international arbitration claims.22 Ultimately, the tribunal determined that there was no overlap, and thus, that RDC's claims could proceed to the merits.

The parties are currently briefing the merits of the case. On 26 June 2009, RDC filed its memorial on the merits. On 24 July 2009, Guatemala requested that the tribunal address additional jurisdictional objections as a preliminary question (eg, in a separate, preliminary stage). On 24 August 2009, the tribunal issued a procedural order suspending the proceeding on the merits and granting Guatemala's request that the tribunal first address additional jurisdictional objections.

*Pac Rim Cayman LLC v Republic of El Salvador*23

On 9 December 2008, Pac Rim Cayman LLC (Pac Rim), a Nevada corporation and wholly owned subsidiary of a Canadian company, filed a notice of intent with El Salvador to commence arbitration under the ICSID rules. Subsequently, on 30 April 2009 Pac Rim filed its request for arbitration, and the case was registered on 15 June 2009. The parties are still in the process of selecting the arbitral tribunal that will hear the case.

Pac Rim is claiming damages of US$77 million - the amount it asserts it has invested since 2002 in approved natural resource exploration activities in El Salvador. Those exploration activities resulted in the discovery of significant gold ore deposits in 2002 and 2003. Pac Rim filed for an exploitation permit and the necessary environmental permits for mining in 2004. However, Pac Rim alleges that, starting in 2006, the government simply shut down communications with the firm. In March 2008, President Saca announced that no new mining permits would be granted. Pac Rim has alleged that this measure violates El Salvador's domestic law, and constitutes both discriminatory treatment and a violation of the fair and equitable treatment guaranteed by article 10.5 of CAFTA-DR.

*Commerce Group Corporation and San Sebastian Gold Mines, Inc v Republic of El Salvador*24

In a second case relating to El Salvador's mining policies, a joint venture of Commerce Group Corporation and San Sebastian Gold Mines, both US companies, filed a notice of intent to bring claims against El Salvador under the CAFTA-DR on 16 March 2009. The companies subsequently filed a request for arbitration, and their dispute was registered with ICSID on 21 August 2009. The parties are in the process of establishing a tribunal to hear the case.

The two companies had entered into a joint venture to develop mining interests in gold and silver at the San Sebastian Gold Mine. The companies have been active in El Salvador since at least 1968. The companies allege that in 2006 the government revoked their environmental permits, which effectively prevented them from continuing to mine, and refused to issue new permits when the companies applied for them. The companies filed complaints in local courts in 2006, but the matter has not been resolved. The companies have claimed damages exceeding US$100 million.

In both this dispute and in Pac Rim, press reports indicate that the current government of El Salvador is seeking to reach negotiated settlements with the affected companies.25 At the same time, however, recently proposed legislation would apparently ban precious metal mining in the country and give the companies six months to wind down their operations. The outcome of these discussions, and the pending arbitrations, are being watched closely by other foreign companies invested in mining operations in El Salvador.

*TCW Group Inc and Dominican Energy Holdings, LP v The Dominican Republic*26

On 15 March 2007, the TCW Group (TCW), a US company owned by Société Générale, a French company, filed a notice under the CAFTA-DR citing potential violations of the Treaty. On 21 December 2007, TCW filed its notice of arbitration and statement of claim. In it, TCW alleged violations of the CAFTA-DR's national treatment, most-favoured nation treatment, fair and equitable treatment, and expropriation protections. TCW is claiming at least US$680 million in damages. Société Générale has filed a parallel claim under the France-Dominican Republic bilateral investment treaty.27

TCW is the controlling shareholder and 50 per cent owner of Empresa Distribuidora de Electricidad del Este, SA (EDE Este), a Dominican electricity distribution company. TCW purchased its interest in November 2004.

TCW alleges that since March 2007, the Dominican Republic has refused to establish the necessary legal and payment structures for the collection of electricity tariffs, has refused to make payments owed to TCW, has enacted discriminatory and arbitrary regulations that contravene TCW's legitimate, investment-backed expectations, has violated a concession agreement, has failed to treat TCW as well as other foreign investors, has failed to enforce its laws to prevent, and at times has even encouraged, the theft of electricity from EDE Este, and has engaged in retaliatory practices in response to TCW's notice of its intent to invoke the CAFTA-DR arbitration mechanism.

On 21 November 2008, the Dominican Republic filed objections to the CAFTA-DR tribunal's jurisdiction over the dispute with TCW. On 13 February 2009, TCW filed its counter-memorial defending the tribunal's jurisdiction. The Dominican Republic raised four objections to jurisdiction.

First, the Dominican Republic contends that TCW has not waived its right to pursue domestic legal proceedings related to the same measures, as the Dominican Republic claims is required under article 10.18 of CAFTA-DR.

Second, the Dominican Republic argues that TCW's alleged investment does not have the characteristics of an investment for purposes of CAFTA-DR, because TCW has not committed any capital, has no reasonable expectation of gain or profit, and has not assumed any risk associated with EDE Este. TCW contends that it owns an 'enterprise' - EDE Este - (and its stock) and thus has an investment as defined by CAFTA-DR article 10.28. TCW also asserts that the concession agreement constitutes an investment.

Third, the Dominican Republic argues that neither a direct nor indirect expropriation has occurred, and thus the tribunal does not have jurisdiction over such claims. TCW reasserts its expropriation claims, and argues that (for purposes of jurisdiction) it need only show the possibility that the tribunal could rule in its favour on the issue.

Fourth, the Dominican Republic argues that the events giving rise to the arbitration occurred before CAFTA-DR came into force, and thus are outside of the jurisdiction of the tribunal. TCW counters that, at a minimum, the tribunal has claims over all actions that occurred after March 2007. But more fundamentally, TCW argues that the conduct constitutes 'continuing and composite acts' and thus is within the tribunal's jurisdiction.

The tribunal has declared its intention to rule on the jurisdictional objections by January 2010.28 In the parallel arbitration under the France-Dominican Republic BIT, the tribunal issued a decision on jurisdiction in October 2008 in which it allowed the arbitration to proceed to the merits phase.

***

Although the predicted wave of investor-state disputes feared by opponents of CAFTA-DR has not materialised, foreign investors in the region should be aware of, and plan their investments in light of, the important protections afforded by the Treaty. The cases above illustrate the kinds of government measures that may affect foreign investors, and that can be the subject of CAFTA-DR arbitration. As foreign direct investment continues to grow within the region, investors from all CAFTA-DR countries should carefully consider their treaty-based rights when seeking to address adverse treatment by a host state.

Endnotes

Multi-Jurisdiction Litigation

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Summary

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Recovery of Attorneys' Fees in International Arbitration: the Duelling 'English' and 'American' Rules

One of the best-known differences between the American and English legal systems is that, unlike in the UK, a successful US litigant generally 'is not permitted to recover his attorney's fees as damages or as reimbursable costs'.[1] By contrast, under the 'English Rule' - applicable in the UK, Australia, Canada, Hong Kong, New Zealand, Singapore, South Africa and many other Commonwealth countries, plus the Republic of Ireland - the rule is that 'costs follow the event', enabling recovery of attorneys' fees by the prevailing party.

America's abandonment of the English Rule apparently dates back to 'the distrust the colonists felt towards the legal profession and the individualistic spirit of the frontier society which viewed lawyers as an unnecessary luxury',[2] - which, if true, is somewhat ironic, given the litigious nature of modern US society. The topic has given rise to occasional transatlantic sniping. Lord Denning once famously cited the American Rule as among the reasons why '[a]s a moth is drawn to the light, so is a litigant drawn to the United States', claiming that it (combined with contingency fees) enabled a litigant to bring a claim '[a]t no cost to himself; and at no risk of having to pay anything to the other side.'[3] For its part, the Warren Court once suggested that the English Rule was inequitable, imposing a 'penalty' that might 'unjustly discourage' poor litigants from 'instituting actions to vindicate their rights.'[4]

In modern international arbitration, commercial parties, having bargained for a specific arbitration process, might imagine that they are free to make similarly binding arrangements governing the future allocation of attorneys' fees. Indeed, many contracts attempt to do so, adopting either the English Rule (eg, by a 'fee-shifting' clause permitting the arbitrators to award fees to the prevailing party) or the American Rule (eg, by a clause explicitly providing that 'each party shall bear its own fees').

But such choices can sometimes be frustrated. Parties who agree to arbitrate in London might be surprised to learn that the American Rule may be abrogated by a UK statute, even where they want to apply it and do so in their contract. Conversely, a successful party to a US-venued arbitration who manages to recover fees through an express fee-shifting agreement may find its winnings sapped by expensive post-award litigation, in which US courts apply the American Rule.

This article focuses, primarily from a US standpoint, on the extent to which external laws, regulations or rules impact the ability of parties to choose the English Rule or the American Rule in international arbitration. As will be seen, certain 'transatlantic traps' can frustrate the parties' ability to make their own arrangements concerning attorneys' fees.

'Default rules' in the US and UK systems

Determining which law applies to fee-shifting issues

A threshold conflict-of-laws issue arises in relation to both the English Rule and the American Rule: is the recoverability of attorneys' fees a procedural issue, governed by the law of the seat of arbitration, or is it a substantive law issue, governed by the law of the parties' contract? In the UK and other Commonwealth cases discussed in 'The ability of parties to regulate fee-shifting by contract', below, courts seems to have treated fee-allocation as being governed by the law of the seat of arbitration, with the result that an arbitral tribunal sitting in London or Singapore was expected to follow the UK's or Singapore's statutory rules concerning the award of attorneys' fees. In the US, however, debate persists over this issue.

One commentator has stated that although '[m]ost countries consider awards for costs and fees to be governed by procedural law', courts in the United States 'are divided on the issue'.[5]

For example, one court has stated that New York's rules concerning the recoverability of attorneys' fees will apply as a procedural matter to all arbitrations venued in New York. See, for example, Spector v Torenberg,[6] in which the court held that '[t]he arbitration took place in New York and therefore pursuant to New York's procedural rules governing arbitration', including its statutory restrictions on the award of attorneys' fees by arbitrators - but then finding that an exception to those restrictions applied. Another state court, this one located in South Carolina, held that New York's rules about attorneys' fees will apply in any arbitration governed by New York contract law, even if seated outside New York. See Lybrand v Merrill, Lynch, Pierce, Fenner & Smith, Inc[7] (vacating award of attorneys' fees by South Carolina arbitration panel for manifest disregard of New York's rules restricting recovery of attorneys' fees in arbitration).

Attorneys involved in drafting a fee-shifting provision that might be reviewed by a US court or arbitrator should therefore take into account both the governing law of the contract and the arbitration law applicable in the seat of arbitration.

Default rules regarding fee-shifting for international arbitration in the UK, Commonwealth jurisdictions and Ireland

Within the UK, most Commonwealth countries and Ireland, there is a strong tradition of awarding attorneys' fees to the successful party in litigation. This tradition has carried over to arbitration and is reflected in section 61 of the English Arbitration Act 1996:

> Award of costs
>
> (1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.
>
> (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

Thus, an arbitration tribunal sitting in London is authorised to award attorneys' fees, even if the parties' agreement and the applicable arbitration rules are silent on the issue. (Similar statutory provisions exist in Ireland and the Commonwealth.)

In Aasma v American Steamship Owners Mutual Protection & Indemnity,[8] a group of US seamen brought an arbitration in London against two insurers. They lost, and although the contract was silent on the issue of attorneys' fees, an award of attorneys' fees was nevertheless made against them. They then urged a US court to refuse recognition of the attorneys' fees award, arguing that the fees award was 'beyond the scope of the submission to arbitration' for purposes of article V(1)(c) of the New York Convention because the contract made no provision for fee-allocation. In a rhetorical flourish, they claimed the award was made by 'an unsympathetic arbitrator in a foreign land' who 'reward[ed] [the successful party] for hiring phalanxes of attorneys who ran up legal fees with unfettered abandon'.[9] Rejecting these arguments, the court held that because the arbitration was 'conducted in accordance with the [English] Arbitration Act 1996', the arbitrators had authority to award fees by virtue

of section 61's 'default provisions in the absence of an agreement between the parties as to costs'.10

Default rules regarding fee-shifting for international arbitration in the United States
The traditional position

Although the Federal Arbitration Act (FAA) does not address the recoverability of attorneys' fees, the arbitration statutes of many states still adhere to the American Rule. New York, for example, 'follows the prevailing American Rule on fee-shifting, permitting an award of fees only where "specifically provided for by statute or contract"'11 (emphasis added). The New York state arbitral statute (which reflects section 10 of the 1955 Uniform Arbitration Act) provides that '[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorneys' fees, incurred in the conduct of the arbitration, shall be paid as provided in the award'.12 In Asturiana, a court held that an arbitrator, sitting in New York and adjudicating a contract dispute that was governed by New York contract law, was not empowered to award attorneys' fees to the prevailing party, because the contract did not expressly authorise the award of such fees.13 Similar holdings have been made in other states that adhere to the 1955 Uniform Arbitration Act. See, for example, Quick & Reilly, Inc v Zielinski,14 (vacating arbitrator's award of attorneys' fees, where Illinois state arbitral law restricted arbitrators from doing so, absent express agreement); D & E Construction Co v Robert J Denley Co,15 (similar result; Tennessee equivalent); and Bingham County Comm'n v Interstate Electric Co16 (similar result; Idaho equivalent).

Recently, 12 states plus the District of Columbia have adopted the new Revised Uniform Arbitration Act of 2000, which, in contrast to the New York rule, provides that '[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorised by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding'.17 Although this drops the 1955 Act's restrictive language concerning the award of attorneys' fees, it still does not provide an independent authorisation for the award of such fees - it only states that such an award is authorised by an agreement between the parties or otherwise 'authorised by law.' The impact (if any) of this revised statute remains to be tested in the courts.

Some courts, however, have doubted whether the state arbitration acts even apply to arbitration that involves interstate or foreign commerce. See Ceco Concrete Construction, v J T Schrimsher Construction Co;18 and PaineWebber Inc v Bybyk19 (holding that, where the arbitration agreement was broad enough to encompass claims for attorneys' fees, New York's restrictions on fee awards could not apply in light of the FAA's pro-arbitration policies). But the FAA arguably does not change the equation. Indeed, one court has stated that 'under either body of law [New York law or federal law], arbitrators lack the power to award attorneys' fees unless the parties agree to submit the issue for determination'.20

State statutes authorising fee-shifting in international arbitration

California, Florida, Hawaii, North Carolina, Ohio, Oregon, and Texas have enacted 'international arbitration' statutes explicitly permitting attorneys' fees awards in international cases. See, for example, California Civil Code of Procedure ('unless otherwise agreed', an international arbitral tribunal shall have the power to award 'costs', including '[l]egal fees and expenses' of the parties);21 Hawaii Revised Statutes Annotated (permitting international 'arbitration center[s]' to create rules authorising attorneys' fee awards).22 Thus, recovery of attorneys' fees in international arbitration in those jurisdictions may be possible, even absent an explicit fee-shifting agreement.

The ability of parties to regulate fee-shifting by contract

Under US law

Parties may, by express agreement, oust the American Rule in favour of the English Rule. Thus, in Lummus Global Amazonas, SA v Aguaytia Energy Del Peru,23 a contract, governed by New York law with the International Chamber of Commerce International Court of Arbitration (ICC) arbitration in Houston, stated that '[t]he arbitrators shall determine who is the prevailing party and shall award attorney fees [...] to the prevailing party'.24 It was held that the clause satisfied an exception to the American Rule, namely, 'when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party,' a tribunal has the power to award such fees, 'so long as those amounts are not unreasonable'.25

The American Rule, however, still influences the interpretation of fee-shifting agreements because, in some states, 'provisions for attorneys' fees are to be construed strictly'.26 Further and importantly, 'costs' are not always construed to encompass as 'attorneys' fees' in the American legal lexicon. Under many US rules of court, 'costs' are merely filing fees and minor ancillary expenses, such as token copying costs. Probably for this reason, one US court held that a clause permitting recovery of 'expenses or costs of arbitration' did not permit an award of attorneys' fees because it did not include the power to award attorneys' fees and legal expenses.27 Thus, in drafting a fee-shifting clause that might someday be interpreted by a US court or tribunal, explicit reference to attorneys' fees is advisable if the intent is to confer such a power on the arbitrators.

Disputes may also arise as to which party to a dispute was actually the 'prevailing party'. In Seagate Technology International v Alliance Computer Systems,28 an arbitrator dismissed both claims, but still awarded fees to the respondent, holding that it was the 'prevailing party'. Dismissing the plaintiff's challenge to the award, a Massachusetts federal court held that the identity of the 'prevailing party' was a classic factual question for the arbitrator, which the court would not second-guess, especially as there seemed to be some factual basis for viewing the respondent as the winner.29

Disputes can also arise as to the reasonableness of fees claimed. In the US, '[f]actors for assessing the reasonableness of an award of attorney fees include: "the difficulty of the questions involved; the skill required to handle the problem; the time and labor required; the lawyer's experience, ability and reputation; the customary fee charged by the Bar for similar services; and the amount involved"'.30 Nonetheless, US lawyers generally lack the vast experience their colleagues in England have in this field, and there are not as many 'hard and fast' rules concerning quantification of fees in US arbitral practice (eg, what kind of documentation should be submitted in order to quantify fees; and whether a fee application should be denied where the winning party has refused to accept a reasonable settlement offer).

Statutes blocking the parties' choice of the American Rule in UK, Commonwealth and Irish arbitration

Ordinarily, an arbitration agreement incorporating the American Rule, that is, providing that each party is to bear its own attorneys' fees, would be regarded as valid and enforceable in the US. The same may not be true in England, where section 60 of the English Arbitration Act 1996 states that '[a]n agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen'. (Emphasis added.) Section 60 thus would appear to abrogate any

contractual attempt to incorporate the American Rule (except if the agreement is made after the arbitration begins).

In Shashoua v Sharma,[31] a shareholders' agreement was governed by Indian law, with ICC arbitration in London, and further provided that 'each party should bear its own costs in connection with such an arbitration'. A London ICC tribunal ruled that section 60 of the English Arbitration Act 'prevented' the contractual prohibition on costs awards 'from being valid' and issued a 'costs award' against one of the parties. In subsequent litigation, the English Commercial Court endorsed this view, remarking that 'section 60 exists for the very reason that parties agree to English arbitration with [no-fee shifting] clauses [...] in their agreement'.

Near-identical statutory rules exist in Australia, Hong Kong and Singapore. See, for example, Fasi v Specialty Labs Asia Pte Ltd[32] (commenting that Singapore's equivalent of section 60 may render 'unenforceable' a clause stating '[t]he cost of arbitration shall be borne equally by the parties hereto'). These statutory rules create a potentially significant limitation on party autonomy and are of questionable policy value in international commercial arbitration where such party autonomy is a cornerstone of the process.

The impact of arbitration rules on the parties' ability to claim fees

International arbitration rules (other than AAA-ICDR rules)

Many international arbitration rules expressly address fee-shifting:

- United Nations Commission on International Trade Law (UNCITRAL): the UNCITRAL Arbitration Rules permit a tribunal to award '[t]he costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable'.[33]
- ICC: the ICC Rules authorise a tribunal to award 'reasonable legal and other costs incurred by the parties for the arbitration'.[34]
- London Court of International Arbitration (LCIA): the LCIA Arbitration Rules state that '[t]he Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing'.[35]
- International Institute for Conflict Prevention & Resolution (CPR): the CPR Rules for Non-Administered Arbitration authorise the tribunal to 'fix the costs of arbitration in its award', including '[t]he costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate'.[36]
- The International Centre for Settlement of Investment Disputes (ICSID) system: awards made under the 1965 ICSID Convention may include decisions regarding the 'cost of the proceedings' (see ICSID Arbitration rule 27). Such decisions are not subject to judicial review by national courts. The Arbitration Rules of the ICSID Additional Facility (whose decisions may be subject to review by national courts) explicitly permit awards of attorneys' fees.[37] ('Unless the parties otherwise agree, the Tribunal shall decide how and by whom [...] the expenses incurred by the parties in connection with the proceeding shall be borne'.)

Several US cases have held that, where a contract provides for arbitration under the ICC or UNCITRAL rules, this selection confers authority on arbitrators to award attorneys' fees. See,

for example, Willbros West Africa, Inc v HFG Engineering US, Inc38 (upholding attorneys' fees award by UNCITRAL tribunal); Shaw Group, Inc v Triplefine Int'l Corporation39 (submission to ICC rules empowered arbitrators to award attorneys' fees).

The position under the ICDR or AAA Rules

The American Arbitration Association's international arm, the International Centre for Dispute Resolution (ICDR), has adopted rules that permit a tribunal 'to fix the costs of arbitration in the award', including 'the reasonable costs for legal representation of a successful party'.40 In one case, it was held that these rules gave an ICDR tribunal power to award attorneys' fees. See Apache Bohai Corporation, LDC v Texaco China BV41 ('As far as the court can tell, the American Rule has not been incorporated into the [ICDR] International Rules'.)

But in CIT Project Finance, LLC v Credit Suisse First Boston LLC,42 the Supreme Court of New York (a first-instance state court) vacated an ICDR award of attorneys' fees. It held that the parties' contractual choice of New York law meant that the arbitrators were subject to the American Rule, prohibiting the award of attorneys' fees absent explicit contractual or statutory authority.43 In this regard, it held that article 31 of the ICDR International Rules 'does not provide an independent ground' for the award of attorneys' fees, 'without consent by the parties for such relief.'44

Even if this (still unresolved) split is resolved in favour of an ICDR arbitrator's authority to award arbitrators' fees, another potentially important split exists within the AAA's various rules. Unlike the ICDR International Rules, rule 43 of the AAA's Commercial Arbitration Rules merely provides that an arbitrator's award 'may include [...] an award of attorneys' fees if all parties have requested such an award or it is authorised by law or their arbitration agreement' (emphasis added). This might not displace the American Rule.

Given this potentially critical difference, parties should be aware of the AAA's practices concerning the applicability of these rules.

The ICDR International Rules will apply where the parties agree to arbitration under the International Rules, and will also apply by default to international cases where the parties have chosen to arbitrate pursuant to American Arbitration Association Rules. The ICDR treats cases as international if they would qualify as such under the UNCITRAL Model Law (eg, a dispute involving parties of different nationality or that calls for performance in more than one country, or both).

The AAA Commercial Arbitration Rules will apply by default to certain domestic commercial disputes where the parties agree to arbitration under American Arbitration Association Rules. They may also apply to international cases, but usually only when the parties' agreement affirmatively selects the Commercial Arbitration Rules.'

Thus, in an international case, a bland agreement to arbitrate under AAA Rules may catapult a party into the International Rules, and may thus arguably empower the arbitrators to award attorneys' fees - even if the agreement is silent on the issue and even if the arbitration takes place in in New York.

Further exceptions to the American Rule

There remain a number of further exceptions to the American Rule that will enable a US-venued arbitral tribunal to award attorneys' fees against a losing party.

Waiver

If both parties in an arbitration request attorneys' fees, they may be deemed to have waived any objection to subsequent fee awards. See, for example, Marshall & Co v Duke[45] ('Since it appears clear that both parties sought an award of their fees without a jurisdictional objection from the other, the issue of who should get fees and how much was effectively submitted by agreement of the parties.'); First Interregional Equity Corporation v Haughton.-[46]

Statutory entitlements

Several US statutes permit a claimant to recover attorneys' fees in statutory claims. See 15 USC section 4304(a) ('in any claim under the antitrust laws, or any State law similar to the antitrust laws [...] the court shall, at the conclusion of the action [...] award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee'); 18 USC section 1964(c) (RICO claimant may recover 'reasonable attorney's fee [...]'); and 15 USC section 1117(a) (similar rule for Lanham Act disputes). Where these statutes apply, 'the arbitrator becomes imbued with authority to award any attorneys' fees [...] to the extent there is a statutory basis for such an award.'[47]

Texas has passed a general law allowing recovery of attorneys' fees in a wide variety of cases, including contractual actions. See the Texas Civil Practice & Remedies Code Annotated, section 38.001; Sungard Energy Systems, Inc v Gas Transmission W. Corporation,[48] the judge held 'the contract on its face purports to be governed by Texas law, and Texas law awards attorney's fees to a party who prevails on a breach of contract claim. Therefore, the panel did not exceed its powers when it awarded [the prevailing party] its attorney's fees'.

The 'bad faith' exception or sanctions

Some courts have recognised the power of arbitrators to award attorneys' fees against parties who are guilty of 'bad faith' conduct during the course of a proceeding. In ReliaStar Life Insurance v EMC National Life Co,[49] for example, it was held that arbitrators possessed inherent authority to award attorneys' fees against a party who had conducted itself in bad faith, even though the contractual agreement provided that both parties would bear their own costs.

In addition, courts or arbitrators occasionally order that the opposing lawyers pay attorneys' fees, as a sanction for professional misconduct. The large body of law governing attorney sanctions is beyond the scope of this article, save to note that courts and arbitrators have displayed particular dissatisfaction with counsel who 'disregard and flout the authority of the arbitral forum' and who treat arbitration as a procedure where 'anything goes'.[50]

Attorneys' fees as damages

Finally, in some cases, the courts have upheld an arbitrator's award of attorneys' fees as damages for a party's past breach of a forum selection clause. See MWN Group, Inc v MAG USA, Inc[51] (upholding arbitrator's award of damages incurred by prevailing party arising from opponent's actions in 'filing suit in Michigan rather than instituting arbitration proceedings'). Thus, an arbitrator might consider an award of the fees incurred by a party in compelling a recalcitrant party to submit to arbitration.

Recovery of attorneys' fees incurred in post-award litigation

A successful party sometimes incurs significant expense fending off challenges to the award in the national courts. In the English courts, such expenses are recoverable under the English Rule. But in the US, 'there is no provision in the [FAA]... that awards attorney's fees to a party who is successful in pursuing a motion to compel arbitration or in defeating a motion to compel arbitration.'[52] Thus, even when the contract or arbitral rules might have permitted

an award of attorneys' fees in the arbitration, post-award litigation expenses may not be recoverable. Thus, in Alcatel Space, SA v Loral Space & Comm'ns Ltd[53] the court denied the French company's application for fees incurred in seeking to confirm an ICC award by stating: '[t]he general rule is that each party in a federal litigation pays its own attorneys' fees'.

Thus, to recover attorneys' fees in post-award litigation, a litigant will need to identify an exception to the American Rule, for example:

- a contractual provision expressly permitting recovery of litigation expenses in addition to arbitration expenses - see Olle v 5401 W Ave Residential, LLC[54] (holding that a contract entitling a defendant to recover fees incurred in enforcing an arbitration agreement was valid);
- 'bad faith' or sanctions - see Telenor Mobile Comm'ns v Storm LLC[55] (the prevailing party in an UNCITRAL arbitration was entitled to attorneys' fees incurred in pursuing post-award contempt proceedings, after its Ukrainian business partner refused to honour the award); Celsus Shipholding Corporation v Pt Pelayaran Kanaka Dwimitra Manunggal[56] (enforcing award and awarding attorneys' fees on the ground that the 'defendant ha[d] presented no justification or reason for its failure to abide by the [London] arbitrator's decision'); or
- possibly under the Revised Uniform Arbitration Act of 2000 (now in force in 12 states plus Washinton, DC) permitting recovery of 'reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made'[57] - if this statute can be validly utilised in cases governed by the FAA.

Security for costs

Under section 38 of the English Arbitration Act, in an arbitration that takes place in England, arbitrators have the power to require a claimant to furnish 'security for costs', that is, to post a cash (or cash-equivalent) deposit equal to the amount of attorneys' fees that the other party might incur in the course of the proceeding to provide security against the possibility that the claimant might lose the case. 'Security for costs' is available in arbitration in other Commonwealth countries as well. See, for example, Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd[58] (where Singapore is the seat of arbitration, arbitrators have power to order security for costs). Security may be warranted where 'there is some doubt that [the claimant] will be in a position to meet the defendant's costs should his actions fail',[59] for example, where the claimant is a company with few or no assets.

As a general matter, the concept of 'security for costs' is somewhat unfamiliar to US lawyers. Nevertheless, some have argued that an application for 'security for costs' can be based on the arbitrator's (or a court's) general powers to grant interim conservatory measures[60]. Moreover, LCIA rule 25.2 expressly permits arbitrators 'to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate'. Thus, if a party agrees to arbitration in New York under the LCIA Rules, it may be deemed to have agreed to a system that allows its opponent to request security for costs.

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Parties who desire to recover their attorneys' fees in arbitration are well-advised to include an express fee-shifting agreement in their contract, particularly if the contract contemplates arbitration in the US. In all events, parties should be aware of the myriad implications arising

from their selection of venue, which can have a profound - and often unintended - effect on the recovery of legal fees in arbitration.

Endnotes

Skadden

Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

https://www.skadden.com

Argentina

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Summary

Argentina: A Look into Investor-state Arbitration

Since 1992 Argentina has entered into approximately 56 bilateral investment treaties (BITs).1 As Grigera Naón2 expressed in 2000, 'the growth of foreign investment has been accompanied (perhaps one could say triggered) by a Copernican change in the attitude of host countries - particularly, but not exclusively, in the developing world - regarding the treatment and level of protection to be afforded to foreign private investments. From positions clearly adverse […] developing countries have generally shifted in more recent years towards positions favouring […] protection.'3 These protections usually included the obligation of the host state to treat investors according to minimum international standards, the rights of the investors to transfer currency out of the host state, the right of the host state to expropriate assets of the investors located in the host state, with the duty to provide full compensation, and the settlement of disputes through international arbitration, among others.

Most of the BITs provided for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),-4 while some others provided for arbitration under UNCITRAL Rules.5 In 1991, Argentina signed the ICSID Convention,which entered into force on 18 November 1994.6 In Argentina, the ratification of BITs and of the ICSID Convention did not raise any public concerns as to the commitments therein contained.

During the 90s there was a wave of privatisations of public utilities in Argentina and foreign direct investments in the form of greenfield or de novo investments, international franchising, mergers and acquisitions and international joint ventures, among others.

However, for economic reasons that exceed the scope of this article, Argentina entered into its worst economic crisis around 2001. As a result, President De la Rua had to step down, several people died in violent riots, and the country was brought to the brink of chaos. On 2 January 2002 Duhalde was appointed president by Congress.
The political and economic crisis of Argentina

As a consequence of the economic and financial crisis suffered by Argentina in 2001/2002, the government enacted Emergency Law 25,561,7 followed by several other laws and decrees (the Emergency Laws), that heavily interfered with the tariffs and the economic equation set forth in public and concession contracts of public utilities privatised during the 90s. After long periods of unsuccessful negotiations with the Argentine government to restore the economic equation of those contracts, a considerable number of foreign investors decided to submit a notice of claim, and to request arbitration before ICSID or UNCITRAL arbitration panels. These claims were brought to Argentine public attention, and the ICSID system was put under examination and some voices went so far as to consider, against Argentine Supreme Court precedents, that arbitration awards should be subject to local judicial scrutiny.

After the initial submission of investor claims against Argentina before ICSID panels, scholars and diplomats discussed an interesting and complex issue related to the legal standing of investors, which was whether they could resort directly to international arbitration without submitting the case before local courts, and how jurisdictional clauses in the public contracts that referred disputes to local courts should be construed. At that time, the distinction between contract claims and treaty claims based on the violation of the fair and equitable treatment standard contained in the BITs was not very clear, as it is today.

As Cremades and Cairns explained in detail,8 the ad hoc Committee that decided the annulment9 of the Vivendi award10 is an excellent example of how to deal with this issue:

> [...] A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard. The availability of local courts ready and able to resolve specific issues independently may be a relevant circumstance in determining whether there has been a breach in international law [...] But it is not dispositive, and does not preclude an international tribunal from comidering the merits of the dispute [...] Under the BIT they had the choice of remedies [...]11

In addition, scholars and public officials also raised concerns about the obligation of the host state (in this case Argentina) set forth in article 54.1 of the ICSID Convention to consider the award as if it were a final judgment of a court in the host state,12 thereby preventing the local courts from reviewing the award to determine whether it meets the standards required under the Argentine Constitution. This was considered a violation of Argentine public policies, such as the due process of law, equality and the relativity of certain rights that might be modified through the enforcement of new laws, between others13 and, therefore, incompatible with local law.

What appeared to be the core concern about the wave of cases filed against Argentina (approximately 50) was the Argentine government's uncertainty about whether the different ICSID and UNCITRAL arbitral panels would accept the Argentine defence of the state of necessity that allowed it to enact the Emergency Laws, which entailed a break in the economic equation of contracts. It was sustained that, certainly, such defence would have been admitted by the local courts as the crisis met the standards set forth by the Argentine Supreme Court and cast doubts on the potential arbitrators' approach.

Changes to Argentine Supreme Court decisions

On 1 June 2004, the Argentine Supreme Court issued a controversial ruling in the Cartellone case.14 Although the arbitration clause determined that the parties had waived their right to appeal, the Supreme Court reviewed the arbitration award. The case had been dismissed by the Federal Court of Appeals on the ground that the previous admittance of the appeal would require this court to enter into the merits of the case and such right had been waived by the parties. On the contrary, the Argentine Supreme Court ruled that the waiver contained in the arbitration clause could not be construed as covering an award that violates 'public policy' and further stated that an award that asses the facts and applies the law correctly is not subject to appeal, but at the time the award would be subject to judicial review (appeal) if it were deemed 'unconstitutional, illegal or unreasonable'.

The ruling in Cartellone appeared to make possible the judicial review of any award, whether the parties had waived their right to appeal or not, or even under the prohibition under the ICSID Convention. However, scholars had divergent comments on the case. Some of them considered that the ruling only ratified Argentine Supreme Court precedents,15 while others considered it as a violent attack against the parties' consent to refer their disputes to arbitration.16

Other scholars emphasised the value of Argentine commitments, such as the ratification of 56 BITs, whatever the result was in investor-state arbitrations, to avoid segregation from the international community.17

Back to the past

Although Argentina was the first Latin American country that experienced massive investor claims in the international forum, many other countries are joining the list. Ecuador registers 13 cases, Venezuela registers 12 cases, Peru registers five cases, and Bolivia registers three cases.18 This situation may bring back hostility of developing countries towards foreign investment.

The Argentine government was not alone in its challenge to investor-state arbitration. The decision of many Latin American countries to enter into BITs and to be part of the ICSID Convention is currently being revisited.

Although Ecuador's experience with ICSID arbitration has appeared positive, its government has recently decided to withdraw from the ICSID Convention.19 That is, future disputes between investors and Ecuador shall not be referred to international arbitration.

Unfortunately, this decision could be followed by the other developing countries involved. However, as we will explain bellow, the Argentine experience in international arbitration so far does not justify a similar decision.

Argentina's experience in arbitration

In the beginning, the Argentine government might have assumed that UNCITRAL or ICSID arbitration panels would favour investors, with the prejudice that arbitrators were likely to be biased, and that Argentina would not have its right to present its cases fairly, or that any claim presented by an investor would have been admitted for the full amount.

Argentine experience in ICSID arbitration turned out very differently. Each case has to be duly prepared, presented and argued by both sides before receiving an award, and experience shows that there are no given results beforehand. Each party has to work hard to obtain recognition of its rights and its defences.

The Emergency Laws were enacted almost eight years ago, and Argentina's experience in investor-state arbitration has been as follows.

For ICSID cases, investors have filed 49 cases against the Republic of Argentina.20 Of those cases, 31 are pending and 18 have been concluded.

Of the concluded cases, 13 cases were concluded by agreement of the parties and provided for the withdrawal of the claim.21 Three cases had a final award against Argentina with a partial admission of the claim,22 and three cases were dismissed either on the ground of lack of jurisdiction or on the merits.23

Since 2004, the Attorney General of Argentina Osvaldo Guglielmino has lead the team of attorneys representing Argentina before international arbitration panels, and the record shows that he has been quite successful in defending Argentine interests.

According to some calculations, foreign investors' claims against Argentina before ICSID totalled more than US$20 billion,24 and as of 2008 the withdrawn or suspended cases represent US$9.52 billion.25 The Office of the Attorney General concluded more than 25 per cent of the cases, with only three awards imposing pecuniary obligations on Argentina, at levels well below the original claims.

In addition, the state of necessity defence was also admitted by ICSID panels. In the Continental Casualty Company case the claim was admitted at only 3 per cent of its original value. The ground to dismiss the rest of the claim was based on the admission by the arbitral tribunal of the existence in Argentina of a crisis that allowed the government to impose the Emergency Laws according to article XI of the US-Argentina BIT,26 which contemplates the adoption of measures necessary for the maintenance of public order.

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Investor-state disputes have gone through different stages. From the Jecker Claim, where the Mexican government's default on a loan determined France's invasion of Mexico in 1862-1867, to international arbitration, the means to resolve international conflicts has continuously evolved.

Argentina has indeed gone through a very difficult period in its economic and political life and was compelled to adopt the Emergency Laws, which have interfered with the interests and rights of foreign and national investors.

From the Argentine experience, we can conclude that ICSID and the ad hoc UNCITRAL arbitration have been a satisfactory system to solve international disputes. Moreover, we can affirm that the initial hostility towards international arbitration was groundless.

In our opinion, Argentina does not need to resort to theories that challenge its commitments under BITs or ICSID rules for the enforcement of awards. The compliance with international rules of arbitration seems to be a better way to defend national interests.

Endnotes

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Bermuda

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Summary

Developments in Bermuda Arbitration Law

In last year's edition of Global Arbitration Review we reported Bermuda's continued development as a sophisticated international arbitration centre, especially for the (re)insurance industry. The past year has seen more and more class 4 (re)insurers writing policies containing Bermuda arbitration clauses and an increase in the number of (re)insurance arbitration disputes, possibly reflecting premium increases. The Bermuda Commercial Court has further demonstrated its desire to support two key areas of arbitration law and practice: parties' agreement to arbitrate and the arbitrator appointment procedure. As discussed towards the end of this article, the European Court of Justice's February 2009 decision in The Front Comor has represented a move away from English arbitration in favour of Bermuda arbitration.

Enforcement of agreement to arbitrate

The Bermuda Commercial Court has, in unreported decisions, again shown its preparedness to grant anti-suit injunctions to enforce parties' contractual agreement to arbitrate. OAO CT Mobile v IPOC International Growth Fund Ltd, LV Finance Group Limited v IPOC International Growth Fund Ltd,[1] remains the most significant decision on agreements to arbitrate outside of Bermuda.

In ACE Bermuda Insurance Ltd v Continental Casualty Company[2] the Bermuda Court was prepared to grant an anti-suit injunction against a non-party to an arbitration agreement. The plaintiff, ACE, and the defendant, Continental, had both issued excess liability insurance policies to the Minnesota Mining and Manufacturing Company (3M). Continental had commenced proceedings in the District Court for the Fourth Judicial District of the state of Minnesota (the Minnesota proceedings) against, inter alia, its insured 3M, seeking a declaration as to the scope of its liabilities under certain excess liability policies issued to 3M at various times between 31 December 1969 and 1 January 1986. Continental had joined, as defendants to the Minnesota proceedings, more than 60 other insurers (including ACE) on the basis that 3M had purchased potentially applicable insurance policies from them. As Mr Justice Bell explained, the Minnesota proceedings impacted on ACE's contractual rights:

> The policies which Continental issued to 3M pertain to liability in respect of claims arising from exposure to toxic substances caused by 3M products. In the nature of such claims, complex questions arise as to when liability under particular insurance policies was triggered and as to the appropriate allocation between the various policies […] Continental seeks declarations in relation to the issues of triggering and allocation in relation to the various underlying insurance policies issued by the Defendant Insurers, as well as a declaration that Continental's policies have not been triggered by the exhaustion of the underlying insurance. This […] will necessarily require the Minnesota Court to determine, so far as ACE is concerned, the contractual rights and obligations between ACE and 3M with regard to the terms of their contract and the extent of coverage thereunder.

Bell J upheld an order giving leave to serve notice of the Bermuda proceedings out of the jurisdiction and continued an anti-suit injunction to restrain Continental from pursuing the Minnesota proceedings against ACE. The learned judge accepted ACE's argument that the Minnesota proceedings were unconscionable since they would decide in a final and binding

manner the issues between ACE and 3M, in clear breach of an arbitration clause in the ACE policy which provided for arbitration in Bermuda.

Continental unsuccessfully challenged the jurisdiction of the Bermuda Court to grant an injunction against it on the grounds that it was not a party to the arbitration agreement between ACE and 3M. The relevant jurisdictional rule (RSC order 11, rule 1(d) (iii)) provided that the court could grant leave to serve proceedings out of the jurisdiction on a foreign defendant, where the plaintiff's claim affected a contract governed by Bermudian law. Continental argued that, to find jurisdiction under that rule, there had to be a contract between the plaintiff and the defendant. Rejecting that argument, Bell J ruled:

> […] the Court has granted anti-suit injunctions to restrain a party from pursuing foreign Court proceedings in breach of an arbitration agreement for many years. In my judgment, the Court has such jurisdiction whether or not the party pursuing the foreign proceedings is itself a party to the arbitration agreement. It is the breach of the arbitration clause calling for arbitration in Bermuda that the Court has jurisdiction to restrain. Continental's suit in Minnesota is calculated to breach such an arbitration clause, and the Bermuda Court thus exercises jurisdiction.

It remains in doubt whether this reasoning is correct. Where C is not a party to the agreement to arbitrate between A and B, how can C breach an agreement that it is not bound by? There is no further judicial guidance on the point but we remain of the view that the result in ACE v Continental was justified on the basis that Continental's conduct amounted to an unconscionable (and possibly tortious) interference with ACE's contractual rights.

In Starr Excess Liability Insurance Company Ltd v General Reinsurance Corp,[3] Bell J granted an anti-suit injunction to restrain proceedings in New York, which purportedly were filed in breach of an arbitration agreement that was governed by the procedural law of Bermuda. The facts were as follows: General Re (Gen Re) reinsured Starr Excess (Starr) under a casualty quota share reinsurance contract. That reinsurance contract was stated expressly to be governed by New York law. Clause A of the arbitration clause dealt with the appointment of arbitrators and an umpire and contained a mechanism for appointment of such arbitrators by a justice of the Supreme Court of New York. However, clause B of the arbitration clause stated: 'the arbitration proceeding shall take place in Hamilton, Bermuda' and then dealt with a number of procedural matters. There was no express choice of 'seat' or procedural law.

A coverage dispute arose and Starr commenced arbitration against Gen Re. There then followed a dispute between them as to the scope of the arbitration clause. Starr argued that the seat of the arbitration was Bermuda with the consequence that Bermudian procedural law applied (the Bermuda International Conciliation and Arbitration Act 1993 which applies the UNCITRAL Model Law). Gen Re, represented by a US firm unversed in Bermuda law, argued that New York procedural law applied and duly commenced litigation in New York to request that the New York court interpret the arbitration clause. Bell J found that the seat of the arbitration was Bermuda, and the arbitration was therefore subject to Bermudian procedural law, not New York law. The judge noted that 'it is common in international arbitration for the procedural law to be different than the law governing the substantive dispute between the parties' and went on to say:

> […] given that the parties reached an express agreement that the arbitration proceeding should take place in Bermuda, and there being no express choice of procedural law, the next question is whether [there] are any other pointers to offset the 'very strong pointer' that by agreeing to arbitrate in Bermuda the parties have implicitly chosen the law of Bermuda to be the procedural law of the arbitration.

Granting an anti-suit injunction restraining Gen Re's New York proceedings, and having considered the terms of clause A of the arbitration clause, the judge concluded:

> I do not regard the default provision for appointing an arbitrator or umpire as being a matter which should be taken beyond its relatively narrow confines; it is, as Mr. Attride-Stirling submitted, a purely administrative provision, applicable only to the appointment of an arbitrator or umpire. In my view, it cannot justify an inference that it represents some wider choice of procedural law […]
>
> In the circumstances, there is no part of the arbitration agreement that operates to counter the 'very strong pointer' that the parties' agreement on Bermuda as the place of the arbitration implicitly indicates their agreement that the procedural law of Bermuda should apply to the arbitration. I am therefore satisfied by their agreement to arbitrate their dispute in Bermuda the parties did implicitly agree that Bermuda procedural law (and only Bermuda procedural law) should apply to the arbitration, and I so find.

Enforcement of Bermuda form arbitration clauses

Bermudian (re)insurers continue to underwrite policies on the Bermuda form, which was invented in the mid 1980s to respond to the critical lack of liability insurance coverage available to US industrial concerns at that time. Arbitrations arising under the Bermuda form are, according to its arbitration clause, to be held in London (ie, subject to English procedural law) but governed by New York law.

The Bermuda form came before the English Court of Appeal for the first time in December 2007 in the case of C v D.[4] In that case, D was the liability insurer of C, a company based in New Jersey. C made a claim on the policy, which was written on the Bermuda form, and D raised various defences to indemnification. The tribunal ruled in favour of C and dismissed D's defences. Following the hearing C applied to the tribunal to 'correct' the award on the ground that the tribunal's findings constituted a 'manifest disregard of New York law' and were therefore reviewable by the US Federal District Court. The tribunal refused to 'correct' its award saying that it had no power to do because the parties had expressly agreed to contract out of the right to appeal given by the (English) Arbitration Act 1996, section 69. A dispute therefore arose as to whether: English procedural law applied (ie, the Arbitration Act 1996), which permitted the contracting out of a right to appeal against arbitration awards; or whether, because New York substantive law governed the contract, D had the right to draw upon the New York procedural law and appeal to the New York Court on the ground of 'manifest disregard of New York law', which could not be excluded by agreement by the parties.

The Court of Appeal affirmed the judge's decision to grant a permanent injunction restraining D from appealing to the New York Court. The central issue was not so much the proper law

of the arbitration agreement (New York) nor the determination of the procedural law (which was clearly English) but whether or not the parties, by choosing London as the seat of the arbitration, must be taken to have agreed that proceedings on the award should be only those permitted by English law. The Court of Appeal ruled that the parties agreed to exclude an appeal to the English Commercial Court and, in view of that agreement, could not appeal to the New York Court. The whole purpose of the balance achieved by the Bermuda form was that judicial remedies in respect of the award should be only those permitted by English law. The remedies of the New York Court were not available in tandem or parallel and to permit such a dual system would invite a rush by the parties to take advantage of the different and conflicting rules of the two jurisdictions. The choice of arbitration seat must be the choice of forum for remedies seeking to attack the award.

Appointment of arbitrators and lot drawing

In relation to enforcement of parties' agreement to the arbitrator appointment process the judgment of Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd-5 concerned our client, Montpelier Re (a Bermudian (re)insurer), which was reinsured under two reinsurance contracts by Manufacturers Property & Casualty Ltd (MPCL). Those contracts contained identical arbitration clauses providing for resolution of disputes by a three-man Tribunal, subject to Bermudian procedural law. The arbitration clause went on to set out the procedure for selection of the third arbitrator:

> The two arbitrators, chosen as above provided, shall within thirty (30) calendar days after the appointment of the second arbitrator choose a third arbitrator. In the event of the failure of the first two arbitrators to agree on a third arbitrator within thirty (30) calendar days thereafter, the arbitrators may, upon mutual agreement, implement the ARIAS-US Umpire Appointment Procedure to select the third arbitrator. Alternatively, each arbitrator will nominate three candidates and notify the other arbitrator of those nominations. The arbitrator receiving such notice will reject two of the candidates so nominated. The third arbitrator will then be chosen from the remaining two candidates by a lot drawing procedure acceptable to the two arbitrators, and the chosen candidate will be appointed.

This wording became controversial when Montpelier's appointed arbitrator, Bryan Kellett (an English former Lloyd's underwriter), was unable to agree a third arbitrator with MPCL's appointed arbitrator, Charles Foss (an American in-house lawyer). Mr Foss had proposed a number of candidates for the role of third arbitrator, all of whom were American and inexperienced in Bermuda arbitrations. Mr Kellett objected and refused to enter into the lot drawing process. Montpelier applied to the Bermuda court to appoint the third arbitrator and resolve the impasse. The question arose as to what jurisdiction the court possessed to make such an appointment. Montpelier argued that the Model Law provided that the court could only order the appointment of a third arbitrator. It could not order the arbitrators to draw lots. Article 5 of the Model Law states: In matters governed by this Law, no Court shall intervene except where so provided by this Law.

With specific reference to the appointment process, article 11(4) of the Model Law states:

> Where, under an appointment procedure agreed upon by the parties,

> (a) a party fails to act as required under such procedure, or
>
> (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure […] any party may request the Court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Article 11(5) then provides that there shall be no appeal from a decision made under article 11(4) above.

Kawaley J held that article 11(4)(b) should be interpreted broadly and that the clear purpose of the provision was to empower the court to appoint an arbitrator where either the parties or two party-appointed arbitrators were unable to effect the relevant appointment in accordance with the agreed procedure. The nature of the inability to reach an agreement was either irrelevant or subsidiary to the dominant practical concern that the appointment mechanism provided for by the contract had clearly broken down. The judge therefore appointed Michael Collins QC, an English lawyer experienced in Bermuda arbitrations.

The effect in Bermuda of the European Court of Justice's ruling in The Front Comor[5]

Although the Privy Council is Bermuda's highest court of appeal, English judgments are of persuasive, but not binding, authority in Bermuda. European law has no binding effect in Bermuda, which is not a member of the EU. However, as discussed below, the ECJ's February 2009 decision in The Front Comor has had a beneficial effect on the facility of Bermuda arbitration.

In that case the charterers of a ship, The Front Comor, crashed into a jetty in Sicily. After paying the owners of the jetty (who were also the charterers) the insurers of the jetty commenced subrogated proceedings against the shipowners in Italy. The shipowners argued that the proceedings were in breach of an arbitration clause in the charterparty by which all disputes would be referred to arbitration in London, subject to English law. The insurers argued that they were not bound by the arbitration agreement or English law. The House of Lords posed the following question to the European Court of Justice: Is it consistent with Regulation No. 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?

The ECJ answered 'no', reasoning that the Italian proceedings were commenced to determine a preliminary issue on the validity of the arbitration agreement on the insurers. It was for the Italian courts to determine their own jurisdiction to hear the issue. In effect the ECJ found that it was incompatible with Regulation No. 44/2001 for a court of any other country within the EU to decide that the court seised should be restrained from determining its own jurisdiction. The decision therefore rendered useless anti-suit injunctions in England against parties in other EU member states. Indeed, Gloster J later found in National Navigation Co v Endesa Generacion SA (The Wadi Sudr)[6] that she had no jurisdiction to grant anti-suit relief in respect of proceedings already initiated in the courts of another EU member state.

Since the ECJ's decision in The Front Comor was handed down earlier this year, more and more parties have sought a more reliable arbitral seat to protect their bargain and ensure that arbitration clauses are observed and enforced. Bermuda has been a principal beneficiary

of that flight to other arbitration systems. Parties consider arbitration clauses to be of fundamental importance and will often not conclude contracts without arbitration clauses, especially if the alternative is US litigation. How much longer Bermuda will benefit remains to be seen. The Ministry of Justice has proposed amendments to Regulation No. 44/2001, which would effectively reverse The Front Comor decision. For the time being Bermuda is enjoying the benefits of the EU's inefficiencies in this vitally important area.

Endnotes

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Summary

The Development of Arbitration in the Brazilian Courts (2006 - 2009)

Arbitration has grown significantly and very quickly in Brazil. The milestones of this development were: the enactment of the Arbitration Law, in 1996;1 the recognition of the constitutionality of such law by the Federal Supreme Court, in 2001;2 and the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in 2002.3

As a result, there has been an increase in the number of international and domestic arbitrations conducted in Brazil, especially in the past four years.

An analysis of the statistics of the International Court of Arbitration of the International Chamber of Commerce (ICC), for example, shows that, between 1950 and 1991, Brazilian parties were involved in only 44 cases. In the past 10 years, however, this number has risen exponentially and Brazilian companies have been parties in approximately 300 ICC cases.4 Moreover, since 2006, Brazilian companies have been one of the leading users of the ICC in Latin America, achieving the position of the fourth most active country that year, behind only the United States, Germany and France.5 Brazilian cities, especially São Paulo, have also been increasingly chosen as the place of arbitration, leading the ICC Latin American ranking in 2006 and 2007. At the same time, the number of Brazilian arbitrators confirmed and appointed in ICC arbitrations has seen a large increase, appearing among the 10 most frequent nationalities in 2006 and 2007.6 Following this trend, the number of arbitration proceedings administered by Brazilian arbitration institutions has doubled over the past two years.

Brazilian courts have also been playing a very important role in the development and consolidation of arbitration. Their attitude towards arbitration has moved from scepticism, up to the end of the 20th century, to enthusiasm. Arbitration agreements have been duly respected and parties that still insist on resort to the courts instead of arbitration generally have their lawsuits dismissed, with few exceptions outside the states of São Paulo and Rio de Janeiro.

There is no doubt that arbitration needs the support of the national courts to achieve the best result. Arbitration nowadays is increasingly resembling litigation, and it is not always possible to rely only on the voluntary compliance and the cooperative spirit of the parties. Therefore, a harmonious and collaborative attitude from the courts is fundamental to the effectiveness of arbitration proceedings and awards.

Through the analysis of some recent court decisions, this article provides an overview on the development of arbitration, confirming that Brazil is definitely an attractive and suitable venue for arbitration.

Provisional and interim measures granted by courts and its relationship with arbitration

There is no controversy about the powers of judges to grant provisional or conservatory measures prior to the institution of an arbitration.7 Brazilian precedents are consolidated in the sense that, before constitution of the arbitral tribunal, the filing of an injunctive relief before the court will not be considered as a breach of the arbitration agreement.8 The main purpose of such provisional measures is to protect the rights of the party until the effective commencement of the arbitration proceedings.9

According to the Brazilian Civil Procedure Code, after a preparatory injunctive relief is granted by the court, the plaintiff must file the main lawsuit within 30 days.10 For disputes subject to

arbitration, such requirement will be fulfilled with the institution of the arbitration. Therefore, the plaintiff must indicate such intention in its request for the injunctive relief and if it does not commence the arbitration within the aforementioned term, such provisional measure shall be reversed and the lawsuit dismissed.

In Paulista Simon LLC et al v Jorj Petru Kalman et al,11 the Court of Appeal of the State of São Paulo ruled in this sense, at the beginning of 2009. The parties were partners in a limited liability company, and Jorj Petru Kalman et al had initially obtained a provisional order to avoid the sale of real estate belonging to the company. After such measure, despite the existence of an arbitration clause in the shareholders' agreement, the plaintiffs filed a lawsuit before the court, requesting the dissolution of the company. The dispute was submitted to the Court of Appeal of the State of São Paulo, due to an interlocutory appeal filed by the defendants, claiming the dismissal of the injunctive relief due to the violation of the arbitration clause.

The reporting justice of the case, whose detailed opinion was followed by the majority of the members of the panel, confirmed the possibility of filing lawsuits, including those of a provisional nature, before the court, even when arbitration had been chosen by the parties as the means for dispute resolution. He noted, however, that such lawsuits should have the primary purpose of instituting and preserving the arbitration, giving effectiveness to the questions to be decided by the arbitral tribunal. Consequently, the Court of Appeal dismissed both the injunctive relief and the main claims for dissolution of the company.

Accordingly, Brazilian courts have been demonstrating awareness that the merits of the dispute can only be decided through arbitration and that their jurisdiction is restricted to a preparatory and temporary phase.

A question that still does not have a uniform answer in our courts is what to do with the interim or provisional measures granted by the courts after the arbitration has initiated. Should judicial proceedings be immediately dismissed, or should judges maintain the order they have previously issued until arbitrators rule otherwise? Going further, can arbitrators modify or set aside such court orders, issued previously to the commencement of the arbitration?

As soon as the judge is informed that the arbitral proceeding has begun, he or she should forward the records of the preparatory injunctive relief to the new competent court: the arbitral tribunal. This does not mean, however, that the interim measure should be dismissed without trial on the merits, but only to be transferred from court jurisdiction to arbitral jurisdiction. From this moment on, the arbitrator has jurisdiction over such measure.

The understanding that a provisional measure granted by a court could only be modified by the judiciary itself has been progressively abandoned. Indeed, the arbitrator is not bound by the decision of any court, having its own jurisdiction that is not subject to any hierarchy. Therefore, given that arbitrators have jurisdiction over the merits of the dispute, it follows that they have the authority to review a provisional measure previously granted by a court as well, maintaining or reversing it.12

Due to the recent increase in arbitration in Brazil, the intervention of courts for preliminary injunctive relief and provisional measures has increased and there are several examples showing that judicial authorities are aware of the limits of their powers and those conferred upon arbitrators by parties through arbitration clause. In this sense, a number of court decisions have already recognised that, after the arbitration has commenced, arbitrators

assume the entire jurisdiction over the matter, including any provisional measures previously granted.

In Mineração Gypsum Brasil Ltda v Focco Engenharia Meio Ambiente Ltda et al,13 the Court of Appeal of the State of Minas Gerais affirmed that:

The arbitral tribunal in charge of examining the merits of the dispute has full jurisdiction to rule over the convenience of the interim or provisional measure, letting only its enforcement to the state court, through its powers of coertio and executio, in case the party resists to abide by the measure voluntarily. Nevertheless, an exception providing jurisdiction to the state court is found when an interim or provisional measure is needed before commencement of the arbitration, what takes place upon the arbitrator's acceptance of his or her appointment. In these cases, it is admitted that the request for interim or provisional measures be made directly to the competent state court, subject to confirmation by the arbitrators once the arbitration procedure has initiated, the records of such judicial claim being sent to the arbitrators, in order to preserve the private jurisdiction over the dispute.

However, when the state court does not respect the limits of its power over a dispute subject to arbitration, a conflict of jurisdiction may arise. In this case, assistance of the higher courts might be needed to resolve such conflict. The Brazilian Superior Court of Justice14 has recently admitted that a procedural measure known as conflito de competência can be used not only for conflicts of jurisdiction between different state courts, but also to decide conflicts of jurisdiction between judges and arbitrators, when both are considered to have jurisdiction over a dispute.15 Unfortunately, the case at hand did not reach a final decision, due to a settlement between the parties and the withdrawal of that claim, but that was the first time the Superior Court of Justice rendered a preliminary decision on a conflict of jurisdiction between a state court and an arbitral tribunal.

Validity and efficacy of arbitral awards

The Brazilian Arbitration Law provides that any arbitral award rendered within the Brazilian territory is considered a domestic award.16 In this sense, the grounds provided by the law for setting aside a domestic arbitral award are very limited, and it will be admitted only under the following circumstances:

- if the arbitral agreement is void;
- if the arbitrator did not have jurisdiction over the dispute;
- if the award did not contain all the formal requirements provided in section 26 of the 1996 Arbitration Act;
- if the award exceeded the limits established by the arbitration clause;
- if the award did not rule on all claims submitted by the parties;
- if the award was rendered under unfaithfulness, extortion or corruption;
- if the award was rendered after the time limit established by the parties;17 or
- if the adversarial system, impartiality and independence of the arbitrator were not respected during the proceedings.18

In general, Brazilian courts have respected such limits, dismissing any argument that could implicate a new analysis of the merits of the dispute.

Recent research coordinated by the Brazilian Arbitration Committee and the Law School of the Fundação Getúlio Vargas, published in August 2009, reached such conclusion, showing that arbitration has been developing as a consistently useful method of private dispute resolution and that arbitration has counted on broad acceptance and cooperation from Brazilian courts.19

Such research found almost 800 court decisions related to arbitration in the databases of the Federal Supreme Court, Superior Court of Justice, and courts of appeals of all Brazilian states, since the enactment of the law, in 1996, up to February 2008.20 The statistics demonstrate that only 15 per cent of these court decisions refer to the setting aside of arbitral awards. When analysing in depth such decisions, the researchers concluded that the Brazilian courts have been interpreting the Arbitration Law properly, and only arbitral awards that met one of those grounds of nullity provided in the law were set aside.

A positive Brazilian precedent is Racional Engenharia Ltda v Rio do Brasil Projetos Ltda et al,-21 in which Racional, after losing the arbitration, tried to set aside the arbitral award, alleging violation of the due process of law under the argument of obstruction of its right to produce evidence. After having the annulment action dismissed by the lower court, Racional filed an appeal, requesting also the adjournment of the effectiveness of the arbitral award. As such request was rejected by the lower court, the plaintiff appealed to the Court of Appeal of the State of São Paulo. The Court of Appeal refused to stay the effects of the arbitral award and also mentioned that the court shall only analyse formal aspects related to the arbitral proceedings.

Two decisions from the Court of Appeal of the State of Minas Gerais also demonstrate that courts are adopting a narrow and strict interpretation of the grounds for setting aside arbitral awards. In Nutrimus Comercial Ltda v Semper S A Serviço Médico Permanente,22 the court held that a dissenting opinion does not constitute a ground for setting aside an arbitral award and that the state courts are not allowed to re-examine the evidences produced in the arbitral proceedings. In Formalar Engenharia e Incorporações Ltda v Construtora Brilhante Ltda. et al,23 the losing party tried to set aside an arbitral award alleging violation of the adversarial system, as the arbitral tribunal did not allow it to produce a certain evidence during the arbitration. In his opinion, the reporting justice asserted that the grounds for setting aside an arbitral award are limited and that the mere dissatisfaction of the party with the result of the arbitration does not allow it to resort to the state court.

Arbitration with state companies

In the past four years, the validity of arbitration clauses in administrative contracts has been also definitely consolidated in the legislative, jurisprudential and academic environments, and recognised by the Brazilian state itself.

The landmark case AES Uruguaiana v Companhia Estadual de Energia Elétrica - CEEE,24 in which the Brazilian Superior Court of Justice first ruled in favour of the submission of state companies to arbitration,25 has been in the spotlight until recently, when the case was completely closed due to a settlement between the parties.26 In 2008, other similar decisions followed this ruling (eg TMC Terminal Multimodal de Coroa Grande v Federal Government27 and Petróleo Brasileiro S A Petrobrás v Tractebel Energia SA28), upholding the Superior Court's position on the topic.29

Added to that, several legislative changes have occurred in recent years, expressly authorising arbitration as the dispute resolution mechanism in concession contracts30

and public-private partnerships (PPPs).31 The Brazilian Attorney General José Antonio Dias Toffoli32 has strongly defended arbitration as a valid method of dispute resolution for the public sector, and it is known that federal regulatory agencies (such as the National Agency of Petroleum, Natural Gas and Biofuels) and the state of São Paulo itself have already been subject to arbitration proceedings under the aegis of domestic and international institutions.

The final confirmation of the favourable position towards arbitration in the public sector came by the end of 2007 and beginning of 2008, with two bids for concessions to operate some of Brazil's largest power plants, to be built in the Amazon region.

The US$5.6 billion Santo Antonio power plant, in which we acted as consulting counsel for the construction company, and the US$4 billion power plant of Jirau are part of the Madeira River Complex and are the largest ever built by the private sector in Brazil. Together they will have a generating capacity of 6,450MW, able to provide electricity to approximately 20 million homes.

This was the first time Brazil's electricity regulator, Agência Nacional de Energia Elétrica (ANEEL), itself agreed to submit to arbitration the disputes related to concessions granted by it. The arbitration clauses included in both concession contracts apply to disputes related to compensation for the termination of said contracts. The arbitration proceedings shall be conducted in Portuguese, in accordance with the ICC Rules of Arbitration, by three arbitrators. The seat of arbitration shall be Brasília and Brazilian substantive laws shall apply to the merits of any dispute. The concession contracts also allow the parties to submit to arbitration any other disputes related to economic rights, by means of a submission agreement to be executed by the parties.

In addition, one of the greatest innovations of the engineering, procurement, and construction (EPC) agreement for Santo Antonio was the provision of two alternative dispute resolution methods: dispute adjudication board and arbitration, both pursuant to the ICC rules.

The bidding for an even larger project is expected next year. The Belo Monte power plant will be built on the Xingu River, also in the Brazilian Amazon region, with a generating capacity of 11,182MW, almost twice the generating capacity of the entire Madeira River Complex. Although the content of the contracts that will be executed for this new project still remains unknown, it is very likely that the model used in the Madeira River Complex will be adopted, including the election of arbitration.

Arbitration and bankrupt companies

Finally, in recent years, Brazilian courts have started to deal with a complex issue that still remains controversial in many countries: the arbitrability of disputes involving bankrupt or insolvent companies.

In Interclínicas Planos de Saúde S A v Saúde ABC Serviços Médicos Hospitalares Ltda,33 the Superior Court of Justice, for the first time, confirmed the arbitrability of disputes involving companies under liquidation (in this case Interclínicas), whenever the arbitration agreement was executed before the liquidation and the signatories had full capacity to contract and to be sued, as required by article 1 of the Brazilian Arbitration Law. In her opinion, the reporting Justice, Nancy Andrighi, also provided a detailed and enlightening interpretation of the kompetenz-kompetenz principle, asserting that arbitrators are the ones with primary jurisdiction to decide upon their own jurisdiction and the validity of the arbitration agreement, being reserved to the judicial courts a post-arbitration control of the legality of this decision.

The arbitral award was eventually rendered in August 2008, in favour of Saúde ABC.-34 The losing party, Interclínicas, unsuccessfully tried to set aside the arbitral award, but the reasoning of the Superior Court of Justice was fully respected and such lawsuit was dismissed in December 2008.35

Following this trend, the Court of Appeal of the State of São Paulo, in Jackson Empreendimentos Ltda v Diagrama Construtora Ltda,36 affirmed that there are no statutory provisions forbidding the sub-mission of disputes involving bankrupt companies to arbitration, if the arbitration agreement was executed before the declaration of bankruptcy when the company had full capacity to enter into such agreement.

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As one can see, arbitration continues to gain force and popularity in Brazil and the courts have been playing a very positive role in this development. It is undeniable that incorrect interpretation of the law and the principles that govern arbitration could be found in case law. Even in the most developed nations in this field there are always exceptions from time to time, which serve to fuel the debate over some topics. Nevertheless, Brazil is going in the right direction and the courts' commitment to this mechanism of dispute resolution shows that the future of arbitration in Brazil is bright and prosperous, consolidating its leading position in Latin America and among other developing countries.

Endnotes

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Summary

ENDNOTES

Recent Developments in Cayman Arbitration Law

Cayman arbitration law is in the process of undergoing something of a renaissance. The number of arbitrations taking place in the Cayman Islands has increased over the past few years, particularly in the property and business interruption insurance field as a direct consequence of the impact of major storms such as Hurricane Ivan in September 2004 and Hurricane Paloma in 2008. This trend is continuing as fallout from the worldwide financial crisis and recession has given rise to disputes concerning Cayman domiciled funds and other structured investment vehicles, or where parties have otherwise provided for dispute resolution in 'neutral' jurisdictions like the Cayman Islands. At the same time, Cayman arbitration law is currently the subject of a review aimed at reforming the law and implementing the terms of the UNCITRAL Model Law on International Commercial Arbitration.

Sources of domestic Cayman arbitration law

By way of a brief introduction, the primary sources of Cayman arbitration law are statutory:

- the Arbitration Law (2001 Revision) governs domestic and international arbitration proceedings and the enforcement of local arbitration awards; and
- the Cayman Islands is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Foreign Arbitral Awards Enforcement Law (1997 Revision) gives effect to the provisions of the New York Convention, and governs the recognition of foreign arbitral proceedings and the enforcement of foreign arbitral awards.

Foreign arbitral awards to which the New York Convention is not applicable may also be enforced in the Cayman Islands pursuant to applicable conflict of laws principles as applied by the Grand Court.

Arbitration case law is developed through judicial decisions of the Grand Court of the Cayman Islands, and through appeals therefrom to the Cayman Islands Court of Appeal and thereafter to the Privy Council in London. The Arbitration Law is based on the English Arbitration Act 1950, and as a consequence the Cayman courts will apply common law principles established through relevant English case law in interpreting its provisions.

The Cayman courts have a supervisory jurisdiction over Cayman arbitrations aimed at ensuring both quality and fairness. The courts also exercise a supportive function, including the ability to provide interim relief in support of the arbitral process, particularly in cases of urgency. In general, however, the courts will seek to exercise this jurisdiction sparingly so as to avoid encroaching unnecessarily upon the powers invoked on the arbitrators by the parties to the relevant dispute.

Recent developments

A major factor in the increasing number of arbitrations that have taken place in the Cayman Islands over the last couple of years have been storms such as Hurricane Ivan, which passed close to Grand Cayman on 11 and 12 September 2004, and Hurricane Paloma, which caused extensive damage on Cayman Brac and Little Cayman in particular as it passed on 8 November 2008.

In particular, Hurricane Ivan caused widespread damage to property and infrastructure and resulted in widespread business interruption, particularly on Grand Cayman, the largest of

the three islands that comprise the Cayman Islands and the location of the vast majority of its population. Approximately 83 per cent of the total housing stock on Grand Cayman was estimated to have suffered some degree of damage during the storm at a cost in the region of CI$1.44 billion.1 Major damage was also sustained to infrastructure and commercial premises such as hotels and resorts which formed a key part of Cayman's tourism industry. In total, the economic impact of the storm on the Cayman Islands was estimated to be US$3.43 billion.2

The insured loss associated with Hurricane Ivan was estimated to be in the region of US$1.5 billion.3 In the weeks and months that followed the storm, numerous insurance claims were made under property and business interruption policies issued by local and overseas insurers. Although the vast majority of these claims were settled without recourse to legal proceedings, inevitably a small proportion of these claims were disputed and resulted in litigation or arbitration proceedings. A large proportion of the Cayman arbitrations that have taken place between 2005 and 2008 have been linked in some way to damage sustained during Hurricane Ivan. This said, very few of these arbitrations have resulted in the production of ancillary judgments of the Grand Court, the Cayman Islands Court of Appeal or the Privy Council on matters associated with the proceedings, a factor that suggests that these arbitrations were concluded to the parties' satisfaction.

Case study: a Hurricane Ivan arbitration

A good example of an arbitration connected with a Hurricane Ivan insurance claim is the proceedings brought by the operator of a major timeshare resort on Grand Cayman against the underwriters of its material property damage and business interruption insurance.4 The resort property sustained major damage during the storm and the owner made a claim under its policy, which was governed by Cayman law and contained an arbitration clause in respect of any disputes that may arise. The resort operator and its underwriters were unable to agree on the quantification of the damage sustained and therefore the extent of the operator's claim under the policy, and as a consequence arbitration proceedings were brought against underwriters. The proceedings were commenced in early 2006 and were determined at an arbitration hearing that took place in Grand Cayman in December 2007.

Although the details of the arbitration proceedings and the award subsequently issued by the arbitrators are confidential to the parties, we are able to comment in general terms on the following procedural aspects of the proceedings.

This was an ad hoc arbitration conducted under rules of the parties' own devising. Until very recently, there were no arbitral institutions established to provide services in connection with arbitrations in the Cayman Islands. However, there is now a Cayman Islands chapter of the North American branch of the Chartered Institute of Arbitrators, which is available to assist parties in the conduct of their arbitrations in the Cayman Islands.5 Arbitrations are conducted in Cayman using the rules of various international institutions (such as the American Arbitration Association, the International Chamber of Commerce and the London Court of International Arbitration, as well as the Chartered Institute of Arbitrators). However, more often ad hoc arbitrations are conducted here pursuant to rules of the parties' own devising, usually with very successful results. Underlying Cayman arbitration law is a strong presumption in favour of allowing the parties to resolve their disputes in accordance with a private system of rules agreed between them rather than one imposed externally. In this case, the parties were able to agree a tailored set of rules and procedures as were necessary to manage the particular type of dispute and the issues arising therein.

Given the subject matter of the dispute concerning the quantification of hurricane damage sustained to property, the parties nominated arbitrators in different disciplines appropriate to the determination of a specialist dispute of this nature. The arbitrators were located in Grand Cayman and in London. The parties' experts were also located in Grand Cayman and in a number of overseas jurisdictions, and the parties used specialist Queen's Counsel from the UK at the final arbitration hearing. This geographical diversity presented some logistical challenges, although these were overcome by using video links for all hearings with the exception of the final arbitration hearing and a meeting of the parties' experts. This allowed both of the arbitrators (and in the lead up to trial the parties' Queen's Counsel and the UK-based umpire) to participate in the proceedings without the need for the persons located overseas to travel to Cayman on a regular basis during the interlocutory stage of the arbitration, As a consequence, the parties were able to limit the costs associated with the proceedings while selecting arbitrators and experts with appropriate experience and expertise for a dispute of this scale and nature.

The Cayman Islands does not have any specialist facilities available for the conduct of arbitration proceedings, although again this does not pose any impediment to the efficient and effective conduct of arbitrations in Cayman. The parties in this arbitration were able to utilise the facilities available at the offices of the parties' local counsel and the Cayman-based arbitrator in conducting the interlocutory hearings using video link facilities as stated above. The arbitration hearing took place at the Ritz Carlton Grand Cayman, one of several hotels able to provide excellent facilities for the conduct of an arbitration hearing of this nature. The opening of the Ritz Carlton in December 2005 has led to increase in both the range and quality of facilities available on Grand Cayman for arbitration hearings.

Overall, these arbitration proceedings illustrate the ease with which specialist disputes are being successfully arbitrated in the Cayman Islands using legal and other resources located in both Grand Cayman and overseas. More generally, the case also provides an excellent example of the advantages that the arbitration process has to offer in comparison with court-based litigation, particularly for more specialist types of dispute of this nature. The parties in this case were able to tailor both the tribunal and the conduct of the proceedings to reflect the particular issues arising in the dispute in a manner that would not have been possible if the claim was conducted through the courts. The parties were also able to conclude the dispute within two years of the issue of the proceedings, notwithstanding that a number of interlocutory hearings were required due to the complexity of the claim. Accordingly, the arbitration process allowed for a reasonably swift conclusion to the dispute.
K Coast Development Limited v Proprietors of Strata Plan #55

One recently reported decision of the Grand Court in the field of arbitration law is the case K Coast Development Limited v Proprietors of Strata Plan #55 [2007] CILR N. 17, which illustrates the influence of English case law on Cayman jurisprudence. The case concerned a dispute over the payment of fees by the defendant to the plaintiff for work undertaken in restoration of the defendant's property following Hurricane Ivan.

The plaintiff had retained subcontractors to undertake restoration work on the defendant's property, which had been certified under the construction contract by an independent quantity surveyor. On receipt of the certification, the defendant paid to the plaintiff the contractually agreed sum by cheque in respect of the work undertaken. In reliance on the deposit of the cheque into its bank account, the plaintiff paid this sum to the subcontractors. However, the quantity surveyor then purportedly changed his mind about the work certified

and as a consequence the defendant stopped the cheque. The plaintiff sued the defendant on the cheque and sought summary judgment in respect of its claim.

The defendant asserted that there had been a total failure of consideration for the payment given the change in the quantity surveyor's mind about the work, and sought a stay of the proceedings and an order that the plaintiff's claim be referred to arbitration pursuant to the terms of the construction contract. However, the Grand Court held that the claim could not be submitted to arbitration given that the defendant's claim was in effect a claim for unliquidated damages based on an alleged overpayment, which could not be raised as a defence, set-off or counterclaim to the plaintiff's action on the cheque. There was, therefore, no 'dispute' between the parties that could be referred to arbitration.

In so finding, the Grand Court applied the decision of the English House of Lords in Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 2 All ER 464, and approved the following quote taken from the headnote:

> Even if the claim on the [cheque] were liable to be submitted to arbitration, there was not any dispute between the parties with regard to the claim within [section 6 of the Arbitration Law], since a claim for unliquidated damages [ie the claim for total failure of consideration based on an overpayment pending quantification through an arbitral award] could not be raised by way of defence, set-off or counterclaim to an action on a [cheque] and therefore could not be used to create a 'dispute' on the [cheque] within the meaning of [section 6]. It followed that no admissible defence to the appellants' claim on the [cheque] had been put forward by the respondents.'

The Grand Court therefore followed the stated principle of English law established in the context of the English Arbitration Act 1975, and refused to grant a stay of the proceedings pending arbitration in these circumstances. However, the Grand Court left it open for the defendant to pursue separate arbitration proceedings based on the allegation that the work for which payment had been given had not been done and had been erroneously certified.

The case is a good example of the wide variety of disputes that have arisen from damage sustained to property during Hurricane Ivan. It also illustrates the manner in which the Cayman courts will follow and apply relevant common law principles established by the English courts in the arbitration field, in this case in respect of the circumstances in which the court will stay proceedings brought before it in favour of arbitration.

Unilever Plc v ABC International; Molson Coors Brewing Company v ABC International

Unilever Plc v ABC International [2008] CILR 87 provides an illustration of the extent of the Cayman court's jurisdiction to supervise parties, and grant relief, in connection with an improper threat to commence arbitration proceedings. The decision also provides a further example of the fact that the Cayman courts will follow the English common law principles on this topic.

In Unilever, the defendant had made several attempts to initiate arbitration proceedings against the plaintiffs in relation to various disputes that had arisen concerning the performance of obligations under a contract which contained an arbitration clause. The plaintiffs then commenced proceedings seeking declaratory relief to the effect that they were not bound by the agreement and were not bound to engage in arbitration in respect of

the disputes, and injunctive relief restraining the defendant from further attempts to compel them to arbitrate.

Granting the relief sought by the plaintiffs, the Cayman court held that the contract (and the arbitration agreement relied upon by the defendant) had been terminated previously, such that there was no basis for alleging any contractual relationship between the parties. Accordingly, the court granted an injunction restraining the defendant from attempting to force arbitration upon the plaintiffs.

The Cayman court held that it had jurisdiction to grant the relief sought notwithstanding the defendant's contention that the court had no jurisdiction to adjudicate in the dispute between the parties. The court noted that having acknowledged service of the proceedings, the defendant had not applied to strike out or stay the proceedings as it would have had standing to do under section 4 of the Foreign Arbitral Awards Enforcement Law. Accordingly, and following the decision of the English Court of Appeal in Liberia (Republic) v Gulf Oceanic Inc [1985] 1 Lloyd's Rep 544 (which was approved by the House of Lords in Metal Scrap Trade Corp Ltd v Kate Shipping Co Ltd (The 'Gladys') [1990] 1 WLR 115), the court held that it had a general jurisdiction to grant declaratory relief in such circumstances.

The court also held that it had an inherent jurisdiction to grant an injunction restraining a defendant amenable to the jurisdiction from proceeding to arbitration where appropriate and necessary to avoid injustice, including where (as here) an action had been brought by a party contending that it was not bound by a supposed arbitration agreement. The court followed and approved the English decision in Kitts v Moor & Co [1985] 1 QB 253 in this regard.

Finally, the court held that in the circumstances there was no reason why it could not grant declaratory and injunctive relief of this nature on an application for summary judgment, following the English decisions in Leco Instruments (UK) Ltd v Lan Pyrometers Ltd [1982] RPC 133 and Shell-Mex & BP Ltd v Manchester Garages Ltd [1971] 1 WLR 612.

The case is a good example of the Cayman court exercising its supervisory jurisdiction by granting relief to a plaintiff at an early stage of proceedings in circumstances where it considered the conduct of a defendant in attempting to compel the plaintiff to submit to arbitration to be vexatious and oppressive.

Reform of Cayman arbitration law

Arbitration law in the Cayman Islands is currently the subject of a collaborative effort by private and public sectors to reform the law. The main purpose of the proposed reform is to stimulate Cayman's growth as an international arbitration centre. Although increasing numbers of domestic Cayman arbitrations have taken place over recent years as discussed above, the Cayman Islands have historically been infrequently used as a seat for international arbitrations. As stated, the Cayman Arbitration Law is based on the English Arbitration Act 1950, which in England has since been replaced with the Arbitration Act 1996. The implementation of new legislation in the near future will serve to correct any perception that Cayman arbitration law is outdated and in need of modernisation and bring Cayman arbitration law into the modern era.

In particular, it is proposed to introduce into Cayman law the principles enshrined in the UNCITRAL Model Law on International Commercial Arbitration.6 The UNCITRAL Model Law sets out desired international standards aimed at achieving the harmonisation and improvement of domestic law as it pertains to international commercial arbitration practice, and covers all aspects of the arbitral process from the arbitration agreement to the

recognition and enforcement of the arbitral award. Given the nature of the jurisdiction, much of the business conducted in the Cayman Islands originates onshore and is of an international nature: companies and funds are formed in Cayman with the primary object of conducting their business overseas. Accordingly, the implementation of the harmonised rules and principles for the conduct of international commercial arbitration as set out in the UNCITRAL Model Law will have direct relevance and applicability to much of the business transacted through the Cayman Islands when disputes arise.

A committee appointed by the Law Society of the Cayman Islands[7] produced recommendations and draft new legislation modelled on the UNCITRAL Model Law for the consideration of the Cayman Islands' government. The proposed reforms will closely follow the provisions of the Model Law save that some changes may reflect the experiences of other offshore jurisdictions, such as Bermuda, Singapore and Hong Kong, which have adopted the Model Law. In addition, revisions have been proposed to reflect the nature of the offshore financial business conducted in Cayman, and in particular the types of business where participants may require access to sophisticated dispute resolution mechanisms. For example, in recognition of the multitude of parties often involved in hedge fund disputes, specific provisions have been proposed that deal with multi-party arbitrations and related issues concerning the consolidation of arbitral proceedings. Another proposal addresses the fact that Cayman is a major centre for offshore banking: to the extent that ancillary asset-preservation relief may be required in support of arbitration proceedings, the proposed reforms seek to augment the asset-preservation powers of arbitral tribunals.

The Law Reform Commission has now produced a draft Bill, which is currently undergoing a further round of review. It is expected that the proposed reforms will be implemented in early 2010.

Arbitration and the Cayman funds industry

The timing of the reforms is certainly apposite given the growing number of disputes concerning Cayman registered funds and other structured investment vehicles. Cayman currently boasts over 10,000 registered funds with a total net asset value in excess of US$1.3 trillion.[8] Cayman has a greater number of domiciled hedge funds than any other offshore jurisdiction.

The recent financial crisis and recessions in a number of countries led to a loss of confidence on the part of investors. Funds struggled to meet consequential redemption requests submitted by investors and at the same time struggled to meet margin calls on their leveraged investments. In addition, deterioration in financial performance led investors and creditors to take a harder look at and harder line with the funds' service providers. Declining financial performance generally has a tendency to give rise to heightened suspicions of malfeasance by investment managers and other service providers, while some managers were making increasingly risky plays to cover below-par returns and short positions.

All of this has led to an increasing number of disputes concerning Cayman domiciled funds, including claims brought by disgruntled investors, creditors and also liquidators in cases where a fund has had a winding-up order made against it. Claims of this nature have been brought in the courts of various jurisdictions, including in particular Cayman, New York and Delaware. However, given the specialised nature of disputes concerning funds, many of these claims are likely to be amenable to resolution through arbitration rather than court-based litigation. For example:

- The flexibility offered by the arbitration process allows the parties to tailor any arbitration, including the tribunal and the procedure to be followed, to the particular matters in dispute. This makes arbitration particularly useful and well-suited to the complex and technical commercial disputes that can arise in connection with hedge funds, for example disputes concerning the valuation of a fund's assets: the parties to such a dispute would be able to nominate specialist arbitrators with expertise in the funds industry. While the judges in the Cayman courts have an increasingly wide range of experience in dealing with fund disputes, the ability to nominate a particular arbitrator with specific expertise in the funds industry is a significant factor that can make arbitration extremely attractive for disputes of this nature in comparison to court-based proceedings.
- Arbitration is usually much quicker than litigation, not least because the arbitrators' decision is final and binding and only subject to appeal on limited grounds. In addition, arbitration proceedings are not subject to the challenges of court schedules that can arise in a small jurisdiction, and parties can avoid the conventional pre-trial timetables usually imposed by the court on litigants. Accordingly, arbitration usually results in the final determination of disputes in a much shorter time frame than court-based litigation. As with many commercial disputes, this factor may be of critical importance in the funds arena. With the asset values of many troubled funds declining at alarming rates, and with the distinct possibility that there may be nothing left to argue about by the time parties get to trial as a consequence, the speed of dispute resolution afforded by the arbitration process is likely to be particularly advantageous in fund disputes. This factor can also result in considerable costs savings in determining such claims.
- Arbitration is private and results in the production of an award which is confidential to the parties. Accordingly, the process does not result in the production of a public judgment and avoids any disclosure of confidential information into the public domain. Again, this can represent a considerable advantage in fund disputes, for example where there are issues concerning the identity of investors, investment strategies adopted, portfolio make-up and other commercial secrets relating to a fund's operations.

It is anticipated that the forthcoming reform of Cayman arbitration law will, once implemented, see the Cayman Islands well placed as a modern and sophisticated jurisdiction in which to conduct international arbitrations, including disputes concerning Cayman-domiciled funds.

Endnotes

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Summary

National and International Arbitration in Ecuador
Development of arbitration in Ecuador

The existence of alternative methods for dispute resolution is not new in Ecuador. Traditionally, they have existed as valid means to resolve controversies, even in judicial proceedings. Nowadays, all civil litigations, according to the law, must submit to a conciliation board seeking an amicable solution to the conflict. In practice, nonetheless, a solution is reached in very few cases in judicial proceedings. This fact brought about the need to include alternative mechanisms for dispute resolution in our legislation.1

The Arbitration and Mediation Law (AML) follows the UNCITRAL Model Law and was enacted on 4 September 1997.2 The AML repealed the former Commercial Arbitration Law that had been in force since 28 October 1963 and other provisions in the body of laws that contradicted it or made its application difficult, such as article 1505 of the Civil Code construed by the Supreme Court of Justice in the sense that submission to international arbitration constituted illicit object.3

More than 10 years after the enforcement of the AML, it is possible to infer that dispute resolution mechanisms - arbitration in particular - provide certainty, independence and impartiality to users. Subsequent statistics show that very few conflicts are submitted to the resolution of arbitration tribunals and that most of them continue being heard by the ordinary courts.

Several amendments to the original text of the Arbitration and Mediation Law were introduced on 25 February 2005, in an effort to lessen concerns and demands generated during the first few years after those provisions were applied.

The most important changes embodied in the 2005 amendment made reference to the following issues:

- it is clear that the mechanism for challenging the validity of an arbitral award is an action, and not a recourse;
- 30 days are allowed for the president of the Provincial Court of Justice to resolve annulment actions filed against arbitral awards; and
- an ordinary judge is obligated to resolve - previously - a plea of existence of an arbitration agreement submitted during the course of an ordinary lawsuit.

One of the major drawbacks in developing and propagating arbitration is lack of experience in drafting and preparing effective arbitration clauses. This gives rise to frequent problems of jurisdiction due to pathological clauses. Likewise, there is a certain degree of ignorance among users and lawyers concerning the differences between the arbitration system and the ordinary justice system.

Statistics show that although there is an increasing trend in the number of cases being heard at the major arbitration centres in Ecuador, it is still far lower than the number of cases arriving at the ordinary courts, which may well amount to 1,500 per courthouse every year on average.4

The arbitration regime in the new 2008 constitution

The new constitution, approved in a referendum on 28 September 2008, was prepared by the National Constituent Assembly (NCA) and contemplates the existence of arbitration and

includes provisions relating to its treatment and regulation. Likewise, it comprises specific rules addressing international arbitration and international treaties.

Recognition of the validity of arbitration and other alternative methods for dispute resolution

First of all, it is important to mention that the new constitution recognises arbitration as a method for dispute resolution, though in a different manner to the recognition set forth in the constitution approved in 19985, as will be explained below:

The new constitution includes the following text with respect to arbitration:

> Section VIII - Alternative methods for dispute resolution
>
> Article 190 - Arbitration, mediation and other alternative methods for dispute resolution are recognised. These proceedings shall be applied in accordance with the law on matters where, by reason of their nature, it is possible to compromise Arbitration at law shall apply on public contracting upon a prior favourable opinion from the Attorney General of the State pursuant to conditions set forth in the law.

The following conclusions are drawn from an analysis of the above provisions:

- The condition that arbitration only applies to matters where it is possible to compromise, a principle already included in the AML that does not affect arbitration per se, has now been raised to a constitutional principle.
- In matters involving contracts with the state, the prior authorisation of the attorney general of the state will be a condition for arbitration to proceed. This condition applies to national and to international arbitration and makes no distinction with respect to state institutions, whether or not with juridical capacity of their own.6 It ought to be understood that such authorisation must be given before the arbitration clause is executed, but not before the arbitration proceeding commences because, if so, the attorney general of the atate would be entitled to veto the very commencement of the arbitration, thus resulting in arbitration being an innocuous proceeding.

Prohibition to enter into future treaties

Additionally, the new constitution includes an express prohibition for Ecuador to enter into international treaties or instruments waiving jurisdiction with a view towards international arbitration involving contractual and commercial issues, according to the following terms:

> Article 422 - It shall not be possible to enter into international treaties or instruments in which the Ecuadorean State waives sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the State and private individuals or corporations.
>
> Excepted from the foregoing are international treaties and instruments providing for dispute resolution between States and citizens of Latin America by regional arbitral venues or by jurisdictional organisations designated by the signatory countries. Judges from the states that as such or as nationals of those states are parties of the dispute cannot participate.

> In the case of disputes relating to the foreign debt, the Ecuadorean State shall promote arbitral solutions in terms of the origin of the debt, subject to principles of transparency, equity and international justice.

The approval of the constitutional text with the above provision weakens international arbitration and, specifically, investor-state arbitration. However, the limitation mentioned in article 422 above does not affect the international treaties currently in force7.

Article 422 seeks to shield the Ecuadorean state from international arbitration and is a sort of re-issue of the Calvo clause, which is confirmed by the minutes of the NCA that read as follows:

> Article 8 [now 422] takes up an aspiration having had much national support as a consequence of the abuses that have impaired Ecuador's juridical sovereignty. That provision expressly states that it will not be possible to enter into international conventions or treaties compelling the Ecuadorean State to waive jurisdiction to international arbitration venues involving contractual or commercial matters. Historically, Ecuador has executed treaties that have been considered detrimental for the country's interests because they transfer jurisdiction and venue in cases of disputes originating from contractual or commercial relations with transnational companies to supranational arbitration venues where, it seems, the states are placed at the same level as a commercial company.8

Article 422 leads us to the following conclusions:

- the execution of treaties allowing arbitration in investment cases has not been prohibited, that is, not for contractual or commercial reasons, and under the standards of international public law on investment;
- the prohibition refers to contractual or commercial matters where the state is the counterparty of private persons;
- Ecuador is allowed to enter into treaties to resolve disputes:
    - between states and individuals (that is, not companies);
    - in Latin America;
    - by regional venues or by regional jurisdictional bodies9; and
    - relating to the foreign debt;
- the international treaties of which Ecuador has been a party before the new constitution became effective, and that comprise arbitration matters, will continue in full effect. That is, the constitutional prohibition is limited to the execution of new treaties; and
- the constitutional provision does not prohibit the state - upon a prior opinion from the attorney general - from executing arbitration clauses in international arbitration.

Another important and positive aspect of how international arbitration is treated in the new constitution is that it eliminates the concept or the prohibition of submitting to an

extraneous jurisdiction - that is, to international arbitration - in contracts executed between the state and juridical persons that had been included in article 14 of the 1998 constitution.-10 This provision has not been included in the new constitution, thus definitively eliminating the concept of extraneous jurisdiction in relation to arbitration, although there are judicial decisions clearly stating that the term 'extraneous jurisdiction' does not include international arbitration.11

Local statistics: arbitration in the principal centres in Ecuador (2007 and 2008)12

Below is the most important information regarding the use of arbitration locally:

	2007	2008
Quito Chamber of Commerce	66	61
Ecuadorean - American Chamber of Commerce	5	4
Quito Construction Chamber	10	7
Azuay Production Chambers	7	1
Manta Chamber of Commerce	15	10
CIAM	1	0

International arbitration as a guarantee for foreign investment

For the purposes of promoting, attracting and protecting foreign investment, Ecuador signed the International Convention on Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) on 3 March 1986, which became fully in effect on 19 April 2001.13 Likewise, Ecuador has executed 28 bilateral investment treaties (BITs) that include ICSID or UNCITRAL14 arbitration clauses. At present, 20 BITs are in effect.15 Ecuador is a party to the World Trade Organization16 and more than once it has applied state-to-state arbitration as set forth in WTO treaties.17

Furthermore, article 32 of the Investment Promotion and Guarantee Law18 reads as follows:

> Article 32 - The State and the foreign investors may submit any disputes arising from the application of this Law to arbitration tribunals constituted by virtue of international treaties of which Ecuador is a party, or to procedures specifically agreed upon or stipulated in bilateral or multilateral agreements signed and ratified by our country.19

The above provision is in keeping with the spirit of opening up to foreign investment that was very much alive in Ecuador during the 1990s and in the first years of the 21st century.

The administration of President Rafael Correa has openly demonstrated its doubts about ICSID impartiality, alleging that the Centre only favours the interests of developed countries and of those countries' companies coming to invest in Ecuador. This scepticism took on a definite form on 4 December 2007, when President Correa sent a letter to ICSID stating

his intention of limiting Ecuador's consent to submit to arbitration on issues pertaining to the utilisation of natural resources such as oil, gas and minerals.[20] In June 2009, President Correa decided to withdraw Ecuador from the ICSID Convention, and requested the National Assembly's approval to denunciate the Convention based on articles 419 and 422 of the new constitution. Furthermore, the request mentions article. 25(1) of the ICSID Convention and the letter to CSID notifying limitations on its jurisdiction.[21] Neither President Correa nor the National Assembly considered the effects of articles 25(1) and 72 of the ICISID Convention. Both provisions recognise that the consent given by one contracting state cannot be unilaterally withdrawn. Furthermore, if the Convention is denunciated, the consent remains in effect. Therefore, the consent given by Ecuador in contracts and BITs remains effective despite the denunciation or any municipal construction of international law and the Constitution of Ecuador.[22]

Presently, as we have learned, Ecuador has 10 pending international arbitration cases pertaining to investment as set out below.

Pending cases against Ecuador:[23]

Plaintiff	Defendant	Date of registration	Rules	Subject matter
Repsol/Murphy Oil/OPIC/CRS	Ecuador	12 Jun 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Burlington	Ecuador and Petroecuador	4 Jun 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Perenco	Ecuador and Petroecuador	2 Jun 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Murphy	Ecuador	15 Apr 2008	ICSID	Law No. 42 setting forth a charge for increased oil price
Occidental	Ecuador	13 Jul 2006	ICSID	Cancellation, petroleum contract
Vatadur	Ecuador	n/a	CIAC	Breach of contract
Ulysseas	Ecuador	n/a	UNCITRAL	Breach and violation of investment guarantees

Globalnet	Ecuador	n/a	UNCITRAL	Breach and violation of investment guarantees
CGC	Ecuador	n/a	n/a	Breach of contract
Chevron	Ecuador	6 Dec 2006	UNCITRAL	Abuse of justice

It should be mentioned that cases such as City Oriente, Noble and MachalaPower and Oxy 124 were the subject of settlement or agreements between the state and the investors and, therefore, were withdrawn or terminated.

Enforcement of international arbitral awards in Ecuador

Aside from the rules of self-contrained arbitration systems (ie, ICSID), we will discuss the principal laws and treaties relating to the enforcement of international awards.

On 19 August 1961, Ecuador ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 1958 New York Convention (NYC).25 At the time of ratification, Ecuador submitted the reservation on reciprocity subject to arbitral awards deriving from litigations that arise from juridical commercial relationships pursuant to the national laws as allowed by article 1.3 of the NYC.26 We still do not have any cases in Ecuador relating to enforcement of awards issued under the NYC.27

The Inter-American Convention on International Commercial Arbitration, or Panama Convention (PC), which entered into force on 30 January 1975, and was ratified in 1978,28 is a second tool for enforcing foreign arbitral awards. The PC was executed by the Organization of American States (OAS) member countries and, therefore, its application is limited to arbitral awards pronounced in one of the OAS member countries that entered into the PC.29 The PC applies to arbitral decisions resulting from disputes of a commercial character.30 It is important to mention that Ecuador ratified the PC 'with a declaration that the entities under Ecuadorean public law cannot submit to a foreign jurisdiction'.31 According to this reservation, it is inferred that the PC can only apply if the arbitrated dispute has had an Ecuadorean individual or corporation under private law as the counterparty.

Article 4 of the PC provides that recognition and enforcement of arbitral awards that meet the requirements and limitations of the Convention must be recognised in the same manner as national or foreign judgments are recognised and enforced.32

In May of 198233 the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, or the 1979 Montevideo Convention34 (MC) came into effect in Ecuador. In addition to the coverage provided by the MC to judgments and awards pertaining to other matters, it also applies to enforcement of foreign arbitral awards relating to commercial issues. An important limitation in the MC, just as in the PC, is that it only applies to judgments and awards issued in OAS member countries. The MC's intention is to cover 'judicial judgments and awards issued in civil, commercial or labour proceedings in one of the member states'.35

As far as local norms are concerned, the AML does not have a specific system for recognition and enforcement of foreign awards but, rather, it gives them the same treatment as the process for enforcing local judicial judgments in a last instance. Article 42 of the AML

states that '[…] awards issued in an international arbitration proceeding shall have the same effects and shall be enforced in the same manner as awards issued in a national arbitration proceeding.' According to article 32 of the AML, that proceeding will be applicable to local judgments passed at last instance, that is, through a judicial order. The AML sets forth the judge's duty to recognise and enforce foreign awards through a judicial order, without the possibility of applying any other procedure.

The judicial order procedure is commenced by the judge who allows a very short period of time for the debtor to pay what is due or otherwise to designate property for attachment and subsequent auction. This proceeding does not admit any opposition from the debtor, while the NYC does.36 For this reason, the AML presents an alternative that could be more expeditious to enforce awards before the lex fori.

Currently, Ecuador is the country - after Argentina - with the most investment arbitrations and it can be predicted that this trend will not vary in the near future. These proceedings are still pending at ICSID and CIAC tribunals, in addition to tribunals created according to UNCITRAL rules. The ease or difficulty in enforcing potential arbitration awards against Ecuador will depend on the rules of these kinds of tribunals.

Although the enforcement of international arbitral awards in Ecuador has not been put to the test, there are contradictory opinions from local authors with respect to their immediate enforcement. Professor Santiago Andrade, on the one hand, believes that international awards do require a judicial revision as a prior requirement before their enforcement,37 while others, like Xavier Andrade, opine as follows:

> In view of the foregoing, we reiterate that foreign arbitral awards are not enforced in the same fashion as foreign judgments. Alleging otherwise would, in our judgment, constitute disavowal and clear breach of the conventions signed and ratified by Ecuador, the constitutional principle of supremacy of international rules, and the clear provisions of the Arbitration and Mediation Law.38

According to the foregoing, it is inferred that there are sufficient bases to argue that the exequatur procedure for enforcement of international arbitral awards is not necessary in Ecuador.

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

ICSID awards are binding and final for the contracting parties. Furthermore, the enforcement process provided for in the ICSID Convention remains effective for those cases and treaties in which Ecuador has given consent prior to the denunciation.39

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

Hence, the enforcement of an ICSID award in Ecuador will be made as if it was a 'final judgment of a court in that state'.40 Needless to say, an ICSID award entails crucial benefits

for the investor: local courts are not empowered to revise the award, since no exequatur is required; consequently, enforcement of ICSID awards may be more expeditious than enforcement of other international awards, since there is no need to go through the revision process.

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

If that is not the case and a domestic court (for public or constitutional reasons) allows a revision, the award may be enforced in any other contracting state of the ICSID Convention, and such enforcement may not be opposed by Argentina. In other words, the fact that there is a domestic procedure aimed at reviewing the award does not preempt any other contracting state or its judiciary to grant the enforcement.41

Therefore, in Ecuador, an international award that is not protected by a specific treaty providing for its own enforcement mechanism (ie, the ICSID Convention) has to be enforced by applying the LAM and thus, by filing the proper petition to the judiciary in an enforcement process,42 in which the merits of the arbitration cannot be discussed or revised unless they contravene public policy and due process, as set forth in the Code of Civi Procedure43 and the New York and Panama Conventions.44 Once the international award has gone through the enforcement process without going through a review on the merits of the case, it is fully enforceable.

Endnotes

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Summary

Challenges to Arbitral Awards in Uruguay

Parties to arbitration, and the majority of the rules they choose to govern arbitration, reduce the appeals that can be brought against awards essentially to appeals for nullity. Uruguayan courts respect this guiding principle, and they apply a restrictive criterion when reviewing cases challenging awards.

Appeals for nullity are the only route for challenging arbitral awards in Uruguay

The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention), provide the possibility of an award's being annulled in the country that is the seat of arbitration or in another under whose law the award has been issued.1 Appeals for nullity are also provided as the sole instance for review of awards pursuant to the MERCOSUR International Commercial Arbitration Agreement (MERCOSUR Agreement). In this case, it provides that such appeals should be brought before the ordinary courts in the country that is the seat of the arbitration.2 The Uruguayan General Code of Procedure, which governs domestic arbitration but is applied subsidiarily to international arbitration, provides the same solution.3

In Uruguay, an appeal for nullity of an international award issued in the country must be brought before the courts that would have heard the case on appeal, had it not been submitted to arbitration.4 Normally, on international commercial matters this would be a civil appeals court.

In a decision handed down in a proceeding for nullity of an international award in an arbitration in Uruguay, the court found that under the New York Convention the award should be valid in the country that was the seat of arbitration, even if the parties had agreed to a particular foreign procedural law or arbitration rules. The competence of the Uruguayan courts to hear appeals for nullity derives from the parties' autonomy to choose the seat of arbitration.5

Validity of the arbitral agreement may be questioned in the appeal for nullity

The validity of the arbitral award takes on special relevance on two occasions. One is prior to initiating arbitration, if any of the parties objects to the arbitral jurisdiction on the basis of invalidity of the agreement. The other is upon termination, if any of the parties seeks to set aside the award by bringing an appeal for nullity or challenging it at the enforcement stage.

In the case of international arbitration when judging the validity of the arbitral agreement, Uruguayan courts respect the requirements of the New York and Panama Conventions.

Requirements applicable to the arbitral agreement

An appeals court rejected the appeal for nullity of an award issued in an international arbitration in Uruguay based on the criterion of validity of the arbitral agreement per international conventions. The challenging party argued that the award was not valid because the arbitral commitment had not been executed in a judicial document or pleading or in a public instrument as required by domestic procedural law.6 The court concluded that arguing for nullity based on Uruguayan procedural law implied a failure to recognise the consequences of ratification of the New York and Panama Conventions. According to the ruling, setting forth the arbitral award in writing under the New York Convention is a material rule that prevails over national rules.7

Jurisprudence admits the validity of arbitral agreements included in adhesion contracts and in preprinted forms, to the extent that the party was aware or could have become aware, with minimal diligence, of the existence of the arbitration clause.8

Scope of the arbitral agreement

As regards substantive validity in Uruguay, jurisprudence has analysed in various cases whether the specific dispute between the parties was subject to the arbitration clause.

Uruguayan jurisprudence has moved from application of a restrictive criterion for that interpretation to a more flexible one in recent years. This evolution has taken place specifically in the context of international commercial arbitration.

It is worth noting here the Labour Court decision that sent a case to arbitration brought by a local manager of a Spanish company against his employer, a Uruguayan subsidiary. The employment contract that gave rise to the dispute did not include an arbitration clause. That clause had been included in a share purchase agreement between the claimant manager and the Spanish parent company, in which the seller had accepted the management post in question as part of a package agreement. The Labour Court found that, despite the lack of an arbitration clause between the specific parties to the dispute, there was sufficient connection since a model employment contract had been attached to the share purchase agreement. The Court ordered the parties to settle the labour claim by arbitration under the Arbitration Rules of the International Chamber of Commerce (ICC).9

Subsequently, in the context of a dispute involving a distribution, another court admitted validity of the arbitration clause and sent the parties to arbitration in Osaka, Japan, under the Arbitration Rules of the Osaka Securities Exchange. In this case, a Uruguayan distribution company brought a judicial claim against the US affiliate of a Japanese multinational firm. Years earlier, the parent in Japan had signed a distribution agreement with the claimant that included an arbitral agreement. Despite the defendant US company's not having been a party to the distribution agreement and not having signed the arbitral agreement, the court found that the parties' allegations referred to the original distribution agreement, so that there was sufficient connection to apply the arbitral agreement.10

These two cases opened the door for abandoning the principle of restrictive interpretation of the arbitral agreement, replacing it with a more flexible one that tends to favour arbitration, respecting the intention of the parties and steering clear of any manoeuverings to avoid compliance.

Additionally, in various cases the Uruguayan courts determined whether a matter can be submitted to arbitral jurisdiction under Uruguayan law.

The New York Convention authorises refusing enforcement of an international award if the subject of the dispute is not arbitratable under the law of the country in which enforcement is sought.11 Domestic procedural law, moreover, provides that the Uruguayan courts must ensure that the international award does not violate Uruguayan international public order in order to admit enforcement in the country.12 Various decisions include the arbitratability of the dispute in this analysis.

The Supreme Court has examined arbitratability independently and, in other cases, together with the public order issue. Under Uruguayan law,13 the Court has established that matters that can be settled can also be submitted to arbitration. In line with that, the Supreme Court and other courts have accepted arbitration of corporate and labour disputes.

An appeals court admitted, indirectly upon deciding as to whether an arbitration was in law or equity, submitting to arbitration corporate issues such as exclusion of a partner, removal of an administrator, declaration of winding up of a commercial company and personal continuation of corporate activity.14 More recently, a court sent a matter to arbitration involving the relations among partners in a commercial company and related corporate issues.15 In a previous decision the same court excluded from arbitral jurisdiction a matter regarding the right to withdraw from a commercial company, insofar as it is an unwaivable right whose exercise cannot be restricted.16

In a 2003 labour case mentioned above, where the local manager of a Spanish company sued its Uruguayan subsidiary locally, a labour court sent the parties to arbitration under ICC Arbitration Rules. This decision is important in that it comes from a labour court, insofar as such courts have traditionally been unwilling to accept alternative dispute settlement mechanisms.17

Finally, the Supreme Court of Justice also accepted enforcement of an international award on a labour matter. The party against whom enforcement of the award was sought in Uruguay argued that submitting the labour dispute to arbitration was contrary to the country's international public order. The Court held that the award was in relation to a subject that was arbitratable.18

Autonomy of the arbitral agreement

Uruguayan jurisprudence has pronounced in favour of the autonomy or separability of the arbitral agreement, as independent from the legal relationship to which it is applicable, although indirectly upon ruling on other arbitration-related matters.

The New York Convention excluded from the criteria for validity of arbitral agreements the requirements of local law, including material rules in article II thereof, and leaving to the parties the decision as to the law applicable to the arbitral clause in article V.1(a).

The MERCOSUR Agreement, in turn, expressly establishes the autonomy of the arbitral agreement from the base contract, and stipulates than nonexistence or invalidity of the latter does not affect the agreement.19

An Appeals Court maintained, in an action for nullity of an award issued in an arbitration with its seat in Uruguay, that the requirements of the New York Convention are material rules that prevail over national rules. It also affirmed that recognition must be given to the principle of autonomy of will to determine which rules govern the validity of the arbitration agreement.20 The decision states that as the arbitral agreement emanates from the will of the parties, they are the ones who establish how it will be governed. It adds that the regimen in question tends to be independent from the main contract. Based on these grounds, the court rejected the appeal for nullity of the award because the arbitral commitment did not fulfill formal requirements of Uruguayan law applicable to domestic arbitration.

The principle of autonomy or separability of the arbitral award implies that any nullity of the base contract subjected to the agreement will not affect the latter. In one case in which a exception of lack of jurisdiction of the ordinary courts was brought, an appeals court held, as maintained in the unanimous opinion of doctrine, that the arbitral award included in a contract is independent from the other provisions thereof. It indicated that the contract can even be declared null and void, without implying invalidity of the arbitral clause. 21

Respect for award requirements is vital for avoiding nullity

The New York and Panama Conventions do not expressly establish anything in terms of award requirements, although some can be extracted indirectly from the grounds they allow for denying enforcement. Hence, it is necessary for the award to be in writing and to set forth the arbitrators' decision, the points it addresses and the grounds. This is the only way in which the competent court of the place where nullity is sought can control:

- that the award rules on all points submitted and only on those points;
- that the parties' right to defence was respected; and
- that enforcement will not contradict public order of the requested country.22

The MERCOSUR agreement establishes that the award must be in writing and signed, and must bear the date and place of issuance, its grounds, the decision as to the points submitted, and costs. If any of the arbitrators fails to sign the award, the president of the tribunal must provide a certified indication of the reasons.23

Decisions handed down by Uruguayan courts, in processes seeking nullity of an award issued in Uruguay or under its law, or enforcement of an international award, directly confirm that the latter must comply with certain requirements that permit jurisdictional verification under the international conventions. In fact, in the majority of these cases, the objections raised included that the award had decided on points that had not been committed, or that a decision had not been made on others that were so. They also referred to the exception of violation of international public order, especially as regards the subject matter and due process. None of these cases could have been appropriately decided if the award did not respect the requirements permitting its control.

Under Uruguayan law advance waiver of appeals for nullity is not permitted

Jurisprudence has maintained that under Uruguayan law appeals for nullity are not waivable, as they are in other countries. A decision determined invalidity under Uruguayan law of an advance waiver of appeals for nullity of the award. It found that the arbitral agreement can never imply such a waiver.24

The scope of appeals for nullity is limited and does not allow an analyses of the merits of the subject matter of the award.

In a case of nullity of an award issued in Uruguay according to ICC Rules and foreign law, an Appeals Court held that Uruguayan judges are competent to examine only the form used in line with international rules. It added that international awards can only be annulled in the event of manifest and serious violation of international public order. On these grounds, the court confirmed that it was prevented from reviewing the merits of the matter of the award.25

In a similar case, in an arbitration under ICC Rules and Argentine law, with its seat in Uruguay, another Appeals Court affirmed that in the appeal for nullity of the award the judge should analyse the process and not the substance of the dispute between the parties. It noted, moreover, that this appeals channel is entirely original and special to arbitration.26

The grounds for nullity established by Uruguayan law do not govern if international arbitration rules are applicable.

The Appeals Court in the aforementioned case held that the grounds for nullity provided in internal procedural law for domestic awards are not to be applied to international awards. Courts must look to current international conventions.27 Furthermore, the judges analysed

whether there was violation of due process as a manifestation of international public order. Specifically, whether the arbitral tribunal had refused to take certain evidence and if the arbitrators had ruled on points that were not at issue and failed to rule on others that had been so. The Appeals Court rejected the appeal for nullity because it found that, under the award and the mission statement, the tribunal was limited to deciding on the points at issue, and in its refusal to take evidence it had acted in accordance with the ICC Rules chosen by the parties.

In another case, the Appeals Court found that, once the award had been qualified as international, the international conventions in effect in the country became applicable. Echoing the previous judgment, it held that internal procedural rules on the nullity appeal refer only to domestic awards and are not applicable to international awards. It recognised the international trend to ensure existence of similarity between the grounds for annulment and those for denying enforcement of international awards. The Court held that the only direct control it could exercise was as to whether the award affected Uruguay international public order. In this context, the decision rejected the nullity appeal after concluding that: the arbitration was backed by a valid arbitral agreement; and it had respected the parties' right to defence and to due process because the arbitral tribunal had not exceeded the points submitted to its decision. The Court concluded that there had not been any violation of the country's international public order, particularly with the characteristics of a 'grave and manifest violation' as required for supporting an action for nullity. The decision added that the rest of the applicable controls with regard to the award under international conventions pertain to the country in which enforcement of the award is sought.[28]

Endnotes

Venezuela

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Arbitration with Venezuela

Traditionally, the Venezuelan government has participated in international arbitration either in commercial cases based on arbitration agreements included in contracts with the state or in investment cases based on bilateral investment treaties (BITs) or other investment agreements. However, during the past years, Venezuela has questioned the ability of arbitration as a method for the resolution of disputes with the state under the argument of bias of arbitrators. The criticism of Venezuela against arbitration has been supported by political allies such as Nicaragua, Ecuador and Bolivia to the extreme that the last two mentioned countries decided to withdraw from the ICSID Convention.

In a truly valuable work published by Dr Susan D Frank in the Harvard International Law Journal Vol. 50, a detailed analysis on several publicly available awards shows that the alleged bias does not have any statistical basis. Regarding the outcome of the analysed arbitrations, governments won most of the cases where they participated (57.7 per cent) and the average amount awarded in those arbitrations where they lost (approximately US$10 million) was only a fraction of what investors typically requested (approximately US$343 million).

Venezuela, although a member of the New York Convention and the ICSID Convention, has moved from rhetoric to action. First, Venezuela threatened the denunciation of the ICSID Convention, which has not been done. Second, because of relevant arbitration claims commenced by foreign investors on the basis of the BIT between Venezuela and the Netherlands, the government decided to denounce the mentioned treaty on 21 April 2008. However, in accordance with the third clause of article 14 of the BIT, the investments made during the period when the BIT was in force will be protected for 15 years from 1 November 2008. Third, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice rendered a decision on 17 October 2008 where it analysed article 22 of the Promotion and Protection of Investments Act 1999 (PPIA), and concluded that the mentioned article does not constitute an offer of arbitration, against the opinion of most of the national legal writers.

And last but not least, a curious press release was issued on 15 June 2009 by the Supreme Tribunal of Justice, where the head of the Venezuelan judiciary, with regard to some judgments issued by the Constitutional Chamber where arbitration was either obiter dicta or the main issue, pointed out that:

- the state is sovereign to subject itself to foreign courts (including international arbitration tribunals);
- entering into an agreement where the state submits disputes to foreign tribunals must be authorised by the highest authorities of the government;
-

the submission of disputes related to investment arbitration or any other matter to international mechanisms must be approved by the president of Venezuela and the treaty must be ratified by the National Assembly;

- on the basis of sovereignty, the state may denounce or modify those international treaties where Venezuela was subject to a foreign jurisdiction;
- article 22 of the PPIA may not be construed as an offer of arbitration;
- the judgments exhort to the creation of arbitration centres as alternatives to the traditional ones.
- the judgments recognise and support those treaties signed by the government where Venezuela has been subject to a foreign jurisdiction, such as the BITs signed with Argentina, Cuba and Iran; and
- the enforcement of decisions rendered by foreign tribunals against Venezuela will depend on the decision not breaching the sovereignty of the country.

Among all the issues described above, the state has given the most relevant post to the enforcement of decisions given by foreign tribunals, including international arbitral tribunals.

The enforcement of an award given under the provisions of the New York Convention will be enforced by the Venezuelan courts by applying the proceedings established in the Commercial Arbitration Act 1998 (CAA), which provides that the Venezuelan tribunals have jurisdiction to control the legality of the award in the manner similar to that established in the New York Convention. According to article 48 of the CAA, the Venezuelan tribunals will recognise the awards, without consideration of their country of origin, as final and binding. The same article provides that after the corresponding request in writing filed before a tribunal of first instance, it must be enforced without requesting exequatur, according to the rules for the enforcement of judgments established by the Civil Procedure Code.

If such award is to be enforced against the Venezuelan government, the competent courts will be those of the jurisdiction for the Judicial Review of Administrative Matters, headed by the Political-Administrative Chamber of the Supreme Tribunal of Justice (PAC). In the case of recognition and enforcement of the award, the PAC will additionally apply the special proceedings for the enforcement of judgments against the government provided for in the Attorney General's Office Act 2008 (AGOA). The AGOA provides that the court will request a proposal from the government about the opportunity and manner to comply with the judgment. If the proposal is rejected by the party requesting the enforcement, the proceeding described will be repeated for a second time. If the second proposal offered by the government is also rejected by the party requesting the enforcement, the court will order compliance with the award in the manner established by the AGOA for the payment of liquid amounts, if it is the case.

If the application for the enforcement and recognition of the award given under the provisions of the New York Convention is rejected by the Venezuelan tribunals, the requesting party will be able to seek the recognition and enforcement of such award in another state that is signatory to the convention, despite the international responsibility of the Venezuelan state owing to the fact that the rejection is in breach of the mentioned treaty.

According to article 54 of the ICSID Convention, contracting states shall recognise and enforce the awards rendered by ICSID tribunals '[…] as if it were a final judgment of a court in that State'. However, according to the decision given on 3 March 2009 by the ad

hoc committee in the case of Sempra Energy International v Argentina in a request for stay of enforcement of the award, the state is obliged to comply voluntarily with the ICSID awards and there is no place in the ICSID Convention regime for coercive enforcement. According to the ad hoc committee, if the contracting state does not comply voluntarily, the party requesting the enforcement will be entitled to seek diplomatic protection. We consider such a criterion to be partially applicable in Venezuela, since the proceedings provided for in the AGOA for the enforcement of judgments stipulates two phases: the first phase is where the courts request a proposal from the government on the manner and opportunity to comply, which has been named by the Venezuelan case law as 'voluntary enforcement'; and if the voluntary enforcement fails, then the court will proceed with the second phase, called 'coercive enforcement'. A party seeking the enforcement of an ICSID award in Venezuela could be compelled to apply for the voluntary enforcement proceeding as previously described.

The main issue with the enforcement of ICSID awards comes from the rule in article 53 of the ICSID Convention, which provides that the award '[…] shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. Despite the mentioned provision, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice has rendered at least two judgments where it makes it clear that the enforcement of ICSID awards may be rejected if they are considered to breach constitutional rules (judgments No. 1942 dated 15 July 2003 and No. 1541 dated 17 October 2008). Although there has not been a case where the Venezuelan tribunals have rejected the enforcement of an ICSID award, it is worth noting that the obligation established in article 53 for the recognition and enforcement of ICSID awards is imposed on all contracting states, and not only to the state party to the dispute. As a result, if the enforcement of an ICSID award is rejected by the Venezuelan tribunals, the party requesting the recognition and enforcement of such award will be entitled not only to obtain diplomatic protection from his country of origin, but also to seek the enforcement of the award in any other contracting state of the ICSID Convention.

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The Venezuelan Supreme Tribunal is convinced that the awards given by arbitral tribunals are required to pass the internal test to determine if there is a breach of internal public order or constitutional provisions. When we refer to the enforcement of arbitral awards given under the provisions of the New York Convention, the invocation of public order to deny recognition and enforcement is possible according to article V.2.b of the Convention and article 49.f of the CAA. As mentioned above, the case is not the same when ICSID awards are involved since one of the alleged advantages of the ICSID de-localised arbitrations is the control of the award by internal mechanisms and not by national courts.

As mentioned above, the Venezuelan rhetoric against arbitration has evolved into action by preparing the legal system to eventually reject the enforcement of arbitral awards. The constitutional test has been applied to a judgment given by the Inter-American Court of Human Rights, where the Constitutional Chamber rejected the enforcement of the mentioned decision because it considered the decision to be against the Venezuelan constitution. The test has not yet been applied to arbitral awards, but Venezuela is currently facing important disputes that have been submitted by foreign investors to arbitral tribunals that will deal with some of the issues raised above, such as the interpretation of article 22 of the PPIA. Therefore, it is almost certain that we are going to see further developments on arbitration in Venezuela.

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