The Arbitration Review of the Americas

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Global Arbitration Review is delighted to publish *The Arbitration Review of the Americas 2012*, 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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Introduction

Luis M Martinez

Vice President of The International Centre for Dispute Resolution (ICDR), the international division of the AAA

In a previous article I had written for Global Arbitration Review in 2009, I described what had become an obstacle to the robust growth of international commercial arbitration and the advancement of the arbitration cultures in a number of countries in Latin America. That obstacle was primarily the investment treaty arbitration backlash and its impact on international commercial arbitration in the region.1 The question still remains today as to whether Latin America has moved any closer towards an embrace of international commercial arbitration, or have the criticisms of the investment treaty arbitration regime taken its toll on all international arbitration in the region?

Investment treaty arbitration in Latin America continues to be the subject of much debate. With Bolivia's denunciation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), Ecuador's rejection of ICSID's jurisdiction over its oil, gas and mining disputes, Nicaragua's withdrawal of its consent to ICSID arbitration in its international investment agreements and Venezuela's proclamations that it would withdraw its consent to ICSID's jurisdiction, a number of Latin American countries are expressing their dissatisfaction with investment treaty arbitration in very public ways. This repudiation in part was one of the goals established by the Bolivarian Alliance for the Peoples of Our America (ALBA), where Cuba, Bolivia, Ecuador, Nicaragua and Venezuela, along with a number of Caribbean States, have formed an alliance primarily as an alternative to the Free Trade Area of the Americas but with one of their initiatives being an agreement to withdraw from the ICSID Convention and create a regional mechanism for investor-state disputes.2

It is beyond the scope of this article to discuss the factors and politics that have led to this backlash, and there are a number of commentators who have examined these ICSID investment treaty cases and provided various perspectives.3 It must be recognised that there are 157 states that have signed the ICSID Convention with only two denunciations.4 Yet there remains today a concern that these investment treaty arbitration problems may have a negative impact on international commercial arbitration throughout the region. These state actions were covered by the media through many outlets and were the subject of articles and conferences all over the world. People generally unfamiliar with investment treaty arbitration were presented with a negative portrayal of this system. Its critics complained of its lack of transparency, inconsistent awards and the concern that foreign tribunals were rendering large monetary awards against these sovereign states. Conversely, international commercial arbitration, which in most instances is confidential, receives hardly any public exposure. Positive examples of its success, such as the efficient and economical resolution of commercial disputes and that the majority of awards are complied with voluntarily each year, never see the light of the day.5 The limited exposure it does receive is confined to cases that reach the courts and since they typically do not involve a state, the coverage is not extensive. For investment treaty arbitration the old saying that there is no such thing as bad

press does not apply, and with the increased usage of social media and other outlets its critics are reaching a broader audience in the region.

Increasingly, Latin American states have been taking the position that their national courts should reassert their authority over investment treaty arbitration.6 The return of the Calvo-7 doctrine is being discussed in the context of investment treaty arbitrations where there are trends towards greater sovereign policy being reserved by the states in the international investment regime. One commentator noted with concern a complete retreat from investor-state arbitration, citing as one example the recent US-Australia BIT which foregoes investor-state arbitration in favour of local courts.8

Of course, states determine what dispute resolution mechanisms they will consent to and a number of states are not party to the ICSID Convention, including Mexico and Brazil. While Mexico is a party to the NAFTA agreement, which does provide for international arbitration of NAFTA-related disputes, Brazil has passed its PPP (public-private partnership) law allowing for arbitration between state-owned entities and private individuals provided they take place in Brazil and are conducted in Portuguese.9 The majority of BITs also contain the possibility of ad hoc arbitration pursuant to the UNCITRAL Arbitration Rules as an alternative or if the ICSID option is in question. Moreover, states as well as state-related parties may opt to select a dispute resolution mechanism that calls for institutional arbitration by the incorporation of a specific arbitration clause in their contract with investors which references the Rules or, although less likely, by executing a post dispute submission agreement providing for institutional arbitration.10

Fortunately the fear that the investment treaty backlash would lead to much broader rejection of all arbitration in the region has largely failed to materialise. While investment treaty arbitration has been the focus of negative attention, it has not derailed the general advancement of international commercial arbitration that is underway in Latin America. In fact, just the opposite has occurred and what we may be seeing is the positive effects of the developing arbitration cultures that have established a firm foothold in support of international arbitration.

This positive trend is being fuelled by a combination of a number of factors such as the increased level of professionalism in the field where more Latin American law firms have developed specialised and sophisticated international arbitration practices, adding to a competitive climate with the European and North American law firms that is raising the bar each year. This competition is not only limited to the law firms; in recent years we have seen a dramatic push by a number of cities around the world engaged in promoting their legal framework and infrastructure in an effort to increase their designation as the seat of international arbitrations to attract more of the international dispute resolution business.11 Latin American countries eager to attract these matters to their cities as well focused on enhancing their own legal framework by adopting new modern arbitration laws in Mexico, Chile, Peru and others based on the UNCITRAL Model Law with Costa Rica being the most recent. Costa Rica's new law eliminates its requirement that arbitrators and counsel be admitted to the Costa Rican Bar to participate in an international arbitration in Costa Rica and has designated the First Chamber of the Costa Rica Supreme Court as the only court competent to set aside arbitral awards.12 Brazil also has a modern arbitration law and the Brazilian Superior Court of Justice (Superior Tribunal de Justiça, STJ) is responsible for the recognition of foreign arbitral awards. The concentration of these international cases in specific courts is also a positive factor and will lead to more consistent decisions in line

with established international arbitration practice. Another factor is the work of arbitration committees in Latin American countries. In Brazil you have the excellent work of the Comitê Brasileiro de Arbitragem (Brazilian Arbitration Committee, CBAr). This association of Brazil's leading international arbitration practitioners and members from around the world whose purpose is to promote arbitration in Brazil has been at the forefront in developing Brazil's arbitration culture.13 The development of the Latin American Arbitration Association, whose membership is comprised of leading arbitration practitioners with a focus on the development of Latin American dispute resolution, is another positive initiative.

The region has benefited by the increased professionalism and development of a select number of arbitration institutions that provide administrative services. The Inter-American Commercial Arbitration Commission (IACAC) is an association of institutions that has a specialised focus on the alternative dispute resolution landscape for the Americas. Through the work of its members, IACAC has been active in many of these pro-arbitration reforms in the region and its member from the United States is the ICDR.14 Unfortunately, one of the areas of concern that must be monitored is the increasing numbers of arbitral institutions throughout Latin America that are poorly qualified to administer international arbitrations. Many have entered the market expecting to be successful administrators; however, their arbitrators may lack qualifications, their staff may be inexperienced and they lack clear procedural policies that will adversely affect predictability. These institutions do not have the facilities needed for international services and their administrative decisions can be impacted by local powerful arbitrators, counsel or corporate entities when faced with challenges and procedural hurdles. There are significant differences among arbitral institutions and there are a troubling number of institutions that fail to provide the proper services, or protect the arbitral process while ensuring due process, fair play and integrity.15

From the ICDR perspective, it continues its focus on Latin America. Its International Dispute Resolution Procedures are available in Spanish and Portuguese,16 its international panel of arbitrators is comprised of the region's leading international arbitrators, and it has a number of important regional cooperative agreements that compliment its more than 85 years of dispute resolution experience and a team of administrators that staff the ICDR's America's desk and specialise in Latin American international arbitrations and mediations.

ICDR arbitration awards have been recognised and enforced by several courts in Latin America. In Industria y Distribuidora Indistri SA v SAP Andina y Del Caribe CA, Bogota's Tribunal Superior issued a ruling on 10 March 2010 dismissing an annulment request filed against an ICDR award that was issued in December 2009. Among other things, the Court noted that awards rendered in ICDR cases seated in Bogota are not subject to "annulment actions" before Colombian courts, citing article 27 (1) of the ICDR Rules.17 In 2009, the Chilean Supreme Court recognised an ICDR award rendered in New York in Comverse Inc v American Telecommunications Inc Chile SA (ATI Chile). Comverse sought to enforce the award pursuant to the NY Convention's article IV. ATI Chile alleged violations of the NY Convention's article V. The Supreme Court received the opinion of the Fiscal Judicial who found no evidence of any violation of the NY Convention, adding further that the purpose of the exequatur was not a revision on the merits.18 In a 2011 case in Colombia, a party sought to enforce an ICDR award before the Colombian Supreme Court of Justice, invoking the New York Convention. The Colombian Supreme Court applied the New York Convention rejecting all defences that were not part of the Convention. Moreover, the Court established that there was not a violation of public policy as the dispute did not concern issues of national interest and rejected the respondent's other defences enforcing the ICDR's award.19

In conclusion, I think international commercial arbitration in Latin America is on a positive track, and the increased professionalism in the field and the numerous pro-arbitration initiatives will fuel its continued development and advancement where we may see more Latin American cities selected as seats for international arbitration and substantial contributions from the region to the world's international arbitration practice.

The ICDR's model arbitration clause

Practitioners who wish to designate the ICDR as their administrator can arbitrate future disputes by inserting the following clause into their contracts:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

The parties should add the following provisions:

- "The number of arbitrators shall be (one or three)";
- "The place of arbitration shall be (city and/or country)"; and
- "The language(s) of the arbitration shall be _____."

The International Centre for Dispute Resolution is the international division of the American Arbitration Association, a not-for-profit corporation that can provide efficient, neutral and affordable dispute resolution services to parties from all over the world.[20](#)[1](#)

See Luis M Martinez, "Are We There Yet?", in Arbitration Review of the Americas (2009).

[2](#)See www.investmenttreatynews.org/cms/news/archive/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy-treaty.aspx ; see also www.cadtm.org/Bolivia-Venezuela-and-Nicaragua.

[3](#)For an analysis of ICSID awards and an examination of ICISD's potential bias, including opposing supporting views of the ICSID system, see Susan D Frank, "The ICSID Effect? Considering Potential Variations in Arbitration Awards", in Virginia Journal of International Law, Volume 51, No. 4, (2011).

[4](#)See ICSID Member States on ICSIDS's web site at www.icsid.worldbank.org.

[5](#)See survey where users report voluntary award compliance in 90 per cent of cases, "International Arbitration: Corporate attitudes and practices", The Price WaterhouseCoopers & Queen Mary Survey, (2008).

[6](#)See Bernardo Cremades, "Resurgence of the Calvo Doctrine in Latin America", 7 Business Law International 53 (2006).

[7](#)The "Calvo" doctrine represented the region's attitude in the late 19th century towards international arbitration until Latin American countries began rejecting Calvo in the early 20th century to provide investors with the arbitration option to attract foreign direct investment. Calvo, an Argentine diplomat, formulated the doctrine in response to European armed interventions in Latin America to collect or enforce a number of claims on behalf of its citizens. He took the position that aliens doing business in Latin America were to be required to submit their claims for grievances to the local courts. This doctrine developed into

the Calvo clause, which some countries included in their Constitutions. For a review of the Calvo and Drago doctrines, see Gonzalo Biggs, Bernardo Cremades' "Contribution to the Development of the Arbitration Law of Latin America", Liber Amicorum, edited by MA Fernandez Ballesteros and D Arias, La Ley, Madrid Spain, (2010).

8See José E Alvarez, "Why are we 'Re-Calibrating' Our Investment Treaties?", World Arbitration & Mediation Review, Volume 4, No. 2, (2010).

9See Cremades, supra note 6, at 61.

10The ICDR has administered cases with states and state-related entities pursuant to the UNCITRAL, International, Commercial and IACAC Rules, which can all be found on the ICDR's website at www.icdr.org.

11See initiatives such as the New York State Bar's International Brochures and its "Final Report of the New York State Bar Association's Task Force on New York Law in International Matters" on the NYSBA web site at www.nysba.org. Other initiatives were started in London, Spain, Hong Kong and Singapore as well.

12See Ricardo H Puente, "Costa Rica's New International Arbitration Law", Dispute Resolution Journal, May - July 2011.

13See CBAr's website at www.cbar.org.br.

14IACAC national sections are located in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, United States, Uruguay and Venezuela; associated sections: Santa Cruz, Barcelona, Medellín, Valparaíso and Arequipa.

15See Luis M Martinez, "Designating the Administrator for International Commercial Arbitrations", The Asia-Pacific Arbitration Review (2008).

16See the ICDR's web site at www.ICDR.org.

17See Anulación de laudo Arbitral - Recurso de Súplica. Indistri S.A. contra SAP Andina y del Caribe C.A. en Colombia, 2010000150 00. See Article 27 (1), "Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties. The parties undertake to carry out any such award without delay."

18See Dyala Jimenez Figueres and Johanna Klein Kranenberg, "Recent International Arbitration Developments in the Chilean Courts," Arbitration News, Newsletter of the International Bar Association Legal Practice Division, Vol. 15, No. 1, March (2010).

19Reported by Eduardo Zuleta, Gomez-Pinzon Zuleta Abogados, Colombia.

20For further information, questions or comments regarding this article or the ICDR's model arbitration clause or services - or to obtain a recent copy of the ICDR's International Newsletter - please contact martinezl@adr.org or visit the ICDR's website at www.icdr.org.

Vice President of The International Centre for Dispute Resolution (ICDR), the international division of the AAA

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Compensation in Complex Construction Disputes

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Summary

Introduction

Complex construction projects typically involve highly desirable locations, significant investment and multiple parties, which is why they are the subject of numerous disputes. Currently, the average value at issue in a dispute involving a construction project is over US$35 million, and the quantity of these types of cases is increasing globally.[1] Construction disputes account for approximately one in eight of all ICSID cases to date.[2] The complicated damages issues involved in such cases will continue to regularly challenge arbitration tribunals and independent damages experts in the foreseeable future.

This article focuses on the quantification of economic damages and compensation in the context of construction disputes. I begin with an overview of the principle of full compensation, economic damages and the three basic business valuation approaches. I then discuss the complex nature of construction projects and the role this complexity plays in the quantification of economic damages and compensation. Finally, I discuss the manner in which arbitral tribunals have dealt with these issues in their decisions to date and the implications that those decisions will have on the determination of damages in future construction disputes.

While the focus of this article is on the topic of investor-state disputes, I touch briefly on commercial construction disputes. Although the nature of commercial and investor-state disputes tends to differ, in that the former more commonly involve breaches of contract and the latter involve expropriations, principles of compensation, discussed in the next section, tend to apply in both types of cases.

Compensation and the nature of economic damages

International courts and tribunals have long cited and drawn upon principles of compensation established by the Permanent Court of International Justice (PCIJ) in the judgment of the Chorzow Factory case. The basic principle is that reparation must wipe out all of the consequences of the illegal act and restore the circumstances that would have existed if the act had not been committed.[3] Where restitution in kind is not possible or practical - perhaps due to the deterioration of the relationship between the investor and state or the passage of time - tribunals and international courts will typically rely on the evidence of experts to advise them as to the size of the award that will provide appropriate pecuniary restitution.

Compensation may be measured in reference to the loss of or decrease in value of an investment that may arise as a result of governmental interference.[4] The definition of value that is most frequently applied in the marketplace and by international courts and tribunals is “fair market value”. The American Society of Appraisers defines fair market value as:

> the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.[5]

The International Valuation Standards equivalent, “market value”, contains the same essential features about buyers and sellers and how they should transact in order to satisfy the definition of market value.[6]

Since value is stated only at a specific point in time, the selection of an appropriate valuation date is a key step in the quantification of damages, and tends to vary based on the legal argument posed by the respective parties. For example:

- in the case of a lawful expropriation, compensation may be based on the fair market value of the investment, calculated as at the date of the expropriation;
- in the case of an unlawful expropriation, compensation may be based on the fair market value of the investment as at the date of the award and, additionally, any foregone historical cash flows or profits resulting from the expropriation; and
- in a case involving a breach of contract, compensation may be based on historical foregone cash flows or profits and, if applicable, the loss or decrease in the value of an investment to account for the loss of future cash flows or profits.

While matters of law are beyond the scope of this article, an award of economic damages should aim to place the injured party in the same economic position they would have enjoyed but for the wrongful act or breach of contract. The value of a business interest or investment often plays a role in the quantification of damages.

Valuation overview

The valuation of a business interest is a complex exercise that is considered by many to be comprised of elements of both art and science. In determining the value of a business interest, the expert must identify and analyse all relevant aspects of the business environment: the economy, industry and factors specific to the business. The selection of an appropriate methodology is critical to the valuation exercise. Broadly speaking, there are three valuation methodologies typically employed in determining the value of a business that is expected to operate as a going concern.

The Income-based Approach

The income-based approach derives value on the basis of the present value of expected future cash flows. While other income-based approaches, such as the Capitalized Cash Flow approach, are occasionally employed, the most popular and widely applied is the Discounted Cash Flow (DCF) approach. In applying the DCF, the business' expected future cash flows are forecasted, typically on an annual basis. The present value is then determined by applying a present value factor based on a discount rate which reflects the risks associated with the realisation of such cash flows. The DCF methodology is the most appropriate in cases where future cash flows can be reasonably estimated and where a proxy for an appropriate discount rate is available. The strength of this approach lies in its theoretical and practical soundness, in that it is based on the economic theory that the value of an asset is a function of its future economic benefits. Conversely, its weakness is that its forward-looking nature requires assumptions that relate to future revenues and costs, among other things. To the extent that key assumptions are not well reasoned and properly supported, a DCF analysis may result in an unreliable conclusion as to value.

The Market-based Approach

The market-based approach derives value with reference to valuation metrics observed in comparable publicly traded companies and open market transactions. The strengths of this approach are that it is relatively straightforward to apply and understand, and that its conclusions are driven by valuation metrics that are observable in the marketplace. The main downside to this approach is the inherent difficulty in finding a company that is truly

"comparable" to the subject company, as no two businesses, projects, or assets are identical. Often compounding this issue is the general lack of sufficient detail regarding transactions necessary to completely analyse and understand the underlying data.

The Asset-based Approach

The asset-based approach derives value on the basis of the value of each of the underlying tangible and intangible assets of the business. An example of such an approach is the Adjusted Book Value (ABV) methodology, whereby the book value of equity is taken as a starting point and is then adjusted to reflect the fair market value of specific assets and liabilities. This approach is useful as it compartmentalises value based on each asset and liability. Its main disadvantage stems from the difficulty in its application, as it requires the identification and separate valuation of each asset and liability. Additionally, since the valuation of a business interest using the income or market approach accounts for the value of both tangible and intangible assets and liabilities, the ABV approach may not be necessary in all circumstances. With respect to an operating business deemed to be a going concern, International Valuation Standards state that the asset approach should not be the sole valuation methodology, unless it is commonly used by buyers and sellers.7

Overall, while the selection of an appropriate valuation approach is critical, the concept of fair market value is universal. Thus, in theory, the fair market value of a business should be the same or similar regardless of the methodology applied. In order to bolster a conclusion of value, it is often useful to apply multiple valuation methodologies. Generally, when sufficiently reliable information is available, the income approach is applied as a primary methodology, with the market approach or asset approach as the secondary methodology. As discussed further in this article, the valuation of a new, unique project - commonly the subject of investor-state construction disputes - can be particularly challenging.

Construction delay disputes

In construction delay disputes, more common in the commercial arbitration arena, a breach of contract or wrongful act results in the delay, rather than abandonment, of a construction project. The remedy in a breach of contract case is similar to that of an unlawful expropriation that was discussed previously: compensation is intended to wipe out the economic consequences of the breach. Although there is a lack of available cases to cite, due to the confidential nature of commercial arbitration disputes, the following is an example of a typical construction delay claim in which I was retained.

In this case, a real estate developer commenced an action against a party hired to prepare a site prior to construction. The vendor completed its work on the site one year after the deadline specified in the contract. The developer claimed that the delay constituted a breach of contract, and further that it suffered economic damages from the breach. The economic damages case posed by the developer was premised on its inability to sell units at the peak of the real estate market as a result of the delay, and that it was forced to sell its units during a lull in the local economy.

This is a common scenario in construction disputes. In evaluating economic damages resulting from a construction delay, it is necessary to consider the manner in which the local market has changed as a result of the delay. For example, an expert must evaluate such factors as the selling price per unit; the frequency of sales or ability to sell units (typically referred to as the "absorption rate"); the availability and cost of construction materials; and the availability and cost of labour. In this case, the court found that the

economic damages calculation conducted by the developer's expert was based on a number of unsupported assumptions and was therefore deemed speculative. In other words, insufficient due diligence was performed and documented in order to support this expert's assumptions and calculations.

Although the nature of claims tends to differ, similar compensation measures are applied in commercial arbitration and investor-state construction disputes.

Investor-state construction disputes

Investment disputes generally involve governmental interference with the rights of a foreign investor: property rights; contractual rights; management rights; and administrative or fiscal rights.8 With respect to construction disputes, interference with the rights of the foreign investor typically results in the delay or abandonment of a project.

One example is the case of SPP v Egypt. In this case, SPP and Egypt formed a joint venture to develop multi-use tourist complexes at the pyramids and at Ras El Hekma, on the Mediterranean coast. As part of the arrangement, SPP was to arrange for technical expertise and financing of the project while Egypt would secure the title to the property and possession of land, in addition to the various approvals for the development and execution of the projects.9 Various approvals were obtained and construction of the pyramids site commenced in 1977: roads were laid, water and sewage trunk mains were installed, excavation for artificial lakes and a golf course was undertaken, and work on the main water reservoir was nearly completed.10 Planning for the first hotel was completed and the process had commenced for the second hotel at the pyramid site.11 The pyramids project also secured pre-sales of villas and multi-family accommodations, with 386 lots sold for over US$10 million in total.12 Shortly thereafter, the pyramids project encountered political opposition due to concerns that it posed a threat to undiscovered antiquities, and subsequent to that, approvals previously granted were withdrawn and cancelled by the state.13 The tribunal stated that Egypt was lawful in its expropriation of the contractual rights of the claimant.14

Another example is the well-known case of Siag v Egypt. In this case, a company owned by the claimants purchased a large parcel of oceanfront land on the Gulf of Aqaba on the Red Sea, near the town of Taba and the border with Israel, from the Egyptian government, in 1989.15 The claimants planned to build a tourist resort and infrastructure, which was intended to be built over three phases once the necessary governmental approvals were granted.16 Basic construction commenced from 1990 to 1994.17 By 1996, construction of phase one was underway with eight apartment buildings and 288 individual apartments already constructed.18 Additionally, foundations for two additional apartment buildings had been laid and construction of 12 luxury villas had been started.19 In mid-1996, Egypt cancelled the contract with the claimants and seized the property.20 In addition to other breaches of the Bilateral Investment Treaty (BIT), the tribunal found that Egypt unlawfully expropriated the claimants' investment.21

In my experience, the fact patterns that existed in SPP and Siag are common in investor-state construction disputes. Although the nature of each construction project and the circumstances surrounding the dispute makes each case unique, construction projects in the context of investor-state disputes tend to have at least a few of the following common themes:

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Proposed sites are often in unique and highly sought after locations. Such sites may require the consideration of historical elements and preservation issues.

- Some form of state or local government approval is required to commence construction.
- Construction projects typically involve multiple partners, such as developers, engineers, financiers, architects and, in some cases, local government.
- Construction projects require a significant amount of capital and are typically financed through the equity contributed by the partners, in addition to debt obtained from third parties. Debt financing varies by stage of development. For example, construction financing is typically required to cover costs incurred prior to the completion of the project. Generally, with construction financing, interest or principal is not payable until the project is completed and security is based on the title to the underlying property. Once the project is completed, permanent financing, generally based on the market value of the completed project at the time of the loan, is deployed to repay the principal and accrued interest associated with the construction loan.

- Projects are often "mixed-use" developments, in that they combine more than one type of real estate, such as residential, retail, office and leisure. The key benefit of combining properties of a different use is the potential to achieve synergies. For example: residential occupants use the parking at night, which is heavily trafficked during the day by retail shoppers; residential owners are attracted to the amenities offered by the hotel, such as health club and restaurants; and retail outlets benefit from clientele generated from residential, hotel and office inhabitants. The interplay of different property types makes planning, developing, financing, constructing and operating mixed-use developments more complex than developments with a single use. While the risk in a mixed-use development may be viewed to be diversified by the existence of multiple property types, the complexity and intricacies in its execution may serve to increase the overall risk of the overall project. The following are some examples of the factors that may increase the complexity of mixed-use developments:

    - The projects are more complex from an administrative standpoint. For example, the developer must obtain different types of zoning for each type of property.
    - They tend to be constructed in phases and thus take more time to develop. This has a number of implications, such as:
        - the success of the earlier phases may affect that of subsequent phases;
        - the longer duration makes the overall project susceptible to changes in the cost of materials for construction and the market for the space; and
        - financing may be required over time, in tranches as each phase is constructed and completed.

- The integration of each component and the type of property must be considered by the developer in order to maximise synergies and the effectiveness of the overall project and each individual component.
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The projects are typically larger than single-use developments and, as such, require more capital, which may make it more difficult to obtain financing.

- The nature of revenue streams from each component may differ. For example, residential units are typically sold by the developer, while retail and commercial space are leased.
- Since multi-use developments are more complex than single-use developments, there are typically more parties involved in the development, construction, financing and operating activities.

The intricacies and complexities inherent in construction projects present some valuation challenges.

For example, in applying the income approach in quantifying economic damages, the expert must determine the likely set of circumstances that would have existed "but for" a wrongful act. This necessitates the use of assumptions that address the various factors impacting the development and eventual use of the project, the development and construction timeline and the various project components. Reasoned assumptions relating to the financial aspects of the project, such as financing terms and availability, quantum of construction costs, revenue streams and profit sharing arrangements, are also critical to the analysis.

Assumptions may be developed by considering documents produced by the parties, which often contain the plans, forecasts and agreements relating to the project. The expert may also base assumptions on benchmarks derived from the industry or comparable projects, to the extent such information is reliable and available.

The multitude of complexities inherent in the valuation of construction projects, all else equal, increases the number of assumptions and consequently the opportunity for error, as well as the uncertainty in forward-looking estimates of cash flows. For this reason, a number of tribunals have not looked favourably upon the DCF methodology in early stage businesses. Tribunals have adopted the same view in cases involving construction projects that were expropriated during the development and construction phase. In both SPP and Siag, the tribunal rejected the DCF calculations posed by the claimants' experts.

In SPP, the claimant contended that compensation should have been equal to the value of the enterprise at the time of the taking, which was calculated based on the DCF methodology using an 18-year period of development and an estimate of future revenues based on actual lot sales over the life of the project.22 The tribunal rejected the approach, stating that "the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF", and that estimation of the total project's revenue based on the 386 lots sold, which comprised approximately 6 per cent of total sales, was hypothetical.23

In Siag, the claimants presented their loss calculations under three scenarios. The first was a DCF analysis; the second was a "Comparable Sales Valuation", based on comparable properties; and the third was a hybrid approach of the first two.24 The methodologies applied by the claimants resulted in valuations that were in a relatively close range: US$181.4 million (Comparable Sales) to US$195.8 million (DCF).25 However, the tribunal did not look favourably upon the DCF. While the tribunal agreed that the claimants' investment was "a substantial one and one considerably more valuable than portrayed by Egypt," it took a similar position regarding the DCF approach to that of the tribunal in SPP, stating that "the authorities are generally against the use of a DCF analysis in circumstances such as the present, and

further that the DCF analysis presented... is an insufficiently certain basis upon which to calculate damages in the present case."[26]

To support its decision, the tribunal in Siag cited the higher degree of uncertainty in valuing the future profits of a business that has been operating for several years versus a "business opportunity" that was still under development.[27] It also cited the "numerous moving parts" and the sensitivity of the absolute value of a business to small changes to the weighted average cost of capital as further perceived weaknesses in the approach to be used in the context of the case.[28] In summarising the above perceived weaknesses, the tribunal went on to state "points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for "young" businesses lacking a long track record of established trading."[29]

As discussed above, in the case of Siag, the claimants provided alternative calculations of value and damages, which proved beneficial. While the tribunal rejected the DCF and the hybrid approach (which relied in part on the conclusion of the DCF), it did favour the market approach. The claimants' expert presented comparable sales and other evidence, including offers, which related to properties that were similar to the project, with adjustments to changes in land value over time.[30] In support of the tribunal's reliance on the claimants' market approach was the fact that Egypt launched a similar project 20 kilometres south of subject property.[31] The role that this played in the claimants' quantitative analysis was not clear in the award.

Parties in both Siag and SPP presented another type of market-based approach, which was based on imputing an enterprise value from actual transactions involving the investments prior to expropriation. In SPP, the claimant based their valuation on two transactions and one offer related to the purchase of SPP shares prior to the wrongdoing. The tribunal dismissed this approach on the basis that there was "a very limited number of transactions" and that "the price at which the shares were sold was privately negotiated."[32] Similarly, in Siag, the tribunal rejected a valuation approach proposed by Egypt that was based on the value shares in Siag that were sold prior to expropriation between members of the family controlling the company. The tribunal believed that such a transaction was "unlikely to be a reliable proxy for an open-market transaction conducted at arm's length on normal commercial terms" and that there were "simply too many (obvious) non-commercial factors which might affect the price at which the transaction is concluded."[33] In both cases, the tribunals considered, albeit not explicitly, at least some of the factors that define fair market value, in their assessment of historical transactions.

As previously noted, the tribunal in SPP rejected the DCF and market approaches proposed by the claimant. As is commonly the case when the tribunal does not deem the income or market approaches to be appropriate, the award provided to the SPP was based on its out-of-pocket costs, plus a return thereon reflecting the loss of commercial opportunity. This decision is similar to that of the hotel dispute, Wena v Egypt, where the tribunal rejected the DCF calculations presented by both the claimant and respondent, and awarded compensation on the basis of the claimant's costs plus a return.[34] While somewhat conservative - and analogous to the asset approach described previously - compensation on this basis essentially removes speculation surrounding the economic outcome of the project that would have existed but for the alleged wrongdoing. However, rather than wiping out the consequences of the expropriation, such an award tends to wipe out the investment

itself. Thus, this approach may not achieve the intended purpose of the principle of full compensation.

Conclusion

While any forward-looking analysis will inherently contain elements of uncertainty, the intricacies in construction projects complicate the economic damages analysis. As a result of this, tribunals and courts have established criteria for damages experts, demonstrating a few key hurdles to the selection and application of an appropriate valuation methodology.

The selection of the valuation approach is a crucial element in the valuation of any business. Although frequently rejected by tribunals and courts for yielding conclusions that are speculative, the DCF can be a powerful tool in quantifying the economic impact associated with a wrongful act or breach of contract. It is the duty of the expert to determine whether a DCF can be reliably performed in a given case and, if so, to ensure that the approach is properly applied and in a thoughtful and supported manner. The expert must perform the due diligence necessary to support the use of key assumptions, ideally through the use of independent and reliable sources. In this regard, a deep understanding of the business is critical in identifying and developing key assumptions.

In order to bolster a valuation conclusion and opinion of damages, where possible, the conclusion should be tested for overall reasonableness in order to ensure that the analysis is theoretically sound and that the conclusion is realistic relative to observations from the open market. Typically, this is achieved through the use of multiple valuation approaches; to the extent that conclusions obtained by the use of various approaches differ materially, the expert should attempt to reconcile such differences.

Finally, experts must accommodate tribunals' increasing sophistication in the area of damages. As an example, it is not uncommon for tribunals to request access to spreadsheets and models that allow them to modify key assumptions and variables that underlie the analysis. Consequently, it is essential that the expert prepare calculations with extremely rigorous precision and transparency, while presenting calculations in a manner that is clear, understandable and helpful. When combined with an analysis of damages that is based on the appropriate approach, supported key assumptions and an overall conclusion that is tested for reasonableness, the expert is able to provide evidence that is highly useful to courts and tribunals; the magnitude of which increases exponentially with the complexity of the business or project.

Notes

1
Global Construction Disputes on the Increase, EC Harris Research Finds, 23 May 2011.

2Includes tourism-related disputes. Per The ICSID Caseload - Statistics, Issue 2011-2, p12. Construction and tourism-related cases comprise 7 per cent and 5 per cent, respectively, of all ICSID cases as of 30 June 2011.

3Factory at Chorzow (Germ v Pol), 1928 PCIJ (ser A) No. 17 (13 September), par 125.

4Damages in International Investment Law, Sergey Rapinsky with Kevin Williams, p182.

5In Canada, the term "price" should be replaced with the term "highest price", ASA Business Valuation Standards, American Society of Appraisers, Glossary.

6International Valuation Standards, Eighth Edition, chapter 2, section 5.0. The term "market value" is defined as "the estimated amount for which a property should exchange on the date

of valuation between a willing buyer and willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion."

7International Valuation Standards, Eighth Edition, evidence note No. 6, par 5.14.3.5.

8Interference may also be in the form of changes to the regulatory framework. Damages in International Investment Law, Sergey Rapinsky with Kevin Williams, p8.

9Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (ICSID Case No. ARB/84/3) Award, 20 May 1992, par 42 and 43.

10Ibid, par 61.

11Ibid, par 61.

12Ibid, par 61.

13Ibid, pars 62 to 65.

14Ibid, par 158.

15Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt (ICSID Case No. ARB/05/15) Award, 1 June 2009, par 18.

16Ibid, par 23.

17Ibid, par 24.

18Ibid, par 33.

19Ibid, par 34.

20Ibid, pars 35 to 48.

21Ibid, par 465. The tribunal also found that Egypt failed to provide full protection to the claimants' investment; that Egypt failed to ensure the fair and equitable treatment of the claimants' investment; and that Egypt allowed the claimants' investment to be subjected to unreasonable measures.

22Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (ICSID Case No. ARB/84/3) Award, 20 May 1992, pars 184 to 185.

23Ibid, par 188.

24Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt (ICSID Case No. ARB/05/15) Award, 1 June 2009, pars 549 to 552

25Ibid, par 519.

26Ibid, pars 566 and 570.

27Ibid, par 567.

28Ibid, pars 568 to 569.

29Ibid, par 570.

30Ibid, par 551.

31Ibid, par 574.

32Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (ICSID Case No. ARB/84/3) Award, 20 May 1992, par 197.

33Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt (ICSID Case No. ARB/05/15) Award, June 1, 2009, par 564.

34Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4).

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US Developments in Class Arbitration:What Comes Next?

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Arbitration clauses are now widespread in consumer and employment contracts in the United States. Perhaps predictably in light of that development, the American arbitral community has in the last 10 years explored the possibility of bringing claims under or related to such contracts as class actions overseen by a panel of arbitrators. In 2003, for example, the American Arbitration Association issued guidelines for the conduct of class arbitrations and has published a growing number of class arbitration decisions.1 In response to these developments, a number of companies inserted in their form contracts with consumers, customers and employees arbitration clauses that barred class arbitrations. Two recent decisions of the United States Supreme Court - one in April 2010 and the second a year later - have considered significant issues with respect to the availability of class arbitration. Taken together, they evince a profound suspicion of the class arbitration mechanism and will inevitably have the effect of reducing its availability.

In Stolt-Nielsen, SA v AnimalFeeds International Corp, decided in April 2010, the US Supreme Court prohibited arbitrators from imposing class arbitration on parties that had not agreed to it - that is, in cases in which an arbitration clause is "silent" on whether class arbitration is permitted.2 Subsequently, in AT&T Mobility LLC v Concepcion, the Court ruled that the Federal Arbitration Act (FAA) preempts state-law decisions holding that class arbitration waivers in many consumer form contracts are presumptively unconscionable and therefore unenforceable.3 This article briefly surveys the two cases, outlines some of their implications, and highlights questions that remain open and can be expected to be (and indeed have already been) the subject of continuing litigation in the area.

Imposition of class arbitration without consent

In Stolt-Nielsen, the Supreme Court held that imposing class arbitration in the absence of an agreement by the parties to permit class arbitration would violate the "foundational FAA principle that arbitration is a matter of consent."4 As such, the Court vacated an arbitral award that had directed class arbitration where the parties had not agreed to it.5

The case arose from separate suits brought by AnimalFeeds and other Stolt-Nielsen customers, each accusing the maritime shipping company of price-fixing.6 During the arbitration, the parties stipulated that their arbitration agreements were silent regarding class arbitration, but they disagreed about whether that silence precluded the claims from being arbitrated as part of a class. Ruling in favour of AnimalFeeds, the tribunal allowed the class arbitration to proceed. Petitioners sought judicial review of that decision in federal trial court,

which vacated the tribunal's decision.7 On appeal, the United States Court of Appeals for the Second Circuit reversed.8 The Supreme Court, by a vote of 5-3,9 agreed with the District Court.

In its opinion, the Supreme Court acknowledged that Stolt-Nielsen faced a "high hurdle" in seeking to overturn the arbitral award directing class arbitration.10 Specifically, the FAA provides four grounds on which a court may vacate an arbitral award: fraud, corruption, other serious misconduct or "where the arbitrators exceeded their powers."11 The Court has generally characterised these grounds as very limited.12 That stringent standard was met in this case, however, because in the Court's view the arbitral tribunal had "exceeded its powers" in that the tribunal had based its decision on policy considerations rather than on any governing law.13 Although the panel's opinion had not mentioned policy in its award, the Supreme Court found that the tribunal's ruling rested not on the two bodies of law that could have applied to this dispute - New York or maritime contract law - but instead on the tribunal's own perceptions about the merits of class arbitration as a policy matter.14 As discussed below, this application of the excess-of-power ground for overturning arbitral awards is a significant expansion of that ground and will likely be a fertile source of further litigation in other cases.

After finding that the Stolt-Nielsen arbitral tribunal had exceeded its powers, the majority decided the class arbitration question itself and held that the FAA barred class arbitrations where the arbitration clause was silent.15 The Court found that the FAA forbids a tribunal from authorising class arbitration in the absence of the parties' consent because class arbitration differs dramatically from bilateral arbitration in form and economics.16 The Court found, for example, that class arbitration lacks privacy and confidentiality protections, requires the adjudication of the rights of absent parties, and can entail the resolution of extraordinarily high-value claims without the possibility of any but the narrowest appeal on the merits. As such, the Court explained, arbitrators cannot presume that a party consenting to bilateral arbitration had also consented to class arbitration.

Notably, the Court did not state that the parties' consent had to be explicit: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorise class-action arbitration."17 But the Court strongly suggested that the burden of finding an agreement to permit class arbitrations would be a high one: "An implicit agreement to authorise class-action arbitration... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."18

Unconscionability of class arbitration waivers

A year later in Concepcion, the Court considered an arbitration clause that was not only not "silent" on class arbitration, but expressly barred it. The Court held that arbitration agreements waiving class arbitration are enforceable in accordance with their terms and that the FAA pre-empts state laws that would otherwise deem such class action waivers unconscionable.19

In 2006, the Concepcions filed a complaint in federal district court against AT&T, alleging that the company defrauded them by charging sales tax - in their case, approximately US$30 - on phones advertised as free.20 The complaint sought to have the case proceed as a class action. AT&T moved to bar the class action by filing a motion to compel individual arbitration. The AT&T arbitration clause provided a decidedly pro-consumer procedure, stipulating that AT&T had to pay all costs for non-frivolous claims, arbitration had to take place in the county where the customer is billed, and the arbitrator could award any form of individual relief,

including injunctions and presumably punitive damages. In addition, AT&T could not seek reimbursement of attorneys fees and, in the event that a customer obtained an arbitration award higher than AT&T's most recent settlement offer, AT&T had to pay claimants a minimum of US$7,500 and twice their attorneys fees.

The district court, in a decision affirmed by the Ninth Circuit, denied the motion to compel individual arbitration.21 The lower courts relied on a decision of the California Supreme Court in Discover Bank v Superior Court22 that class arbitration waivers are unconscionable and unenforceable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes... predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."23 The district court found the entire arbitration clause unconscionable because AT&T had failed to show that the bilateral arbitration procedures in its contract adequately substituted for the deterrent effect of class actions favoured by California law.24 The Ninth Circuit Court of Appeals also held that the FAA did not pre-empt the California rule.25 Applying section 2 of the Federal Arbitration Act - which provides that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"26 - the Ninth Circuit concluded that the Discover Bank rule was simply a species of unconscionability analysis, a state law ground for revoking contracts generally.27

The Supreme Court reversed in a 5-4 vote. It held that the FAA pre-empts California's Discover Bank rule because that rule "interferes with the fundamental attributes of arbitration" to an extent not tolerated by the FAA.28 Because it is a "fundamental principle that arbitration is a matter of contract," "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms."29 As in Stolt-Nielsen, the majority decision in Concepcion turned on the conclusion that class arbitration is fundamentally different from bilateral arbitration.30

In the course of its opinion, the Supreme Court described AT&T's arbitration process, praising its speed and efficiency and noting that it was likely to ensure relief and provide adequate incentives for the prosecution of meritorious claims.31 Nevertheless, the availability of these consumer-friendly procedures did not appear to be a primary factor in the Court's ruling.

Because of an ongoing disagreement with the Court majority's broad approach to pre-empting state law,32 Justice Thomas joined in the opinion only "reluctantly"33 in order to form a majority. He wrote separately to advance a narrower view of the circumstances in which federal courts could apply state law to invalidate an arbitration agreement. Justice Thomas's concurrence agreed that under section 2 of the FAA, "courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.'"34 But, based on the analysis of the text of the FAA, Justice Thomas would permit a court to invalidate an arbitration clause only where "a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake."35

Interpretation of "silent" arbitration clauses

The Stolt-Nielsen and Concepcion decisions left open several questions that are likely to fuel future litigation. One question is whether Stolt-Nielsen will spawn a line of cases transforming the "exceeding their powers" ground for overturning arbitral awards into a new tool for obtaining review of arbitrators' decisions on the merits. The Supreme Court's decision is an expansion of the traditional application of that ground, however, and it will undoubtedly

lead to many pages in briefs attacking awards on this ground; it is unlikely to lead to many decisions actually overturning awards based on this broadened theory. Limited review of arbitral awards is firmly embedded in American jurisprudence[36] and it is unlikely that the Supreme Court really meant to signal a turning point. Rather, this is likely a case of the Supreme Court saying to lower courts, "do what I say, not what I do." Indeed, the majority in a Court of Appeals decision after Stolt-Nielsen recognises no change in the doctrine and applies the lower court's pre-existing "exceeding their powers" precedents.[37]

Another set of questions concerns the interpretation of arbitration clauses that do not explicitly address the availability of class arbitration. First, after Stolt-Nielsen, who - the arbitration tribunal or the court - has the authority to determine the proper interpretation of such a clause? In Stolt-Nielsen, the Supreme Court, after finding that the arbitral tribunal had "exceeded its powers" in its approach to interpreting the arbitration clause, went ahead and interpreted the clause itself.[38] But it did so because it held that no other conclusion was possible in light of the parties' stipulation that they had reached no agreement on the availability of class arbitration. The Court acknowledged that

> "procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide.-[39]

A number of cases subsequently have faced this question of who decides whether an arbitration clause that does not mention class arbitration should be interpreted to be "silent" on the question. In accordance with the dicta in Stolt-Nielsen, in the overwhelming majority of cases, courts have declined to determine whether the parties agreed to class arbitration and referred that decision to arbitrators.[40] In only one reported federal court decision has the court itself ordered individual arbitration, holding that "[e]ven though Plaintiff Cotton's enrolment agreement did not contain a class action waiver, under Stolt-Nielsen, class arbitration could not be maintained absent an agreement to allow for class arbitration."[41]

Second, if "silent" on class arbitration, how is an arbitration clause typically interpreted and on what grounds? We have reviewed 17 arbitrator decisions decided after Stolt-Nielsen in which the arbitration clause did not explicitly address the availability of class arbitration.[42] In 12 of the 17 arbitrator decisions, the arbitrators found that the agreement did not permit class arbitration, and in five, the arbitrators found that the agreement did permit class arbitration.-[43] The preponderance of decisions finding no consent to arbitration is not surprising in light of Stolt-Nielsen, under which the relevant inquiry is "whether the parties agreed to authorise class arbitration."[44]

The decisions interpreting apparently "silent" arbitration clauses to permit class arbitration are more surprising. The most common rationale offered in arbitral awards is that governing state law "fills the gap" and provides a basis for inferring an agreement to permit class arbitration. In Smith & Wollensky Restaurant Group, Inc v Passow, for example, the District Court of Massachusetts affirmed an arbitrator's decision to permit class arbitration where the arbitrator noted that the broadly-worded agreement to arbitrate contemplated "any claims for wages, compensation and benefits" and was drafted against a background of the Federal Fair Labor Standards Act and the Massachusetts wage and hour laws, which expressly permit class actions.[45] The arbitrator had held that those statutes must be considered part of the agreement and, therefore, demonstrated the parties' intent to arbitrate class claims.[46] Similarly, in Benson v CSA-Credit Solutions of America, Inc, the arbitrator

looked to Texas state contract law to conclude that the parties intended to allow class claims.47 Finding the arbitration clause to be broad, the arbitrator concluded that "supplying an omitted term regarding collective or class arbitration is consistent with the intent of the parties which demonstrably was to authorize arbitration in the broadest possible category of cases."48

Neither of these decisions is persuasive, and they surely are inconsistent with Stolt-Nielsen. Class mechanisms are procedural law, and an arbitration clause no more pulls in class procedures than it pulls in other procedural features of court cases, such as rules of pleading or evidence.49 If an intent to incorporate class action procedures into an arbitration could be inferred from the mere fact that the case would proceed as a class action outside of arbitration, then the Supreme Court would likely have interpreted the parties' stipulation in that case that they had reached no agreement on class arbitration to have been written against the background of federal law that permitted class actions.50 Nevertheless, as a recent federal appeals court decision illustrates,51 once an arbitrator has so construed a contract, a reviewing court may well uphold the decision, notwithstanding the Supreme Court's robust view of the "exceeding their powers" ground for overturning an award.

Limitations on class arbitration waivers

The Concepcion decision is more recent and there have been relatively few decisions addressing its limits. Plaintiffs' attorneys seeking to bring consumer and employee actions as class actions are likely to test the limits of that case as they have Stolt-Nielsen, but the prospects for success are uncertain.

First, the majority did not rule that unconscionability rules can never apply to arbitration clauses. Plaintiffs' lawyers can be expected to argue that a class action waiver in a particularly one-sided arbitration waiver is unconscionable not because of the fact that arbitration is at issue, but because of the particular features of the arbitration clause or the overall one-sided bargain struck. In addition, the majority left the door open to other forms of regulation applying to arbitration clauses in consumer contracts: "Of course states remain free to take steps addressing the concerns that attend contracts of adhesion - for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted."52 This remark could lead to a patchwork of state laws governing contract formation, potentially making it difficult for companies to design a system for national compliance.

Second, the question remains whether the numerous pro-consumer aspects of the AT&T arbitration agreement are necessary to ensure the enforceability of a class arbitration waiver. As noted, the majority did not seem to place much weight on those procedures. Nevertheless, the limits of the Concepcion decision will be tested in the lower courts and the absence of the kind of consumer-friendly procedures that AT&T had included may well turn into a significant ground for distinguishing the case. In particular, the Second Circuit Court of Appeals last year struck down a class waiver in an antitrust case on the ground that the waiver effectively immunised the defendant from liability because it was not economically feasible for plaintiffs to bring antitrust claims individually, in particular because of the high costs of necessary expert testimony.53 The Supreme Court remanded that case for reconsideration in light of its decision in Stolt-Nielsen.54

Third, the decision in Concepcion arose in federal court. Justice Thomas' concurrence was necessary to form a majority. He has said unequivocally in four cases, beginning with Allied-Bruce Terminix Cos v Dobson,55 that none of the FAA's provisions apply in state court.

Justice Thomas did not address this point in his Concepcion concurrence, where it did not apply, but it may be that in a case emanating from state court, no Supreme Court majority would form, or Justice Thomas would vote with the four dissenters in Concepcion. So the extent to which the Concepcion will apply in cases brought in state court will likely be the subject of future litigation.

Congressional or regulatory action?

Some have speculated that the hostility towards class arbitration in Stolt-Nielsen and Concepcion may prompt congressional or regulatory action to remove consumer and employee cases from the realm of arbitration entirely. Following the release of the Concepcion opinion, US senators Al Franken and Richard Blumenthal and representative Hank Johnson said that they planned to reintroduce the Arbitration Fairness Act.56 This version of the Act would invalidate pre-dispute arbitration clauses in employment, consumer and civil rights cases. In addition, the Consumer Financial Protection Bureau (CFPB) has the power under the Dodd-Frank Act to regulate pre-dispute arbitration clauses in consumer financial products and services contracts.57 Congress has directed the CFPB to conduct a study concerning the use of pre-dispute arbitration in this context and report back.

Conclusion

Class arbitrations have undoubtedly hit their high-water mark. Indeed, it now appears that the Stolt-Nielsen and Concepcion decisions are part of a broader retrenchment by the Supreme Court on class action procedures. In June 2011, the Court in Wal-Mart Stores, Inc v Dukes et al58 overturned the certification of a class of some 1.5 million female employees asserting claims against Wal-Mart for injunctive relief and monetary damages in the form of back pay. The majority held that the class commonality requirement was not met because there was no "significant proof" that Wal-Mart operates under a "general policy" that discriminated against female employees. While there will undoubtedly be numerous cases testing the limits of Stolt-Nielsen and Concepcion, decisions reaching a pro-class arbitration result that reach the Supreme Court are likely to find a sceptical bench.

Notes

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1
Supplementary Rules for Class Arbitrations, American Arbitration Association (8 October 2003), www.adr.org/sp.asp?id=21936; Searchable Class Arbitration Docket, American Arbitration Association (last visited 25 July 2011), www.adr.org/sp.asp?id=25562.

2130 S Ct 1758 (2010).

3131 S Ct 1740 (2011).

4130 S Ct at 1775.

5Id at 1768-70.

6Id at 1764-66.

7Stolt-Nielsen SA v Animalfeeds Int'l Corp, 435 F Supp 2d (SDNY 2006).

8Stolt-Nielsen SA v Animalfeeds Int'l Corp, 548 F3d 85 (2d Cir 2008).

9Before her appointment to the Supreme Court, Justice Sotomayor was a member of the appeals court panel that decided an earlier version of the case, JLM Industries, Inc v

Stolt-Nielsen SA, 387 F.3d 163 (2d Cir 2004); she did not participate in the Supreme Court's decision.

10130 S Ct at 1767.

119 USC sections 10(a)(1)-(4) (2009).

12See First Options of Chicago, Inc v Kaplan, 514 US 938, 942 (1995) (section 10(a) authorises vacatur "only in very unusual circumstances").

13130 S Ct at 1770.

14Id at 1768-69.

15Id at 1776.

16Id

17Id at 1776 n.10. As noted, the parties had stipulated that their contract was silent on whether class arbitration was permitted, so the Court found it had no reason to analyse, for example, the drafting history, usages of trade or other factors that might suggest an implicit agreement to permit class arbitration. See id at 1770.

18Id at 1775.

19131 S Ct 1740.

20Id at 1744.

21Laster v AT&T Mobility LLC, 584 F3d 849 (9th Cir 2009); Laster v T-Mobile USA, Inc, No. 05cv1167, 2008 WL 5216255 (SD Cal 11 August 2008).

22113 P3d 1100 (Cal 2005).

23Id. at 1110.

242008 WL 5216255, at *14.

25584 F3d at 856.

269 USC section 2 (2006).

27584 F3d at 857.

28131 S Ct at 1748.

29Id at 1745 (citations omitted).

30Id at 1751-52.

31Id at 1744, 1753.

32Id at 1754 (Thomas, J., concurring).

33Id.

34Id at 1753.

35Id at 1755 (citation omitted).

36An instructive example is the history of the judicially created ground for overturning arbitral awards for "manifest disregard" of law. See Wilko v Swan, 346 US 427, 436 (1953). This ground is often invoked but very rarely successful.

37Jock v Sterling Jewelers Inc, No. 10-3247-cv, 2011 WL 2609853, at *7-8 (2d Cir 1 July 2011).

38131 S Ct at 1770.

39Id at 1775 (quoting Howsam v Dean Witter Reynolds, Inc, 537 US 79, 84 (2002)).

40See, eg, Winn v Tenet Healthcare Corp, No. 2:10-CV-02140-JPM-CGC, 2011 WL 294407 (WD Tenn 27 January 2011); Fisher v General Steel Domestic Sales, LLC, No. 10-CV-01509-WYD-BNB, 2010 WL 3791181 (D Colo 22 September 2010); Smith v Cheesecake Factory Rests, Inc, No. 3:06-00829, 2010 WL 4789947 (MD Tenn 16 November 2010).

41Miller v Corinthian Colls, Inc, 769 F Supp 2d 1336, (D Utah 2011) (citing Stolt-Nielsen, 130 S Ct at 1775).

42Clark v CHDP Condo, LLC, AAA No. 11-115-Y-01921-09 (2010) (Dreier, Harr, & Hendrick, Arbs.), www.adr.org/si.asp?id=6254; Dealer Computer Servs, Inc v Randall Ford, Inc, AAA No. 11-117-Y-002788-06 (2011) (Widman, Silverman, & Marshall, Arbs.), www.adr.org/si.asp?id=6464; Emergency Physicians of St Clare's LLC v ProAssurance Corp, AAA No. 11-195-Y-01789-10 (2011) (Chambers, Arb.), www.adr.org/si.asp?id=6588; LA Health Serv Indem Co v DVA Renal Healthcare, Inc, AAA No. 11-193-02297-06 (2011) (Frank, Jr & Perry, Jr, Arbs), www.adr.org/si.asp?id=6465; Maslo v Oak Pointe Country Club, Inc, AAA No. 11-181-02243-06 (2010) (Esshaki, Arb.), www.adr.org/si.asp?id=6214; McCalley v NVR, Inc, AAA No. 11-110-01323-09 (2011) (Barrett, Arb), www.adr.org/si.asp?id=6463; Mensch v Alta Colls, AAA No. 11-516-00995-09 (2010) (Baker, Arb.), www.adr.org/si.asp?id=6146- ; Nabors v Peco Foods, Inc, AAA Case No. 11-181-2467-08 (2010) (Sneed, Arb.), www.adr.org/si.asp?id=6218; Pardun v AT&T Corp, AAA Case No. 11-160-01767-07 (2011) (Bissell, Arb.), www.adr.org/si.asp?id=6585; Spradlin v Trump Ruffin Tower I, LLC, AAA No. 11-115-Y-01846-09 (2010) (LaMothe, Arb.), www.adr.org/si.asp?id=6232; Sussex v Turnberry/MGM Grand Towers, LLC, AAA No. 11-115-01858-09 (2011) (Hare, Arb), www.adr.org/si.asp?id=6468; Todd v Credit Solutions of Am, Inc, AAA No. 11-516-01254-09 (2010) (Mainland, Arb), www.adr.org/si.asp?id=6406.

43Benson v CSA-Credit Solutions of Am, Inc, AAA No. 11-160-M-02281-08 (2010) (Meyerson, Arb), www.adr.org/si.asp?id=6139; Demetriou v Earthlink, Inc, AAA No. 11-117-00273-10 (2010) (Hare, Arb.), www.adr.org/si.asp?id=6349; Knudsen v N Motors, Inc, AAA No. 11-155-02699-09 (2010) (Daerr-Bannon, Arb), www.adr.org/si.asp?id=6236; Passow v Smith & Wollensky Rest Grp, Inc, AAA No. 11-160-00357-08 (2011) (Gestel, Arb), www.adr.org/si.asp?id=6467; SWLA Hosp Assocs v Corvel Corp, AAA No. 11-193-2760-06 (2010) (Gary & Moreland, Arbs.), www.adr.org/si.asp?id=6212.

44Eg, Emergency Physicians of St Clare's LLC v ProAssurance Corp, AAA No. 11-195-Y-01789-10 (2011) (Chambers, Arb) at 9, www.adr.org/si.asp?id=6588 (quoting Stolt-Nielsen, 131 S Ct at 1776); see, eg, Pardun v AT&T Corp, AAA Case No. 11-160-01767-07 (2011) (Bissell, Arb) at 5, www.adr.org/si.asp?id=6585 (citing Stolt-Nielsen, 131 S Ct at 1776).

45Smith & Wollensky Rest Grp, Inc v Passow, No. 10-11498-EFH, 2011 WL 148302, at *1 (D Mass 18 January 2011) (citing Passow v Smith & Wollensky Rest Grp, Inc, AAA No. 11-160-00357-08 (2011) (Gestel, Arb) at 9, www.adr.org/si.asp?id=6467).

462011 WL 148302, at *1.

47Benson v CSA-Credit Solutions of America, Inc, AAA No. 11-160-M-02281-08 (2010) (Meyerson, Arb.), www.adr.org/si.asp?id=6139.

48Id at 6.

49See Jock, 2011 WL 2609853, at *17 (Winter, J, dissenting) (arguing that a clause providing that the arbitrators would have power to award "any types of legal or equitable relief that would be available in a court of competent jurisdiction" "refers only to relief in the form of an award based on a violation of law or contract - damages, injunctions, etc - and not to the availability of procedures used to pursue such relief").

50Admittedly, there is somewhat more basis for finding class procedures to be part of the substantive law where, as in the Smith & Wollensky decision, the governing substantive law (and not just general procedural rules) incorporates class procedures. But even there it is a leap too far to say that the parties "agreed" to provide for class procedures where they did not even refer to that governing statute with any specificity.

51In Jock, the Second Circuit upheld a pre-Stolt-Nielsen arbitrator's decision that an arbitration clause that did not mention class actions should be interpreted to permit an arbitrator class action based in part on a clause that gave the arbitral tribunal power to award "any types of legal or equitable relief that would be available in a court of competent jurisdiction." Jock, 2011 WL 2609853, at *3, 12. The court, in a 2-1 decision, held that this reasoning "had a colorable justification under Ohio law." Id. at *9

52AT&T Mobility, 131 S. Ct. at 1750.

53In re Am. Express Merchs.' Litig., 554 F.3d 300 (2d Cir. 2009).

54Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010).

55513 U.S. 265, 285 (1995).

56Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts against Corporations, Senator Al Franken (Apr. 27, 2011), http://franken.senate.gov/?p=press_release&id=1466.

5712 U.S.C. § 5518 (2010).

58131 S. Ct. 2541 (2011).

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The New ICC and UNCITRAL Rules: Focus on Cost-Effectiveness and Multiparty Disputes

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Introduction

Two prominent sets of international arbitration rules were revised in the past year: the Rules of Arbitration of the International Chamber of Commerce (ICC) and United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. This article summarises the most significant changes to these rules, including changes that respond to criticisms that international arbitration has become increasingly costly and inefficient, and particularly so with respect to the increasing number of disputes involving more than two parties.

The critical distinction between the ICC Rules and the UNCITRAL Rules is, of course, that the UNCITRAL Rules are not administered by any particular arbitration institution, while the ICC Court of Arbitration (ICC Court) administers and supports arbitrations under the ICC Rules. Although discussion of the relative advantages and disadvantages of institutional and ad hoc arbitration is beyond the scope of this article, in general terms, the UNCITRAL Rules are intended to allow parties to resolve their disputes autonomously, resorting to national courts and designated appointing authorities only if required and in order to facilitate the arbitration. For arbitrations conducted under the ICC Rules, the ICC Court formally appoints arbitrators, determines issues not agreed between the parties (eg, number of arbitrators, seat of the arbitration, etc) and challenges to the appointment of arbitrators, approves Terms of Reference, and scrutinises awards before delivery to the parties.

The new ICC Rules, which will take effect on 1 January 2012, are the product of the first revision since 1998. The new ICC Rules are principally intended to increase the efficiency and cost-effectiveness of ICC arbitration without disturbing provisions that substantially differentiate the ICC Rules from other institutional arbitration rules. Other amendments to the ICC Rules concern appointment of arbitrators; proceedings involving multiple parties, multiple contracts and consolidation; emergency arbitrators; and costs of arbitration.

The new UNCITRAL Rules, which came into effect for contracts entered into after 15 August 2010, replace the original 1976 version of the rules and follow a four-year review by the UNCITRAL Working Group II, which has met twice a year since 2006. The Working Group

aimed to modernise the rules in important ways without departing from the formula that has made the UNCITRAL Rules so successful.

The new ICC Rules

Introductory Provisions

The new ICC Rules no longer state that the Court is to provide for resolution of "business disputes of an international nature" (article 1 (1), 2012 Rules). This change was made for several reasons.

First, in practice, the ICC Court often considers disputes that lack an international character - in particular, those occurring between nationals of the same state. In 2009, such cases represented 16 per cent of the total number of requests for arbitration filed with the ICC, including a number of such cases from Brazil and Mexico. The 1998 Rules provided that, subject to agreement of the parties, such disputes could be submitted to ICC arbitration. Nonetheless, the reference to "international character" in the 1998 Rules raised questions as to whether an ICC tribunal had jurisdiction to consider a dispute without an "international character." Second, the 2012 Rules no longer refer to the "business nature" of the dispute. This change recognises the fact that the ICC Rules are also used to resolve investment disputes, which are usually not characterised as "business disputes." Furthermore, a new rule, article 1(2), provides that only the ICC Court is authorised to administer arbitrations under the ICC Rules. This rule is further bolstered by article 6(2), which provides that parties agreeing to arbitration under the ICC Rules consent to management of the dispute by the ICC Court. These changes make clear that only the ICC Court may administer disputes under the ICC Rules. From the standpoint of the ICC Court, arbitrations administered by other institutions and resulting awards are not arbitrations and awards under ICC Rules because, inter alia, the ICC Court does not engage in scrutiny and approval of those arbitral awards.

Also, the 2012 Rules no longer refer to the chairman of the ICC Court or arbitral tribunals, but rather to the president of the Court and tribunals.

Appointment of arbitrators

One of the distinguishing features of the ICC Rules is its procedure for appointment of arbitrators. Under the ICC Rules, the parties do not appoint, but only nominate (ie, propose) potential arbitrators; the final decision to approve arbitrators is made by the ICC Court. If a party does not nominate an arbitrator, the ICC Court requests a National Committee to make the appointment, subject to confirmation by the Court. Absent a contrary agreement by the parties, a sole arbitrator or president of the tribunal is appointed by the ICC Court upon a proposal of a National Committee or Group that the ICC Court considers to be appropriate (see article 9(3), 1998 Rules; article 13(2), 2012 Rules). Usually the ICC Court requests such a proposal from the National Committee of a country that is neutral in relation to the parties and to the already confirmed or appointed arbitrators.

Under the 1998 Rules, the ICC Court could directly appoint arbitrators for a party, bypassing the National Committee, only when there was no National Committee, when the National Committee did not make a proposal within the time limit fixed by the Court, or when the proposal of the National Committee was not accepted by the Court. Appointment of a sole arbitrator or a chairman of the tribunal under the 1998 Rules had to be done under a proposal of the relevant National Committee. Only given the presence of special circumstances and in the absence of the parties' objections was the Court entitled to make a direct appointment from a country in which there was no National Committee.

The 2012 Rules, however, give the ICC Court the right to make direct appointments in the following cases:

- one or more of the parties is a state or state entity;
- the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
- the president of the Court certifies to the Court that circumstances exist which, in the president's opinion, make a direct appointment necessary and appropriate. (Article 13 (4), 2012 Rules.)

Some of the introduced changes concern the formal requirements of arbitrators. Under the 1998 Rules, a potential arbitrator was required to submit to the ICC Court a declaration of independence and disclose in writing to the Secretariat any facts or circumstances that might be of such nature as to call into question the arbitrator's independence in the eyes of the parties (article 7(2), 1998 Rules).

In 2009, the ICC Court introduced a procedure under which a potential arbitrator must submit a statement on availability, stating the number of arbitration and court cases in which the potential arbitrator is already involved as party representative, arbitrator or otherwise, and indicating a number of weeks in which he or she will be available to hold hearings in the next 18 months. The ICC Court introduced this requirement to avoid delays that resulted when arbitrators accepted appointments despite being overburdened with other matters. Reflecting this existing practice, the 2012 Rules provide that a potential arbitrator must sign not only a declaration of independence, but also one on his or her availability (article 11 (2), 2012 Rules).

The 2012 Rules also provide that an arbitrator should not only be independent, but also impartial (article 11, 2012 Rules). The 1998 Rules stated that a party was entitled to challenge an arbitrator "for an alleged lack of independence or otherwise" (article 11 (1), 1998 Rules). The absence of the word "impartiality" led to confusion regarding the meaning of the rule. In practice, however, the phrase "or otherwise" covered not only lack of impartiality, but also other cases; including, for example, when an arbitrator committed material misconduct. In order to avoid any uncertainty, the term "impartiality" was included in the 2012 Rules.

Increasing cost-effectiveness and efficiency of arbitration

Perhaps the most substantial changes to the Rules are those intended to improve the cost-effectiveness and efficiency of ICC arbitration.

A new rule, article 22 (1), states that "the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner having regard for the complexity and value of the dispute." Article 22(2) provides, "In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."

Case management conference and procedural schedule

The 2012 Rules require the arbitrators, when drafting the Terms of Reference or as soon as possible thereafter, to convene a case management conference to consult the parties on procedural measures that may be adopted (article 24(1), 2012 Rules). Such measures may include one or more of the case management techniques described in the new Appendix IV to the Rules, titled "Case Management Techniques". Case management conferences may

be conducted through a meeting in person, by video conference, telephone or other similar means of communication.

The 2012 Rules specifically provide that an arbitral tribunal is entitled to request the parties' attendance at any case management conference (in addition, of course, to their outside counsel) (article 24(4), 2012 Rules). The new rule is intended to respond to criticism that outside counsel too often negotiate overly complicated and time-consuming schedules of arbitration proceedings that are not in the best interests of their clients. The presence at the case management conferences of the parties aims to increase the efficiency of arbitrations.

Recommendations for Managing Arbitral Proceedings

The "Case Management Techniques" provided in Appendix IV include:

- Bifurcating the proceedings or rendering one or more partial awards on key issues when doing so may genuinely be expected to result in a more efficient resolution of the case.
- Identifying issues that can be resolved by agreement between the parties or their experts.
- Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.
- Production of documentary evidence:
    - requiring the parties to produce with their submissions the documents on which they rely;
    - when appropriate and to control time and cost, avoiding requests for document production;
    - where requests for documents are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;
    - establishing reasonable time limits for the production of documents; or
    - using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.
- Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain focus on key issues.
- Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential, and using IT such as ICC's NetCase, which enables online communication among the parties, the arbitral tribunal and the ICC Court Secretariat.
- Organising a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed upon and where the arbitral tribunal can indicate to the parties the issues on which it would like the parties to focus at the hearing.
- Settlement of disputes:
    -

Informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules.

- Where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that such steps are not inconsistent with its duty under article 41 to make every effort to ensure that its award is enforceable.

These recommendations were among those included in the ICC publication entitled "Techniques for Controlling Time and Costs in Arbitration", referenced in the 2012 Rules.

Multiple parties, multiple contracts and consolidation

A large number of changes to the ICC Rules concern arbitration involving more than two parties (multi-party arbitration) or based on more than one arbitration agreement (multi-contract arbitration).

According to ICC Court statistics, in 2009, one-third of the ICC cases involved more than two parties. In 88 per cent of these cases, three to five parties were involved and in 12 per cent of these cases, six or more parties. The largest number of parties to a dispute was 19. Cases also exist where the respondent submits a counterclaim not only against the initial claimant or claimants, but against other persons who initially were not parties to the arbitration. Such parties, being brought to the arbitration, may also have claims against other parties. Furthermore, counterclaims may be brought on the basis of other contracts, even when the arbitration clause in the second contract is not identical to the arbitration clause in the contract under which the arbitration was initiated. Situations like these were not sufficiently addressed by the 1998 Rules.

The 2012 Rules specify the procedure for joining additional parties. In order to join, an interested party must send a request to join an additional party to the ICC Secretariat (article 7, 2012 Rules). The joined party is entitled, jointly with the claimant or respondent, to take part in nominating an arbitrator (article 12(7), 2012 Rules). No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree (article 7(1), 2012 Rules). This results from a concern that after the arbitrator is confirmed or appointed by the Court, the additional party will be deprived of an opportunity to take part in formation of the arbitral tribunal, which is perceived by some national courts as a breach of ordre public. In particular, in BKMI and Siemens v Dutco, the French Cassation Court overturned an ICC award issued in a case in which the claimant appointed its own arbitrator, the ICC Court proposed that two co-respondents jointly appoint an arbitrator, and they made this appointment. However, they objected to the requirement to jointly appoint an arbitrator, arguing that each of the co-respondents had differing procedural interests. The French Cassation Court agreed with this position, stating that violation of equal rights of the parties when appointing arbitrators contravenes public policy (French Cass civ. 7 January 1992 (BKMI and Siemens v Dutco)/1992 Journal Du Droit International).

The 2012 Rules also establish the criteria for the Court when deciding on the existence or absence of prima facie jurisdiction in multi-party or multi-contract arbitration (article 6(4), 2012 Rules). In particular:

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Where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any joined additional parties, bound by one arbitration agreement to the prima facie satisfaction of the Court.

- Where claims are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied:
    - that the arbitration agreements under which those claims are made may be compatible; and
    - that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The 2012 Rules also establish the grounds pursuant to which the Court may consolidate arbitrations (article 10, 2012 Rules). Consolidation may take place only at the request of a party; neither the Court nor the arbitral tribunal is entitled to do it on its own initiative.

The Court may consolidate two or more pending arbitrations into a single arbitration, provided that either:

- the parties have agreed to consolidation;
- all of the claims in the arbitrations are made under the same arbitration agreement; or
- where the claims in the arbitrations are made under more than one arbitration agreement:
    - the arbitrations are between the same parties;
    - the disputes in the arbitrations arise in connection with the same legal relationship; and
    - the Court finds the arbitration agreements to be compatible.

Even if all of the above criteria are met, the Court is not required to consolidate proceedings. The Court is most likely to order consolidation in instances where either no arbitrators have been confirmed or appointed in any of the cases, or where the same arbitrators have been confirmed and appointed in all of the cases. Even with the agreement of the parties, it is complicated to consolidate cases where the arbitral tribunals differ, since it would be necessary to decide which of the tribunals will continue proceedings in the consolidated case.

Unless the parties agree otherwise, when arbitrations are consolidated, they shall be consolidated into the arbitration that was first filed.

The 2012 Rules also provide that in an arbitration involving multiple parties, any party may assert claims against any other party (article 8(1), 2012 Rules). Nonetheless, the 2012 Rules preserve the principle that once the Court signs and confirms the Terms of Reference, no new claims can be brought without the permission of the arbitral tribunal (article 8(1), 2012 Rules).

Establishment of an emergency arbitrator

In 1997, the ICC put into effect its Rules for Pre-Arbitral Referee Procedure as a mechanism for parties to obtain interim relief before the constitution of the arbitral tribunal; however, those rules are not widely known and infrequently used. The 2012 Rules essentially adopt the practice that was established by the ICC Pre-Arbitral Referee Rules, except that unlike those rules, the provision automatically applies to ICC arbitration agreements concluded after 1 January 2012 unless the parties affirmatively opt-out of the provision. Thus, parties needing urgent interim or conservatory measures no longer need to wait for the constitution of a tribunal. Now a party need only apply for an emergency arbitrator. Although the arbitral tribunal will be entitled to modify, terminate or annul the actions of the emergency arbitrator, this new provision offers immediate relief to those seeking orders urgently.

Under the 1998 Rules, a party could obtain conservatory or interim measures only after the arbitral tribunal was formed (article 23, 1998 Rules), as there was no one in a position to make such a decision before the arbitral tribunal was constituted. The 2012 Rules incorporate key provisions of those rules directly into the ICC Rules, in a similar fashion to measures taken by other arbitral institutions (article 29, 2012 Rules).

Under article 29 of the new Rules, a party needing urgent interim or conservatory measures before the arbitral tribunal is constituted may apply for such measures pursuant to the provisions establishing an emergency arbitrator. A party may submit such an application even before submitting a request for arbitration; however, in that case, and unless the emergency arbitrator sets a longer deadline, the request must be submitted within 10 days after filing an application.

Under the 2012 Rules, the parties undertake to comply with any order made by the emergency arbitrator (article 29(2), 2012 Rules). However, the arbitral tribunal, after its composition, is entitled to modify, terminate or annul the order issued by the emergency arbitrator (article 29(3), 2012 Rules).

Confidentiality

Parties often mistakenly assume that international arbitration proceedings are confidential when in fact most arbitration rules provide for only limited confidentiality. The 2012 Rules preserve the limited obligation of confidentiality expressed in the 1998 Rules, which requires employees of the ICC Court Secretariat, arbitrators and members of the ICC Court to maintain the confidentiality of the proceedings.

The new ICC Rules do not disturb this premise that the confidential nature of the arbitration should be resolved by the parties themselves, rather than by the Rules. The 2012 Rules are also consistent with the view that states and state entities may not necessarily require confidential proceedings. Nonetheless, the 2012 ICC Rules include a rule by which, upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matter in connection with the arbitration, and may take measures for protecting trade secrets and confidential information (article 22 (3), 2012 Rules).

Costs of arbitration

The 2012 Rules preserve the basic framework on costs set forth in the 1998 Rules, with several exceptions. Under the 2012 Rules, in making decisions on costs, the arbitral tribunal "may take into account such circumstances as it considers relevant," which includes "the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner" (article 37(5), 2012 Rules). This provision aims to give "teeth" to other provisions in the 2012 Rules designed to improve the efficiency of ICC arbitration.

New article 37(6) provides that in the event the arbitration is terminated or the claims are withdrawn before a final award is rendered, the ICC Court shall fix the fees and cover the expenses of the arbitrators and any ICC administrative expenses. Where the parties have not agreed on how costs are to be allocated or on other relevant issues relating to costs, the arbitral tribunal is to decide such matters. If the arbitral tribunal has not been constituted at the time of termination or withdrawal of claims, any party may request that the ICC Court constitute the arbitral tribunal for the purpose of making decisions on costs.

Finally, a new provision on the advance on costs has been added concerning arbitrations involving multiple parties and multiple claims. New article 36(4) provides that when claims are made under article 7 ("Joinder of Additional Parties") or article 8 ("Claims Between Multiple Parties"), the ICC Court shall fix one or more advances on costs payable by the parties "as decided by the Court." Thus, there is no presumption of payment in equal shares, as there is when the arbitration involves two parties only. Compare article 36(4) of 2012 Rules with article 36(2) of 2012 Rules.

The new UNCITRAL rules

Effective date

Under article 1(2), only parties to arbitration agreements or clauses concluded after 15 August 2010 will be presumed to have agreed to apply the new Rules. The 1976 Rules will be presumed to continue to apply to those agreements or clauses that were either entered into before 16 August 2010 or that result from an offer that was made before that date. This means, in practice, that the 1976 Rules will continue to apply and be in use for a significant time to come as they will cover all future disputes arising from contracts and treaties concluded before 16 August 2010 unless the parties provide otherwise.

Focus on time and cost

In an attempt to address concerns regarding perceived increases in the time and cost of arbitration, a duty has been placed on the arbitral tribunal to minimise cost and delay. While article 17 maintains the arbitral tribunal's broad discretion regarding the conduct of the arbitration, as provided for in the 1976 Rules, it now requires the arbitral tribunal to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

Response to the notice of arbitration

Unlike many other arbitral rules, the 1976 Rules did not provide for a respondent to file a response to the claimant's notice of arbitration. This led to the unsatisfactory position that a respondent might take no steps in the arbitration until the service of its defence.

Article 4.1 of the new Rules now requires the respondent to file a response to the notice of arbitration within 30 days of receipt of the notice, which reflects typical practice occurring under the 1976 Rules. The response is required to provide the contact details of the respondent and "a response to the information set forth in the notice of arbitration". Article 4.2 provides that the response may include the following:

- any plea that the arbitral tribunal to be constituted lacks jurisdiction;
- proposal for an appointing authority;
- proposal for a sole arbitrator or nomination of a party appointed arbitrator;
- a brief description of any cross-claim or counterclaims; and
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a notice of any claim against a third party who is also a party to the arbitration agreement.

From the non-mandatory wording of article 4.2, it would appear that a failure to raise any of these issues in the response, in particular those in relation to jurisdiction, counterclaims or third party claims, will not prevent them for being raised at a later stage. Indeed, as is common with other arbitration rules, article 23 explicitly provides that pleas that the arbitral tribunal does not have jurisdiction can be raised as late as the time of submission of the statement of defence. Such an approach is entirely sensible as it may not be clear based on the notice of arbitration whether the arbitral tribunal lacks jurisdiction and the issue may only reveal itself once the claimant serves a detailed statement of claim.

Appointing authorities

Article 6 contains new rules regarding designating and appointing authorities, which are aimed at encouraging parties to agree on an appointing authority as soon as possible during the arbitration. The model arbitration clause for contracts, as set out in an annex to the new Rules, contains an option but not a requirement for the parties to specify the appointing authority in the arbitration clause. In default of agreement, and upon the request of either party, the secretary general of the Permanent Court of Arbitration (PCA) at The Hague will designate the appointing authority.

Multi-party arbitration

The Rules also contain new provisions relating to multi-party arbitrations, including in relation to the filing of the response (article 4(2)(f)) and the appointment of arbitrators (article 10). Article 10 provides how arbitrators should be appointed where there are multiple claimants or respondents. This is discussed immediately below.

Challenge and replacement of arbitrators

The rules relating to the challenge and replacement of an arbitrator have been redrafted but remain broadly consistent with the 1976 Rules. The main difference is that a new provision has been introduced by article 14(2) that allows the appointing authority, where an arbitrator is to be replaced at the request of a party or in exceptional circumstances, to deprive a party of its right to appoint the substitute arbitrator. The appointing authority can either appoint the substitute arbitrator itself or, if it occurs after the closure of hearings, authorise the other arbitrators to proceed with the arbitration and make any decision or award. It will be interesting to see in what circumstances this power is exercised and whether the exercise of this power will result in challenges to the award, form the basis to seek to deny the enforcement of the award or both.

The new Rules also provide as an annex a model statement of independence that can be made by arbitrators. Furthermore, there is an additional optional statement that a party may request from a potential arbitrator regarding the arbitrator's ability to dedicate the necessary time for the conduct of the arbitration. This is in response to increasing dissatisfaction on the part of parties to arbitrations regarding delays in proceedings (particularly in finding dates for hearings and in the production of awards) caused by the lack of availability of arbitrators who have accepted an appointment. It follows the ICC's lead on this issue.

Arbitrators' liability

Article 16 of the new Rules contains an entirely new provision that waives the parties' rights to make any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration, except where there has been intentional wrongdoing.

Statements of case

Under the 1976 Rules, there was no explicit requirement that the statements of case (eg, statements of claim and statements of defence) include legal grounds or arguments, although in practice this was the approach adopted by most practitioners. The new Rules now make it clear that statements of case are to include legal grounds or arguments supporting the claim.

Likewise, while the inclusion of documents or other evidence with the statements of case was optional under the 1976 Rules, the new rules now require that the statements of case should, as far as possible, be accompanied by all documents and other evidence relied upon or made reference to by the parties in the statement.

Interim measures

The rules relating to the arbitral tribunal's power to order interim measures have been expanded significantly by the new Rules. The Rules not only set out in greater detail the types of interim measures that may be ordered, but also set out a test to be satisfied for the arbitral tribunal to order such measures.

The Rules provide, in a non-exhaustive list, that an arbitral tribunal may order a party to:

(a) maintain or restore the status quo pending determination of the dispute;

(b) take measures that prevent or refrain parties from taking action that is likely to cause:

(i) current or imminent harm; or

(ii) prejudice to the arbitral process itself;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) preserve evidence that may be relevant and material to the resolution of the dispute.

The party requesting an interim measure under paragraphs (a) to (c) above is required to satisfy the arbitral tribunal that:

- harm not adequately reparable by an award of damages is likely to result if the measure is not ordered and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

Under the 1976 Rules, there are no explicit criteria according to which an application for an order for interim measures should be assessed. The absence of such criteria rendered the potential outcome of such an application more uncertain. The codification of factors that the arbitral tribunal is to take into account should ensure greater consistency in UNCITRAL arbitration and greater certainty for the parties. It will be interesting to see whether arbitral tribunals in future arbitrations under the 1976 Rules adopt the criteria set out in the new Rules to assess applications for interim measures as a matter of practice.

Choice of law

According to article 35 of the new Rules, in the absence of a choice of law by the parties, "the arbitral tribunal shall apply the law which it determines to be appropriate." This replaces the need for the arbitral tribunal to apply the law determined by the conflicts of laws rules, which it considered applicable, and brings the new Rules in line with other international arbitration rules.

Arbitrators' fees

Article 41.3 of the new UNCITRAL Rules allows the parties to ask the appointing authority to review the basis upon which the arbitral tribunal will determine its fees and expenses within 15 days of the arbitral tribunal providing an explanation. The appointing authority may, within 45 days of the referral, make changes to the arbitral tribunal's fee proposal, which are binding on the arbitral tribunal, if the appointing authority considers that the original proposal is inconsistent with article 41.1, which provides that "the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case."

When the parties are notified by the arbitral tribunal of its actual fees and expenses, the arbitral tribunal now has an obligation to explain the manner in which the corresponding amounts have been calculated. The parties then have 15 days during which they can ask the appointing authority (or in the absence of one, the secretary general of the PCA) to review the arbitral tribunal's fees. If the appointing authority finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's previous fee proposal or is otherwise manifestly excessive, it shall, within 45 days, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy article 41.1, with such adjustments being binding upon the arbitral tribunal.

Appeals

Unlike the default position in most other major international arbitration rules, the new Rules, like the 1976 Rules, do not exclude any right of a party to appeal an award in the national courts. However, the model arbitration clause annexed to the new Rules includes as an option an additional provision waiving the parties' rights to any form of recourse against an award to any court insofar as possible. Such a waiver would not oust mandatory provisions of the relevant national law, however.

Notes

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Current Challenges to Consumer Arbitration in the United States: Much Ado About Nothing For International Arbitration?

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Recent US Supreme Court decisions involving consumer arbitration and related legislation proposed in the US Senate appear to have led some to question the continued acceptance of international arbitration in the United States. While such concerns are understandable, they are unfounded. The recent developments involve the specific context of consumer arbitration that implicate unique considerations and are limited to the domestic sphere. Outside of this narrow context, arbitration - and particularly international arbitration - continues to thrive in the United States. In the words of one appellate court, "[one] of the dark chapters in [US] legal history concerns the validity, interpretation and enforceability of arbitration agreements… [;] to the courts and to the judges they were anathema."1 The United States Arbitration Act (now known as the Federal Arbitration Act (FAA)) in 1925 moved the United States away from these "dark chapters" by rendering arbitration agreements valid, irrevocable and enforceable, and ever since, including most recently, arbitration has become entrenched in the jurisprudence of the United States as an acceptable - and often preferable - mechanism for dispute resolution.

The first part of this article examines the US Supreme Court's recent decisions involving consumer arbitration. The second part considers the newly proposed "Arbitration Fairness Act" in the US Congress, fueled by a reaction to the Supreme Court decisions. The third part concludes that these events will have no bearing on the status of international arbitration in the US, and draws from a number of examples of recent decisions in US courts that demonstrate that international arbitration is currently enjoying widespread acceptance in the United States.

The US Supreme Court's foray into class arbitration of consumer disputes

Bazzle, Stolt-Nielson and Concepcion: The rapid rise and fall of class arbitration

Historically, class arbitration, the arbitral corollary to class action suits, was a relatively rare occurrence in the United States. This changed to some degree with the Supreme Court's June 2003 decision in Greentree Financial Corp v Bazzle, 539 US 444 (2003). In Bazzle, the Court undertook to evaluate the lower court's holding that class arbitration is permissible even if a contract is silent on the issue. Rather than confronting the question head on, the Court concluded that the issue was one of contract interpretation, requiring an evaluation of the type of arbitral procedures permitted by the contract. As such, the Court reasoned, it fell to the arbitrator, rather than the courts, to decide the issue.2 Accordingly, the Court vacated the lower court's decision and remanded the case to the arbitrator. While the Court did not explicitly endorse the use of class arbitration, Bazzle was nevertheless widely viewed as a victory for class arbitration and even prompted a number of the leading arbitration institutions, such as the American Arbitration Association (AAA), to issue rules governing class arbitrations.3 This in turn led to a substantial increase in the number of class arbitrations administered by the AAA and other such institutions.4

Just seven years later, in Stolt-Nielsen SA v AnimalFeeds International Corp, 130 S Ct 1758 (2010), the Supreme Court substantially distanced itself from the holding in Bazzle. As in Bazzle, the arbitration clauses at issue in the case were silent on the availability of class arbitration. The parties, several shipping companies and their customers, entered into a supplemental agreement providing for an arbitral tribunal to decide the issue.5 The tribunal concluded that class arbitration was proper because arbitral tribunals following the Bazzle decision had found "a wide variety of clauses in a wide variety of settings as allowing for class arbitration," and the evidence did not demonstrate an intent to preclude class arbitration.6

In the Stolt-Nielson case, the Supreme Court ultimately rejected the tribunal's decision. The Court held, in no uncertain terms, that there must be a contractual basis indicating party consent to class arbitration before it may be ordered by an arbitrator or court; in other words, silence is not enough. The Court noted that Bazzle "did not establish the rule to be applied in deciding whether class arbitration is permitted," and set out to answer that very question.7 In so doing, the Court turned to the basic principle of party consent at the heart of the FAA. The Court found that, because the arbitration agreements were silent as to class arbitration, the arbitral tribunal's conclusion was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."8 Accordingly, the Court declared that in order to require the parties to submit to class arbitration, there must be a contractual basis evincing the parties' agreement to participate in class arbitration. The Court explicitly limited its holding to class arbitration, by observing that class arbitration differs from most procedural matters in that it fundamentally alters the nature of arbitration proceedings. Indeed, the Court reiterated the general rule that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide."9

The Court's most recent decision in AT&T Mobility v Concepcion in April of 2011, while it spurred a flood of criticism, was largely an extension of the rationale set forth in Stolt-Nielson and was similarly circumscribed in its holding. Unlike the arbitration clauses in Stolt-Nielson, however, the arbitration clause in Concepcion explicitly prohibited class arbitration. The consumers who had purchased AT&T phones initiated a lawsuit against AT&T for falsely advertising free phones, when in fact AT&T charged sales tax for the phones. The suit was consolidated with a class action involving similar facts.10 When AT&T moved to compel arbitration, the consumers opposed the motion, asserting that the waiver of class arbitration contained in their contract with AT&T was unconscionable under California law, which explicitly prohibited class action waivers in arbitration agreements in consumer contracts.11

The Supreme Court granted certiorari in Concepcion to determine whether the California law was pre-empted by the FAA, because it disfavoured the use of arbitration by rendering arbitration clauses that include class action waivers unenforceable. The thrust of the Supreme Court's analysis centred on its interpretation of the FAA's underlying purposes. The Court noted that while the "principal purpose" of the FAA is to "ensure that private arbitration agreements are enforced according to their terms,"12 another purpose of the FAA and of arbitration in general is to "achieve streamlined proceedings and expeditious results."13 According to the Supreme Court, California's law was inconsistent with the FAA because it permitted parties to demand a form of arbitration that was not provided for in the arbitration agreement, a form that is vastly different from the type of "bilateral" arbitration envisioned by the FAA.14 Specifically, the Supreme Court opined that by its very nature, class-wide arbitration does not allow for informality, lower cost and greater efficiency - the very purposes that the FAA promotes.15 Moreover, class arbitration "increases risks to defendants" by omitting multi-layered review and is thus "poorly suited to the higher stakes of class litigation."16 Accordingly, the Court found that California law forbidding waivers of class arbitration was incompatible with the FAA and was therefore pre-empted (ie, rendered invalid) by the FAA.17

The Supreme Court's decisions were based on narrow grounds and preserve the federal policy of promoting arbitration

The decisions in Concepcion and Stolt-Nielson have led some commentators to fear that the Supreme Court fundamentally misconceived the nature of arbitration, possibly endangering the success of arbitration in the United States.18 While it is clear that the Court evinced a misunderstanding of the nature of arbitration, particularly in its contention that arbitration is not meant for "high stakes" disputes, the Court's decision, right or wrong, is unlikely to affect international arbitration for a number of reasons. First, the holdings in both Stolt-Nielson and Concepcion are limited to class arbitration, which is still relatively rare, particularly in commercial disputes. As indicated by Wal-Mart Stores, Inc v Dukes, 131 S Ct 2541 (2011), in which the Court proclaimed that 1.5 million female employees and former employees of Walmart could not constitute a single class, the present Court arguably has taken a more conservative view of class-action litigation in any forum, whether judicial or arbitral. Second, while the Supreme Court's vision of the advantages of arbitration was incomplete, if not flawed, it did go to some length to affirm, repeatedly, the long-standing federal policy favouring arbitration and praised what it viewed as the principal advantages of arbitration. Lastly, the cases arose in the specific context of consumer disputes and constitute part of an ongoing debate over the rights of individual consumers and the propriety of mandatory arbitration clauses in disputes involving parties of deeply unequal bargaining power. This debate is not new and it is far from finished, as evidenced by the recent actions of several members of Congress; but it does not implicate the vast majority of international arbitration, which tends to be between sophisticated commercial parties.

The Arbitration Fairness Act of 2011

The Arbitration Fairness Act: An erosion of the FAA?

The Supreme Court's decision in Concepcion was immediately followed by the presentation of the Arbitration Fairness Act of 2011 in the Senate on 12 May 2011. The Act, which was sponsored by senator Al Franken of Minnesota, is a direct reaction to the Supreme Court's decision in Concepcion. As explained by senator Franken:

Th[e] ruling [in Concepcion] is another example of the Supreme Court favoring corporations over consumers… [t]he Arbitration Fairness Act would help rectify the Court's most recent wrong by restoring consumer rights. Consumers play an important role in holding corporations accountable, and this legislation will ensure that consumers… can continue to play this crucial role.19

The Act proposes to amend the FAA, but in narrow terms, by rendering it inapplicable to pre-dispute arbitration agreements in employment, consumer and civil rights disputes. The presenters of the Bill note in this sense that the FAA "was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power," and observes that "[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration."20

The Bill also provides narrow definitions for each of the three categories of disputes, requiring that all involve an individual. Thus, for example, the definition of a "consumer dispute" is "a dispute between an individual who seeks or acquires real or personal property, services (including services relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property services, money or credit."21

Even if the Arbitration Fairness Act were passed, it is highly unlikely to impact the success of arbitration in the United States. On its own terms, it is circumscribed to categories of disputes that do not encompass general commercial arbitration. It is also evident from the comments of the presenters of the Bill that the focal point of concern is protection of individuals who unwittingly enter into contracts that require arbitration of disputes. These individuals are not knowledgeable about the arbitral process and often would prefer to litigate disputes, for a variety of reasons. The concerns implicated in arbitration of consumer and labour disputes thus are simply not present in international commercial arbitration, and there has not been any indication that any branch of the federal government, Congress or the Judiciary considers that the dispute over consumer and labour arbitration will spill into a broader debate over the federal policy favouring arbitration in the United States. To the contrary, as discussed in the following section, US courts unwaveringly continue to promote commercial arbitration, particularly in the international context.

US courts continue to promote international arbitration

It is plain from a review of the most recent cases involving international arbitration that arbitration continues to enjoy widespread support in the United States. Generally speaking, US courts continue to enforce arbitration clauses in a wide array of contexts. Most recently, a federal judge in the Northern District of California enforced an arbitration clause in an antitrust dispute involving price fixing and compelled the parties to submit to ICC arbitration in London.22 The court rejected the argument that the price-fixing claims were unrelated to the contractual relationship and specifically noted that "[t]he federal policy favoring enforcement of arbitration agreements applies with special force in the field of international commerce."23 In the past year, US courts have continued to compel arbitration in international trademark dispute cases,24 labour disputes involving non-US nationals25 and tort claims cases.26

US courts have likewise fastidiously applied the New York Convention in enforcing awards, despite some creative efforts to enlarge the grounds permitted by the Convention for denial of enforcement. In June 2011, for example, a federal court in the Southern District of New York enforced a US$57 million award against Laos in spite of Loas' contention that

the petitioners chose to seek enforcement of the award in the United States for the sole purpose of taking advantage of its flexible discovery rules.27 In rejecting Laos's argument, the court affirmed that "American courts have an interest in enforcing commercial arbitration agreements in international contracts."28 Also in 2011, a federal court in the District of Columbia confirmed an award where the seat of the arbitration was France, rejecting an objection based on the vacatur of the award by a Qatari court in a proceeding in which both parties allegedly voluntarily participated.29 The court reasoned correctly that the Qatari proceeding was irrelevant for purposes of confirming the award, as article V(1)(e) of the New York Convention only permits non-enforcement of the award if it were set aside or suspended by a French court, as the "competent authority of the country in which, or under the law of which, that award was made."v

In short, practitioners of international arbitration should rest assured that arbitration continues to thrive as a preferred dispute resolution mechanism in the United States. The current debate in the United States over consumer arbitration, including the propriety of class arbitration in consumer disputes, is fuelled by concerns over unequal bargaining power that are absent in the complex disputes arbitrated by today's sophisticated international corporations.

Notes

1
Robert Lawrence Co v Devonshire Fabrics, Inc, 271 F2d 402, 406 (2d Cir 1959).

2
Greentree Financial Corp v Bazzle, 539 US 444, 452-54 (2003).

3
See, eg, AAA Policy on Class Arbitrations, American Arbitration Association, 14 July 2005, available at www.adr.org/Classarbitrationpolicy (noting that the AAA specifically issued its Supplementary Rules for Class Arbitration in response to the decision in Bazzle).

4
An amicus curiae brief submitted by the AAA in Stolt-Nielsen SA v AnimalFeeds International Corp, 130 S Ct 1758 (2010), for example, notes that the AAA administered 283 class arbitrations from 2003 to 2009, compared to "only a small number" prior to 2003.

5
Stolt-Nielsen SA v AnimalFeeds International Corp, 130 S Ct 1758, 1765 (2010).

6
Id at 1766.

7
Id at 1772.

8
Id at 1775. Notably, the Court chose not to decide the issue under the manifest disregard standard, but rather looked to whether the arbitrators had exceeded their powers, a ground for vacatur of an award under the FAA. Id at 1767-68.

9
Id (quoting Howsam v Dean Witter Reynolds, Inc, 537 US 79, 84 (2002)).

10
AT&T Mobility v Concepcion, 563 US __ (2011), 2011 WL 1561956 (US 27 April 2011).

11
This rule is known as the Discover Bank rule, and was enunciated by the California Supreme Court in Discover Bank v Superior Court, 36 Cal 4th 148 (2005). The cell phone contract at issue in the AT&T Mobility case provided for arbitration of all disputes, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."

12
Concepcion, supra note 10, at 9-10.

13
Id at 10.

14
Id at 16.
15
Id at 14-15.
16
Id at 16.
17
Id at 18.
18
Eg, Timothy Kautz, Stolt-Nielsen: Unintended Side Effects? 25-5 Mealey's Intl Arb Rep 22 (2010) (arguing that "[i]the reasoning employed by the Court in Stolt-Nielsen were to be taken as a standard for judicial vacatur proceedings in the US generally, the US would lose appeal as a seat for international arbitration."); Gary Born, The US Supreme Court and Class Arbitration: A Tragedy of Errors, Kluwer Arbitration Blog (declaring that the Supreme Court's "conflicting and often ill-considered decisions on the subject [of class arbitration] now threaten to undermine US arbitration law more generally - turning a field where US courts once pioneered international developments, in decisions like Mitsubishi and Scherk, into one where the US Supreme Court's decisions stand out as examples of how not to deal with the arbitral process.").
19
Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts against Corporations, Press Release, 27 April 2011, available at http://franken.senate.gov/?p=press_release&id=1466.
20
S 987 (112th Congress, First Session), at 2.
21
Id at 4.
22
In re: TFT-LCD [Flat Panel] Antitrust Litigation: Nokia Corp, et al v AU Optronics Corp, No. 09-05609, 2011 US Dist LEXIS 72389 (ND Cal, 6 July 2011).
23
Id at *3 (quoting Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc, 473 US 614, 631 (1985)).
24
Eg, Tigra Technology v Techsport Ltd, No. 10-1623, 2011 US Dist LEXIS 74807 (CD Cal 12 July 2011).
25
Marco Esteban Valdivia Salinas v Carnival Corp, d/b/a Carnival Cruise Lines, No. 10-20910, 2011 US Dist LEXIS 37945 (SD Fla 28 March 2011).
26
World GTL Inc v Petroleum Company of Trinidad and Tobago Ltd, No. 10-1542, US Dist LEXIS 83244 (SDNY 11 August 2010) (granting motion to compel arbitration of tort and contract claims in dispute between New York corporation and Trinidadian corporation).
27
Thai-Lao Lignite (Thailand) Co, et al v Government of the Lao People's Democratic Republic (SDNY 2011), slip op at 16.
28
Id at 20.
29
International Trading and Industrial Investment v Dyncorp Aerospace Technology, 2011 US Dist LEXIS 5954 (DDC 21 January 2011).
30
Id at 22-23 ("[T]he only competent tribunals empowered under the New York Convention to set aside the Award are those located in France, not Qatar.")

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Summary

Overview

It seemed only natural that after devoting our last two contributions to The Arbitration Review of the Americas to issues and developments in the investment arbitration field, our country chapter for this 2012 edition would instead focus on matters concerning commercial arbitration.

This shift is especially fitting as we review the year 2011, which began on a high note right after the end of the January court holidays courtesy of one of the permanent panels of the leading appellate court handling commercial matters in Argentina: the Buenos Aires Commercial Court of Appeal (CNCOM).

The CNCOM is divided into six permanent panels or branches (salas), identified with letters A through F, and each panel is in turn composed of three permanent appellate judges.

The high note was a decision rendered on 7 February 2011 by Panel D of the CNCOM in the case of Sociedad de Inversiones Inmobiliarias del Puerto SA (SIIPSA) v Constructora Iberoamericana SA (CIB).1

In this article, we will comment on some of the salient features of the SIIPSA decision within the context of a broader picture, which has been characterised during the past few years by lights and shadows that seem to dot the landscape of commercial arbitration in Argentina. SIIPSA comes more than three years after Panel D of the CNCOM produced another remarkable decision, the widely praised Mobil v Gasnor case,2 which in turn came three years after the widely criticised Cartellone decision of the CSJN.3

A digression on how to diagnose a healthy arbitration environment

It is no secret that to a large extent, the good health of commercial arbitration in any given country will ultimately be measured by the nature of the interactions that flow between that country's arbitration machinery (arbitrators, arbitral institutions and the businesses and individuals who choose to settle their disputes through arbitration) and the country's court system. Of course, it helps significantly if the country under review has adopted a modern arbitration legislation, preferably one based on the UNCITRAL Model Law, but the most important and pressing questions one normally asks when assessing the state of affairs of commercial arbitration in a specific country have more to do with whether or not at this point in time certain core concepts of arbitration law have been internalised by the courts. We are referring to concepts and principles such as:

- the arbitrability of most (if not all) disputes ultimately involving questions of money, even if the arbitrators - in order to fulfil their jurisdictional task - must examine and apply legal rules and principles that are part of the public policy (ordre public), of the relevant jurisdiction;
- the supplementary notion that it is only when the holding of the award is contrary to public policy that the award may be unenforceable or voided;
- the principle of the autonomy of the arbitration agreement and its separability from the contract to which it may be incorporated;
- the concept that arbitral awards should only be set aside when serious procedural defects have affected the conduct of the arbitration (errors in procedendo) to the point of hampering due process guarantees (this includes extra petita situations);4
-

the reverse of the coin, in other words, that errors in judicando, whether of a legal or a factual nature, should never give rise to the annulment of an arbitral award;

- the principle that the parties may waive in advance all ordinary appeals and recourses that may have otherwise been at their disposal, which is a staple in modern institutional rules,[5] acknowledging, however, that the parties may be prevented by law - as it happens under Argentine law - from waiving their right to seek the annulment of the award, a tool of last resort to ensure that due process has been respected;
- the rule that the procedure for obtaining the recognition and enforcement of an arbitral award should never become an opportunity for an overt or covert de novo review of the merits of the case.

The situation in Argentina

In Argentina, we find ourselves in a rather lukewarm middle ground (the lights and shadows of our title). We are far from being in an environment that is completely hostile to arbitration, but we are also far from being the modern arbitration centre that we believe we could be.

Our point of departure is decisively bleak: our arbitration law is outdated, being as it is still encapsulated just as a chapter within our 1967 National Code of Civil and Commercial Procedure (CPCC). Several congressional bills have come and gone, but no concrete progress has been achieved, for example, in the effort to adopt a local version of the UNCITRAL Model Law, such as other Latin American countries have done.[6]

However, looking at the bright side of the image, Argentina ratified the New York Convention in 1989, the Panama Convention in 1994 and the ICSID Convention also in 1994.

Furthermore, the body of jurisprudence that has developed over the course of more than a century, beginning perhaps with a celebrated 1891 decision from the CSJN,[7] is on balance rather favourable to arbitration. Sadly, it is also true that too many court decisions, year after year and even in cases where judges end up upholding an arbitration agreement or an award, routinely include dicta and caveats to the effect that arbitration is an exceptional means of solving disputes and that therefore all arbitral agreements "must be construed narrowly", a sort of dogmatic mantra that has no constitutional or legal basis whatsoever.[8]

Too many courts still confuse the question of the non arbitrability of certain issues[9] (eg, criminal law cases, although civil liability issues arising from crimes are subject to arbitration; family law matters, etc) with instances where, in order to adjudicate a perfectly arbitrable dispute, the arbitrators must review and apply laws and regulations that are (correctly or incorrectly) classified a priori as part of the country's public policy.[10]

Seven years ago, a loud noise came to disturb the scene at our semi-comfortable middle ground and it came in the form of the Cartellone decision. It is now probably safe to say that some of the most pessimistic forecasts about the future of arbitration in Argentina that came immediately after Cartellone proved to be exaggerated, but it is equally safe to say that the adverse effects of that decision are still felt, and that the holdings and dicta of Cartellone still pose a serious limitation to the development of a healthy commercial arbitration environment.

Cartellone briefly revisited

As many of our readers may know, the Cartellone decision sent shockwaves that still reverberate in the arbitration community. Contrary to what many commentators who favoured the ruling said at the time, in Cartellone the Supreme Court was in no way applying

time-tested doctrines or principles. Far from that, the June 2004 ruling meant a radical departure from consistent criteria that the Supreme Court had maintained for decades.

The Cartellone v Hidronor case pitted a major construction company against a state enterprise that was subsequently liquidated. The parties entered into an arbitration agreement that included a full waiver of any appeals and recourses against the award.

The claimant won the arbitration and the award ordered Hidronor to pay a large sum of money that was made up of the principal amount; an inflation adjustment to the principal, applying official price indexes (indexation became a practice that was sanctioned by the Argentine Supreme Court in 1976 and it lasted until 1991, in the midst of chronic high inflation and even hyper-inflation); and interest, at the rate that had been agreed upon by the parties.

Hidronor filed a request for annulment of the arbitral award and the court in charge of reviewing the case (Panel III of the Buenos Aires Federal Court for Civil and Commercial Matters) dismissed Hidronor's plea in 2001, in a ruling that still represents a fine example of a court correctly applying article 760 of the CPCC.[11]

Hidronor then did something quite unorthodox: it filed an ordinary appeal before the Argentine Supreme Court, based on the fact that as a state enterprise, the now liquidated company had the right to reach the highest court without going through the hurdles and restrictions that private litigants must endure under the rules of the so called extraordinary Supreme Court appeal, a road that is only allowed - at least in theory - when federal or constitutional questions are at stake.

The Supreme Court then effectively treated Hidronor's challenge to the award as an ordinary appeal; an appeal directed not only against the Federal Court's dismissal of the annulment petition, but also at the arbitral award itself. This was indeed a radical departure from the past practice of the Supreme Court, which up until then had only heard arbitration related cases if and when the aggrieved parties managed to show that an extraordinary, constitutional appeal was warranted against the lower courts' dismissal of the annulment petition (extraordinary appeals filed directly against arbitral awards were never permitted by the Court).

To sum up: in Cartellone the Supreme Court proceeded to revoke bits and pieces of the arbitral award, just like a regular appellate court might do with an ordinary judgment, for example, by changing the dies a quo of the inflation adjustment mechanism to be applied to the principal amount and by substituting a lower interest rate for the one that had been contractually agreed, even though Hidronor had not questioned the legality of that rate in a timely manner. Moreover, the rate was not challenged as a case of usury.

The Court disregarded the explicit waiver of appeals that the parties had included in their arbitration agreement, finding instead that any such waivers were subject to review by the courts.

The Supreme Court also held that arbitral awards could be set aside by the courts not only for the grounds specified in articles 760 and 761 of the CPCC (all of them directly or indirectly involving due process violations), but also if the awards were found to be "unconstitutional, illegal or unreasonable". This particular catchphrase, which has since been used by many other courts,[12] was actually picked up from a dormant obiter dictum that had been included without any elaboration in a 1975 decision of the Supreme Court concerning an award issued by a now defunct employment relations board.[13]

Early Signs Of Discontent With Cartellone: The Mobil V Gasnor Case

As reported at the time by this author to a mail list formed within the IBA arbitration community, on 8 August 2007, Panel D of the CNCOM unanimously rejected an attempt by a local natural gas distribution company (Gasnor) to set aside an ICC Award that was rendered in favour of a natural gas producer (Mobil Argentina, a subsidiary of Exxon Mobil).

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

Gasnor argued that an all encompassing waiver of recourses, such as that contained in article 28(6) of the ICC Rules, collided with Argentine principles of public policy when the award turns out to be "unjust", "unreasonable" or "arbitrary" to the point of compromising the state's ordre public. As our readers may notice, the appellant was trying to use the Cartellone decision to its fullest possible extent, but Panel D resoundingly rejected Gasnor's arguments and found:

- that the waiver of ordinary appeals included in article 28(6) of the 1998 ICC Rules was valid and binding in an arbitration agreement entered into under the ICC Rules, and that the will of the parties must be respected by the courts;
- that the Supreme Court dictum in Cartellone had been the subject of authoritative criticism from several quarters;
- that the appellant had failed to show that public policy principles had in fact been violated by the ICC award; and
- that even though, with regards to annulment recourses, Argentine law indeed prohibits a priori waivers, in the case at hand, Gasnor had failed to show the actual occurrence of a violation of due process or an event of extra petita that would merit setting aside the award.

The SIIPSA case

Factual Background

Sociedad de Inversiones Inmobiliarias del Puerto SA (SIIPSA), a real estate developer, entered into a contract with Constructora Iberoamericana SA (CIB), for the construction of a building complex in one of the most exclusive districts of Buenos Aires, the Puerto Madero area.

The contract was signed in July 1999 and work was expected to be finished by October 2000. Even though there were no international elements in their dealings, the parties included in their contract an ICC arbitration clause.14 Disputes ensued after a series of delays occurred, and SIIPSA warned CIB that if the stoppages and delays continued, they would terminate the contract. CIB denied any fault on their part and in turn claimed that SIIPSA was at fault.

On 10 August 2000, SIIPSA finally terminated the construction contract and hired another contractor to finish the work in Puerto Madero.

Two weeks after the termination of the contract, CIB filed for protection under Argentina's Bankruptcy Law (ABL), using a procedure that is designed for the reorganisation and rescheduling of debts, without liquidating the assets of the debtor (a mechanism called concurso preventivo, which is analogous to title 11, chapter 11 of the US Code).

A short time after CIB filed for protection, SIIPSA began arbitration proceedings under the ICC Rules, seeking around US$12.5 million in damages. CIB answered the request for arbitration denying any breach or wrongdoing, and filed a counterclaim against SIIPSA for approximately US$8.5 million. The place of arbitration was Buenos Aires.

An Overview Of Relevant Aspects Of Insolvency Law

A key feature of a concurso preventivo under the ABL is that the debtor retains possession and management of its business and assets. The debtor also retains standing to litigate, either as claimant or respondent, but no new claims arising from obligations that originated before the insolvency filing may be initiated. Instead, all prior creditors of the company undergoing a reorganisation must file proofs of claims with a court-appointed officer: the síndico (trustee).

As for lawsuits already in progress at the time of a concurso preventivo filing, the rule used to be (and still is, if one reads the first part of article 21 of the ABL) that an automatic stay is in place. However, after an amendment to the ABL was introduced in 2006, most pre-existing lawsuits against an insolvent debtor may continue before their original courts if the claimant so chooses. Once a final judgment is entered, the successful claimant must present its judgment to the trustee under a special procedure for belated proofs of claims. Of course, neither the trustee nor the bankruptcy judge may tamper with the res judicata effect of the other court's judgment, but they certainly can and must apply such mandatory rules of bankruptcy law as article 19 of the ABL, which suspends the running of interest as of the debtor's filing. Also, the judgment creditor must abide by the terms of any arrangement offered by the debtor that may have been approved by the court after passing the required majority of creditors.

Finally, article 21 of the ABL requires that the trustee be notified of any pre-existing litigation in order to allow the trustee to take part in the proceedings; even though, as said before, the debtor in a concurso preventivo retains full standing and continues to manage his assets. All this outlook changes dramatically if an individual or company is declared in bankruptcy (quiebra), because then the trustee takes over all of the debtor's assets and the debtor is also deprived of any standing in court, save for a very limited type of case.

CIB was ultimately declared bankrupt and put into liquidation. However, for CIB the change from a concurso preventivo into a fully fledged bankruptcy took place after the arbitration was concluded, thus not affecting the outcome of the issues we are reviewing.

Some Words On Insolvency And Arbitration

The ABL contains only one provision concerning arbitration, which is included in the chapter dealing with liquidation bankruptcies. Article 134 states that any arbitration agreement to which the debtor may be a party is automatically terminated upon the court entering a bankruptcy decree, unless the arbitration tribunal has already been constituted. Under special circumstances, the court may also approve the constitution of an arbitration tribunal even after entering a bankruptcy decree and it may further authorise the bankruptcy trustee to enter into an arbitration agreement on behalf of the debtor.

In 2005, the Argentine Supreme Court confirmed a decision from Panel D of the CNCOM and ruled that an arbitration agreement was valid and binding on an Argentine company undergoing a concurso preventivo (Bear Service SA), thus enforcing the right of the defendant Mexican company (Cervecería Modelo SA de CV) to have the claim heard by

an ICC Arbitration Tribunal sitting in Mexico City. In so deciding, the Court held that if article 134 of the ABL permits the continuation of arbitrations in cases of liquidation bankruptcies, a permissive approach towards arbitration was even more justified when the debtor was merely undergoing a reorganisation proceeding (Bear Service had tried to evade the arbitration clause of its importation and distribution agreement with Cervecería Modelo by filing suit with the Argentine courts).15

As for the rule in article 21 of the ABL concerning the mandatory notification to the trustee of all pre-existing lawsuits (juicios), the law seems not to be clear as to whether or not the word juicios also involves arbitrations. As we shall see very soon, this apparent lacuna in the law gave rise to CIB's principal argument in support of its motion to void the SIIPSA v CIB award.

Summary Of The Procedural History Of The SIIPSA V CIB Arbitration

The tribunal issued two preliminary decisions (described in the court case as "partial awards"), affirming both the validity of the arbitral agreement and the tribunal's jurisdiction to hear the case. The parties did not object or challenge the partial awards, neither then nor at any other time.

The final award was issued on 1 July 2004 and was made solely by the chairman of the tribunal, as prescribed by article 25.1 of the 1998 ICC Rules.16 An addendum to the award was also issued by the chairman on 3 November 2004.

In short, the award found that SIIPSA was justified in terminating the contract with CIB and ordered CIB to pay the equivalent of approximately US$4.3 million plus interest, which would run until the date of payment (ie, well beyond 24 August 2000, which was the date of mandatory suspension of interest under article 19 of the ABL).

The award also found partially in favour of CIB's counterclaim and ordered SIIPSA to pay approximately US$373,000. However, in order to make matters simpler, in the addendum to the award, the chairman of the tribunal proceeded to offset SIIPSA's and CIB's respective credits and ordered CIB to pay only the balance (an amount just below US$4 million).

At no point during the arbitration proceedings was the trustee in the CIB insolvency case formally notified of the existence of the ICC arbitration, although the facts of the case indicate that the trustee was fully aware of it. CIB was still in full possession and administration of its assets at that time, and it could have raised the issue with the arbitration tribunal and also with the insolvency court; but according to the available information, CIB apparently did not raise any such objections in a timely manner, reserving instead the argument for a later stage, as it finally did, making the omission to notify the trustee the centrepiece of its request for the annulment of the award.

The Grounds For Annulment Raised By CIB

CIB moved to have the award set aside on four sets of grounds.

- The first ground was all-encompassing and aimed at obtaining the total annulment of the award. CIB alleged that the entire arbitration was null and void because the trustee appointed by the insolvency court had not been notified, thereby preventing him from taking part of the arbitration. CIB thus posited a broader interpretation of article 21 of the ABL.

All of the other grounds were pleaded in the alternative, in the event the first argument was not upheld by the court.

- The second ground was that article 19 of the ABL was a peremptory norm and that the award was wrong in admitting the addition of interest beyond 24 August 2000 (the date when CIB filed for protection). This was pleaded as a request for a partial annulment of the award.
- The third set of arguments consisted of five separate allegations of unequal treatment of the parties by the tribunal, all of them ultimately related to defects in the evidence gathering process that allegedly had prejudiced CIB's case. CIB chose to describe these arguments also as "partial annulment" requests, although one fails to see how the court could have isolated the specific impact of each alleged equal treatment violation.
- Finally, the fourth argument raised by CIB was that the ICC tribunal had exceeded its powers when offsetting the credits of SIIPSA and CIB since no such set-off had been authorised in the terms of reference.

The Decisions Of The Court

In dismissing all but one of the challenges raised by CIB, Panel D of the CNCOM17 began by recalling its 2007 decision in the Mobil v Gasnor case, stating once again that an express waiver to appeal an arbitral award (or a rule like article 28 (6) of the 1998 ICC Arbitration Rules) did not violate public policy principles, especially considering that article 760 of the CPCC provided enough protection by means of the annulment procedure, which was not subject to a priori waiver. The Court nevertheless emphasised the narrow scope of the review in an annulment case as compared to the broad nature of an appeal.

The Total Annulment Request

In rejecting the main cause for annulment proposed by CIB, the Court points out that, in reality, everyone involved in the case knew from the beginning that CIB was undergoing a debt-reorganisation under insolvency law, as reflected in the award itself. The decision also qualifies the actual importance of article 21 notifications and sees the participation of the trustee in the ongoing lawsuits against a debtor as mainly of an informative nature, as the debtor retains full standing and the trustee does not represent the debtor. Judge Heredia is particularly strong on this issue in his separate opinion.

Therefore, in the view of the panel, the failure to notify the trustee had not raised to the level of an essential breach of procedure fatally damaging the fairness of the arbitration proceedings, as article 760 of the CPCC would require in order to justify the voidance of an award. Furthermore, the Court remarked that there is disagreement among the authors as to whether or not the reference to lawsuits in article 21 of the ABL should be extended to arbitrations as well.

Moreover, the Court rules that even if article 21 of the ABL did require trustees to be notified of arbitrations involving insolvency debtors, no definitive harm could have been caused by the failure to do so in this particular case as the trustee was ultimately able to perform his statutory role within the context of the insolvency proceedings (for example, by vetoing the running of interest beyond the date of the filing, as indeed he did).

In reaffirming the strict interpretation of article 760 of the CPCC and the limits to the type of review that courts are called to perform in the context of annulment requests, the decision says:

> "It would seem that those limits were exceeded by our Supreme Court of Justice in the Cartellone case."

and:

> "It would appear that the Highest Court overstepped the framework within which annulment recourses operate, as the Court not only examined the thema decidendum but also revoked the award in part and ordered that new calculations be performed."

The Panel finally recalls the broad spectrum of criticism that the Cartellone case had elicited among specialised authors, citing five scholarly articles as examples.

The Partial Annulment Requests

Article 19 and the running of interest issue

On this particular argument of the respondent, the Court admits that the arbitral award did not take into account the provision of article 19 of the ABL, but it swiftly dismisses CIB's complaint by stating that it was not the role of the arbitration tribunal to apply that particular provision of bankruptcy law, as that would be the task of the trustee and the bankruptcy court within the context of the proofs of claims process. It also points out that at any rate we would be in front of an error in judicando, unfit for causing the annulment of an award and subject to remedial action at the bankruptcy court level.

The issues on the production of evidence during the arbitration

The Court finds no significant violation of due process in any of the five specific instances of alleged unequal treatment of the parties invoked by CIB. For the purposes of this review, suffice it to say that the Court dismisses each claim by pointing out that all of them involved objections to the way the tribunal had conducted the evidence gathering process, none of which presented signs of due process violations. The panel stresses the fact that tribunals have a reasonable leeway in directing the production of evidence, as long as they respect principles such as the one embodied in article 15 (2) of the ICC Rules of Arbitration, or in the new article 22(4) of the 2012 Rules.

The only successful challenge to the award: The set-off between SIIPSA and CIB

The decision accepts this particular challenge to the award, and it does so based on two factors: that the terms of reference had not contemplated the possibility that the tribunal might unilaterally order a set-off in the event that both the claim and the counterclaim were to succeed (excess of powers); and that the award had violated the legal prohibition to offset credits and debts when one of the parties is undergoing insolvency proceedings.

It is somehow ironic that, in order to explain the latter of the two reasons for admitting CIB's challenge, the Court resorts to none other than the Cartellone precedent, stating that in this particular respect, the award might be described as "illegal".

What the future holds

In the aftermath of Cartellone, the arbitration community in Argentina looked eagerly for signs that would clarify whether or not that Supreme Court decision would turn out to be an isolated case of overzealous protection of state interests in the middle of a politically charged

atmosphere, or a trend-setter that would eventually lead to an irreparable damage to the development of commercial arbitration in our country. It is still early to say which one of the two assumptions was correct. Aside from the commendable Bear Service ruling of 2005, the Supreme Court has since then produced only a handful of arbitration related decisions and all of them have applied standard arbitration law precepts to cases that were not particularly controversial.18 Perhaps the moment of truth will come when the Mobil v Gasnor decision of 2007 becomes ripe for a Supreme Court review, as the case has now managed its way into the Court after an earlier attempt was dismissed for strictly technical reasons. As for the SIIPSA decision, neither CIB nor the bankruptcy trustee have filed Supreme Court appeals against Panel D's decision, although SIIPSA has decided to take that road in order to challenge the part of the ruling that disregarded the set-off and forced SIIPSA to pay in cash the damages arising from CIB's successful counterclaim.

Notes

1
Sociedad de Inversiones Inmobiliarias del Puerto SA c/ Constructora Iberoamericana SA s/ queja SA - CNCOM - SALA D - 7 February 2011 - elDial.com - AA6A60.

2Mobil Argentina SA c/ Gasnor SA s/ laudo arbitral, CNCOM - SALA D - 8 August 2007 - elDial.com - AA4188

3José Cartellone Construcciones Civiles SA c/ Hidroeléctrica Norpatagónica SA o Hidronor SA s/ proceso de conocimiento, - CSJN - 1 June 2004 - elDial.com - AA2145

4Articles 760 and 761 of the Argentine Code of Civil and Commercial Procedure embody this principle.

5Such as article 28(6) of the 1998 ICC Rules of Arbitration or article 34(6) of the 2012 ICC Rules.

6As of September 2011: Chile, Costa Rica, the Dominican Republic, Honduras, Mexico, Nicaragua, Paraguay, Peru and Venezuela, as reported in the UNCITRAL web site: www.uncitral.org

7Capitán del vapor "Camila" c/ Patrón de la Lancha Féliz del Plata, CSJN Fallos 45:78).

8For example, in a case decided in May 2011 by Panel A of the CNCOM, "Peide Industria y Construcciones SA c/Mina Pirquitas Inc Suc Arg s/ medida precautoria" (elDial.com - AA6D4E), the court agreed with the defendant that an arbitration agreement included in certain purchase orders also applied to a matter related to the collection of invoices issued under the purchase orders, but felt obliged to append the "narrow interpretation" caveat at the beginning of its decision.

9As established by the combined application of article 737 of the CPCC and articles 842-849 of the Civil Code.

10A recent example of this confusion may be found in CRI Holding Inc Sucursal Argentina c/Compañía Argentina de Comodoro Rivadavia Explotación de Petróleo SA s/ sumarísimo - CNCOM - SALA C - 5 October 2010 - elDial.com - AA675F, an October 2010 decision from Panel C of the CNCOM. The case concerned a contractual dispute within a mining company, a specific type of partnership that is ruled by the Mining Code. While the Mining Code contains a number of provisions that are considered to be public policy, the parties had signed an arbitration agreement and their dispute was essentially of a commercial nature. Panel C sided with the defendant and declared that the arbitral tribunal lacked jurisdiction as all

issues arising from the Mining Code were deemed not arbitrable per se, because of their public policy nature.

11José Cartellone Construcciones Civiles SA v Hidroeléctrica Norpatagónica SA o Hidronor SA s/ Nulidad de Laudo - 28-08-2001, CNac Civ y Com Fed, sala III - Lexis N° 30000891

12For example, in a December 2009 decision from Panel B of the CNCOM: Edf International SA c/ Endesa Internacional (España) y otros s/ Arbitraje - CNCOM - SALA B - 9 December 2009 - elDial.com - AA5E18.

13In re: Cooperativa Eléctrica y Anexos de General Acha Limitada - CSJN - 7 July 1975. Lexis N° 70060940

14As permitted by article 1(1) of the 1998 ICC Arbitration Rules: "If so empowered by an arbitration agreement, the Court shall also provide for the settlement by arbitration in accordance with these Rules of business disputes not of an international character".

15Bear Service SA c/ Cervecería Modelo SA de CV - CSJN - 5 April 2005 - elDial.com - AA2A9B

16ICC Rules of Arbitration (1998), article 25(1): "When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone". A similar provision is included in article 31(1) of the 2012 Rules.

17The unanimous decision was written by Judge Gerardo Vasallo, with Judges Juan José Dieuzeide and Pablo D Heredia concurring. Judge Heredia added a separate opinion expanding on his own reasons for turning down the request, especially concerning the alleged violation of article 21 of the ABL.

18Bear Service, see Note 15. Cacchione, Ricardo C c/ Urbaser Argentina SA CSJN - 11 March 2008; DJ-2008-I, 997; Pestarino de Alfani, Mónica A c/ Urbaser Argentina SA, CSJN - 11 March 2008; JA-2008-II, 49.

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Bolivia

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Summary

Introduction

To date, the Supreme Court of Justice's jurisprudence contains no ruling concerning the official recognition of an arbitral award issued outside Bolivia's borders, and as such there is no indication how the Bolivian courts would interpret the international and local laws on enforcement.

Notwithstanding the lack of judicial precedents to guide the application of the international conventions ratified by the Bolivian Congress, the topic proposed in this article has a great degree of importance taking into consideration that Bolivia is currently immersed in a series of international arbitration proceedings, linked in essence to the escalation of the nationalisation processes started by the government of President Evo Morales Ayma.

This is to say that in the medium or maybe long term, Bolivia could face the imminent possibility of the Supreme Court of Justice having to decide on the recognition and enforcement of international arbitration awards; for example, under the rules of the International Centre for Settlement of Investment Disputes (ICSID) or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Due to the aforementioned, this article focuses on analysing the local positive law that is applicable to the recognition and enforcement of foreign arbitral awards, which is largely compatible and consistent with international standards.

International arbitrations against Bolivia

To date, Bolivia faces a series of international investment arbitrations that have been accumulating since 2006.

The international arbitration proceedings currently in progress are all practically related to investments and can be summarised as follows:

ICSID Arbitrations In Process

Quiborax SA, Non-Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia (ICSID Case No. ARB/06/2)

Matter: Revocation of a mining concession in the Uyuni Salt Lake salt layer. Date of registration: 6 February 2006.
Date of constitution of the tribunal: 18 December 2007.
Composition of the tribunal: President, Gabrielle Kaufmann-Kohler (Swiss); arbitrators, Marc Lalonde (Canadian) and Brigitte Stern (French).
Current state: Bolivia challenged the jurisdiction of the centre on 30 July 2010.

Pan American Energy LLC v Plurinational State of Bolivia (ICSID Case No. ARB/10/8)

Matter: Nationalisation of Empresa Petrolera Chaco SA.
Date of registration: 12 April 2010.
Current state: Phase of constitution of the tribunal.

Permanent Court Of Arbitration (PCA) Of The Hague (UNCITRAL) - Arbitration In Process

Oil Tanking and Graña y Montero v Plurinational State of Bolivia

Matter: Nationalisation of the Compañía Logística de Hidrocarburos de Bolivia SA, which is dedicated to the activities of transportation of hydrocarbons via pipelines, storage and dispatch.

Possible International Arbitrations

- British Petroleum (BP) notified the existence of a dispute due to the nationalisation of Air BP.
- Rurelec PLC (UK) and GDF Suez (France) notified their disputes and are negotiating compensation following the nationalisation of their stakes in the power generation plants of Guaracachi and Corani.
- Grupo de Cementos de Chihuahua (GCC), in its capacity as shareholder of Soboce, is requesting a fair payment for the nationalisation of the Fábrica Nacional de Cemento (Fancesa).
- Valle Hermoso, administered by the Bolivian Generating Group consortium and Empresa Metalúrgica Vinto, is conducting negotiations regarding its nationalisation.

The nationalisations driven by the current government have multiplied the number of arbitrations against the state. This in turn led to the creation of the Ministry of Legal Defence of the State (now the Attorney General of the State), whose fundamental mission is to represent the state, intervening as a procedural party in judicial, extrajudicial, conciliatory, arbitration and administrative proceedings; and to promote, defend and oversee the interests and the patrimony of Bolivia, especially with regards to matters of investments, human rights and the environment.

International and local legislation applicable to the recognition and enforcement of foreign awards in Bolivia

Local Rules

The recognition and enforcement of foreign arbitral awards are expressly regulated in Bolivia by Law No. 1770, dated 10 March 1997: the Arbitration and Conciliation Law. Articles 79 and 84 conceptualise what must be understood as a foreign arbitral award, as well as other aspects such as the applicable regulations; the causes for the inadmissibility of the recognition and enforcement; the competent authority and the way to formulate the request; the procedure that must be applied thereto; and finally, the defendant's opposition to execution.

International Rules

The Arbitration and Conciliation Law of Bolivia sets out those international conventions that apply to the recognition and enforcement of foreign arbitral awards:

- the Inter-American Convention on International Commercial Arbitration;1
- the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards;2
- the Inter-American Convention on Extraterritorial Efficacy of Foreign Sentences and Awards;3 and
- the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States.4

In relation to the hierarchical ranking of international conventions within the legal order of Bolivia, article 410 - II of the Political Constitution of the State positions them below the Constitution and immediately above national law.

In this manner, the conventions relative to international arbitrations, and especially regarding the recognition and enforcement of foreign arbitral awards, override the local Arbitration and Conciliation Law.

Convergence Of Rules

The Arbitration and Conciliation Law, as well as most international treaties relating to recognition and enforcement of foreign awards, embraces the principle of favourability; by which, in the event of more than one applicable international instrument, the international treaty that is the most favourable to the claimant or party requesting the recognition and enforcement of the award shall apply.
Recognition and enforcement of foreign arbitral awards

Foreign Arbitral Awards

To address this topic from a theoretical perspective due to the absence of precedents that would allow for a pragmatic analysis, it is important to precisely comprehend what should be understood as a foreign arbitral award. The Arbitration and Conciliation Law, at article 79, provides that "A foreign award is an arbitral resolution on the merits dictated or issued outside Bolivia."

Therefore, no interlocutory resolution, or mere procedural resolution dictated within an arbitration proceeding, can be subject to an exequatur before the Supreme Court of Justice since the recognition of foreign arbitral awards is reserved solely for arbitral resolutions based on the merits; in other words, those that are deemed as final and end a dispute of juridical relevance that was submitted to an arbitral tribunal.

Recognition And Enforcement

The recognition and enforcement of foreign arbitral awards are two intrinsically and inseparably linked concepts. The party that requests the recognition of a foreign award - and in general whoever processes an inter nolente proceeding - always has its eventual enforcement in mind.

Bolivian legislation does not generally provide definitions per se.[5] However, for the academic purposes of this article, some ideas are outlined below and an analysis regarding both recognition and enforcement from a juridical perspective is also provided.
Recognition

From the statement of various authors,[6] the recognition of foreign arbitral awards is strictly linked to the analysis of their validity in addition to the concept of the res iudicata, the latter being indispensable for accessing a subsequent phase of enforcement or materialisation of what was decided in the award.

The provisions contained in the Arbitration and Conciliation Law underlines this link and in its article 81 it regulates the causes for which the recognition and enforcement of a foreign arbitral award must be dismissed and declared inadmissible. These grounds revolve around the award's validity as well as the res iudicata, which safeguards the compliance of the principle and general guarantee of non bis in idem.

The grounds contained in the Arbitration and Conciliation Law for dismissal or declaration of inadmissibility of the recognition and enforcement of a foreign arbitral award, which are similar to the grounds contained in article V of the New York Convention, differentiate between those that must be analysed sua sponte in the exequatur and those that must be proved by the defendant or party opposing enforcement. These grounds are as follows:

- The existence of any of the causes for nullification of the award established by law, among which the following can be identified:

- non-arbitrability of the subject matter of the dispute;
- arbitration awards contrary to public policy;
- the existence of grounds for nullity of the arbitral clause or agreement;
- lack of notification of the appointment of an arbitrator or of the arbitration proceedings;
- impossibility to exercise the right of defence;
- the award refers to a dispute not foreseen in the arbitration clause or contains decisions and matters beyond the scope of the arbitration clause prior to the separation of the questions subjected to arbitration and not sanctioned with nullification;
- irregular composition of the arbitration tribunal; and
- vitiated proceedings, violating what was agreed by the parties or what is established in the adopted regulation.

The first two of the above grounds can be examined sua sponte by the competent judicial authority, while the rest must necessarily be invoked and demonstrated by the party against which the recognition and enforcement of the foreign award is sought and as such, in the recognition phase, there is an explicit manifestation of the fundamental right of defence; not only during the arbitration proceeding, but also after the same has been concluded.

On the other hand, Bolivian law establishes that the pronouncement of the award outside the maximum term of 180 days, counted from the date in which the arbitrators accepted their appointment or the last substitution of the tribunal was conducted, constitutes a ground for nullification of the award. However - and notwithstanding that on first impression such a cause of nullification could be invoked as well in cases of recognition and enforcement of foreign awards - in my opinion, the maximum term to pronounce an award only applies to arbitral awards issued in domestic arbitrations and not international arbitral awards.

- The party against which the recognition and enforcement of the foreign award is being requested can prove lack of enforceability, or nullification or suspension of the award by the competent judicial authority of the state where it was issued.
- There are grounds for nullification or inadmissibility established by valid international agreements or conventions.

Enforcement

Only after the foreign arbitral award is recognised by the competent judicial authority is the awarded creditor authorised to enter the last phase of any dispute: enforcement.

Nevertheless, in order to understand the concept of enforcement, we must first understand the general concept of execution, which evokes a double perspective within the juridical field.

Following what was said by the famous Uruguayan litigator Eduardo Couture,7 the term "execution" can be construed as the effective compliance of the consideration owed in favour of the creditor, with liberating effects in favour of the debtor; as well as being similar, from the procedural point of view, to enforcement, since in order for execution to materialise there

is no need for the agreement or willingness of the debtor, but there is a need for the presence of coercion, exercised by an authority constitutionally granted with jurisdiction.

Enforcement is the effective realisation of or compliance with the foreign arbitral award, after its validity and enforceability was recognised before the highest tribunal of justice which, due to obvious limitations, entrusts such executions to the competent judicial authority, which is the one corresponding to the legal domicile of the party against which the recognition of the award was requested, or the one where the executable assets or patrimony is found, as an indispensable element for the enforcement.

Notwithstanding the foregoing, the specific procedure that would be applied by the competent authority carrying out the enforcement of the award after its recognition is not regulated in a specific manner and consequently it could be assumed that the rules applicable to this last instance would be those set forth for the general execution of judgments and local awards, with the favourable and negative aspects related thereto.
Procedure

The procedure for the recognition and enforcement of a foreign arbitral award are regulated in an explicit manner by the Arbitration and Conciliation Law, and in a preliminary manner it can be pointed out that the adopted procedure in Bolivia respects the general guidelines established by article III of the New York Convention, which establishes that for the recognition or the enforcement of foreign arbitral judgments, there will not be appreciably more rigorous conditions imposed, or more elevated fees or costs, than those applicable to the recognition or the enforcement of national arbitral awards.

Competent Authority

The Arbitration and Conciliation Law grants competence to the Supreme Court of Justice so that it is this collegiate tribunal, as the maximum authority of the Bolivian judicial system, that decides regarding the admissibility or inadmissibility of the requests for enforcement of foreign awards.

Requirements Of The Request

The Arbitration and Conciliation Law of Bolivia states that the party seeking the declaration of admissibility of the request for the recognition and enforcement of the foreign arbitral award must present copies of the arbitration clause and arbitral award, duly legalised, and complying with article 1294 of the Civil Code, concerning documents celebrated or executed abroad.

On the other hand, if the aforementioned documents are in a language other than Spanish, they must be accompanied by a translation endorsed by an authorised expert, although it is unclear who can be considered as such given that in Bolivia there is no official or public registry of experts.

Terms, Response And Evidence

The Arbitration and Conciliation Law determines that after the claimant presents its request for recognition and enforcement, the Supreme Court of Justice must serve notice to the other party who shall respond to it and present the evidence deemed convenient within a term of 10 days counted from the notification.

After the request for recognition and enforcement has been answered, the Supreme Court must open an evidentiary period of eight days; however, the law does not specify if such a

term begins to run following the defendant's response and the presentation of evidence, or if to the contrary, the Tribunal must open the evidentiary period in all cases, even if the party against which the recognition and enforcement of the award is requested has not responded to the request and presented evidence.

Finally, article 83 - II of the Arbitration and Conciliation Law, establishes that the Supreme Court of Justice must pronounce on the admissibility or inadmissibility of the request for recognition and enforcement of the foreign arbitral award within five days after the evidentiary period has expired.

Opposition to enforcement

In contrast to other legislation in the region, Bolivia's Arbitration and Conciliation Law expressly provides for the possibility of the Supreme Court of Justice accepting opposition to the enforcement of the award. However, it limits its admission to the compliance of the own award or the existence of a nullification recourse pending of resolution. Such criteria can be considered as adequate in order to avoid an excessive judicial interference with arbitration, which could be extremely damaging within the Bolivian judicial culture.

If opposition is founded on a ground other than the two grounds specifically provided in the Arbitration and Conciliation Law, the Supreme Court of Justice may reject it without further consideration, avoiding delay or hindrance of the pretended enforcement.

On the contrary, if the party opposing enforcement would adduce and reliably demonstrate the existence of a pending nullification procedure, the Supreme Court of Justice must suspend the enforcement of the award until the nullification procedure has concluded that the award remains enforceable.

Finally, the local legal framework does not regulate any aspect regarding supervening facts or pleas, or designate the authority to resolve admissible pleas, resulting in a void that needs to be filled by the time the Bolivian judicial system is asked to consider recognition and enforcement of foreign arbitral awards, particularly as it is also probable that such awards could be in some cases issued against the Bolivian state.

Notes

1 Approved in Panama on 30 January 1975, ratified by Bolivia by means of Law No. 1592 dated 12 August 1994, modified by Law No. 1697 dated 12 July 1996, ratifying instrument was sent to the General Secretary of the Organization of American States on 12 November 1996.

2 Approved in New York on 10 June 1958, ratified by Bolivia by means of Law No. 1588 dated 12 August 1994, ratification instrument was deposited before the Secretary General of the Organization of American States on 28 April 1995.

3 Approved in Montevideo on 8 May 1979, ratified by Bolivia by means of Law No. 1853 dated 7 April 1998.

4 Approved in Washington on 18 March 1965, ratified by Bolivia by means of Law No. 1593 dated 12 August 1994. It must be clarified that Bolivia denounced the Washington Convention on 2 May 2007, with the denunciation becoming effective from 3 November 2007.

5 Following the words of Brazilian jurist Augusto Teixeira de Freitas who said that codes and laws are texts of juridical rules and not juridical dictionaries where you can find definitions.

6 See, for example,

7E J Couture, Fundamentals of Civil Procedural Law, (1942)

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Brazil has experienced a significant development in corporate law and in arbitration. Globalisation associated with the enactment of a new corporate law (Law NO. 6,404/76) and the creation of the Brazilian Securities Commission (CVM) in 1976 have promoted the expansion of Brazilian capital markets. As a result, in the last 20 years the number of publicly held companies and joint ventures has increased; Brazilian companies have received a greater share of foreign capital and begun to establish subsidiaries abroad. In addition, the Brazilian stock exchange (BM&FBOVESPA) has become one of the most important in the world.

Such complex transactions also give rise to disputes involving minority and majority shareholders, conflicts of interest between owners of shared control, derivative transactions and so on. Such disputes represent high cost for companies, since they may hinder their expansion and development, affect their credibility in the market and thus result in devaluation of their assets and shares.

Therefore there is need for speedy and effective solutions, combined with the expertise of adjudicators, which is not always available at national courts. For that reason, the use of arbitration for the resolution of corporate disputes has increased significantly.1

The arbitrability of corporate issues is no longer an issue in Brazil, following the enactment of the Brazilian Arbitration Law (Law No. 9307/96) and the Supreme Court's confirmation of its constitutionality in 2001, and the amendment dated of the same year to the Brazilian Corporation Act (Law No. 6404/76), which expressly provides for the possibility of inclusion of an arbitration agreement in the by-laws of corporations - article 109(3).2

Although that article refers only to conflicts between shareholders and the company and between majority and minority shareholders, it should be widely construed in order to cover all corporate relationships, including conflicts between the company's organs, shareholders and the company's officers. The arbitrability of such disputes cannot be limited to corporations, but should cover all other types of companies.

The binding character of the arbitration agreement

The question as to what type of document an arbitration agreement should be included with in order to bind all members of a company has raised much debate in Brazil.

As a general rule, an arbitration agreement becomes binding upon the company and its members where it is included in its articles of association or by-laws. There are, however, cases in which a quota or shareholders' agreement provides for arbitration; in such cases, the arbitration agreement is binding upon the quota or shareholders that are parties to it. In the event that the company itself appears as a party (and not only as a mere intervening party) to the arbitration agreement, it may also be bound by it.

To be sure, all quota or shareholders, the company itself, its officers and members of the board are subject to the arbitration agreement where the latter is included in the by-laws or articles of association. On the other hand, third parties are only subject to such agreement if they have consented to it and if the parties bound to it accept it too.

There are, however, a few scholars who maintain that the arbitration agreement in the company's by-laws or articles of association does not bind the quota or shareholders who vote against it.[3] Accordingly, the arbitration agreement would only bind those parties that have expressly consented to it. In particular, the Board of Trade of Sío Paulo (JUCESP) has gone so far as to state that an arbitration agreement could only be included in the company's by-laws or articles of association if approved unanimously by the quota or shareholders.[4]

Such positions are, however, groundless.[5] They are inconsistent with the institutional character of a company and with the majority vote rule. A decision that approves the inclusion of an arbitration agreement into the company's articles of association or by-laws is binding upon all quota or shareholders, including those that have voted against it and those who have joined the company after its approval.[6] Any exceptions should be expressly provided by law or by the company's by-laws or articles of association.[7]

Providing for arbitration in a company's by-laws does not violate article 109(2) of Law No. 6404/76, which provides for the shareholder's access to justice.[8] Neither is an arbitration agreement inconsistent with article 5, XXXV, of the Brazilian Federal Constitution, on the fundamental right of access to justice. That is because this right refers precisely to jurisdiction, which can be exercised by state courts or arbitral tribunals.[9]

Moreover, the question as to whether or not the company is subject to an arbitration agreement that is included in a shareholders' agreement rather than in its by-laws has been much discussed in Brazil. That is because under Brazilian law shareholders' agreements ought to be filed in the books of the company's main place of business. The company often acts as an intervening party in such agreements in order to express its awareness of them. For instance, in an ICC award[10] that subsequently became public for being presented in Brazilian state court proceedings,[11] the arbitral tribunal held that the company was not bound by the arbitration agreement provided for in a shareholders' agreement and thus could not participate in the ICC arbitration. This decision was based on our expert opinion submitted to the arbitral tribunal in that case.

The use of arbitration as a catalyser for settlement

Arbitration can also encourage parties to settle their disputes before the arbitral tribunal is constituted or even in the course of arbitration proceedings. Arguments and documents submitted by the parties can enable them to better evaluate their chances of success in arbitration.

This is illustrated in a recent ICC arbitration in which we participated as counsel in a dispute involving shared control on the basis of a joint venture agreement between a Brazilian and a foreign company. In this case, the parties agreed to settle their case having examined carefully the request for arbitration, the additional claims and the answer to the request.

The commencement of arbitration proceedings triggered negotiation between claimant and respondent. The parties considered that an agreement providing for the return to the status quo ante would be satisfactory. Their settlement agreement provided for the termination of the joint venture upon return by claimant of the relevant shares in exchange for reimbursement of the price paid on the basis of the share purchase agreement.

Arbitration aiming at the determination of the purchase price

A recent case that is causing much debate in Brazil concerns the exercise of a call option for the acquisition of participating interest in a holding of one of the largest conglomerates in Brazil.12 The parties disagree on the interpretation of the shareholders' agreement of the holding and, in particular, as to the evaluation criteria applying to the purchase price of the participating interest. According to the shareholders' agreement, an independent bank subject to prior approval by the board was to fix the value of the holding's shares. One of the parties disagrees, however, on the evaluation criteria relied upon by the bank. Arbitration proceedings have not yet commenced in this case.

Similarly, there has been an arbitration where parties have differed on whether the purchase price should correspond to the results of the IPO of respondent's controlling holding, or to the value provided in the IPO prospect that had been drafted by a third party (a bank).

These cases illustrate how arbitration can also be used where a party seeks the determination of the price or the revision of a contract, especially in circumstances under which the price is subject to conditions external to the contract.

Arbitration and competition law

Corporate operations, especially those related to mergers and acquisitions, can also raise matters of competition law. The possibility relying upon arbitration as a means of solving disputes involving matters of competition law has been much discussed in the United States and in the European Union (EU).13

In Brazil, however, the debate remains at a preliminary stage. The discussion in Brazil concerns whether disputes involving competition law would constitute "patrimonial rights over which [the parties] may dispose" within the meaning of article 1 of the Brazilian Arbitration Act.14 In any event, there is no question that competition law provisions constitute mandatory rules under Brazilian law that ought to be applied by arbitral tribunals as the case may be.

Arbitration and joint ventures

Moreover, the increasing complexity of joint ventures in Brazil demand new solutions for which arbitration offers an attractive and often more appropriate procedure than state courts. Arbitral tribunals deciding upon disputes involving corporate and non-corporate joint ventures in Brazil have given precedence to contractual solutions.

The question often submitted to arbitral tribunals concerning corporate joint ventures has been the dissolution of a company whose affectio societatis no longer exists. Arbitral solutions have sought to ensure the survival of the relevant company by way of partial dissolution (dissoluçío parcial), having been based on corporate law.

Arbitral tribunals have ordered partial dissolution of joint-stock companies (sociedade anônonima or SA), particularly following the Brazilian Superior Court of Justice's decision-15 which affirmed the possibility of their partial dissolution in the event that the interested party demonstrates the company's intuitu personae. Partial dissolution of limited liability companies (sociedade limitada or Ltda) has been long accepted by state courts and by arbitral tribunals in Brazil.

Arbitrators determining the partial dissolution of a company may order reimbursement of the price for return of the shares to be made in instalments in order to avoid undercapitalisation of the company. The arbitral tribunal may also order the termination of the purchase

agreement or of the shareholders' agreement in order to re-establish the statu quo ante to the transaction.

Arbitral tribunals in Brazil have applied contractual formulas by analogy in order to calculate compensation in case of withdrawal of a joint venturer in the event that the parties have failed to provide expressly for partial dissolution. That has been the case of put option provisions.

In the event of disappearance of the affectio societatis in a corporate joint venture, the arbitral tribunal should fix the date of the company's dissolution, the valuation criteria of the quotas and shares, and determine the method of payment. The parties may request the winding up of the company in the arbitration, which will follow the procedures set out in article 1218(VII) of the Brazilian Code of Civil Procedure on judicial winding up proceedings - applied by analogy in arbitration. Following the winding up, the arbitral tribunal or the parties or both have to require the cancellation of the company's registration with the Board of Trade.

Moreover, arbitral tribunals deciding upon disputes involving non-corporate joint ventures have also given precedence to contractual formulas in their awards. In a recent arbitration involving the breach of affectio societatis in a joint venture composed by four Brazilian companies, the losing party applied for annulment of the arbitral award on the ground that the arbitral tribunal had exceeded its powers.

The Court of Appeal of the State of Sío Paulo16 held that that was not the case, since the arbitral tribunal had made reference to the penalty under the contract as a mere criterion for fixing the amount of damages owed to defendant in the annulment proceedings. According to the Court, the application of this contractual formula was not equal to a finding that the circumstances for the application of the penalty had been verified; the arbitral tribunal had not applied the penalty itself, but relied upon it as a criterion for calculating damages for rescission on the basis of breach of contract. Other arbitral tribunals have applied contractual provisions on dilution in cases of disappearance of the affectio societatis.

The growing use of dispute resolution boards in Brazil

Today there is an increasing need for massive investments in infrastructure in light of the 2014 Soccer World Cup, the 2016 Olympic Games and the development of telecommunications, construction and oil and gas (pre-salt) industries in Brazil.

The government estimates investments of 1.59 trillion reais in infrastructure starting in 2011 (Program for the Acceleration of Growth - PAC 2), of which approximately 1.1 trillion reais will be invested in electricity (including the pre-salt), 109 billion reais in transportation (highways, waterways and railways) and 137.2 billion reais per year in civil construction between 2011 and 2014.17

Furthermore, according to the Central Bank of Brazil, the amount of foreign direct investment (FDI) received in Brazil jumped from US$3.2 billion to US$48.5 billion between 2000 and 2010, representing an increase of more than 1,500 per cent. The forecast for 2011 is that the amount of investments will reach US$65 billion or more.18

These circumstances are extremely favourable for the development of new forms of dispute resolution, especially those that can prevent them, such as dispute boards.

There is no doubt that there is a great area for development and use of dispute boards in Brazil in the coming years. It is for this reason that the 11th Conference of the Dispute Resolution Board Foundation and the ICC/FIDIC Conference on "International Construction Contracts and the Resolution of Disputes" were held in Sao Paulo, in May and June 2011,

respectively. Similarly, some Brazilian arbitral institutions have enacted rules on dispute boards, such as the Chamber of Mediation and Arbitration of the Institute of Engineering of Sío Paulo (CMA-IE) and the Arbitration Centre of the Chamber of Commerce Brazil-Canada (CCBC).

Although dispute boards have originally been designed for construction contracts, such mechanism has also been used in other types of contracts, such as concession agreements, public-private partnerships, supply contracts and shareholders' agreements, particularly because of their suitability for long-term contracts.19

Dispute boards not only prevent disagreement between the parties in the course of the performance of the contract, but also constitute an effective and efficient dispute resolution method that helps to significantly reduce cases submitted to arbitration and state courts. To be sure, this method can stimulate the increase of investments in infrastructure at more competitive costs in Brazil.

The landmark decision in ***Nuovo Pignone v Petromec***

As mentioned above, Brazilian economy is booming and therefore attracting investments from all over the world. Consequently, alternative methods of dispute resolution acquire an even greater relevance for the settlement of corporate disputes, such as arbitration, mediation and dispute boards. In this respect, the Third Chamber of the Brazilian Superior Court of Justice (STJ) rendered on 24 May 2011 a decision that can stimulate the use of Brazil as the seat of domestic or international arbitrations.

The Court decided unanimously to reverse a decision by the Court of Appeal of the State of Rio de Janeiro, which mistakenly considered an ICC arbitral award rendered in Rio de Janeiro as a "foreign award". The decision has significant implications for the enforcement of arbitral awards administered by foreign arbitral institutions in Brazil. It clarifies that arbitral awards rendered by arbitral tribunals seated in Brazil are domestic, irrespective of whether the applicable arbitration rules belong to an institution seated abroad and that such awards need not be confirmed by the STJ.

In the decision on the merits of Recurso Especial 1.231.554/RJ,20 in which we acted as amicus curiae,21 Justice Rapporteur Nancy Andrighi confirmed that Brazilian legislators had established the place where the award is rendered as the sole criterion for establishing whether an award is domestic or foreign for purposes of enforcement in Brazil. In her view, the mere fact that the arbitration had been administered by the ICC did not result in the award being foreign, particularly where the arbitrator was of Brazilian nationality, Brazilian law was applied and the award was in Portuguese.

Therefore, the Court held that the ICC award, which had been rendered in Rio de Janeiro, had the same effects as a final decision by national courts, pursuant to article 475-N, IV of the Brazilian Code of Civil Procedure and article 31 of Brazilian Arbitration Law (Law No. 9307/96).

Moreover, Brazil ranks fourth in the world in ICC arbitrations, as far as the nationality of the parties involved in arbitration is concerned.22 Eleven ICC arbitration proceedings having Brazil as the place of arbitration have commenced in 2009.23

There is no question that the STJ's decision encourages parties to have foreign arbitral institutions administering arbitrations seated in Brazil.

Notes

1

According to the data provided by the main arbitral institutions in Brazil, approximately 150 arbitral proceedings commenced in 2009, while 134 arbitrations started in 2010. By the end of 2010 there were 216 pending arbitrations, which contrast with the total number of pending arbitrations by the end of 2009 189. The following institutions were considered in this survey: Câmara de Mediaçío e Arbitragem de Sío Paulo (CMA), Centro de Arbitragem da Câmara de Comércio Brasil-Canadá (CCBC), Câmara FGV de Conciliaçío e Arbitragem, Centro Brasileiro de Mediaçío e Arbitragem (CBMA), Câmara Americana de Comércio para o Brasil (AMCHAM) e a Câmara de Arbitragem Empresarial - Brasil (CAMARB). In 2009, Brazil ranked 4th in ICC arbitrations, preceded by the United States, France and Germany ("2009 Statistical Report", ICC International Court of Arbitration Bulletin, volume 21, no. 1, 2010, p8).

2Article 109(3) of Law No. 6.404/76 which has been added by Law No. 10,303 of 31 October 2001.

3Eg, "Modesto Carvalhosa, Comentários à Lei das Sociedades Anônimas", 2nd volume, 3rd edition, Sío Paulo, Saraiva, 2003, pp309-310.

4The Board of Trade of Sío Paulo has refused to register an amendment to the by-laws of a company providing for arbitration, since the amendment was approved on the basis of a majority vote (Opinion CJ/JUCESP 488/2008, rendered 23 September 2008).

5Donaldo Armelin, "Da alteraçío estatutária de companhia para inclusío de cláusula compromissória e a incompetência da Junta Comercial para analisar sua legalidade material", Revista de Arbitragem e Mediaçío, no. 24, January/March 2010, p28.

6Pedro Batista Martins, "A arbitrabilidade subjetiva e a imperatividade dos direitos societários como pretenso fator impeditivo para a adoçío da arbitragem nas sociedades anônimas", in Diogo Leite de Campos, Gilmar Ferreira Mendes, Ives Gandra da Silva Martins (eds), A evoluçío do direito no século XXI: estudos em homenagem ao Prof. Arnoldo Wald, Coimbra: Almedina, 2007, pp445-463. See also: Paulo Fernando Campos Salles de Toledo, "A arbitragem na Lei das Sociedades Anônimas", in Rodrigo R Monteiro Castro e Leandro Santos de Aragío (eds), Sociedade Anônima: 30 anos da Lei n° 6.404/76, Sío Paulo, IDA - Quartier Latin, 2007, p262 et seq.; José Maria Rossani Garcez, "Arbitragem Nacional e Internacional', Belo Horizonte, Del Rey, 2007, p109 et seq; Marcelo Dias Gonçalves Vilela, "Arbitragem no Direito Societário", Belo Horizonte, Mandamentos, p184 et seq; José Virgílio Lopes Enei, "A arbitragem nas sociedades anônimas", Revista de Direito Mercantil, Industrial, Econômico e Financeiro, volume 129, January/March 2003, pp136-173; Marco Aurélio Gumieri Valério, "Arbitragem nas sociedades anônimas: aspectos polêmicos da vinculaçío dos acionistas novos, ausentes, dissidentes e administradores à cláusula compromissória estatutária, após a inclusío do § 3° do article 109 da Lei no. 6.404/76 pela Lei 10.303/2001", Revista de Direito Mercantil, Industrial, Econômico e Financeiro, volume 139, July/September 2005, pp164-176; Olivier Caprasse, "Les sociétés et l'arbitrage ", Paris/Bruxelas, Bruylant/LGDJ, 2002, p247 et seq ; Daniel Cohen, "Arbitrage et Société", Paris, LGDJ, 1993, p258 et seq ; Bernard Hanotiau, "L'arbitrabilité des litiges en matière de droit des sociétés", in Liber Amicorum Claude Raymond - Autour de l'arbitrage, Paris, Litec, 2004, p97 et seq.

7Carlos Augusto da Silveira Lobo, "A cláusula compromissória estatutária", Revista de Arbitragem e Mediaçío, no. 22, July/September 2009, p14, and "A cláusula compromissória estatutária (II) (Anotações adicionais)", Revista de Arbitragem e Mediaçío, no. 26, April/June 2010.

8Article 109 of Law No. 6,404/76 provides: “Neither the by-laws nor a general meeting may deprive a shareholder of the right: Paragraph 2. The means, procedures or actions conferred on shareholders by operation of law to enforce their rights cannot be overridden either by the by-laws or by any general meeting”.

9Rafaella Ferraz and Joaquim De Paiva Muniz (eds), “Arbitragem doméstica e internacional - Estudos em homenagem ao Professor Theóphilo De Azeredo Santos”, Rio de Janeiro, Forense, 2008, p46.

10ICC Case No. 14,144/CCO, Companhia Nacional de Cimneto Portland v CP Cimento e Participações SA e Latcem SA, Final award on jurisdiction, Revista de Arbitragem e Mediaçío, n. 14, Jul/Sept 2007, p. 259 et seq.

11Proceedings No. 2006.001.014953-3, First instance court of the State of Rio de Janeiro, Judge Marcia de Andrade Pumar, decided 29.12.2006, Revista de Arbitragem e Mediaçío, n. 14, Jul/Sept 2007, p. 228 et seq.

12Valor Econômico, 08.23.2011.

13The leading cases Mitsubishi in the United States and Eco Swiss in the EU have established the “second look” doctrine according to which arbitral tribunals can decide on matters of competition law but that is subject to a “second look” by national courts at the stage of annulment or enforcement proceedings. See also, LUCA DI BROZOLO, “Arbitragem e direito da Concorrência”, Revista da Mediaçío e Arbitragem, n. 27, Oct-Dec 2010, pp. 164-165.

14JOSÉ GABRIEL ASSIS DE ALMEIDA, “A Arbitragem e o Direito da Concorrência” in RAFAELLA FERRAZ e JOAQUIM DE PAIVA MUNIZ (eds), “Arbitragem doméstica e internacional - Estudos em homenagem ao Professor THEÓPHILO DE AZEREDO SANTOS”, Rio de Janeiro, Forense, 2008, pp. 200 -201.

15STJ, Embargos de Divergência em REsp 111,294/PR, Second Section, Justice Repporteur CASTRO FILHO, decided 28.06.2006. See also: STJ, AgRg no Agravo de Instrumento 1,013,095/RJ, Forth Panel, Justice Repporteur RAUL ARAÚJO FILHO, decided 22.06.2010.

16TJSP, Apelaçío 994.08.124054-3, Justice Repporteur JOíO CARLOS GARCIA, decided 20.04.2010.

17Estadío News, “Brasil tem IED recorde de US$ 48,5 bi em 2010”, 25.01.2011, available at <>http://www.estadao.com.br/noticias/geral,brasil-tem-ied-recorde-de-us-485-bi-em-2010,670960,0.htm>, accessed 06.22.2011.

18Estadío News, “Brasil tem IED recorde de US$ 48,5 bi em 2010”, 25.01.2011, available at <>http://www.estadao.com.br/noticias/geral,brasil-tem-ied-recorde-de-us-485-bi-em-2010,670960,0.htm>, accessed 06.22.2011. See also Valor Econômico, “Investimento direto dispara e soma US$72 bi em 12 meses”, 24.08.2011.

19ARNOLDO WALD, “Dispute Resolution Boards: Evoluçío Recente”, Revista de Arbitragem e Mediaçío, n. 30, Jul/Sept 2011, forthcoming. PIERRE GENTON discusses the types of contracts that could be subject to dispute resolution boards, and states that “any mid- or long-term contract, in whatever field. I could mention, in particular, banking, insurance and any other commercial contract such as purchase contracts performed over a period of several years” (“ICC Dispute Board Rules: practitioners’ views”, ICC International Court of Arbitration Bulletin, vol. 18, n. 01/2007, p. 44.

20See STJ, Recurso Especial 1,231,554/TJ, Third Section, Justice Repporteur NANCY ANDRIGHI, decided 24.05.2011, and case comment by FRANCISCO CLáUDIO DE ALMEIDA SANTOS, "A nacionalidade da sentença arbitral. Critério territorialista do direito brasileiro", Revista de Arbitragem e Mediaçío, n. 30, Jul/Sept 2011, forthcoming.

21For the amicus curiae brief, see ARNOLDO WALD, THEOPHILO DE AZEREDO SANTOS, "Descabimento de homologaçío de sentença arbitral proferida no Brasil por se considerada pela lei como sentença nacional", Revista de Arbitragem e Mediaçío, n. 29, Apr/Jun 2011, p. 423 et seq.

22"2009 Statistical Report", ICC International Court of Arbitration Bulletin, vol. 21, n. 1, 2010, p. 8.

23"2009 Statistical Report", ICC International Court of Arbitration Bulletin, vol. 21, n. 1, 2010, p. 13.

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Summary

Overview

Commercial arbitration - both domestic and international - is an established and frequently employed dispute resolution mechanism in Canada, and one that is legislatively protected. With respect to international commercial arbitration in particular, the accepted culture and approach is consistent with the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law); that is to say, the courts take a very non-interventionist approach. There are some limits to this, though, which we will discuss.

We begin this chapter with a brief background on Canadian arbitration legislation. We then discuss Seidel v TELUS Communications Inc[1] and Yugraneft Corp v Rexx Management Corp,[2] the Supreme Court of Canada's most recent decisions that analyse and explain how the Canadian justice system and private arbitration processes co-exist. TELUS deals with the relationship between consumer protection legislation, class actions and mandatory arbitration clauses, and Yugraneft with the interaction between local Canadian limitation periods and the enforcement of foreign arbitral awards in Canada. These decisions significantly add to the Supreme Court's body of case law on arbitration in Canada and provide clarity to users of commercial arbitration.

Arbitration legislation in Canada

International commercial arbitration started to become a respected substitute for court proceedings in Canada in the late 1980s and early 1990s, as Canada's federal and provincial governments realised its relevance and importance to Canada's commitment to international trade and commerce. In 1986, Canada became a signatory to the United Nations Convention on the Reciprocal Recognition and Enforcement of Foreign Arbitral Awards, which was adopted by the United Nations Conference on international commercial arbitration in New York on 10 June 1958 (the New York Convention). This led the way to the adoption of the New York Convention and, later, the Model Law as part of local law in Canada.[3]

Canada is a confederation of ten provinces and three territories, each of which has a separate and independent judicial system, as does the federal jurisdiction. Each jurisdiction controls court proceedings and the administration of justice therein, including alternative dispute resolution procedures. As such, each Canadian jurisdiction, including the federal jurisdiction, has a separate commercial arbitration regime - though, notably, these regimes resemble one another.

The provincial legislation governing commercial arbitration divides it into two categories: international commercial arbitration and domestic arbitration. Each province has both a domestic arbitration act and an international arbitration act, which adopts the Model Law as the law applicable to commercial arbitrations that are international in scope. In general, the domestic acts apply to any arbitration under an arbitration agreement unless it is excluded by some other act or law or the international act applies. In Ontario, for example, the International Commercial Arbitration Act, RSO 1990, chapter I.9 governs international commercial arbitrations. It adopts the Model Law, with some modifications, and incorporates the Model Law as a schedule to the act. The Arbitration Act, 1991, SO 1991, chapter 17 governs domestic arbitrations. It applies to any arbitration unless its application is excluded by law or the International Commercial Arbitration Act applies. The federal government has also adopted the Model Law, with some modifications, for all commercial arbitrations, both domestic and international, which fall within the federal jurisdiction.[4]

The provincial international arbitration acts allow domestic courts to intervene in an international commercial arbitration only on very restricted grounds. Further, the international arbitration acts do not provide for rights of appeal to the domestic courts unless the parties expressly provide for an appeal in their arbitration agreement. By contrast, the domestic arbitration acts allow for greater court involvement in domestic arbitrations.

TELUS - Consumer arbitration clauses and class actions

Introduction

On 18 March 2011, the Supreme Court released its decision in TELUS. In that case, the plaintiff, Ms Seidel, had commenced an intended class action in the British Columbia Supreme Court, notwithstanding an arbitration clause in her contract, to the effect that any claim, dispute or controversy arising out of or relating to the contract should be referred to and determined by private and confidential mediation and, failing a settlement, by arbitration. Under her contract, Ms Seidel also waived any right to commence or participate in any class action against TELUS.

Ms Seidel's complaint was that TELUS unlawfully charges its customers for incoming calls based on when the caller connects to TELUS's network, but before the customer answers the call. Her claims (for declaratory and injunctive relief, and damages) were principally based on sections 171 and 172 of the British Columbia Business Practices and Consumer Protection Act, SBC 2004, chapter 2 (BPCPA). Section 3 of the BPCPA, which was central to the appeal, provides as follows:

> Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act. [Emphasis added.]

The British Columbia Court of Appeal, overturning the judge of first instance, stayed Ms Seidel's action in favour of arbitration. Section 15 of the Commercial Arbitration Act, RSBC 1996, chapter 55 (the CAA) provides that where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, the defendant may apply to have the action stayed.

The issue on appeal to the Supreme Court of Canada was whether Ms Seidel's claims under the BPCPA had been properly stayed. The principal question was whether section 3 of the BPCPA created an exception to the mandatory language of section 15 of the CAA. Stated differently: did section 3 mean that claims under sections 171 and 172 could only be heard by a court and not by an arbitral tribunal?

Discussion

Competence-Competence Principle

In a split 5-4 decision, the Supreme Court ruled that section 3 of the BPCPA did, in fact, create such an exception. There was no disagreement that the competence-competence principle had general application.5 It is now beyond doubt in Canada that an express legislative direction that arbitrators are to consider the scope of their own jurisdiction, coupled with the use of language similar to that found in the New York Convention and the Model Law amounts to incorporation of the competence-competence principle.

In such circumstances, absent a challenge to the arbitrator's jurisdiction based solely on a question of law (or one of mixed fact and law requiring only superficial consideration of

the evidence in the record), the existence or validity of an arbitration agreement to which legislation like the CAA applies must be considered first by the arbitrator, and the court should grant the stay. In this case, all judges of the Supreme Court agreed that the British Columbia Court of Appeal had properly accepted and endorsed this approach. However, the Supreme Court was divided as to the correct result of that approach on the facts of this case.

The effect of section 3 of the BPCPA

It is readily apparent from how the majority and the dissent, respectively, characterised the core issue that the court is deeply divided about the role of arbitration in today's Canadian justice system. Justice Binnie,6 for the majority, framed the issue as one of "access to justice", noting that "private arbitral justice, because of its contractual origins, is necessarily limited".7 The dissenting opinion, penned by Justices LeBel and Deschamps, focused not on access to justice simpliciter but, rather, whether access to justice must mean "access to a judge". They observed as follows:

> In an effort to promote and improve access to justice, and to make more efficient use of scarce judicial resources, legislatures have adopted new procedural vehicles designed to modify or provide alternatives to the traditional court action. These alternatives include class actions and arbitration, both of which have been endorsed by this Court. In this case, the consumer's contract provides that in the event of a dispute, the exclusive adjudicative forum is arbitration. This is a forum our courts have long accepted as an efficient and effective access to justice mechanism. Thus, the question in this case is instead whether access to justice means - and requires - access to a judge.8

In contrast, Justice Binnie concluded that section 3 of the BPCPA should be interpreted to mean "that to the extent the arbitration clause purports to take away a right, benefit or protection conferred by the BPCPA, it will be invalid".9 Embedded in this reasoning is the notion that it is a right, benefit or protection under the BPCPA to assert a consumer complaint in the courts. The corollary is that being required to assert the same complaint before an arbitral tribunal is tantamount to an impairment of such right, benefit or protection. Justice Binnie offered two justifications for his approach:

- In the consumer context, declarations and injunctions (remedies provided for under the BPCPA) are the most efficient remedies in terms of protection of consumers' interests and the deterrence of wrongful suppliers' conduct;10 and
- By contrast, arbitrations are "private and confidential", lack precedential value and an order made by an arbitrator would not bind third parties.11

The dissenting judges were unusually critical of the majority's approach, noting: "In our view, [the majority's] interpretation represents an inexplicable throwback to a time when courts monopolized decision making and arbitrators were treated as second-class adjudicators."12 To explain their position, Justices LeBel and Deschamps first carefully reviewed Canadian jurisprudence on arbitration, concluding that, until the late 1980s, Canadian courts had been openly hostile towards arbitration. That hostility eventually gave way to a new approach, under which, where a legislature intends to exclude arbitration as a vehicle for resolving a particular category of legal disputes, it must do so explicitly.13

Next, they explained that the CAA was influenced by the Model Law.14 As to the proper interpretation of the BPCPA, they reasoned that section 3 was intended to protect substantive rights - however, in what forum these rights are to be dealt with is a procedural matter:

> An arbitrator can grant the remedies contemplated in s. 172 of the BPCPA against TELUS. The arbitration agreement between Ms. Seidel and TELUS does not therefore constitute an improper waiver of Ms. Seidel's rights, benefits or protections for the purposes of s. 3 of that Act. Consequently, the BPCPA, in its current form, does not provide a court considering a stay application under s. 15 of the CAA with a reason for refusing to grant it. Section 3 of the BPCPA does not prohibit agreements under which consumer disputes are to be submitted to arbitration or that otherwise limit the possibility of having a proceeding certified as a class proceeding, since s. 172 of the BPCPA merely identifies the procedural forum in which an action with respect to the rights, benefits and protections provided for in s. 172 may be brought in the public court system. However, s. 172 does not explicitly exclude alternate fora, such as an arbitration tribunal from acquiring jurisdiction.15

Implications

One may debate why the majority considered section 3 of the BPCPA to reflect a legislative intent to oust the parties' clear choice in favour of arbitration.16 The contention that section 172 of the BPCPA confers a right, benefit or protection that is sheltered under section 3 of the BPCPA presupposes that having to bring a section 172 claim in an arbitration proceeding constitutes an impairment of a substantial right. However, given the evolution and acceptance of commercial arbitration in Canadian courts in the past two decades, that presupposition is open to discussion.

The majority's argument that arbitration is antithetical to the public purposes of section 172 (in that private arbitration cannot offer the same remedies set out in section 172) is also not so clear cut. Firstly, any arbitral award is enforceable in the courts and thus open to public scrutiny. This would also engage the principle of deterrence, with which the majority appears to have wrestled. Moreover, as the dissent correctly pointed out, under modern statutes in Canada, including in British Columbia, arbitrators have the jurisdiction to grant "specific performance, rectification, injunctions and other equitable remedies".17 Viewed in this light, there is considerable scope to suggest that the dissenting reasons may be more persuasive.

In the final analysis, however, the Supreme Court may simply have added British Columbia to the list of existing jurisdictions where consumer class actions will be permitted to proceed (subject to meeting the usual certification requirements) even in the face of clear arbitration agreements. The result is therefore not remarkable and it appears that - except in the consumer context and even then only where the legislature has intervened - commercial arbitration in Canada will continue to thrive, as it has over the past 20 or so years.

Yugraneft - Enforcement of foreign arbitral awards and local limitation periods

Introduction

In Canada, final arbitration awards are recognised as legally binding between parties without the need for any judicial proceedings. However, a party that wishes to enforce a final award by the customary means of seizure and sale, garnishment, contempt and the like, must first apply to the local court to obtain judgment enforcing the award. Usually, this is a straightforward summary proceeding. While this seems simple in theory, the reality can be more complex. When it comes to the enforcement of an arbitral award, the local rules of the enforcing jurisdiction are engaged. Most significantly, local limitation periods apply, as the Supreme Court recently decided in Yugraneft.

In Yugraneft, it was held that the imposition of a time limit for the enforcement of an international commercial arbitral award is a procedural rule permitted by article III of the New York Convention. Consequently, the question as to whether the enforcement of an arbitration award is subject to any time limit depends on the wording of any limitations legislation in the province where the award is sought to be enforced.

In this case, Yugraneft Corporation, a Russian company in the business of developing and operating oilfields in Russia, purchased materials from Rexx Management Corporation, an Alberta company. Following a contractual dispute and an international commercial arbitration before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation on 6 September 2002, the tribunal awarded just under US$1 million to Yugraneft. On 27 January 2006, Yugraneft applied to Alberta's Court of Queen's Bench for recognition and enforcement of the award. The application was dismissed and an appeal to Alberta's Court of Appeal was unsuccessful. Leave to appeal to the Supreme Court was granted which, following oral argument in December 2009, issued its ruling dismissing the appeal on 20 May 2010.

Discussion

Applicable limitation periods

The principal issue was whether the enforcement proceeding was subject to any limitation period and, if so, whether it should be the two year period applicable to a "remedial order" (section 3 of Alberta's Limitations Act, RSA 2000, chapter L-12) or the 10-year period applicable to a "judgment or order for the payment of money" (section 11). Yugraneft argued that section 11 should apply since a foreign arbitral award possesses all the hallmarks of a judgment and because there was ambiguity as to whether section 3 was intended to apply. Rexx argued that section 3 should apply since the Alberta legislature intended the two-year limitation period to apply to all causes of action, unless one of the exceptions enumerated in the Limitations Act expressly applied.

On the threshold issue as to whether the imposition of a local limitation period for the enforcement of a foreign award was contrary to the New York Convention, the Supreme Court held that this was a procedural - and therefore permissible - rule:

- As a treaty, the New York Convention should be interpreted in good faith in light of its object and purpose. When it was drafted, it was well known that common law states generally treated limitation periods as procedural in nature. The permissive language in article III (as opposed to an express prohibition) suggests that the drafters intended to permit limitation periods to be established by and in Contracting States.18
- In fact, 53 Contracting States have subjected the enforcement of foreign arbitral awards to some form of time limit.19
- The application of time limits "is not a controversial matter" given that leading scholars take it for granted that article III permits local limitation periods.20

In concluding that section 3 of the Limitations Act applied to a foreign award, the Supreme Court held that an arbitral award is not a judgment or a court order and that, in general, "arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators".21 The Supreme Court further pointed out that other statutes, like Alberta's Reciprocal Enforcement of Judgments Act, RSA 2000, chapter R-6 (RESA)22 and British Columbia's Limitation Act, RSBC 1996, chapter 266,

expressly referred to judgments and awards when prescribing limitation periods, whereas the Limitations Act did not.

Discoverability

The Court also held that the two-year limitation period in section 3 of the Limitations Act was subject to the discoverability rule, which "makes ample allowance for the practical difficulties faced by foreign arbitral creditors, who may require some time to discover that the arbitral debtor has assets in Alberta".23 The Court then established the following rules for determining when a limitation period, such as the one set out in section 3 of the Limitations Act, begins to run in respect of enforcing a foreign award:

- the limitation period will not be triggered until the possibility that the award might be set aside by the local courts in the country where the award was rendered has been foreclosed;
- even then, the time limit will not be engaged until the creditor knew or ought to have known that the bringing of an enforcement proceeding was warranted;
- an enforcement proceeding will be warranted only once the creditor has learned, exercising reasonable diligence, that the debtor possesses assets in the relevant jurisdiction; and
- when the underlying contract identifies the jurisdiction in which the debtor is registered (or has an office), it is presumed that the creditor knows or ought to know that a proceeding is warranted.

Implications

The Supreme Court has - at least for the time being - resisted the opportunity to pronounce that arbitral awards are at least functionally equivalent to judgments. This is perhaps somewhat surprising given that the Supreme Court has, in the past decade, consistently held that arbitral proceedings are "autonomous" and are to be afforded judicial deference (see, eg, Desputeaux v Éditions Chouette (1987) inc, 2003 SCC 17; Dell Computer Corp v Union des consommateurs, 2007 SCC 34; and Rogers Wireless Inc v Muroff, 2007 SCC 35). On the other hand, the Supreme Court has clarified what until now had been an arguably ambiguous issue and promulgated clear rules, providing certainty for users of commercial arbitration.

Conclusion

In Canada, there is a vibrant arbitration culture involving seasoned counsel as well as neutrals. Recently, for example, the Toronto Commercial Arbitration Society was founded. Its mission is to promote and develop a world centre in Toronto for arbitration excellence to resolve international and domestic disputes by providing qualified arbitrators, experienced counsel, innovative research and a supportive legal environment, regardless of the location of the parties or their systems of law. It also seeks to promote the use of arbitration to resolve commercial disputes.24

This vibrancy is the result of a judicial system that is deferential toward alternative dispute resolution mechanisms, but which, nonetheless, has established clear limits on arbitrations. Notably, however, the Canadian judicial system has also clearly articulated that - generally speaking - agreements to arbitrate will be upheld in Canadian courts of law.

Notes

1
2011 SCC 15 [TELUS].

22010 SCC 19 [Yugraneft].

3J Brian Casey, Arbitration Law of Canada: Practice and Procedure (Huntington, NY: Juris Publishing, Inc., 2005) at 2-4.

4Ibid at 21 and 23.

5Ibid, para 29 and 89-121.

6Justice Binnie resigned shortly after this decision was released, as did Justice Charron, who sided with the dissent.

7Ibid, para 7 and 22.

8Ibid, para 52.

9Ibid, para 31.

10Ibid, para 35.

11Ibid, para 35, 38-39.

12Ibid, para 55.

13Ibid, para 89-121, esp para 103.

14Ibid, para 109-121, esp para 109-110.

15Ibid, para 164.

16See the Ontario Consumer Protection Act, 2002, S.O. 2002, c. 30 Sched. A, section 7

17TELUS, supra at para. 146-148.

18Yugraneft, supra at paras. 19-20.

19Ibid. at para. 21.

20Ibid. at para. 22.

21Ibid. at para. 44.

22The RESA has a six year limitation period for the enforcement of judgments and arbitral awards rendered in reciprocating jurisdictions, which Russia is not; hence, Yugraneft's application was brought under the Model Law, as enacted in Alberta pursuant to the International Commercial Arbitration Act, R.S.A. 2000, c. I-5.

23Yugraneft, supra at para. 49.

24See http://torontocommercialarbitrationsociety.com.

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Summary

The Law on Arbitration and Mediation (LAM), enacted on 4 September 1997,1 repealed the previous Law on Commercial Arbitration that had been in force since October 1963, as well as several other legal provisions that could be deemed opposed to the new regime.2

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

- The possibility of challenging the validity of an arbitral award is clearly defined through a procedural nullity action (acción de nulidad), which cannot be considered an appeal within the same proceeding.
- The president of the Provincial Court of Justice is allowed 30 days to decide on the acción de nulidad filed against an award.
- In case a party to an arbitral agreement is sued before the judicial system, the judge will have to decide upon the existence and validity of such arbitral agreement as a pre-trial matter by means of the principle of judicial economy (see article 8, LAM).

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

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

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

The arbitration regime in the 2008 Constitution

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

Similar to its predecessor, the 2008 Constitution recognises the existence and validity of ADR mechanisms, expressly including arbitration (see article 190, 2008 Constitution). However, unlike the 1998 Constitution, the 2008 Constitution imposes certain conditions and requirements for arbitration to be viable.

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

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

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

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

Constitutional Control Of Arbitration

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

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

International Arbitration And Foreign Investment Protection

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

Additionally, there is a strong political decision to withdraw from several bilateral investment treaties through which Ecuador gives its consent to international arbitration.14

Actually, the Constitutional Court has been issuing a series of decisions declaring that the dispute settlement provision of bilateral investment15 (BITs) are unconstitutional (ie, the Ecuador-UK and Ecuador-Germany BITs and others). This is done as part of a major scheme to withdraw from those treaties because they are considered to be the illegitimate cession or waiver of sovereign powers; namely, the power of Ecuadorean courts to exercise their jurisdiction within the territory of Ecuador.

The Constitutional Court has issued the aforementioned decisions based on article 422 of the 2008 Constitution, which establishes in the relevant part:

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

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

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

At the time of writing, the National Assembly International Law Committee has already issued internal reports suggesting the withdrawal of several BITs and has approved the withdrawal of BIT executed with Finland.

The general procedure for withdrawing from the BITs is as follows: The National Assembly International Law Committee issues a recommendation to all the other legislators in the sense that they should approve the withdrawal from each BIT. After voting on the matter, the National Assembly will approve the withdrawal from each BIT and the president of the republic will send the notice of withdrawal to the other contracting party in each BIT.

It is important to say that despite the fact that the Constitutional Court has approved the withdrawal of several BITs, the National Assembly has rejected the request of withdrawal of the BITs executed with China, the Netherlands and Germany.

Recent developments in negotiation and renegotiation procedures for public contracts indicate that Ecuador is willing to submit disputes with foreign investors arising from specific contracts to international arbitration under UNCITRAL rules, having Santiago de Chile as the seat of arbitration. The attorney general has already approved this type or arbitral provision as required by the Constitution.

Also, the recent Production Code approved by the government to reactivate the economy contains some interesting provisions on settlement of investment disputes. Article 27 of the approved Code establishes that conflicts that arise from an investment may be resolved through arbitration, but the arbitration clause must be included in an investment contract. The mandatory applicable law will be Ecuadorean and there is a mandatory mediation phase that needs to be exhausted before the arbitration commences. The arbitration agreement needs to meet some legal requirements in order to be valid, but it is quite evident that the government understands that there is a need for having disputes with foreign investors resolved through international arbitration. Special care will surely be needed when drafting these contracts.

It is also worth mentioning that Ecuador is a party to the World Trade Organization[16] and more than once it has applied state-to-state arbitration as set forth in WTO treaties.[17]

Pending Cases Against Ecuador

Presently, as we have learned, Ecuador has nine pending international arbitration cases pertaining to investment.18

Enforcement Of International Arbitral Awards In Ecuador

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

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

On May 1982,26 the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, or the 1979 Montevideo Convention27 (MC), came into effect in Ecuador. In addition to the coverage provided by the MC to judgments and awards pertaining to other matters, it also applies to enforcement of foreign arbitral awards relating to commercial issues. The MC, just as in the PC, only applies to judgments and awards issued in OAS member countries. The MC's intention is to cover judicial judgments and awards issued in civil, commercial or labour proceedings in one of the member states.28

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

Therefore, we believe that the LAM provides a mechanism that is more expeditious and direct than those provided in international conventions, which can be applied to international arbitration awards in Ecuador.

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

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

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

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

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

As regards the ICSID Convention, articles 53 and 54 have specific provisions that make it a special and unique self-contained system. Many practitioners choose ICSID based on these provisions, which are one of the most relevant improvements of the ICSID Convention regarding other arbitral organs and procedures. These provisions mandate that ICSID awards may only be reviewed under the rules of the ICSID Convention: the parties recognise the award and any contracting state enforces the pecuniary obligations awarded as if they were res judicata from any domestic tribunal. If that is not the case and a domestic court (for public order or constitutional reasons) allows a review, the award may be enforced in any other contracting state of the ICSID Convention and such enforcement may not be opposed by Ecuador. In other words, the fact that there is a domestic procedure aimed at reviewing the award does not pre-empt any other contracting state or its judiciary to grant the enforcement.32

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

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

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In 2011, arbitration in Ecuador has been under the public eye. Important arbitral awards in investment cases have been issued where Ecuador has obtained favourable decisions, and the government has concluded several contracts in which international arbitration in Chile is the alternative selected by the attorney general. This has been welcomed by the arbitral community because the government accepts international arbitration as a forum for contractual and investment disputes.

On the local arena, arbitrators and practitioners are still waiting for the developments as to whether there is room for a constitutional revision of local arbitral awards. Also during this year we have seen good decisions issued by the actual president of the Provincial Court of Quito regarding the annulment of arbitral awards.

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

Notes

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

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

3See supra note 1.

4Arbitration statistics are provided below.

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

6See section 2 of article 190 of the Constitution.

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

8Section a) of article 4 of the LAM.

9Section a) of article 4 of the LAM.

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

11Accordingly, in 2009 the Organic Code of the Judiciary was enacted. The Code - which is also an organic law - provides that arbitration is part of the state's bodies for the administration of justice and that arbitrators exercise jurisdictional duties. Thus, awards can misguidedly be considered equal to judicial rulings. See Organic Code of the Judiciary, article 17, which says: "[t]he administration of justice by the Judiciary is a public service, [...]. Arbitration, mediation and other alternative dispute resolution mechanisms established in the law constitute a form of public service, just like the duties relating to justice exercised by the authorities of indigenous peoples".

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

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

14President Correa's speech to Congress on 10 August 2009 contained a strong message against bilateral investment and commercial treaties. See a press article at the following URL: www.asambleanacional.gov.ec/20090810235/noticias/rotativo/discurso-del-presidente-de-la-republica-economista-rafael-correa.html.

15See the article by Global Arbitration Review at the following URL: www.globalarbitrationreview.com/news/article/28642/ecuador-champing-bits/.

16Protocol of Adhesion to the WTO, published in Official Register issue 852, dated 29 December 1995.

17Ecuador has participated 15 times in the WTO Dispute Resolution System: three times as claimant, three times as defendant, and nine times as a third party. See www.wto.org/spanish/thewto_s/countries_s/ecuadoir_s.htm#disputes.

18Source: www.pge.gob.ec/es/patrocinio-internacional/arbitrajes-en-curso.html, last visit 4 September 2011.

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

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

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

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

23See articles 7 and 9.

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

25Article 4 of the PC provides that "arbitral judgments or awards that cannot be challenged according to the law or applicable procedural rules shall have the force of res judicata. Their enforcement or recognition may be demanded in the same manner as judgments pronounced by national or foreign ordinary courts according to the procedural rules of the

country where they are enforced and to what is established by international treaties in this respect".

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

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

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

29See article 5 of the NYC.

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

31Id.

32Id.

33Id.

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

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

36See press article at the following URL: www.hoy.com.ec/noticias-ecuador/ecuador-propondra-nuevo-sistema-de-arbitraje-durante-su-presidencia-en-unasur-357247.htm

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Venezuela

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Summary

Since the last edition of The Arbitration Review of the Americas, there have been relevant developments for both investment and commercial arbitration in Venezuela. For investment arbitration, a long discussion about the validity of article 22 of the Venezuelan Decree-Law for Promotion and Protection of Investment 1999 (the Investment Law) invoked as an offer of arbitration, reached the international arena with the rendering of three ICSID awards on which we will comment in this paper. For commercial arbitration, the Constitutional Chamber of the Venezuelan Supreme Tribunal rendered a new decision establishing a clear link between arbitration and constitutional rights to judicial protection and access to justice, and clearly stating the role of the judiciary in arbitral proceedings.

Investment arbitration: No BIT? National jurisdiction

Since investment arbitration became a concern in Venezuela, article 22 of the Investment Law has been the focus of academic conferences, judicial cases and, lately, arbitral awards. Legal writers were divided on the interpretation that could be given to the mentioned provision. Some of them argued that article 22 was clearly an offer of arbitration, while the other group argued that there was not an unequivocal consent expressed in that provision. Several cases were filed before ICSID on the basis of article 22, while a judicial opinion was requested from the Constitutional Chamber of the Supreme Tribunal of Justice by the Venezuelan Attorney General's Office. The Constitutional Chamber rendered its judicial opinion on 17 October 2008, in a judgment known by its number, 1.541/08, and concluded that article 22 could not be construed as an offer of arbitration.

The discussion on article 22 was also taking place in several cases before ICSID arbitral tribunals, which started to give their decisions on 10 June 2010, when the decision on jurisdiction in the Mobil case was rendered. This decision has been the one setting the guidelines that other two tribunals have followed for the interpretation of article 22 in the Cemex and Brandes cases, which decisions were rendered on 30 December 2010 and 2 August 2011, respectively.

In the Mobil case the tribunal started by establishing the standard of interpretation that must be applied to article 22. The tribunal had to decide whether to apply national or international standards of statutory interpretation. After analysing the precedents in ICSID cases where arbitral tribunals dealt with the interpretation of similar provisions in national legislation of the states party to those disputes, the conclusion was that there was not a coherent position. At least four cases were not clear about the standard applied, while the other three cases followed "general principles of statutory interpretation", taking into account both "relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations" (SPP v Egypt); or "international law without any reservation" (CSOB v Slovak Republic); or domestic law "subject to ultimate governance by international law" (Zhinvali v Georgia). The tribunal also analysed the precedents of the International Court of Justice regarding unilateral acts of the state and concluded that those acts, when used by the state to consent to ICSID jurisdiction, must be interpreted in accordance with the ICSID Convention "and the rules of international law governing unilateral declarations of states". Finally, the tribunal established that due regard must be had to the intention of the state, where domestic law may have a role to play, and that the provisions of the Vienna Convention on the Law of the Treaties may be applicable by analogy to the unilateral acts of the state.

The arbitral tribunal then moved to the actual interpretation of article 22 from the grammatical perspective and concluded that the article was so obscure that it was possible

to sustain interpretations both against and in favour of the offer of arbitration nature of the provision. There was also an analysis of the effet utile principle, put forward by the claimant, but the tribunal adopted the criteria set by the International Court of Justice in the decision on jurisdiction of the Fisheries case, where the effet utile principle must not be taken into account in the interpretation of states unilateral declarations.

The next step was to find out the intention of Venezuela when it included article 22 in the Investment Law. The tribunal reviewed the historic hostility of Venezuela against international arbitration and the change of that position since the 1990s with the approval of several BITs, the enactment of the Commercial Arbitration Act 1998, and the Constitution of 1999, which favours arbitration in general but maintains the restrictions over public interest contracts. The decision also states that since the Investment Law is a Decree-Law, there was no parliamentary discussion, nor the explanation of reasons that could be found in other decree-laws. The reference to statements given by alleged drafters of the decree-law were dismissed since they were given after the claim was filed, and additionally, they were not brought before the tribunal in order to give a proper statement as a witness. Finally, the tribunal concluded that if Venezuela had the intention of giving its consent to ICSID jurisdiction in article 22, the language would have been as clear as the one used in the 15 BITs concluded at that time. The conclusion was that Venezuela did not have the intention to give its consent in advance to ICSID arbitration in article 22 and therefore it does not provide basis of jurisdiction of the tribunal.

Given the decision on jurisdiction given in the Mobil case, followed by the decisions on the Cemex and Brandes cases, it is difficult to foresee that other ICSID tribunals, for which decisions on jurisdiction are still pending, could adopt a different conclusion, although we consider there could be solid arguments to do. As a result, the Investment Law is not currently a good basis to invoke ICSID jurisdiction, and foreign investors who are not covered by a BIT could be obliged to submit their disputes for the breach of the Investment Law provisions to local courts.

Commercial arbitration: Good news!

The most relevant event involving commercial arbitration in Venezuela during the past year was the decision rendered on 3 November 2010 by the Constitutional Chamber of the Supreme Tribunal of Justice in the Astivenca case. This case initiated in the First Instance National Tribunal for Maritime Matters, which received a claim by Astivenca against Oceanlink and requested interim measures of protection, which were partially granted by the tribunal. When Oceanlink appeared in the proceedings, the first action was to oppose the interim measures of protection already granted by the tribunal and later challenge the jurisdiction on the tribunal based on the arbitration agreement between the parties.

The tribunal upheld the challenge to its jurisdiction and consequently, in a later decision, revoked the interim measures of protection granted. Astivenca filed a special appeal before the Political Administrative Chamber (PAC) of the Supreme Tribunal of Justice. Astivenca based its appeal on the previous criterion of the PAC, which provided that a party that did not challenge the jurisdiction of the tribunal in its first appearance in the proceedings would be deemed to have waived the arbitration agreement and the local courts would have jurisdiction to hear the dispute.

The PAC dismissed the appeal filed by Astivenca and confirmed the decision given by the Fist Instance Tribunal declaring lack of jurisdiction. Astivenca challenged the decision given by the PAC before the Constitutional Chamber through an Application for Constitutional

Review. The challenge was based on the grounds of the violation to the principle of legitimate expectations, and the constitutional rights to non-discrimination and legal certainty because the PAC did not apply the criterion explained above, which was applied to previous cases.

The Constitutional Chamber uphold the application for constitutional review filed by Astivenca, ratified the most relevant judicial opinions on traditionally polemic issues about commercial arbitration in Venezuela, and established some new criteria on other issues where there was a lacuna in the Venezuelan legal regime.

Arbitration Agreements And Public Policy

The Constitutional Chamber ratified the opinion rendered in judgment 1.541/08, mentioned above in relation to the possibilities to submit to arbitration cases where there are issues of public policy. The PAC was traditionally reluctant to grant jurisdiction to arbitral tribunals in those matters where the law established that they were of public policy, such as employment, house renting, consumer, and real estate disputes, among others.

The Constitutional Chamber made it clear that the qualification as a public policy matter is of concern to the merits of the case and not to procedural or jurisdictional issues. It means that the rules of the substantive law cannot be modified by the parties, while the agreement of the parties to submit these disputes to arbitration is related to procedural law.

Kompetenz-Kompetenz And Separability

The Astivenca decision backed the Kompetenz-Kompetenz principle and the separability of the arbitration agreement. The decision goes further than other previous cases and makes it clear that local courts are not empowered to make a full review of the validity of arbitration agreements, but recognises that possibility to arbitral tribunals exclusively.

When facing arbitration agreements, local courts must be limited to make a prima facie examination of the validity, efficacy and applicability of the arbitration agreement, and if they do not find a gross violation of those, without any possibilities of analysing the validity of the consent given by the parties.

In accordance with modern trends, the Constitutional Chamber established that the written consent may be in any kind of document or combination of documents, such as letters, telex, fax or any other kind of correspondence, including other technological means.

Concurrent Jurisdiction

The decision makes reference to the principle of cooperation and subsidiary role of the judiciary vis-á-vis commercial arbitration. According to the Constitutional Chamber, the role of the local courts is that of assistance and control of the arbitral proceedings. It is also stressed by the Constitutional Chamber that there is no contradiction between the judiciary and arbitration, and that the cooperation of judges and arbitrators is a guarantee to the constitutional right to effective judicial protection.

The assistance to the arbitral tribunals is for the local courts to perform the functions that are not given to arbitrators, such as the enforcement of interim measures of protection or the enforcement of the awards, the designation of arbitrators if required by the law and the taking of evidence.

With regard to the control of the arbitral proceedings and its effects, the Chamber ratified that the only remedy available against arbitral awards rendered in Venezuela is the nullity, as

provided by the Commercial Arbitration Act 1998 in similar terms to the UNCITRAL Model Law. The Chamber emphasised that the nullity of the award is an exceptional remedy, and that the intention of the legislator is to guarantee the stability of arbitral awards and ratify the criterion according to which there is no room for constitutional injunctions - or amparo - against arbitral awards.

Waiver To Arbitration Agreements

The Astivenca decision, which is binding for the rest of the Venezuelan tribunals, modified the traditional criterion applied by the PAC with regard to the waiver of arbitration agreements. After Astivenca, there will be no waiver of the arbitration agreement if the conduct of the parties shows that there is a clear intention to arbitrate the dispute. The opposition by the defendant to an interim measure or any other action not related to the merits of the case may not be deemed as a waiver or the arbitration agreement.

Interim Measures - Pre-arbitral Referee

Apart from ratifying the powers of the arbitrators to order interim measures of protection, the Astivenca case changed the criterion that PAC established in decisions rendered in the cases Arpigra, dated 10 October 2001, and TIM International, dated 11 December 2003, where the claimants requested interim measures of protection from local courts because the arbitral tribunal was not yet constituted. In those cases, the PAC established that the arbitration agreement excluded the jurisdiction of local tribunals and therefore there was no jurisdiction for ordering such a measure.

The Constitutional Chamber did not share the views of the PAC in the Astivenca case and established that local courts are empowered to order interim measures of protection even before initiation of the arbitral proceedings, and this could not be deemed as a waiver to the arbitral agreement by the claimant. There is also recognition of the validity of the pre-arbitral referee proceedings provided for in the rules of arbitral institutions such as the Venezuelan Business Centre of Conciliation and Arbitration (CEDCA), and the Rules for a Pre-Arbitral Referee Procedure of the ICC.

The Constitutional Chamber even established the proceedings for the mentioned requests:

- The document containing the arbitration agreement must be filed jointly with the petition for precautionary protection with the indication that the arbitral proceedings have already commenced or are about to commence.
- The applicant must provide evidence of the fumus boni juris and the periculum in mora.
- The tribunal could only order the interim measures of protection if there is no evidence that the applicable rules of arbitration provides for a pre-arbitral referee proceeding. If the possibility is provided for in the arbitral rules, the tribunal will be prevented from ordering the requested measures.
- Once the measure is ordered, the applicant must bring evidence of the initiation of the arbitral proceedings within the next 30 days. If the applicant does not comply with this obligation, the tribunal will revoke the measure ordered.
- Any opposition to the interim measures ordered will be resolved by the local tribunal, unless the arbitral tribunal is constituted.
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In any case, the measure will cease if it has not been possible to constitute the arbitral tribunal after 90 days.

Conclusions

As mentioned before, the developments described above are of a high relevance for arbitration in Venezuela. In investment arbitration, the trend of interpretation of article 22 of the Investment Law clarifies the scenario for the foreign investors, who are now aware of the measures to be taken in order to have their investment duly protected.

For commercial arbitration, the decisions given by the Constitutional Chamber, being the last ones commented on in this chapter, have given strong support to arbitration and to Venezuela as a seat for arbitral proceedings, since the judiciary has adopted a deferent position, allowing the arbitrations to flow without undue interference, but with the assistance of the national judges.

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