The Arbitration Review of the Americas

2013

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Global Arbitration Review is delighted to publish *The Arbitration Review of the Americas 2013*, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports *The European, Middle Eastern and African Arbitration Review* and *The Asia-Pacific Arbitration Review*, *The Arbitration Review of the Americas* provides an unparalleled annual update - written by the experts - on key developments.

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.

Contents

Canada

Thomas P O'Leary, Michael D Schafler, Rachel Howie

Fraser Milner Casgrain LLP

Ecuador

Rodrigo Jijón-Letort, Juan Manuel Marchán

Pérez Bustamante & Ponce

Panama

Fernando Aued, Claudio De Castro

Arias, Fábrega & Fábrega

Venezuela

Fernando Peláez Pier, José Gregorio Torrealba

Hoet Peláez Castillo & Duque Caracas

Introduction - Latin America

Eduardo Zuleta

Senior Vice Chair of the IBA Arbitration Committee

It is a fact that international arbitrations involving Latin American parties are on the rise. However, this does not necessarily mean that Latin American venues are increasingly gaining acceptance in the world.

Even though available reports suggest that the number of parties from Latin America and the Caribbean has grown significantly,[1] the number of international arbitrations seated in Latin America seems to have remained rather low.[2] Moreover, the 2010 International Arbitration Survey revealed that no Latin American venue is among the world's favourite seats of arbitration and the ITA Inaugural Survey of Latin American Arbitral Institutions has shown that the vast majority of arbitrations administered by regional institutions are local arbitrations.[3] The numbers speak for themselves.

Beyond these statistical results, the threshold issue seems to be whether Latin American venues may be a reliable option when choosing a seat of arbitration. In this vein, a qualitative analysis requires overcoming the traditional approach of considering Latin America as a single unit. States along the region - albeit ones that are mostly part of the civil law tradition - have different legal systems with different approaches to international arbitration. Once this diversity is acknowledged, it is possible to proceed with a legal analysis of the reliability of a defined venue. At least three core issues must be considered.

The first issue is the New York Convention. As a matter of fact, most Latin American states have ratified the Convention.[4] Thus, the recognition of awards issued in arbitrations seated in the region will generally be subject to the treaty. But the Convention is not only relevant when a Latin American venue is being considered as a seat, but also if a prospective award may need to be enforced in the region. There are jurisdictions in which courts have had little experience with the application of the treaty (eg, Bolivia)[5] or where the instrument has been interpreted inconsistently with its object and purpose (eg, Colombia before July 2011)[6]. In addition, attention should be drawn to the fact that exequatur proceedings may take years in various jurisdictions. Therefore, under certain circumstances (which should be analysed on a case-by-case basis), Latin American venues could be chosen just to avoid cumbersome local exequatur proceedings.

The second issue would be the arbitration law of the state where the venue is located. A number of Latin American states have adopted model law-based statutes for international arbitration.[7] Some have followed an even more liberal approach than that of the model law.[8] In other venues, however, international arbitration is subject to non-model law legislation.[9] Several issues arise with these models. Extremely liberal models in countries with a relatively recent arbitration culture could generate, at least in non-locals, a similar suspicion than a law with a purely local approach. Dualist models may give rise to questions as

to whether the local courts would strictly follow the provisions related to international arbitration or would fill lacunae with provisions of the local arbitration law. Even though legislation specifically governing international arbitration is often favourable to arbitration, such circumstance may have limited practical effects if less favourable provisions of domestic law are simultaneously applied by local courts. That is why certain jurisdictions have attempted to create a 'self-contained' international arbitration regime, by requiring the relevant provisions to be interpreted according to their international character and by establishing the inapplicability of other procedural provisions of local law (at least in certain matters).[10]

Last but not least, the third issue refers to local courts. Three points should be considered in this regard:

- The ways in which the courts approach the provisions set forth in international arbitration statutes and apply international conventions. Certain countries have a tradition of court decisions favourable to arbitration (Mexico); others seem to be following an entirely new path towards an arbitration-friendly interpretation of the law, at least as regards international arbitration (Chile, Colombia and Peru). Although it is impossible to predict how steady this approach will be, the new trend seems to get stronger every day.
- The approach of the courts to constitutional actions for the protection of fundamental rights. Even though such actions may be filed in a number of Latin American jurisdictions against decisions of arbitral tribunals or arbitration-related court decisions (eg, rulings on exequatur or annulment),[11] most of the publicly known cases correspond to local arbitrations where arbitrators are considered judges and part of the judicial system. Moreover, the reasons to give room to such actions differ substantially. While in some jurisdictions there may be a need to fill lacunae in the provisions (eg, because the grounds for annulment of awards are not sufficient to protect the right to present the case and be heard), in others the constitutional actions may be the result of a clear policy against arbitration.
- It should be noted, however, that the approach differs when it comes to international arbitration. Intervention of the courts in international arbitration on constitutional grounds could be considered the exception and not the rule in Latin America. For example, in a recent case, a local court dismissed an action for the protection of constitutional rights filed against a judicial decision enforcing an international arbitration agreement.[12]
- Judicial review. Many Latin American jurisdictions have adopted systems allowing a general constitutional control over statutory law. Thus, local constitutional courts may repeal or condition the applicability of arbitration-related norms. For example, in a decision dated 25 August 2004, the Chilean Constitutional Tribunal conditioned the constitutionality of certain provisions of the respective model law-based arbitration statute to the understanding that the constitutional powers allowing the Supreme Court of Justice to control all Chilean tribunals, as well as the constitutional actions in favour of those who may be affected by the application of the statute, remained unaffected.[13]

In sum, several countries in the region are moving towards being a friendly venue for international arbitration. But it requires time, and only time will tell if the present trend is

steady. But someone would ask: What about now? Is now the time for Latin American venues? If a general answer is expected, I would be able to say, as Mark Twain once did: 'I was gratified to be able to answer promptly and I did. I said I didn't know.'[14] If the underlying question is whether I would recommend a Latin American venue, my answer would depend both on the venue and on the specific case at issue. Indeed, no answer would be both general and accurate.

Notes

1. ICC Statistical Report, ICC Dispute Resolution Library, 2009, pp5-6.
2. This assertion is based on the information provided in the ICC Statistical Report, ICC Dispute Resolution Library, 2009, p13.
3. Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration, 2010, pp17-20; ITA, The Inaugural Survey of Latin American Arbitral Institutions, 2011, p12.
4. UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards - Status [online] www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
5. In this regard, a recent report states: '[t]o 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'. Andrés Moreno, The Recognition and Enforcement of Foreign Arbitral Awards: The Bolivian Perspective, The Arbitration Review of the Americas 2012, pp30-33.
6. Since its decision in Semar v Sunward Overseas (20 November 1992), the Colombian Supreme Court of Justice had applied the grounds for denying recognition and enforcement listed in the New York Convention as additional to those set forth by the Code of Civil Procedure (articles 693 to 694). On 27 July 2011, when considering a request not to grant exequatur to a foreign ICDR award on several grounds set by the Code of Civil Procedure, the Court determined that recognition could only be denied in the cases exhaustively listed in article V of the treaty.
7. See, for example, Law No. 19.971, 29 September 2004 (Chile); Law 1563, 12 July 2012 (Colombia).
8. See, for example, Legislative Decree 1071, 28 June 2008 (Peru).
9. See, for example, National Code of Civil and Commercial Procedure (Argentina), 1969.
10. For example, under the new Colombian Statute of International Arbitration, the Code of Civil Procedure is inapplicable to the recognition of foreign arbitral awards: Law 1563, 12 July 2012 (Colombia), article 114.
11. The relationship between constitutional law and arbitration in Latin America is a far-reaching question beyond the scope of this brief presentation.
12. Supreme Court of Justice of Colombia, Compañía de Representaciones Médicas SA CTP Médica SA v Civil Chamber of the Superior Tribunal of Bogotá, 13 July 2011.
13. Constitutional Tribunal of Chile, File No. 420, 25 August 2004, sections 6, 16 & 17.
14. Mark Twain, Life on the Mississippi (1883), Harper & Brothers Publishers, 1917, p49.

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Introduction - ICCA 2014

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International commercial arbitration as the preferred dispute resolution mechanism continues to show signs of strong support and growth. The ICCA 2012 Congress recently wrapped up in Singapore boasting record attendance. An inspiring 1,059 delegates were welcomed by Justice Sundaresh Menon, Singapore's then-attorney general, who spoke about the coming of a new age for international commercial arbitration. As this uptrend continues, ICCA 2014 promises to be even more successful. All eyes will focus on North America and its host city Miami as it continues to evolve into a global centre for international arbitration.

Compared with our European counterparts, the Americas' arbitration roots are relatively young. Despite that, 24 per cent of ICC cases filed in 2010 involved parties from the Americas.[1] US parties continue to be the most numerous of all nationalities in ICC cases.[2] In 2010, the number of US parties engaged in arbitration rose by 14 per cent compared to 2009.[3] Parties from Latin America and the Caribbean also grew by 23 per cent, from 241 in 2009 to 297 in 2010.[4] New York City, Mexico and Miami made the list of the top 10 venues in the world selected for arbitration, while 14.5 per cent of ICC cases selected a Latin American city as their preferred venue for arbitration.[5] The perspective of continued growth is the same across the practice, including other administered and ad hoc arbitrations. In short, the Americas are witnessing sustained growth and ever-increasing interest in arbitration. Nothing illustrates the importance of arbitration to the Americas better than Miami winning the bid to host ICCA 2014; the Congress' second appearance in the United States[6] and fourth appearance in North America in ICCA's history.

Miami's bid for ICCA 2014 has been years in the making. Locally, the Miami International Arbitration Society (MIAS) has served as the platform for the effort.[7] Practitioners who have spent years promoting a culture of arbitration as the preferred method of dispute resolution paved the way. MIAS was founded in order to promote the use of international arbitration and mediation, and the selection of Miami as the situs for international arbitration proceedings. They have been one of the driving forces in the establishment of Miami on the international commercial arbitration scene. Accordingly, a group from MIAS, including Chairman Burton Landy of Akerman Senterfitt; Jose Astigarraga, founding partner of Astigarraga Davis; Dan González, co- director of the international arbitration practice at Hogan Lovells US LLP; John Barkett, partner at Shook, Hardy & Bacon; and Judith Freedberg, the International Arbitration programme director at the University of Miami School of Law, went to Geneva to present Miami's bid.

Miami was selected due to a multitude of factors, including investment by the legal community and academia. The University of Miami recently launched an LLM programme for studies in international arbitration. The programme has attracted some of the world's preeminent authorities in this field, including Jan Paulsson, past president of the London Court of International Arbitration (from 2004 to 2010), a member of the Permanent Court of Arbitration in The Hague, and a board member of the American Arbitration Association,

just to name a few of his accolades. The programme's director is Judith Freedberg, the former general counsel to the Permanent Court of Arbitration.[8] Among her many past accomplishments is her service as head of the Department of International Commercial Arbitration at TMC Asser Institute for International Law at The Hague. Florida International University also launched a Global Legal Studies Initiative to research legal issues of critical international importance.[9] Among their priorities is the study of international litigation and arbitration through research and by hosting annual summits.

In addition to being a multicultural city with multilingual professionals, Florida's statutory and judicial environments welcome foreign attorneys to arbitrate locally. The Florida Bar adopted a rule that allows non-Florida attorneys to participate in international arbitration proceedings in Florida.[10] With the International Litigation Section of the Florida Bar, which included the help of MIAS members, such as Eduardo Palmer, Edward Mullins and others in 2010, the Florida legislature passed legislation[11] to adopt the Model Law on International Commercial Arbitration developed by the UN Commission on International Trade Law (UNCITRAL) into Florida's Arbitration Act. Florida is only the seventh state in the United States to adopt the Model Law. The passage of the Model Law solidified Miami's position as a strategic arbitral venue. Beyond its legal climate, Miami's geographic location, robust transportation hub and reputation as the crossroads of the world strengthened its case to serve as the ICCA 2014 host city.

In addition to ICCA 2014, there are several other international commercial arbitration conferences set in Miami, further highlighting it as a global centre for dispute resolution. For example, the International Centre for Dispute Resolution (ICDR) and the International Bar Association (IBA) co-hosted the 10th Annual Miami International Arbitration Conference: The Greatest Hits between 9 and 11 September.[12] The conference covered key relevant issues in the proliferation of commercial arbitration throughout the Americas. In October 2012, the American Bar Association's section of International Law hosted its fall meeting in Miami as well.[13] Practitioners from more than 90 countries united to discuss current international legal issues.

On the legal front, in the United States, courts continue to favour arbitration. On 25 June 2012, the United States Court of Appeals for the Eleventh Circuit, which reviews matters out of Florida among other states, decided in favour of allowing foreign parties involved in foreign arbitration proceedings to seek discovery from a person or entity located in the United States.[14] This decision is significant because there is disagreement in United States federal courts on the extent to which parties involved in foreign arbitrations may rely on federal statutes and the Federal Rules of Civil Procedure to seek discovery from US entities. In Consorcio Ecuatoriano, the Eleventh Circuit affirmed a district court's grant of an ex parte application for judicial assistance under section 1782 to obtain discovery for use in foreign arbitration proceedings in Ecuador.[15] In coming to its decision, the Eleventh Circuit held that the arbitral tribunal constituted 'a foreign or international tribunal' within the meaning of section 1782.[16]

A 1782 application creates an avenue for litigants in legal proceedings outside the United States to apply to United States courts for assistance in obtaining evidence for use in non-US proceedings.

Accordingly, in those US jurisdictions where the courts have found the federal statute applicable, parties who wish to obtain discovery in a foreign tribunal may file an application under section 1782 in the district court where that discovery is located. More specifically,

section 1782 provides that 'any interested person' may file an application with a federal district court seeking discovery from a person or entity in the United States as long as the evidence is 'for use in a proceeding in a foreign or international tribunal.'[17] The Eleventh Circuit relied on the United States Supreme Court decision in Intel Corp v Advanced Micro Devices, Inc, which emphasised the breadth of the statutory term 'tribunal'.[18] The Eleventh Circuit's decision is vital for parties engaged in international arbitration who are looking to broaden the scope of discovery in aid of foreign arbitral proceeding. Moreover, it can be expected to expand the use of section 1782 applications related to foreign arbitrations.

Also of note in the United States, on 8 August 2012, the United States Court of Appeals for the Second Circuit, which reviews matters out of New York and neighbouring states, issued a decision confirming an award of €30 million in damages against the Kingdom of Thailand.[19] In 2005, Walter Bau AG, a German construction company, filed for arbitration against Thailand pursuant to a bilateral investment treaty signed between Germany and Thailand.[20] The action was brought under UNCITRAL Rules and concerned a dispute relating to the construction of the Don Muang toll road.[21] Walter Bau claimed that the Thai government unlawfully interfered with its investments, violating the treaty.[22] As a result, Walter Bau alleged that they suffered substantial financial losses. The arbitration tribunal awarded Walter Bau €30 million in damages. In 2010, Walter Bau successfully confirmed the award under 9 USC section 201 et seq, which implements the New York Convention. The Thai government appealed.[23]

On appeal, the Thai government argued that the district court should have independently adjudicated the arbitral tribunal's ruling that it had jurisdiction instead of only performing a deferential review of the tribunal's decision.[24] The Second Circuit rejected Thailand's contention and held that by incorporating the UNCITRAL rules, the parties had agreed that the tribunal should rule on its own jurisdiction.[25] Accordingly, the Second Circuit affirmed confirmation of the arbitration award indicating that United States courts have an interest in confirming foreign arbitral awards.[26]

Commercial code reforms in other parts of North America that touch on international arbitration are also worth noting.[27] For example, in January 2012, Mexico adopted important reforms to the laws that regulate its public-private partnerships (PPP). These PPP's are long-term contractual relationships between the public and private sectors that are designed to facilitate the rendering of services and building of infrastructure to increase investment in that country.[28] In what appears to be an effort to further facilitate efficient dispute resolution procedures, and perhaps accommodate private-sector concerns, Mexico included article 139(1) of the PPP law, which authorises the public-private partnerships to refer certain contractual disputes to arbitration.[29] Arbitration provisions are not new to public-private arrangements in Mexico, but their availability represents a continuing effort by the Mexican government to encourage the flow of private capital into the country. However, the arbitration provision continues to reserve to the sovereign through its federal courts matters concerning the termination of a concession or the authorisation of the concession, and other official acts of the government. Notwithstanding these limitations on the reach of arbitral provisions in PPP contracts, Mexico's continued commitment to arbitration confirms that the movement is on the rise.

As a rising tide lifts all boats, North America is benefiting from the wave of increased interest in international arbitrations. In February, the International Court of Arbitration of the ICC opened an office of the ICC Court's Secretariat in New York.[30] The first overseas office of the

Secretariat was opened in Hong Kong in 2008 and an ICC representative office was opened in Singapore in 2010. The goal of the expansion to New York is to increase the ICC's presence in North America and provide better access to counsel, arbitrators and parties alike. Through its office in New York, the ICC joins the ICDR and the International Division of JAMS as providers of international arbitration services in New York City.

Additionally, JAMS opened a dispute resolution centre in Miami. Chris Poole, president and CEO of JAMS declared that 'Miami was the natural choice for our next Resolution Centre Opening. It's an important international business community with a lot of opportunity.' The JAMS office opening adds to the landscape of institutions providing dispute resolution services in Miami.

In sum, international commercial arbitration in the Americas is on an upswing. In a survey conducted of major corporations who rely on international commercial arbitration, research showed that the most popular and the most used institutions for international commercial arbitrations were the ICC and the ICDR, respectively.[31] Both institutions have made significant investments in North America. As Miami prepares for ICCA 2014, the growth prospects for practitioners in the field of international commercial arbitration have never looked better.

Notes

1. 2010 Statistical Report, 22 ICC Int'l Ct of Arb Bull 1 (2011).
2. Id.
3. Id.
4. Id.
5. Id.
6. In 1986, the conference was held in New York City.
7. For more information on MIAS, see www.miamiinternationalarbitration.com.
8. See University of Miami School of Law LLM Program on International Arbitration Specialization, www.law.miami.edu/iglp/international_arbitration/.
9. See FIU Global Legal Studies Initiative, http://law.fiu.edu/academic-information/international-and-graduate-studies-2/global-legal-studies-initiative/.
10. R Reg Fla Bar 1.3.11 (d), (e).
11. 2010 Fla Laws chapters 2010-60.
12. For more information on conference, see https://www.aaau.org/media/12688/aaa288_10thannconfmiamiagenda_final_web-7-10.pdf.
13. For more information on conference, see www.americanbar.org/calendar/2012/10/section_of_internationallaw2012fallmeeting.html.
14. Consorcio Ecuatoriano de Telecomunicaciones SA v JAS Forwarding (USA), 685 F.3d 987 (11th Cir 2012).
15. Consorcio Ecuatoriano, 685 F.3d at 990.

16. Id.
17. 28 USC section 1782.
18. 542 US 241 (2004).
19. Schneider v Kingdom of Thailand, No. 11-1458, 2012 US App LEXIS 16508 (2d Cir 8 August 2012).
20. Id. at *2.
21. Id. at *3.
22. Id. at *2-3.
23. Id. at *4.
24. Id. at *2.
25. Id. at *9.
26. Id. at *13.
27. See Herfried Wöss, Mexico: Dispute resolution under the new public- private partnerships law, Global Arbitration Review, 23 May 2012, available at www.woessetpartners.com/BackOffice/manager/pdf/64.pdf.
28. Id.
29. Id.
30. See ICC to open office of the Court in New York, available at www.iccwbo.org/News/Articles/2012/ICC-to-open-office-of-the-Court-in-New-York/.
31. See International Arbitration: Corporate Attitude and Practices, 2008, available at www.pwc.co.uk/forensic-services/publications/international-arbitration-2008.jhtml.

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Volatility and Creative Destruction's Effects on Damages in Arbitration

Anthony Charlton and **Greig Taylor**

FTI Consulting

Extreme volatility in commodity prices, stock markets and the wider global economy is a major contributor to the recent surge in international disputes. In addition, we are witness to fundamental changes in technology, infrastructure and business processes, as well as broader economic developments and geopolitical change. Indications are that this upheaval is unlikely to abate soon and will give rise to further arbitration activity over the coming months and years. The inherent uncertainty as to what the future holds makes the quantification of forward-looking damages claims and valuation of businesses a complex exercise. Given the dramatic pace of change, how is it possible to make reasonable predictions as to what even the short-term future holds?

If a damages expert's work is to be valued by a tribunal, he or she must take special care to avoid finding themselves on the wrong side of the divide between providing a reasonable estimate of a claimant's economic loss and mere speculation. This article examines the link between volatility and change, and commercial and investment disputes. It suggests why such volatility and change occurs, and examines some of the issues damages experts must resolve in the context of their work.

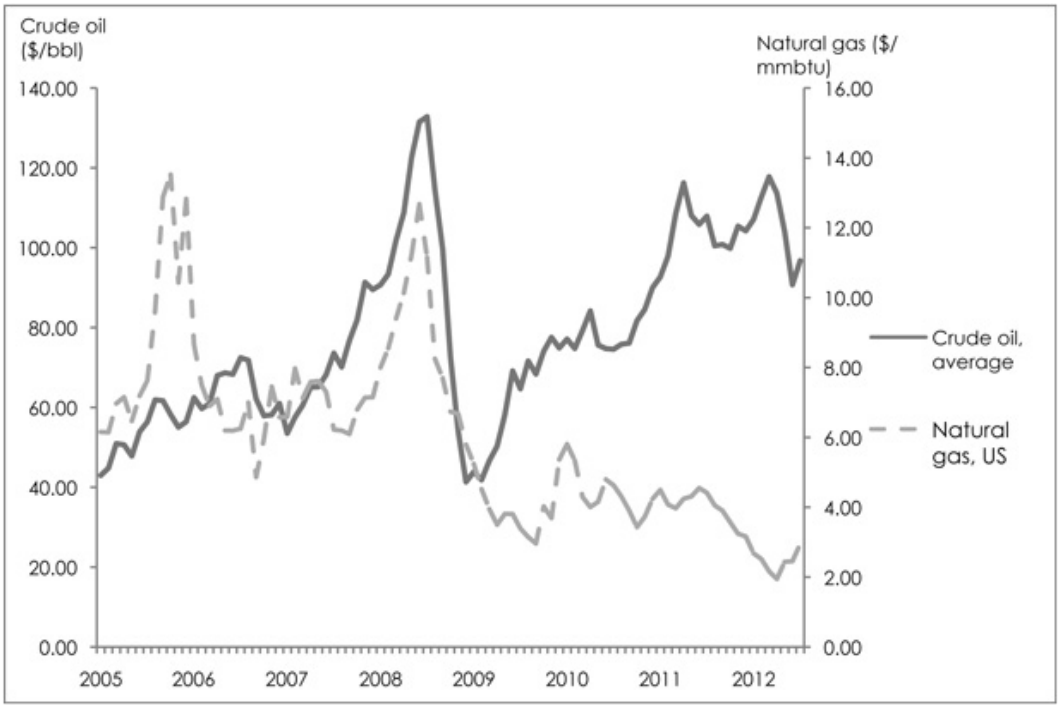
How volatility causes disputes

Volatility and risk are ever-present in business, and corporations have devised a number of risk management strategies to enable them to seek to limit such risk and transact with other parties or enter into long-term agreements. By way of illustration, one way in which companies hedge their pricing risk (eg, raw material purchases) is through the use of derivatives such as futures and options. In addition, commercial contracts frequently include price revision clauses using, for example, annual benchmarking processes, detailed price escalation formulae linked to market-based indices or minimum or maximum order quantity agreements. While such mechanisms are often successful in serving their intended purposes, unforeseen circumstances can and do arise that ultimately end in the parties being unable to re-negotiate and having to resort to arbitration to resolve their disputes.

To give an obvious example of how price volatility causes disputes, recent swings in the price of natural gas has seen many parties to long-term supply contracts fall out with their business partners. One of the structural causes of such disputes is the linkage in certain contracts (particularly in mainland Europe) between the price of natural gas supplied and the price of oil.[1] In many contracts, the price of natural gas supplied is partly determined by the prevailing price of oil; all is well provided gas and oil prices mirror one another - as they

did to an extent until 2009 - but a rising oil price coupled with a falling natural gas price is to the detriment of the wholesale gas purchaser. The gas purchaser, faced with a contract that is no longer commercially viable, faces the commercial necessity to renegotiate price and rebalance the relationship. Self-evidently, the inverse is true of the seller who is enriched by this oil or gas price decoupling. The result is frequently breach of contract or arbitration.

The chart below shows not only the wild swings in the prices of natural gas and crude oil over recent years, but also the widening disconnect between the two commodities.



Source: World Bank Commodity Price Data

What is volatility?

In the world of finance, volatility may be defined as the variation of the price of a security or asset over a certain period of time. It is important to distinguish between swings in prices within a certain range (volatility) and the direction (up or down) in which price movements occur, as the concepts are quite different. By way of illustration, a general rise in a stock market index over a number of years is said to reflect a bull market (direction), whereas a 200-point daily rise in the index followed the next day by a fall of the same magnitude exhibits volatility.

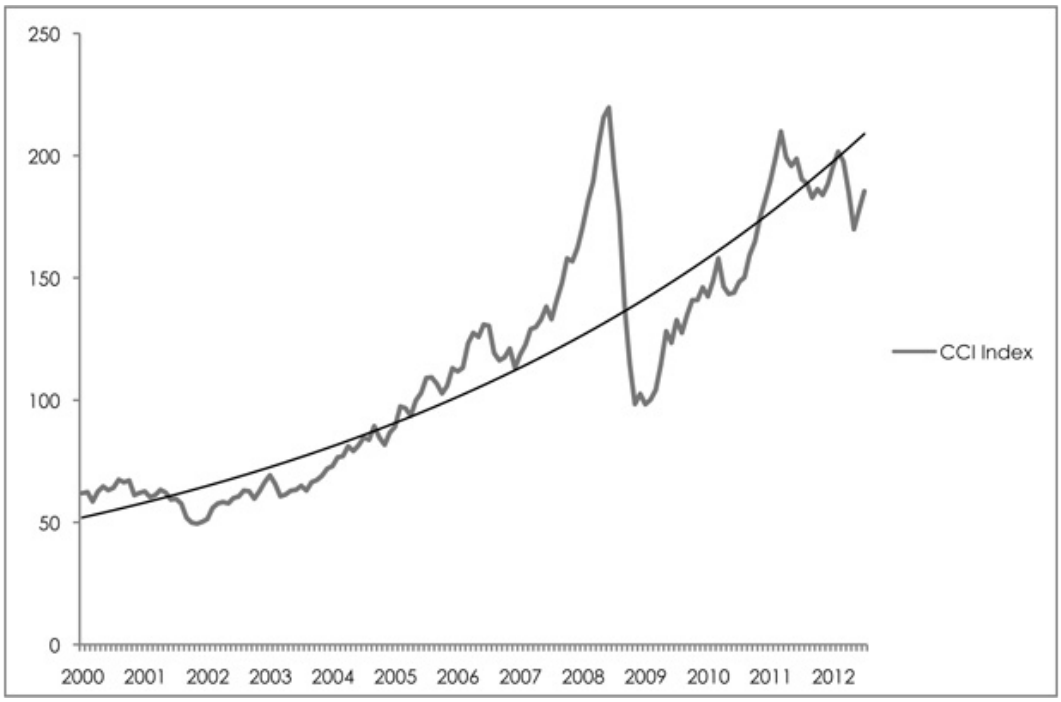
There exists much debate - and little consensus - as to what exactly causes volatility. Many academic papers have been written examining the relative influences on volatility of changing attitudes to risk, fear, asymmetrical and incomplete information, market inefficiencies or efficiencies, computerised trading, market manipulation and so on. All of these factors undoubtedly play their role at different times, but the nature, cause and scale of volatility is ever-changing. Like the proverbial chicken and egg, one might wonder whether it is uncertainty that causes volatility or the other way round.

Finally, it is worth noting that volatility can occur at all stages of the business cycle, not merely in times of recession; it arises in both bull and bear markets. Some commentators take the view that commodities are in a multi-year bull market; the chart overleaf shows that

the general trend in commodity prices is indeed up but that, since 2008, the market has been subject to sharp swings up and down.

Creative destruction

Market and price volatility is likely only a small part of the backdrop to the rise in international disputes. We would suggest that volatility is merely a symptom of something with far greater significance for arbitration, namely continuous and profound change in all aspects of the global economy. At this point, it behooves us to turn to the Austrian-Hungarian-American economist and political scientist Joseph Schumpeter, who famously coined the term 'creative destruction' to describe the process by which capitalist societies are constantly changing. According to Schumpeter:



> ...the fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers, goods, the new methods of production or transportation, the new markets, the new forms of industrial organisation that capitalist enterprise creates.[2]

Schumpeter criticised the prevailing view among his contemporaries that simple price competition was the best (or only?) explanation for how the economy functioned. He believed instead that change was far more prevalent and that competition in the real world came from:

> ...the new commodity, the new technology, the new source of supply, the new type of organisation... competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives.[3]

Schumpeter's insights appear to make a great deal of sense when one considers a real-life example of creative destruction in action such as is occurring in the smartphone market. Having launched the revolutionary BlackBerry smartphone in 1999 and dominated the market for years, the very survival of BlackBerry producer Research in Motion (RIM) is now under serious threat. From an all-time high of around US$150 in 2008, the share price of RIM

has collapsed to under $7 today. What happened? Quite simply, new technologies emerged in the form of handsets using Google's Linux-based operating system, Android, and the iPhone. These rivals captured huge swathes of the market previously occupied almost exclusively by RIM. From boasting a market share in the United States of close to 50 per cent in early 2008, RIM now accounts for less than 10 per cent, against a combined share of 82 per cent for (now dominant) Android handsets and iPhones.[4][5]

The emergence of the first iPhone in 2007 was not even seen as a genuine threat by RIM executives, who completely underestimated the likely impact of this new technology.[6]

On a topic of direct relevance to much current arbitration, recent advances in hydraulic fracturing techniques (fracking) have had a significant impact on natural gas prices. While fracking was first used in 1947, it was not until 1997 that modern techniques were devised to allow shale gas to be extracted economically. Shale gas has now greatly expanded global energy supplies and production has grown exponentially. In the United States, for example, production of shale gas accounted for less than 2 per cent of all natural gas produced in 2001, but has increased to around 30 per cent today.[7] As natural gas prices in the United States and elsewhere have retreated in (part) response to this additional supply, there has been a knock-on effect to other parts of the economy, resulting in many different types of disputes emerging. In addition to the glut of price-review arbitrations, companies engaged to build or operate LNG terminals, for example, have found themselves in dispute as their counterparties renege on transactions that appeared highly profitable prior to the shale gas revolution. Conversely, it is interesting to look at the impact of a less favourable regulatory environment in the Nuclear industry after the Fukushima Daiichi accident or the rash of disputes that have erupted in the Solar Energy market following changes to levels of government subsidies.

Other examples of creative destruction abound, such as digital photography rendering the photographic film industry near-obsolete, or the rise of internet retailing destroying the business models of many high-street retail chains. While their precise form may be hard to predict, in a highly dynamic economy with technology changing at unprecedented speed, it is clear that other trends will emerge with important implications for arbitration.

As we shall see, extreme volatility and creative destruction (ie, change) raise important issues in the context of forward-looking damages claims and valuation of businesses.

Impact on quantum

In many ways, the increased volatility witnessed today changes nothing from the perspective of the professional valuer or damages expert; dealing with uncertainty about the future and trying to model and quantify the unknown has always been integral to the expert's role. The expert's job, however, has undoubtedly become more difficult for a number of reasons, which we set out in the remainder of this article.

Many damages experts' assignments involve forecasting what the future outcome of a specific project would have been in the absence of one or more actions on the part of the respondent (the 'but for' or 'counterfactual' scenario), and modelling what the future is likely to hold as a result of said actions (the actual scenario). The valuation professional has a number of different methodologies available to him or her including the market comparables approach, the income approach, and asset-based approaches. For the purposes of this article, due to its inherent flexibility and growing acceptance in the arbitration community, we will assume that the expert is producing a discounted cash flow (DCF) model.

The output of a DCF model is a single number (or range of numbers), representing the net present value (NPV) of a project's or business' projected future cash flows, discounted to take into account the time value of money and the uncertainty - both upside as well as downside - of the projected future earnings. When DCF is applied correctly, the calculated NPV approximates to the fair market value (FMV) of a project or business since it reflects the present value of the future cash flows and hence determines a price at which a well-informed and willing vendor and purchaser could transact. Crucially, the expert's conclusions on value are reached as at a certain point in time. Since the conclusions are based only on information that is either known or knowable at the time of valuation, hindsight information should usually not be employed to cast doubt on the valuation conclusion.

The quality and relevance of the output from a DCF model depends on the quality of the inputs, for example, the reasonableness of the growth assumptions and the discount rate. Typically, both the counterfactual and the actual scenarios will require the expert to produce a DCF model that includes forecasts of future revenues, growth rates, costs, required capital investment, working capital needs, and make a number of other assumptions. Increased volatility and the pace of change more broadly means that it is far harder than before to predict each of these elements. Before embarking on creating complex spreadsheets, therefore, the expert firstly needs to invest significant time and due diligence in order to understand in depth the nature of the industry and market in which the relevant business or project operates. How is the subject project or business positioned from a competitive standpoint against its peers? To what extent can current or past earnings be said to be sustainable given potential risks, for example, entry into the market of a new competitor, demise of key customers, increases in the cost of raw materials, and so on?

The example of RIM shows how difficult forecasting can be for the valuation expert, even if he or she is armed with the most up-to-date information. An expert attempting to value RIM at the end of 2007 would certainly be aware of the launch of Android technology and the Apple iPhone; what the expert could not know at the time is both how quickly and fundamentally the iPhone and Android-based phones would change the smartphone market at the expense of RIM. Given that senior RIM executives themselves saw the iPhone as only one more new entrant in a crowded market, the expert might reasonably have assumed RIM would continue to dominate. On this basis, provided that the expert made their valuation reasonably, taking into account all known or knowable information, it would be hard to criticise the resulting valuation. Indeed, the market has to deal with uncertainty as a fact of life even though subsequent events may disprove assumptions made at the time. With the benefit of hindsight, however, we can say that a DCF model produced in December 2007 that predicted significant year-on-year revenue growth for the following 10 years would have been wrong.

For these reasons, quantum experts and valuation professionals should provide a sensitivity analysis to show how their valuation would change as the assumptions are adjusted. Moreover, experts need to be especially cautious in developing forecasting models and avoid the use of aggressive or unrealistic assumptions. In practice, however, what does this mean?

We suggest that the experts who are of most assistance to the tribunal are those who adopt a sceptical and objective mindset. Firstly, this means being prepared to challenge firmly what he or she is told by the claimant about its business. If, for example, a claimant's management suggests to the expert that a given project's internal rate of return (that is, the average annual return or yield from the investment) over its 10-year lifetime is expected to be in the order of 30 per cent, this should cause proverbial alarm bells to ring in the expert's head.[8] This is

not to deny that some projects can be highly profitable in the short-term, especially if the investor has an important first-mover advantage or there are large barriers to entry in the market; however, according to basic economic principles, price competition and innovation will reduce margins over time. As such, returns in excess of the cost of capital trend towards zero over the long term. On (fortunately rare) occasions, we have seen DCF models that ignore such realities and project exponential returns into perpetuity.

We now turn to how specifically the valuation expert adopts a cautious approach in building a DCF model. A DCF model will comprise firstly an explicit forecast period in which the valuation expert will make specific revenue, cost, growth, capital expenditure and other assumptions in order to model expected cash flows for each of those years. This explicit period may mirror the period over which the claimant felt able itself or did forecast its businesses prospects. If appropriate, the model may also include a terminal period to capture the value of the cash flows after the explicit period. In order to calculate the terminal value, the expert must make assumptions as to revenues, costs, and required capital expenditure in the final year of the explicit forecast period; crucially, he or she must make an assumption as to the long-term growth of the project or business.[9]

Since the future is by definition unknown, best practice dictates that the explicit forecast period should not be too long. What is reasonable will vary on a case-by-case basis and the expert must use his or her judgment and knowledge of the relevant industry to determine the appropriate length of the explicit period. We would suggest that, for some industries (eg, utilities such as water), cash flows are more predictable and less influenced by volatility or change than in others (eg, high technology, media).

Arbitrators should be wary of cash flow forecasts that assume high growth rates over an extended time period. While counter-cyclical businesses do exist that prove an exception to the rule, trading conditions have generally become harder for most businesses and therefore assumed growth rates should reflect this. In addition, as we have explained above, growth rates will tend to level off over time due to the entry of new competitors and price competition among other factors.

Notwithstanding the fact that valuation can be a difficult exercise given the inherent uncertainties, we wish to emphasise that, in practice, investors and companies trade and transact all the time on the basis of less than perfect information. Such investment decisions are based on parties' respective evaluation of relevant future prospects. DCF is a powerful tool to enable such valuations to be performed, based as they are on the risk adjusted rate of return on future cash flows. Best practice requires that the conclusions of a DCF model be cross-checked where possible, for example, against recent transactions in comparable companies.

Discount rate

Market volatility and current economic conditions have important implications for the determination of the discount rate, which is used to discount future cash flows into present day terms. The discount rate takes into account investors' required returns on their investment and reflects the riskiness of the future cash flows. In general terms, the more risky a project is, the higher its discount rate. The higher the discount rate that is applied to a stream of future cash flows, the lower will be their present value and vice versa.

For the purposes of this discussion, we will assume that the relevant project or business requires a mix of debt and equity funding. In our discussions, we will consider the impact

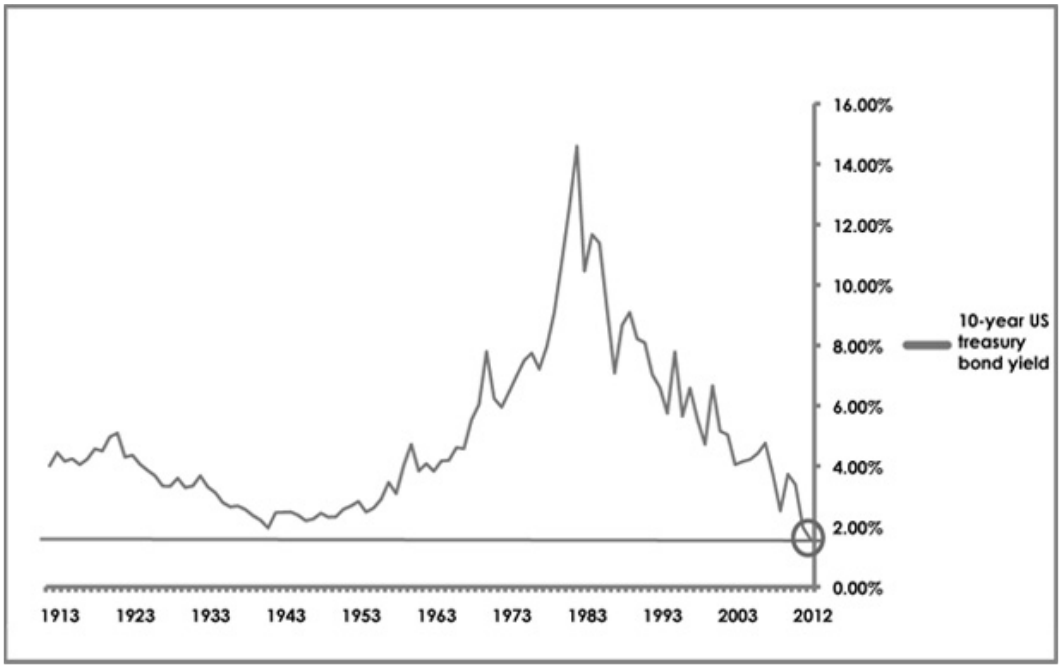
of market turbulence on the cost of debt and cost of equity, the two components needed to calculate the weighted average cost of capital (WACC), being the discount rate. We will assume that the cost of equity is to be calculated using the capital asset pricing method (CAPM).

There are, of course, several different methods for determining the discount rate, and valuation experts and academics can and do disagree as to which is the most appropriate approach. Interestingly, a recent Delaware court decision came out strongly in favour of the CAPM approach over the 'build-up' method on the basis that the presiding judge, Chancellor Strine, believed the build-up method 'has not gained acceptance among distinguished academicians in the area of corporate finance'.[10]

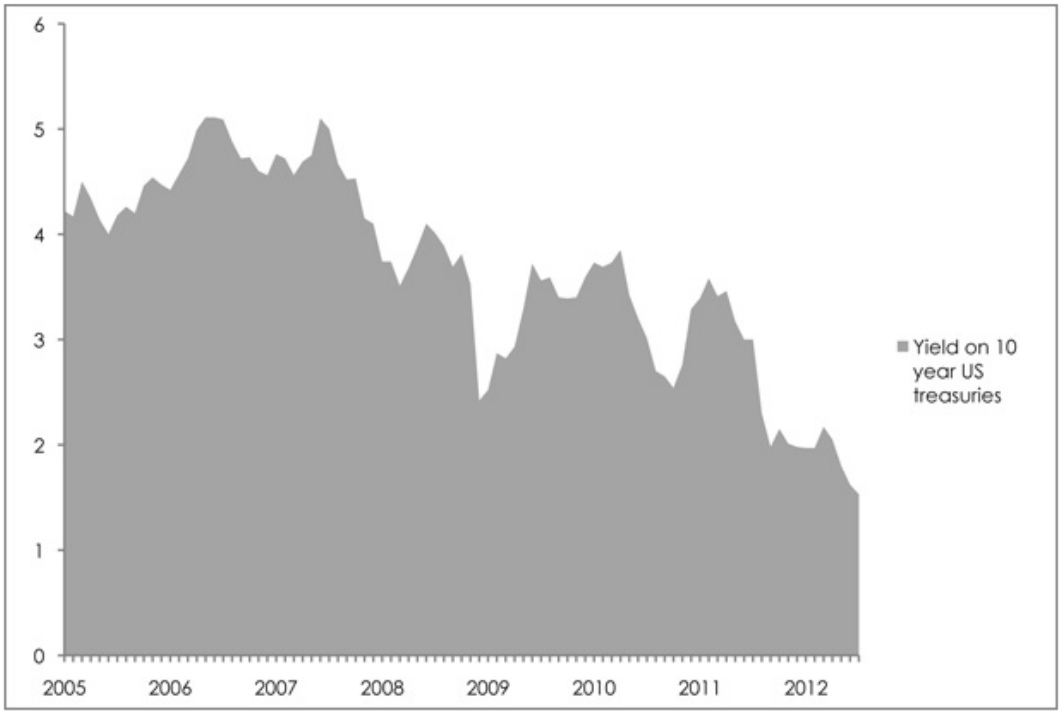
It is interesting to read Strine's views, although it should be understood that CAPM and the build-up methods are not entirely different animals. While we do not have the space in this article to attempt a forensic comparison between the two, conceptually and in practice, the build-up method is closely related to CAPM and there are modified versions of CAPM that can appear similar to the build-up approach. It will be interesting to see whether the arbitration community will form any consensus on such matters in the future.

Returning to the calculation of WACC, our starting point is the risk-free rate, which is the default-free long-term interest rate in a currency and is used to estimate both the cost of debt and equity. One proxy for the risk-free rate is the yield on 10-year US treasury bonds, although there is now some debate as to whether even US treasury bonds are truly 'risk-free'. As we shall see, the risk-free rate has changed significantly over time; as the rate changes, this causes the valuation to change also.

From a record high of over 14 per cent in 1982, the yield on the 10-year US treasury bond reached an all-time low of 1.4 per cent in July 2012. At the time of writing this article, the yield has recovered only slightly, to around 1.65 per cent. The chart below shows in stark terms both the change over time of the risk-free rate and also the historical nature of the record low.



While this chart puts the all-time low in US bond yields into historical context, since it spans nearly 100 years, it fails to show just how volatile the yield has been since the financial crisis began. Since most commentators pinpoint the real beginning of the financial crisis as the collapse of Lehmans in mid-September 2008, it is worth considering the path of the yield curve thereafter. As the chart below shows, the yield on 10-year bonds has been fairly volatile since 2008, fluctuating within a range of around 1.5 per cent to 4 per cent on a downwards trend. As we explain later, the presence of volatility means that the valuation date chosen is an issue of great importance.



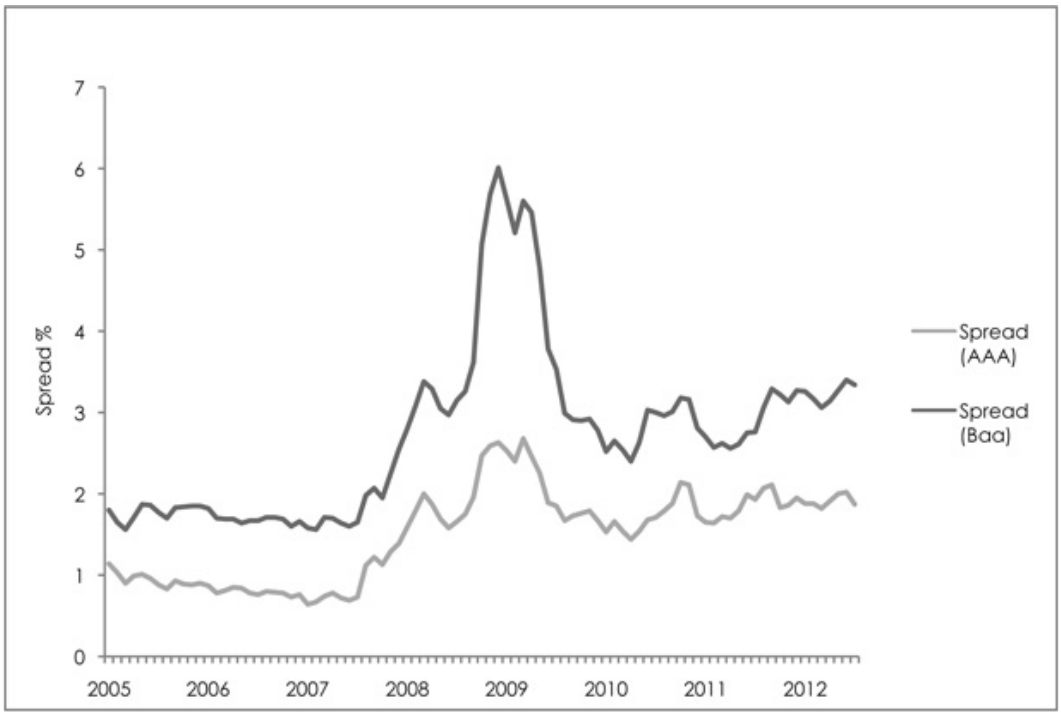
Source: Federal Reserve

As a key component of both the cost of debt and the cost of equity, all things being equal, a lower risk-free rate results in a lower discount rate. The significance of a low discount rate is that the net present value of a future stream of cash flows will be higher than with a higher discount rate. This may at first seem paradoxical; since much of the economy is struggling to tread water, one might expect the riskiness of most projects' cash flows to be higher not lower. The answer to this paradox is that the risk-free rate is, of course, only one component of the discount rate. In the cost-of-debt formula, for example, one needs to also factor in the additional return above the risk-free rate required by lenders to companies, referred to as the corporate debt margin or corporate spread. We discuss the cost of equity later in this article.

The debt margin on any given corporate bond will depend on a number of factors, and is greatly influenced by the credit 'rating' attributed to it by specialist agencies such as Standard & Poor's and Moody's. The purpose of such ratings, according to Moody's, is to provide investors 'with a simple system of gradation by which future relative creditworthiness of securities may be gauged'.[11] Agencies can and do vary in their methodology for assessing the creditworthiness of securities and will take into account many different parameters. One of the most important of these parameters is the interest coverage, defined as the ability of the borrowing firm to pay interest on its debt from its earnings; in general terms, the higher the interest coverage, the better the credit rating.

Depending on the particular agency, ratings range from the highest investment grade (AAA) to medium-grade (Baa) down to the lowest (junk) bonds (C).[12] For obvious reasons, the most credit worthy bonds (AAA) enjoy the lowest spreads (ie, the differential above the treasury benchmark bonds) and junk bonds the highest. In calculating the relevant cost of debt, the valuation expert will usually refer to corporate spread data for the debt instruments and company types that most closely matches the risk profile of the company or project they are seeking to value.

With the onset of the financial crisis in 2008, something very interesting began to happen in terms of corporate spreads between debt instruments of different ratings. As the chart below shows, from 2005 until 2007, the corporate spread of AAA-graded bonds remained slightly below 1 per cent and that of Baa bonds around 2 per cent, resulting in a differential between the two of around 1 per cent. The period between 2008 and 2009 was marked by a severe credit crunch when, due to the 'flight to safety', investors eschewed almost all debt-instruments except for those of the highest investment grade. Consequently, as shown in the chart below, the corporate spread of Baa bonds (medium grade) exceeded 6 per cent, whereas the spread of AAA bonds was only around 2.6 per cent, ie, a differential of 3.4 per cent. While this differential subsequently narrowed, it is still significantly above pre-crisis levels.



Source: Federal Reserve

It will be appreciated that wildly fluctuating corporate spreads - and the differential between debt instruments of different ratings - have real implications for the calculation of the discount rate and hence valuation of a claimant's damages. Significant differences can emerge between experts' respective valuations due to, inter alia, the valuation date assumed, the assumed risk profile of the subject company (ie, selection of the appropriate corporate spread) and other factors. There is a further factor to take into account: in times of high volatility and heightened risk, companies with relatively high-risk profiles may struggle to obtain debt financing at all. If it is unable to obtain lending, the claimant's counterfactual scenario is likely to be pessimistic, resulting in a small (if any) economic loss.

Turning to the cost of equity, in general terms, the valuation expert will seek to take into account the additional return the equity investor requires compared with the risk-free investment. The cost of equity is almost always higher than the cost of debt due to:

- the tax shield on interest paid on debt;
- the fact that debt holders will be repaid in preference to shareholders in the event of liquidation; and
- the fact that the return on debt is fixed and thus predictable, whereas shareholders benefit from excess returns.

The first element of this additional return is known as the equity (or market) risk premium (ERP). The size of the ERP at any point in time is heavily influenced by market volatility and overall change. Some of the factors that determine the ERP include:

- investors' attitude towards risk - the more risk averse investors (as a collective) are, the higher the additional returns they require. At the height of the credit crunch, investors' flight to the relative safety of US treasury bonds was indicative of wide-scale risk aversion; and
- general state of the economy - where we are in the business cycle at a given time will influence the ERP. Volatile conditions, including erratic swings in inflation, economic growth, interest rates, and so on, will tend to increase the ERP.

There are differing opinions in the valuation and academic communities as to how the ERP should be calculated, over what time period, what the proxy for the risk-free rate should be and so on. Many experts prefer to take a (simple) long-term view and estimate the average historical ERP over say 50 years or even further back. This is done by estimating the actual excess return from equities over risk-free assets over the chosen historical period. Proponents of this method believe that using a long-term average means that the peaks and troughs of the market and business cycle are ironed out such that the historical ERP takes all eventualities into account.

The obvious downside with using a historical ERP is that the past may not be a reliable guide to the future; valuation is, after all, focused on what the future holds. For this reason, some experts prefer to calculate the 'supply-side' ERP which has a forward-looking assumption built-in. Under the supply-side ERP approach, the valuation expert attempts to calculate the difference between the expected total returns on stocks and the expected risk-free return. The expected total returns on stocks are usually calculated by focusing on either the expected dividend payment and future growth in dividends, or the share-price-to-earnings ratios. Clearly, in a time of volatility, uncertainty or economic recession, the market may have very low expectations of future earnings and dividends. Stock-market crashes are not unheard of either: in the eight days from 1 October 2008 to 10 October 2008, the Dow Jones Industrial Average fell by over 22 per cent, resulting in depressed price-earnings ratios for many stocks. Finally, for various reasons, the supply-side ERP will usually be lower than the historical ERP.

For the above reasons, the question of how and when the valuation expert calculates the ERP will have important implications for the determination of the discount rate.

Once the ERP has been determined, the valuation expert's next task is to calculate the beta, being a measure of how sensitive a company's share price is to movements in the overall stock market index. The higher the beta, the more sensitive the stock is to changes in the overall market and vice versa. Thus, while a stock with a beta of one will theoretically move exactly in step with the market, stocks with high betas will exaggerate market movements (in both directions). A stock with a beta of 1.5 is, in theory, 50 per cent more volatile than the overall market. In other words, there is a greater chance of making more money than the market but equally a greater chance of making less: the stock is more risky.

In valuing the relevant project or company, the valuation expert will usually estimate the beta by referring to published data of comparable quoted companies. It should be understood that the value of beta for any given company is calculated using historical data and regression analysis; beta is, therefore, backward-looking. Despite this, it is thought by many that stock betas remain constant over time and do not vary, for example, in response to changes in market volatility. This assumption may not be correct. According to some recent academic research, betas can and do change in response to highly volatile market conditions. For example, Arisoy et al write:

> ...we find that portfolio betas change significantly when aggregate market volatility is beyond a certain threshold. More specifically, portfolios of small and value stocks have significantly higher betas at times of high volatility. The opposite is true for big and growth stock portfolios. Due to changes in their market betas, small and value stocks are perceived riskier than their big and growth counterparts in bad times, when aggregate volatility is high.[14]

Depending on the project or company appraised, under the modified CAPM approach it may be appropriate to add additional risk premiums to build up the cost of equity. One of the most common risk premiums is the country risk premium, which reflects the greater perceived risk of investing in a given region relative to investing in the most stable and developed economies, such as Western Europe, the UK and the USA; this reflects different political, economic and local currency risks. One way of measuring the country risk premium is by reference to the additional interest rate that would be payable on a loan for a given investment project in a particular (less stable) country compared to the rate payable for a loan for a similar project in a stable country such as the United States. Care must be taken to ensure that the terms, maturity and currency of the loans are the same. By way of illustration, few countries are currently immune to concerns over sovereign debt, with Greece, Spain and Portugal providing obvious examples. Political instability, upheaval, and depressed economic conditions are other factors that can impact on country risk. Consequently, many country risk premiums are likely to be volatile, within an upward trend.

Other considerations

Valuation date

As noted above, since conditions have been volatile for a number of years, the choice of valuation date is likely to have a significant bearing on valuation, and hence quantification of damages. It is important for the legal team and the expert to work closely together in order to determine what information should be taken into account, including the use of post ante or ex ante information.

But-for scenario

In the face of market volatility and depressed economic conditions, Claimants need to be realistic in their expectations as to how the counterfactual scenario would have played out

in the absence of the respondent's actions. Failure to take into account new or changed realities can lead to damages claims being significantly overstated.

Need for additional risk premiums

Volatility affects different businesses and industries in assorted ways. Companies which have powerful brands, a low fixed-cost base, low gearing, and a strong business model are far more likely to come out the other side of an economic downturn than companies that do not meet these criteria. Whilst experts have different opinions, under the modified CAPM approach, it may be appropriate to include additional risk premiums to take into account the above-average riskiness of, for example, a small company.

Conclusion

As we have discussed, market volatility and economic change have important implications for valuation and the quantification of damages. Given the recent economic environment, the challenges faced by experts in dealing with these issues have been exacerbated. This places greater emphasis on the ability of the expert to not only quantify and factor in these difficult areas in their analyses, but also in being able to explain and present their conclusions to the tribunal (and client) in as clear, transparent and logical manner as possible.

Forward-looking projections are only as good as the inputs - 'garbage in, garbage out' is as true today as it ever has been, yet those inputs as described above are a moving target, and have been more volatile in recent years than what many of us have experienced in our lifetime. This in turn leads to greater uncertainty in being able to rely upon these inputs for the purposes of estimating the future. Can we predict the future? That is the ultimate question here. The answer lies within a range of possibilities. The expert needs to consider all possibilities, but ultimately reach a reasoned conclusion based on a sound methodology, reliable inputs, and an open mind as to what the future may bring.

Notes

* This paper should not be construed as expressing opinions on matters of the stock markets and law, which are outside the scope of the authors' expertise. Nor does this paper represent the view of FTI Consulting Inc or any of its experts, who have held a range of views on the matters discussed below and may be expected to do so in future.

1. See, for example, www.icis.com/Articles/2012/05/07/9556553/commentary-energy-hurts-europe.html.
2. From Capitalism, Socialism and Democracy (New York: Harper, 1975) (originally published 1942), pp82-85.
3. Ibid.
4. http://mobileorchard.com/apple-and-google-dominate-smartphone-market/.
5. www.intomobile.com/2008/06/03/palm-centro-boosts-palm-marketshare-rim-sees--BlackBerry-market-share-rise-apple-loses-in-iphone-market/.
6. Jim Balsillie, co-chairman of RIM famously announced '[Apple and the iPhone is] kind of one more entrant into an already very busy space with lots of choice for consumers... But in terms of a sort of a sea-change for BlackBerry, I would think that's overstating it.'
7.

Report dated 18 August 2011 of the Shale Gas production subcommittee of the US Department of Energy (- www.shalegas.energy.gov/resources/081811_90_day_report_final.pdf), p6.

8. The IRR measures the average annual yield on an investment: the higher the IRR, the more attractive the investment. In general terms, the IRR shows the discount rate that would be needed to produce a present value of all future cash flows of zero.
9. In our experience, claimants do not always remember to make provision for the likely capital expenditure that will be required after the explicit period.
10. Appraisal of The Orchard Enterprises, see http://courts.delaware.gov/opinions/download.aspx?ID=175740.
11. www.moodys.com/ratings-process/Ratings-Definitions/002002.
12. Based on Moody's ratings.
13. Incidentally, the same Chancellor Strine to whom we made reference in relation to CAPM favours the supply-side ERP. Strine provides his reasoning thus:

> I recently... addressed the choice between the historical equity risk premium and the supply-side equity risk premium in Global GT LP v Golden Telecom, Inc. In Golden Telecom, although recognising that the historical equity risk premium is the more traditional estimate, I concluded that the academic community has shifted toward greater support for equity risk premium estimates that are closer to the supply-side rate published by Ibbotson.

14. 'Aggregate Volatility and Threshold CAPM' by Yakup Eser Arisoy, Aslihan Altay-Salih, Levent Akdeniz, November 2011.

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Forum Non Conveniens in Actions to Enforce Arbitral Awards

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A recent decision from an influential appellate court in New York has reaffirmed that a court may dismiss an action to confirm or enforce a foreign arbitral award on the grounds that the forum is 'inconvenient' under the doctrine of forum non conveniens (FNC).[1] This doctrine allows a judge's discretion to dismiss cases when a plaintiff's ability to bring the claim would not be fundamentally compromised, yet it would be fairer to the defendant or more efficient if the case were handled elsewhere.[2]

In 2002, the United States Court of Appeals for the Second Circuit decided that an action to confirm a foreign arbitral award may be dismissed under the FNC doctrine if 'the case does not lend itself to summary disposition' and 'has no connection with the United States other than the fact that the United States is a Convention signatory.'[3] Then, last December, it decided that when a sovereign state is being sued, that state's interest in having the case heard at home and under its own law can weigh overwhelmingly in favour of a forum non conveniens dismissal.[4] This is controversial because critics say that it places the US in breach of its treaty obligations under the New York[5] and Panama[6] Conventions, which strictly require signatory states to recognise and enforce foreign arbitral awards unless the defendant proves one of several affirmative defenses specifically listed in the treaties. Yet US courts have now declined to enforce foreign arbitral awards under each Convention before even considering these defences because, in their view, another country would be a more appropriate forum for recognition and enforcement of the award.

While the overall controversy centres on whether the US has violated its treaty obligations and what this means for the world of international commercial arbitration, the legal debate centres on a seemingly mundane disagreement about the meaning of a single word: 'procedure'. This article will review the emerging line of case law, holding that there is no conflict between the right to enforce awards under the Conventions and the FNC doctrine, survey the opinions of various commentators on the issue, and conclude with a few remarks on my views on the question.

The forum non conveniens doctrine

The FNC is an equitable doctrine aimed at curtailing 'forum-shopping',[7] which refers to litigation strategies designed to exploit a 'home-court advantage' or preferable legal regime available in a particular court. When an action could potentially be brought in several judicial systems, the party who chooses where to file a claim will inevitably consider its own interests first, which raises a concern that the litigation might not start on a level playing field. The

doctrine may be likened to the notion that each case has one or more 'natural forums' where it should ideally be litigated, and that courts must sometimes step in when litigation is initiated too far afield.

The FNC analysis proceeds in three steps. Before the analysis begins, however, the party seeking to have the case dismissed - that is, the defendant who claims the plaintiff's choice of forum for the lawsuit is prejudicial - must establish that the forum in which the plaintiff filed suit is 'manifestly inconvenient'.[8] The plaintiff's choice may be inconvenient either to the defendant or, insofar as it would consume judicial resources, to the public at large.

Once the threshold test of 'manifest inconvenience' is met, the first step in the three-step analysis is a 'sliding scale'[9] evaluation of how much protection is needed in each particular case. This depends on the degree to which self-interest motivated the plaintiff's choice of forum, but because such 'vexatious' motives are not always readily apparent, the plaintiff's genuine connection with the forum stands as a proxy for good faith.[10] The general rule is that 'a plaintiff's choice of forum is entitled to greater deference [in] the home forum... [while] a foreign plaintiff's choice deserves less deference'.[11]

Second, to avoid punishing the plaintiff too much in exchange for the defendant's convenience, the court must ensure that there is an 'adequate, available alternate forum' where the plaintiff's claim can be heard.[12] The court should not consider whether the substantive law is more or less favourable to either party when it evaluates adequacy because FNC is only about where the case should be heard, not how it should be decided. Lack of due process, rule of law, or a venue that will even hear the claim will render the alternative forum inadequate.

Third and finally, the court should exercise guided discretion by weighing a number of factors, taking into account both the private and public interests at stake. This 'balancing' step is aimed at optimising the fairness of the outcome while recognising that there is no bright-line rule that determines when inconvenience rises to the level of injustice.[13] The factors include such practical concerns as the parties' costs of travelling to a faraway court for litigation, the location of evidence and witnesses that will be needed to resolve the dispute, and whether the need for judges competent in foreign language or law will make a trial in the original forum unrealistic or inefficient. More general considerations include the public policy interests of a foreign country that may wish to have its own courts exercise jurisdiction over the case, the relative administrative burdens on the judicial systems of each potential forum, and the 'local interest in having localised controversies decided at home'.[14]

FNC is applied relatively infrequently in the US and other common law countries, and is nonexistent in civil law jurisdictions. It is particularly rare in post-arbitration actions and other types of summary proceedings. This is because many of the factors listed above are unlikely to be present where no full-blown trial is anticipated.

The problem of 'procedure' and article III of the New York convention

While FNC vests considerable discretion in the court, the New York Convention leaves little room for judicial discretion. Its main operative provision, article III, states rather mechanically that member states 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles'.[15] Those conditions include documentary and technical requirements, a 'wait-and-see' option in case a court at the seat of arbitration is already handling litigation relating to the same award, and the aforementioned defences,

which relate to the fairness of the underlying arbitral proceedings and fundamental public policies of the country in which enforcement is sought.[16]

Article III commands local courts to enforce foreign awards but with two qualifications: they shall do so in accordance with domestic procedural rules, and under the Convention's conditions. On the one hand, rather than specifying precisely how awards are to be enforced, the Convention opts to incorporate domestic procedure by reference; and since FNC is considered a rule of procedure in the United States,[17] article III seems to permit, if not direct, that US courts apply it just as they would any other rule regarding how litigation unfolds - for example, a statute of limitations or a rule that the defendant may no longer object to jurisdiction after it makes pleadings on the merits. On the other hand, article V - one of the 'conditions' under which courts must enforce awards - states that enforcement 'may be refused... only if' a defence is proven.[18] The problem is that by dismissing an enforcement action under FNC, the court effectively refuses to enforce the award, but without proof of a defence.

Monde Re: the first case applying FNC to a convention enforcement action

In Monde Re, the plaintiff sought to enforce a valid arbitral award it had won against Nak Naftogaz, a Ukrainian gas company.[19] The original contract had been with Ukrgazprom, which later merged with several other companies to form Naftogaz. The Ukrainian government played some role in creating Naftogaz and remained a major shareholder.[20] The parties disputed whether the government controlled Naftogaz to the extent and in a manner to make Naftogaz the government's alter ego and to make Ukraine responsible for the award, but it was impossible to resolve this question without a very complex inquiry into Ukrainian law as well as evidence, including witnesses, that were located in Ukraine and not accessible to the New York district court. Significantly, Monde Re had not yet identified any assets of either Naftogaz or the Ukrainian government in the United States.

The district court held that FNC could be used under article III of the New York Convention and dismissed the action. The Second Circuit agreed. It held that FNC was a rule of procedure that is applied in actions to enforce a domestic arbitral award and therefore could be applied in actions to enforce a foreign award.[21] In applying the doctrine to the case at hand, the Court emphasised that, in the absence of attachable assets in the jurisdiction, 'the motivation of Monde Re for bringing its enforcement proceeding in the United States is not apparent', and concluded that 'the jurisdiction provided by the Convention is the only link between the parties and the United States'.[22] Because of the complexities involved in trying the alter ego issue in the US, the court agreed with the district court that the balance weighed in favour of dismissal.

Figueiredo

Monde Re has received mixed reviews,[23] but the latest case applying its reasoning on article III and FNC has received no academic support. Figueiredo, a Brazilian consulting firm, had entered into a lump-sum contract with a Peruvian government agency to help expand the drinking water and sewage services in several cities in Peru. The contract was based on the government's initial feasibility studies, which proved to be unrealistic;[24] however, this ultimately caused the consulting firm to do far more work than it had anticipated, extending the term of the consulting work three times longer than planned with no additional compensation. A Peruvian arbitral tribunal, deciding ex aequo et bono, held that the Peruvian government had acted 'in bad faith', had been unjustly enriched by Figueiredo's extensive work, and was therefore not entitled to enforce the lump-sum contract to make Figueiredo responsible for the substantial excess costs it had incurred in carrying out the requested

works.[25] Figueiredo was awarded substantial damages and attempted to satisfy the award by attaching the proceeds of a Peruvian sovereign bond offering in New York.[26]

The district court declined to dismiss Figueiredo's action to confirm the award. Ruling on an interlocutory appeal, the Second Circuit reversed on FNC grounds. The decision turned on a Peruvian statute that limited the amount of money any government entity may pay to satisfy a judgment to three per cent of its annual budget.[27] Although both Figueiredo and Peru agreed that the cap would not apply if the award was paid with funds located abroad, Peru argued that enforcing the award against its assets in the US would allow Figueiredo to circumvent the applicable Peruvian law and its underlying policy - a prime example, Peru argued, of the type of forum-shopping that FNC is designed to prevent.[28]

In considering Peru's FNC motion,[29] the court characterised the cap statute as 'a highly significant public factor warranting FNC dismissal'. The court found that, even though in this case application of this factor favoured one of the litigants before it, 'there is nonetheless a public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments'.[30] The court did not pause to reconsider whether FNC is available at all in a Convention case, simply relying on Monde Re. It also did not make the prerequisite finding that the US was a manifestly inconvenient forum or that Figueiredo had actually had improper motives in going after Peru's US assets, skipping straight to the three-step analysis. It held that Figueiredo's choice of forum was entitled to little deference since it was not a US corporation and that Peru was an adequate alternative forum because 'some assets' of the defendant were located there,[31] and then proceeded to balance the public and private interests at stake.

The opinion mentioned only three factors:

1. the US' public interest in its pro-arbitration policy and fulfilling its Convention obligations, to which the court accorded little weight;
2. the connection between the underlying dispute and Peru, which the court found was stronger than the US connection, since the latter was based only on the fact that Peruvian assets were located in a New York bank;[32] and
3. 'the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the Award', which the court found 'tips the FNC balance decisively' in favour of dismissal.[33]

Figueiredo's enforcement action was thus sent back to Peru.

Figueiredo dissent

There are two main lines of criticism of the Monde Re and Figueiredo decisions: first, that FNC should never be used in actions governed by the New York and Panama Conventions; and second, that it was wrongly applied in these cases. In a vigorous dissent to the Figueiredo opinion, Judge Lynch explored both approaches.[34]

First, Lynch argued, the terms of the Convention preclude applying FNC to enforcement actions. 'Given that forum non conveniens is not listed as a defence to enforcement in either the New York or the Panama Convention, a strong case can be made that, by acceding to the treaties, the United States has made the doctrine inapplicable to enforcement proceedings that they govern'.[35] In this regard, he argued, the term 'procedure' in article III should be read narrowly. FNC was 'unlikely to have been anticipated by the treaties' drafters and signatories',

who could not have intended for non-standard doctrines like FNC to derail recognition and enforcement actions.[36] Interpreting article III to create such a loophole would 'dramatically undercut' the Convention's purpose,[37] since its goal is to provide a guarantee that arbitral awards will be predictably and uniformly enforced across Convention jurisdictions, whereas an unusual procedure like FNC creates inconsistency and surprise. 'The Convention seeks to open the doors of foreign courts to efforts to enforce arbitration awards wherever assets are available, free of local prejudice or obstructive local rules that make enforcement difficult in the courts of the adversary state.[38]

Second, Judge Lynch argued, even if FNC could be considered, the Convention makes enforcement actions summary proceedings in any jurisdiction where the defendant's assets are located, so unless there are complex tangential issues (such as the questions that arose in Monde Re), a Convention state will necessarily not be 'manifestly inconvenient.' Since the Convention specifically allows those who win arbitral awards to seek enforcement in any signatory state, Figueiredo was not forum-shopping but simply playing by the rules; in fact, dismissing the case would unfairly allow Peru to avoid its own obligation to honour the award.

Finally, as for the balancing test, Judge Lynch argued, treaty obligations undertaken by the US to other sovereign nations should have been the paramount consideration in the balancing test because 'the interest of the United States in satisfying its obligations under the Panama Convention is at least as great as any interest Peru might have in imposing its limit on the payment of arbitral awards'.[39]

Other criticism of the application of FNC to New York Convention actions

Authorities and commentators have taken different positions on Figueiredo. Thus far, there appears to be unanimous agreement that the action should not have been dismissed, but there is no consensus on which of Judge Lynch's two arguments should have prevailed.

The ALI restatement

The American Law Institute (ALI), in the current draft of its forthcoming Restatement of International Commercial Arbitration, takes the position that the FNC can never apply in Convention actions, agreeing with Judge Lynch that article III incorporates domestic procedure only to the extent it is compatible with the Convention's other requirements.[40] Among those is article V, which strictly requires enforcement unless an affirmative defence is proven.[41] International law requires that treaties be interpreted in accordance with their object and purpose.[42] The Reporter's Note accompanying the draft Restatement argues that the 'purpose [and] larger structure of the Convention' bar a reading of article III that leads to a violation of the Convention's other terms, including 'employ[ing] inconvenience as an additional basis for dismissing an action for enforcement of an award that is otherwise entitled, as a matter of treaty obligation, to enforcement.[43]

Furthermore, the draft Restatement suggests, there is no such thing as a 'better' or 'more convenient' forum for enforcement actions; any jurisdiction in which assets may be found is an appropriate forum, especially since the Convention eliminates any material differences in how an enforcement would proceed in various potential fora.[44] Finally, the Restatement asserts that the FNC is excluded from the 'procedure' category in its own right, independently of the Convention's purpose or its other terms. Any rule that 'does not address how litigation shall proceed, but whether it shall proceed' is, by definition, 'not a purely procedural rule'.[45]

Treaty interpretation and the New York Convention's travaux préparatoires: 'procedural' might mean 'non-discretionary'

Some commentators have suggested looking to the travaux préparatoires of the New York Convention to help decipher the intended meaning of the term 'rules of procedure'. By this measure, it is said, forum non conveniens should be excluded because (in brief) the phrase was copied straight from a previous treaty drafted primarily by civil law countries, whose representatives would never have thought of forum non conveniens when they contemplated 'procedure' because it simply wasn't part of their native legal vocabulary. Further, the only discussion of 'procedure' concerned the risk of discriminatory procedural rules specifically governing foreign arbitral awards, and the discussion considered only the most mundane and technical procedural requirements for the enforcement of arbitral awards, rather than issues in which courts might retain discretion to hear or not hear a claim before them.[46]

Conclusion

My 2004 article argued that, while forum non conveniens is rightly seen as counterintuitive in the context of arbitral award enforcement actions, this is because the factual circumstances justifying its use will be rare, not because it is legally inapposite.[47]

I accepted the Second Circuit's reasoning that the rule is a rule of procedure and that it was not inconsistent with the Convention. I urged that courts should apply the doctrine sparingly; however, the presence in the forum of attachable assets likely owned by the defendant should almost always, if not always, be a sufficient connection to the forum to justify the exercise of jurisdiction, even in an alter ego case. Additionally, if an action to enforce is nonetheless dismissed on grounds of forum non conveniens, the court should usually condition dismissal on posting of security substantially equal to any assets properly attached.[48]

I will admit that there is considerable merit to the Restatement's analysis that any rule that regulates not how a matter should proceed but whether it does is not a rule of 'procedure'. But there are many procedural rules, such as statutes of limitations, jurisdiction and service of process, that determine whether a case proceeds to the merits. I find it hard to call a rule that is intended to determine the proper forum in which to hear a case anything other than a rule of procedure.

There is also much appeal to the view that permitting a court to exercise discretion to dismiss an action is inconsistent with the Convention's broader command that the court hear the action. But, again, I have difficulty saying that a rule that is discretionary in application is, for that reason, not 'procedural'. Many clearly procedural rules - such as evidentiary rules and rules of judicial notice - permit a trial court broad latitude to consider the evidence even if it might otherwise be excludable.[49]

Ultimately, I continue to think it unwise to stretch the natural meaning of the word 'procedure' to address the difficult cases that the Second Circuit faced. I believe that the approach that best accords with widespread notions of 'procedure' versus 'substance' is that 'procedural' rules do not result in a ruling on the merits of the claim. In an enforcement action, the 'merits' are whether there is a valid award, whether one of the article V grounds is present and whether particular assets may be seized to pay the award. Anything else that may arise is 'procedural' for purposes of article III. On this reasoning, there is no basis for excluding FNC from the usual array of rules of procedure that can be applied in actions to enforce or confirm an international arbitral award.

The conclusion in Figueiredo seems clearly wrong, however. The Peruvian cap statute should not have been considered a public interest - a factor that generally refers to the forum's

interest in sound use of judicial resources - but was rather a particular defence that one litigant had or did not have. That the parties agreed that it would not apply to assets outside of Peru (a surprising conclusion) suggests that the rule was actually a rule allocating duties between the Peruvian courts and its executive. In any case, it had no role in the FNC analysis.

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The question whether FNC applies to actions to confirm or enforce a foreign arbitral award is now settled in New York and other states in the Second Circuit (Connecticut and Vermont). But other circuits among the 13 circuit courts of appeals have yet to weigh in, and the United States Supreme Court has likewise not addressed the issue. It remains to be seen whether these decisions are path-breaking or aberrational in the broader context of US arbitral jurisprudence.

Notes:

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1. Figueiredo Ferraz E Engenharia de Projeto Ltda v Republic of Peru, 665 F.3d 384 (2d Cir 2011) [hereinafter Figueiredo].
2. Piper Aircraft Co v Reyno, 454 US 235, 255-56; Gulf Oil Corp v Gilbert, 330 US 501 (1947).
3. In re Arbitration between Monegasque De Reassurances SAM v Nak Naftogaz of Ukraine, 311 F.3d 488, 500 (2d Cir 2002) [hereinafter Monde Re].
4. Figueiredo, 665 F.3d at 390.
5. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 21 UST 2517, 330 UNTS 38 [hereinafter NY Convention], implemented by chapter 2 of the Federal Arbitration Act, 9 USCA section 201 et seq (West 1999) [hereinafter FAA].
6. Inter-American Convention on International Commercial Arbitration, opened for signature 30 January 1975, OASTS No. 42, 1438 UNTS 245, implemented by FAA Ch 3, 9 USC sections 301-307 (1994) (originally enacted as Act of 15 August 1990, Pub L No. 101-369, 1990 USCCAN (104 Stat 448) 675) [hereinafter Panama Convention]. The United States signed the Panama Convention on 9 June 1978.
7. See Gilbert, 330 US at 507-508.
8. See, eg, Focus Enter Inc v Zassi Medical Evolutions, Inc, 2007 WL 1577844, at *3 (DDC 31 May 2007); Reers v Deutsche Bahn AG, 320 F.Supp.2d 140, 158 (SDNY 2004).
9. Iragorri v United Technologies Corp, 274 F.3d 65, 71 (2d Cir 2001).
10. See Piper, 454 US at 256 No. 24 (citing Pain v United Technologies, 637 F.2d 777, 797 (DC Cir 1980)). The Second Circuit applies a 'bona fide connection' standard, exhorting courts to 'consider a plaintiff's likely motivations in light of all the relevant indications'. Iragorri, 274 F.3d at 72.
11. Piper, 454 US at 255-56.
12. See Piper, 454 US at 254 No. 22 (stating that personal jurisdiction over the defendant 'ordinarily' renders a forum adequate unless it is 'clearly unsatisfactory' in light of other

considerations). Iragorri, 274 F.3d at 71-72, elaborates on the factors to be considered in this sliding scale analysis.

13. See Gilbert, 330 US at 508 ('Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court...').
14. Gilbert, 330 US at 509.
15. NY Convention article III (emphasis added). The Panama Convention (art. 4) counterpart reads:

> An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

16. NY Convention article V.
17. Am Dredging Co v Miller, 510 US 443, 453 (1994) (FNC doctrine is 'procedural rather than substantive' for purposes of determining whether state (procedural) or federal (substantive) rules apply in state court). There is a precedent under the Warsaw Convention on air transport for defining 'procedure' differently in the context of a treaty. In Hosaka v United Airlines, 305 F.3d 989, 994 (9th Circuit 2002), the court held that a court should not apply FNC to Warsaw Convention cases, notwithstanding a treaty provision that provides, '[q]uestions of procedure shall be governed by the law of the court to which the case is submitted', citing, among other things, the purpose and drafting history of the Convention. Another appeals court has reached a contrary result. In re Air Crash Disaster Near New Orleans, Louisiana on 9 July 1982, 821 F.2d 1147, 1161 (5th Circuit 1987).
18. NY Convention article V (emphasis added).
19. Monde Re was actually a reinsurer bringing the claim on behalf of the original party by subrogation, but this issue was not material to the outcome or the FNC decision.
20. Monegasque de Reassurances SAM (Monde Re) v Nak Naftogaz of Ukraine, 158 F. Supp. 2d 377, 380 (SDNY 2001).
21. Monde Re, 311 F.3d at 496:

> The signatory nations... are free to apply differing procedural rules consistent with the requirement that the rules in Convention cases not be more burdensome than those in domestic cases. If that requirement is met, whatever rules of procedure for enforcement are applied by the enforcing state must be considered acceptable, without reference to any other provision of the Convention. The doctrine of forum non conveniens, a procedural rule, may be applied in domestic arbitration cases brought under the provisions of the Federal Arbitration Act, see, eg, Matter of Arbitration Between Maria Victoria Naviera, SA v Cementos Del Valle, SA, 759 F.2d 1027, 1031 (2nd Circuit1985), and it therefore may be applied under the provisions of the Convention.

22. Id. at 499. I note that the Court in Figueiredo disputed that the absence of assets was central to the Monde Re decision, arguing that the quoted language about the absence of a link to the United States might have referred to the underlying litigation, rather than the absence of assets, and quoting language in the district court's opinion in Monde Re expressing uncertainty about whether there were any assets in the United States. 665 F.3d at 390 No. 8. That is not how most readers, myself included, understood the decision at the time.

23. See, eg, W W Park, Respecting the New York Convention, 18 ICC International Court of Arbitration Bull. No. 2, at 7 (2007) (criticising the decision as having 'gone astray as a matter of both logic and history'); W W Park & A A Yanos, Treaty Obligations and National Law: Emerging Conflicts in International Arbitration, 58 Hastings L Rev 251, 262 (2006) (same); The International Commercial Disputes Committee of the Association of the Bar of the City of New York, Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards (April 2005), reprinted in 15 Am Rev Int'l Arb 407 at No. 98 (2006) (arguing that Monde Re may have reached the correct result on an incorrect basis); A J van den Berg, 'Why Are Some Awards Not Enforceable?', in New Horizons in International Commercial Arbitration and Beyond 297, 313-14 (ICCA Congress Series, Kluwer 2005) (regarding the decision as exceptional, and American FNC jurisprudence as unique); L J Silberman, International Arbitration: Comments from a Critic, 13 Am Rev Int'l Arb. 9, 16 (2002) (criticising the decision and stating that 'courts should not be permitted to circumvent th[e] objective [of worldwide enforcement of NY Convention arbitral awards] on the basis of considerations that are directed to concerns about the litigation of an original dispute and have little relevance to an enforcement action'); J Neuhaus, Current Issues in the Enforcement of International Arbitration Awards, 36 U Miami Inter-Am L Rev 23 (2004) (supporting the outcome of Monde Re while questioning the reasoning); C H Brower II, Reflection on Forum Non Conveniens: Monde Re was Right?!?, Kluwer Arbitration Blog (Mar. 16, 2010) http://kluwerarbitrationblog.com/blog/2010/03/16/reflections-on-forum-non-conveniens-monde-re-was-right/ (supporting both the outcome and the reasoning of Monde Re).

24. Figueiredo Ferraz E Engenharia de Projeto Ltda v Republic of Peru, Ex Aequo et Bono Arbitration Award, 2007 WL 6464902 at 32, para 42 (2007).

25. Id at 29, para 30, and 30, paras 32-35.

26. Figueiredo Complaint, 2008 WL 887298 at 1, No. 108CV00492 (18 January 2008).

27. 665 F.3d at 387 (citing Law No. 27584, article 42, as amended by Law No. 27684, currently set forth in Supreme Decree No. 013-2008-JUS, article 47).

28. Reply Brief for Defendants-Appellants in Figueiredo, 655 F.Supp.2d 361 (SDNY), 2010 WL 6351473 at 17-28 (13 August 2010).

29. Peru also raised objections to jurisdiction of the US court, but the court relied on Sinochem Int'l Co Ltd v Malaysia Int'l Shipping Corp, 549 US 422, 432 (2007), which held that forum non conveniens can be addressed before decisions on jurisdiction.

30. 665 F.3d at 392.

31. Id at 390-91. The Court also did not consider whether Peru was also an 'available' forum in light of the statutory cap.

32. Id at 392.
33. Id.
34. 665 F.3d at 394-99 (Lynch, J, dissenting).
35. Id. at 397.
36. Id. at 398.
37. Id. at 397.
38. Id. at 402.
39. Id. at 408.
40. Indeed, Judge Lynch cited and relied upon the Restatement in his dissent. Id. at 398 (Lynch, J, dissenting).
41. 'Stay or dismissal of an action to confirm or enforce a Convention award based on forum non conveniens would run afoul of the Conventions' requirement that, absent a specific Convention defense to enforcement, Contracting States confirm and enforce awards.' Restatement (Third) of International Commercial Arbitration (Council Draft No. 3, 23 December 2011) section 4-29 comment b, at 161, available athttp://extranet.ali.org/docs/ICA_CD3_online.pdf [hereinafter Restatement].
42. Vienna Convention on the Law of Treaties, article 46, 23 May 1969, 1155 UNTS 331; 8 ILM 679 (1969).
43. Restatement section 4-29, Reporters' Note (b)(ii), at 379:44-380:14.
44. See Restatement section 4-29, Reporters' Note (d), at 381:32-382:1.
45. Restatement section 4-29, Reporters' Note (b)(ii), at 380:l15-18 (emphasis added). See also George Bermann, Bermann on Figueiredo Ferraz v Republic of Peru, Conflictoflaws.net (21 December 2011), http://conflictoflaws.net/2011/bermann-on-figueiredo-ferraz-v-republic-of-peru/. Bermann is the Reporter for the Restatement.
46. Eg, UN Doc No. E/Conf 26/L11 (25 May 1958); UN Doc No. E/Conf 26/L.21 (27 May 1958); UN Doc No. E/Conf 26/SR. 10, at 3-8 (12 September 1958). These documents are available at www.uncitral.org.
47. J Neuhaus, Current Issues in the Enforcement of International Arbitration Awards, 36 U Miami Inter-Am L Rev 23 (2004).
48. Id. at 35.
49. See, eg, Fed R Evid 403 (permitting court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence); Fed R Evid 807 (hearsay is admissible if, among other things, the statement has 'circumstantial guarantees of trustworthiness' equivalent to other hearsay exceptions and 'admitting it will best serve the purposes of these rules and the interests of justice'); Fed R Evid 201 (permitting court to take judicial notice of 'generally known' facts).

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Who Decides Arbitrability? A Resurgence of the Debate in the United States

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Recently, in a very high-profile decision, the US Court of Appeals for the DC Circuit in Republic of Argentina v BG Group PLC[1] annulled a $185 million arbitration award on the basis of its independent review of the arbitrators' decision on the arbitrability of the dispute. Once again, this case has brought the question of 'who decides arbitrability' to the forefront in the United States. BG Group not only raises questions about the proper allocation of authority between judge and arbitrator, it also underscores the implications of judicial overreaching on the success of international arbitration, particularly in the enforcement context. Not surprisingly, BG Group has generated much concern over the role of courts in arbitration in the United States and, for some, has called into question the principle of finality on which parties seeking to enforce non-domestic arbitral awards in the United States rely.

We consider in this article whether the concerns over BG Group are justified. We begin by reviewing the line of Supreme Court cases on which BG Group relied, all of which took place in the context of domestic arbitration. Next, we examine the holding of BG Group in detail. We follow this with a discussion of a recent Second Circuit decision, Schneider AG v Kingdom of Thailand.[2] Like BG Group, that case addresses the issue of 'who decides arbitrability' in the enforcement context, although it appears to go a step further than BG Group in addressing arbitrator authority. Finally, we consider whether the concern prompted by BG Group about the enforcement of international arbitration awards in the United States is justified.

US Supreme Court jurisprudence and questions of arbitrability

In the 1986 case of AT&T Technologies, Inc v Communications Workers[3], the Supreme Court first articulated the now frequently-quoted rule that '[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitration is to be decided by the court, not the arbitrator'. Then, in 1995, the Supreme Court decided First Options of Chicago, Inc v Kaplan,[4] which established the standard to be used by district courts reviewing arbitrator decisions on arbitrability. While AT&T Technologies was decided in the context of a motion to compel arbitration, First Options involved a motion to vacate an

arbitration award and a competing request to confirm the award under the Federal Arbitration Act (the FAA).[5]

The parties seeking to vacate the award in First Options had objected to the tribunal's jurisdiction on the basis that their dispute was not arbitrable, because they were not parties to the arbitration clause in question.[6] The tribunal rejected this argument and ruled on the merits in favour of the claimant.[7] The District Court in First Options confirmed the award, a decision that was subsequently reversed by the Third Circuit on the ground that the dispute was not arbitrable.[8] The Supreme Court granted certiorari to determine the standard of review to be used by a federal court 'in reviewing the arbitrators' decision on arbitrability'.[9]

Starting from the premise that 'arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes - but only those disputes - that the parties have agreed to submit to arbitration', the Supreme Court determined that the question of 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter'.[10] Hence, if the parties agreed to submit the matter of arbitrability to the arbitrator, then a reviewing court 'should give considerable leeway to the arbitrator...'[11] However, the Court added that '[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so'.[12] If, however, the parties 'did not agree to submit the arbitrability question itself to arbitration, then the district court should decide the question... independently'.[13] On the basis of these principles, the Court concluded that the party seeking confirmation of the award was unable to show that the opposing party had agreed that an arbitrator would decide whether their dispute was arbitrable.[14]

At first blush, the rule articulated by the Supreme Court in First Options may appear to be straightforward: arbitrability should be decided by a judge unless the parties clearly agree otherwise. However, just what constitutes a 'question of arbitrability' to be presumptively decided by a judge? As BG Group demonstrates, this question has turned out to be far more complicated than first meets the eye.

The Supreme Court considered the question in John Wiley & Sons, Inc v Livingston,[15] a case in which an employer objected to a motion to compel arbitration under a collective bargaining agreement. The employer argued that the employee had not complied with grievance procedures that were prerequisites to arbitration.[16] According to the employer, such 'procedural' questions of arbitrability were to be decided by courts, not arbitrators.[17] In evaluating this argument, the Court adopted a bright line approach to determining whether a court or an arbitrator should decide the 'gateway issue' of arbitrability. Substantive questions of arbitrability, the Court stated, were to be decided by the courts.[18] Conversely, '"procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator'.[19] In this case, '[d]oubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration'.[20] Hence, whether or not the 'procedural prerequisites' involving the grievance procedures had been followed was a procedural question 'grow[ing] out of the dispute' to be decided by the arbitrator.[21] Beyond this analysis, the Court provided little guidance on what types of 'procedural questions' 'grow out of a dispute' that can be decided by arbitrators.

In Howsam v Dean Witter Reynolds, Inc,[22] the Court was presented with the question of whether an applicable statute of limitations provision rendered an arbitration claim falling outside of the limitations period non-arbitrable. On these grounds, the party opposing

arbitration, Dean Witter, had sought an injunction in the district court seeking to prevent the party that initiated arbitration, Howsam, from proceeding in the arbitration.[23] In addressing whether the applicability of the statute of limitations to the arbitration was itself a question of arbitrability, the Court observed that while any 'gateway question' could potentially constitute a question of arbitrability, for purposes of determining who was to decide a question of arbitrability, the concept had a 'far more limited scope'.[24] A 'question of arbitrability' in this context existed only in the kind of narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[25]

On the basis of this analysis, the Court determined that issues involving fulfilment of a condition precedent to arbitration, or waiver, or a 'like defense', were 'procedural questions which grow out of the dispute and bear on its final disposition'.[26] Such procedural questions did not constitute 'question[s] of arbitrability' to be presumptively decided by a court absent clear and unmistakable evidence that the parties had agreed to submit such questions to an arbitrator.[27] By contrast, questions such as 'whether the parties are bound by a given arbitration clause' or 'a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy' were questions of arbitrability to be presumptively decided by a court.[28] On the basis of this distinction, the Court held that the statute of limitations claim raised by Dean Witter was a procedural matter to be decided by the arbitrator.[29]

BG Group v Argentina

Fast-forwarding nearly a decade to January 2012, when BG Group was decided, it is clear that the rules established by the Supreme Court in AT&T Technologies, First Options, John Wiley and Howsam may have provided more questions than answers.

In BG Group, the DC Circuit set aside a $185 million UNCITRAL award rendered in favour of BG Group.[30] BG Group had initiated arbitration under the UNCITRAL rules pursuant to a bilateral investment treaty between the United Kingdom and Argentina (the UK-Argentina Treaty). The UK-Argentina Treaty provided that investors were required to submit disputes with the host state to the courts of the host state. If, however, the domestic courts failed to render a final decision within a period of 18 months, either party would have the option to submit the dispute to arbitration.[31] For various reasons, BG Group determined not to submit its dispute with Argentina to the Argentine courts and directly initiated arbitration.[32]

The tribunal found that it had jurisdiction over the dispute, in spite of BG Group's failure to comply with the UK-Argentina Treaty's requirement first to submit disputes to the Argentine courts.[33] It determined that the conditions in Argentina at the time of the dispute were such that compliance with the local remedies requirement of the UK-Argentina Treaty would have been futile.[34] It proceeded to decide on the merits in favour of certain of BG Group's claims and to issue an award in favour of BG Group.[35]

Thereafter, Argentina petitioned to vacate or modify the award pursuant to the FAA, while BG Group cross-moved for recognition and enforcement of the award.[36] The district court denied the motion to vacate and granted enforcement in a decision which Argentina appealed to the DC Circuit.[37]

The DC Circuit determined that the threshold question presented by Argentina's appeal was 'arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling... [the] requirement that recourse initially be sought in [Argentina]?'.[38] In determining whether the local remedies exhaustion requirement was a question of arbitrability, the court employed Howsam's test of whether the case fit the 'narrow circumstances' where the 'contracting parties would likely have expected a court to have decided the gateway matter.'[39] The Court determined that the 'Treaty provides a prime example of a situation where "the parties would likely have expected a court" to decide arbitrability'.[40] Then, to determine the proper standard of review of the tribunal's decision, the DC Circuit considered whether there was 'clear and unmistakable evidence' that the parties agreed to submit this question of arbitrability to the arbitrator. Under First Options, if there was such clear and unmistakable evidence, then the tribunal's decision on this question of arbitrability was entitled to 'considerable leeway'; if not, then the district court should have decided the arbitrability question independently.[41]

The Court then proceeded to conduct its own review of the evidence to determine whether there was 'clear and unmistakable evidence' that the parties 'intended the arbitrator to decide arbitrability where BG Group disregarded the requirements... of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court'.[42]

While the court recognised that the UNCITRAL Rules empower a tribunal to determine the issue of arbitrability and that the Treaty allowed for recourse to UNCITRAL arbitration, the Court nevertheless held that Argentina's consent to grant the arbitrator the power to decide questions of arbitrability under the UNCITRAL Rules was not 'triggered' until the BG Group first fulfilled the conditions of the Treaty requiring investors to exhaust local remedies.[43] The Court found that the district court, by failing to determine whether the parties had intended to submit to an arbitrator the particular question of arbitrability where the Treaty's exhaustion requirements had not been fulfilled, erred as a matter of law.[44]

The Court distinguished John Riley on the basis that the substantive/procedural dichotomy adopted by the Court there was drawn to '[a]ccord with the policy behind federal labor law'.[45] Likewise, the Court summarily distinguished Howsam on the basis that the question of arbitrability there was 'intertwined with the facts underlying the substantive dispute' and the statute of limitations rule was adopted by the forum in which the arbitration took place, such that the arbitrators were 'comparatively more expert about the meaning of their own rule'.[46]

Finally, the Court bolstered its conclusion with a discussion of the importance of giving effect to the parties' agreement, which, in this case, compelled the conclusion that the parties did not intend for an arbitrator to decide the issue of arbitrability where a party failed to comply with the threshold requirement to submit disputes to the local courts.[47]

Schneider AG adds another twist

A recent case issued by the Second Circuit, Schneider AG v Kingdom of Thailand, has added yet another twist to jurisprudence on the 'who decides' question. There, the Second Circuit considered the appropriate level of review of a tribunal's determination that a particular investment fell within the scope of the applicable agreement to arbitrate, contained in a bilateral investment treaty between Germany and Thailand (the Germany-Thailand Treaty).

Over Thailand's objections, the tribunal in Schneider AG determined that it did have jurisdiction over the claims because the investment was covered by the agreement to

arbitrate, and issued an award in favour of the claimant. The investor sought to confirm the award in the United States, while Thailand cross-moved to vacate on grounds that the tribunal lacked jurisdiction for the same reasons it had argued to the tribunal.[48] The district court held that whether the investment fell within the scope of the Germany-Thailand Treaty was an issue of 'scope' and did not concern 'formation', and that the tribunal's decision was accordingly subject to deferential review by the court.[49]

On appeal, the Second Circuit found that, regardless of whether the arbitrability issue was one of scope or formation, the district court erred in failing to determine whether there was clear and unmistakable evidence of the parties' intent to submit that issue for decision by an arbitrator.[50] Such an inquiry was required before the district court determined what standard of review to apply to the arbitrator's decision on arbitrability. The Second Circuit then conducted this analysis itself, finding on a review of the record, that there was 'clear and unmistakable evidence' that the parties agreed to grant the arbitrators the power to determine questions of arbitrability, in the form of both the Terms of Reference and the parties' agreement to use of the UNCITRAL Rules.[51] Accordingly, an independent judicial determination of the arbitrability of the parties' dispute was unnecessary.[52]

The test applied by the Second Circuit in Schneider AG seems to skip entirely over the requirement of determining whether a particular issue constitutes a 'question of arbitrability' to be presumptively reviewed by a court. Instead, the court directs that, regardless of whether an issue decided by an arbitrator is one of scope or formation, the district court should determine whether there was 'clear and unmistakable evidence' that the parties agreed to grant the arbitrator the power to decide the issue. If there is no such evidence, the court may perform an independent review. This holding creates some tension with the premise that certain questions should be left to the arbitrator and reviewed on a deferential basis without any presumption in favour of judicial review. The case thus could expand the ability of US courts to perform an independent review of an arbitrator's decision.

In addition, the Second Circuit's approach in Schneider AG serves as a notable counterpoint to that of the DC Circuit in BG Group. Having determined that the consideration of the local remedies requirement should have been decided by a court, the DC Circuit never analysed the BG Group's substantial arguments that submission to Argentine courts would have been futile. In contrast, once it determined that a court should decide the question of arbitrability, the Second Circuit actually did analyse the underlying question.

Will BG Group prove detrimental to international arbitration in the United States?

BG Group has prompted a flurry of criticism and concern. Schneider AG v Kingdom of Thailand risks engendering similar criticisms, although it is too early to tell at this point, given that the case was decided very recently, in August 2012.

One criticism of BG Group is that it undermines arbitrator authority and impermissibly expands the judicial role in arbitration. This criticism has morphed into a broader concern that BG Group represents a reversal in the United States' 'emphatic federal policy in favour of arbitral dispute resolution' cited in the Mitsubishi case.[53] Other concerns relate specifically to the future of enforcement of arbitral awards under the New York Convention. These include the risk that BG Group will encourage parties to take a 'second bite at the apple' in challenging arbitration awards, and the converse risk that parties may now hesitate before choosing a United States jurisdiction as the seat of arbitration on account of a lack of confidence prompted by BG Group in the role of US courts in promoting finality of arbitration awards.

Yet there are a number of counterarguments that counsel against a hasty conclusion that BG Group is 'bad' for international arbitration in the United States.

While BG Group (and now perhaps Schneider AG) can be said to add to the 'unpredictability' of enforcement of arbitration awards by expanding the scope of judicial review over 'questions of arbitrability',[54] the better position may be the view of BG Group as just one case in a line of cases where the courts have struggled to draw a line between arbitrator authority and judicial authority. As the review of Supreme Court jurisprudence in this article demonstrates, the Supreme Court has not yet articulated a 'bright line' rule for determining the threshold question of what constitutes a 'question of arbitrability' to be presumptively decided by a court. Under First Options, that question must be answered before a court may then proceed to determine what standard of review to apply to an arbitrator's decision on a question of arbitrability. A review of BG Group indicates that the court there lacked guidance in determining that threshold question. It relied primarily on the Supreme Court's imprecise direction that a court should ask itself whether the parties 'would likely have expected a court to have decided the gateway matter'.[55] It is perhaps not surprising that application of this nebulous principle could lead to a seemingly counter-intuitive result. In a similar vein, the 'procedural/substantive distinction' discussed in John Wiley and Howsam may, in some cases, be a difficult rule to apply, given the frequent overlap between procedural and substantive issues.

Additionally, outside of the 'arbitrability' context, US courts have continued to enforce awards routinely. Applications pursuant to the New York Convention to enforce arbitration awards issued in forums and under rules ranging from the International Centre of Dispute Resolution[56] to FIFA's dispute resolution chapter,[57] to the Society of Maritime Arbitrators Rules[58] and to the ICC Rules, have been granted in various district courts this year. The Second Circuit, which decided Schneider AG, also recently issued a 'pro-enforcement' decision, Scandinavian Reinsurance Company Limited v Saint Paul Fire and Marine Insurance Company, et al.[59] In that case, the Second Circuit reversed a decision by the lower federal district court to vacate an arbitration award on account of arbitrator bias. The Second Circuit held that the failure of two co-arbitrators to disclose concurrent service in a similar arbitration, without evidence of bias, did not provide a basis for vacating an arbitral award on 'evident partiality' grounds under the New York Convention as implemented by the FAA.[60]
The largely pro-arbitration decisions from US courts should quell some of the concern over the potential effect of BG Group and related decisions such as Schneider AG on the future of international arbitration, and specifically enforcement, in the United States. As US courts continue to deal specifically with arbitration in the international context, there will inevitably be greater certainty for parties seeking to enforce arbitration awards in the United States and increased confidence in the role of the arbitrator. Perhaps at that point we will finally find the elusive 'perfect' allocation of authority between judge and arbitrator.

Notes

* The authors are grateful to Sonia Farber and Benjamin Aronson for their excellent assistance in preparing this article.

1. 665 F.3d 1363 (DC Cir 2012).
2. Schneider v Kingdom of Thailand, Docket No. 11-1458-cv, 2012 WL 3194228 (2d Cir 8 August 2012).
3. 475 US 643, 649 (1986).

4. 514 US 938, 944-45 (1995).
5. 9 USC section 1 et seq.
6. AT&T Technologies, 514 US at 941.
7. Id.
8. Id.
9. Id.
10. Id. at 943 (emphasis in original).
11. Id.
12. Id. (internal citation and quotation omitted).
13. Id.
14. Id. at 946-47.
15. 376 US 543 (1964).
16. Id. at 555-56.
17. Id.
18. Id. at 557.
19. Id.
20. Id.
21. Id. at 558-59.
22. 537 US 70 (2002).
23. Id. at 82.
24. Id. at 83.
25. Id. at 83-84.
26. Id. at 84-85.
27. Id.
28. Id.
29. Id. at 85.
30. Republic of Argentina v BG Group PLC, 665 F.3d 1363 (DC Cir 2012).
31. Id. at 1366.
32. Id. at 1367.
33. Id. at 1368.
34. Id. at 1367-68.
35. Id. at 1368.
36. Id. at 1368-69.
37. Id. at 1369.
38. Id.
39. Id. (citing Howsam, 537 US at 83-84).

40. Id. at 1371.
41. Id. at 1370.
42. Id. at 1371-72.
43. Id. at 1370-71.
44. Id. at 1371-72.
45. Id. at 1372-73.
46. Id. at 1372 n.6.
47. Id. at 1373.
48. 2012 WL 3194228, at *1-2.
49. Id. at *2.
50. Id. at *3.
51. Id. at *3-4.
52. Id.
53. Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc, 473 US 614, 631 (1985).
54. Jean E Kalicki & Dawn Yamane Hewett, 'The Unavoidability of Uncertainty: One Lesson from the Recent US Court Ruling in Argentina v BG Group', Kluwer Arbitration Blog (27 January 2012), http://kluwerarbitrationblog.com/blog/2012/01/27/the-unavoidability-of-uncertainty-one-lesson-from-the-recent-u-s-court-ruling-in-argentina-v-bg-group/ (last visited 17 August 2012).
55. BG Group, 665 F.3d at 1371.
56. Subway Intern BV v Bletas, Slip Copy, Civil Action No. 3:10-cv-01715 (JCH), 2012 WL 1118205 (D Conn 3 April 2012) (confirming application to enforce award issued in International Centre of Dispute Resolution).
57. Chelsea Football Club Ltd v Mutu, Case No. 10-24028-CIV, 2012 WL 463932 (SD Fla 13 February 2012) (confirming award issued by FIFA's dispute resolution chapter).
58. Sea Shipping Inc v Half Moon Shipping LLC, No. 11 Civ 8152(PAE), 2012 WL 245204 (SDNY 26 January 26 2012) (confirming arbitration award issued under Society of Maritime Arbitrators Rules).
59. No. 10-0910-cv, 668 F.3d 60 (2d Cir 3 February 2012).
60. Id. at 74.

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Summary

CONTROVERSIAL COURT DECISIONS. FORTHCOMING LEGISLATION. AN OPPORTUNITY TO CHANGE?

Last year we finished our comment saying that in Argentina it is not very clear if the trend of Court cases is to uphold arbitration in general. We will now discuss two decisions of the National Courts of the City Buenos Aires. The first decision is a promising one as it suggests a positive trend towards higher recognition of the autonomy of parties to rely on arbitration as a dispute-resolution alternative. The second decision is not quite so promising, as it seriously limits the arbitration panel's powers to decide upon its own jurisdiction.

In our comment last year we made reference to and discussed the decision issued by Panel D from the National Court of Appeals for Commercial Matters in the case Sociedad de Inversiones Inmobiliarias del Puerto SA v Constructora Iberoamericana SA,[1] which confirmed that a waiver to appeal contained in an arbitration clause is perfectly valid under Argentine law and does not violate any public policy principle.

We then remembered that the same court had issued a decision in the case Mobil Argentina SA v Gasnor SA on Arbitration Award (Mobil),[2] which started to reverse the trend so far established by the quite criticised Federal Supreme Court decision in José Cartellone Construcciones Civiles SA v Hidroeléctrica Norpatagónica SA or Hidronor s/ proceso de conocimiento (Cartellone).[3] Without doing any reference regarding the procedural details that allowed the Federal Supreme Court, the highest court of law in Argentina, in deciding the case, stated in an obiter dictum that arbitral awards may be annulled by both a court of law based on sections 760 and 761 of the National Code of Procedure (mainly based on violations of due legal process) and also if found to be 'unconstitutional, illegal or unreasonable' notwithstanding the existence of a waiver to appeal.

The Cartellone Supreme Court decision had raised justified concerns in the arbitral community. Thereupon we commented that, fortunately, later on came the Mobil decision, where, although the defendant cited Cartellone as a precedent supporting its view, the Commercial Court of Appeals held that a waiver to appeal contained in an arbitration clause is valid, as the freedom of the parties to contract should prevail.

Let us also briefly mention that the Argentine Congress is now debating a comprehensive reform of our Civil and Commercial Codes, which will be unified into one single body. As part of this reform, a new chapter will be introduced concerning arbitration, under the denomination of 'Contract of Arbitration'. Despite the many well-founded objections that are being raised concerning the in-depth changes that shall be introduced in our civil and commercial laws, in case this reform is passed - as it seems it will be - the impact regarding arbitration appears to be a positive one, although there are authorised opinions that it would be better to try to pass a more comprehensive and globally accepted legislation on arbitration as the UNCITRAL Model Law.

The Wallaby case

Court decisions in Argentina, even if favourable to arbitration, generally include expressions such as 'arbitration is an exceptional procedure for the resolution of disputes'. As a result, some sort of principle has been established indicating that arbitration clauses should be narrowly construed; in other words, in case of doubt about the existence of an agreement to submit a dispute to arbitration, the opinion is that the jurisdiction of ordinary courts of justice

should prevail. Although there are no constitutional or legal basis to support this 'case law doctrine', it is usually remembered in arbitral cases submitted to judicial revision.

Auspiciously, in Wallaby, this interpretation principle was not followed and instead the Court turned to the application of an adequate contract interpretation doctrine.

In a services agreement between Wallaby SA and Despegar.com.ar SA, the following arbitration clause was included:

> Any controversy arising between the parties in connection with this agreement or its application, interpretation, performance or termination, shall be settled by an arbitrator appointed by mutual agreement of the parties or by an ordinary court of justice in the absence of such mutual agreement.[4]

When the conflict appeared, the parties failed to appoint by mutual agreement an arbitrator in charge of deciding the case. Consequently, Wallaby appeared before a commercial court of law[5] alleging that negotiations to appoint the arbitrator between the parties had failed and, therefore, the court should appoint the arbitrator, as set forth in the arbitration clause.

The defendant objected the plaintiffs request, arguing that the dispute resolution clause should be interpreted as establishing the direct jurisdiction of ordinary courts in the event of failure of the negotiations for appointing an arbitrator.

The judge hearing the case understood that the text of the arbitration clause was somewhat misleading as it could be construed to be supporting the view of the defendant if read separately from the entire agreement.

However, the judge did not rule in favour of the defendant's view. On the contrary, the judge considered that, even though the basic interpretation principle is set forth in section 1198 of the Civil Code, which states that agreements should be executed, construed, and performed in good faith and according to what the parties reasonably understood or could have understood exercising due care and caution, in deciding, section 218(2) of the Commercial Code could not be ruled out. This section establishes that all terms and conditions contained in an agreement must be consistently interpreted; that is, searching for the sense that reasonably results from the general context.

In this sense, the judge noted that a comprehensive reading of the Services Agreement indicated that the parties had anticipated that arbitrators could be designated by a court of law. In Clause 10, the domiciles of the parties are first established, and thereupon it states that, in case the arbitrator is 'designated by a Court of Law, such an arbitrator shall be an arbitrator of law'.

The correct interpretation made by the judge hearing the case set aside the literal interpretation criteria purported by the defendant, and gave relevance to a basic interpretation rule, in other words, that the provisions in an agreement cannot be examined as separate unrelated terms and should be considered entirely and any interpretation doubts should be solved referring to the overall spirit of the agreement.

The decision of the lower court judge was appealed by the defendant, which expressly requested the Appeals Court the application in the case of a narrowly construed interpretation stating:

> ...the lower court judge, although considering that the arbitration clause was ambiguously drafted, failed to apply a narrow criteria and gave preponderance

> to the arbitration jurisdiction instead of the court jurisdiction, thus making a broad interpretation of the agreement, which would be rejected both by legal scholars and by application of prior court decisions. In this sense, both legal authors and court decisions are clear: in the event of doubt as to the sense of the arbitration clause, the view that courts of law should prevail to solve the dispute.[6]

Fortunately, the Court of Appeals (Panel A) did not rely on the defendant's arguments to issue a decision. Instead, it reviewed the applicable interpretation rules and arrived at the same conclusion as the lower court judge did. However, we must say that the Court of Appeals did consider that the arbitration clause had been ambiguously drafted, and that such an ambiguity could have misled the defendant. Consequently, the judge ruled that each party had to bear its own costs. The lower court had understood that costs should be borne only by the defeated party.

Although this appears to be a case in which it would have been easy to rule in favour of upholding the validity of the arbitration clause, both the lower court and the court of appeals felt compelled to make a thorough analysis to support their view that the arbitration clause should not be interpreted narrowly. Although the courts avoided expressly saying that arbitration clauses should be subject to the same interpretation rules as any other contractual clauses, this is what transpires from these decisions.

We welcome the fact that in both instances the arbitration clause was upheld, avoiding the application of the so called 'narrow interpretation' principle.

Papel del Tucumán case

An Argentine company undergoing a bankruptcy proceeding, Papel del Tucumán SA, commenced an arbitration case against Argentina under ICC rules.[7]

Argentina appeared before the arbitration panel filing certain defences concerning the existence, validity and scope of the Arbitration clause. Such defences were dismissed by the Arbitration panel on the grounds that it had jurisdiction to hear the case.

Against such a decision from the arbitration panel, Argentina filed an annulment request based on Section 760 of our Civil and Commercial Code of Procedure directly before the Federal Court of Appeals for Administrative Contentious Matters. Argentina understood that such a court had jurisdiction over the case based on the provisions of section 763 of the Civil and Commercial Code of Procedure, which sets forth that the court with jurisdiction over annulment proceedings is 'the appeals court corresponding to the court who would have heard the matter if the matter had not been submitted to arbitration'.

However, the Court of Appeals, due to other reasons, found that it had no jurisdiction over the subject matter of the case.

To arrive at this conclusion, the Court of Appeals examined the various rules contained in the chapter referring to arbitration in our local procedural laws and found that its jurisdiction was limited to review any annulment requests filed against the 'arbitration award' as set forth in section 758 of the Civil and Commercial Code of Procedure. The Court's interpretation was that the meaning of 'arbitration award' in the clause meant an arbitration award that puts an end to the arbitration process. As Argentina wanted the Court of Appeals to review a preliminary decision on jurisdiction, ie, one which clearly did not end the arbitration process, such a request from Argentina was outside the scope of the Court of Appeals' jurisdiction.

The Court of Appeals seems to have applied the Kompetenz-Kompetenz principle that gives arbitrators the power to decide upon objections raised concerning their own jurisdiction, therefore excluding courts of law from making such a decision, at least until the arbitration proceeding has been completed and, as the case may be, until courts of law may gain jurisdiction based on appeals or annulment defences as filed by the parties.

This decision could have set a valuable precedent to reinforce the applicability of the Kompetenz-Kompetenz principle, especially with the Argentine Republic as one of the parties to the arbitration. But that could be precisely the reason why the correct decision on lack of jurisdiction was followed by a further paragraph in the same decision that totally invalidated what would have been a valuable precedent.

The Court of Appeals understood that 'there is no express regulation in our procedural laws governing the review or challenge by a court of law of the existence, validity and scope of an arbitration clause, or about the decision made regarding jurisdiction of an arbitration panel to hear a case'.[8]

Such a lack of regulation should have resulted in a dismissal of the annulment requested by Argentina allowing the arbitration panel to continue with the proceeding. This would have been an effective application of the Kompetenz-Kompetenz principle, which would have avoided court interference in the development of the arbitration process.

However, after finding that it lacked jurisdiction, the Court of Appeals decided that, 'given the lack of express regulations on the matter, the proceeding and the decision concerning the dispute should be carried out by a lower court judge'.[9] The Court of Appeals based such a decision on section 319 of the Civil and Commercial Code of Procedure, which authorises a Court to order what kind of process is applicable when the dispute is related to any rights other than a monetary claim.

This portion of the Court of Appeals' decision is totally unfortunate. The application of section 319 of the Civil and Commercial Code of Procedure is purported for a dispute that may be heard by courts of law. The Court of Appeals itself stated that the matter was at the time completely outside the jurisdiction of courts of law so the decision resulted inconsistently.

The consequence of the last part of the Court of Appeals' decision is clearly negative. The arbitration case was turned into an ordinary court action and the panel from the Court of Appeals would have given itself jurisdiction to eventually hear the case in the likely scenario that the lower court decision is appealed. The logic behind this decision is hard to understand, and we have to come to agree with our colleague Roque Caivano, who, discussing this same case, concluded that the problem seems to be the outdated legislation on arbitration in force locally.[10]

To further complicate the Court interference in the arbitration process, the Commercial Appeals Court in charge of the bankruptcy proceeding of Papel del Tucumán claimed to have jurisdiction to hear the appeal filed by Argentina against the decision of the arbitral panel. The Lower Court on Administrative and Contentious Matters concurred and decided to send the file to the Commercial Courts. However, this decision was appealed by Argentina, and the Court of Appeals on Administrative and Contentious Matters reaffirmed its ruling that the case should remain within the Contentious and Administrative Courts.[11]

As there is a conflict between two Courts of Appeals, the conflict should now be decided by the Federal Supreme Court. Perhaps this might be a good opportunity for the Federal

Supreme Court to declare that neither of the Appeals Courts is competent to hear the case as the decision of the arbitral panel is not subject to appeal on the basis of the Kompetenz-Kompetenz principle, at least until the moment when the Courts of Justice are empowered to review the award.

The unification of the Civil and Commercial Codes. The 'Contract of Arbitration'

The Federal Government has recently submitted to the National Congress a Bill for the unification of the Civil and Commercial Codes that have been separate pieces of legislation for the last 150 years. This has obviously motivated a big national discussion regarding many of the purported innovations contained in the draft. One of those innovations, quite unexpectedly, is the inclusion of a chapter under the name of 'Contract of Arbitration'.

The arbitration community had to face many difficulties when courts of law become involved in an arbitration process due to the absence of a specific legislation on arbitration. This has been repeatedly pointed out by authors and commentators, and the recommendation to our National Congress that they should adopt the UNCITRAL Model Law on Arbitration as the most practical and direct way to solve these difficulties is unanimous.[12]

One of the reasons why a federal law similar to the UNCITRAL Model Law on Arbitration has not been passed was the fact that Argentina is organised under a federal government. Under such organisation, the National Constitution establishes the distribution of powers between the federal government and the provinces to enforce legislation stating that:

> The provinces reserve to themselves all the powers not delegated to the Federal Government by this Constitution, as well as those powers expressly reserved to themselves by special pacts at the time of their incorporation.[13]

The section where the powers of the National Congress are listed state:

> Congress is empowered to... 12. To enact the Civil, Commercial, Criminal, Mining, Labor and Social Security Codes, in unified or separate bodies, provided that such codes do not alter local jurisdictions, and their enforcement shall correspond to the federal or provincial courts depending on the respective jurisdictions for persons or things...[14]

The result of this distribution is that Argentine provinces have never delegated to the federal government the power to enforce general procedural laws applicable in the provincial jurisdictions; this power has always been exercised exclusively by the provinces themselves. As a result, each province has enacted its own procedural codes and, in many cases, specific rules on arbitration have been passed at the provincial level.

In turn, the Federal Government has enforced the National Code of Procedures applied by federal courts, which we cited above. Such a Code also includes a specific section governing the 'Arbitration Proceeding'.[15]

As we indicated above, the draft of the Bill of the new Unified Civil and Commercial Code includes a chapter called 'Contract of Arbitration'. The incorporation of this chapter into a piece of legislation that has been expressly delegated by the provinces to the federal government would make such chapter binding and applicable by all courts in Argentina and seems to be a good solution to solve the problem of different jurisdictions regulating on arbitration.

Recognised national authors[16] have advocated for this solution, arguing that this finds basis on the mixed character of arbitration: on one side the contractual basis of arbitration, and on the other side its procedural nature. This double characteristic is maintained by internationally well-known authors as well.[17] These authors do not deny that there is a procedural dimension to arbitration, but they argue that it 'must be subordinated to the law of obligations and of contracts in general'.[18]

The problem with this approach is that, although our National Congress is empowered to enact these rules, they would co-exist with arbitration rules already in place in local codes of procedure. These local codes of procedure will not be automatically abrogated, and new discussions could arise as to the applicability (or not) of the new laws.

For example, the principles of autonomy[19] and jurisdiction[20] included in the projected bill are in no way objectionable. Quite the opposite: they will be well received, as they shall constitute the legal framework to give a sound solution to cases as the ones cited above. But the same is not true for interim or conservatory measures.[21] An interim measure is a typical procedural step, and its admittance and enforcement could, in some cases, contradict local procedural laws.

If the bill is passed, it will undoubtedly result in some progress in certain areas related to arbitration. However, we should not lose sight of the ultimate goal of having in our legislation a specific Domestic and International Arbitration Law following the UNCITRAL Model Law. In this way, Argentina could have a modern arbitration law - one that will foster the development of arbitration and help our country to come up to speed with most recent global arbitration trends.

Conclusion

The local community linked to arbitration has been growing steadily over the past two decades and has, for a long time, been seeking a modernisation of the local rules to avoid the constant temptation of Court interference that, in many cases, seems to transpire from their decisions.

The enforcement of the Unified Civil and Commercial Code, including the chapter 'Contract of Arbitration' that contains the principles that would allow a friendly environment towards arbitration, might be a starting point that persuades the Courts that alternative dispute resolutions are a valid choice for individuals to solve their disputes away from any abusive interference from the Courts.

In the long run, the adoption of the globally successful UNCITRAL Model Law is the best way to bring Argentinian arbitration to an international level.

Notes

1. *Sociedad de Inversiones Inmobiliarias del Puerto SA v Constructora Iberoamericana SA* on Appeal for Annulment, National Court of Appeals for Commercial Matters, Panel D, 7 February 2011.
2. *Mobil Argentina SA v Gasnor SA* on Arbitration Award, National Court of Appeals for Commercial Matters, Panel D, 8 August 2007.
3. *José Cartellone Construcciones Civiles SA v Hidroeléctrica Norpatagónica SA* or Hidronor SA on Hearing Process, National Supreme Court, 1 June 2004.
4. Free translation of the author. The clause in Spanish reads:

> Cualquier dificultad que se suscite entre las partes en relación con este contrato o con motivo de su aplicación, interpretación, cumplimiento o disolución, será resuelta por un árbitro arbitrador designado de común acuerdo por las partes o por la justicia ordinaria a falta de acuerdo de éstos.

5. ***Wallaby SA c Despegar.com.ar SA s/ordinario***, Juzgado Nacional de 1a Instancia en lo Comercial No. 13.
6. ***Wallaby SA c Despegar.com.ar SA s/ordinario***, Cámara Nacinaol de Apelaciones, Sala A, sentencia del 28 de febrero de 2012. Free translation of the author. The Spanish text reads:

> el juez de grado, si bien consideró que era dudosa la redacción de la cláusula en cuestión, en lugar de aplicar un criterio restrictivo hizo prevalecer la jurisdicción arbitral por encima de la jurisdicción estatal, realizando una interpretación amplia del convenio, lo que sería rechazado tanto por la doctrina como por la jurisprudencia. En ese sentido, indicó que si la cláusula compromisoria no es clara debe estarse siempre por la intervención de la justicia estatal.

7. ICC Arbitration No. 12634/KGA/CCA/IRF ***Papel del Tucumán SA (under bankruptcy proceeding) v the National State (Argentina)***
8. CNFed. Contenciosoadministrativo, Sala II, 25/10/2012, EN - Procuración del Tesoro de la Nación c Tribunal Arbitral (Arbitraje 12364 CCI-EXP 111-195270/95) s/ proceso de conocimiento. Author's free translation. The text in Spanish says:

> lo atinente a la revisión o impugnación judicial tanto acerca de la existencia, validez y alcance del Acuerdo Arbitral, como respecto de aquello que se resuelva sobre la jurisdicción del Tribunal Arbitral para entender en el caso, carece de una regulación expresa en el ordenamiento procesal.

9. CNFed. Contenciosoadministrativo, Sala II, 25/10/2012, EN - Procuración del Tesoro de la Nación c Tribunal Arbitral (Arbitraje 12364 CCI-EXP 111-195270/95) s/ proceso de conocimiento.Author's free translation. The text in Spanish says:

> ante la ausencia de previsión expresa en punto al trámite por asignar, corresponde que el conocimiento y decisión de la articulación aquí planteada sean llevados a cabo por el Sr. Juez de Primera Instancia.

10. Roque Caivano, Court Review of Arbitral Decisions About Their Own Jurisdiction, La Ley, 04/26/2012
11. CNFed. Contenciosoadministrativo, Sala II, 09/08/2012, EN - Procuración del Tesoro de la Nación c Tribunal Arbitral (Arbitraje 12364 CCI-EXP 111-195270/95) s/ proceso de conocimiento.
12.

Roque Caivano, La Obsolescencia De La Legislación Argentina Sobre Arbitraje Es Cada Vez Más Evidente, ***Journal of the Buenos Aires Bar Association***, July 2012. Volume 72, Issue 1, pp63-73.

13. National Constitution, article 121.
14. National Constitution, article 75(12).
15. National Code of Civil and Commercial Procedure, Book Six.
16. Rivera, Julio César and Parodi, Víctor Gustavo - Possibility to Include the Arbitration Agreement in the Civil Code, La Ley, 28 June 2012.
17. Silva Romero, Eduardo, 'Arbitration Reviewed from the Viewpoint of the Law of Obligations', 'The Arbitration Agreement'. Legis Editores SA, Colombia, 2005, pXV and following pages, cited by the authors mentioned in the above note.
18. Rivera, Julio César y Parodi, Víctor Gustavo - Possibility to Include the Arbitration Agreement in the Civil Code, La Ley, 28 June 2012.
19. Civil and Commercial Code Bill, section 1653, Autonomy. The arbitration agreement is independent from the agreement it relates to. Any ineffectiveness of the latter shall not invalidate the arbitration agreement, and therefore arbitrators shall continue to have jurisdiction, even in the event of nonexistence or nullity of such agreement, to determine the respective rights of the parties and to issue an award on their requests for relief and allegations.
20. Civil and Commercial Code Bill, section 1654, Jurisdiction. Except as otherwise provided for, the arbitration agreement shall empower the arbitrators to decide on their own jurisdiction, even concerning defences as to the existence or validity of the arbitration agreement, or regarding any other than substantive defences preventing the merits of the case to be decided.
21. Civil and Commercial Code Bill, section 1655, Interim Measures. Except as otherwise provided for, the arbitration agreement empowers the arbitrators to adopt, at the request of any of the parties, precautionary measures as considered necessary with respect to the subject-matter of the litigation. The arbitrators may ask the requesting party to post sufficient bond in connection with such a request. The enforcement of precautionary measures and if applicable of any interim steps, must be made by a court of law. The parties may also request that a judge adopt these measures, and such a request to a judge will not be considered a breach of the arbitration agreement nor a waiver of the arbitration jurisdiction; it does not exclude either any of the powers conferred to arbitrators.

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Bolivia

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Summary

LEGAL PERSPECTIVES ON THE BOLIVIAN NATIONALISATION PROCESS

LEGAL PERSPECTIVES ON THE BOLIVIAN NATIONALISATION PROCESS

Since taking office in 2006, President Evo Morales and his cabinet of ministers have dictated a series of expropriating measures affecting foreign investments in the hydrocarbons, telecommunications, electricity and mining sectors of the Bolivian economy. This 'nationalisation process' comprises the following 12 Supreme Decrees:

- On 1 May 2006,[1] the government reverted 50 per cent plus one of the shares of oil and gas giants to the control of the state, including:
- Empresa Petrolera Chaco SA, controlled by Amoco Bolivia Oil & Gas AB;
- Andina SA, controlled by Repsol YPF;
- Transredes SA, controlled by Shell Gas Latin America BV and Ashmore Energy LLC;
- Petrobrás Bolivia Refinación SA, controlled by Petrobras; and
- Compañía Logística de Hidrocarburos Boliviana SA, controlled by Oiltanking GmbH, Graña y Montero Petrolera SA.
- This Supreme Decree was denominated 'Heroes of the Chaco', remembering those who fought in the Chaco War fought between Bolivia and Paraguay between 1932 and 1935 over the most important hydrocarbons region in Bolivia.
- On 31 October 2006,[2] the Huanuni Mining Center operated by England's Allied Deals PLC was nationalised as a result of a series of the tragic confrontations held on 5 and 6 October 2006 among the different mining sectors who claimed the exploitation rights of the referred mining property.
- On 7 February 2007,[3] the government reversed to the domain of the state the Metallurgical Complex of Vinto, which was under the control of Swiss company Glencore International AG.
- On 1 May 2008,[4] the acquisition of a majority shareholding interest (50 per cent plus one share) in Empresa Petrolera Chaco SA and Transredes - Transporte de Hidrocarburos SA was consolidated in favour of the State of Bolivia.
- On 1 May 2008,[5] the acquisition of the total share package of Oiltanking GmbH, Graña y Montero Petrolera SA in Compañía Logística de Hidrocarburos Boliviana SA - CLHB was established.
- On 1 May 2008,[6] the Bolivian government seized and expropriated ETI Euro Telecom International NV's investments in Bolivia's largest telecommunications corporation, Entel SA.
- On 2 June 2008,[7] 100 per cent of the shareholding package of Shell Gas Latin America BV and Ashmore Energy LLC in oil and gas transportation corporation, Transredes SA was reverted and nationalised.
- On 23 January 2009,[8] 100 per cent of the shareholding interests of Amoco Bolivia Oil & Gas AB in Empresa Petrolera Chaco SA were reverted to state domain.
- On 1 May 2009,[9] the government declared the reversion of the entire share package of Air BP Bolivia SA, BP's jet fuel investments in Bolivian airports.
-

On 1 May 2010,[10] the government seized all the shares of GDF Suez, Carlson Dividend Facility SA, The Bolivian Generating Group LLC (BGG) and Rurelec PLC in electrical power generators Corani SA, Vallehermoso SA and Guaracachi SA.

- On 1 May 2010,[11] the Vinto-Antimony Plant, operated by Swedish Glencore International AG was nationalised back to state domain.
- Finally, on 1 May 2012,[12] the state nationalised all the shares of Red Eléctrica Internacional SA in electrical carrier Transportadora de Electricidad SA.

It is important to point out that all 'nationalising' Supreme Decrees were dictated in a recurring manner every year on 1 May when International Labor Day is celebrated, with a few exceptions, such as the nationalisation of Empresa Petrolera Chaco SA, which occurred on 23 January 2009, just two days prior to the public national referendum that eventually approved the current Bolivian Consitution.

From a juridical perspective, the Bolivian nationalisation process not only created a negative and unfavourable scenario for foreign investments in our country, but in turn triggered a series of international arbitration processes commenced by foreign investors who saw themselves affected by such process. Faced with this situation, the State of Bolivia adopted several defence mechanisms that included the denunciation of the Washington Convention; denunciation or renegotiation of bilateral investment treaties (BITs); the creation of the Ministry of Legal Defense of the state; crystallised subsequently in the attorney general of the state; and the adoption of an open and amicable negotiation strategy to reach out of court economic compensations and thus avoiding international investment arbitrations that could conclude with important economic sanctions against the state.

As mentioned above, in light of the expropriation or nationalisation measures assumed by the government of President Morales, the State of Bolivia saw itself entwined within a series of international investment arbitrations served under the norms of the United Nations Commission on International Trade Law (UNCITRAL), and the rules of the International Centre for Settlement of Investment Disputes (ICSID). Based on the foregoing, and considering that - under the eyes of the Bolivian government - ICSID awards permanently favoured the interests of private investors, on 2 May 2007, the State of Bolivia took the first safeguard measure by denouncing the Washington Convention, the same which was effective six months thereafter, taking legal effect on 3 November 2007.

From our perspective, Bolivia's decision to unilaterally step aside from the Washington Convention was incongruent with the terms of the 22 BITs, whereby Bolivia recognised ICSID as a valid dispute resolution mechanism and forum. On this matter, the Bolivian government announced that it would individually denounce or, as the case may be, renegotiate the existing BITs in order to adapt them to the terms of the current Bolivian Constitution. According to the government, denunciations or treaty renegotiations would be subject to the following parameters:

- protection of all Bolivian nationals;
- equilibrium between public and private interests; and
- preference to those investors who are willing to contribute to the economic and social development of the region.

The government of Bolivia has announced that individual renegotiations of BITs will commence during the last quarter of 2012.

The attorney general of the state is another defence mechanism created by the government of President Morales. Established for the purpose of promoting, defending and overseeing the interests of the State of Bolivia in any litigious or contentious matter where these may be compromised or affected, the attorney general of the state replaced the existing Bolivian Ministry of Legal Defense. The attorney general is legally empowered:

- to judicially and extrajudicially defend the interests of the state, assuming its juridical representation and intervening in all judicial, extrajudicial or administrative actions, and specifically in all matters of involving foreign investments, human rights and the environment; and
- to coordinate actions jointly with the Ministry of Foreign Affairs, for the legal defence of the state before international organisms and within processes resulting from foreign relations.

Since its creation, the attorney general has been promoting amicable settlements with investors affected by the Bolivian nationalisation process. As of the current date, several cases have been successfully settled pursuant to government's negotiation strategy:

- On 16 September and 1 October 2008,[13] the Bolivian government agreed economic compensations with Shell Gas Latin America and Ashmore Energy LLC for their expropriated investments in Transredes SA.
- On 9 September 2010,[14] the now-extinct Ministry of Legal Defense executed an economic settlement with the shareholders of CLHB Compañía Logística de Hidrocarburos Boliviana SA.
- On 3 November 2010,[15] the Ministry of Legal Defense and the Ministry of Public Works and Services were granted authorisation to execute a transactional agreement with ETI Euro Telecom International NV, in order to settle the arbitration process initiated by the latter due to the nationalisation of its share package in Entel SA.
- On 28 September 2011,[16] the minister of hydrocarbons and the president of the Bolivian National Electricity Corporation (ENDE) were duly authorised to execute a transactional settlement with Inversiones Ecoenergy SA and Carlson Divided Facility SA for their expropriated investments in nationalised electrical generator CORANI SA.
- On 29 February 2012,[17] the minister of hydrocarbons and the president of the Bolivian Hydrocarbons Corporation (YPFB) were jointly authorised to settle an economic compensation with the former shareholders of Air BP Bolivia SA.

Regarding Bolivia's nationalisation process outlined above, we are of the opinion that the legal consequences of Bolivia's denunciation of the Washington Convention are yet to surface. Only time will confirm whether this action triggered a jurisdictional shield for the state or, if on the contrary, its provisions served as legal guarantee for all those investments that were executed before denunciation was made effective.

Independently of the above, the government will have a very difficult task in successfully implementing its strategy to denounce or renegotiate BITs or both. We believe contracting countries may be reluctant to renegotiate agreement terms until the government of Bolivia provides legal certainty that foreign investments will be respected. Renegotiating

bilateral investment instruments would not serve any purpose if one of the parties were to continuously confiscate and expropriate foreign investments in its territory.

The creation of the attorney general of the state, although positive from a legislative point of view, may turn ineffective due to its restricted faculties and attributions. Notwithstanding that he is vested with legal authority to assume juridical representation in all judicial, extrajudicial or administrative actions brought up against the State of Bolivia, the attorney general does not have enough power to settle or execute any type of binding transactional agreement with third parties. The fact that all economic settlements (involving international arbitrations) have been authorised by specific Supreme Decrees signed by the president and his cabinet of ministers clearly demonstrates that the attorney general, thus far, is a figure that lacks decision-making authority.

However, it is fair to mention that the attorney general has played an important role in implementing the government's open and amicable negotiation strategy to procure out court economic compensations with affected foreign investors. Under this context, although Bolivia's strategy has been fairly successful thus far, the government still faces several material arbitration claims, some of which will most likely be settled by any arbitration tribunal due to their nature and amounts involved.

Finally, it is absolutely clear that foreign investments paid the highest toll of the Bolivian nationalisation process. Unfortunately, despite its extraordinary potential, Bolivia has not been able to take advantage of the current economic bonanza of high-priced commodities such as minerals, coffee, natural gas, forestry and so on. The government has announced new foreign investments for the last quarter of 2012, however, until investors are granted legal certainty and expropriating measures are discontinued, new foreign capital is unlikely and investments will continue to decrease in detriment to the Bolivian economy and development.

Notes

1. Supreme Decree No. 28701.
2. Supreme Decree No. 28901.
3. Supreme Decree No. 29026.
4. Supreme Decree No. 29541.
5. Supreme Decree No. 29542.
6. Supreme Decree No. 29544.
7. Supreme Decree No 29586.
8. Supreme Decree No. 29888.
9. Supreme Decree No. 111.
10. Supreme Decree No. 493.
11. Supreme Decree No. 499.
12. Supreme Decree No. 1214.
13. Supreme Decrees No. 29706 and 29726.
14. Supreme Decree No. 621.
15. Supreme Decree No. 692.

16. Supreme Decree No. 995.
17. Supreme Decree No. 1149.

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2012 has been particularly good for the practice of commercial arbitration in Brazil. The increase of investment in infrastructure due to the 2014 Soccer World Cup and the 2016 Olympic Games, as well as the new bulk of incentives planned by the Brazilian government for the private sector to invest in concessions for ports, railways, airports and roads, provides great expectations for 2013.

In 2012 we saw:

- the passing of new legislation extending the possibility of introducing arbitration clauses in defence contracts under the auspices of the Brazilian Public Private Partnership Law;
- the passing of a Court Resolution settling the Brazilian Superior Court of Justice's (STJ) position on the binding effects of arbitration clauses introduced in contracts executed before the Brazilian Arbitration Law entered into effect; and
- the entering into effect of the new arbitration rules of the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (CCBC), the oldest and busiest arbitration institution in the country.

On a less positive note, a panel of three Justices of the São Paulo Court of Appeals has, by majority vote and with a very interesting dissenting opinion by Justice Lazzarini, stayed an arbitration under the rules of the Insurance and Reinsurance Arbitration Society (ARIAS), in London. The decision has had some repercussion within the international arbitration community. In this chapter we will show that the outcome of the decision is not as bad as it has been pictured by some. The case gained notoriety in Brazil and abroad as the Jirau's Dam case, since the dispute arises out of the discussion of the liability of the insurance companies hired to indemnify losses and damages suffered by construction contractors facing losses with riots and strikes that occurred in the construction of the dam for the hydroelectric plant of Jirau, in the Amazon.

We conclude our chapter with the news that Senator Renan Calheiros has filed a request for the creation of a commission of scholars to discuss a new arbitration bill. The commission will be chaired by STJ Justice Luis Felipe Salomão and will, in a period of 180 days, conduct public hearings for the collection and assembly of suggestions for a reform to the current Brazilian Arbitration Law. We also discuss possible new trends in the practice of arbitration in Brazil as some commercial and infrastructure contracts related to the 2016 Olympic Games have included in their texts a dispute resolution clause submitting future claims to the Court of Arbitration for Sports (CAS).

2012 so far

Legislation

Federal Law No. 12.598/2012, Arbitration in Defense Contracts

Federal Law No. 12.598/2012, enacted on 22 March 2012, authorised the use of the public-private partnership regime for the development of goods and systems of military defence. The public-private partnership institute, established by Federal Law 11.079/2004, is considered a partnership between the public authorities and the private sector, with the goal of planning, financing, building and operating projects of infrastructure normally provided by the government through regular public contracts, such as public concessions.[2]

The Brazilian legislation expressly authorises the use of arbitration for public-private partnership contracts,[3] provided that the arbitration has its seat in Brazil and Portuguese as the governing language.

The expansion on the use of arbitration for matters involving the public administration is a tendency in Brazil.[4] A few examples can be quoted in this sense, such as:

- the law on the concession and permission of public services (Law 8.987/1995), which considers the arbitration clause as an essential clause of the concession contract;
- the Petroleum Law (Law No. 9.478/1997), which authorises the use of arbitration for contracts involving concession for the exploitation of oil; and
- the law that regulates the organisation of telecommunication services (Law No. 9.472/1997), which authorises disputes involving interconnecting networks to be resolved by arbitration.

Hence, the authorisation for the use of arbitration regarding contracts involving military defence comes to reinforce a tendency already in force in Brazil.[5]

Court Resolution No. 485

On 28 June 2012, the Superior Court of Justice enacted Court Resolution No. 485,[6] which establishes that 'the Brazilian Arbitration Law is applicable to contracts that have an arbitration agreement, even if the contract was entered into before the law took effect.'

Court Resolution No. 485 settles the dispute on the effects of the Brazilian Arbitration Law (BAL) to contracts entered into before its enactment. The effects of the law have been much debated by the case law and scholars' opinions.[7] Some scholars argued that only the procedural provisions of the BAL would be immediately applicable.[8] On the other hand, the Superior Court of Justice had already issued contradictory judgments supporting the applicability of the BAL for contracts entered into before the law took effect,[9] as well as denying the applicability of the BAL for such contracts.[10]

Court Resolution No. 485 consolidates the position that the Brazilian Arbitration Law is applicable to all arbitration clauses inserted into contracts executed before the enactment of such act in 1996. The direct consequence of such resolution is more predictability to the arbitration users on the courts' interpretation of the law.

New CCBC Arbitration Rules 2012

The reflection of the consolidation of the practice of arbitration is that arbitration centres all over the world have been modifying their rules in order to adapt to the recent trends in arbitration. This has been seen nationally and internationally.

The China International Economic and Trade Arbitration Commission (CIETAC) enacted new rules that entered into force in March 2012. The International Court of Arbitration of the International Chamber of Commerce (ICC), by its turn, also enacted new rules that took effect in January 2012.

Following the example of these international institutions, the CCBC enacted new rules that entered into force in January 2012 (CBBC 2012). These rules broadened the duty of disclosure of the arbitrator in comparison to the previous rules. The CBBC 2012 rules now also have an express provision authorising arbitrators to grant partial awards, formalising a practice that had long been accepted and adopted by the majority of arbitrators in Brazil.

The granting of interim measures is also more detailed in the new text. New article 8.1 provides that the Arbitral Tribunal can determine interim, coercive[11] and anticipatory measures.[12] Allowing the arbitral tribunal to grant all sorts of interim measures is in perfect alignment with the current jurisprudence of the STJ.[13]

Finally it is worth mentioning that the CCBC 2012 rules establish a new method for calculating the arbitrators' fees and costs of the arbitration. According to the new rules, the arbitrators' fees are not based only on the hours worked by the arbitrator, but for disputes above 7,500,001 reais the calculation is done by a combination of a fixed value and a percentage of the value in dispute.[14]

The relevance of the new arbitration rules enacted by the CCBC can be easily explained by the statistics relating to arbitral cases filed in the past three years before that institution: in 2010, 48 cases were started; in 2011, that number increased to 63 cases; and by August 2012 there were already 43 cases ongoing.[15] The CCBC is the busiest arbitration centre in Brazil and the new rules currently in place are a relevant step to attract more cases to the centre, mostly those of international nature.

Court precedent

The Jirau's Dam case

On 19 April 2012, a panel of three Justices of the São Paulo Court of Appeals issued a judgment by majority vote and with a declaration of dissenting vote by Justice Alexandre Lazzarini, staying insurance companies from entertaining an arbitration in London before the ARIAS. This anti-arbitration judgment has been seen by many as a setback in the practice of arbitration in Brazil.

The facts of the case are as follows: in 2011, a workers' riot on the worksite of the Jirau's Dam caused serious delays and significant material damages to the construction of a hydroelectric plant at the Madeira River in the Amazon. The civil contractors called upon insurance companies to indemnify their losses. The insurance companies contracted by the consortium responsible for the building of the plant refused to pay for the damages, claiming that the workers' riots had political grounds and therefore were not covered by the insurance policy.

A dispute between the civil contractors and the insurance companies started in order to define who would be responsible for paying for the damages suffered. The insurance companies started an arbitration in London, before ARIAS, while the contractors filed for a judicial claim in Brazil.

The civil contractors further filed a request for interim measures for the stay of the arbitration in London. The construction companies argued that the insurance contract, entered into in Brazil, did not provide for an arbitration agreement. They also claimed that only the insurance policy had an arbitration agreement, which, in turn, was null, void, inoperative or incapable of being performed under the provisions of paragraph 2 to article 4 of the Brazilian Arbitration Law.

Paragraph 2 to article 4 of the Brazilian Arbitration Law provides that, in adhesion contracts,[16] the arbitration agreements have to be properly flagged and highlighted in order to avoid any possible misinterpretation or wrongful inducement of the adhering party. In other words, the adhering party has to express clear consent to arbitrate otherwise the clause may be found null and void.

Another argument presented by the construction companies was that the ARIAS had been founded by the insurance companies, which would lead to a biased decision.

In December 2011, the insurance companies filed a claim before the English judiciary, the Queen's Bench Division, requesting an anti-suit injunction preventing the construction companies from taking any actions before the Brazilian judiciary. The Queen's Bench Division granted the insurances companies' request ordering the Brazilian contractor to immediately cease their actions in Brazil at the risk of imprisonment. Cooke J, from the Queen's Bench Division, held that, in this case, the proper law of the arbitration agreement was English Law, and therefore that the restrictions imposed by the Brazilian law for arbitration agreements inserted in adhesion contracts did not apply to this case. The English Court of Appeals agreed with Cooke J in that the arbitration agreement was governed by English Law.[17] The Brazilian construction companies did not follow the English judge's order.

The São Paulo Court of Appeals, by its turn, granted an interim relief in favour of the construction companies, affirming jurisdiction to hear the dispute and ordering the insurance companies to stay the arbitral proceedings in London. On 19 April 2012, the São Paulo Court of Appeals imposed a fine of 400,000 reais per day, in the event the insurance companies insisted not to comply with the order.

The São Paulo Court of Appeals followed the argument put forward by the construction companies affirming that the insurance contract had the nature of an adhesion contract and that, therefore, the arbitration agreement was null and void. The court also mentioned article 44 of the Susep Directive 256/2004, which expressly determines that arbitration clauses inserted on insurance contracts must be written in bold type, contain the signature of the insured on a separate document or on the arbitration clause, and contain the information that the arbitration agreement was voluntarily agreed by the insured.

In light of the purported illegality of the arbitration clause, the São Paulo Court of Appeals determined that, in cases in which it is evident that the arbitration agreement is null and void, the judiciary has power to determine whether the arbitration agreement is valid. According to the court, such situation would justify an exception to the Kompetenz-Kompetenz principle, since the arbitration award would eventually be annulled by the Brazilian judiciary. The São Paulo Court of Appeals further ordered the insurance companies to drop the arbitral proceeding before the ARIAS, in London immediately.

As mentioned before, however, the decision of the São Paulo Court of Appeals was granted by a majority vote. Justice Alexandre Lazzarini issued a very well-reasoned and sound dissenting vote where he pondered that the insurance contracts in debate were no ordinary consumer related insurance contracts. For Justice Lazzarini, the complex nature of the civil works in Jirau, and thus the complex nature of the insurance policies retained, singled out these contracts from the general standard nature of adhesion contracts applied to insurance policies.

For Lazzarini, the complex nature of the insurance contracts assures that the arbitral tribunal be constituted under the rules of ARIAS to decide on its jurisdiction and under the auspices of the Kompetenz-Kompetenz principle, and without the interference of either the Brazilian or English Judiciary.

The decision mentioned above is of high importance for understand in which line the case law in Brazil will consolidate regarding two themes: the requirements for an arbitration clause inserted in an insurance policy to be valid; and the interpretation of the Kompetenz-Kompetenz principle in Brazil.

The first issue relates to whether an insurance policy, irrespective of the complexity of the underlying transaction it insures, may automatically be considered an adhesion contract, and what the requirements must be for including an arbitration clause on such contract.

We share Justice Lazzarini's view that in this case the insurance contract cannot be considered as an adhesion contract. The contractual relationship in question was balanced, having both parties negotiate the terms and conditions of the insurance policy.

The second relevant issue dealt by the court relates to the interpretation of the Kompetenz-Kompetenz principle. In our opinion, the judgment as rendered by the São Paulo Court of Appeals constitutes not only a violation to the principle but an infringement to section 20 of the Brazilian Arbitration Act, which expressly forbids parallel interference of local courts in international arbitrations.

What to expect in 2013
A New Arbitration Law

On 29 August 2012, the Brazilian Senate created a special commission for the reform of the Brazilian Arbitration Law. Senator Renan Calheiros, responsible for filing the request for the creation of the special commission, grounded his plea on the argument that arbitration has reached a massive success in Brazil and that the current statute, now in its 16th year of existence, must be updated. According to Senator Calheiros, most of the success of arbitration is due to the massive waive of foreign direct investment received by the country in the last decades.

STJ Justice Felipe Salomão will chair the special commission, the goal of which is to adapt the text of the law to the international business environment.

The current statutes were drafted in the early 1990s under the coordination of scholars Pedro Batista Martins, Selma Lemes and Carlos Alberto Carmona and were highly influenced by the Model Law, the New York Convention and the Spanish Arbitration Act of 1988. In many ways the authors of the bill that later became Law 9307/96 admit that the 'ideal text' had to make room for the 'possible text' to be published.

Although the ideal of a new statute is very welcome by practitioners in general, it is important for the international business and the arbitration community in particular to keep an open eye on how the discussions of the new text evolve.

One thing, however, that can be said from the outset, is that the senate chose a very competent person to chair the committee.

Arbitration and sports infrastructure

With the proximity of the 2014 Soccer World Cup and the 2016 Olympic Games, the need for investment in sports infrastructure is continuously increasing.

One potential trend emerging in our daily practice is the inclusion of arbitration clauses submitting disputes to the Court of Arbitration for Sports (CAS) on contracts regarding sports infrastructure.

The CAS is an arbitration chamber specialised in sports-related disputes, and authorised to pronounce binding decisions on the adjudication of conflicts related to sports organisations.[19] The CAS deals with disputes directly or indirectly linked to sport, which can be of either a commercial or disciplinary nature.[20] The most common commercial disputes submitted to the CAS are related to corporate sponsorship, merchandising, agency contracts and transfers of professional sports players between teams.[21]

Therefore, the execution of contracts related to sports infrastructure with a CAS arbitration clause can be considered a new trend. One reflection of this is that the CAS has never issued any award related to disputes concerning contracts providing for the outsourcing of IT services related to the Games, construction of arenas or commercial contracts for the rendering of services related to the events.

There is no prohibition in accordance with the 2012 CAS code in submitting disputes related to infrastructure or commercial-related issues to the CAS, as long as the contract is somehow linked to sports-related issues.

Conclusion

In 2012 we again saw a steady increase in the use of commercial arbitration as an alternative means to solving complex international and domestic disputes in Brazil. There is no doubt that, for some time now, arbitration has been embraced as the main alternative for solving complex commercial and infrastructure disputes in Brazil or related to Brazilian parties.

The Brazilian Judiciary has been playing a very important role in supporting the use of arbitration in the country, and decisions such as the Jirau's Dam case should be construed as just an indication that there is still some room for improvement in terms of solving issues related to the arbitrability of disputes in the country or on a cross-border basis. This is no different in any arbitration-friendly jurisdiction.

2013 will be a very promising year as congress and the civil society in general are being instigated to sit together and work out a new bill improving the text of the arbitration law already in place. There are plenty of reasons to be optimistic about arbitration in Brazil in the next 12 months.

Notes

1. Folha de São Paulo. 'Pacote do governo para concessões de rodovias e ferrovias soma R$ 133 BI.' Available at www1.folha.uol.com.br/mercado/1137602-pacote-do-governo-para-concessoes-de-rodovias-e-ferrovias-soma-r-133-bi.shtml, accessed 31 August 2012, last visited on 4 September 2012.
2. OLIVEIRA, Gustavo Henrique Justino. A arbitragem e as parcerias público-privadas. Revista de arbitragem e mediação. Ano 4, 2007. p33.
3. Article 11, Federal Law 11.079/04 - The convocation instrument shall contain the draft of the contract, the express submission of the bid to this law and shall observe, where appropriate, the 3rd and 4th of article 15, the articles 18, 19 and 21 of the Law 8.987, of February 13, 1995, and can also provide: (...) III - the use of private mechanisms of dispute resolution, including arbitration, to conducted in Brazil, in Portuguese, under

the terms of Law No. 9.307/1996, to resolve any dispute arising or in connection with the contract.

4. MARTINS, Pedro A Batista Arbitragem e atração de investimentos no Brasil. Vol. 32, January 2012, p103.
5. Id.
6. Court Resolution No. 485 - the Brazilian Arbitration Law applies to contracts that have an arbitration agreement, even if the contract was entered into before the law took effect. Reporting judge Cesar Asfor Rocha, em 28/6/2012 - precedents of the court Resolution: REsp 712566/RJ, REsp 791260/RS, REsp 934771/SP, SEC 349/JP, SEC 831/FR and SEC 894/UY.
7. Valor Econômico, 20 August 2012.
8. Id.
9. STJ REsp 934.771, Rep Judge Luis Felipe Salomão, j. 6 September 2010.
10. STJ REsp 238.174, Rep Judge Antônio de Pádua Ribeiro.j. 16 June 2003.
11. Coercive measures still depend on the assistance of the Judiciary to be enforced.
12. Article 8.1 A menos que tenha sido convencionado de outra forma pelas partes, o Tribunal Arbitral poderá determinar medidas cautelares, coercitivas e antecipatórias, que poderão, a critério do Tribunal, ser subordinadas à apresentação de garantias pela parte solicitante.
13. STJ REsp 129.7974, Rep Justice Nancy Andrighi, j. 29 September 2011.
14. www.ccbc.org.br/arbitragem.asp?subcategoria=tabela%20de%20custos, accessed on 31/08/2012, last visited on 4 September 2012.
15. Information provided by the CCBC Secretariat.
16. Contacts under which the adhering party has no latitude whatsoever for any kind of negotiation, having only the possibility of agreeing to its terms or refusing to sign it.
17. The Resolver, the quarterly magazine of the Chartered Institute of Arbitrators, August 2012, p11.
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21. Blackshaw, Ian S, Sport, Mediation and Arbitration. T M Asser Instituut, Institute for Private and Public International Law, International Commercial Arbitration and European Law, 2009, p171.

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Summary

ARBITRAL JURISDICTION IN CANADA: RECENT DECISIONS

Overview

Any consideration of arbitral jurisdiction in Canada must proceed within the governing legislative framework. Legislation in each Canadian province and territory, as well as federal legislation, directs how and when the parties may seek the assistance of local courts on matters of arbitral jurisdiction in both domestic and international arbitrations. The legislation governing domestic arbitrations is similar in each jurisdiction. Each province and territory has also adopted legislation for international commercial arbitrations that incorporates the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (the Model Law). The federal government has incorporated the Model Law, with some slight modifications, for all domestic and international arbitrations under federal jurisdiction.[1] Broad adherence to the Model Law provides a significant degree of predictability to parties arbitrating disputes in Canada.

As arbitration becomes an increasingly popular means of resolving commercial disputes, Canadian Courts are often called upon to adjudicate issues of arbitral jurisdiction. This chapter will begin by providing a brief overview of the historical Canadian approach to arbitral jurisdiction, followed by a discussion of several recent court decisions from across the country that address specific aspects of arbitral jurisdiction in a commercial arbitration context. The current state of Canadian law in this respect is commented upon in the conclusion.

Arbitral jurisdiction in Canada

Provincial, territorial and federal legislation concerning both international commercial arbitration and domestic arbitration seeks to safeguard arbitral jurisdiction from inappropriate judicial intervention. Consistent with the Model Law, each statute sets out certain limited circumstances where a local court may intervene in arbitral proceedings. These provisions have generally been interpreted narrowly and reflect a strong deference to the parties' decision to arbitrate and to arbitrators acting within their jurisdiction. Defining the precise boundaries of that jurisdiction can still present challenges, as some recent cases attest.

The starting point for Canadian Courts when assessing arbitral jurisdiction is the competence-competence principle, which states that arbitrators have the competence and power, in first instance, to determine their own jurisdiction. In the Seidel v TELUS (Seidel)[2] decision - discussed at length by Fraser Milner Casgrain LLP in The Arbitration Review of the Americas 2012[3] - both the majority and minority decisions at the Supreme Court of Canada endorsed the competence-competence principle and an approach of deference to arbitral jurisdiction. Seidel provides that challenges to the jurisdiction of an arbitrator should first be determined by that arbitrator. Narrow exceptions to this rule exist only where the challenge to the arbitrator's jurisdiction involves a pure question of law or a question of mixed fact and law that requires only a 'superficial consideration of the documentary evidence in the record'.[4]

Two aspects of arbitral jurisdiction recently considered by Canadian Courts warrant specific attention. The first is the interaction between arbitral jurisdiction and the role of domestic Courts. This issue has recently arisen in both pre-arbitration and post-arbitration contexts. At the pre-arbitration stage, the question was when and on what grounds a local Court is

to determine whether to stay a legal action in favour of an agreement to arbitrate. This was addressed in Shaw Satellite GP v Pieckenhagen (Shaw).[5] Post-arbitration, in United Mexican States v Cargill Inc (Cargill),[6] the Ontario Court of Appeal addressed the appropriate standard of review when a local Court is being asked to set aside a portion of an award from an international arbitral tribunal. A second aspect of arbitral jurisdiction recently considered is the extent of arbitral jurisdiction over entities not party to the arbitration agreement. This question arose where a party sought an interim injunctive remedy from an arbitrator that would apply against third parties in Farah v Sauvageau Holdings Inc (Farah),[7] and when the terms of an arbitral award would impact the legal rights of non-parties, in MJS Recycling Inc v Shane Homes Ltd (MJS).[8]

Arbitral jurisdiction and the courts

Shaw Satellite GP v Pieckenhagen

This case involved a dispute between Shaw Satellite GP (Shaw), a licensed television broadcaster, and 23 individuals and companies who were allegedly involved in receiving encrypted television programming from Shaw under false pretences and then retransmitting that programming fraudulently, contrary to agreements and in violation of the Radiocommunciation Act.[9] The encrypted programming was allegedly received under nine standardised Residential Agreements, six of which were held by false names or aliases. It was claimed that programming was received under a Residential Agreement and then retransmitted by the defendants throughout multi-unit residential complexes through an unauthorised satellite master antennae television system (SMATV System), contrary to the Residential Agreement. The same arrangement was allegedly being used to obtain and retransmit programming from another broadcaster, Bell ExpressVu, who had commenced separate litigation against some of the same parties.[10] The Residential Agreements required that any claim or dispute 'arising out of or relating to' the Residential Agreement or services provided thereunder be referred to a sole arbitrator.[11]

Shaw commenced an action in the Ontario Superior Court of Justice against all 23 defendants claiming breaches of the Residential Agreements, fraud, fraudulent misrepresentation and contravention of the Radiocommunication Act.[12] Soon after, the 23 defendants moved under section 7(1) of Ontario's Arbitration Act[13] to stay Shaw's action based on the agreement to arbitrate in the Residential Agreement. Section 7(1) of the Ontario Arbitration Act is directory in nature and reads:

> 7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.[14]

The defendants urged that the Residential Agreements and the competence-competence principle required an arbitrator to decide the issue of jurisdiction in the first instance, and the court should not consider the issue of arbitral jurisdiction until an arbitrator had first done so. Notably, only a few of the 23 defendants were even alleged to be proper parties to a Residential Agreement and the defendants expressly reserved the right to deny the jurisdiction of an arbitrator to determine the dispute.[15]

The defendants' application requesting that the matter be stayed was rejected. Justice Perell of the Ontario Superior Court of Justice gave three separate grounds for refusing a stay. First, the defendants applied to stay court proceedings under section 7(1) of the Arbitration Act under which only 'another party to the arbitration agreement' may apply, yet all defendants

denied being bound by such an agreement. In effect, the defendants were seeking arbitration but at the same time refusing to admit they were subject to the arbitration agreement. Justice Perell held that neither section 7(1) of the Arbitration Act nor the competence-competence principle was engaged. The applicant defendants had not shown (and in fact specifically denied) they were parties to an arbitration agreement. Without that fact established, no grounds for a stay could exist under statute or otherwise.[16]

Second, if section 7(1) of the Arbitration Act and the competence-competence principle were engaged, Justice Perell held that the case fell within the specific exceptions to the competence-competence principle recognised in Seidel. Based on the view that the pith and substance of the dispute (fraud, fraudulent misrepresentation, conversion and breaches of the Radiocommunciation Act) did not depend on the Residential Agreements containing the arbitration clause, Justice Perell reasoned that the Residential Agreements and the arbitration clause therein were only 'factual background' to the real issues in dispute.[17] Thus only a 'superficial consideration of the evidence' was necessary in order to rule on arbitral jurisdiction and it was appropriate for the Court to determine the application according to Seidel.

Third, even if the Seidel exceptions to the competence-competence principle did not apply, efficiency favoured a continuation of the dispute through litigation rather than arbitration. Interests of efficiency underlie section 7(5) of the Arbitration Act, which provides:

> 7(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> - (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
> - (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.[18]

Courts have interpreted this provision to allow partial stays of proceedings or to refuse such stays altogether even where an arbitration agreement clearly applies to part of a dispute.[19] Justice Perell refused to grant a stay based on this provision. Allowing claims against those defendants who had signed the Residential Agreement or otherwise attorned to the jurisdiction of an arbitrator to proceed by way of arbitration while the remaining claims (including similar claims in litigation by Bell ExpressVu) proceeded before the Court would result in an unnecessary multiplicity of proceedings.[20]

The defendants appealed Justice Perell's decision to the Ontario Court of Appeal. The Court of Appeal upheld Justice Perell on his first and third grounds for refusing a stay. On the first ground, the Court of Appeal stated an applicant looking to invoke a stay under section 7(1) must at least indicate to the Court that they are a party to and agree to be bound by the arbitration agreement.[21] While this finding alone was sufficient to dispose of the appeal, the Court of Appeal also affirmed the alternate ground that based on section 7(5) of the Arbitration Act a stay of the Court proceedings should be refused on grounds of efficiency even if section 7(1) of that Act and the underlying competence-competence principle were engaged.[22]

Notably, the Ontario Court of Appeal did not take the opportunity to comment and provide guidance on Justice Perell's second ground for refusing a stay. The interpretation and

application of the reasoning in Seidel will almost certainly be at issue in future cases and it is unfortunate that the appeal in Shaw did not yield further guidance on the point. Another important question left outstanding in Shaw is the impact of Shaw's claim that the Residential Agreement and the arbitration clauses therein were void as being obtained through fraud.[23] Does such a pleading effectively preclude application of the competence-competence principle as it relates to arbitral jurisdiction? How and in what forum should arbitral jurisdiction in such a case be determined? These issues remain uncertain.

We note that the defendants in the Shaw case have recently sought leave to appeal the Ontario Court of Appeal decision to the Supreme Court of Canada. A decision on that leave application remains pending as of September 2012.

United Mexican States v Cargill Inc

The Ontario Court of Appeal has also recently addressed the Court's ability to intervene in an award rendered by an arbitral tribunal in an international arbitration under article 34 of the Model Law. A unanimous decision of the Court of Appeal in Cargill[24] (leave to appeal the decision to the Supreme Court of Canada was denied)[25] held that the standard of review on a true question of arbitral jurisdiction is one of correctness while strongly endorsing a narrow approach to what constitutes such a question. The Court stressed that when reviewing an international arbitral award on a question of jurisdiction a Court should assess only whether the tribunal was correct in that the decision rendered was within the scope of the submission to arbitration; the Court should not incidentally delve into matters that go to the merits of the dispute.[26]

This case involved an arbitration initiated by Cargill Inc against Mexico under the North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States (NAFTA).[27] Cargill alleged certain measures taken by Mexico were in breach of various provisions of NAFTA and caused damage to Cargill's investment in the Mexican high-fructose corn syrup (HFCS) industry. As a result of these measures, Cargill's wholly owned Mexican subsidiary had to close its HFCS distribution centre and several of Cargill's American HFCS production plants had to close.[28] The arbitration proceeded before the International Centre for the Settlement of Investment Disputes (Additional Facility) and addressed damages 'by reason of or arising out of' a NAFTA breach.[29] In a decision released on 18 September 2009, the tribunal awarded damages to Cargill in the amount of US$77,329,240, representing US$36,166,885 for lost sales and costs incurred in relation to Cargill's investment in its wholly-owned Mexican subsidiary and US$41,162,355 for loss suffered by Cargill's production plants in the United States due to lost sales to the Mexican subsidiary.[30] At the arbitration hearing, Mexico challenged the jurisdiction of the tribunal to award the latter set of 'upstream' damages claiming they were outside of the tribunal's jurisdiction. The tribunal held that under the 'broad and inclusive' definition of an investment under NAFTA, and the facts of this case, it did have jurisdiction to award the 'upstream' damages.[31]

Mexico brought proceedings in Ontario to set aside the award, requesting the Court substitute the tribunal's award of damages with an award for only the first portion of Cargill's damages, the US$36,166,885.[32] As both Mexico and Cargill agreed that the 'place of arbitration' would be Toronto in the Province of Ontario,[33] the competent court for these proceedings, pursuant to Ontario's International Commercial Arbitration Act[34] (which incorporates the Model Law), was the Ontario Superior Court of Justice.

Mexico's submission for setting aside this portion of the damages award was grounded in article 34(2)(a)(iii) of the Model Law, which reads in relevant part:(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:

...

- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside...

The Ontario Superior Court of Justice considered the proper standard of review to determine whether the tribunal exceeded its jurisdiction was reasonableness.[35] In assessing whether the tribunal reasonably considered it had jurisdiction to make the impugned award, the Court embarked on a review of certain NAFTA provisions along with the tribunal's reasoning and interpretation of other NAFTA tribunal decisions.[36] Ultimately the Court found that the tribunal's decision to award the 'upstream' damages was reasonable, and dismissed the application.[37]

Mexico appealed to the Ontario Court of Appeal. That court dismissed Mexico's appeal, but offered strikingly different reasons from the court below. The Court of Appeal framed the issue before it as 'whether, and on what standard of review' the award should be set aside 'on the basis that it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration'.[38] The Court of Appeal held that the proper standard of review for such questions of pure arbitral jurisdiction was correctness and not reasonableness as had been suggested by the court below. The Court of Appeal was careful, however, to communicate that such a finding does not give the courts a broad scope of intervention in international arbitrations. Instead, courts are expected to intervene only in rare circumstances. Noting the tendency for matters of true substantive challenge to be cloaked as jurisdictional issues, and for substantive considerations to influence considerations of jurisdiction, the Court added the following important commentary:

> ...Courts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction. In my view, the principle underlying the concept of a 'powerful presumption' is that courts will intervene rarely because their intervention is limited to true jurisdiction errors.
>
> ...courts are to be circumspect in their approach to determining whether an error alleged under Article 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal.[39]

The Court of Appeal stated that the first purpose of the reviewing court is to identify and narrowly define any true question of jurisdiction. The proper approach is to ask the following three questions:

- What was the issue that the tribunal decided?
- Was that issue within the submission to arbitration?
- Is there anything in NAFTA that precluded the tribunal from making the award?[40]

In Cargill, the submission to arbitration was for 'loss or damage by reason of, or arising out of' the NAFTA breach.[41] The Court of Appeal recognised that the tribunal had to find facts, apply those facts to the definitions and determine whether the 'upstream' damages met that criteria.[42] The narrow issue for the Court of Appeal was 'whether the tribunal was correct in its determination that it had jurisdiction to decide the scope of damages suffered by Cargill by applying the criteria set out in the relevant articles of Chapter 11'.[43] Whether Cargill's 'upstream' damages actually met the NAFTA criteria was seen as 'a quintessential question for the expertise of the tribunal, rather than an issue of jurisdiction'.[44] In other words, the tribunal clearly had jurisdiction to consider the scope of damages suffered by Cargill by applying the relevant NAFTA criteria and did so. Having properly assumed that jurisdiction, the reasonableness of the tribunal's decision is not subject to Court review.

As Cargill concerned the application of a Model Law provision defining when Courts may intervene on jurisdictional grounds, the Court of Appeal's assessment is of significance in all Canadian jurisdictions. In light of Cargill, those seeking a Canadian place of arbitration for an international dispute should have confidence the Courts will allow substantial deference to the arbitrator or arbitrators and will take a very narrow view as to what comprises a jurisdictional issue. In any challenge to a decision of an international arbitral tribunal on jurisdictional grounds under article 34 of the Model Law, the Court will only look at whether the consideration of the issue was properly within the jurisdiction of the tribunal and will not under that guise seek to assess or evaluate the reasonableness or correctness of the decision.

Arbitral jurisdiction over third parties

Farah v Sauvageau Holdings Inc

In Farah v Sauvageau Holdings Inc (Farah)[45] the Ontario Superior Court of Justice held that the Ontario Arbitration Act[46] did not confer jurisdiction upon an arbitrator to grant an injunction enjoining non-parties from dealing with property owned by or obtained from the parties. This dispute involved the sale of a collection agency, Collection Systems Canada Corp (CSC), from Mr Farah to Sauvageau Holdings Inc (Sauvageau). A dispute arose shortly after the sale when Sauvageau alleged the share purchase agreement contained several false representations about, inter alia, the nature of CSC's clients, value of assets, liabilities and profitability.[47] After legal action was commenced, the parties agreed to proceed through arbitration and appointed an arbitrator.[48] Suspicious of further property sales and financial transfers, Sauvageau appeared before the arbitrator, ex-parte and without notice to Mr Farah, and obtained a Mareva-type injunction to restrain any dealings involving the property of Mr Farah and his wife. The injunction purported to apply to servants and agents of Mr Farah and his wife as well as to banks, financial institutions and all persons with notice of the injunction.[49] The arbitrator denied the application by Mr Farah and his wife to set aside the injunction.[50]

Mr Farah and his wife then applied to the Ontario Superior Court of Justice, under the Ontario Arbitration Act, for an order setting aside the arbitrator's injunction claiming the injunction exceeded arbitral jurisdiction by binding non-parties. The Court first emphasised that an arbitrator, unlike a Court, has no inherent jurisdiction, and obtains jurisdiction and authority only from the contractual or statutory provisions appointing it.[51] Thus arbitral jurisdiction on a particular subject matter must be found within that agreement or applicable statutory provision. The Court rejected the Sauvageau argument that the Ontario Arbitration Act granted the arbitrator the powers of a Superior Court to issue a Mareva injunction binding non-parties to the arbitration. Legislation does not empower arbitrators to 'grant Mareva injunctions or for that matter to appoint receivers, grant Anton Pillar orders, or grant Norwich orders' which may require third parties to act.[52] Further, it was explained that arbitrators do not require powers to issue orders binding third parties because the Arbitration Act incorporates a process whereby the Court's jurisdiction may aid arbitration in this respect when necessary. In particular, section 6 of the Arbitration Act permits the Court to assist in the conduct of arbitrations for the purpose of preventing unequal or unfair treatment, and section 8 specifically recognises the Court's jurisdiction to make injunctive orders in arbitrations for the detention, inspection or preservation of property.

The Court similarly rejected Sauvageau's contention that the agreement to arbitrate, which directed the arbitration proceed in accordance with the ADR Chambers Arbitration Rules,[53] provided for such orders over third parties. ADR Chambers is a Canadian organisation of dispute resolution professionals, comprised of experienced lawyers and retired judges, that offers dispute resolution services for both national disputes in Canada and international disputes.[54] It has published its own set of rules to assist parties in planning for arbitration. Rule 11 of the ADR Chambers Rules states that the arbitrator 'may order whatever interim measures it deems necessary, including injunctive relief'.[55] The Court held the ADR Chambers Rules adopted by the parties to govern the arbitration process represented nothing more than a private agreement between the parties to follow a specific process. Such a private contractual arrangement did not and could not confer on the arbitrator jurisdiction over third parties.[56] The arbitrator was found to have exceeded his jurisdiction in granting the Mareva injunction.[57]

The Farah decision is consistent with the bulk of other Canadian authorities in strongly rejecting any type of arbitral jurisdiction over non-parties. It is important to note, however, that parties are not categorically barred from obtaining relief against non-parties by choosing to pursue arbitration. In order to ensure that parties achieve effective justice through arbitration, Canadian legislation generally provides that the parties to an arbitration can seek the court's assistance in obtaining interim injunctive relief or other preservation orders notwithstanding that these might affect non-parties to the arbitration. Canadian Courts have been and should continue to be willing to exercise their inherent and statutory jurisdiction to assist the arbitration process in these respects where a need for such is demonstrated.

MJS Recycling Inc v Shane Homes Ltd

In MJS Recycling Inc v Shane Homes Ltd,[58] the Alberta Court of Appeal also recently considered arbitral jurisdiction in relation to third parties. In this case, MJS Recycling Inc (MJS), a waste-management company, entered into a Purchase Agreement to buy-out the shares of several entities in MJS, including Shane Homes Limited (Shane), and two other home builders (collectively, the Builders Group). Under the Purchase Agreement, the members of the Builders Group promised they would continue to provide MJS with a certain

amount of waste for removal and pay MJS fees for such. The Purchase Agreement also directed that any disputes be resolved by way of arbitration under Alberta's Arbitration Act.[59]

A dispute eventually arose as to whether one of the members of the Builders Group, Shane, was meeting its ongoing waste-removal obligations to MJS. In light of the dispute, MJS paid the balance it owed to the Builders Group on the Purchase Agreement into a trust account. MJS then initiated arbitration proceedings against Shane for failing to provide the specified volume of waste under the Purchase Agreement. Shane counterclaimed for its share of the balance owing for shares under the Purchase Agreement, which comprised roughly 25 per cent of the funds MJS paid into trust.[60]

The arbitrator found that Shane had breached the Purchase Agreement and MJS was entitled to damages 'in an amount to be assessed'.[61] The parties were unable to agree on damages, and a Supplementary Award from the arbitrator on the matter limited MJS's remedy to a release from all of its further payment obligations to all of the Builder Group under the Purchase Agreement, and also directed a return to MJS of all share purchase funds in trust.[62] It is important to note that roughly 75 per cent of the share purchase funds paid into trust by MJS were to pay the other two members of the Builders Group: non-parties to the arbitration that had not breached the Purchase Agreement.

MJS applied to the Alberta Court of Queen's Bench under section 45(1) of the Arbitration Act to set aside the award, inter alia, on the basis that it contained a decision on a matter (the entitlement of the other members of the Builders Group to funds in trust) beyond the scope of the agreement to arbitrate. The Court held that while the arbitrator may have exceeded his jurisdiction in this respect, such excess of jurisdiction was of no ultimate impact as the arbitral award was not binding on the other members of the Builders Group.[63] The other members of the Builders Group could presumably claim separately against MJS for amounts owed under the Purchase Agreement. The Court dismissed the MJS application because the agreement to arbitrate between MJS and Shane expressly stated any arbitral decision would be 'final and binding' and there was 'no right of appeal'.[64]

MJS applied for leave to appeal this decision to the Court of Appeal. Granting leave, Justice O'Brien noted that while deference is ordinarily owed to an arbitrator it does not follow that such deference is owed where the arbitrator has exceeded their jurisdiction, particularly in purporting to affect the rights of a non-party by an award.[65]

The Alberta Court of Appeal granted MJS's appeal, finding that the arbitrator exceeded his jurisdiction in releasing MJS from making any share purchase payments to the Builders Group even though only Shane was a party to the arbitration. The entitlements of the other members of the Builders Group to be paid for their shares was not submitted for determination and the decision that MJS did not have to provide further payment to these other parties went beyond the scope of the arbitration agreement.[66]

The Court of Appeal's treatment of the attempted prohibition against appeals from arbitration in the Purchase Agreement also deserves mention. The Court of Appeal confirmed that it is not possible under Alberta legislation for an arbitration agreement to exclude residual Court jurisdiction to set aside an arbitral award for want of jurisdiction under the Arbitration Act. Section 3 of the Arbitration Act specifically prevents the parties from contracting out of the Court's jurisdiction in this regard. In any event, the Court stated the 'no appeals' clause in the arbitration agreement should not be interpreted as an agreement to accept an award beyond the scope of the agreement to arbitrate.[67]

The Court of Appeal considered that the situation in MJS was one where the jurisdictional errors within the award could be corrected by the arbitrator with appropriate direction from the Court.[68] The matter was remitted to the arbitrator to render an award in accordance with the Court's directions on the scope of his jurisdiction.[69]

Conclusion

There continues to be a clear and strong commitment by Canadian legislatures and courts to ensure that, absent exceptional circumstances, agreements to arbitrate are honoured and that arbitral jurisdiction is maintained without judicial intrusion. While the general approach of deference and respect for the competence-competence principle are well established, the precise limits of arbitral jurisdiction continue to be the subject of dispute and judicial commentary as the cases reviewed above attest.

Recent Canadian case law reinforces the historical approach of deference to arbitration and demonstrates that Canadian Courts will strive to ensure only true issues of arbitral jurisdiction attract judicial scrutiny. The Cargill case seems to be a particularly good example of this narrow approach to defining reviewable issues of arbitral jurisdiction. The Shaw case presents an example of the type of exceptional or unusual circumstances that may oust an apparent agreement by the parties to arbitrate a dispute in favour of judicial jurisdiction.

One limiting principle of arbitral jurisdiction that Canadian Courts have strongly endorsed is the absence of arbitral jurisdiction over non-parties to the arbitration. In both the Farah and MJS cases, Canadian Courts set aside arbitral awards on this basis. While Courts have been strict on protecting the rights and interests of non-parties, it is notable that Canadian arbitration legislation generally provides for the Courts with inherent jurisdiction over non-parties to affect interim relief in arbitrations. Given the above, parties to arbitration in Canada are well advised to carefully consider the potential interests of non-parties when choosing to seek arbitration as well as when seeking specific awards and remedies within the arbitration process.

Notes

1. J Brian Casey, Arbitration Law of Canada: Practice and Procedure (Huntington, NY: Juris Publishing Inc, 2005) at p21 and p23.
2. Seidel v TELUS Communications Inc, 2011 SCC 15 [Seidel].
3. Michael D Schafler, Tamela J Coates and Chloe Snider, 'Commercial Arbitration and the Canadian Justice System: Recent Decision of the Supreme Court of Canada,' (2011) The Arbitration Review of the Americas 2012, p38.
4. Seidel, supra note 2 at paras 29 and 114.M
5. 2011 ONSC 4360, aff'd 2012 ONCA 192.
6. 2010 ONSC 4656, rev'd 2011 ONCA 622, leave appeal to SCC refused, 34559 (10 May 2012).
7. 2011 ONSC 1819.
8. 2011 ABCA 221.
9. RSC 1985, c R-2. Shaw Satellite G P v Pieckenhagen, 2011 ONSC 4360 at paras 22-24 [Shaw, ONSC].
10. Ibid at paras 10, 13-20.
11. Ibid at para 11.

12. Ibid at paras 21-23.
13. SO 1991, c17.
14. In Alberta, under the Arbitration Act, RSA 2000, c A-43, section 7(1) reads: If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.
15. Shaw, ONSC, supra note 9 at paras 30 and 45. At the hearing of the application, one of the defendants attorned to the arbitrator's jurisdiction. See Shaw Satellite G P v Pieckenhagen, 2012 ONCA 192 at para 11 [Shaw, ONCA].
16. Shaw, ONSC, supra note 9 at paras 34-36.
17. Ibid at paras 38, pp40-41.
18. Other provincial, territorial and federal legislation governing domestic arbitrations contains similar provisions. See, for example, section 7(5) under the Alberta Arbitration Act, RSA 2000, c A-43.
19. Shaw, ONSC, supra note 9 at para 43.
20. Ibid at paras 45-46.
21. Shaw, ONCA, supra note 15 at para 10.
22. Ibid at para 16.
23. Shaw, ONSC, supra note 9 at paras 17 and 48-51.
24. United Mexican States v Cargill Inc, 2011 ONCA 622 [Cargill, ONCA].
25. 34559 (May 10, 2012).
26. Cargill, ONCA, supra note 24 paras 42 and 66.
27. 17 December 1992, Can TS 1994 No 2.
28. Cargill, Incorporated v United Mexican States, Award (18 September 2009), ICSID Case No ARB(AF)/05/2 (NAFTA), online: ITA Law, http://italaw.com/documents/CargillAwardRedacted.pdf at paras 1-5 [Cargill]. See also Cargill, ONCA, supra note 24 at paras 5-6.
29. Ibid.
30. Cargill, ONCA, supra note 24 at para 10.
31. Cargill, supra note 28 at paras 522-526.
32. United Mexican States v Cargill Inc, 2010 ONSC 4656 at paras 5, 45 [Cargill, ONSC].
33. Ibid at para 3.
34. RSO 1990, cI-9.
35. Cargill, ONSC, supra note 32 at para 55.
36. Ibid at paras 56-73.
37. Ibid at para 80.
38. Cargill, ONCA, supra note 24 at para 3.
39. Ibid at paras 46-47.

40. Ibid at para 52.
41. Ibid at para 63.
42. Ibid at paras 69-70.
43. Ibid at para 74.
44. Ibid at para 72.
45. 2011 ONSC 1819 [Farah].
46. RSO 1991, c17.
47. Farah, supra note 45 at para 22.
48. Ibid at paras 27-28.
49. Ibid at para 34.
50. Ibid at paras 40-41.
51. Ibid at para 54.
52. Ibid at para 63 (emphasis removed).
53. The ADR Chambers Arbitration Rules, in a current version effective as of 16 April 2012, are available online at: http://adrchambers.com/ca/arbitration/regular-arbitration/arbitration-rules/ [ADR Rules].
54. See The ADR Chambers' website for further information: http://adrchambers.com/ca/.
55. ADR Rules, supra note 53. The language of Rule 11 discussed in Farah has been revised and is now found within Rule 12 of the current ADR Chambers Arbitration Rules.
56. Farah, supra note 45 at para 70.
57. Ibid at para 73.
58. 2011 ABCA 221 [MJS, ABCA].
59. MJS Recycling Inc v Shane Homes Ltd, 2010 ABCA 376 at paras 2-5 [MJS, Application for Leave].
60. Ibid at paras 6-7.
61. Ibid at para 9.
62. Ibid at para 11.
63. MJS, ABCA, supra note 58 at para 19.
64. Ibid at paras 19-20.
65. MJS, Application for Leave, supra note 59 at para 18.
66. MJS, ABCA, supra note 58 at para 29.
67. Ibid at paras 22 and 35.
68. Ibid at paras 37-38.
69. Ibid at para 39.

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Summary

NATIONAL AND INTERNATIONAL ARBITRATION IN ECUADOR

Constitution of the Republic of Ecuador

The text of the new Constitution of the Republic of Ecuador (the Constitution)[1] was published in the Official Register in October of 2008 after it was approved in a referendum on September 28 of that year. The text is the result of several months of work by the National Constituent Assembly convened to that effect. One of the areas in the Constitution that includes major reforms with reference to methods for alternative dispute resolution pertains to the judiciary and to the administration of justice. The Constitution expressly recognises those methods - arbitration among them.[2] By virtue of this recognition, arbitration of all kinds, of any origin and between all manner of entities and persons is deemed valid in Ecuador subject to the requirements set forth in the Constitution and secondary laws,[3] all of which will be discussed in this paper.

International conventions

According to Ecuador's legal system, international law is subordinated to the Constitution and prevails over and above any other domestic laws,[4] except with respect to human rights where international instruments may prevail over the Constitution if they stipulate more favourable rights to persons.[5]

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

- the 1928 Havana Convention on Private International Law;[6]
- the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);[7]
- the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention)[8] - recently denounced;[9]
- the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention);[10] and
- the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[11]

Arbitration and mediation law: guidelines for applicability

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law of 1997 (AML).[12] The Law proposes a dualist regime comprising rules governing local arbitration in detail and a few - albeit determinant - rules on international arbitration. Additionally, pursuant to the AML, other bodies of law such as the Code of Civil Procedure (CCP), the Organic Code for the Judiciary (OCJ) and the Civil Code[13] may be supplementary to it, provided that arbitration is conducted at law.[14]

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

> International arbitration shall be regulated by treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador. Every natural or juridical person, public or private with no restrictions whatsoever is at liberty, directly or by reference to an arbitration regulation, to stipulate everything concerning the arbitration proceeding, including its establishment,

> discussions, language, applicable legislation, jurisdiction and seat of the arbitration panel which may be in Ecuador or in a foreign country. [Emphasis added.]

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

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

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

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

International commercial arbitration: definition and scope

The AML does not have any explicit definition for international arbitration. It only mentions the requirements for a proceeding to be considered as such. Article 41 sets forth two kinds of requirements: one is subjective and another is objective. In the former case, the parties

must establish in their agreement that arbitration will be international. In our opinion, this agreement does not have to be specific because the mere adoption of regulations or other set of rules regarding international arbitration ought to be interpreted as the parties' positive decision that arbitration must be international. In the latter case, it is necessary that the dispute be included at least within one of the following assumptions:

- if at the time of execution of the arbitration agreement the parties are domiciled in different states;
- if the place where a substantial portion of the obligations is to be performed or to which the issue under litigation is most closely related is situated outside the state in which at least one of the parties is domiciled; or
- if the issue being litigated relates to an international trade operation susceptible to compromise and not affecting or impairing national or collective interests.[15]

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

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.[16] 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). There are arguments buttressing each side.[17] The Constitutional Court has rendered rulings[18] in arbitration related aspects that have so far been favourable for the development of arbitration in Ecuador, but there is a high risk that this court could start using constitutional protection to affect arbitration in Ecuador.

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.[19] (For additional information on Ecuador's withdrawal from ICSID, please see the Ecuadorean chapter on international arbitration in 2011 edition of The Arbitration Review of the Americas.) Although this notice from Ecuador does not affect the consents provided for in contracts with ICSID dispute resolution clauses in BITs executed by Ecuador,[20] 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.[21]

Actually, the Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of bilateral investment[22] (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 a BIT executed with Finland.

It is important to say that, despite the fact that the Constitutional Court has approved the withdrawal of several BITs, the National Assembly has rejected the request of withdrawal of the BITs executed with China, the Netherlands and Germany. This initiative has been stopped and Ecuador has not pursued to finish this aggressive process of withdrawal of several BITs, and all the main treaties executed with the United States of America, United Kingdom, Spain and France remain in force.

Ecuador's initiative to submit disputes with foreign investors arising from specific contracts to international arbitration under UNCITRAL rules, having Santiago de Chile as the seat of arbitration remains unaltered. The attorney general has already approved this type or arbitral provision as required by the Constitution in several contracts.

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[23] and more than once it has applied state-to-state arbitration as set forth in WTO treaties.[24]

Pending cases against Ecuador

Presently, as we have learned, Ecuador has 13 pending international arbitration cases pertaining to investment.[25]

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).[26] At the time of ratification, Ecuador submitted the reservation on reciprocity as allowed by article 1.3 of the NYC.[27] We still do not have any cases in Ecuador relating to enforcement of awards issued under the NYC,[28] however we have seen two cases of enforcement of private international commercial awards under the AML.

On 30 January 1975, the Inter-American Convention on International Commercial Arbitration, or Panama Convention (PC), entered into force and was ratified in 1978.[29] 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.[30] The PC applies to arbitral decisions resulting from disputes of a commercial character.[31] Article 4 of the PC provides that recognition and enforcement of arbitral awards that meet the requirements and limitations of the Convention must be recognised in the same manner as national or foreign judgments are recognised and enforced.[32]

On May 1982,[33] the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, or the 1979 Montevideo Convention[34] (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.[35]

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.[36] 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.[37]

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'.[38] 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.[39]

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,[40] 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 Procedure[41] and the New York and Panama Conventions.[42] 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.[43] Furthermore, Ecuador is in favour of a Latin American self-contained dispute settlement mechanism, which is still under analysis.

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In 2012, Ecuador has seen a growth in cases that are being litigated in several international forums. Maybe one of the most important cases is the interstate claim brought by Ecuador against the United States of America seeking the interpretation of certain provision of the Ecuador-US BIT. Also, 2012 will see the ICSID award in the claim brought by Occidental Exploration and Production Company against Ecuador, the outcome of which will put the international arbitration system under scrutiny in Ecuador.

A favourable aspect is that Ecuador is still accepting all new contracts with foreign investors to international arbitration in Chile.

In 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. A negative aspect is that the new president of the Provincial Court of Quito has issued several rulings annulling local arbitral awards applying broad constitutional theories - this against several good precedents that were issued by the past president of this court.

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

Notes

1. Official Register No. 449, 20 October 2008.
2. Article 190, Constitution: 'Arbitration, mediation and other alternative proceedings for dispute resolution are recognized. These proceedings shall be applied in accordance with the law on matters where, by reason of their nature, it is possible to compromise'.
3. It should be mentioned, however, that this recognition is not new since article 191 of the 1998 Constitution already included it with a similar language; it is, in fact, ratification of an existing principle.
4. Article 425, Constitution: 'The hierarchical order for the application of norms shall be as follows: The Constitution, international treaties and conventions, organic laws, ordinary laws, regional rules and district ordinances, decrees and regulations, ordinances, agreements and resolutions, and other acts and decisions of the public powers.'
5. Article 417, Constitution: 'International treaties ratified by Ecuador shall be subject to the provisions of the Constitution. In the case of treaties and other international instruments on human rights, the principles pro human being, no restriction of rights, direct applicability and open clause established in the Constitution shall apply.' This principle has been developed further in article 5 of the Organic Code for the Judiciary, which states that: 'The judges, administrative authorities and officials of the Judiciary shall directly apply constitutional norms and those set forth in international instruments on human rights if the latter are more favorable to those established in the Constitution, even if not expressly invoked by the parties.' Organic Code of the Judiciary, Official Register Supplement 544, 9 March 2009.
6. Official Register Supplement 1201, 20 August 1960.
7. Official Register 43, 29 December 1961. Ecuador ratified the New York Convention resorting to the commercial and reciprocity reservations set out in article I(3).
8.

Official Register 386, 3 March 1986. Note that this Convention only pertains to disputes relating to investments between contracting states and nationals of other states, as specified in its provisions.

9. On 3 June 2009, the president of the Republic delivered a request to the Legislative and Auditing Committee of the National Assembly asking it to denounce the Washington Convention, claiming that it infringes the interests of Ecuador and violates article 422 of the Constitution. The request was considered by the National Assembly on 12 June 2009. Subsequently, the president of the Republic issued Executive Decree No. 1823 on 2 July 2009, where he resolved: '(1) To denounce and, therefore, to declare the termination of the Convention on Settlement of Investment Disputes ICSID …' Notice of the denunciation was served to ICSID on 6 July 2009.
10. Official Register 875, 14 February 1992.
11. Official Register 153, 25 November 2005.
12. Official Register 145, 4 September 1997. Codification was published in Official Register 417, 14 December 2006.
13. Official Register Supplement 46, 24 June 2005.
14. Article 37, AML: 'The provisions of the Civil Code, Code of Civil Procedure or Commercial Code and other related laws are supplementary and shall be applied on all matters not set forth in this Law, provided that arbitration at law is involved.' It is not possible to understand the objectives of the lawmaker's limitation because, in practice, supplementary norms also are - and should be - used in arbitration ex aequo et bono or in equity, especially if the Judiciary intervenes during any stage.
15. Article 41, AML. The terms 'if susceptible to compromise and not affecting or impairing national or collective interests' in the last assumption are the result of a hasty legal amendment in 2005 within the context of international arbitration claims that the Ecuadorian State was beginning to confront at that time. There is no case law providing clarity for its application. See such amendment in Law No. 2005-48, Official Register 532, 25 February 2005.
16. Article 94, Constitution.
17. Accordingly, in 2009 the Organic Code of the Judiciary was enacted. The Code - which is also an organic law - provides that arbitration is part of the state's bodies for the administration of justice and that arbitrators exercise jurisdictional duties. Thus, awards can misguidedly be considered equal to judicial rulings. See Organic Code of the Judiciary, article 17, which says: '[t]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'.
18. In 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.
19. Please 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'.

20. See article 25 (1) of the ICSID Convention.
21. President Correa's speech to Congress on 10 August 2009 contained a strong message against bilateral investment and commercial treaties. See a press article at: www.asambleanacional.gov.ec/20090810235/noticias/rotativo/discurso-del-presidente-de-la-republica-economista-rafael-correa.html.
22. See the article by Global Arbitration Review at the following URL: www.globalarbitrationreview.com/news/article/28642/ecuador-champing-bits/.
23. Protocol of Adhesion to the WTO, published in Official Register issue 852, dated 29 December 1995.
24. Ecuador 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.
25. Source: www.pge.gob.ec/es/patrocinio-internacional/arbitrajes-en-curso.html, last visit 22 August 2012.
26. Legislative Resolution published in Official Register issue 293, dated 19 August 1961.
27. Id. The Legislative Resolution establishes that Ecuador '[r]atifies the execution of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, taking into account that Ecuador, on the basis of reciprocity, will apply such Convention to recognition and enforcement of arbitral awards pronounced in the territory of another contracting state only when such awards involve litigations arising from juridical relations deemed to be commercial by Ecuadorean law.'
28. The final award in Occidental Exploration and Production Company v Ecuador (also known as OXY 1), was subject to a revision process under the NYC in London (lex arbitri). However, it was not examined under Ecuadorean law because the parties reached a compromise. Source: www.bittium-energy.com/cms/content/view/6944/1/.
29. Supreme Decree No. 3019, published in Official Register issue 729, dated 12 December 1978.
30. See articles 7 and 9.
31. Article 1 of the PC establishes that 'an agreement between the parties whereby they undertake to submit to arbitral decision the differences arising or having arisen between them with relation to a commercial business is valid. The respective agreement shall be included in a written document signed by the parties or in an exchange of letters, telegrams or telex communications'. See also declaration included in the ratification instrument dated 6 August 1991, published in Official Register No. 729, dated 12 December 1991, related to state-owned entities.
32. Article 4 of the PC provides that 'arbitral judgments or awards that cannot be challenged according to the law or applicable procedural rules shall have the force of res judicata. Their enforcement or recognition may be demanded in the same manner as judgments pronounced by national or foreign ordinary courts according to the procedural rules of the country where they are enforced and to what is established by international treaties in this respect'.
33. Executive Decree No. 853, published in the Official Register issue 240, dated 11 May 1982.

34. This convention was executed in Montevideo, Uruguay, on 8 May 1979. Source: http://untreaty.un.org/unts/60001_120000/22/28/00043359.pdf.
35. Article 1 of the MC establishes that '[t]his Convention shall apply to judicial judgments and arbitral awards issued in civil, commercial or labour proceedings in one of the member states unless at the time of ratification one of them has made an express reservation to limit it to judgments pertaining to convictions on equity matters. Likewise, any of them may declare, at the time of ratification, which it also applies to resolutions culminating the proceeding, those issued by authorities that exercise some jurisdictional function, and to criminal sentences as regards indemnities of damages deriving from the offense. The rules of this Convention shall apply as regards arbitral awards on everything not set forth in the Inter-American Convention on International Commercial Arbitration executed in Panama on January 30, 1975.'
36. See article 5 of the NYC.
37. See articles 25 (1) and 72 of the ICISID Convention. See also supra note 12. Ecuador withdrew from the ICSID Convention on 7July 2009 and such withdrawal became effective six months later (January 2010), as per the ICSID Convention. See http://icsid.worldbank.org/ICSID/.
38. Id.
39. Id.
40. Id.
41. See article 32 of the LAM. See also article 414 of the Code of Civil Procedure, codified through Law No. 2005-010, published in Official Register issue 46, dated 24 June 2005, which states: 'Foreign judgments shall be enforced if not contrary to Ecuadorean 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.'
42. See Michael Reisman et al, International Commercial Arbitration, University Casebook Series, New York, 1997, at 691.
43. See press article at the following URL: www.hoy.com.ec/noticias-ecuador/ecuador-propondra-nuevo-sistema-de-arbitraje-durante-su-presidencia-en-unasur-357247.htm.

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Panama

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Panama is no stranger to arbitration. It has been a dispute resolution mechanism generally accepted in our country since the late 1970's. Moreover, Panama is a party to the Inter-American Convention on International Commercial Arbitration,[1] the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards,[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[3]

In 1999, Panama enacted its first special act on arbitration, the Law Decree No. 5 of 1999 on Arbitration, Mediation and Conciliation (the Arbitration Act),[4] which remains the current law applicable to arbitration.

Since the enactment of the Arbitration Act, and especially between 2001 and 2003, the Panamanian Supreme Court issued a series of decisions that raised doubts as to the practicality of arbitration as a private dispute resolution mechanism in Panama.

However, the Panamanian approach towards arbitration took a positive change of direction in 2004 when the Panamanian Constitution was modified to recognise arbitration as a valid system for the resolution of disputes separately from the Panamanian Courts, and to include the Kompetenz-Kompetenz principle in the Constitution. Also included expressly in the constitution was the capacity of the government to be a party in arbitration proceedings without the need for any further authorisation, provided that an arbitration clause is included in the contract to which the government is party. These amendments were perceived as a clear pro-arbitration message that Panama was sending to the international arbitration community.

Since then, the Supreme Court of Justice has played a relevant role in building arbitral jurisprudence through its decisions, which at times may be controversial. Panamanian Supreme Court decisions are final, binding and definitive when deciding constitutional issues or issues of legality of governmental administrative resolutions. They are persuasive and of 'probable doctrine' when issued three or more times on a same issue and applied to the same or a similar series of fact, in civil and commercial matters.

The latest controversy raised by the Supreme Court of Justice in the Panamanian arbitration forum was caused by a decision rendered on 9 June 2011 in the case of HEBE Corporation, SA (the Claimant) v Vent Vue, SA (the Defendant) and Innovaciones de Vidrios, SA (the Third Party).[5] Here, the Supreme Court of Justice decided a special action for the protection of constitutional guarantees (writ of amparo) filed by the Claimant against an Arbitral Tribunal.

The question faced by the Supreme Court of Justice in the HEBE case was whether or not the decision of an Arbitral Tribunal to abstain from hearing and deciding on claims brought through arbitration against the Third Party - assignee of certain credits of the Defendant - violated the Claimant's constitutional guarantees.

In a divided decision (six to three), the Supreme Court of Justice granted the writ of amparo and, as a result, the interim award of the Arbitral Tribunal was revoked. The Supreme Court of Justice concluded it was necessary that all the parties involved in the dispute, including the Third Party, appear and be brought into the arbitration proceedings in order to preserve the right to due process of law.

In this article, we will analyse the HEBE decision, as well as its potential effects regarding arbitration in Panama.

Understanding the HEBE decision

Factual background of the HEBE decision

In the HEBE case, the Claimant entered into a contract with the Defendant, for the supply and installation of construction materials for a building in Panama City (the Contract). The Contract included an arbitration clause for the resolution of all disputes arising out of or in connection with the Contract, requiring the parties to submit their request for arbitration pursuant to the rules of a Panamanian arbitration centre.

In this case, the Defendant had assigned a series of credits to the Third Party. The Claimant considered that such an assignment of credits constituted a fraudulent conveyance prejudicing its rights under the Contract and, pursuant to the arbitration clause, it submitted a request for arbitration against both the Defendant and the Third Party.

The Arbitral Tribunal concluded that the Third Party could not be joined as defendant in the arbitration as only an assignment of credits had taken place and not an assignment of the Contract that contained the arbitration clause. As a result, the Arbitral Tribunal found that it only had jurisdiction to decide the claim against the Defendant, thus excluding the Third Party from the arbitration. The Arbitral Tribunal also stated that its decision did not result in a denial of justice, as the Claimant could always bring a claim against the Third Party before the ordinary courts.

The Claimant considered that this interim award of the Arbitral Tribunal violated its constitutional right of due process (debido proceso), as the Claimant argued that the action seeking to revoke the allegedly fraudulent assignment of credits required the submission of a claim against both the Defendant and the Third Party, and the arbitration clause prevented the Claimant from pursuing such action against the Defendant before the ordinary courts. The Claimant therefore submitted a writ of amparo (seeking protection of its constitutional guarantee of due process) before the Plenary of the Supreme Court of Justice.

Legal content of the HEBE decision

The HEBE decision deals mainly with two legal issues: the availability of writs of amparo against arbitral awards, and the necessary appearance of all parties in interest in the arbitration proceedings, as a means to extend the effects of arbitration clauses to non-signatory third parties.

The availability of writs of amparo against arbitral awards

The writ of amparo is an independent action seeking protection against orders from the authorities or public servants that violate constitutional guarantees. In the context of ordinary judicial proceedings, an amparo is conceived as an extraordinary remedy to be accessed whenever all other ordinary available remedies have been used and decided.

The Panamanian courts have, on different occasions and with different results, discussed the issue of whether or not a decision from an Arbitral Tribunal should be the proper subject of a writ of amparo, mainly because this action was conceived as a means to review

decisions issued by public servants. There has been much debate as to whether, in this context, arbitrators should be considered public servants.

In several 2010 decisions,[6] the Plenary of the Supreme Court of Justice of Panama concluded that arbitrators and Arbitral Tribunals were not public servants, and therefore their decisions could not be subject to writs of amparo. This position was further supported by the Kompetenz-Kompetenz principle, which prevents the courts from reviewing preliminary decisions of arbitrators (mainly as they relate to their capacity to decide the dispute), and the availability of the writ to set aside (or annul) the arbitration award, as a means to judicially control the final arbitration award once the arbitration proceedings have concluded. In the HEBE decision, the Supreme Court of Justice has moved away from this criterion and admitted a writ of amparo against an interim award issued by an Arbitral Tribunal. Under the position set in the 2010 decisions, such writ of amparo would have been dismissed without entering into further consideration of the merits.

Thus, the HEBE decision has reignited the debate on the availability of writs of amparo against awards rendered by arbitrators and Arbitral Tribunals.

The necessary appearance of all parties with interest in the arbitration proceedings as a means to extend the effects of arbitration clauses to non-signatory third parties

The Arbitration Act does not regulate the joinder of third parties to the arbitration proceedings. The traditional position of Arbitration Tribunals in Panama has been to only admit as parties to arbitration those who have entered into an arbitration agreement or who otherwise have clearly expressed their consent to arbitrate a dispute. This position has changed in recent times through the development and application by Arbitral Tribunals in Panama of the 'principle of attraction' to the arbitration clause, which has gained relevance in the national arbitration forum.

Pursuant to the principle of attraction to the arbitration clause, it is possible to attract third parties that have not expressly consented to or executed an arbitration clause, but that are closely related or connected to the effects of the agreement or underlying transaction containing an arbitration clause. This is the case of a guarantor of obligations of a contract that contains an arbitration clause, claims against related companies, joint venture disputes and construction contract disputes involving contractors and sub-contractors.

The HEBE decision goes a step further in the development of this principle of attraction of third parties to arbitration, as in order to consider that the Third Party was bound to be heard in the arbitration, the Supreme Court of Justice applied a statute of the Panamanian Code of Civil Procedure, which provides that, for proceedings before the ordinary courts, parties that participate in the events or transactions leading to the dispute are to be incorporated as defendants.

The position of the Supreme Court of Justice of Panama regarding the joinder of a third party to the arbitration is summarised in the following extract of the HEBE decision:

> The conflict has arisen by way of an alleged breach of contract by Vent Vue, SA [the Defendant] regarding Hebe Corporation, SA [the Claimant], and relates to the assignment of credit in favour of Innovaciones de Vidrios, SA [the Third Party]. Therefore, it is necessary that Innovaciones de Vidrios, SA [the Third Party] appears in the arbitration proceedings in order to help in the resolution of this matter, as the award that will be issued could also affect its interests.
>
> As the alleged infringement arises because of the assignment, it is necessary

> for both the assignor and the assignee to appear in the arbitration proceedings in order to elucidate the conflict and, pursuant to the constitutional guarantee of due process and the right to an effective defence, it is also necessary that the procedural opportunity to clarify the facts be given to the parties.

After these considerations, and quoting article 678 of the Code of Civil Procedure of Panama,[7] the Supreme Court of Justice decided that:

> This court must grant the motion for the protection of constitutional guarantees because it is necessary that all parties involved in the conflict appear in the proceedings especially to defend their rights, which can be affected by the award that will be granted by the Arbitral Tribunal.

From the excerpts of the HEBE decision, in considering that the Third Party was bound to the arbitration agreement, the Supreme Court of Justice took into consideration that:

- the alleged breach (the assignment of credits in fraud of the Claimant's rights) of the contract containing the arbitration clause involved the participation of the Third Party;
- the intervention of the Third Party would be necessary for a proper and complete resolution of the dispute;
- the award to be rendered by the Arbitral Tribunal could affect the interests of the Third Party;
- a provision of the Code of Civil Procedure of Panama can be applied in support of an application to join a third party to the arbitration; and
- pursuant to the constitutional guarantee of due process and the right to an effective defence, it is also necessary that the procedural opportunity to clarify the facts be given to all the parties involved.

Potential legal consequences of the HEBE decision

The HEBE decision could have two relevant impacts on arbitration in Panama: it could become a source of reference in support of writs of amparo to be used as a means to restrict or impose limits to the principle of Kompetenz-Kompetenz, and it could create an additional argument favourable to claimants seeking to join non-signatory third parties to arbitration proceedings.

The writ of amparo as a means of restricting or imposing limits to the application of the Kompetenz-Kompetenz principle

As we mentioned above, in its origins, the Kompetenz-Kompetenz principle was not always kindly treated by Panamanian judiciary. However, in 2004 the Panamanian legislative bodies decided to to send a pro-arbitration message to the international arbitration community by raising the Kompetenz-Kompetenz principle to constitutional level via an amendment to the Panamanian Constitution.

Thus, the Supreme Court of Justice in 2010 resolved as follows:

> It is worth pointing out that the claim regarding the Arbitral Tribunal's jurisdiction is an issue that must be raised before the Arbitral Tribunal itself, which pursuant to the principle of Kompetenz-Kompetenz should resolve this issue and decide for itself and in light of the arbitration agreement (Article 202 of the Constitution), if it has jurisdiction over the dispute, notwithstanding that this point can be reviewed later in the annulment proceedings.[8]

However, in the HEBE decision, by reviewing through an action for the protection of constitutional guarantees, an interim award of an Arbitral Tribunal regarding its own jurisdiction, the Supreme Court of Justice of Panama denied the autonomous scope of the of the Kompetenz-Kompetenz principle in favour of the protection of constitutional guarantees.

The HEBE decision could serve as future reference for the submission of writs of amparo, not only to challenge the jurisdiction of an Arbitral Tribunal, but also for challenging other interim awards that may be issued by Arbitral Tribunals within the course of the arbitration proceeding. If this were the case, it could cause significant delays in the development of arbitration proceedings, given the considerable workload and restrictions of the judiciary.

It would be desirable for the Supreme Court of Justice of Panama to revisit this issue and to favour the position that arbitral awards are not subject to writs of amparo. This would not mean that Arbitral Tribunals or arbitrators would be able to blindly violate Panamanian constitutional guarantees, but that Panamanian courts will only review these issues through the available annulment proceeding once a final award has been rendered.

An additional argument to bind third parties to arbitration agreements

As a general rule, the decision to arbitrate a dispute stems from the autonomy of the will of the parties. Parties that have not expressly agreed to submit a dispute to arbitration should only be brought exceptionally to the arbitration proceedings. This could be the case when such parties have a strong connection to the matter subject to arbitration and it could be inferred that this was the will of all the parties involved in the dispute. This seemed to be the reasoning behind the HEBE decision where although the Supreme Court of Justice acknowledges the material relevance of the principle of the autonomy of the will of the parties to submit a dispute to arbitration, it adopted a rather flexible approach for joining the Third Party to the arbitration. The Supreme Court of Justice did not go into detail as to why the Third Party needed to be brought as a party to the arbitration proceeding as it merely concluded that the participation of the Third Party in the allegedly fraudulent assignment was sufficient to bind it to the arbitration proceeding, and that such Third Party would, in any case, have an interest to participate in the arbitration proceeding in defence of its rights.

Finally, the application by the Supreme Court of Justice of a statute of the Panamanian Code of Civil Procedure, traditionally conceived for civil litigation before ordinary courts, to the resolution of a matter dealing with arbitration, may lead to a less stringent application of the principle of attraction of the arbitration clause. This reasoning may open the door for additional arguments, based on provisions applicable proceedings before ordinary courts, to attract third parties to arbitration.

The arbitration community in Panama looks forward to signs that would clarify whether or not the HEBE case will be an isolated case or a trendsetter that may result in litigants being able to limit the effects of the Kompetenz-Kompetenz principle, or to bind non-signatory third parties to arbitration agreements.

For the moment, the relevance of the HEBE decision regarding these issues remains to be seen.

Notes

1. Law No. 11 of 23 October 1975.
2. Law No. 5 of 25 October 1983.
3. Law No. 13 of 3 January 1996.

4. Law Decree No. 5 of 8 July 1999.
5. Decision dated 9 June 2011, issued by the Supreme Court of Justice's Plenary in the writ of amparo (motion for protection of constitutional guarantees) filed by HEBE Corporation, SA against the minutes of the hearing of an Arbitral Tribunal dated 18 November 2010, in the arbitration proceedings filed by HEBE Corporation, SA against Vent Vue, SA and Innovaciones De Vidrios, SA.
6. Decision of 24 August 2010, issued by the Plenary of the Supreme Court of Justice. Writ of amparo filed by Las Brisas de Amador, SA against the decision of 4 February 2010, issued by an Arbitral Tribunal in the proceedings filed by Palliser Holdings, Inc. against Las Brisas de Amador, SA; decision of 13 August 2012, issued by the Plenary of the Supreme Court of Justice. Writ of amparo filed by Moisés David Mizrachi Russo against the decision of 4 February 2010, issued by an arbitrator in the proceedings filed by Palliser Victoire Universal, SA against Fernando Alvarez.
7. This is a provision applicable to judicial proceedings, and not to arbitration proceedings, which provides that when the grounds for a claim are acts or transactions in which several persons have been involved or participated or that, by their nature or on account of a legal requirement, cannot be solved on the merits without all parties involved in such acts or transactions appearing in the proceedings, the claim must be directed against all those involved.
8. Decision of 24 August 2010, issued by the Plenary of the Supreme Court of Justice. Writ of amparo filed by Las Brisas de Amador, SA against the decision of 4 February 2010, issued by an Arbitral Tribunal in the proceedings filed by Palliser Holdings, Inc against Las Brisas de Amador, SA.

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Venezuela

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Summary

ARBITRATION AGREEMENTS IN CONTRACTS WITH THE VENEZUELAN STATE AND ITS INSTRUMENTALITIES

Before 2008, public procurement in Venezuela was regulated by the Biddings Act (2001), which provided for the structure and requirements of the biddings procedures, Decree No. 1417 on the General Conditions for the Contracting and Execution of Works (GCC), applicable only to ministries in a compulsory manner, and the Decree-Law for the Promotion of Private Investment Under Concessions Regime 1999 (PPCR). In 2008, the Venezuelan President executed the Decree-Law on Public Procurement, last amended by the Venezuelan National Assembly in 2010 (the PPA), which is complemented by the Administrative Regulations published in the Official Gazette on 19 May 2009. The PPA and its Administrative Regulations revoked the Biddings Act and the GCC.

The GCC established in article 9 that disputes arising out of the contract would be submitted to the local courts and could not give rise to foreign claims. The Administrative Regulations of the PPA have reproduced this rule in article 133. A wide interpretation of this rule has allowed public entities to include arbitration agreements provided that the seat of the arbitration is in Venezuela and the dispute is subject to Venezuelan legislation. However, if the seat of the arbitration is agreed abroad, it would be hardly arguable that the arbitration agreement is not valid on the basis of article 133 of the Administrative Regulations of the PPA.

Arbitration agreements in contracts with the Republic and government agencies

According to articles 12 and 13 of the Advocate General's Office Organic Law (2008), when there is a national or international arbitration agreement included in a contract to be executed by the Republic, it is required to have the legal opinion of the Attorney General's Office. To fulfil this formality, the highest authorities of the organs of the National Public Power must submit to the advocate general the draft contract, jointly with the opinion issued by the in-house counsel regarding the legality or not of the inclusion of the arbitration agreement.

In the same way, article 5 of the Advocate General's Office Organic Law (2008), applicable to government agencies, clearly establishes the obligation to any public officer to request the opinion of the attorney general before entering into arbitration agreements.

The opinion rendered by the Advocate General's Office is not binding for the contracting entity, and the lack of it is not essential for the validity of the arbitration agreement. However, the public officer who executes a contract on behalf of the Republic without fulfilling the mentioned requirement could be personally liable.

Arbitration agreements in contracts with Venezuelan state-owned companies

For arbitration agreements with state-owned companies, there is a general regime established in article 4 of the Commercial Arbitration Act (1998). The agreement must be approved by the corresponding corporate government body, usually a board of directors, and authorised in writing by the ministry to which the company is attached. The arbitration agreement must identify what kind of arbitration and the number of arbitrators, which cannot be less than three. The rule has been subject to interpretation by the Political Administrative Chamber of the Supreme Tribunal of Justice (PAC) in the cases of CADAFE (11 January 2006), Elettronica Industriale SpA (5 April 2006), and Herperia Enterprises Sucursal Venezuela (12 December 2007). In all of these, the PAC established that the fulfilment of the requirement established in article 4 of the Commercial Arbitration Act (1998) is of the essence for the validity of the arbitration agreement.

However, some of the Venezuelan state-owned companies may be subject to a special regime. For instance, there is a particular regime for state-owned companies affiliated to Corporación Venezolana de Guayana (CVG), which are companies for the heavy industry (aluminium, iron, lime and carbon, among others), established in the Decree-Law for the Partial Amendment of the Organic Statute for the Development of Guayana (2001). According to article 21 of this Decree-Law, for CVG and its affiliated companies to enter into arbitration agreements, it is required to have the written authorisation of the president of the CVG. The arbitration agreement must express the kind of arbitration, the number of arbitrators (no less than three) and the applicable legislation.

Contracts of public interest

Additionally, the Venezuelan Constitution provides for a special treatment for contracts where public interest is involved, establishing in article 151 that:

> In contracts of public interest, unless inapplicable due to the nature of those contracts, a clause shall be deemed included even if not expressed, whereby any doubts and controversies which may arise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic in accordance with its laws and shall not on any grounds or for any reason give rise to foreign claims.

According to the judgment rendered on 24 September 2002 by the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice in the case of Andrés Velásquez, within the category of public interest contracts are:

> ...all those contracts executed by the Republic... which object is determining or essential for the attainment of the objectives and tasks of the Venezuelan state, in the search of giving satisfaction to the individual and coincident interests of the national community, and not only the interest of a sector, implying the assumption of obligations which total or partial payment is to be done in several fiscal years after that in which the object of the contract was caused, in view of the implications that the adoption of those commitments may imply for the economic and social live of the Nation.

As can be seen, public contracts are treated differently if they fall within the category of Public Interest Contracts.

The interpretation of article 151 of the Venezuelan Constitution 1999 (which reproduces article 127 of the revoked Venezuelan Constitution 1961) has been established by the Supreme Tribunal of Justice in several decisions.

Political Administrative Chamber of the Supreme Court of Justice, 15 January 1998

Industrias Metalurgicas Van Dam, CA

In this case, the PAC considered that the arbitration agreement was included in a contract 'for the performance of the modernisation, improvement, refurbishment and turn key of war material which determines features of national security and defense which identify it with the classification provided for in article 126 of the Constitution as a Public Interest Contract'. The case was under the rules of arbitration of the Civil Proceedings Code (CPC) and the arbitrators were to act as amiable compositeurs. The PCA allowed the arbitration but limited only to technical issues, even when the arbitration agreement was to decide on disputes arising out of issues of a 'technical or of any other nature'. The limitation was based on the Public Interest nature of the Contract.

Plenary Chamber of the Supreme Court of Justice, 27 August 1999

Apertura Petrolera

The court established that article 127 of the Constitution (current article 151) adopted a system of relative immunity based on the incorporation of the exception of the nature of the contract. This case decided a challenge to the contracts executed by the Venezuelan state-owned oil company with third private parties for the exploitation of oil or provision of services. The court decided that it was possible to include the arbitration agreement in these contracts based on their commercial nature.

Constitutional Chamber of the Supreme Tribunal of Justice, 19 March 2002

MINCA v Corte Primera de lo Contencioso Administrativo

In this case, the mining contract is considered a public interest contract and included an arbitration agreement between MINCA and Corporación Venezolana de Guayana. The Constitutional Chamber decided an appeal against a decision of a lower court which decided a constitutional action to compel CVG to arbitration. The Constitutional Chamber did not question the validity of the arbitration agreement included in the public interest contract.

Political Administrative Chamber of the Supreme Tribunal of Justice, 18 November 2003

The Republic v Aucoven

In this case, the Republic argued that a concession contract for the exploitation of a motorway connecting Caracas with the main airport of the Republic was a contract of national interest, and because of the importance of the motorway, the concession could not be subject to international arbitration according to article 3.B of the Commercial Arbitration Act (1998), since public services are of the exclusive competence of the state.

The Court determined that the assignment of the shares of the concessionaire to a foreign company with the aim of excluding the jurisdiction of the Venezuelan courts was not valid since the assignment should have been authorised by the National Executive and not by the Ministry of Infrastructure. The court also decided to apply article 10 of the Decree-Law No. 138, which establishes that the concessioner will be subject to Venezuelan laws and jurisdiction. The Political Administrative Chamber declared that the Venezuelan judiciary had jurisdiction to hear this case even when there was an arbitration pending before an ICSID tribunal.

Political Administrative Chamber, 15 July 2004

MINCA v Corporación Venezolana de Guayana

This case was about the formalisation of an arbitration agreement according to the CPC. The Political Administrative Chamber of the Supreme Tribunal of Justice declared its jurisdiction since it is the tribunal legally empowered to hear pecuniary claims against the Republic in accordance with the Supreme Court of Justice Organic Act applicable rationae temporis. The PAC declared that the contract for mining exploitation was a contract of public interest and then stated that this kind of contract on state-owned assets, the Constitution and the legislation established limitations or restrictions for the state to apply an adequate control in order to guarantee the preservation of the general interest involved. The PAC also declared that in establishing or determining the matters that can be subject to arbitration in this special category of contracts, a restrictive criteria must be applied. The PAC declared its jurisdiction on the basis of a waiver of the arbitration agreement since MINCA filed other legal actions before filing the application for arbitration.

Political Administrative Chamber of the Supreme Tribunal of Justice, 5 April 2006

Elettronica Industriale SPA v Venezolana de Televisión

This case was a challenge of an arbitral award rendered by an arbitral tribunal against the state-owned broadcasting station Venezolana de Televisión. The PAC declared the award null and void since there were some formalities that the tribunal considered that were not fulfilled. These formalities were not established in the legislation applicable at that time, but after the enactment of the CAA. One of the most important sentences of this judgment is where the PAC establishes that no state contract may be subject to arbitration since the national patrimony is at stake, even if the contract is not one of Public Interest.
Constitutional Chamber of the Supreme Tribunal of Justice, 18 October 2008

Interpretation of Article 258 of the Constitution

In this case, although it has no relation to the petition filed by the Republic, the Constitutional Chamber analysed several issues of arbitration in Venezuela. One of those issues was the submission of disputes arising out of public interest contracts to arbitration. The Constitutional Chamber adopted the same criteria established by the Plenary Chamber of the Supreme Court of Justice in 1999 in the case of Apertura Petrolera, where it was established that the Constitution adopted a relative immunity and allows arbitration in public interest contracts depending on the nature of the contract.

The last mentioned judgment is binding to every judge in Venezuela in accordance with article 335 of the Venezuelan Constitution. The current status of Venezuelan case law allows for the use of arbitration in public interest contracts only when the contract is of a commercial nature, regardless of if the public interest is involved or not.

Challenge of arbitral awards involving the Venezuelan state, its instrumentalities and state-owned companies

In Venezuela, the only possibility to have an award set aside is through the application for judicial review established in article 43 of the Commercial Arbitration Act (1998), and on the grounds established in article 44 eiusdem, including:

- lack of capacity by one of the parties to enter into the arbitration agreement;
- lack of notification of the appointment of arbitrators, or for the performance of any act of the proceeding;
- when the tribunal has not been properly composed or the proceeding has not abided to the Commercial Arbitration Act (1998);
- lack of jurisdiction of the arbitral tribunal over issues included in the arbitral award; and
- arbitrability of the matter.

Article 43 of the Commercial Arbitration Act (1998) establishes that the application for judicial review must be filed before the competent Superior Court within five days after the notification of the award, or its correction, complementation or clarification. However, for those matters where a public entity is involved, the Organic Law of the Jurisdiction for Judicial Review of Administrative Matters (2010) applies. The mentioned law provides that any kind of activity of the public entities within its scope is subject to the control of the Jurisdiction for the Judicial Review of Administrative Matters.

As a consequence, a challenge to an arbitral award where one of the parties is the Venezuelan government, one of its instrumentalities or a state-owned company, should be filed before the competent tribunal of:

- the Jurisdiction for the Judicial Review of Administrative Matters;
- the Political Administrative Chamber of the Supreme Tribunal of Justice;
- the National Tribunals for the Judicial Review of Administrative Matters;
- the State Superior Tribunal of the Jurisdiction for the Judicial Review of Administrative Matters; or
- the Municipal Tribunal of the Jurisdiction for the Judicial Review of Administrative Matters.

Recognition and enforcement of arbitral awards against the Venezuelan state, its instrumentalities and state-owned companies

As a member of the New York Convention, Venezuela is obliged to recognise and enforce arbitral awards rendered in other member states. Following the same principle of universal control of the Jurisdiction for the Judicial Review of Administrative Matters, the enforcement of an arbitral award against the Venezuelan government, its instrumentalities or a state-owned company, must be requested from the competent Court of the mentioned jurisdiction. Recognition and enforcement could only be denied on the grounds established in article 49 of the Commercial Arbitration Act (1998), namely:

- lack of capacity by one of the parties to enter into the arbitration agreement;
- lack of notification of the appointment of arbitrators, or for the performance of any act of the proceeding;
- when the tribunal has not been properly composed or the proceeding has not abide to the applicable lex arbitri;
- lack of jurisdiction of the arbitral tribunal over issues included in the arbitral award;
- when it is proved that the award is not yet binding or has been suspended;
- arbitrability of the matter; and
- that the arbitration agreement is not valid under the applicable law.

Additionally, the enforcement of an award against the Republic would be subject to the proceeding established in the Advocate General's Office Organic Law (2008) for the enforcement of judgments against the Republic. In this proceeding, the Republic will propose a way to comply with the award. If the party requesting the enforcement rejects the proposal of the Republic, the tribunal will request a new proposal. If the new proposal is not received, or if rejected by the interested party, the tribunal should proceed to enforce the award by ordering the inclusion of an allowance in the national budget for the payment during the following year.

If the award is for the handing over of assets, the tribunal must put the assets in the possession of the interested party, unless it is affected for public purposes. In the last case, there will be a valuation of the assets in order to put a price that could be awarded to the interested party.

Conclusions

The inclusion of arbitral agreements in contracts with the Venezuelan government, its instrumentalities and Venezuelan state-owned companies is constitutionally and legally possible. Even the rules that could be argued as an obstacle for the inclusion of arbitration agreements would have to face the rule established in article 258 of the Venezuelan Constitution, which encourage the use of arbitration as a dispute resolution mechanism.

When the contracts are to be executed with the Republic or an instrumentality of the national government, the only requirement is that the arbitration agreement must be subject to the scrutiny of the Advocate General's Office, which must render a non-binding opinion on the basis of the prior opinion of the in-house counsel of the public entity involved in the contract and any other relevant documentation. However, this requirement does not affect the validity of the arbitration agreement, although it would make the public office personally liable for not requesting the opinion of the Advocate General's Office.

In the case of state-owned companies, the requirements are those established in the Commercial Arbitration Act (1998) regarding the approval of the corporate government body and the authorisation of the ministry to which the company is attached, although, as mentioned above, there could be some special regimes for particular state-owned companies.

As per the challenge of an award, the difference with the ordinary regime in commercial arbitration is with regards to the court to which the application for judicial review has to be filed. Because of the universal control of the Courts for the Judicial Review of Administrative Matters, the challenge of an award where a public entity is involved must be filed before the special courts of the mentioned jurisdiction taking into account the value of the award. The same principle is applicable to the recognition and enforcement of the award. However, there is a special procedure for the enforcement of judgments against the Republic that will be applicable to the enforcement of awards.

Finally, when dealing with a Venezuelan public contract with the Republic, an instrumentality or a state-owned company, it is convenient to review the applicable regime, since there are contracts excluded from the scope of the Public Procurement Act (2010), but are regulated under the ordinary regime of commercial contracts. However, this circumstance does not imply that other requirements of the legislation, which have been commented above, are not applicable to the arbitration agreements included in those contracts.

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