The Arbitration Review of the Americas

2015

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This edition provides an unparalleled annual update – written by the experts – on key developments in Argentina, Bolivia, Brazil, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Dominican Republic, Ecuador, Mexico, Panama, Peru the United States and Venezuela.

GAR Global Arbitration Review

Contents

Canada

Craig Chiasson, Robert J C Deane

Borden Ladner Gervais LLP

Cayman Islands

Mac Imrie, Luke Stockdale

Maples Group

Colombia

Juan Camilo Fandiño-Bravo, Alberto Zuleta-Londoño

Cárdenas & Cárdenas Abogados

Dominican Republic

Lucas A Guzmán López, Anya Rodríguez Ros

OMG

Ecuador

Rodrigo Jijón-Letort, Juan Manuel Marchán

Pérez Bustamante & Ponce

Mexico

Montserrat Manzano, Marco Tulio Venegas, Claus von Wobeser

Panama

Claudio De Castro

Arias, Fábrega & Fábrega

Peru

José Daniel Amado, Lucía Olavarría, Cristina Ferraro

Miranda & Amado Abogados

Venezuela

Andrés A Mezgravis

Mezgravis & Asociados

Introduction: CAM-CCBC

Frederico José Straube

President of the Arbitration and Mediation Centre of the Canada-Brazil Chamber of Commerce

Summary

INSTITUTIONAL ARBITRATION IN LATIN AMERICA

The role of arbitral institutions in the development of arbitration is a subject that has been increasingly discussed in international forums. In the last ICCA Congress, in Miami, the relationship of such entities with legitimacy was the topic of an entire panel. And one of the main concerns regarding the matter is the growth of local institutions in opposition to the predominance of traditional international centres of arbitration.

Such discussion is especially important in Latin America, where the development of arbitration is related to the emergence of local arbitral institutions. In fact, in the continent, such entities encouraged best practices and provided national markets with the necessary certainty for the strengthening of commercial exchanges. Interestingly, the evolution of ADRs in such areas also promoted the growth of several local institutions.

In this context, the Institute for Transnational Arbitration (ITA) conducted a survey regarding the situation of local arbitral institutions in Latin America. The results of the survey pointed out that most of these entities were created after 1990, when local jurisdictions had already set a legal framework for arbitration.

Theoretically, relevant institutions provide better conditions for parties and counsel through the reduction of costs and more adequacy to the national legal order or traditions. Moreover, it is often pointed as a reply to the criticism directed towards arbitration's legitimacy, based on the fact that most arbitrators and counsels belong to developed countries. Local entities from developing countries have among their roster national arbitrators, who do not come from Europe or the United States.

In this scenario, local arbitral entities would serve as an antidote to protect the legitimacy of arbitration with respect to regional particularities. However, there are two facts that undermine such argument.

First, the strength of traditional international arbitral institutions continues in Latin America. At the end of 2002 there were 1,135 cases in the International Arbitration Court of the ICC; 175 from Latin America. In 2012, there were 158 cases submitted to the six most-renowned Brazilian arbitral institutions, while the ICC received 82 cases from Brazil alone. This illustrates the appeal that traditional 'arbitral institutions' keep in Latin America, despite the development of new centres that compete with them.

Second, most Latin American counsels and arbitrators are used to carrying out their cases in European and North American traditional institutions, meaning that they tend to keep the same practices in their proceedings submitted to local entities. Moreover, they attend courses offered by such entities and obtain LLMs or PhDs in universities in countries that have an 'arbitral tradition'. As a result, the arbitral culture of such countries are incorporated by Latin American professionals who reproduce it, instead of creating a regional standard.

On the other hand, despite the fact that nowadays it is not possible to state that local institutions are capable of securing the legitimacy of arbitration, their perspective is interesting. The survey carried out by the ITA, mentioned above, concluded that the number of cases involving at least one foreign party has significantly increased in Latin American institutions. The same thing happened in terms of arbitrations concerning the public administration and in cases with multiple parties. Such outcomes reflect the evolution of those entities and their emergence as international players.

As president of the most traditional and renowned Brazilian arbitral institution, I can certify that the development of arbitration is related to the role taken by arbitral institutions in Brazil.

Certainly, the enactment of our Arbitration Act, in 1996, followed by the recognition of its accordance to the Brazilian constitutional order by the Supreme Court, was essential for the consolidation of arbitration in our juridical reality. The fact that, before 1996, only two arbitral procedures were submitted to the Arbitration and Mediation Centre of the Canada–Brazil Chamber of Commerce (CAM–CCBC) demonstrates the importance of a legal framework for the growth of ADRs in Latin America.

However, after the creation of a legal framework, the efforts directed to the consolidation of arbitration were made mostly by arbitral institutions that joined forces with the academy and non-profit organisations with the purpose of fostering knowledge related to ADRs (such as the Brazilian Arbitration Committee). As a result, the number of arbitrations submitted to Brazilian institutions has been increasing in incredible proportions. Before 2003, there was an average of five new procedures in CAM-CCBC each year. In 2004, 11 cases were initiated, and in 2006 the number raised significantly to 21 proceedings. Last year alone, we received 90 requests for arbitration.

Moreover, before 2010, more than 90 per cent of the cases under CAM-CCBC rules involved only Brazilian parties. In contrast, from 2011 on, around 17 per cent of arbitration proceedings have had at least one foreign party. Important foreign companies include arbitration clauses under our rules in their agreements. It is important to notice that our data is in accordance with surveys recently carried out in other Latin American institutions, demonstrating the development of arbitration in the continent. In other words, those numbers are the ultimate evidence that foreign parties have sufficient confidence in such institutions to sign agreements containing arbitral clauses under their rules.

Despite these optimistic numbers, it is important to bear in mind that there is still space for growth. A relevant share of the Latin American arbitration market still belongs to traditional institutions. Also, there are specific areas in which arbitration is embryonic, such as arbitration with the public administration or in consumer relations. As such, it is possible to conclude that local arbitral institutions from Latin America have grown significantly but that many obstacles must be faced for them to achieve their full potential.

President of the Arbitration and Mediation Centre of the Canada-Brazil Chamber of Commerce

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US & International Arbitration

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Summary

INCREASING CERTAINTY FOR ARBITRATION IN US COURT

Major decisions by US courts this year strengthened their support of international arbitration and provided clearer standards for practitioners and parties.

In overturning a 2012 decision by the US Court of Appeals for the District of Columbia Circuit in*BG Group plc v Republic of Argentina*, the US Supreme Court held that it is for arbitrators, not courts, to interpret and apply procedural preconditions to arbitration, and that treaties, as contracts between nations, are to be interpreted by US courts no differently than ordinary contracts. The Supreme Court's decision eased the widespread criticism and concern evoked by the DC Circuit's decision, which had held that interpretation and application of the pre-arbitration local litigation requirement in the UK–Argentina bilateral investment treaty was a matter for the courts to review de novo. It also reaffirmed the line of Supreme Court precedent establishing that questions of procedural arbitrability are primarily for the arbitrators to determine. This first-ever US Supreme Court decision involving an investment treaty brings greater certainty for parties to such treaties and other arbitration agreements, but left open the question, applicable in the treaty context, of how to interpret explicit references to 'conditions of consent' to arbitration.

Two decisions by the US District Court for the Southern District of New York considered the question of what circumstances constitute 'violations of basic notions of justice' by a foreign court, which would permit a US court to enforce an arbitration that has been annulled or set aside in its primary jurisdiction. The two cases, *Corporación Mexicana de Mantenimiento Integral, S De RL De CV v Pemex-Exploración y Producción* and *Thai-Lao Lignite (Thailand) Co, Ltd & Hongsa Lignite (Lao PDR) Co v Government of the Lao People's Democratic Republic*, reached opposite outcomes in a matter of months. However, together the two decisions provide detailed guidance for application of the 'basic notions of justice' standard, espoused by US federal appellate courts.

BG GROUP AND THE QUESTION OF WHO DECIDES THRESHOLD QUESTIONS

The line of precedent leading to the US Supreme Court's decision: AT&T Technologies, First Options, John Wiley and Howsam

The US Supreme Court's decision in BG Group is the latest in a line of cases, dating from 1986, that addresses the allocation of responsibility between judges and arbitrators to decide threshold questions to arbitration, sometimes called 'questions of arbitrability'.

In the context of a motion to compel arbitration, the Supreme Court in ***AT&T Technologies, Inc v Communications Workers of America*** articulated the now well-known rule that 'Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'[1] Then, in ***First Options of Chicago, Inc v Kaplan***, the Court set forth the standards to be used by US courts when reviewing arbitrator decisions on arbitrability: if the parties to the arbitration agreement agreed to submit the question to arbitration, the reviewing court 'should defer to the arbitrator's arbitrability decision'; if they did not, then the reviewing court 'should decide the question independently.'[2]

In ***John Wiley & Sons, Inc v Livingston***, the employer argued that arbitration should not be compelled because the employee had failed to comply with required pre-arbitration grievance procedures.[3] The Court held that '"procedural" questions which grow out of the

dispute and bear on its final disposition' – such as the procedural prerequisites to arbitration at issue in the case – 'should be left to the arbitrator', while substantive questions of arbitrability were for the court.[4] The Supreme Court further clarified this rule in ***Howsam v Dean Witter Reynolds, Inc***. Dean Witter sought to enjoin arbitration on the basis that the statute of limitations in the arbitration agreement had expired.[5] In holding that this matter was for the arbitrator, the Court explained that a 'potentially dispositive gateway question' is not always a true 'question of arbitrability' for courts to decide.[6] Rather, such a question of arbitrability exists 'in the kind of narrow circumstance 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'.[7] Accordingly, gateway questions such as whether the parties are bound by an arbitration clause, or whether a valid arbitration clause applies to a particular dispute, are presumptively for the court.[8] Gateway procedural disputes, such as questions of waiver, delay, time limits, notice, laches and estoppel, are presumptively for the arbitrator.[9]

The BG Group Decisions

The dispute in ***BG Group v Argentina*** involved a local court litigation requirement in the 1990 Agreement for the Promotion and Protection of Investments between the United Kingdom and Argentina (UK–Argentina BIT). Article 8 of the treaty requires the parties to an investment dispute to submit the dispute to a local court in the country in which the investment was made and then wait 18 months before initiating arbitration, unless they agreed to proceed directly to arbitration.[10]

In the early 1990s, BG Group, a UK company, belonged to a consortium that bought a majority interest in an Argentine gas distribution company, MetroGAS. Pursuant to a 1992 law privatising Argentina's state-owned gas utility and distributing its assets, MetroGAS held a 35-year exclusive licence to distribute natural gas in Buenos Aires. The consortium of which BG Group was a part was the successful bidder in the international public tender for the controlling interest in MetroGAS. Contemporaneously enacted statutes provided that Argentine regulators would calculate gas tariffs in US dollars, and that the tariffs would be set at levels sufficient to assure gas distribution firms a reasonable return. However, in 2002 and 2003, in the context of Argentina's economic crisis, Argentina enacted new laws changing the basis for calculating gas tariffs from dollars to pesos, which had the effect of reducing the rate from one to three pesos per dollar. As a result, MetroGAS began to experience losses.[11] At the same time, Argentina enacted several measures restricting access to its courts by companies that were affected by these changes. It established a 'renegotiation process' for public service contracts and barred from participation in that process firms that were litigating against Argentina, and Argentina's president issued a decree staying for 180 days the execution of courts' final judgments in suits claiming harm as a result of the new economic measures.[12]

In 2003, BG Group invoked article 8 of the UK–Argentina BIT and sought arbitration before an ad hoc tribunal under the UNCITRAL Rules. It claimed expropriation and denial of fair and equitable treatment.[13] In addition to denying the claims, Argentina argued that the tribunal lacked jurisdiction to hear the dispute, on the basis, inter alia, that BG Group had initiated arbitration without first litigating its claim in Argentina's courts.[14] In December 2007, the arbitration tribunal held that it had jurisdiction because Argentina's own conduct

had waived or excused BG Group's failure to comply with the local litigation requirement. Although the measures enacted by Argentina in 2002 did not make local litigation impossible, they significantly 'hindered' recourse 'to the domestic judiciary', so that requiring BG Group to seek relief in Argentina's courts for 18 months in those circumstances would lead to 'absurd and unreasonable result[s]'.[15] The tribunal awarded BG Group US$185 million in damages on its fair and equitable treatment claim.[16]

In March 2008, Argentina filed a petition in the US District Court for the District of Columbia to vacate the award on the ground that the arbitrators lacked jurisdiction and thus exceeded their powers. BG Group cross-moved to confirm the award. The district court denied Argentina's petition and confirmed the award.[17]

In a controversial decision, on appeal, the US Court of Appeals for the District of Columbia Circuit reversed and ordered the arbitration award vacated.[18] Relying on ***AT&T Technologies***, ***First Options*** and ***Howsam***, the court found that the case presented a 'prime example' of a situation in which the parties would likely have expected a court to decide the question of arbitrability – in large part because 'the gateway provision itself is resort to a court'.[19] The court bypassed entirely the presumptions articulated in ***John Wiley*** and ***Howsam***, restricting them to the facts and contexts of those cases.[20] Examining the treaty text de novo, the appellate court found it clear that the dispute was not arbitrable because BG Group had not complied with the local litigation requirement, and it vacated the award. The court did not consider BG Group's arguments that Argentina's actions that 'hindered' access to the courts waived the treaty's local litigation requirement.[21]

As we observed in our article two years ago, the DC Circuit's decision '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'.[22] In 2013, the US Supreme Court granted certiorari, 'Given the importance of the matter for international commercial arbitration'.[23]

In a seven-to-two opinion issued in May 2014, the Supreme Court reversed the appellate decision, and reaffirmed and clarified the presumptions set forth in ***John Wiley*** and ***Howsam***. The Court stated that if the arbitration agreement is silent on who determines threshold questions, courts presume that the parties intend them to decide 'disputes about "arbitrability"' (ie, the scope and enforceability of the arbitration clause). However, the parties intend the arbitrator to decide 'disputes about the meaning and application of particular procedural preconditions for the use of arbitration'.[24]

The Court held that the local litigation requirement at issue was a 'purely procedural precondition to arbitrate', because 'It determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all'.[25] In other words, the provision was 'a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute'.[26] As a result, it was 'highly analogous' to other procedural provisions that the Court had previously found were primarily for the arbitrators to interpret and apply.[27]

- The Supreme Court also held that the UK–Argentina BIT did not contain sufficient evidence to overcome the presumption that the parties intended the arbitrators to determine the applicability of the local litigation requirement. Indeed, the evidence was to the contrary:
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the treaty did not state that the provision operated as a 'substantive condition on the formation of the arbitration contract';

- 'International arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations regarding the operation of the provision'; and
- the treaty authorised resort to ICSID and UNCITRAL, the rules of which authorise arbitrators to determine their own jurisdiction and competence.[28]

In the decision, the Supreme Court also established the rule that international investment treaties are to be interpreted in the same manner as ordinary contracts, including application of the same presumptions. In doing so, the Court did not accept the US Solicitor General's view that a local litigation requirement could be a condition on the state's consent to enter into the treaty and that, in those circumstances, the Court should review de novo the arbitrators' decision on whether the investor had complied with the condition.[29] The Court accepted that the 'consent' label could have a non-conclusive bearing on whether the parties intended the threshold matter to be decided by a court or the arbitrator, but it left the ultimate determination to another day because the UK–Argentina BIT did not state that the local litigation requirement was a condition of consent to arbitration.[30] The Court limited its decision to holding that 'in the absence of explicit language in a treaty demonstrating that the parties intended a different delegation of authority, our ordinary interpretive framework applies'.[31]

Having determined that the interpretation and application of the local litigation requirement was primarily for the arbitrators, the Court upheld the tribunal's decision following a 'highly deferential' review.[32] Although the Court 'would not necessarily characterise [Argentina's] actions as rendering a domestic court-exhaustion requirement "absurd and unreasonable"', it '[could] not say that the arbitrators' conclusions [were] barred by the Treaty'.[33]

The Supreme Court's decision in ***BG Group*** thus reaffirms and clarifies the framework for allocating responsibility between judges and arbitrators to decide 'threshold questions', and largely puts to rest the concerns over the finality and enforceability of arbitration awards engendered by the DC Circuit's 2012 decision in the case. It remains for a future case to be seen what impact, if any, the 'conditions of consent' label will have on US courts' assessment of treaty provisions addressing issues of procedural arbitrability.

ENFORCEMENT OF AN ANNULLED AWARD: CLARIFICATION OF THE 'VIOLATION OF BASIC NOTIONS OF JUSTICE' STANDARD

Questions about the finality of arbitration awards in US courts also arise in the context of petitions to confirm or enforce awards that have been set aside or annulled in the country in which the award was made or under the laws of which the award was made (the award's 'primary jurisdiction'). Article V(1)(e) of the New York Convention provides that recognition and enforcement of an arbitration award 'may be refused' by courts in other contracting states (the award's 'secondary jurisdictions') if the award has been set aside or suspended by a 'competent authority' in the primary jurisdiction.[34] This provision of the New York Convention recognises the 'generally accepted principle that courts in the country of origin have exclusive competence to decide on the setting aside of an award',[35] and the understanding that they may do so 'in accordance with [the country's] domestic arbitral law and its full panoply of express and implied grounds for relief'.[36]

Consistent with these principles, US federal appellate courts have developed a line of precedent holding that an annulment decision of the court in the primary jurisdiction will generally be honoured, so that an annulled award will not be enforced in US courts. The party seeking enforcement of an annulled award must show 'adequate reason' for refusing to recognise the judgment,[37] and 'extraordinary circumstances' must be present.[38] At the same time, US appellate courts have recognised that an annulled award may be enforced when the annulment decision 'violate[s] ... basic notions of justice'.[39]

Two recent decisions – both in the US District Court for the Southern District of New York (the SDNY District Court) – applied this standard and reached different outcomes. On inspection, however, it is apparent that the opposing outcomes turned on the markedly different facts of the two cases and that the application of the standard was consistent.

The Line Of Precedent: Chromalloy, Baker Marine And TermoRio

In the first reported decision addressing a petition to enforce an arbitration award that had been annulled in its primary jurisdiction, the US District Court for the District of Columbia in 1996, in ***Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corp v Arab Republic of Egypt***, enforced the award, even though the Egyptian Court of Appeal had suspended it.[40] The district court found that Egypt had repudiated its promise that the arbitral tribunal's decision 'shall be final and binding and cannot be made subject to any appeal or other recourse', and reasoned that recognising the decision of the Egyptian court would violate the clear US public policy in favour of final and binding arbitration of commercial disputes.[41]

After ***Chromalloy***, the US Court of Appeals for the Second Circuit, in ***Baker Marine (Nig) Ltd v Chevron (Nig) Ltd***, affirmed the district court's refusal to enforce two awards that had been issued in Nigeria and then annulled by the Nigerian courts, notwithstanding that the awards had been set aside on grounds not recognised by US arbitration law.[42] The court explained that Baker Marine had not argued that the Nigerian courts had acted contrary to Nigerian law and had not otherwise shown 'adequate reason' for refusing to enforce the judgments.[43] The Second Circuit distinguished ***Chromalloy*** on the basis that recognition of the Nigerian judgment did not conflict with US policy, in part because Chevron had not violated any promise by appealing the arbitration award in Nigeria.[44]

Subsequently, in ***TermoRio SA ESP v Electranta SP***, the US Court of Appeals for the District of Columbia Circuit clarified that 'normally' a court in a secondary jurisdiction 'may not enforce an arbitration award that has been lawfully set aside by a "competent authority" in the primary Contracting State'.[45] The appellate court affirmed the district court's refusal to enforce an award between TermoRio and a Colombian public utility company that had been set aside by Colombia's highest administrative court on the basis that the arbitration clause violated Colombian law.[46] The DC Circuit found nothing in the record indicating that the proceedings in Colombia 'were tainted or that the judgment of that court is other than authentic', and explained that enforcing the award 'would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made'.[47] The court found ***Chromalloy*** readily distinguishable, because Electranta had preserved and properly raised its objection to the award in the Colombian courts and had received a definitive ruling by the highest court in that country. At the same time, the DC Circuit recognised a 'narrow public policy gloss' on article V(1)(e), so that an annulled award may be enforced where the annulment decision is 'repugnant to fundamental notions

of what is decent and just in the United States' or 'violate[s] any basic notions of justice to which we subscribe'.[48]

COMMISA V Pemex

In *Corporación Mexicana de Mantenimiento Integral, S De RL De CV v Pemex-Exploración y Producción*, the SDNY District Court took the uncommon step of exercising its discretion under the Panama Convention to confirm an arbitration award that had been annulled in its primary jurisdiction of Mexico on the basis that the annulment of the award violated fundamental principles of justice.[49] Like the New York Convention, article 5.1(e) of the Panama Convention provides that the recognition and execution of a foreign arbitral award 'may be refused' if that award has been nullified 'by a competent authority of the State in which, or according to the law of which, the decision has been made'.[50]

The underlying disputes concerned two contracts for the building and installation of natural gas platforms in the Gulf of Mexico, between Corporación Mexicana de Mantenimiento Integral, S de RL de CV (COMMISA), a Mexican subsidiary of a US corporation, and Pemex-Exploración y Producción (PEP), a subsidiary of Mexico's state-owned oil company.[51] Both contracts contained arbitration agreements made pursuant to Pemex's enabling statute; the enabling statute was passed following the 1994 enactment of the North American Free Trade Agreement (NAFTA), in which Mexico agreed to international arbitration of disputes with the United States and Canada.[52]

In 2004, COMMISA and PEP were unable to resolve disputes over the contracts through conciliation. COMMISA filed a demand for arbitration under the rules of the International Chamber of Commerce (ICC), pursuant to the contract; PEP gave COMMISA notice that it was proceeding by administrative rescission, also pursuant to the contract.[53] COMMISA challenged the administrative rescission in the Mexican courts. In 2006, the Mexican Supreme Court held that administrative rescissions did not violate the Mexican Constitution's guarantee of right of access to the courts because they could be challenged in a timely administrative dispute proceeding.[54]

Meanwhile, the ICC Tribunal was constituted, and it denied several challenges to its jurisdiction entered by PEP.[55] In 2007 and 2009, Mexican law materially changed. One new statute gave exclusive jurisdiction for litigation of issues of compliance with public contracts to the newly created Federal Tax and Administrative Justice Court, and reduced the previously-applicable 10-year statute of limitations to 45 days. A second statute, section 98 of the Law of Public Works and Related Services, provided that administrative rescissions of public contracts could not be subject to arbitration.[56]

In 2009, the ICC Tribunal issued an award worth nearly US$300 million in favor of COMMISA. The Tribunal found that PEP had breached the contracts and that section 98 did not apply, because Pemex's organic law permitted it to enter into arbitrations.[57] COMMISA obtained a judgment in the SDNY District Court confirming the award, and PEP appealed to the US Court of Appeals for the Second Circuit. However, in 2011, on PEP's application, Mexico's 11th Collegiate Court invalidated the arbitration award and held that it violated Mexican public policy, strengthened by section 98, against arbitration of acts of public authority, and that COMMISA should have brought its dispute in the Mexican District Courts for Administrative Matters.[58]

On remand from the Second Circuit, and following three days of expert testimony on Mexican law, the SDNY District Court determined that the annulment decision 'violated "basic notions of justice"' and did not require deference.[59]

The SDNY District Court explained that, as set forth in ***Baker Marine*** and ***TermoRio***, its discretion was narrow, but that this case was 'very different' from those.[60] In this case, COMMISA had every reason to believe, when it initiated arbitration in 2004, that the dispute could be arbitrated, and PEP did not argue otherwise until three years into the arbitration. No source of law in Mexico supported the proposition that the dispute could not be arbitrated until 2009, when section 98 was passed, and the 11th Collegiate Court, while denying that it retroactively applied this law, relied on no other relevant authority. By the time the 11th Collegiate Court had issued its decision, the newly applicable 45-day statute of limitations for COMMISA to challenge the administrative rescission had long passed. In sum, the SDNY District Court enforced the annulled award because the annulling court relied on a law that did not exist at the time of the parties' contract in order to favour a state enterprise over a private party, and it left the prevailing party without a remedy to litigate the merits of the dispute.[61]

Thai-Lao Lignite V Laos

By contrast, in ***Thai-Lao Lignite (Thailand) Co, Ltd & Hongsa Lignite (Lao PDR) Co, Ltd v Government of the Lao People's Democratic Republic***, the SDNY District Court vacated its earlier confirmation of a Malaysian arbitration award that was subsequently set aside by the Malaysian courts, choosing not to exercise its discretion under the New York Convention to enforce the award.[62]

The underlying dispute concerned a project development agreement entered into by Thai-Lao Lignite and Laos for the mining of lignite coal in the Hongsa region of Laos and the operation of lignite-fired electricity generation plants adjacent to the mine for sale of electricity to Thailand. The agreement provided for arbitration of any disputes arising out of the agreement in Kuala Lumpur, Malaysia. Any award by an arbitration tribunal was to be 'final, nonappealable, binding, and conclusive', and the parties 'waive[d] to the extent permitted by law any rights to appeal or any review of such award'.[63]

In January 2010, an arbitration tribunal sitting in Kuala Lumpur awarded Thai-Lao Lignite and Hongsa Lignite US$57 million in damages on the basis that Laos had unlawfully terminated the project development agreement.[64] In 2011, the SDNY District Court confirmed the award and the US Court of Appeals for the Second Circuit affirmed. Meanwhile, in October 2010, Laos initiated proceedings in Malaysia to set aside the award. The High Court of Malaya at Kuala Lumpur initially dismissed the challenge on the basis that it was untimely because it was not filed within 90 days after the award was issued. However, the Malaysian Court of Appeal excused Laos's untimeliness on the basis that it had not received adequate local legal advice, and it remanded the case. The Malaysian High Court then held that the arbitrators had exceeded their jurisdiction by assuming jurisdiction over disputes concerning two contracts into which the parties had entered before the project development agreement, and by admitting and adjudicating claims by non-parties to the project development agreement. The High Court ordered arbitration before a new panel, and the Malaysian Court of Appeal affirmed.[65] Laos then moved in the SDNY District Court to vacate the earlier confirmation of the award under article V(1)(e) of the New York Convention.[66]

In vacating its earlier confirmation of the annulled award, the SDNY District Court found that the errors in the Malaysian proceedings alleged by Thai-Lao Lignite and Hongsa Lignite did 'not rise to the level of violating basic notions of justice', as set forth in ***TermoRio*** and as applied in ***COMMISA v Pemex***.[67] The court rejected a host of factual and legal attacks on the Malaysian proceedings and the judgments of the Malaysian High and Court of Appeals. These included that:

- Laos had commenced a proceeding to set aside the award even though it had waived any rights of appeal or review in the arbitration agreement;
- the Court of Appeals failed to appreciate that two of Laos's attorneys were qualified Malaysian litigators; and
- the High Court had failed to quote an alleged waiver by Laos of its jurisdictional objection.

The SDNY District Court found that:

- the waiver in the arbitration agreement was only 'to the extent permitted by law' and there was evidence that Malaysian law did not permit such a waiver;
- the issue before the Court of Appeal was whether Laos's attorneys had in fact informed it of the limitations period, and not whether they were qualified in Malaysia; and
- the High Court had conducted an extensive waiver analysis.[68]

In sum, no 'extraordinary circumstances' existed in the case. Rather, the award had been set aside in the courts of a neutral, third country mutually chosen by the parties as the seat of arbitration, on the universally recognised ground that the arbitrators had exceeded their jurisdiction. Moreover, this decision did not leave the parties that had prevailed in the award without a remedy.[69] The SDNY District Court in ***Thai-Lao Lignite v Laos*** expressly distinguished ***COMMISA v Pemex***.[70] Taken together, the two decisions provide concrete guidance as to the application of the 'basic notions of justice' standard in the context of a petition to enforce an annulled arbitration award.

CONCLUSION

With important recent decisions by the US Supreme Court in ***BG Group v Argentina*** and the US District Court for the Southern District of New York in ***COMMISA v Pemex*** and ***Thai-Lao Lignite v Laos***, US courts offer parties to arbitration disputes greater certainty in three significant areas:

- the allocation of responsibility between judges and arbitrators for questions of arbitrability;
- the interpretation of bilateral investment treaties; and
- courts' discretion to enforce annulled arbitration awards on the basis of 'violations of basic notions of justice' by the annulling court.

These decisions should allay any concerns over US courts' earlier decisions on these subjects and continue to promote the United States as a robust and predictable arbitration jurisdiction.

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Notes

1. 475 US 643, 649 (1986).
2. 514 US 938, 938 (1995).
3. 376 US 543, 555-56 (1964).
4. Id at 555-59.
5. 537 US 79, 81-82 (2002).
6. Id at 83.
7. Id at 83-84.
8. Id at 84.
9. Id at 84-85.
10. ***BG Group plc v Republic of Argentina***, 134 S Ct 1198, 1203 (2014); see Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, article 8(1)-(2), 11 December 1990 (requiring submission of disputes 'to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made', and providing for arbitration '(a)(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal [...] the said tribunal has not given its final decision; [or] (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute', or '(b) where the Contracting Party and the investor of the other Contracting Party have so agreed'.
11. ***BG Group***, 134 S Ct at 1204.
12. Id at 1205.
13. ***BG Group plc v Republic of Argentina***, UNCITRAL, Final Award, 24 December 2007; BG Group, 134 S. Ct. at 1204.
14. ***BG Group***, Final Award paras 140-41; ***BG Group***, 134 S Ct at 1204.
15. ***BG Group***, Final Award para 147; ***BG Group***, 134 S Ct at 1204-05.
16. ***BG Group***, Final Award paras 310, 444; see 134 S Ct at 1205.
17. ***Republic of Argentina v BG Group plc,*** 764 F Supp 2d 21 (DDC 2011).
18. 665 F.3d 1363 (DC Cir 2012).
19. Id at 1371 (emphasis in original).
20. Id at 1372 & n.6.
21. Id at 1373.
22. Catherine M Amirfar and David W Rivkin, 'Who Decides Arbitrability? A Resurgence of the Debate in the United States', ***The Arbitration Review of the Americas 2013***, Global Arbitration Review, at 17.
23. ***BG Group***, 134 S Ct at 1205.
24. Id at 1206-07.

25. Id at 1207 (emphasis in original).
26. Id.
27. Id.
28. Id at 1210.
29. Id at 1208.
30. Id at 1208-09.
31. Id at 1209.
32. Id at 1212-13.
33. Id at 1213.
34. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, article V(1)(e).
35. Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award Be Abolished?', 29(2) *ICSID Review* 263, 266 (2014).
36. *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us, Inc*, 126 F3d 15, 23 (2d Cir 1997).
37. *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*, 191 F.3d 194, 197 (2d Cir 1999).
38. *TermoRio SA ESP v Electranta SP*, 487 F.3d 928, 938 (DC Cir 2007).
39. Id at 939.
40. 939 F Supp 907 (DDC 1996). For a full discussion of the case and related precedents, see David W Rivkin, 'The Enforcement of Awards Nullified in the Country of Origin: The American Experience', ICCA Congress Series No. 9 (Kluwer 1998), pp 528-543.
41. Id at 912-13.
42. *Baker Marine (Nig) Ltd*, 191 F.3d at 196-97.
43. Id at 197.
44. Id at 197 n. 3.
45. *TermoRio*, 487 F.3d at 935.
46. Id at 929-31.
47. Id at 930, 936.
48. Id at 939.
49. 962 F Supp 2d 642 (SDNY 2013).
50. Inter-American Convention on International Commercial Arbitration, Jan 30, 1975, article 5.1(e).
51. *COMMISA*, 962 F Supp at 644-45.
52. Id at 645.
53. Id.
54. Id at 646.
55. Id at 647.
56. Id at 647-48.

57. Id at 648.
58. Id at 650-51.
59. Id at 657.
60. Id at 660.
61. Id at 643-44, 658-61.
62. *Thai-Lao Lignite (Thailand) Co, Ltd & Hongsa Lignite (Lao PDR) Co, Ltd v Government of the Lao People's Democratic Republic*, No. 10-CV-5256 (KMW) (DCF), 2014 WL 476239 (SDNY 6 February 2014).
63. Id at *1.
64. Id.
65. Id *2.
66. Id *3.
67. Id *7.
68. Id *9-11.
69. Id *11-12.
70. Id *11

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Economic Damages

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Summary

THE PERILS OF USING MARKET-BASED DATA IN BUSINESS VALUATION AND DAMAGES QUANTIFICATION

Many cases that require the quantification of economic damages include a valuation component. In determining the fair market value of a business interest, it is generally appropriate to consider market-based data, either in the primary valuation or as a supporting methodology. However, while the market-based approach has several benefits, it relies on a number of implicit assumptions which, if not addressed properly, can result in incorrect or misleading results. The focus of the market-based approach is 'price' as opposed to 'value'. It assumes that the market prices assets accordingly. Awareness of the limitations of market-based data will benefit counsel in reviewing expert reports and in cross-examination.

INTRODUCTION

There are two primary valuation approaches employed in determining the value of a business that is expected to operate as a going concern: the income-based approach and the market-based approach.[1] The income-based approach calculates value based on the present value of expected future cash flows; the most widely used income-based approach is the discounted cash flow (DCF) methodology. In contrast, the market-based approach calculates value with reference to assets that are similar to the subject asset. The most popular market-based approaches consider either comparable publicly listed companies or historical transactions that involve comparable companies.

Using market-based data to ascertain value has obvious benefits. First, the data generally represents the price that the market would bear for an asset with certain characteristics, and therefore it is conceptually easy to defend. Second, there is evidence suggesting that market participants act based on market-based data. While they consider future cash flows, they judge whether an asset is under or overvalued by reference to market-based approaches.[2] Finally, the key strength of the market-based approach is that it is relatively straightforward to apply and understand. For these reasons, it is widely applied in valuation and quantification of economic losses.

While the market-based approach has its strengths, it relies on numerous implicit assumptions. These assumptions, often glossed over, may have a significant impact on the valuation conclusion.

The importance of addressing the assumptions increases with the emphasis placed on the results of the approach; that is, in cases where the market-based approach is used as the primary valuation methodology, an in-depth assessment of each comparable is likely necessary. There is always a cost–benefit trade-off to conducting an in-depth analysis, and the valuator must use his or her judgement to ensure that an appropriate level of due diligence has been conducted in each case.

GENERAL OVERVIEW OF MARKET-BASED APPROACH

The market-based approach is a relative valuation; value is determined with reference to how similar assets are priced in the marketplace. For example, a prospective purchaser of a condominium may determine the price that he or she is willing to pay for a particular unit by reference to historical sales of other condominium units. This application of the market-based approach in this situation involves the following three steps:

-

Identify a universe of comparable assets. In this example, the purchaser may consider transactions that involve units in the same condominium complex or in the same neighborhood. In the valuation of a business, the valuator may consider businesses in the same industry to be comparable.

- Translate market data into a valuation benchmark (or 'multiple') and apply it to the subject asset. A valuation benchmark typically depends on a characteristic common to both the subject asset and comparable asset. There must be a strong correlation between this characteristic and value. In our example, it is reasonable to assume that, all else being equal, a larger condominium would sell at a higher price than a smaller condominium; therefore, a reasonable valuation benchmark would be the price per square foot. In the valuation of a business, common benchmarks include price-to-earnings, enterprise value[3] to EBITDA,[4] or an industry-based metric, such as enterprise value per room in the hotel industry and enterprise value per ton of resource or reserve in the mining sector.
- Make adjustments for any differences between the comparable asset and the subject asset. Suppose that the subject condominium had significant upgrades (such as new appliances or flooring) relative to the comparable units. This difference would have to be accounted for in the valuation analysis. With businesses, differences in competitive advantage, growth prospects and geographical market may be accounted for if necessary.

By way of a numerical example, if comparable condominium sales indicated a range of US$450 to US$500 per square foot, one would expect to pay US$450,000 to US$500,000 for a 1,000-square-foot condominium (ie, the subject asset). Any additional amenities applicable to the subject asset would command a higher premium (ie, valued separately) or justify a price at the top of the range.

Clearly, the market-based valuation approach relies on the ability to identify assets that are comparable to the subject asset and, if possible, quantify any differences between the comparable and subject assets.

WHAT IS A 'COMPARABLE' COMPANY?

Risks, Cash Flows And Growth

The market-based approach assumes that the risks and growth prospects associated with the future cash flows of the comparable companies are representative of those of the subject company. Generally, valuators will use companies in the same industry as the subject company as a proxy for the risks associated with the subject company. The valuator may also consider size, geographical markets, nature of products and services, and financial leverage in determining whether a firm is comparable to the subject company. In practice, it is difficult to find companies that are truly 'comparable' to the subject company. This is particularly true of industries with few participants and those that are isolated to certain geographic regions, such as developing countries.

Accounting Policies

Inconsistencies in accounting practices among various companies further compound the comparability issue, particularly when applying a valuation benchmark based on revenues or earnings (such as price-to-earnings or enterprise value to EBITDA). The implicit assumption in the market-based approach is that accounting policies of comparable companies are consistent with those of the subject company. However, this is seldom the case. Even if the

companies follow the same set of accounting rules (ie, GAAP, IFRS), accounting policies by their nature provide some degree of flexibility in order to allow management to account for increasingly complex business transactions. One firm may, for example, recognise revenue more aggressively than its peers or capitalise certain expenditures rather than expense them and still be in accordance with the same accounting standards. Differences in accounting policies may be dealt with by way of adjustment or by using a larger sample of comparable companies.

Arbitral Tribunals On The Lack Of Comparability

Arbitral tribunals have considered the lack of comparability in their assessment of damages. In *CMS Gas Transmission Company v The Argentine Republic* (*CMS Gas Transmission Company*), the tribunal accepted the use of the DCF over the market-based approach.[5] In doing so, it was noted that there were 'significant differences' between TGN (the subject asset) and the three companies put forward by the respondent's expert as comparable with respect to 'asset levels, business segments, financing policy, and other issues'.[6]

In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* (*Occidental Petroleum Corporation*), it was the tribunal's view that the DCF 'is the most widely used and generally accepted method in the oil and gas industry for valuing sales or acquisitions'.[7] The tribunal adopted the claimants' expert's view that the use of a comparable company transaction method was not appropriate in that case because 'each oil and gas property presents a unique set of value parameters: size, quality of oil, type of contractual relationship, environmental or remedial obligations'.[8]

As arbitral tribunals have recognised, there is an inherent difficulty in identifying proper comparable companies in applying the market-based approach. This discussion of comparability applies to any market-based valuation methodology.

COMPARABLE PUBLIC COMPANIES METHOD

Price V Value And Efficient Market Hypothesis

The comparable public companies methodology derives one or more valuation benchmarks by reference to the stock price of a comparable company.[9]

An implicit assumption in this approach is that a company's stock price is representative of its fair market value –[10] in other words, that the market has reasonably 'priced' the stock in relation to its value at a point in time. Economists generally refer to this as 'efficient market hypothesis'. In reality, market prices are volatile and may fluctuate in the short-term as a result of factors such as changing investor sentiment, news releases, 'day trading' and the activity of large institutional investors. The market price of a security may also fluctuate relative to changes in the overall market – such as in the event of a 'crash' or 'boom'. Accordingly, while the price of a security may revert to its value in the longer term, the two may be disparate when considered as at a point in time.

In cases where a security is thinly traded, the stock price may not be reflective of fair market value, and as such, a seller may face a discount or premium to the listed share price when liquidating their interest.[11] Similarly, in cases where a particular company has a relatively small market capitalisation or there is little interest shown by large institutional investors and analysts, the seller of a large block of shares may experience a discount to the stock market price upon liquidation.[12]

Tribunals And Experts On Price V Value

In *CMS Gas Transmission Company*, the comparable public companies put forward by the respondent's expert were listed on the Argentine stock exchange.[13] In rejecting the comparable public companies method in favour of the DCF, the tribunal considered that the 'market capitalization in illiquid markets [such] as Argentina is not the most adequate method to value companies'.[14]

In *CME Czech Republic B V (The Netherlands) v The Czech Republic*, the subject asset was an equity interest in a Czech television services company; the valuation date was 5 August 1999.[15] The claimant's expert tested his DCF valuation through the use of a comparable companies approach, based on the average enterprise value to EBITDA ratios of 29 broadcasting companies in the United States, Europe and Asia in 1998.[16] The respondent's expert criticised the analysis for being 'backward looking', as it predated the valuation date.[17] Further, the comparable companies used in the analysis included major Western European broadcasters; the respondent's expert contended that capital markets in Eastern and Central Europe do not value broadcasters based on the same trading multiples.[18] While the criticisms of the claimant's expert evidence appear to be valid based on how it was described in the Award, the tribunal did not address the market-based approach in their ruling on damages.

Overall, stock prices may not be representative of fair market value. The difference between price and value tends to be more obvious in cases where liquidity issues – pertaining either to the individual security at hand or to the entire market – are present.

COMPARABLE COMPANY TRANSACTIONS METHOD

The comparable company transactions methodology derives one or more valuation benchmarks by reference to transactions involving comparable companies. In order for a transaction to be useful to the valuation analysis, it should:

- relate to a comparable company;
- meet the definition of value;
- represent intrinsic value (ie, rather than including synergies); and
- be at or around the notional valuation date.

Does The Transaction Reflect Fair Market Value?

Application of the comparable company transactions valuation method implies that the consideration in a historical transaction involving a comparable company was representative of its fair market value. To illustrate why this may not be the case, one can refer to the following definition of fair market value:

> the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.[19]

The elements of an open market transaction may differ – at times significantly – from the definition of fair market value in a notional valuation. Consider each of the elements of the fair market value definition above:

- Expressed in terms of cash. Open market transactions frequently include some non-cash component as consideration such as debt, shares, and earn-out arrangements. In these cases, consideration should be adjusted to reflect its equivalent cash value (which may require assumptions).
- Acting at arm's length. In open market transactions, vendors and purchasers may not be dealing at arm's length. This may shift consideration in favour of one party.
- Open and unrestricted market. Legal and contractual obligations may restrict the sale of assets or shares. For example, shareholders' agreements may give other shareholders the right of first refusal or otherwise require their approval for the sale of shares. In some industries, government approval is required for a change in ownership or control. A prospective purchaser may pay less due to such restrictions because they tend to reduce the liquidity of their shares.
- Under no compulsion to act. Market participants may be compelled to act. For example, a company experiencing financial difficulty may be compelled to sell and thus be willing to accept a price that is lower than fair market value for its assets or shares. In contrast, a buyer that is growing by acquisition may be compelled to buy and pay a premium above fair market value.
- Informed and prudent parties. In the open market, there may be an information asymmetry amongst parties that transact. For example, the seller of a business generally has more information about factors that may affect price than the buyer does. This phenomenon exists for both private and public companies. Additionally, actors driving open market transactions may not act prudently.

In reality, an open market transaction may contain one or more of the elements above that may preclude it from meeting the definition of fair market value. It is generally up to the judgement of the valuator to determine the extent to which these factors may have caused the consideration to deviate substantially from fair market value. Often the ability of the valuator to determine whether a transaction is useful is limited by the available information since transaction details are seldom publicly available.

ARBITRAL TRIBUNALS ON FAIR MARKET VALUE

In the context of treaty arbitration, tribunals tend to consider the various components described above. For example, in ***CME Czech Republic B V (The Netherlands) v The Czech Republic***, in considering whether an offer to purchase the asset met the definition of fair market value, the tribunal considered 'arm's-length negotiations' in addition to a valuation and due diligence report to support the purchase price.[20] In ***Tecnicas Medioambieltales Tecmed SA v The United Mexican States***, the tribunal considered that a price obtained in a public tender is an efficient manner to determine the price (which it later considered to be the value) of the assets.[21]

In ***Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt***, the claimants relied on transactions and offers involving shares of the subject company as benchmark transactions.[22] The tribunal stated that 'the purchase and sale of an asset between a willing buyer and a willing seller should, in principle, be the best indication of the value of the asset',

especially in the case of a 'perfectly competitive market having many buyers and sellers in which there are no external controls or internal monopolistic arrangements'.[23] However, the tribunal ultimately did not accept the share transactions as benchmarks because 'there was a very limited number of transactions and there was no market as such for the shares that were sold' and 'the price at which the shares were sold was privately negotiated'.[24]

SPECIAL INTEREST PURCHASERS

'Special interest' purchasers further complicate open market transactions. Special interest purchasers may be willing to pay an amount over and above the intrinsic value of the business. In exchange for the additional consideration, buyers hope to increase future cash flows, decrease risk, or create new growth opportunities over and above that of the individual entities. Synergies are difficult to identify and compute; generally, the purchaser is in a better position to identify and quantify post-acquisition synergies. To the extent that a comparable company transaction includes consideration for post-acquisition synergies, this may result in an over-valuation of the subject company.[25]

TIMING OF COMPARABLE TRANSACTIONS

Timing is important when applying the comparable transactions approach because transactions rarely fall on the same day as a notional valuation date. Fair market value exists as at a point in time; expectations of market participants regarding relevant economic, industry or business factors may differ significantly at various points in time. Therefore, even if the price of a transaction is equal to its value, that value may not be representative of value at another point in time, particularly if a significant amount of time has elapsed or if the pace of change in the industry is rapid.

Arbitral Tribunals On Timing

Experts should consider timing and relevant trends (and their impact on changes in price/value over time) in their application of this valuation approach. This is particularly important in the resource sector, where expectations of future commodity prices may be vastly different at the date of the transaction and at the valuation date. In the ***Occidental Petroleum Corporation*** case, the tribunal adopted the claimant's expert's view that 'there is also the difference in oil prices which, the claimants submit, can make the comparable [transaction] unreliable'.[26]

When applying the comparable company transaction method in the context of an economic damages analysis, it is important to consider the extent to which the comparable transaction price is affected by or incorporates the measures that form the basis of the complaint in the litigation or arbitration. In the ***Occidental Petroleum Corporation*** case, the tribunal concluded that a transaction involving the subject asset was executed at a time when the caducidad, or termination of a participation contract (ie, the subject of the arbitration), was under consideration by the Ecuadorian authorities.[27] An award of damages based on a valuation that incorporates the alleged wrongdoing would generally be unfairly punitive to the plaintiff or claimant.

CONCLUSION

The market-based approach can be useful in that it provides a representation of the price that market participants are willing to pay for a particular asset. It is a highly relevant valuation method either on a stand-alone basis or in the corroboration of a conclusion from another valuation approach. The approach tends to be credible in cases where actual

comparable companies can be identified. While it is practical and easily understandable, its straightforward nature is at times deceptive. As explained in this article, there are several implicit assumptions in the market-based approach – that companies are comparable, that stock prices represent value at a point in time, that transaction prices represent value as at the valuation date – which, if not properly considered and addressed, may skew the valuation conclusion. Overall, market-based data represents price as opposed to value; for the reasons discussed, consideration of this distinction is critical in formulating an overall valuation conclusion, as markets are not always efficient in reality.

The onus is on the expert to be cognisant of and properly address the various nuances of the market-based approach. He or she should know how and when it is appropriate to use the approach because it may be used as a primary or secondary valuation methodology. Finally, with the increasing sophistication of tribunals and courts, it is important that counsel is also aware of both the strengths and the inherent limitations of market-based data and its place in the quantification of economic damages.

Notes

1. In this article, I do not discuss other going-concern valuation approaches, such as the asset-based approach.
2. Aswath Damodaran, ***Damodaran on Valuation***, 2nd ed, p. 234.
3. Enterprise value is the total value of the business, including its interest-bearing debt and equity components.
4. Earnings before interest, tax, depreciation and amortisation.
5. CMS Gas Transmission Company, ICSID Case No. ARB/01/08, Award (12 May 2005), para. 411.
6. Ibid, para. 412.
7. ***Occidental Petroleum Corporation***, ICSID Case Number ARB/06/11, Award (5 October 2012), para. 779.
8. Ibid, paras. 781 and 787.
9. In applying this approach, the stock price is generally used to determine the total equity value or the enterprise value or both.
10. It is believed by some that publicly traded stocks may include a minority discount (ie, to reflect the fact that the normal trading block of shares would not have the ability to unilaterally control the enterprise) or a premium associated with increased liquidity (ie, over and above that of shares of a private company) or both. I do not address these topics in this article.
11. In the case of a thinly traded security, there are relatively few transactions between buyers and sellers, and as such, the fair market value of the security may be higher or lower than its quoted price.
12. Ian R Campbell and Howard E Johnson, ***The Valuation of Business Interests*** (Canadian Institute of Chartered Accountants, 2001), p. 10.
13. ***CMS Gas Transmission Company***, supra note 5, para. 412.
14. Ibid.
15.

CME Czech Republic B V (The Netherlands) v The Czech Republic (UNCITRAL), Final Award (14 March 2003), paras. 4 and 97 [*CME v Czech Republic*].

16. Ibid, para. 166.
17. Ibid, para. 367.
18. Ibid.
19. Definition per the Canadian Institute of Chartered Business Valuators. This definition is consistent with International Valuation Standards (2013) definition of 'fair value', which is 'the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties.'
20. *CME v Czech Republic*, supra note 15, para. 514.
21. *Tecnicas Medioambieltales Tecmed SA v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 191.
22. *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits (20 May 1992), para. 192.
23. Ibid, para. 197.
24. Ibid.
25. Assuming that a prospective acquirer of the subject company would not expect similar post-acquisition synergies the purchasers in the comparable company transactions.
26. *Occidental Petroleum Corporation*, supra note 7, para. 781.
27. Ibid, para. 786.

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Argentina

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Summary

In past contributions to *The Arbitration Review of the Americas* we remarked that it would be important for Argentina to have an updated legislation in order for it to be considered an attractive place of arbitration. Nevertheless, most Argentine courts respect the parties' agreement to arbitrate their disputes and follow the principles of modern arbitration. Even so, certain issues do not have a clear-cut answer, such as whether the Argentine Civil and Commercial Procedural Code (CCPC) admits the annulment recourse against partial awards, and the time limit to apply for it.

In the recent case *Pluris Energy Group Inc (Islas Vírgenes Británicas) y otro c/ San Enrique Petrolera S A y otros*,[1] the Commercial Court of Appeals, Section B (the Court) decided that the time limit to apply for the annulment recourse of the partial award issued on 26 December 2008 (the partial award) had expired, because the recourse was filed after the entry of the final award issued on 4 March 2011 (the final award). The Court considered that the aggrieved party had to apply for the annulment recourse within five working days after receiving notice of the Partial Award, which is the time for filing an annulment recourse against an award under the CCPC,[2] and not afterwards.

Since partial awards are becoming more common in arbitral proceedings as a means of saving time and costs in arbitration (see section a, Appendix IV – Case Management Techniques of the ICC Arbitration Rules,[3] article 34 paragraph 1 and 2 of the UNCITRAL Arbitration Rules),[4] it is of vital importance to have a clear rule on whether they are subject to annulment recourse or not under Argentine law, and the time frame within which the party may apply to the court to annul a partial award.

The Court in *Pluris Enegry Group* provides a clear answer to the issue; however, other courts may decide the issue on the opposite direction.[5] In view of the fact that Argentina does not follow the stare decisis doctrine, the definitive answer must come from the enactment of arbitration legislation.

Meanwhile, a party which seeks to annul a partial award shall have to apply for the recourse within the time limit set forth by the CCPC or the applicable treaty after receiving notice of the partial award. In this case, the worst possible scenario would be that a court may stay its decision until the final award is rendered, if it considers that a partial award is not subject to annulment recourse. Otherwise, the aggrieved party may be losing its right to challenge the partial award.

IS A PARTIAL AWARD SUBJECT TO ANNULMENT RECOURSE UNDER ARGENTINE LAW?

The Pluris Energy Group principle

The CCPC does not provide a definition of an 'award'. Only article 754 of this procedural code refers to the content of the award as follows: 'arbitrators shall render the award on all the claims submitted to their decision... including related issues'.

Argentine scholars define the award as a final decision on the matters of the dispute rendered by an arbitrator or panel of arbitrators, equivalent to a judicial court judgment;[6] but there is no uniform criterion as to whether partial awards are subject to annulment recourse.

On one hand, Rivera explains that although the award is a decision rendered by an arbitrator or panel of arbitrators, not every decision rendered by them is an award. The author makes a distinction between preliminary decisions, partial awards, interlocutory awards, procedural orders and final awards, emphasising the relevance of the decisions that conclude the

arbitral proceeding. Rivera seems to consider that only those awards that conclude the arbitration proceeding are subject to recourse.[7]

On the other hand, Caivano states that the concept of 'final award' includes the definitive decision on 'all' substantial matters submitted to the arbitration (final total award), and the definitive decision on 'some' of the substantial matters (partial final award). And, therefore, he affirms that partial final awards are subject to annulment recourse.[8] The ***Pluris Energy Group*** case shares Caivano's views.

In ***Pluris Energy Group***, Teresa Rosa Giustinian de Malenchini, Roque Malenchini, Fernando Malenchini y San Enrique Petrolera SA (the defendants) applied for annulment recourse against the partial and final award. They also challenged, in a separate motion, the legal standing of ***Pluris Energy Group*** to move forward with the claim based on the breach of a stock purchase agreement executed on 18 August 2006, and its assignment to a third party (the separate motion).

The Court in an elaborated decision summarised some of the principles of modern arbitration (eg, respect for the parties' agreement to submit their disputes to arbitration, court support within the arbitration proceeding, non-judicial interference or review of arbitrator's decisions, among others).

In relation to the separate motion, the Court remarked that, under the ICC Rules of Arbitration, applicable to the case, the parties consented the interlocutory award of the panel of arbitrators that decided those challenges. Hence, the interlocutory award could not be reviewed by the Court.

As regards the partial award, the Court pointed out that the parties authorised the panel of arbitrators in the terms of reference to render a partial award. The partial award decided that the stock purchase agreement was terminated, and that both parties were liable for said termination (allocating a different share of responsibility on them). In deciding so, the Court also dismissed the claim of the specific performance of the stock purchase agreement, and postponed for a future award the decision as to the costs of the arbitration. The Court also commented that the parties agreed that points 4 and 5 of the terms of reference (ie, the plaintiff's claim for damages and the defendants' counterclaim for damages, respectively) would be decided in the final award.

The annulment recourse filed by the defendants comprised a challenge to the partial and the final award. The plaintiffs answered the annulment recourse and argued that since the partial award was final, the defendants should have filed the annulment recourse within five working days after receiving notice of it.

The Court analysed the issue as follows:[9]

> [T]he Partial Award was final in relation to the matters decided in the Award… and they were decided in advance as means to avoid costs and with the agreement of the Parties [...]
>
> Since the Partial Award took a decision on liability and postpone for a future stage the award on damages, it cannot be said that it would be necessary to wait for the Final Award to apply for the annulment recourse. Therefore, the annulment recourse against the Partial Award had been filed in excess of the time limits set forth in the law and should be dismissed on this ground[...]

> The Parties admitted the bifurcation of the proceedings, and they did so to avoid time and unnecessary costs. Had the Partial Award dismissed the liability of Defendants, the arbitration would have concluded at that time.
>
> The main disadvantage of the partial award is that it allows judicial review (and delays the proceedings). The courts may intervene during the arbitration proceedings to annul or confirm the partial award. (Alan Redfern and Martin Hunter 'Teoría y Práctica del Arbitraje Comercial Internacional' reference 8-45 and case cited on footnote 93, p524, 4th edition, La Ley, 2007)

Afterwards, the Court also dismissed the annulment recourse against the final award considering that none of the grounds that would allow said decision were present in the case.

That the Court in ***Pluris Energy Group***, clearly stated the principle that a partial final award is subject to annulment recourse, and that the aggrieved party must apply for the annulment recourse within five working days after receiving notice of it.

WAS THE RESULT IN PLURIS ENERGY GROUP CORRECT OR DESIRABLE?

As mentioned above, Argentine law does not provide a definition of award, nor does it answer whether partial final awards are subject to annulment recourse.

In the ***Pluris Energy Group*** case, the Court showed its support for arbitration when it summarised its modern principles, and respected the arbitration rules chosen by the parties (in this case, the ICC Arbitration Rules). It also performed a comparative examination by referring to foreign scholars' opinions[10] that sustain the result of the case on the issued analysed. However, the Court did not analyse whether any article of the CCPC or any other analogous statute or comparative law could have lead to a different result.

When referring to the content of an award, article 754 of the CCPC reads as follows: 'arbitrators shall render the award on "all" the claims submitted to their decision [...] including related issues'. And, the annulment recourse is admitted only against the arbitral award mentioned in the CCPC (article 758 and 760). Therefore, if the only award subject to annulment recourse is the one that decides 'all' the claims submitted to the arbitrators, partial final awards shall not be subject to recourse.

Furthermore, the Mercosur Agreement on International Commercial Arbitration and the International Commercial Arbitration Agreement between Mercosur and Bolivia and Chile[11] – not applicable in ***Pluris Energy Group***, but applicable to other international commercial arbitrations in Argentina – also suggest that the final award, subject to the annulment recourse, is the one that 'completely' decides the dispute (articles 20.1,[12] 20.4.c and 22). Therefore, the Court could have construed the rule by analogy with this other statute to decide the case with the opposite result.

We do not ignore that institutional and ad hoc arbitration rules allow the arbitrator or panel of arbitrators to bifurcate the arbitral proceedings or to render partial final awards,[13] but those rules do not deal with the judicial annulment recourse.

In relation to foreign law, there is no uniform criterion on whether a partial final award should be subject to appeal – as shown by the dissenting opinion in ***Metallgesellschaft AG v M/V Capitan Constante and Yacimientos Petroliferos Fiscales***[14] and other papers from

foreign legal scholars – that I find applicable to Argentine law in the sense that only the arbitrators' final decision on 'all' the matters submitted to the dispute is subject to a recourse of annulment. The Court in ***Pluris Energy Group*** did not find this issue highly controversial.

In ***Metallgesellsaft***, Judge Feinberg expressed in his dissenting opinion:

> As the majority recognizes, arbitration is designed 'to permit relatively quick and inexpensive resolution of contractual disputes...' The majority points out that appellees could have obtained summary judgment on their claim for freight, had they chosen to submit it to a court rather than to an arbitration panel, and suggest that appellant might then have been able to appeal to this court immediately. The majority therefore believes that its decision is necessary to encourage use of arbitration rather than litigation similar situations in the future. Even if the courts were the appropriate source of such an exception to the requirement of finality embodied in section 10(d), I do not agree that confirmation of partial final awards ultimately furthers the goals of arbitration. Indeed, the function of arbitration should make considerations of finality even more compelling in arbitration than they are in conventional litigation.
>
> It is true that allowing the district court to confirm a partial award of freight would provide appellees here with a speedier resolution of one of their counterclaims than if they had to await a decision on the remaining claims. Nevertheless, in the long run, I fear that confirmation of such separate and independent claims will make arbitration more complicated, time consuming and expensive. After this decision, use of partial final awards will doubtless increase and, if the successful parties can get partial awards confirmed by the district courts, it stands to reason that they will do so... Just as piecemeal review disrupts and delays ongoing litigation in courts; confirmation of partial awards will inevitably interrupt and extend arbitration proceedings. It will make arbitration more like litigation, a result not to be desired. It would be better to minimize the number of occasions the parties to arbitration can come to court; on the whole, this benefits the parties, the arbitration process and the courts.

In her paper 'Judicial Review of Partial Arbitral Awards under Section 10(a)(4) of the Federal Arbitration Act',[15] Rhodes, a US legal scholar, states that

> courts should adhere to the long-standing rule forbidding interlocutory review and not loosen the finality requirement embodied in Section 10(a)(4) [of the Federal Arbitration Act]. First, the analogy between the courts' review of a partial arbitral award and an appellate courts' review of a district court's partial judgment is inapt... Second, the relaxed approach to arbitral finality undermines the goal of deference to arbitrators. Third, arbitration is a creature of contract, and courts should not rewrite the contract ex post.

She also explains the definition of 'final award' as follows:

> A 'final' award means that arbitration must be 'complete' and 'not interlocutory' which in terms means that the arbitrator must have already decided all issues presented, including both liability and damages. Combined with the word 'mutual', it means that all issues involving all parties have been decided. 'Define' means that 'the award is sufficiently clear and specific to be enforce should it be confirmed by the district court and thus made judicially enforceable.

If we come back to the content of the award under article 754 CCPC ('arbitrators shall render the award on "all" the claims submitted to their decision'), it is easy to conclude that this requirement under Argentine law is very similar to the 'final' requirement of the Federal Arbitration Act thus forbidding the annulment recourse against a partial award.

In relation to bifurcation agreements, Rhodes cites ***Hart Surgical, Inc v Ultracision, Inc***,[16] where the First Circuit of the United States Court of Appeals decided a case very similar to the ***Pluris Energy Group*** case:

> The specific issue presented is a complicated one that is sure to recur in different contexts. There is very little case law in point and the Second Circuit cases that are the most relevant are seemingly at odds. Though we hold that the district court can review the partial award in this case, we think it best to limit our holding to the situation in which there is a formal, agreed-to bifurcation at the arbitration stage. We reserve judgment on what would happen if, for example, in the absence of bifurcation the arbitrator issued an initial decision on liability and one party then sought district review. The outcome in such a scenario might depend on the circumstances, and we prefer not to prejudge that result.
>
> Another important consideration is the risk that, in moving away from the concept of final judgments that prevails when review is sought of district court decisions, we may create situations at the arbitration level in which the losing side may forfeit an appeal (e.g., as to liability) by waiting until all arbitration proceedings are complete. One could imagine a rule that would allow the loser to seek review at once, but also retain the option of waiting until the completion of all phases at the arbitration level. These are not problems that we must resolve now, but ones that we will no doubt confront in future cases.

As we see, in ***Pluris Energy Group*** the Court reached the result of ***Hart Surgical***, that is, when the parties to the arbitration agree to bifurcate the proceedings (ie, award in liability and damages), partial awards shall be subject to review. However, in ***Pluris Energy Group*** the Court went further to decide that the defendants had forfeited their right to apply for the recourse of annulment of the partial award. Although the court in ***Hart Surgical*** has not decided this issue, it suggested in obiter dicta that a probable rule would be that the aggrieved party may choose to apply for the review when it receives notice of the partial award or when it receives notice of the final award.

In ***Hart Surgical***, the First Circuit departs from the more restrictive view of the finality requirement developed by the Second Circuit in ***EB Michaels v Mariforum Shipping SA***,[17] which considers that

> In order to be 'final' and arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them... Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages.

Rhodes also criticises the decision in ***Hart Surgical***:

> One reason why parties may agree to bifurcate liability and damages but not agree to piecemeal judicial review is because it is not clear that allowing judicial review of the liability phase before the arbitrator decides damages is quicker than allowing the arbitrator to determine both liability and damages before the district court reviews the awards.[18]

And, there is no doubt that under Argentine law the admission of recourse of annulment against a partial award shall cause undesirable effects that parties might not have foreseen when drafting the arbitration clause or at the outset of the arbitration proceedings.

The cumbersome annulment recourse procedure contemplated in the CCPC is likely to bring judicial intervention and delays in the arbitration proceeding against the will of the parties, the arbitrators and the courts.

Unlike other modern legislations (ie, the UNCITRAL Model Law on International Commercial Arbitration) the CCPC has an inconvenient procedure to apply for the annulment recourse of an award.

In relation to the procedural issues of the annulment recourse, the CCPC sets forth that the annulment recourse must be filed with the arbitration panel within five working days after receiving notice of the award, and that the aggrieved party must state with particularity the grounds for the motion, the relief sought, and the legal argument to support it (article 759).[19] The annulment recourse shall be decided by the court of appeals that would have had jurisdiction in the case if the parties had not submitted the dispute to arbitration (763). Although article 760, final paragraph, sets forth that the appellee shall not be heard, most Argentine courts of appeal would allow the reply of the recourse within five working days after the appellee receives notice of the appellant's brief.

- If the court of appeals decides to admit the annulment of the award, the CCPC provides the following alternatives:
- the arbitrator or panel of arbitrators shall be replaced;
- the court of appeals may decide to partially annul the award, if the award is severable; and
- the parties may request that a lower court issue a new award, that would be subject to a recourse of appeal before the competent court of appeals, even if the recourse of appeal had been waived by the parties (article 761).[20]

Finally, we should point out that under Argentine law the annulment recourse stays the arbitration proceedings.

It is clear that under these circumstances, this outdated regulation of the annulment recourse of an award in the CCPC shall inevitably cause a substantial delay in the arbitration proceeding. This is why the result in ***Pluris Energy Group is*** not only incorrect but also undesirable for any party involved in arbitration.

CONCLUSION

The Commercial Court of Appeals, Section B, decided a highly controversial issue in Argentina and abroad in ***Pluris Energy Group*** – that is, whether a partial final award is subject to the annulment recourse, and the time frame, within which the aggrieved party may apply for it.

Although the Court showed clear support for arbitration, ***Pluris Energy Group*** reached the incorrect result. In our opinion the Court neither critically analysed the CCPC, analogous statutes and foreign law, nor the undesirable consequences of its decision.

Parties and arbitrators choosing Argentina as a place of arbitration shall have to focus their attention on the issue of partial awards when drafting the arbitration clause or at the outset of the arbitration proceedings to avoid undesirable delay or consequences they might not have foreseen. Any benefit that a partial award might have brought to speed the arbitration proceeding shall likely be offset by the ***Pluris Energy Group*** case doctrine.

It is thus clearly desirable that a future arbitration legislation or court decision should reverse the ***Pluris Energy Group*** case.

Notes

1. Court of Appeals in Commercial Matters, Section B, 21 April 2014, elDial.com – AA876C.
2. As we will show in this article, the CCPC does not make a distinction between partial and final awards.
3. 'The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute. a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.'
4. 'Article 34. 1. The arbitral tribunal may make separate awards on different issues at different times. 2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.'
5. In ***Harz Und Derivate y otra c/Akzo Nobel Coatings SA y otras s/organismos externos-***, Court of Appeals in Commercial Matters, Section D, 28 October 2009, ***elDial.com*** AA5B45, the court decided that in Argentina the annulment recourse could only be applied against an award that puts an end to the arbitration proceeding. Although this case refers to an interlocutory award dealing with jurisdiction, we might not dismiss the possibility that a court may construed the CCPC as denying the right to file and annulment recourse against a partial award.
6. Palacio, Lino Enrique, ***Derecho Procesal Civil***, Tomo IX, Segunda Edición, Abeledo Perrot, 2003, p113); Rivera, Julio César, ***Arbitraje Comercial – Internacional y***

Doméstico, Lexis Nexis, 2007, p569); Caivano, Roque J, ***Control Judicial en el Arbitraje***, Abeledo Perrot, p46.

7. Rivera, supra note 6, at 569, 573 and 644.
8. Caivano, supra note 6, at 120.
9. We provide a free translation of the case.
10. Alan Redfern and Martin Hunter, ***Teoría y Práctica del Arbitraje Comercial Internacional***, reference 8-45 and case cited on footnote 93, p524, 4th edition, La Ley, 2007.
11. Law 25,223.
12. 20.1. 'The award or arbitral judgment must be written, reasoned and shall decide the dispute completely'; 20.4.C. 'The award or arbitral judgment shall be signed by the arbitrators and shall include [...] c) the decision upon all the matters submitted to arbitration.'
13. See, supra notes 3 and 4.
14. Cited by Redfern and Hunter, supra note 10; United States Court of Appeals, Second Circuit, 790 F.2d 280.
15. Rhodes, Jennifer M, 'Judicial Review of Partial Arbitral Awards under Section 10(a)(4) of the Federal Arbitration Act', 70 ***U. Chi. L. Rev.*** 663.
16. 244 F.3d 231.
17. 624 F.2d 411.
18. Rhodes, supra 15.
19. Palacio, supra note 6 at 136.
20. Palacio, supra note 6 at 146.

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Summary

THE NEW INVESTMENTS LAW OF BOLIVIA AND ITS EFFECT ON INVESTMENT ARBITRATION

On 4 April 2014, five years after the enactment of the new Bolivian Constitution, Law No. 516 for the Promotion of Investments was passed, with the purpose of providing national and foreign investors with a general institutional and legal framework for the promotion of investments aimed at contributing to the growth and socio-economic development of the country.

The Law for the Promotion of Investments came in a context where, according to official government declarations, all bilateral investment treaties (BITs) signed and ratified by Bolivia have been denounced. The basis for such denunciations are found in the ninth transitory provision of the Bolivian Constitution, which establishes that within a term of four years from the election of the executive branch, the new government authorities must denounce – or, if the case may be, renegotiate – those international treaties considered contrary to the Constitution.

As a consequence, regardless of the fact that the Bolivian government may or may not be renegotiating all BITs and of the existence of sunset clauses that extend their applicability for existing investors despite their denunciation, the new Law for the Promotion of Investments seeks to offer investors the new basic guidelines that will rule investment in Bolivian territory.

LAW NO. 516 FOR THE PROMOTION OF INVESTMENTS

Law No. 516 for the Promotion of Investments (Law No. 516) comprises six chapters and 26 articles.

Pursuant to Law No. 516, the 'investment' is defined as the allocation of investment contributions within the different investment mechanisms provided by Law, destined to the permanent development of economic activities and the generation of income which contributes to the social and economic development of the country.

The Law also states that investments shall be made in Bolivia in accordance with nine main principles, including:

- sovereignty and dignity (the state conducts the social and economic planning process, directs the economy and exercises control and direction of the strategic sectors);
- change in the productive matrix (the state promotes investment for the development of the productive sectors in non-traditional economic activities);
- mutual respect and equity (the state directs, controls, regulates and participates in the economic development of the country, dealing with investors under conditions of independence, mutual respect and equity, within the framework of sovereignty and dignity of the state);
- legal security (the legal relations of the state with national or foreign investors and the legal relations among investors which perform under the economic organisation structures recognised by the Constitution are based in legal security and subject to clear, precise and determined rules. All recognised economic organisation structures shall be equal according to law); and
-

prioritisation (the state shall prioritise Bolivian investment over foreign investment as a mechanism to strengthen national productivity).

INVESTMENT TREATMENT

As regards the treatment of investments, Law No. 516 provides that the state, through the Ministry of Development Planning and other ministries that are head of their respective sectors, directs the investments towards economic activities that propel social and economic development, generate employment and contribute to the eradication of poverty and the reduction of economic, social and regional inequalities.

It further establishes that investment can be destined to any economic sector of the country and shall be implemented through the corporate and contractual structures permitted by law, observing the principles provided by it and the particularities referred to the exclusivity of the state.

The term 'exclusivity of the state' relates to the reservation of rights carried out by the state for the development of economic strategic sectors as provided by the Constitution, including strategic natural resources, energy and water sources, the electromagnetic spectrum and others. Such rights are to be exercised by the state through its participation as investor, by means of 'productive state investment', which according to Law No. 516 is comprised of state investment contributions that are destined to public companies or mixed capital companies whereby the state holds a majority participation. Productive state investment is oriented towards activities of the production chain of strategic natural resources and other activities that contribute to the change in the production matrix towards non-traditional sectors.

Further to the above, private investors – national or foreign – may also develop economic activities in strategic sectors pursuant to specific rights to be granted by the state for such purpose within the legal and political framework.

As regards investment mechanisms, the Law states that the placement of investments is to be performed through private companies, public companies, companies with mixed capital whereby the state is the majority stakeholder, contracts, or other joint investment mechanisms – all in accordance with the applicable Bolivian norms and regulations. Additionally, the specific mechanisms for carrying out the investments in each sector shall be established by sectorial norms, which shall abide by the regulations on the treatment of investments, productive state investment, dispute resolution mechanisms and other dispositions provided by Law No. 516, safeguarding the interests and strategic goals of the country.

- Investors may make investment contributions through:
- local or foreign currency that is freely convertible;
- movable assets and real estate over which property rights can be exercised;
- reinvestment of profits;
- intellectual property rights, intangible technological contributions and other rights over intangible assets;
- acquisition of shares that are registered or listed on the Bolivian Stock Exchange of companies that operate in the country, in accordance with the applicable laws;

- industrial plants, new or reconditioned machinery or equipment, parts and components;
- raw material and intermediate products; and
- others provided by law.

The state makes investment contributions mainly with the rights of use over the natural resources, within the framework of the constitutional provisions.

As investment conditions, Law No. 516 provides that the investments to be made in Bolivia must take into account:

- that the transfer of foreign capital is funnelled through the local financial system;
- that the foreign investments comply with the regulations on transfer costs established in the country;
- that the profitability of the proposed investment projects that purport to be classified as preferred is not conditioned upon the incentives provided by the state;
- that the state does not endorse or guarantee any internal or external credit contracts executed by private individuals or legal entities that are either Bolivian or foreign;
- that the transfer of technology is to be performed in accordance with the terms thereto;
- that the employment relationships that emerge from the investments are subject to the General Labour Law and its regulations; and
- that the investments established within the Law are subject to the tax, customs, environmental and other applicable laws in the country.

FOREIGN INVESTMENT REGISTRY

The Bolivian Central Bank is in charge of the registration of foreign investments and shall issue an entry certificate for the contributions of foreign investment in Bolivia, which shall serve as evidence of the entry of foreign resources into the country.

The registration must be performed in specific formats that ensure the gathering of information related to the origin, purpose, contributions and mechanisms of the investments and reinvestments, according to what is established by Law.

Additionally, any contracts that involve investments must be registered at the Registry of Commerce. In the case of joint investments by private local or foreign investors, the registration must minimally gather the information relating to the intervening parties, the purpose of the contract, the origin of the investment, the contributions of the investors and the term of the contract. In the case of joint investments where the state is a party, in addition to the foregoing, the registration must gather the information relating to the entity in charge of administrating the contract and the causes of contract termination.

TRANSFERS ABROAD

The foreign investors, after complying with all tax and other obligations provided by the law, may transfer abroad, in freely convertible currency, the following:

-

capital from the total or partial liquidation of the companies in which registered investments were performed, or from the sale of shares, participations or acquired rights derived from the foreign investment;

- net profits generated from the registered foreign investment;
- money resulting from the resolution of disputes;
- payments to providers or creditors domiciled abroad directly related to the investment, subject to the applicable laws; and
- other payments to which the foreign investors are entitled, subject to the applicable laws.

The Bolivian Central Bank shall register the aforementioned remittances abroad.

PROMOTION AND ATTRACTION OF INVESTMENT

The Ministry of Development Planning constitutes the competent authority for the promotion of investment in Bolivia and has the main following attributions:

- to recommend the approval of policies and norms aimed at encouraging investment in the country;
- to recommend the approval of general and specific investment incentives as well as their suspension or cancellation; and
- to qualify as preferred investment the proposal of projects submitted for its review.

The Ministry of Development Planning shall evaluate the administrative procedures for carrying out investments in the country, with the purpose of recommending their modification or simplification while safeguarding the legality and transparency of the process.

Furthermore, the ministries responsible for the strategic sectors shall take the necessary actions destined to attract investment qualified as preferred.

Additionally, with reference to the attraction of investment, Law No. 516 establishes that the state may grant general or specific investment incentives. General incentives shall be granted to sectorial productive activities that fall within the scope of the economic development planning of the country and shall be applicable to the corresponding sector in a general manner.

On the other hand, specific incentives shall be granted to investment projects that qualify as preferred investment. The Ministry of Development Planning shall qualify an investment project as preferred if it deals with the development of productive activities of strategic interest for the country – such as those related to strategic natural resources in the areas of oil and gas, mining, energy, transport, tourism, agro-industry and textiles – which generate added value, as well as the development of new areas of interest for the country. In addition, the investment projects that involve the aforementioned activities shall contemplate technology transfer and the creation of employment.

The applicability of incentives, whether general or specific, is approved by means of the particular law or supreme decree to which it may correspond, and such incentives shall have a temporary validity of between one and 20 years, depending on the economic activity and the investment recovery period.

The contractual terms applicable to projects bound by incentives are to include specific clauses that establish in a clear and precise fashion those substantial obligations which, if not complied with, shall result in the suspension or cancellation of the incentives granted. Moreover, the agreements related to strategic sectors shall include the specific incentives that shall enter into effect once such agreements are approved by the Bolivian Congress.

STATE CONTROL AND SUPERVISION

Ministries that are responsible for particular sectors shall periodically supervise the investments made in their sector and, in particular, the investments qualified as preferred. To that end, they shall evaluate the achievement of the objectives determined in order to grant the respective general incentives, and evaluate the accomplishment of specific goals and objectives under preferred investment projects.

DISPUTE RESOLUTION

The last chapter of Law No. 516 dedicates one article to dispute resolution and establishes that the controversies that arise from the relations between the investors shall be resolved according to the mechanisms and conditions established in the laws in effect.

INVESTMENT TREATIES

The First Additional Provision of Law No. 516 stipulates that the treaties related to foreign investment that are renegotiated in accordance with the Ninth Transitory Provision of the Constitution shall adjust to the regulations contained in the Constitution and Law No. 516, and shall be formalised by means of investment framework agreements. The Provision further states that from the publication of Law No. 516 all investment framework agreements or international commercial agreements on investments to be signed by Bolivia shall be founded in the stipulations provided by Law No. 516.

The First Additional Provision concludes by establishing that the treatment of investments subject to supranational integration agreements shall be bound by them, provided they have been ratified by the Bolivian state and that they fall within the scope of the constitutional provisions.

LAW NO. 516 ANDINVESTMENT ARBITRATION

As previously described, Law No. 516 contains a limited provision concerning dispute resolution and refers only to 'controversies that arise from the relations between the investors' without even mentioning the state as a potential party to a dispute, and to finalise the provision, states in a broad manner that such controversies 'shall be resolved according to the mechanisms and conditions established in the laws in effect'. As a result, the corresponding chapter does not refer to the specific mechanisms that shall apply to investment disputes which involve the Bolivian state.

It is important to note that the Third Transitory Provision of Law No. 516 establishes that within a term of three months from the publication of the Law, the Ministry of Justice and the attorney general of the state shall prepare the new conciliation and arbitration norm, which shall include specific regulations for investment dispute resolution, and thus it would be reasonable to infer that arbitration shall be a legally accepted mechanism to resolve investment controversies, bearing in mind the constitutional prohibition to submit hydrocarbons-related disputes to international arbitration.

The cited Transitory Provision also states that the new conciliation and arbitration norm to be enacted shall observe what is established in the Law No. 516 and, within the frame of general accepted principles for investment dispute resolution, identify the following: equity, truthfulness, good faith, confidentiality, impartiality, neutrality, legality, celerity, economy and mutual acceptability.

The final paragraph of the Third Transitory Provision establishes that while the above-mentioned norm is enacted, and if a controversy arises, the parties in conflict shall apply the stipulations of Law No. 1770 of Arbitration and Conciliation (currently in effect), in all that is not contrary to the Constitution and Law No. 516.

Under the latter provision, it would appear that Law No. 516 opens the possibility for ad hoc arbitration under the current Law No. 1770 of Arbitration and Conciliation if an investment dispute arises, until the new arbitration norm is enacted. This will surely be subject to various diverse interpretations.

Notwithstanding the fact that more than three months have passed since the publication of Law No. 516, the referred new conciliation and arbitration norm has not yet been enacted, and under the current state of affairs it is difficult to envisage with certainty the direction that the Bolivian state will take regarding investment arbitration. However, there is a scenario under current discussion whereby the state would contractually incorporate international arbitrations clauses seated in Bolivia as a mechanism for undermining and disregarding BITs.

Nonetheless, for now, the sign to be taken by investors is that a new arbitration norm – which is to include specific regulations for investment dispute resolution – will be enacted in the near future.

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Summary

APPLICATION FOR CLARIFICATION IN ARBITRATION

When choosing to settle disputes via arbitration, parties forgo the possibility of resorting to the state courts (so-called negative effect of competence-competence). Once such a choice is made, the specificities of the arbitration procedure include the fact that the decisions rendered by the arbitrator or arbitral tribunal cannot be appealed.[1]

According to Law 9,307/1996 (the Arbitration Law), within five days from the receipt of the notice or personal awareness of the arbitral award, the interested party may apply for the correction or clarification of the award to the arbitrator or to the arbitral tribunal, upon notice to the other party.

This device is referred to as the 'application for clarification' and forms the subject matter of this chapter, especially as regards its limitations.

PURPOSE OF THE APPLICATION FOR CLARIFICATION

Pursuant to article 30 of the Brazilian Arbitration Law, the following may be the subject matter of the application for clarification to the arbitral award:

- the correction of any clerical error;
- the clarification on any obscurity, doubt or contradiction; and
- a statement of the arbitrator or arbitral tribunal on the omitted issue that should have been addressed in the award.[2]

As has been noted by Luis Guilherme Bondioli,[3] the application for clarification and the motion for clarification, provided for in article 535 of the Brazilian Code of Civil Procedure, are essentially the same, providing for the optimisation and improvement of the jurisdictional activity, aiming at the remediation of specific defects of a decision before its very renderer, in order to ensure its completeness and quality.

It is worth mentioning that article 535 of the Code of Civil Procedure does not provide for the correction of clerical error or doubt, and the parties may not modify the determined term to apply for the clarification, differently from the arbitration law. In what concerns the lack of provision for the correction of clerical error, the reasoning is quite logical, as ratification can be provided ex officio at any level of jurisdiction.

Carlos Alberto Carmona explains that the lack of provision for the correction of doubt, in turn, is based on the fact that, though the relevance of this provision had already been discussed when the Arbitration Law was drafted, the lawmaker decided to maintain the possibility of applying for clarification in the event of doubts, to avoid interpreters imagining the scope of the application to be narrower than that of the motion for clarification.[4]

Nevertheless, in order to preserve one of the greatest advantages of arbitration, which is celerity, the correct thing to do is not to attempt to reopen discussions about anything other than what the Arbitration Law effectively sets forth as the purpose of the application for carification. After all, it is known that the arbitral award may not be appealed.[5] The mere dissatisfaction of one party with the arbitral award, because either the arbitrator or arbitral tribunal did not entertain one of its motions, may not be deemed as a claim capable of giving rise to an application for clarification.

Issues related to the reopening of discussions on the merits of the dispute therefore cannot be claimed by any of the parties under the veil of an application for clarification, although in some exceptional cases, as shall be addressed below, errors made by the arbitrator or arbitral tribunal that must be corrected may change the merits of the award.

The indiscriminate use of the application for clarification, as unfortunately often takes place with the motion for clarification, must be strongly rejected by the arbitrator or arbitral tribunal. It is also worth mentioning that if the arbitrator or arbitral tribunal decides not to entertain the application for clarification, it will impact the term for the filing of any annulment to the award, which will be counted from the notice of the award, for there is no amendment in this case.[6]

EFFECTS OF THE APPLICATIONS FOR CLARIFICATION

Modification Of The Award

The decision on the application for clarification in the arbitration closes the arbitration procedure, thereby completing the award, and, as has been previously mentioned, aims at the correction of clerical errors, the clarification of doubt, obscurity, contradiction or omission, without nevertheless implying modification of the decided merits.

Similarly, in Brazilian civil procedure there are the motions for clarification that also do not intend to modify the content of the decision, but rather to correct the obscurity, contradiction and omission, pursuant to article 535 of the Brazilian Code of Civil Procedure. As shall be addressed in the next section, article 30 of the Brazilian Arbitration Law was inspired by article 535 of the Brazilian Code of Civil Procedure and by the UNCITRAL Model Law.

However, in relation to the motion for clarification, there are scholars who argue that the motions for clarification may have modifying or amending effects. As a result, it would be possible to review the rendered decision when given its events of admissibility. Any motions with such effect, created and sustained by scholars and case law, are referred to as motions for clarification with modifying effects.

This issue is still being discussed with respect to arbitration. As a rule, modifying effects are not admitted; however, considering concrete cases, such stand may be relativised, based on principles such as of operosity, whereby procedural principles must be used in order to obtain the greatest productivity possible.[7] It is worth noting that this is not an appeal, but only the entertainment of an application whose purpose is to modify part of the award for reason of error (in this case, lato senso, as a synonym of 'contradiction' or 'obscurity') or omission in the rendered award, thereby ensuring the legal safety of the award.

On the other hand, there are scholars who argue that no modifying effects may ever be attributed to the application for clarification. They argue that, by admitting such effect, the result would be in flagrant violation of article 19 of the Brazilian Arbitration Law, which expressly prohibits the filing of any type of appeal.[8]

Though controversial, it seems more reasonable for the issue to be assessed based on each concrete case, without losing sight of the limitations imposed on the application for clarification.

The Application For Clarification And The Stay And Interruptive Effects

Within the scope of civil procedure, motions for clarification may have stay effects, thereby preventing the appealed decision from becoming final and extending the lis pendens.

In turn, there are scholars who understands that the application for clarification does not provide for stay effects, for it is not capable of superseding the effectiveness of the arbitral award, which is immediate.[9] However, the application for clarification interrupts the term for the filing of objections against the arbitral award; in other words, it interrupts the 90-day term for the filing of any application for annulment,[10] provided for in articles 32 and 33 of the Arbitration Law.[11] This understanding arises out of the interpretation given to article 538 of the Code of Civil Procedure[12] and of the application of the 'spirit of the law' within the scope of arbitration.

The party could, therefore, claim that the arbitral award subject matter of the application must not be deemed final, for it is still subject to future corrections of the decision on the application for clarification. This may be understood as stay effect.[13]

The term for the filing of any annulment is interrupted by the application for clarification as a result of the interpretation of article 33 of the Arbitration Law, which determines that the 90-day period must be counted from 'receipt of the notice of the arbitral award or its addendum'. In this case, 'addendum' corresponds to the decision on the application for clarification and therefore, as deemed by law, the term for the filing of the claim would only count as from said decision. This is the reason why the interruption is discussed, and not only the stay of the term.

LIMITS OF THE APPLICATIONS FOR CLARIFICATION

Prior to addressing the limits of the applications for clarification, it is worth mentioning the role arbitrators play in conducting arbitration procedures and in the rendering of fair and enforceable awards. This is important because, once this role is better understood, the need to reflect on the limits the applications for clarification must become clearer.

In fact, as has been taught by Arnoldo Wald, when referring to ethics and impartiality in arbitration, arbitrators must find solutions for disputes in order to provide for a fair and effective arbitral award. Arbitrators must go far beyond the mere interpretation of the matter:

> If the world is characterised by the audacity of hope, twenty-first century law emphasises the growing relevance of innovation and requires creativity on the part of judges, arbitrators and lawyers alike, thereby covering the diagnosis of problems and the provision of solutions.[...]
>
> Arbitrators must therefore find solutions for the disputes in line with ethical rules, thus providing for fair and effective arbitral awards, based on the proven and claimed facts, according to the applicable rules, by means of a procedure that enables the parties to argue their case as accurately as possible.[14]

In events in which the arbitrator or arbitral tribunal must render an additional award, the liability for such award to be fair and effective is even more latent. One must be extremely careful for the parties to be provided with an award that is as flawless as possible, thereby avoiding any future action for annulment. Article 30 of the Arbitration Law authorises nothing other than a 'last chance', not only for the parties, but also for the arbitrator or arbitral tribunal to correct anything that might have gone wrong.

It is a fact that the main limit of the applications for clarification is that they may not be used as an appeal in arbitration procedures. As has been addressed above, as a general

rule, the decision of said applications should not admit any modifying effects, under penalty of adversely affecting the speed of the arbitration procedure and violating article 18 of the Arbitration Law.

It is nevertheless necessary to consider that when correcting the award as a result of a doubt, obscurity, contradiction or omission brought forth by the party, the arbitrator or arbitral tribunal may have to modify the essence of the award.[15] The classic example given by scholars[16] is the case of a preliminary claim of limitation that was not entertained by the arbitrator or arbitral tribunal. In such events, it would be illogical to authorise a right barred by the statute of limitations to be freely exercised by one of the parties, in view of the impossibility of modifying the merits of a rendered arbitral award.

The reasoning on the duty of the arbitrators to diagnose problems and offer solutions to render the arbitral award enforceable must now be resumed. Much like in the popular expression, there are two weights and two measures: on one hand, as a rule, the awards on application for clarification must not have modifying effects; on the other hand, the parties pursue legal safety (as does the arbitrator or arbitral tribunal) to ensure that the award will not be annulled based on the violation of the items of article 32 of the Arbitration Law.[17]

As such, when the arbitrator or arbitral tribunal faces any such exceptional events, it is necessary to make a logical effort, as it is more important to have an exceptionally modified award on its merits than an award annulled by state courts in the future, thereby resulting in substantial legal and financial losses for both parties.

It is also worth mentioning that the possibility of an appeal is not under discussion, nor is the constitution of the rendered award by means of modifying effects. Quite to the contrary, the purpose is to definitively determine such award,[18] so that it is no longer likely to be annulled for any reason that could have been remedied in the proceeding itself.

The modification would be in line with the grounds provided for by law, and, in each said event, if any situation is verified in the concrete case, the modifying effect may and should be authorised according to the reasoning presented thus far.

Unfortunately, arbitration professionals, researchers and academics are widely aware of the fact that the act of filing for motions for clarification before courts in order to obtain modifying effects on the merits is not as discouraged as it should be. Often, the party is not even sentenced for malicious prosecution. This should not take place in arbitration which is why it is always worth emphasising the exceptional nature of the modifying effects.

Applications for clarification in the Brazilian Arbitration Law and Rules

In general terms, the Arbitration Law, much like similar laws of other countries, was inspired by the UNCITRAL Model Law. Nevertheless it seems that article 30 of the Arbitration Law is far more similar to article 535 and following of the Code of Civil Procedure, given it is far more objective and narrower in its scope, as follows:

Brazilian Code Of Civil Procedure

> Article 535. Motions for Clarification may be filed when:
>
> I – there is any obscurity or contradiction, in the judgment or decision;
>
> II – any issue that should have been addressed by the judge or court has been omitted.

Article. 536. The motion must be filed within five (5) days, addressed to the judge or to the reporting judge, including the indication of the obscure, contradictory or omitted issue, and shall not be subject to the payment of costs.

Article. 537. Court shall decide on the motion within five (5) days; the reporting judge shall present the motion to court in the subsequent session, thereby rendering his/her opinion.

UNCITRAL Model Law19

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature.
(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, u a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an arbitral award additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

Brazilian Arbitration Law

Article 30. Within five days from receipt of the notice or personal awareness of the arbitral award, the interested party may apply for any of the following to the arbitrator or to the arbitral tribunal, upon notice to the other party:

I – correction of any clerical error of the arbitral award;

> II – clarify any obscurity, doubt or contradiction, or issue a statement on any omitted issue that should have been addressed in the award.
>
> Sole Paragraph. The arbitrator or arbitral tribunal shall decide on such application within ten days, thereby amending the arbitral award and notifying the parties pursuant to Article 29.

The lawmaker's choice of a more objective wording does not leave grounds for interpretations that may lead the Arbitral Tribunal to reopen discussions that result in new interpretations of the award. Article 33, (1), (b) of the Model Law does not specify the issue that could be subject matter of a new interpretation, thereby enabling possible new litigations on the merits.

Nevertheless, certain jurisdictions have chosen to follow the Model Law, thereby including the possibility, in their laws, for arbitrators or the arbitral tribunal to interpret the award in the event of any application for clarification. This is the case of France, Chile and the United States,[20] even if the latter is more peculiar, enabling American courts to modify the merits of arbitral awards.[21]

It is worth mentioning that the draft of the new Arbitration Law does not set forth any amendment on this matter, having only included the possibility for the parties to agree on a different term to file the application for clarification, thus following the international trend dictated not only by the Model Law, but also by other laws and rules.

Based on the comparison of the rules of Brazil's most important arbitration chambers (ie, CAMARB, CCBC, FGV, FIESP/CIESP and AMCHAM), it is possible to note that, in general, the rules thereof maintain the spirit of article 30 of the Arbitration Law and, in some cases, even repeat the wording of the article.[22] The general spirit of the provision of the Arbitration Law is maintained as there is no specific provision in the rules that culminates in any modification of the events of applicability, effects or limitations of the application for clarification.

As regards the differences found between certain rules and the Arbitration Law, there are certain Brazilian institutions that do not specify the possibility of litigating the clerical error before the arbitral award in their rules by means of the application for clarification itself, as is the case of CCBC[23] and FIESP/CIESP.[24] Others, in turn, provide for different terms than those set out in the Law, such as CCBC[25] and CAM/BOVESPA.[26] Both rules determine 15 days to apply for any clarifications deemed necessary. This provision is also backed by the rules of foreign institutions (such as CCI,[27] LCIA,[28] ICDR[29] and UNCITRAL[30]), which generally set out longer periods than the Arbitration Law.

Though the aforementioned provisions exist, there must be no conflict on the term to be applied to file the application for clarification, for, in honour of the principle of the free will of the parties, one of the pillars of arbitration, the correct thing to do would be to apply the terms set out in the rules. This is because if the parties elected the rules, then they agreed to comply with the procedural rules thereof. It is therefore necessary to apply the period agreed to by the parties, as determined in the rules of the relevant arbitral institution.

As per the New Bill of the Arbitration Law, this 'confusing' context regarding the term for the application for clarification may have been the inspiration for the lawmaker to determine, in the new bill, that the periods governing the applications for clarification could be agreed

by the parties,[31] thereby respecting the autonomy of the parties and in line with the international trend.

Within the scope of international arbitration, it is worth further assessing the rules of the International Chamber of Commerce (ICC), which determines the following in its article 35:

> Article 35
>
> Correction and Interpretation of the Award; Remission of Awards:
>
> 1 On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
>
> 2 Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.[32]

Based on the assessment of the rules, it is clear that the events of the application for clarification are more restrictive, and the applicability thereof is limited to the correction of clerical, computational or typographical error, or further in the interpretation of the award. The ommission of the application for clarification in an award has therefore been excluded.

The limitation of the effects of the application for clarification in any ICC arbitration does not allow the parties to seek the modification of the award.

In conclusion, depending on the rules chosen by the parties, the arbitrator or arbitral tribunal may be barred from implementing a material modification of the award.

FINAL CONSIDERATIONS

The application for clarification is a subject that cannot be ignored or underestimated, and arbitrators and arbitral tribunals must avoid using it indiscriminately. It is important to study the ways to face and identify applications for clarification submitted in bad faith, seeking a non-legal modification of the arbitral award. It is also important to bear in mind that both the applicable law and the choice of the rules applicable to the arbitration will have a significant influence on the limits to the application for clarification.

Therefore, again, whenever the arbitrator or arbitral tribunal faces any of the exceptional events commented herein, it will be necessary to make that logical effort, for it is more important to have an exceptionally modified award on its merits that an award annulled by state courts, in the future, thereby resulting in substantial legal and financial losses for both parties.

Notes

1. Article 18 of Law 9,307/1996: 'The arbitrator is the judge in fact and in right, and the award rendered may not be appealed or enforced by State Courts'.
2. Article 30 of Law 9,307/1996: *Within five days from receipt of the notice or personal awareness of the arbitral award, the interested party may apply for any of the following to the arbitrator or to the arbitral tribunal, upon notice to the other party: I – correction of any clerical error of the arbitral award; II – clarify any obscurity, doubt or contradiction, or issue a statement on any omitted issue that should have been addressed in the award.Sole Paragraph. The arbitrator or arbitral tribunal shall decide on such application within ten days, thereby amending the arbitral award and notifying the parties pursuant to Article 29.*
3. Bondioli, Luiz Guilherme. Embargos de Declaração e Arbitragem. ***Revista de Arbitragem e Mediação***, No. 34, jul/set. 2012, p195.
4. Carmona, Carlos Alberto. ***Arbitragem e Processo: um comentário à Lei 9.307/1996***. São Paulo: Atlas, 2009, p386.
5. Article 18 of Law 9,307/1996.
6. Article 33 of Law 9,307/1996: *The interested party may file for the annulment of the arbitral award before the competent agency of the State Courts, in the events provided for hereunder. Paragraph One. The motion for the annulment of the arbitral award shall progress regularly, as provided for in the Brazilian Code of Civil Procedure, and shall be filed within ninety days from receipt of the notice of the arbitral award or the modification thereof.*
7. Barros, Octávio Fragata M ***Reflexões Acerca dos Efeitos Infringentes dos Embargos Arbitrais***. Revista Brasileira de Arbitragem, No. 9, Jan/Mar 2006, p66.
8. Figueira, Joel Dias Jr, ***Manual da arbitragem***. São Paulo: Editora Revista dos Tribunais, 1997, p192; Carreira Alvim, J E, ***Comentários à Lei de Arbitragem*** (Lei no 9.307, de 23.09.1996). Rio de Janeiro: Lumen Juris, 2002, p148.
9. Bondioli, Luiz Guilherme, 'Embargos de Declaração e Arbitragem'. ***Revista de Arbitragem e Mediação***, No. 34, jul/set. 2012, p197.
10. As has been claimed by J E Carreira Alvim: 'The period for the filing of the action for annulment is interrupted once the motion is filed – as a result of the secondary application of Article 538, caption, of the Brazilian Code of Civil Procedure – which once again runs for ninety days following the notice on the modification.' Carreira Alvim, J E, ***Direito Arbitral***, Rio de Janeiro: Editora Forense, 2004, p366. In the same sense: Bulos, Paulo Uadi Lammego, ***Lei da Arbitragem comentada***. Saraiva, 1997, p111; Figueira, Joel Dias Junior. Manual da arbitragem. São Paulo: Editora Revista dos Tribunais, 1997, p90. For a different understanding, see: Bondioli, Luiz Guilherme, ***Embargos de Declaração e Arbitragem***, Revista de Arbitragem e Mediação, No. 34, jul/set. 2012, p197.
11. Article 32:
    An arbitral award is null and void if:
    I–the submission to arbitration is null and void;
    II – it is made by a person who could not be an arbitrator;
    III – it does not comply with the requirements of Article 26 of this Law;
    IV – it has exceeded the limits of the arbitration agreement;
    V – it does not decide the whole dispute submitted to arbitration;

VI – it has been duly proved that it was made through unfaithfulness, extortion or corruption;
VII – it is made after the time limit, except in the case of Article 12, item III, of this Law; and
VII – it disregards the principles dealt with in article 21, second paragraph, of this Law.
Article 33:
The interested party may submit to the State Court having jurisdiction an application for the setting aside of the arbitral award, in the cases foreseen in this Law. First Paragraph: The action requesting the setting aside of the arbitral award shall follow the ordinary procedure provided for in the Code of Civil Procedure, and must be submitted within ninety days immediately following receipt of the award or its addendum. Second Paragraph: The decision granting the setting aside motion shall: I- declare the arbitral award null and void, in the cases foreseen in Article 32, items I, II, VI, VII and VIII; II – order the sole arbitrator to the arbitral tribunal to make a new award, in the other cases. Third Paragraph: The motion for the nullity of the arbitral award may also be submitted under a debtor's defense, in accordance with Articles 741 and following of the Code of Civil Procedure, if a judicial enforcement is instituted.

12. Article 538 CPC: The motion for clarification interrupts the term for filling appeals, by any of the parties.

13. In the same sense: Lemes, Selma Ferreira, 'Embargos Arbitrais e a Revitalização da Sentença Arbitral', ***Revista de Arbitragem e Mediação***, No. 6, jul./sep. 2005, p38 and KNUTSON, Robert D A, 'The Interpretation of Arbitral Awards – When is a Final Award not Final?' Journal of International Arbitration, vol. 11/2, 1994, p. 99.

14. Wald, Arnoldo, 'A Ética e Imparcialidade na Arbitragem', ***Revista de Arbitragem e Mediação***, No. 39, 2013, p9. Free translation. Still on the duties of the arbitrators: Carmona, Carlos Alberto. ***Árbitros e Juízes: Guerra ou Paz?*** In: Martins, Pedro A Batista; Lemes, Selma Ferreira e Carmona, Carlos Alberto (Coord.). ***Aspectos Fundamentais da Lei de Arbitragem***. Rio de Janeiro: Forense, 1999. Derains, Yves; Schwartz Éric A. ***A Guide to the New ICC Rules of Arbitration***, Haia: Kluwer, 1998, p353; Platte, Martin, 'An Arbitrator's Duty to Render Enforceable Awards', ***Journal of International Arbitration***, v. 20, No. 3, pp307-313, June 2003.

15. In this sense: Carneiro, Paulo Cezar. Aspectos processuais da nova lei de arbitragem. In: Casella, Paulo Borba (Coord.). ***Arbitragem: a nova lei brasileira (Lei n.o 9.307/1996) e a praxe internacional***. São Paulo: LTr, 1996, p150.

16. Lemes, Selma. ***Os 'Embargos Arbitrais' e a revitalização da sentença arbitral***. Available at www.selmalemes.com.br/artigos/artigo_juri22.pdf, accessed on 17 August 2014; Barbosa Moreira, José Carlos. Estrutura da sentença arbitral. In: Batista Martins, Pedro A; Garcez, José Maria Rossani (Coords). Reflexões sobre arbitragem – in memoriam do Desembargador Cláudio Vianna de Lima. São Paulo: LTr, 2002. p352-353; Carmona, Carlos Alberto. ***Arbitragem e Processo: um comentário à Lei 9.307/1996***. São Paulo: Atlas, 2009, p388.

17. The understanding is that the application for clarification with modificating effects in specific cases does not lie outside national or international scholars' opinions. In this sense: LEMES, Selma. ***Os 'Embargos Arbitrais' e a revitalização da sentença arbitral***. Available at www.selmalemes.com.br/artigos/artigo_juri22.pdf, accessed on

17 August 2014, p2 and 3; Martins, Pedro Batista. ***Apontamentos sobre a Lei de Arbitragem***. Rio de Janeiro: Forense, 2008.

18. Article 30 of Law 9,307/1996, Sole Paragraph: 'The arbitrator or arbitral tribunal shall decide on such application within ten days, thereby amending the arbitral award and notifying the parties pursuant to Article 29'. In other words, the arbitral award is only final once the term of the Application for Clarification has elapsed.
19. Article 33 of the Model Law. Available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, acessed on 10 September 2014.
20. In order: Jana, Andrés. ***National Report for Chile*** (2010). In Jan Paulsson (Coord.), ***International Handbook on Commercial Arbitration***, Kluwer Law International, 1984, Supplement No. 59, May/2010, pp1–68; Derains, Yves Derains; Kiffer, Laurence, ***National Report for France*** (2013). In Jan Paulsson (Coord.), ***International Handbook on Commercial Arbitration***, Kluwer Law International, 1984, Supplement No. 74, May/2013, pp1–98 and Holtzmann, Howard M; Donovan, Donald Francis et al, ***National Report for the United States of America*** (2013). In Jan Paulsson (Coord.), ***International Handbook on Commercial Arbitration***, Kluwer Law International, 1984, Supplement No. 76, October/ 2013, pp1–109.
21. Section 11, Federal Arbitration Act.
22. Camarb: Article 10.8:
    In the event of material mistake, omission, obscurity, doubt or contradiction of the arbitration award, the parties shall have five days from the date the award is received to file a motion for clarification; FGV: Article 53: Within five days from the receipt of the arbitral award, any party may, upon notice to the other party, request the arbitral tribunal to: a) correct clerical error of the arbitral award; b) clarify existing obscurity or contradiction; c) issue a statement on any omitted issues that should have been addressed by the award.
23. Article 10.5:
    Once the final arbitral award is issued and the parties notified, the arbitration will be considered closed, unless there is a request for clarification as provided in the following article, in which case jurisdiction will be extended until the respective decision; 10.6. The parties can, within 15 days from the date they receive the arbitral award, request clarifications regarding any contradiction, omission or obscurity by request directed to the Arbitral Tribunal; 10.6.1. The Arbitral Tribunal will decide during the following 10 days, counted from their notification regarding the request for clarification.
24. Article 16.1:
    Within 10 days from the date of receipt of the notice or of the personal knowledge of the arbitral award, the interested party, upon communication to the Secretariat of the Chamber, may submit a Request for Clarification to the Arbitral Tribunal, on the grounds of lack of clarity, omission or contradiction in the award, asking that the Arbitral Tribunal clarifies it, cures its omission or remedies the contradiction found in the arbitral award; 16.2 – The Arbitral Tribunal shall decide within ten (10) days, by amending the arbitral award, as the case may be, and by notifying the parties under item 15.7.

25. Article 10.6:
    The parties can, 15 days from the date they receive the arbitral award, request clarifications regarding any contradiction, omission or obscurity by request directed to the Arbitral Tribunal.
26. Article 7.7
    Application for Clarification. Within 15 days to count from the receipt of the award, the interested party may request the Arbitral Tribunal to: i) correct any clerical error of the arbitral award and/or ii) clarify any obscurity, doubt or contradiction of the arbitral award, or issue a statement on any omitted issues that should have been addressed in the award.
27. Article 35.2:
    Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other term as the Court may decide.
28. Article 27.1:
    Within 30 days of receipt of any award, or such lesser term as may be agreed in writing by the parties, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature. If the Arbitral Tribunal considers the request to be justified, it shall make the corrections within 30 days of receipt of the request. Any correction shall take the form of separate memorandum dated and signed by the Arbitral Tribunal or (if three arbitrators) those of its members assenting to it; and such memorandum shall become part of the award for all purposes.
29. Article 32.1:
    Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.
30. Article 33.1:
    Within 30 days of receipt of the award, unless another term of time has been agreed upon by the parties.
31. Draft of the new arbitration law No. 406/2013: Article 30:
    In the term of five days, to count from receipt of the notice or personal awareness of the arbitral award, unless another period has been agreed upon by the parties, the interested party, upon notice to the other party, may apply for any of the following to the arbitrator or to the arbitral tribunal.
32. ICC Rules. Article 35.

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British Virgin Islands

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Summary

At the time of going to press, the existing legislation governing arbitration in the British Virgin Islands (BVI), the Arbitration Act 1976 (the 1976 Act), has just been repealed by the Arbitration Act 2013 (the New Act), which came into force on 1 October 2014. The 1976 Act, which has never been amended or revised, was recognised as being considerably out of date, limited in scope compared to more modern legislation, and more suited as a framework for the conduct of domestic arbitration. (It will nevertheless continue to apply to arbitrations commenced before 1 October 2014.) In contrast, the New Act, contains comprehensive legal provisions that take into account modern principles and practices of arbitration and incorporates many of the Articles of the UNCITRAL Model Law (Model Law). But this is not simply a modernising statute; it is one which, together with the BVI's accession to the New York Convention on 25 May 2014 (making an arbitral award from a BVI tribunal enforceable in other contracting states and vice versa), is designed to make the BVI as popular a seat for international arbitration as London, Paris and New York. In particular, the New Act provides for the establishment of a statutory body, the BVI International Arbitration Centre (IAC), with a governing board and the power to promulgate rules under the New Act.

This chapter outlines the current legislation, highlights the major changes brought about by the New Act, and focuses on the enforcement of foreign awards in the BVI, which remains a 'hot topic' as far as practitioners are concerned. Where no specific reference is made to either statute, that is because the position is comparable under both. There are specific sections in the New Act relating to mediators, but these are not examined in any detail here.

THE ACTS

Overview And Jurisdiction

The 1976 Act governs both domestic and international arbitrations (as defined), and contains provisions relating to:

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

The New Act has as its object the facilitation and attainment of a fair and speedy resolution of disputes without unnecessary delay and expense. It applies to arbitration under an arbitration agreement, whether or not the arbitration agreement is entered into in the BVI, if the place of arbitration is in the BVI. 'Arbitration agreement' is defined as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The New Act contains various mandatory provisions that will principally apply to arbitration agreements entered into before 1 October 2014 and a number of opt-in provisions that parties may choose to include in the arbitration agreement by reference.

Neither statute expressly defines those matters that are arbitrable, and the common law will therefore govern whether a dispute is capable of being resolved by arbitration or not.

Except where third parties agree to be bound, an arbitration agreement (and any award) will generally only affect the parties to it. There are English authorities to the effect that an award

may, in certain circumstances, be relied on in a claim against a third party for an indemnity and the BVI courts are likely to follow those authorities.

The BVI courts are likely to follow the approach of the English courts in upholding the arbitration agreement where possible to give effect to the intentions of the parties that their differences should be resolved by the arbitral process and not the courts. The liberal interpretation of arbitration clauses – thereby avoiding semantic arguments about whether the dispute 'arose out of' or was 'in connection with' or 'arose under' a contract – was forcefully espoused in England in ***Fiona Trust Corp v Privalov & Ors***, an approach which has been endorsed in the BVI in ***Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors*** (BVI HCV 2007/0293). In summary, absent express words to the contrary, parties are to be taken to have intended that all their disputes should be arbitrated.

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

There is no express provision in the 1976 Act that the tribunal should rule on questions relating to its jurisdiction, and the common law will prevail. Accordingly, a challenge to the actual existence of the arbitration agreement is likely to be a matter for the BVI court, while a challenge to its validity should be left to the tribunal: ***Premium Nafta Products Ltd & Ors v Fili Shipping Co Ltd & Or***s [2007] UKHL 40 approved in the BVI courts in ***Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors*** (BVIHCV 2007/0293). A party may also resist enforcement of an award in the BVI on the grounds that the tribunal lacked jurisdiction.

Under the New Act, article 16 of the Model Law is incorporated, expressly giving the tribunal the competence to rule on its own jurisdiction, including:

- any objections with respect to the existence or validity of the arbitration agreement;
- whether the tribunal is properly constituted; and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.

There is no appeal from a ruling that the tribunal did not have jurisdiction, and in such circumstances the court – if it has jurisdiction to do so – will decide the dispute. In the event of a party being dissatisfied with a ruling as a preliminary question by the tribunal (which may also rule on jurisdiction) that it does have jurisdiction, that party can apply to court for a determination on jurisdiction, but must do so within 30 days.

Where a party commences court proceedings in respect of a dispute that falls within the arbitration agreement, under the 1976 Act, the right to a stay of those proceedings in favour of arbitration depends on whether the arbitration agreement is domestic or international. A domestic arbitration agreement is a written agreement to submit to arbitration in the BVI and in no other jurisdiction, the parties to which are only individual nationals of or residents in the UK or corporate bodies incorporated in or whose central management and control is exercised in the UK. The BVI court may stay proceedings commenced in breach of a domestic arbitration agreement if it is satisfied that there is no sufficient reason why the matter should not be arbitrated in accordance with the parties' agreement and that the applicant for the stay was, at the time the proceedings were commenced and remains, ready and willing to do all things necessary to the proper conduct of the arbitration. In the case of an international arbitration agreement, the BVI court must stay the proceedings unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed, or that there is, in fact, no dispute between the parties (section 6(2) of the Act). As regards both domestic and international agreements, the party seeking a stay must apply for it before delivering any pleadings or taking any other step in the proceedings.

The New Act is considerably less cumbersome. If a party commences court proceedings concerning a matter that is the subject of the arbitration agreement, then any party to that agreement can ask the court to refer the matter to arbitration. The court must make that referral (and stay the court action) unless it finds that the arbitration agreement is null and void, inoperative, or incapable of performance.

Limitation

Limitation periods are governed by the Limitation Act 1961, which expressly extends to arbitrations and which provides for when arbitrations are deemed to be commenced for the purposes of calculating the relevant time limits. Contract and tort claims may not be brought after the expiration of six years from the date on which the cause of action accrued. The same time limit applies to common law actions on an award. In cases of fraud or concealment, time does not start to run until the fraud or concealment has been – or, with reasonable diligence, could have been – discovered.

The Act also expressly provides that where the court orders an award to be set aside, the period between the commencement of the arbitral proceedings and the date of the set-aside order shall be excluded in computing the time prescribed by a limitation enactment.

Conflicts Of Law

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

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

Selection Of The Tribunal

The provisions of the 1976 Act apply in the absence of express agreement by the parties, whether in the arbitration agreement itself or otherwise, as to the composition of the tribunal. Neither statute imposes any limits on the parties' freedom to select arbitrators or umpires.

Under the 1976 Act, in the absence of a contrary intention, every arbitration agreement is deemed to include a provision that the reference is to a single arbitrator. Similarly, where the reference is to two arbitrators, in the absence of a contrary intention, the agreement shall be deemed to include a provision that the two arbitrators will appoint an umpire. The High Court may appoint an arbitrator where:

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

As far as the New Act is concerned, the parties are expressly stated to be free to determine the number of arbitrators, including the right to authorise a third party, including an institution, to make that determination. If the parties fail to agree on the number of arbitrators, the IAC will decide whether it should be one or three, depending on the circumstances of the case. The court or the IAC is empowered to intervene and make appointments in circumstances broadly similar to those set out above, with articles 11, 14 and 15 of the Model Law having been given effect in the New Act.

The extent to which the BVI court is able to interfere with the selection process itself is not set out in the 1976 Act and common law principles will apply. Under the New Act, article 13 of the Model Law, which sets out the procedure for challenging an arbitration, is given effect.

Although there are no express provisions in the 1976 Act mandating arbitrator independence, impartiality or neutrality, the Act provides for revocation by the High Court of the arbitrator's authority in the event of impartiality (section 26), and for the removal by the High Court of an arbitrator who has misconducted himself or the proceedings (section 25). Common law principles will apply to the question of bias and the consequential inference of substantial injustice.

Save for the provisions highlighted in the previous paragraph, the 1976 Act makes no express provision as to the duties of the tribunal. In common law, those duties are likely to include the following (as a minimum):

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

The New Act expressly provides that in the absence of an express statutory provision, the court will not interfere in the arbitration of a dispute, because subject to the observance of safeguards necessary in the public interest, parties should be free to agree how their dispute should be resolved. The New Act mandates that where the court does interfere, it should as far as possible give due regard to the wishes of the parties and the provisions of the arbitration agreement.

The New Act also expressly provides (by importing article 18 of the Model Law) that the arbitral tribunal is required:

- to be independent;
- to act fairly and impartially between the parties, giving them a reasonable opportunity to present their cases and to deal with their opponents' cases; and
- to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means of resolving the dispute.

A person approached for a possible appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence, and that obligation continues throughout the appointment.

The Act provides that the IAC may issue a code of conduct for arbitrators and mediators, as well as guidelines with respect to the procedures to be followed by and the conduct expected of 'persons connected with' the operation of the Act.

Procedure

The parties are free to tailor the arbitration process to suit their needs. In the absence of a contrary intention, the 1976 Act is very limited in its deeming provisions. Section 14 of the 1976 Act provides that every arbitration agreement shall be deemed to contain the following provisions:

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

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

The 1976 Act is silent as to matters such as the holding of hearings, timetabling, the language of the arbitration, legal representation of the parties, and the liability of arbitrators or umpires for negligent acts or omissions or mistakes. It is likely, however, that a BVI court would hold that an arbitral tribunal should be immune from suit on the grounds of public policy.

The New Act imports articles 10 to 24 of the Model Law and therefore contains far more detailed provisions on the procedure of the tribunal. It also contains express provisions giving arbitral tribunals immunity from liability for acts or omissions in the performance of their functions, save where they have acted in bad faith.

Interim Remedies

The 1976 Act provides that any party to a reference may issue a writ of subpoena ad testificandum or duces tecum, and that the High Court may order such writs to compel the attendance before the tribunal of a witness wherever he may be in the BVI. Section 14 of the Act also provides for the High Court to have the following powers in relation to arbitrations, as it does for the purpose of proceedings before it:

- order security for costs (the provisions under the New Act are dealt with in the 'costs' section);
- order discovery of documents or the administration of interrogatories;
- order the giving of evidence by affidavit or the examination on oath of any witness before an officer of the High Court or any other person;
- issue a request for the examination of a witness who is outside the BVI;
- make orders for the preservation, interim custody or sale of any goods that are the subject matter of the reference;
- secure the amount in dispute; or
- detain, preserve or inspect any property or thing, including authorising entry on land or into buildings belonging to or in the possession of a party or the taking of samples.

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

Under the New Act, articles 17 and 17A to 17G of the Model Law are brought into effect. The parties are able to agree that the tribunal should not have power to grant interim measures –however, in the absence of such agreement, the tribunal is given wide powers to:

- preserve the status quo;
- prevent harm or prejudice to the arbitral process itself;
- preserve assets and evidence; and
- make preliminary orders (which are binding on the parties but not subject to enforcement by the court).

An applicant for interim relief must satisfy the tribunal that:

- costs are not an adequate remedy;
- the harm to the applicant in the absence of the remedy substantially outweighs the harm to the respondent if the remedy is granted; and
- there is a reasonable possibility he will succeed on the merits.

A party requesting a preliminary order or interim measure will be liable for any costs or damage caused to the other party in the event the tribunal ultimately determines that the order should not have been granted.

The court itself is empowered to grant interim measures in support of any arbitral proceedings that have been or are to be commenced in or outside the BVI. This provides, for the first time, a statutory basis for free-standing injunctive relief. In relation to arbitral proceedings outside the BVI, interim relief can only be granted where the proceedings are capable of giving rise to an award that may be enforced in the BVI and the nature of the interim measure sought is of a type or description a BVI court is able to grant in relation to arbitration proceedings. There is no appeal from the court's grant or refusal of an interim measure.

The award

Part IV of the 1976 Act contains provisions relating to awards, although these are of course subject to any contrary intention of the parties as set out in the arbitration agreement. The tribunal may issue interim awards and make orders for the specific performance of a contract (other than a contract relating to land or any interest in land). Awards are final and binding on the parties and those claiming under them, and the tribunal may correct any clerical mistakes or errors in an award that arises from an accidental slip or omission.

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

There is no requirement under the 1976 Act for the award to be a reasoned one.

Under the New Act, articles 29 to 31 of the Model Law provide for decision-making by the tribunal (a majority in the case of more than one arbitrator, unless otherwise agreed by the parties) for an award on agreed terms after a settlement, and for the form and contents of the award.

Article 33 of the Model Law is brought into effect, enabling parties to apply within 30 days of receipt of the award to request the tribunal to correct errors in computation, or clerical or typographical errors, or to ask the tribunal to make an additional award in respect of claims omitted from the first one.

Challenging an award

An award under the 1976 Act may be set aside by the High Court where the umpire or arbitrator has misconducted himself or the proceedings, or where the award has been improperly procured. The procedure for an appeal is to the High Court by way of case stated, which broadly speaking means that any point of law may be challenged, leaving questions of fact to the sole remit of the tribunal. A decision of the High Court under the case stated procedure is deemed to be a judgment of that court and a further appeal lies to the Court of Appeal of the Eastern Caribbean Supreme Court, with the leave of the Court of Appeal. The case stated procedure is also available in respect of an interim award or with respect to a question of law that arises during the course of the reference.

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

The 1976 Act is silent as to the ability of the parties to exclude the right to appeal by agreement, but we take the view that the parties would be free to do so if they so choose.

The New Act provides for awards to be set aside or appealed in the following circumstances:

- the court may set the award aside in the event of a successful challenge to the arbitrator;
- where the arbitration agreement provides that the award may be challenged on the grounds of serious irregularity (or where those grounds of challenge apply automatically by virtue of the arbitration agreement having been entered into prior to
- 1 October 2014 and being a domestic arbitration agreement or one under which the parties have expressly provided that the agreement is to be dealt with under the 1976 Act);
- subject to the leave of the court, or the agreement of all parties, where the arbitration agreement provides that the award may be appealed on a question of law. It should be noted that an agreement to dispense with reasons for the award will be treated as an agreement to exclude the court's appeal jurisdiction and that the court has no other jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award;
- with the leave of the court under the provisions of article 34 of the Model Law. Accordingly, an award may be set aside upon a party furnishing proof that:
    - a party to the arbitration agreement was under an incapacity;
    - that the agreement was not valid either under the law to which the parties subjected it, or absent such indication, BVI law;
    - the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
    - the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. If the problematic parts can be separated from the rest, then only the problematic part may be set aside; or
    - the composition of the tribunal or the procedure adopted was not in accordance with the parties' agreement, unless that agreement was in conflict with a provision of the New Act from which the parties cannot derogate, or failing the parties' agreement, was not in accordance with the New Act;
- the court finds that the subject of the dispute is not capable of being settled by arbitration under BVI law; or
- the court finds that the award is in conflict with the public policy of the BVI.

On hearing an appeal, the court may confirm, vary, or remit in whole or in part the award to the tribunal, or set it aside in whole or part.

An application under the New Act to set aside the award may not be made after three months from the date the party received the award.

An appeal upwards to the Court of Appeal from an appeal at first instance is permissible with the leave of the Court of Appeal.

ENFORCEMENT OF FOREIGN AWARDS

In principle, the New Act will not affect the enforceability in the BVI of Convention Awards. Pursuant to section 36 of the 1976 Act, the enforcement of Convention Awards is mandatory, save in specific circumstances that mirror those set out in the Convention; for example, where the arbitration agreement is invalid, a party was unable to present its case, or where enforcement of the award would be contrary to public policy. Both foreign non-Convention Awards and domestic awards can be enforced by application under the 1976 Act, which provides that an award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order of the High Court to the same effect. Where leave is granted, judgment may be entered in terms of the award. Awards may also of course be enforced by action on the award at common law, and enforcement is now a gateway for permission to serve any such proceedings out of the jurisdiction.

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

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

The New Act essentially continues the same well-tested regime for the enforcement of foreign awards from the 1976 Act, but with improvements. The principal changes are that:

- the Act explicitly provides that the grounds for refusal of enforcement that apply to a New York Convention Award also apply to the enforcement of a non-Convention Award, and in both cases those grounds are fully incorporated into the Act itself; and
- a UK arbitral award now counts as a New York Convention Award in the BVI.

Under the old Act, UK awards were rather confusingly carved out of the definition of Convention Awards because a UK award could already be enforced under the reciprocal enforcement of judgments legislation that applied to UK judgments. Now a UK award can, sensibly, also be enforced as a Convention Award.

CONFIDENTIALITY

Although the 1976 Act is silent on the point, there is an implied duty of confidentiality in all arbitration agreements as a matter of the common law of the BVI.

The New Act contains a number of provisions intended (save in limited specified circumstances) to maintain the confidence of arbitral proceedings, including that any court proceedings should be heard in chambers, imposing reporting restrictions and prohibiting parties from disclosing, publishing or communicating any information relating to the arbitration proceedings or the award. Where the court considers that a judgment given in closed court proceedings is of legal interest, it may direct publication in the law reports, subject to appropriate safeguards in respect of the anonymity of the parties or to delaying publication for an appropriate period not exceeding 10 years.

REMEDIES

The only express provision in the 1976 Act relating to the grant of remedies by the tribunal is its power to make orders for specific performance (other than in relation to contracts for the sale of land). The tribunal's power to award punitive damages will depend on the width of the arbitration agreement, but as a matter of BVI law, punitive damages are only available in a small number of cases.

As far as the remedy or relief to be awarded is concerned, the New Act expressly empowers the tribunal to award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings. Unless otherwise agreed by the parties, the tribunal also has the same power of the court to order specific performance or any contract, other than one relating to land or an interest in land. Despite its wide terms, we do not think the New Act empowers an arbitral tribunal to make a winding up order. The position in relation to punitive damages is unchanged.

COSTS

Under the 1976 Act, in the absence of express provision to the contrary, every arbitration agreement is deemed to include a provision that the costs of the reference and of the award are in the full discretion of the tribunal. However, any provision in the arbitration agreement to the effect that a party should bear its own costs in any event is void, unless the agreement relates to a pre-existing dispute. In the event that the tribunal fails to make a costs order, any party may apply for one within 14 days. The 14-day period may be extended by the court.

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

Under the New Act, where a challenge on the basis of serious irregularity or an appeal or application for leave to appeal is pending, the court may order the applicant or appellant to provide security for costs. There is also provision for the arbitral tribunal to include directions with respect to costs (including its own fees and expenses) in the award. Costs are entirely at the discretion of the tribunal and must be assessed by the tribunal unless the parties have agreed on an assessment by the court. The tribunal may refuse to deliver its award until its costs have been met. The parties are jointly and severally liable for those costs.

The New Act also contains express provisions in respect of interest, enabling the tribunal to award interest on any monetary award and on costs, the rate and time frame of such interests to be at the discretion of the tribunal.

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Summary

International commercial arbitration in Canada is governed by a well-developed legal framework designed to promote the use of arbitration and minimise judicial intervention. Canadian courts have consistently upheld the integrity of the arbitral process and recent case law has further established Canada as a leader in the development of reliable jurisprudence relating to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) by giving broad deference to the jurisdiction of arbitral tribunals and supporting the rights of parties seeking to enforce international arbitral awards.

LEGISLATIVE FRAMEWORK

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, however, Canada's provinces were not uniform in adopting the Model Law and a number of them deviated from it in certain respects. The lack of complete uniformity among the provinces led to some discrepancies in how the courts addressed arbitration issues. Nevertheless, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process and a high level of predictability for parties to international arbitrations in Canada and those seeking to enforce international awards in Canada.

In response to amendments to the Model Law in 2006, in recognition of changes to international arbitration law and practice in the last three decades, and to develop a higher degree of uniformity and predictability throughout Canada, beginning in late 2011, the Uniform Law Conference of Canada (ULCC) undertook a review of the current international arbitration legislation with a view to developing formal recommendations for truly uniform legislation. The ULCC published its recommendations in 2013, which included a draft uniform international commercial arbitration statute.

Among other things, the ULCC's report endorses the adoption of all of the 2006 amendments to the Model Law (including those that broaden the jurisdiction of courts and arbitral tribunals to order interim relief), recommends implementation of a uniform limitation period for commencing recognition and enforcement proceedings (10 years), and introduces a simplified process for enforcing arbitral awards in multiple provincial jurisdictions. The process for enacting the uniform statute in the provinces is now underway.

AN ARBITRATION-FRIENDLY JURISDICTION

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. Canadian courts have consistently expressed their approval of these principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, Canadian courts have stated that

> [t]he purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business

> transaction and facilitates and encourages the pursuit of freer trade on an international scale.[1]

Courts across Canada have echoed these sentiments, frequently applying the competence-competence principle, showing broad deference to the decisions of arbitral tribunals, and narrowly interpreting the grounds for setting aside arbitral awards. In addition, some provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.[2]

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of enforcement provisions in the Model Law. Accordingly, article V of the New York Convention, which sets out the limited grounds on which enforcement may be refused, is narrowly interpreted, and arbitral debtors have the burden of proving any allegation of injustice or impropriety that could render an award unenforceable.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, Arbitration Place, ICC Canada's Arbitration Committee, the British Columbia International Commercial Arbitration Centre, the ADR Institute of Canada and the Canadian Commercial Arbitration Centre. These organisations provide parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators, and meeting facilities.

RECENT CANADIAN CASE LAW

The commitment of Canadian courts to the tenets of the Model Law and the New York Convention has been confirmed by recent case law. For example, significant recognition and enforcement decisions were rendered in the provinces of British Columbia and Ontario this year that clearly demonstrate the Canadian judiciary's respect for the integrity of the international arbitration process. The Supreme Court of Canada also recently rendered a decision relating to the grounds for review of domestic arbitral awards that is expected significantly to reduce courts' ability to review such awards. These cases are summarised below.

CE International Resources Holdings LLC V Yeap

In *CE International Resources Holdings LLC v Yeap* (*CEIR v Yeap*),[3] the Supreme Court of British Columbia respected and deferred to the arbitrator's decision that the defendant, a non-signatory to the arbitration agreement, was nevertheless bound by that agreement. *CEIR v Yeap* also demonstrates the willingness of Canadian courts to assist arbitral creditors during arbitral proceedings. The Court granted a ***Mareva*** injunction against both the corporate respondent and the personal respondent, preventing dissipation of their assets prior to the conclusion of arbitration proceedings.

CEIR v Yeap involved a dispute over a contract for the purchase and sale of precious metals. The claimants, CEIR, commenced arbitration in New York seeking an award of over US$8

million, plus costs, against both the contracting corporation and the individual who signed the contract on the corporation's behalf.

CEIR wanted to ensure that the respondents did not dispose of assets in British Columbia and other jurisdictions before an award was rendered, but the tribunal had not yet been constituted. CEIR, therefore, applied to the Supreme Court of British Columbia for an interim freezing order (***Mareva*** injunction) to maintain the status quo until interim relief could be sought from the arbitral tribunal. The order was granted, and equivalent orders were obtained from courts in New York, Singapore and the Cayman Islands.

At its first opportunity, CEIR applied to the tribunal for a similar order. The interim award granting the ***Mareva*** injunction was enforced by the Court, which also ordered the defendants to provide information regarding the extent and location of their assets. The defendants' failure to comply with that order led to sanctions for contempt of court including a warrant for the personal defendant's arrest.

The tribunal issued its final award on 24 May 2013, holding the respondents liable for US$10 million and confirming that the personal respondent was a party to the arbitration agreement despite his non-signatory status. The respondent resisted enforcement of the award in British Columbia on the grounds that British Columbia law precludes the enforcement of awards against non-signatories.

In recognising the award, the Court reiterated the mandatory nature of the enforcement provisions in the International Commercial Arbitration Act (ICAA) and the Foreign Arbitral Awards Act (FAAA), which jointly incorporate the Model Law and the New York Convention in British Columbia, stating that

> under the ICAA (and the FAAA) the court is required to recognize and enforce foreign arbitral awards unless the party opposing recognition satisfies the onus of proving that one or more of the grounds set out in s. 36(1)(a) or (b) apply.

The respondents argued that their burden had been met because the procedure followed had not been in accordance with the arbitration agreement (section 36(1)(a)(v)) and the finding of personal liability could not be the subject of arbitration in British Columbia (section 36(1)(b)). The Court rejected the respondents' arguments, referring to competence-competence, and stating that British Columbia courts should not 'scrutinize the arbitrator's findings of jurisdiction'. Noting this high level of deference, the Court ultimately held that an arbitral award could be enforced against a non-signatory in British Columbia if the arbitrator has made a finding that the non-signatory is a party to the arbitration agreement.

The Court also rejected the respondent's argument that enforcement of the award would violate public policy, reaffirming the narrow definition of 'public policy' that has been accepted in Canada and rejecting that the tribunal's determination on jurisdiction in any way offended local principles of justice and fairness.

Assam Co India Ltd V Canoro Resources Ltd

In *Assam Co India Ltd v Canoro Resources Ltd* (*Assam v Canoro*),[4] the Supreme Court of British Columbia dismissed allegations of procedural unfairness and violations of public

policy, holding that arbitral creditors who decide not to defend arbitral proceedings will not be permitted to re-litigate the same issues that were before the tribunal.

The parties had entered into a joint operating agreement (JOA) in respect of an oilfield in India, and a dispute arose when Canoro sought to transfer 53 per cent of their shares to Mass Financial despite a right of first refusal clause in the JOA.

Assam invoked the arbitration agreement in the parties' contract and proceeded to appoint arbitrators according to that agreement, including exercising its right unilaterally to appoint the third arbitrator. Canoro raised an objection to the tribunal with respect to Assam's appointment of the third arbitrator and petitioned the Supreme Court of India for similar relief. However, before a determination was made in either venue, Canoro advised its counsel not to appear on its behalf, and from that point onwards, ceased participating in the proceedings.

On 21 November 2011, the arbitral tribunal issued a final award against Canoro that entitled Assam to relief, including the shares wrongfully sold to Mass, Canoro's interest in the oilfield, and US$32 million. Assam sought to enforce the award in British Columbia. Canoro resisted enforcement on the basis of subsections 36(1)(a)(iii) (inability to present a party's case), (v) (improper composition of the tribunal), and 36(1)(b)(ii) (public policy) of the ICAA, arguing that that it was 'not given an opportunity to be heard contrary to the basic principles of natural justice and procedural fairness' and was 'forced to withdraw as, given the circumstances surrounding the arbitration, it had no or little chance to receive a fair hearing'.

In rejecting Canoro's arguments and enforcing the award, the Supreme Court of British Columbia emphasised the limited scope for judicial intervention in the Model Law, and noted that concerns of comity and respect for the capacity of foreign tribunals necessitate a high degree of deference to the decisions of arbitrators. The Court also referred to ***CEIR v Yeap***, confirming that the 'Court is generally not empowered to scrutinise the arbitrator's findings on matters of jurisdiction but rather it should accept the arbitrator's decision on its face and ought not go behind it'.

The Court soundly rejected Canoro's argument that it had not had a chance to present its case, holding that

> Canoro took a high risk strategic decision when it opted to abandon both its petition in the Supreme Court of India and its further participation in the arbitration. Having done so, it now seeks to re-litigate before this Court the same objections raised in India, labelling them as 'triable issues'... Canoro is not entitled to re-litigate its case in British Columbia. It could have and should have pursued the procedural and legal options it had available to it in India. It did not do so and it must live with the consequences.

On the issue of public policy, the Court emphasised that the scope of the exception only extends to situations in which enforcement of an award would offend

> local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the party of the tribunal which could not be seen to be tolerated by our courts.[5]

The final issue before the Court was the effect of portions of the award that entitled Assam to acquire Canoro's shares in light of Canoro having been dissolved for failing to file annual reports. Since the corporation no longer existed, it could not be ordered to transfer the shares to Assam. After canvassing authorities on the effect of dissolution on an ongoing dispute, the Court concluded that proceedings may continue against a company despite dissolution, and judgment may be obtained against a dissolved company. Recognising that there would be practical obstacles in implementing a share transfer, the Court nevertheless recognised the award and granted leave to Assam to apply for approval of a mechanism by which any difficulties that may arise in enforcing the award could be overcome.

Sociedade De Fomento Industrial Private Limited V Pakistan Steel Mills Corporation (Private) Ltd

In *Sociedade de Fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Ltd* (*SFI v PMS*),[6] the Court of Appeal for British Columbia addressed the rights of creditors to obtain interim relief in aid of arbitration, and confirmed that under the New York Convention a claimant is not obligated to seek enforcement of an award in the debtor's home country before seeking enforcement in a foreign jurisdiction.

Like *CEIR v Yeap*, *SFI v PSM* involved an application for a *Mareva* injunction to prevent the respondent from disposing of assets. In this case, SFI had already been granted a final arbitral award in an ICC arbitration (the final award), and sought a freezing order in advance of recognition and enforcement proceedings in British Columbia.

The final award was granted in favour of SFI in June 2010. After 10 months of non-payment, SFI learned that PMI had purchased three shipments of coal from a company in British Columbia, the second of which was scheduled to depart British Columbia by sea in or around May 2011. PMI applied for, and was granted, a *Mareva* injunction on 21 April, preventing the vessel from departing British Columbia and restraining PMI from disposing of the coal. As a condition of the injunction, PMI agreed to indemnify the third-party charter for any losses sustained as a result of the order.

After the final award was recognised and enforced by the British Columbia Supreme Court, SFI petitioned for reimbursement of amounts paid to the vessel charterer under the indemnity agreement and damages arising from SFI's efforts to collect on the award. PMI counterclaimed, asserting that the *Mareva* injunction had been wrongly granted and had caused PMI to suffer significant losses.

The lower court granted PMI's request and set aside the *Mareva* injunction, noting that *Mareva* injunctions were extraordinary and that the balance of convenience favoured PMI. The decision was based on the Court's finding that SFI had failed to make full, frank, and fair disclosure of a material fact (ie, by not informing the court that it could seek to enforce the final award in Pakistan, PMI's home jurisdiction). In the opinion of the trial judge, the onus was on SFI to satisfy the court that the award could not be enforced in the debtor's home country before execution remedies could be sought in a jurisdiction with no connection to the parties or the dispute.

On appeal, SFI argued that it was entitled to recognise and enforce its award in British Columbia regardless of whether it had first attempted to enforce it in Pakistan, emphasising the principles on which the New York Convention is based. As a result, SFI argued that it was entitled to the same array of execution remedies as any other judgment creditor.

The Court of Appeal agreed with SFI, concluding that the judge had erred in conducting a forum conveniens analysis to determine whether ordering a ***Mareva*** injunction was appropriate. In rejecting this approach, the Court of Appeal acknowledged that the New York Convention requires domestic courts to recognize foreign awards as if they were rendered in British Columbia. According to provincial legislation, a real and substantial connection between British Columbia and the subject matter of the dispute is presumed to exist in proceedings to enforce foreign arbitral awards. The Court held that 'it would be illogical to ignore this presumed jurisdictional connection for interlocutory purposes, but recognize it for final judgment purposes'. This removed any doubt that SFI was entitled to seek enforcement of its award in British Columbia, along with all the practical execution remedies available to domestic judgment debtors, regardless of its connection to the province or its attempts to enforce the award elsewhere.

The Court went on to hold that the trial judge's conclusions on the material non-disclosure issue were coloured by her 'erroneous conclusion that the onus was on the appellant to establish it could not enforce the award in Pakistan'. The correct approach, according to the Court of Appeal,

> should have been directed more to the question of whether considering all the circumstances, it was just and convenient to grant the injunction. The judge's balance of convenience analysis ought to have taken into account the delay that would accompany enforcement proceedings in Pakistan, as well as the considerable doubt about the enforcement of that part of the award representing interest under Pakistani law.

In essence, the Court of Appeal held that the availability of enforcement proceedings elsewhere was a factor to be considered in the balance of convenience analysis for a ***Mareva*** injunction, but that under the New York Convention a party had no obligation to seek enforcement elsewhere as a precondition to seeking enforcement in British Columbia. The Court of Appeal then held that the balance of convenience weighed in favour of granting the injunction on the bases that: SFI's claim was strong, the scheduled departure of PMI's assets from the province was imminent, and PMI continued to refuse to pay SFI. Accordingly, SFI was entitled to reimbursement for any losses it suffered in attempting to execute on the final award.

New York Stock Exchange, LLC V Orbixa Technologies Inc

In ***New York Stock Exchange, LLC v Orbixa Technologies Inc*** (***NYSE v Orbixa***)[7] the Superior Court of Ontario confirmed that under the New York Convention, a party seeking enforcement may do so prior to the award becoming final (although the moving party risks denial of enforcement until the award is binding). This decision further affirms the narrowness of the grounds on which enforcement of a foreign award will be refused.

NYSE and Orbixa were parties to a contract under which NYSE provided market data to Orbixa and permitted Orbixa to disseminate the data to certain third party users. A dispute arose concerning the designation of third-party users and the fees due to NYSE, and NYSE gave notice of termination of the agreement. Orbixa commenced arbitration, seeking injunctive relief to prevent NYSE from terminating the contract.

On 29 April 2013, an arbitral award was rendered in favour of NYSE, denying Orbixa's claims for injunctive relief and granting NYSE's counterclaim for a declaration that NYSE was entitled to terminate the parties' agreement and for amounts due and owing by Orbixa under various invoices. On 28 May 2013, Orbixa filed an application with the US Securities and Exchange Commission requesting a review of NYSE's decision to terminate the contract and the arbitrator's award.

On 13 June 2013, NYSE applied for enforcement of the award in Ontario, pursuant to the International Commercial Arbitration Act (Ontario). Orbixa challenged the award on the basis that the application for enforcement was premature; the award was not final and binding until the three-month appeal period specified in the Model Law had expired. The Court held that as long as the award is binding (ie, the three-month period has elapsed) when the enforcement application comes before the court then it cannot be challenged as 'not yet binding'.

The Court also rejected Orbixa's contention that enforcement of the award was contrary to public policy because of the parallel regulatory proceedings. Noting that Orbixa had received a full hearing and exercised its right of review, the Court concluded that the award in no way offended principles of justice or fairness.

Sattva Capital Corp V Creston Moly Corp

The Supreme Court of Canada in ***Sattva Capital Corp v Creston Moly Corp***[8] robustly confirmed the importance of arbitration in the Canadian legal system by setting the bar very high with respect to the ability of courts to review domestic arbitral awards. The Court narrowed the scope of judicial interference in the decisions of arbitrators by finding that in most cases a party's complaint that a contract was wrongly interpreted by an arbitrator will not be subject to review.

The dispute between Sattva and Creston concerned an agreement through which Sattva was entitled to a US$1.5 million finder's fee, payable in Creston Shares, in relation to Creston's acquisition of a mining property. The parties agreed that Sattva was entitled to the fee, but disagreed as to the appropriate valuation date under the contract, and therefore the number of shares payable. The parties commenced arbitration pursuant to the British Columbia Commercial Arbitration Act (CAA), the domestic equivalent to the ICAA. Arguments focused on the interpretation of 'Market Price' under the contract, and the application of a 'maximum amount' provision that Creston argued limited the amount payable. The arbitrator found in favour of Sattva, holding that the definition of market price in the contract entitled Sattva to over 11 million shares.

Creston sought leave to appeal the award pursuant to section 31 of the CAA. Leave may only be granted under the CAA on questions of law that 'may prevent a miscarriage of justice'. The Supreme Court of British Columbia denied Creston's application on the basis that the arbitrator's decision had been based on both law and fact, and was therefore not subject to appeal. At the Court of Appeal, Creston was granted leave on the basis that interpretation of the contract is a question of law.

In hearing the merits of the appeal, the Supreme Court of British Columbia held that the arbitrator's interpretation of the contract was correct and upheld the final award. Creston appealed and the Court of Appeal again overturned the trial court decision, ruling that the 'maximum amount' provision was determinative. Sattva appealed the leave decision and the decision on the merits to the Supreme Court of Canada.

The Supreme Court of Canada found in favour of Sattva on both grounds of appeal. On the issue of the leave decision, the Court held that the interpretation of a contract by an arbitrator is a question of mixed fact and law, and therefore cannot be appealed under the CAA except in specific circumstances. This represents a shift away from the traditional approach to contract law and affords a great deal of protection to arbitrators, whose decisions frequently rest on the interpretation of parties' contracts.

To meet the requirement that the appeal 'may prevent a miscarriage of justice', the Court stated that the legal error must relate to an issue which, if decided differently, would affect the results of the case. The Court held that the standard of review applicable to an arbitrator's decision is almost always reasonableness and that unless there is 'arguable merit' that the arbitrator's decision was unreasonable, the award cannot be appealed. The Court further noted that even if the appeal concerns a question of law that would affect the result of the case, leave to appeal may be denied at the discretion of the court. This narrow interpretation of section 31 of the CAA provides significant deference to the arbitral process and provides commercial parties with extremely limited grounds on which to appeal arbitral awards in the domestic context.

Although the analysis of the leave application was sufficient to allow the appeal, the Court went on to evaluate the merits, holding that the arbitrator had reasonably construed the contract as a whole and had given due regard the definition of 'Market Price', the 'maximum price' clause, and the business reality of the agreement.

Collectively, these cases demonstrate the proclivity of Canadian courts to respect the conclusions of arbitral tribunals and extend a full range of practical execution remedies to arbitral creditors.

CONCLUSION

Canada is consistently recognised as an arbitration-friendly jurisdiction, and with good reason. The legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

The authors are grateful for the valuable assistance of Kalie McCrystal (an articled student with Borden Ladner Gervais LLP).

Notes

1. *Automatic Systems Inc v Bracknell Corp* (1994) 18 OR (3d) 257 at p264, cited with approval in *Seidel v TELUS Communications Inc*, 2011 SCC 15 and *Desputeau v Editions Chouette (1987) Inc*, 2003 SCC 17.
2. The definition of 'local judgment' in British Columbia's Limitations Act specifically includes arbitral awards to which the Foreign Arbitral Awards Act or the International Commercial Arbitration Act apply, providing arbitral creditors with a 10-year limitation period for enforcement proceedings. Similarly, the British Columbian Court Jurisdiction and Proceedings Transfer Act presumes a 'real and substantial

connection' (the standard for Canadian courts to assume jurisdiction over a dispute) in any proceeding to enforce a foreign arbitral award.

3. 2013 BCSC 1804.
4. 2014 BCSC 370.
5. *Citing Schreter v Gasmac Inc*, [1992] OJ No 257 at 623.
6. 2014 BCCA 205.
7. 2013 ONSC 5521, aff'd 2014 ONCA 219.
8. 2014 SCC 53.

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Cayman Islands

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Summary

The Arbitration Law 2012 (the Law) provides a modern statutory regime based largely on the UNCITRAL Model Law and the English Arbitration Act (1996 Act).

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

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

KEY FEATURES OF THE LAW

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

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

An arbitral tribunal appointed under the Law has wide powers and is essentially able to award any interim or final remedy that a court could have granted if the dispute in question had been the subject of court proceedings. The Law gives the parties the freedom to tailor the arbitral proceedings according to their needs, but also provides default provisions that apply in the absence of agreement. There are certain mandatory provisions of the Law designed to protect the integrity of the arbitration process; for example, by ensuring that the tribunal maintains its impartiality throughout the arbitration and does not have any conflicts of interest. The Law expressly recognises that arbitration proceedings are to be confidential and the limited grounds set out in the Law, upon which an arbitral award may be challenged in the Cayman Islands courts reflect the grounds in the New York Convention.

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

JURISDICTION

The Law does not impose any restrictions on the types of dispute that may be referred to arbitration. Section 26(1) provides that any dispute that the parties have agreed to submit

to arbitration may be determined by arbitration unless the arbitration agreement is contrary to public policy or the dispute is not capable of determination by arbitration under any other law of the Cayman Islands.

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

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

Under section 9, where a party to an arbitration agreement institutes court proceedings in respect of any matter falling within the arbitration agreement, the other party to the arbitration agreement may apply to the court for an order staying the proceedings. The court must then grant a stay unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. A party that takes a step in the court proceedings to answer the substantive claim loses its right to apply for a stay of the proceedings (section 9(1)).

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

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

LIMITATION

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

CONFLICTS OF LAWS

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

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

SELECTION OF ARBITRATORS

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

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

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

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

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

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

(a) Pursuant to section 18(3) a challenge may be brought against an arbitrator where:

(i) circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or

(ii) he does not possess the qualifications to which the parties have agreed.

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

PROCEDURE

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

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

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

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

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

INTERIM REMEDIES

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

- in relation to security for costs;

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

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

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

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

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

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

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

In light of the principle of non-intervention by the court in arbitration proceedings set out in section 3(c), the court may only be willing to grant interim relief where the tribunal is unable to act itself. Instances such as this may include where the tribunal has not yet been appointed or where relief is sought against a person who is not a party to the arbitration agreement. It is expected that the courts will follow the approach adopted by the English courts under the 1996 Act of recognising the arbitral tribunal as having primary responsibility for granting interim relief and only acting where the tribunal is unable to do so.

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

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

EVIDENCE

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

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

CONTENT OF AWARD

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

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

Unless otherwise agreed, the tribunal may make more than one award at different times during the arbitral proceedings on different aspects of the matters to be determined. Such awards could include an award determining particular facts, an award relating to the existence or non-existence of particular conditions or an award relating to compliance or non-compliance with a particular rule, standard or quality. Where the tribunal makes such an award, it must specify the issue, claim or part of a claim that is the subject matter of the award (section 56).

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

CHALLENGING AN AWARD

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

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

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

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

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

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

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

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

The Law does not specify whether an application to set aside an award is to be determined by way of review or a rehearing, but the UK Supreme Court has determined that, in relation to the equivalent provision in the 1996 Act, the court is to conduct a rehearing on the question of the tribunal's jurisdiction (see ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious***

Affairs, Government of Pakistan [2011] 1 AC 763). This decision is likely to be influential in the Cayman Islands.

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

FOREIGN ARBITRAL AWARDS

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

The enforcement in the Cayman Islands of awards made in states which are parties to the New York Convention has been a straightforward exercise since the enactment of the Foreign Awards Law in 1975 and the Cayman Islands courts have readily enforced such awards under this legislation (see, for example, ***In the Matter of Swiss Oil Corporation: InMar Maritima SA and Others v Republic of Gabon*** (1988-89 CILR 277) and ***Tek Technologies Corporation v Dockery*** (2000 CILR 196)). The grounds for refusing enforcement set out in section 7 of the Foreign Awards Law match those in the New York Convention and are the same as those in section 103 of the English Arbitration Act 1996.

ENFORCEMENT

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

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

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

If leave to enforce the award is granted on an ex parte application, the defendant may within 14 days apply to set aside the order. The Grand Court may adjourn the enforcement proceedings and may, on the application of any party seeking to enforce the award, order the other party to give security. This can include interim relief, such as a freezing injunction, in appropriate circumstances.

CONFIDENTIALITY

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

the unauthorised disclosure of confidential information by any third party involved in the arbitration proceedings.

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

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

REMEDIES

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

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

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

COSTS AND TAX

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

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

INVESTOR STATE ARBITRATIONS

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

SUMMARY

Financial services institutions and processional advisers are now increasingly incorporating Cayman Islands arbitration clauses into their agreements.

Maples Group

Colombia

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Summary

RECOGNITION OF FOREIGN ARBITRAL AWARDS IN COLOMBIA

The adoption of Law 1563 of 2012, whose international section was based on UNCITRAL's Model Law on International Commercial Arbitration, represents a complete makeover of international arbitration in Colombia. It is widely recognised that the advantages brought by the adoption of such law are steadily positioning Colombia as an arbitral seat to be sought by national and international businessmen and law practitioners. However, the task of improving Colombia's position in the international arbitration scene cannot be fully achieved by Law 1563 of 2012. It also requires the fine-tuning of the judicial practice that applies its provisions in such a way that the legal system as a whole keeps up with the specificities and developments of international arbitration, recognising that despite the considerable differences existing between dispute resolution regimes, they are parts of a major system for the delivery of justice which needs of the mutual efforts of arbitral tribunals and national courts to be effective.

Law 1563 of 2012 it not alone in achieving this. There is a long history of international policy favourable to international commercial arbitration that has led the Colombian state to sign and ratify the following international treaties:

- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (the Montevideo Convention), approved by Law 16 of 1981;
- Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention), approved by Law 44 of 1986; and
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), approved by Law 39 of 1990.

Against this background, experience has shown that the procedure and law applicable to the recognition in Colombia of an arbitral award rendered abroad remains controversial. Thus, an analysis of the case law on the matter is required in order to pave the way for a new generation of jurisprudence, to be produced under the umbrella of Law 1563 of 2012.

We will now turn to the most significant decisions issued by the Colombian Supreme Court regarding the recognition of foreign arbitral awards. Every one of them was issued while the aforementioned international conventions were in force in the country.

SUNWARD OVERSEAS SA V SEMAR LTDA1

In 1992, the Colombian Supreme Court of Justice (the Supreme Court) was asked, for the very first time, to declare the recognition of a foreign arbitral award. In this case, the award had been rendered in 1988 by an arbitral tribunal seated in New York. Notwithstanding the fact that the Supreme Court accepted the applicability of the rules contained in the New York Convention, it refrained from declaring that the New York Convention had replaced the Colombian Code of Civil Procedure (CCCP) with regard to the list of grounds on which recognition could be denied, and ruled that both sets of requirements had to be satisfactorily fulfilled, hence adding the following requirements to those established in article V of the New York Convention:

- there must exist either legal or diplomatic reciprocity between Colombia and the country in which the award was produced;
-

the award must not refer to real property constituted over assets located in Colombia the moment the foreign arbitral proceedings initiated;

- the matter of the dispute should not be one defined by the Law as of the exclusive jurisdiction of Colombian Courts; and
- there must not exist a judicial proceeding or final judgment in Colombia over the same dispute.

This rule evolved over time, but it helps explain the gap that still exists between national and international practice on the recognition of foreign awards.

MERCK & CO INC V TECNOQUÍMICAS SA2

The second time that the Supreme Court addressed the issue of the recognition of foreign arbitral awards in Colombia was provided by a set of cases in which Merck & Co Inc sought the recognition of an interim arbitral award on jurisdiction and provisional measures rendered by an arbitral tribunal seated in the state of New Jersey and functioning under rules of the International Chamber of Commerce (the ICC Tribunal) in which the ICC Tribunal, among others, ordered the defendant, a Colombian based company, to refrain from starting arbitral proceedings in Colombia with regard to the same dispute that was being heard by the ICC Tribunal. The Supreme Court, in two decisions that were ultimately confirmed by the entirety of its Civil Chamber, reaffirmed its doctrine on the necessity to fulfil the requirements of both the New York Convention and the CCCP, as follows:

> As a matter of fact, exequatur being a special institution, its request must be subject to certain special requirements in order to be admissible. Among those requirements are: the jurisdiction of the Court to hear the claim; the foreign nature of the decision whose recognition is sought; the need for the concerned decision to have been rendered as the consequence of a process (Art. 695 para 1, CCCP); the fulfillment of the general requirements of complaints (Art. 75 CCCP); as well as the fulfillment of the special requirements for exequatur claims (Art. 695.2. CCCP), namely: that the claim does not relate to real property rights constituted over assets located in Colombia when the proceedings initiated; that the award is not contrary to the Colombian ordre public; that the award is final, according to the law of its country of origin; that duly certified and authenticated copy of the decision is presented; that the award does not relate to matters under the exclusive jurisdiction of Colombian courts (Arts. 695.2 and 694 paras. 1-4, CCCP).[3]

Besides strengthening its doctrine in the accumulation of requirements for the recognition of foreign arbitral awards in Colombia, the Supreme Court found that interim awards, given that they do not provide a final resolution of the dispute between the parties, cannot be considered as awards for the purpose of the application of the New York Convention and the relevant national regulation for recognition of foreign awards in Colombia. The rationale of the Court is summarised as follows:

> the New York Convention [...] establishes in numeral 1 of article I, as susceptible of exequatur, not only those decisions considered as 'arbitral awards' in the state where they were made, but also those arbitral awards 'not considered as

> domestic awards in the state where their recognition is sought', as long as, in any case, they 'arise out of differences between persons whether physical or legal'. As can be seen, not any decision that settles a dispute can be enforced in the State where its recognition is sought. Only those that settle, totally or partially, a 'difference between persons whether physical or legal' can. [...] It is then a mistake to assert that the Convention relates to 'arbitral awards' that 'have their origin' in disputes, rather than to arbitral awards that 'settle disputes' or 'put an end to disputes', because, if that were the case, the Convention would be construed mistakenly, accepting that an 'arbitral award' is not only the one that settles the 'differences between persons, whether physical or legal' but also the one that decides 'differences' that 'arise out of' the 'arbitral proceedings', as those that decide on jurisdiction and other issues, when that, by no means, can be extracted out of the whole context of the convention.[4]

Therefore, for the Supreme Court, the only decisions that could be subject to recognition in Colombia were those that materially put an end to disputes between the parties. Accordingly, the Court expressly excluded from recognition those decisions that, even when being formally final, were not 'definitive' awards. As a consequence, in every case, the claims for recognition where dismissed on the grounds that interim awards were not 'awards' as understood by the New York Convention and local regulations.

POLLUX MARINE SERVICES CORP V COLFLETAR LTDA5

This decision, on the admissibility of an exequatur claim, took place in 2011. In it, the Supreme Court considered that the claimant should have fulfilled the formal requirements set forth by the CCCP and, since the Supreme Court found that Pollux failed to provide evidence that the award was final (ie, a certification issued by the arbitral tribunal that rendered the award) or a certified translation of the arbitration agreement, the Supreme Court rejected the claim. This decision is representative of the regrettable approach adopted by the Supreme Court in its reading of the rules in the New York Convention and their link with relevant national regulation, which leads not only to an increase in the formal requirements that the claimant in the recognition proceedings must fulfil, but also to an unjustified establishment of further substantive requirements not included in the New York Convention. In this specific case, the Supreme Court failed to take into account that the New York Convention does not require that any recourse against the award be final and resolved prior to its recognition being sought – thus highlighting the extraordinary nature of annulment procedures.

PETROTESTING COLOMBIA SA AND SOUTHWEST INVESTMENT CORPORATION V ROSS ENERGY SA6

This decision, rendered in 2011, marks the stating of a new position in the Court's jurisprudence, informed by a recognition of globalisation as a tangible phenomenon that affects every aspect of modern society and calls for freedom of movement, not only of people, goods and services, but also of judicial and arbitral decisions.[7] In this case, the defendant in the recognition proceedings posed as defence against the recognition sought by the claimants that the legal requirements for the exequatur laid down in the CCCP were not met. The Court, in its analysis of the case, overruled its position from the ***Sunward Overseas*** and ***Merck*** cases and determined that, pursuant to article V of the New York Convention, the only defences available to the respondent in this kind of proceedings are those set forth

in the New York Convention. However, the Supreme Court still departed from the New York Convention in one key aspect: despite the fact that Colombia made no reservations when ratifying the convention (especially concerning reciprocity as allowed by article I.3 of the New York Convention), the Supreme Court still demands that reciprocity exist between the country where the award is rendered and Colombia as a condition for granting recognition.

The decision in the ***Petrotesting*** case is also relevant as it is the first time the Court addresses the issue of ordre public with regard to international commercial arbitration. In order to determine of the content of Colombian International Public Policy, the Court performed an exercise of comparative law, after which it declared that such concept relates only to the fundamental values upon which Colombian basic institutions are based, including, but not limited to: due process; independence and impartiality of the courts and tribunals; and the prohibition of abuse of rights. In other words, Colombian International Public Policy, as understood by the Supreme Court in the context of recognition of foreign arbitral awards, is in keeping with international jurisprudence and encompasses a much narrower realm than domestic public policy.

Finally, the Court also examined and determined the content and extent of the defence posed pursuant to article V.1.b. of the New York Convention regarding the due process of the defendant in the arbitral proceedings. For the Court, such a defence should be interpreted in a restrictive fashion, limiting the events for its application only to those set forth by the convention; that is, the lack of due notice and the impossibility for the defendant to present its claim. This last event is completed by the Court with considerations made by the Colombian Constitutional Court, which determined that the opportunity for a party to present its case is violated whenever such a party is prevented from:

- accessing the judiciary and presenting its claim before a competent Court;
- being duly served of the decisions that lead to the creation, modification or extinction of a right;
- expressing its opinions freely;
- controverting the claims or defenses presented;
- achieving a decision in a reasonable term, without unjustified delays; and
- producing and presenting evidence, and being able to contradict the evidence presented by its counterpart.

Additionally, as an expression of the pacta sunt servanda principle, the Court determined that any such circumstance should have been submitted by the interested party to the arbitral proceedings in a timely fashion.

After the analysis summarised here, the Court granted the recognition of the foreign arbitral award.

DRUMMOND LTD V FERROVÍAS AND FENOCO SA8

Also in 2011, the Supreme Court was asked to declare the recognition of two arbitral awards, one interim and one final, with their respective addenda, as rendered by an arbitral tribunal constituted under the rules of the International Chamber of Commerce. This case is, in essence, the application of the doctrines developed in the prior cases, given that the Court was asked to rule on the recognition of an interim award and on the defences posed by the respondents based on the regulation laid down in the CCCP.

As per the possibility of granting recognition of an interim award, the Court repealed its doctrine from the ***Merck*** cases, according to which, disregarding their denomination, the only arbitral decisions to be recognised in Colombia are those that settle in a definitive manner a dispute between the parties. According to the Supreme Court, as one of the decisions in these proceedings is called an 'interim award', it holds, as per its nature and scope, the nature of an award because it puts an end to several of the claims. In that regard, the doctrine has pointed out that:

> numerous regulations relate to the possibility of an arbitral tribunal to issue interim awards. ICC, LCIA, UNCITRAL and AAA rules all include the possibility for arbitrators to issue interim awards [...] The doctrine refers to such awards as decisions that are final, in a manner, not because they put an end to the arbitration or to the functions of the tribunal, but because they settle in a definitive matter a part of the disputes that have been submitted to arbitration, leaving the rest unsettled [...] an interim award is then final with regard to the dispute it settles, but partial, with regard to the totality of the disputes under arbitration.[9]

Contrary to what was decided in the ***Merck*** cases, the Court found that the interim award could be recognised in Colombia given that, despite its 'preliminary' character, it settles in a definitive fashion some of the disputes between the parties as it decides on several of the claims in the complaint.

As regards the requirements for the declaration of recognition, the Court again dismissed all the defences asserted pursuant to the CCCP, recognising that the only ones available for the respondents were those based on article V of the New York Convention.

As a novelty, while reviewing the defences posed by one the claimants, the Supreme Court established, following jurisprudence from the Colombian Council of State[10], that the fact that a state entity appears as defendant in an international commercial arbitration proceeding does not affect Colombian ordre public, given that the possibility for public entities to enter into international commercial arbitrations has not been limited by any relevant law and, further, that the New York Convention is applicable to awards rendered in proceedings where a state entity has acted because, as per its article I, the Convention applies to awards that arise out of differences between persons, whether physical or legal, without distinction between their private or public nature. Consequently, the Supreme Court concluded that disputes arising out of Colombian governmental contracts are not subject to the exclusive jurisdiction of the Colombian judiciary and, therefore, can be decided by arbitral tribunals, as long as the arbitrators refrain from ruling on the legality of the administrative acts produced by such entities in the exercise of their exceptional powers, as had previously determined the Colombian Constitutional Court.[11] Accordingly, the Court granted the exequatur of the concerned arbitral awards.

POLIGRÁFICA CA V COLUMBIA TECNOLOGÍA LTDA12

The latest decision made by the Court on the matter took place with regard to an arbitral award rendered against a Colombian based company by an arbitral tribunal constituted under the rules of the Arbitration and Conciliation Centre of the Chamber of Commerce of Guayaquil, Ecuador. This decision is important because it is the first one rendered after Law

1563 of 2012 came into force, and is representative of the most evident shortcoming of Colombian judicial practice with regard to the recognition of foreign arbitral awards (ie, the seemingly everlasting quest for reciprocity).

As per the effects of the adoption of law 1563 of 2012, the Court recognised that it includes a new, more expeditious proceeding for achieving the recognition of foreign arbitral awards that exclude the use of exequatur rules contained in the CCCP. Nevertheless, pursuant to rules found in the very Law 1563 of 2012, the Court concluded that this specific case should be conducted as an exequatur because the foreign arbitral proceedings started before Law 1563 of 2012 came into force.

Consequently, the Court initiated its accustomed study on the existence of either legal or diplomatic reciprocity between Colombia and Ecuador. In doing so, the Court found that there were three international treaties applicable to the case: the New York Convention; the Montevideo Convention; and a Treaty on Private International Law signed by Colombia and Ecuador in 1903.

In light of the latter, the Court had to determine which of the aforementioned treaties apply to the specific case. With regard to the New York Convention, the Court concluded that, as per article VII, said instrument holds a 'residual' nature and must yield when faced with other bilateral or multilateral agreements on the matter. The Treaty on Private International Law between Colombia and Ecuador was also discarded as non-applicable. Hence, the court decided to rule according to the provisions found in the Montevideo Convention.

In the absence of defences posed by the respondent, the Court found that all the applicable requirements were met in the case, thus granting the recognition of the award.

CURRENT SITUATION AND EXPECTATIONS FOR THE FUTURE

Upon reviewing the arguments developed by the Court in its rather limited experience with the recognition of foreign arbitral awards in Colombia, it is interesting to note how the highest civil Court in Colombia has been growing in its awareness of the importance of arbitral justice and of its specificities. Jurisprudential evolution, though rather slow, is on the right track, without evidence of arbitrary reasoning by the Court or of a decided wariness against international commercial arbitration. However, challenges remain. The constant quest for reciprocity, even if it has had no regrettable material effects, constitutes a clear misapplication of the relevant international rules by the Court, which in this regard has failed to grasp the logic behind international regulations such as the New York Convention.

The decision in the ***Poligráfica*** case, while partially flawed (as explained above), gives room to a more optimistic prospect as to the future of recognition of foreign arbitral awards in Colombia. The fact that the Court expressly recognised the ending of the regime of recognition based on exequatur, and acknowledged, as applicable to future cases, in an exclusive basis, that the rules laid down in Law 1563 of 2012 – essentially a compilation of the rules found in the New York Convention – enhances the expectations and allows practitioners and businessmen to anticipate a favourable environment for the recognition of foreign arbitral decisions.

Notes

1. Colombian Supreme Court of Justice, Civil Chamber, Judgment of 20 November 1992.
2.

Colombian Supreme Court of Justice, Civil Chamber, Judgments of 12 November 1998, 26 January 1999 and 1 March 1999.

3. Colombian Supreme Court of Justice, Civil Chamber, Judgment of 1 May 1999.
4. Supra Note 3.
5. Colombian Supreme Court of Justice, Civil Chamber, Judgment of 11 May 2011
6. Colombian Supreme Court of Justice, Civil Chamber, Judgment of 27 July 2011.
7. Ibid. The Supreme Court expressly stated: The dynamics imposed by globalization of all activities of modern society, characterised by economic and cultural interconnections, derived from the traffic of people, goods and services, has influenced the current trend of private international law to advocate for the recognition and enforcement of decisions rendered abroad, on a prior basis of reciprocity, constituting a clear exception to the sovereign authority to administer justice through the judiciary in its territory.
8. Colombian Supreme Court of Justice, Civil Chamber, Judgment of 29 December 2011.
9. Ibid.
10. Colombian Council of State, Decision of 22 April 2004, case 2003-00034-01
11. Colombian Constitutional Court, Judgment C-1436 of 2000.
12. Colombian Supreme Court of Justice, Civil Chamber, Judgment of 19 December 2013.

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Dominican Republic

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Summary

LEGAL FRAMEWORK FOR ARBITRATION IN THE DOMINICAN REPUBLIC

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

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

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

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

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

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

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

GENERAL PRINCIPLES OF THE LAW FOR COMMERCIAL ARBITRATION

The Law for Commercial Arbitration is based on the Spanish arbitration Law No. 60/2003 and the UNCITRAL Model Arbitration Law, as revised in 2006. The law is divided into nine chapters. The first chapter refers to the general dispositions of the law, including scope of application, disputes subject to arbitration, definitions and rules of interpretation, as well as the representation of the state. The second chapter is dedicated to the arbitration agreement, its form, definition and autonomy. Chapters 3, 4 and 5 refer to the arbitral tribunal, its composition, jurisdiction and the procedural aspects of arbitration. Chapters 6, 7 and 8 provide for the awards, the finalisation of the procedural aspects, the challenge of the awards and the recognition and enforcement of the awards. Finally, Chapter 9 establishes certain transitory dispositions necessary for the enactment of the law.

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

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

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

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

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

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

THE KOMPETENZ-KOMPETENZ PRINCIPLE

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

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

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

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

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

ENFORCEMENT AND CHALLENGE OF ARBITRATION AWARDS

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

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

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

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

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

(i) that one of the parties to the arbitral agreement was affected by an incapacity at the moment of entering into the agreement, or that the agreement to arbitrate was invalid under the law of the arbitration;

(ii) a violation of the right of defence of one of the parties due to non-compliance with due process;

(iii) that the arbitrator or arbitral tribunal decided ultra petita;

(iv) that the designation of the arbitrators or the arbitral procedure was not executed in accordance with the agreement of the parties (except if the agreement of the parties was contrary to obligatory dispositions of the Law for Commercial Arbitration) or in the absence of agreement of the parties on these issues, that they were executed in disregard of the Law for Commercial Arbitration;

(v) decisions on matters not susceptible to arbitration; and

(vi) that the arbitral award is contrary to public order.

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

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

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

This chapter is accurate as of October 2013.

Notes

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

OMG

Ecuador

Rodrigo Jijón-Letort and **Juan Manuel Marchán**
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Summary

NATIONAL AND INTERNATIONAL ARBITRATION IN ECUADOR

ARBITRATION AND MEDIATION LAW: GUIDELINES FOR APPLICABILITY

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

As regards international arbitration, article 42 of the AML categorically provides the following:

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

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

- Parties may elect any norms to conduct an ad-hoc or institutional arbitration proceeding. 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 public policy – not clearly defined in Ecuador. Despite this lack of definition, we consider that norms such as those relating to the due process (specified below) would be included in this category.
- AML provisions for local proceedings are not necessarily applicable to international arbitration, except restrictedly to the assumptions described 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 an arbitration proceeding.
- Substantive non-procedural provisions in the AML could be important and applicable to international arbitration in certain circumstances.

It is therefore necessary to outline such assumptions wherein Ecuadorean law could be applicable to international arbitration. In principle, local law is important when it operates as lex arbitri, namely, when it is the law of the place where the arbitration is conducted. Lex arbitri is fundamental for certain questions that could arise before, during and after arbitration, especially provisions that might be deemed imperative or pertaining to public policy. Although not intending to provide a fully comprehensive 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;
- due-process rules;
- preventive measures;
- judicial assistance;
- formalities for issuing the arbitral award;
- actions and recourses against the award; and
- jurisdiction of the courts.

INTERNATIONAL COMMERCIAL ARBITRATION: DEFINITION AND SCOPE

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

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

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

INTERNATIONAL CONVENTIONS

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

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

- the 1928 Havana Convention on Private International Law;[7]
- the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);[8]
-

the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention)[9] (recently denounced);[10]

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

INTERNATIONAL ARBITRATION AND FOREIGN INVESTMENT PROTECTION

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

Actually, the Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of BITs[14] are unconstitutional. 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. Currently, the only BIT that is being denounced is the BIT with Finland; the other treaties have not been denounced by the government. We believe that the government is waiting for the Commission for the Citizens' Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments' (CAITISA) report.

CAITISA

After unfavourable judgments from a number of international tribunals, the government moved to limit its international liability by denouncing a number of treaties. The attack began with a letter dated 5 October 2012 issued by the National Juridical Secretary on behalf of President Correa, addressed to ministers and public authorities,informing them that 'in future, contracts to be concluded by Ecuador, disputes must be submitted only to local courts and not to arbitral tribunals'.[15]

The letter does not distinguish between local or international arbitration, so we can infer it applies to any kind of arbitration clause that may be included in an administrative contract. Despite this, Ecuador's initiative to submit disputes with foreign investors arising from specific contracts to international arbitration under UNCITRAL rules, having Santiago de Chile as the seat of arbitration, remains unaltered. The Attorney General has already approved this type of arbitral provision as required by the Constitution in several contracts.

Executive Decree 1506, dated 6 May 2013,[16] established the creation of CAITISA. The objectives of CAITISA are to examine and evaluate:

- the execution and negotiation process of BITs and other agreements on investment signed by Ecuador, as well as the consequences of their application;
- the content and compatibility of those treaties with Ecuadorean legislation; and
- the validity and appropriateness of the actions, proceedings and awards issued by international investment tribunals and arbitral bodies where Ecuador has been a party.

CAITISA's objective is to determine, from a legal, social, economic and political perspective, the legality, legitimacy and fairness of the decisions, and to identify inconsistencies and

irregularities that have caused or may cause impacts on the Ecuadorean state in economic, social and environmental matters.

In order to complete its tasks, CAITISA will have an eight-month period (extendable for additional eight months) and broad access to 'the entire content of instruments for treatment of foreign investment and dispute resolution on the matter'. All public institutions are obliged to provide CAITISA with the information it requests. Up to this date, CAITISA has not issued a formal declaration on any matter.

This period has been extended and CAITISA is scheduled to render its final report at the end of 2014. The issuance of this report will be of true relevance for the development of international arbitration in Ecuador and for the future of bilateral investment treaties that for sure will be mentioned in CAITISA's report.

Finally, CAITISA drafted a bill that still has to be introduced before Congress that grants immunity from civil and criminal liability to all of its members for any results the report may contain. This type of immunity is common for truth and reconciliation commissions but not for this type of administrative commission.

PENDING CASES AGAINST ECUADOR

To date, Ecuador has 16 pending international arbitration cases pertaining to investment and five notifications of existence of a dispute filed under different bilateral investment treaties.-

ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN ECUADOR

As far as municipal law is concerned, the AML does not have a specific system for the recognition and enforcement of foreign awards, but rather treats them as a final decision from the Ecuadorian highest court of law. Article 42 of the AML states that 'awards issued in an international arbitration proceeding shall have the same effects and shall be enforced in the same manner as awards issued in a national arbitration proceeding'. According to article 32 of the AML, that procedure mirrors the enforcement procedure of final judgments rendered by Ecuadorean courts. The AML sets forth the judge's duty to recognise and enforce foreign awards through a judicial order without the possibility of applying any other procedure.

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

The enforcement procedure begins with an order to the debtor ordering him to pay the award in 24 hours. This proceeding does not admit any exceptions. For this reason, the AML presents an alternative that could be more expeditious than the New York Convention.

It is important to note that one of the tasks of CAITISA is to determine the 'legality, legitimacy and fairness' of decisions issued by arbitral tribunals against the Ecuadorean state. We believe this power will affect the enforcement of foreign awards. Any local judge who is aware of a negative ruling by CAITISA will at least think twice before enforcing an award that orders the state to compensate investors for violations of their rights.

Recently, a circulating bill was proposed by a number of academics that specifically addressed the enforcement of international arbitral awards in Ecuador. This project awards the President of the National Court of Justice the authority to recognise and enforce

international arbitral awards, and seeks to block enforcement against the treasury accounts and assets of public entities. The project also requires authorisation from the government and a declaration stating that payments will be subject to the availability of funds before any public entity, as a result of the enforcement of international awards, pays an amount of money to the creditor.

Some authors argue that awards should be recognised and enforced in the same way as foreign judicial rulings, which require a complex proceeding that requires the application of all the burdensome filters of article 414 of the Code of Civil Procedure and article 143 of the OCFJ. We believe this interpretation to be mistaken. The enforcement and execution of foreign arbitral award in Ecuador is explicitly mentioned in the AML and only requires a judicial order. Any other procedure, in our opinion, has no legal ground.

OTHER ASPECTS WORTH MENTIONING

Recently the development of arbitral proceedings is being disturbed by a series of constitutional actions that impede the regular development of arbitral cases. Judges are currently invoking constitutional rights to force arbitrators to refrain from entertaining certain arbitral proceedings or force them to make important jurisdictional decisions on the nascent stages of the proceedings.

Additionally, we have learned about an attempt from the Disciplinary Board of the judiciary to initiate administrative proceedings against an arbitral tribunal. The judiciary has no right to rule or entertain disciplinary actions against arbitrators.

2014 has also been important for arbitration due to the recent decisions in the ***Perenco*** and ***Murphy*** cases, and the possible issuance of the CAITISA report.

Notes

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

6. Article 417, Constitution:
   International treaties ratified by Ecuador shall be subject to the provisions of the Constitution. In the case of treaties and other international instruments on human rights, the principles pro human being, no restriction of rights, direct applicability and open clause established in the Constitution shall apply.' This principle has been developed further in article 5 of the Organic Code for the Judiciary, which states that: 'The judges, administrative authorities and officials of the Judiciary shall directly apply constitutional norms and those set forth in international instruments on human rights if the latter are more favourable to those established in the Constitution, even if not expressly invoked by the parties.
   Organic Code of the Judiciary, Official Register Supplement 544, 9 March 2009.
7. Official Register Supplement 1201, 20 August 1960.
8. Official Register 43, 29 December 1961. Ecuador ratified the New York Convention resorting to the commercial and reciprocity reservations set out in article I(3).
9. Official Register 386, 3 March 1986. Note that this Convention only pertains to disputes relating to investments between contracting states and nationals of other states, as specified in its provisions.
10. On 3 June 2009, the President of the Republic delivered a request to the Legislative and Auditing Committee of the National Assembly asking it to denounce the Washington Convention, claiming that it infringes the interests of Ecuador and violates article 422 of the Constitution. The request was considered by the National Assembly on 12 June 2009. Subsequently, the President of the Republic issued Executive Decree No. 1823 on 2 July 2009, where he resolved: '(1) To denounce and, therefore, to declare the termination of the Convention on Settlement of Investment Disputes ICSID ...' Notice of the denunciation was served to ICSID on 6 July 2009.
11. Official Register 875, 14 February 1992.
12. Official Register 153, 25 November 2005.
13. 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.
14. See the article by Global Arbitration Review at the following URL: www.globalarbitrationreview.com/news/article/28642/ecuador-champing-bits.
15. Oficio No. T.1-C.1-SNJ-12-1134 issued by the National Juridical Secretary the 5th October 2013.
16. Official Register 958, 21 May 2013.
17. Source: www.pge.gob.ec/es/patrocinio-internacional/casos-internacionales-activos.html,
    visited 18 August 2014.
18. See article 5 of the NYC.

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Mexico

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Summary

DECISION ON ANTI-ENFORCEMENT INJUNCTIONS AND ACCESS TO JUSTICE

PRELIMINARY CONSIDERATIONS

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

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

This mechanism is recognised by the New York Convention and the Mexican Commerce Code, and effectively allows a party requesting the annulment of an arbitral award to oppose the enforcement of such award while the determination on annulment is pending, giving suitable security in the enforcement proceeding. It goes against the established provisions of international arbitration and is nonsensical for a party requesting annulment to also require the court at the seat of arbitration to grant an anti-enforcement injunction ordering a party from refraining to enforce a binding arbitral award before national or foreign courts.

FACTS

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

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

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

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

In consideration of the previous, Party A partially challenged the ***amparo*** decision. The following issues were settled before the review tribunal, through a decision issued on 28 November 2013.

LEGAL ISSUES THAT ARISE FROM THIS CASE

A provisional measure, granted during an annulment proceeding, is illegal and not contemplated by the provisions of the Commerce Code

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

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

In the discussed case, the arbitration had already been conducted and the final award issued. Therefore, the District Court had no power to grant a provisional measure during the

annulment proceeding in order to bar Party A from exercising its legal right to request the enforcement of the final award.

The District Court created a new legal situation that is not contained in the Mexican legal regime. Therefore, the review tribunal confirmed that there is no legal support to grant another provisional measure in order to 'preserve the subject matter of the annulment proceeding', as this situation is not regulated in the Commerce Code.

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

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

This position is contrary to the Mexican law on commercial arbitration. The review tribunal recognised in its decision the following:

- Article 1461 of the Commerce Code, and articles 4, 5 and 6 of the New York Convention, allow a party to request the recognition and enforcement of the arbitral award in other jurisdictions. According to the New York Convention, the court requesting the enforcement of an award that has been annulled in another jurisdiction has the power of recognising that annulment.
- Foreign courts shall not analyse the validity of the arbitral award. This analysis may only be conducted by competent courts at the place of arbitration. Therefore, according to the provisions of the Commerce Code, New York or Panama Conventions, foreign judges may only recognise and execute the award, or refrain from doing so, if a cause for doing so is found.
- Accepting that the national courts must analyse the validity of the awards issued in their territory before they may be enforced in such country or abroad is contrary to human rights, the Commerce Code, and the New York and Panama Conventions, which oblige courts of a state to recognise and enforce arbitral awards issued by another state party.
- Allowing the District Court to prevent Party A from enforcing the award, which is binding and has the nature of a final judicial decision, is contrary to the Commerce Code and articles III and V of the New York Convention and 4 and 5 of the Panama Convention.
- Parties B and C were never defenceless, given that they could have argued article VI of the New York Convention and article 6 of the Panama Convention before a foreign judge, requesting a stay in the enforcement proceeding until the annulment decision was issued.

Security To Stay Enforcement Pending Annulment Of An Award

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

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

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

COMMENTS

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

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

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

The solution adopted by the review tribunal is clear evidence that Mexican courts are motivated by an interest in facilitating the recognition and enforcement of foreign arbitral awards, not preventing it. The stance that was ultimately followed by the review tribunal has clearly strengthened the efficacy of international awards in a view to the objectives of the New York Convention and the needs of foreseeability and fairness in the scope of judicial review.

Notes

1. Article 1461 Commerce Code, 'Arbitral awards, irrespective of the country in which they are rendered, shall be recognised as binding and, after the filing of a petition in writing to court, they shall be enforced according to the provisions of this chapter.'
2. Article 28, ICC Rules of Arbitration:
   Article 28: Conservatory and Interim Measures:
   1) *Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or*

conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2) Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

3. Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (New York Convention).
4. Inter-American Convention on International Commercial Arbitration of 1975.
5. File with the request:
   • the original of the award or a certified copy;
   • the original or certified copy of the arbitral agreement; and
   • an official translation of the award if it is rendered in a language other than the official language of the country in which its execution is being requested.
6. Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin', *Journal of International Arbitration*, (Kluwer Law International 2009 Volume 26 Issue 2) pp267–292.

Panama

Claudio De Castro
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Summary

In an effort to continue pursuing the pro-arbitration avenue, to redress some of the confusing provisions of the previous arbitration act that differed from international tendencies and to address some of the relevant and current issues being discussed in the international arbitration community, on 31 December 2013, the National Assembly of Panama adopted Law No. 131 of 2013, which regulates national and international commercial arbitration in Panama (the Arbitration Act).[1] The Arbitration Act is largely inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (the UNCITRAL Model Law), including some domestic adjustments and other additional provisions.

Panama is no stranger to promoting arbitration: it is a party to the main conventions on international arbitration, such as the Inter-American Convention on International Commercial Arbitration,[2] the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards[3] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[4]

In 2004, the Panamanian Constitution was amended[5] to recognise arbitration as a valid system for the resolution of disputes separately from the Panamanian courts, and to incorporate the ***Kompetenz-Kompetenz*** principle into the Constitution. These constitutional amendments also included the express mention of the capacity of the government to be a party to arbitration proceedings without the need for an express authorisation, provided that an arbitration clause is included in the contract to which the government or any state-owned entity is a party. In 1999, Panama enacted its first modern law on arbitration, known as the Law Decree No. 5 of 1999 on Arbitration, Mediation and Conciliation (the Previous Act).[6] This was Panama's first attempt to enact a modern legislation on arbitration (prior to the Previous Act, arbitration was regulated by the provisions of the Judicial Code of Panama). However, despite being inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration, the Previous Act contained some provisions that differed from the uniform international tendencies. For example, if the parties did not agree otherwise, or if the chosen rules of arbitration did not provide otherwise, the default rule was that the arbitral tribunal decided the case ex aequo et bono or as amiable compositeur. The Previous Act also provided that, in ex aequo et bono arbitration proceedings, the arbitral tribunal applied its 'free criteria' and the awards did not need to be reasoned.

This chapter discusses the key changes introduced by the Arbitration Act, with special focus on changes regarding interim measures in favour of arbitration proceedings.

WHAT'S NEW?

Among the various changes introduced by the Arbitration Act, the following are worth mentioning:

Amiable Compositeur Is No Longer The General Rule

As mentioned above, the Previous Act provided that if the parties did not agree otherwise, or if the chosen arbitration rules did not provide otherwise, the default rule was that the arbitrators would decide the case ex aequo et bono or as amiable compositeurs. The Arbitration Act redresses this provision to follow the global tendency, which is to consider that the arbitrators can only act as amiable compositeurs when expressly agreed by the parties (article 56 of the Arbitration Act).

Interpretation Based On General Arbitration Principles

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

Reasoned Awards As A General Rule

Contrary to the Previous Act, which seemed to exempt ex aequo et bono arbitral tribunals from issuing reasoned awards, the reasoning of all awards is now mandatory, unless the parties agree that no reasons shall be given or unless the award contains the terms of a settlement by the parties (article 60(2) of the Arbitration Act).

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

Contrary to the UNCITRAL Model Law, which provides that 'failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable', the Arbitration Act does not force the arbitral tribunal to apply 'conflict of laws rules', but rather allows it to directly apply the 'rules of law' it considers appropriate without going thru the process of using conflict of law rules to find such applicable law (article 56(2) of the Arbitration Act). This liberal provision, similar to article 21 of the Rules of Arbitration of the International Chamber of Commerce, gives a larger freedom to arbitrators when determining the applicable law.

Default Number Of Arbitrators

Parties may freely agree on the number of arbitrators provided it is an uneven number. The Arbitration Act also establishes that the default number of arbitrators shall be one unless otherwise agreed by the parties. Other exceptions to this rule are the cases where the state or a state entity is involved, in which case the number of arbitrators shall always be three (article 19 of the Arbitration Act). This provision differs from the Previous Act, which fixed the default number of arbitrators at three for any case.

Enforcement Of International Arbitral Awards Rendered In Panama

Contrary to the Previous Act – according to which the enforcement of arbitral awards rendered in international arbitration proceedings was subject to the issuance of a writ of exequatur by the Supreme Court of Panama, even in cases when the seat of the arbitration was Panama – the Arbitration Act establishes that the enforcement of international arbitration awards rendered in Panama can be requested directly to local courts without prior issuance of a writ of exequatur (article 70 of the Arbitration Act).

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

The Previous Act provided that the language to be used in the arbitral proceedings would always be Spanish when both parties were Panamanians. In contrast, the Arbitration Act has adopted a more international approach, mirroring the UNCITRAL Model Law by establishing that, if the parties do not agree on the language, the arbitral tribunal shall determine the language or languages to be used in the proceedings (article 49 of the Arbitration Act).

Delay For Issuing The Arbitral Award

The Previous Act provided that, unless otherwise provided by the parties, the arbitral tribunal had to issue the award six months after the acceptance of the appointment by the last

arbitrator, and that this period could be extended according to the will of the parties or to the applicable rules.

In contrast, the Arbitration Act establishes a difference between domestic and international arbitration with regards to this matter (article 55 of the Arbitration Act). For domestic arbitrations, the Arbitration Act follows the tendency of the Previous Act by establishing a delay to the issuing of the award. This delay is two months after the filing of the closing statements by the parties. This delay can be extended for another two months by the arbitral tribunal, depending on the complexity of the case. For international arbitrations, the Arbitration Act follows the tendency of the UNCITRAL Model Law, which does not establish such delay and allows this to be decided by the parties, the applicable rules or, in the absence of such, the arbitral tribunal.

Protection Of Arbitral Decisions From Writs Of Amparo

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

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

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

Therefore, with the intention of putting an end to the discussion of whether or not a decision from an arbitral tribunal could be subject to a writ of ***amparo***, the Arbitration Act expressly establishes that in the matters governed therein, local courts cannot intervene and do not have jurisdiction, except in cases expressly established by the law (eg, assistance with the taking of evidence, assistance regarding interim measures, setting aside of arbitral awards) (article 11 of the Arbitration Act).

Moreover, the Arbitration Act also establishes that the request to set aside arbitral awards is the only available action to protect any constitutional right violated or threatened within the arbitral proceedings or by the arbitral award (article 66 of the Arbitration Act).

WHAT'S NEW WITH REGARDS TO INTERIM MEASURES?

Despite the importance of the aforementioned amendments to the Panamanian arbitration legislation, in our view, one of the main changes introduced by the Arbitration Act is the treatment of interim measures in favour of arbitration proceedings. Therefore, we will discuss issues related to interim measures and arbitration proceedings under Panamanian law.

Interim Measures In Favour Of Local Judicial Proceedings

The Panamanian legal system has a limited number of interim measures that may be requested in favour of local judicial proceedings (eg, seizure, suspension of acts related to assets, suspension of corporate decisions, measures to preserve evidence, etc), which are decided by local Courts ex parte and, therefore, the defendant is only notified of the request for interim measures once the measure has been adopted and executed.

Moreover, the scope and effect of interim measures as defined in Panama is very limited (numerus clausus) since Law No. 19 of 26 March 2013 repealed article 569 of the Judicial Code, which previously granted local Courts the possibility of adopting general interim measures.

The Previous Treatment Of Interim Measures In Favour Of Arbitration Proceedings

The Previous Act provided that, unless otherwise agreed by the parties, the arbitral tribunal could, at the request of one of the parties, grant the interim or protective measures that the tribunal considered necessary. This very general provision of the Previous Act did not regulate in detail how interim measures worked in favour of arbitration proceedings. For example, it was not clear if the interim measures issued by arbitral tribunals were the same as the ones issued by local courts; if interim measures by arbitral tribunals could be issued via ex parte proceedings without notifying the party against who the measure was sought – such as interim measures in favour of local judicial proceedings; or if there was a difference between interim measures issued by local courts in favour of arbitration proceedings and interim measures issued by arbitral tribunals in favour of arbitration proceedings.

According to the Previous Act, the arbitral tribunal had the possibility (not the obligation) of requiring the party requesting the measure to provide appropriate guaranties. For the enforcement of these measures, the arbitral tribunal could request the assistance of the Circuit Courts.

Because of the vagueness of this provision of the Previous Act, what regularly happened in practice was that:

- interim measures issued by arbitral tribunals were also granted ex parte – as previously explained, interim measures issued in favour of judicial proceedings are granted ex parte and since the Previous Act did not provide otherwise, a local approach was used to treat interim measures;
- interim measures issued by arbitral tribunals, contrary to those granted by local courts, did not necessarily required the posting of guaranties by the party requesting the measure;
- interim measures issued by arbitral tribunals could be as broad as interim measures issued by local courts under article 569 of the Judicial Code (as mentioned before, until the enactment of Law No. 19 26 March 2013, local courts had the power to order any and all interim measures which they considered appropriate); and
- since there was no express provision regarding the recognition and enforcement of interim measures issued by arbitral tribunals seating abroad (and since our Judicial Code only contemplates the possibility of enforcing 'final' judicial decisions issued abroad), such measures could not be recognised and enforced in Panama.

The Current Treatment Of Interim Measures In Favour Of Arbitration Proceedings

The Arbitration Act mirrors, almost identically, Chapter IV of the UNCITRAL Model Law. The new Arbitration Act introduced some changes regarding the treatment of interim measures in favour of arbitration proceedings, in comparison with the situation under the Previous Act and with the situation of interim measures issued in favour of local judicial proceedings.

Contrary to interim measures issued in favour of local judicial proceedings, interim measures issued in favour of arbitral proceedings are broad and general, since they seek to:

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

Therefore, it could be understood that, in a certain way, arbitrators have more freedom than local courts when issuing interim measures. This is because arbitral tribunals can issue general (not specific) measures while local courts are constrained to issue specific interim measures that appear expressly listed in Panamanian law (eg, seizure, suspension orders, etc).

Contrary to interim measures issued in favour of local judicial proceedings, it could be considered that interim measures issued in favour of arbitral proceedings are not decided ex parte. There is no express provision in the Arbitration Act stating that arbitral tribunals must hear all parties before deciding a request for an interim measure. However, the Arbitration Act does specify that preliminary orders are granted 'without notice to any other party', and does not specify this with regards to interim measures.

This lack of specification (that arbitral tribunals must hear all parties before deciding a request for an interim measure) could cause some confusion. The UNCITRAL Model Law was drafted with the preconceived idea that idea interim measures issued by arbitral tribunals are decided with the audience of all interested parties, while in Panama, local practitioners have the preconceived idea that interim measures are granted ex parte, since this is the regular treatment for interim measures issued by local courts.

Contrary to interim measures issued in favour of local judicial proceedings, interim measures issued in favour of arbitral proceedings do not require the posting of a guarantee by the party requesting the measure. The Arbitration Act provides that the arbitral tribunal 'may' (not 'shall') require the party requesting an interim measure to provide appropriate security in connection with the measure.

Contrary to interim measures issued in favour of local judicial proceedings, interim measures issued in favour of arbitral proceedings require prima facie evidence that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. In addition, the party requesting the measure shall satisfy the tribunal that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

This is a very high standard in comparison with the requirements for measures issued in favour of local judicial proceedings, which do not require prima facie evidence for the likelihood of success of the complaint, but usually (and depending on the type of measure) only require the party requesting the measure to post a security bond before the court in order to cover any damages that could be caused to the party against whom the interim measure is issued.

The enforcement of interim measures issued by arbitral tribunals seated abroad is now possible in Panama, subject to the issuance of a writ of exequatur by the Fourth Chamber of the Supreme Court of Justice.

In this regard, foreign arbitration proceedings could be considered to have a clear advantage over foreign judicial proceedings since the Panamanian legal system does not have any express provision regulating the recognition and enforcement of interim measures issued by foreign judicial authorities, only provisions regarding the enforcement of final foreign judicial decisions on the merits.

Moreover, the arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted or that granted a local court in favour of the arbitration proceedings, upon application of any party. In exceptional circumstances and upon prior notice to the parties, the arbitral tribunal may also modify, suspend or terminate such interim measure on its own initiative.

With regards to interim measures issued by arbitral tribunals seating in Panama, there is a general principle for the immediate recognition and enforcement by local courts of such measures without establishing any grounds for refusing their recognition or enforcement.

Local courts also have the power to issue interim measures in relation to arbitration proceedings, irrespective of the place of arbitration. This is also a clear advantage over foreign judicial proceedings since the Panamanian legal system does not have any express provision that allows for local courts to issue interim measures in favour of foreign judicial proceedings.

Conclusion

As a service-based economy, Panama meets all the practical conditions to be a popular seat of arbitration: a strategic geographic location; a historic transit hub; a dollarised economy; suitable and available infrastructure; and qualified bilingual personnel to assist the arbitral tribunal.

With regards to the legal conditions to be a popular seat of arbitration, the Arbitration Act, including its provisions on interim measures, is a step forward for pro-arbitration policy in Panama.

To continue pursuing this pro-arbitration policy, it is important to construe the Arbitration Act under the spirit of the UNCITRAL Model Law, which is to protect and respect the legitimate expectations and will of the parties who entered into an arbitration agreement to have their disputes settled through arbitration and that such expectations may not be undermined.

Notes

1. Law No. 131 of 31 December 2013, published in Official Gazette No. 27449-C of 8 January 2014.
2.

Law No. 11 of 23 October 1975, published in Official Gazette No. 18056 of 30 March 1976.

3. Law No. 5 of 25 October 1983, published in Official Gazette No. 20079 of 15 June 1984.
4. Law No. 13 of 3 January 1996, published in Official Gazette No. 22947 of 8 January 1996.
5. Legislative Act No. 1 of 27 July 2004, published in Official Gazette No. 25176 of 15 November 2004.
6. Law Decree No. 5 of 8 July 1999, published in Official Gazette No. 23837 of 10 July 1999.

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Peru

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Summary

Last year's Peru chapter provided a general overview of the Peruvian arbitration law (Legislative Decree 1071) issued in 2008. This year we present a more detailed review of the application of some of the main provisions of the arbitration law and recent developments in the arbitration practice.

In this year's Peru chapter we provide an introduction to the 2008 statute's application in practice by reviewing the most recent decisions at the superior court level, as well as the Peruvian Supreme Court, issued in 2012, 2013 and 2014.[1] Notably previous judicial decisions are not binding in the Peruvian legal system as they have no precedential value. However, a careful study of the courts' decisions on setting aside awards should become a valid instrument of guidance and analysis for the benefit of the Peruvian arbitration community.

Accordingly, we briefly comment on the current interpretation by the courts of the different grounds for setting aside arbitral awards under the Peruvian arbitration law, as well as the procedural requirements to file a set-aside request, the applicability of the law to non-signatories, and findings of possible corruption or criminal behaviour in arbitration, among other matters.

We further focus on the efforts currently underway to modernise arbitration practices in Peru, aimed at bringing Peruvian arbitration practice to international standards.

SET-ASIDE REQUESTS UNDER PERUVIAN LAW

The Grounds For A Set-aside Request

Article 63.1 of the arbitration law states that an award may only be set aside on the following grounds:

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

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

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

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

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

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

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

An arbitration award may only be challenged under grounds (i), (ii), (iii) and (iv) if such grounds were raised by the affected party during the arbitration and were rejected. In the case of grounds (iv) and (v), the setting aside decision will only affect the matters that were not the subject of the arbitration submission or that cannot be subject to arbitration, as long as they

can be separated. If it is not possible to separate them, the award will be set aside in its entirety. Ground (vii) may only be invoked if the affected party raised such violation during the arbitration and it is not contrary with its own conduct in the arbitration.

Although the set aside grounds provided in article 63 are exclusive, courts have admitted requests for setting aside an award that are not based in any of the grounds provided in article 63. For example, the Second Commercial Chamber of the Lima Superior Court has stated:

> a request for set aside of an arbitral award may be filed not only on the basis of the grounds contained in article 63, but also on the basis of allegations related to the breach of constitutional rights…[2]

More generally, however, the courts have understood that the breach of a constitutional right (commonly the right to due process) is not a separate ground for set aside, but is contained within article 63.1(b).

Our review of recent court decisions reveals that the most frequently alleged grounds for setting aside arbitration awards have been those provided in article 63.1 (b), on the basis that there was a failure to due process and a party was not able to adequately present its case; and 63.1 (d) on the basis that the award deals with a matter that was not submitted to the tribunal's decision.

Article 62 of the arbitration law forbids judges from reviewing the substance of matters decided in the arbitration or to review the reasoning of the arbitration tribunal. The review of recent court decisions from the Commercial Chambers of the Superior Court of Lima shows, generally, a consistent application of this provision. When the set aside request was clearly not based on any of the grounds listed article 63, the request was dismissed by the courts. When interpreting the arbitration law, the Court stated:

> the annulment process has not been designed by the legislator as a way to reopen a discussion that has been already solved by the Tribunal, and much less as a way to evaluate if the criteria of the arbitrator has been the best; but as an instrument to determine if the award has been issued validly. If this was not the case, the annulment would affect the award's 'res judicata' nature, that article 61 attaches to it.[3]

and

> the arguments presented to support the application of the grounds for setting aside the award, are not related to such grounds, because they do not refer to the arbitrators lack of respect for the procedural rules [...], instead, they question the criteria of the arbitrator for deciding the dispute, alleging it was not correct, with the clear intention of carrying out a review which is not permitted: the review of the substance of the matters subject of arbitration[4]

Deficient Or Insufficient Reasoning In The Award

The most frequently argued ground for setting aside is article 63.1(b), which provides that an award should be set aside when 'a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was not able to present its case'. The last phrase, referring to the inability of a party to present its case, has been construed by the courts in an expansive manner, to cover breaches to the right to due process. Under Peruvian law, the right to a reasoned decision is included within the concept of due process. Thus, requests for set aside are frequently based on allegations of deficient reasoning or lack of reasoning in the award.

However, these allegations are generally not successful since, as previously mentioned, courts limit their analysis to formal issues, without reviewing the substance of the arbitrators' decision.

The Second Commercial Chamber of the Lima Superior Court has stated that:

> a difference of opinion with respect to the interpretation that may be given to the applicable law is not within the ground of deficient or defective reasoning, since that is forbidden, since this action is not a means to review the merits of the controversy[5]

Courts have found that an award has sufficient reasoning when it refers to a different document containing such reasoning. They have also accepted that a certain length or a detailed answer to each and every argument raised by the parties is not required.

Lack of proper reasoning has been found when there is a contradiction in the tribunal's decision. For example, in a 2013 decision, the Second Commercial Chamber of the Lima Superior Court found contradiction in an award that, on the one hand, expressly rejected awarding the claimant compensation on the basis of certain tax expenses and, on the other hand, based the amount awarded on the total amount proposed by an expert report, which included in its calculations such tax expenses.

In another decision, the First Commercial Chamber of the Lima Superior Court found motivation to be only 'apparent' in an award that awarded an amount for currency conversion adjustment when the law and the contract expressly prohibited readjustments.

Peruvian courts have recognised that arbitral tribunals have the authority to deny the application of a legal provision to a specific case if they consider such provision is unconstitutional. However, such decision must be properly reasoned, following parameters set by the Constitutional Tribunal on the matter which include explaining that the legal provision cannot be interpreted in accordance with the Constitution and how its application would cause prejudice to one of the parties. The Lima Superior Court has set aside an award for failing to include such reasoning.

In another case, the First Commercial Chamber of the Lima Superior Court found that the award's reasoning was not sufficient with respect to the determination of damages and that the award had not adequately explained the different items included in the damages determination. The court considered that the award had not explained the link between the amounts awarded and the injury caused.

Validity Of The Arbitration Agreement

Requests for set aside are not commonly filed under article 63.1(a), which refers to the existence or validity of the arbitration agreement. However, there are a few recent cases on the matter.

For example, this ground has been raised with respect to awards issued in cases where arbitration was mandatory pursuant to Peruvian law. In such cases, the courts have found that the legal provision mandating arbitration replaces the agreement by the parties. As explained in last year's Peru chapter, the State Procurement Act (Legislative Decree 1017) provides for mandatory arbitration in all disputes related to contracts by state entities to acquire goods and services. The scope of the law mandating arbitration must be considered carefully. The Lima Superior Court has set aside an award that disregarded a contractual clause referring to the jurisdiction of local courts and applied the mandatory arbitration provision in Legislative Decree 1017. The court found that a state-owned company was not under this provision and thus could validly agree to settle its disputes before the courts.

In another case, the Lima Superior Court found that a valid arbitration agreement did not exist when the arbitration agreement had been identified as a disputed issue in the minutes of conciliation proceedings, but no agreement was reached in such conciliation.

The Superior Court of Lima set aside an award for lack of arbitration agreement considering the claims were not based on the contract in which the agreement was contained. In that case, the parties had arbitrated with respect to a breach of the agreement. After the arbitration had concluded, one of the parties maintained that the other party had acted improperly during the arbitration and alleged to have suffered damages as a result. A second arbitration was commenced under the same agreement and the arbitration tribunal decided on the parties' procedural conduct. The court set aside the second award, considering that the arbitration clause in the contract was not applicable to the dispute because the claims did not derive from the contract, but from the exercise of the parties' procedural rights during the arbitration.

Matters Not Subject To Arbitration Under Peruvian Law

Domestic awards may be set aside under article 63.1(e) when 'the subject matter of arbitration is evidently impossible of settlement by arbitration according to law'. This ground has been strictly interpreted by the courts.

For example, claimants have argued that a tribunal may not address issues that had already been decided by a previous arbitration award. Such issues could not be subject to arbitration under the principle of res judicata. The courts, however, have been satisfied confirming that the tribunal had considered the previous award. If the arbitration tribunal had made a determination on the scope of the previous award and had issued its decision accordingly, the courts have not questioned such determination finding this was within the tribunal's authority.

In public works arbitration, courts have consistently found that arbitration tribunals cannot decide claims regarding additional works over the legal limit. Pursuant to a legal provision, the only authority that may allow additional works over such limit is the government's internal control office. Thus, courts have consistently found that under a mandatory law this matter may not be subject to arbitration. Courts have set aside awards based on claims for unjust enrichment when the substance was related to additional works over the legal limit. The Supreme Court has confirmed this position.

Also with respect to government contracting arbitration, tribunals are not prevented from addressing issues related to administrative acts that have been challenged before the courts. Such issues may be subject to arbitration under Peruvian law.

The Setting Aside Of Extra Petita Decisions

Under article 63.1(d), awards that go beyond the claimant's submissions (extra petita) may be set aside. This provision states that awards may be set aside when 'the award deals with a matter that was not submitted to the tribunal's decision'.

The courts have set aside awards that decide on issues not requested by the claimant that were thus not debated in the proceedings. For example, courts have also set aside an award for extra petita when it awarded damages on the basis of lost profits (lucrum cessans) when the claim was made for direct losses.

An arbitral decision awarding damages when the claim was referred to specific performance only was set aside for extra petita. It was argued that the tribunal had acted according to its authority by applying the iura novit curia principle. The court did not deny the arbitral tribunal had the authority to apply this principle; however, it found such principle 'consisting in the application of the pertinent law to the case, does not allow going beyond the petitions submitted by the parties'.[7]

In another case, the court decided to partially set aside a tribunal's additional award. After the final award had been issued, a party requested an additional award arguing that the final award had not addressed certain matters. The tribunal concluded those matters had not been presented in the proceedings and that the issues were beyond the scope of the arbitral agreement. The court set aside this last part of the additional award for extra petita because the tribunal had not been asked to analyse whether those issues were within the scope of the arbitral agreement, which should be decided by a new tribunal if and when such claims were presented.

In some cases, set aside requests for extra petita have been assimilated to those for deficient reasoning. Courts have considered that an award that addresses issues not presented in the proceedings lacks consistency and therefore has defective reasoning.

When the issue has already been debated in the arbitral proceedings, set aside is not granted under extra petita. For example, in a 2013 decision, the Superior Court found that a claimant attempted 'to reopen a discussion apparently introducing new arguments [...] This is not possible before the courts [within this set aside proceeding] because it would imply a review of the concepts used and developed by the award.'[8]

Compliance With The Requirement Of Having Raised Grounds A), B), C) And D) Of Article 63.1 Before The Tribunal For Admitting An Application For Setting Aside

Under the Peruvian arbitration law, grounds (a), (b), (c) and (d) of article 63.1 of the arbitration law can be the basis for a set aside application only if those grounds were raised during the arbitration by the affected party and were rejected. Pursuant to this provision, Peruvian courts consistently dismiss set aside applications that fail to demonstrate that the arguments that support each alleged ground were raised before the tribunal.

The courts explain that the arbitration process has mechanisms to solve the issues that may appear during arbitration. This is why a set aside request will be dismissed if the

same arguments could have been made through a request for rectification, interpretation or integration of the award.

However, in some cases – such as deficient reasoning of the awards – the courts have understood that the mechanisms regulated in the arbitration law are inadequate to solve such issues. In those cases, the courts have interpreted that it was not necessary to comply with the requirement of having raised the issue before the Tribunal.

The Setting Aside Of Preliminary Decisions

The arbitration law provides that the tribunal may decide on objections to its jurisdiction in the final award or by a preliminary decision. However, this decision may only be challenged by a set aside request against the final award. The courts have been clear in enforcing this provision. The First Commercial Chamber of the Lima Superior Court recently dismissed a request to set aside a preliminary jurisdictional award when the arbitral proceedings were still ongoing, considering it premature. Any such request must be filed at the time the arbitration is concluded, and jointly with a request referred to the final award.

Opportunity For Set Aside Requests

Under Peruvian arbitration law, set aside requests must be filed within 20 business days from when the award, or any supplementary decision, was notified. The Supreme Court has found that if the award is not properly notified, the legal term previously referred to shall be counted from the date when the interested party had knowledge of the content of the arbitral award, including constructive knowledge pursuant to the publicity principles applicable to the information contained in the public registry.

Kompetenz-Kompetenz Principle And Parties Bound By The Arbitration Agreement

Peruvian law accepts that under the *Kompetenz-Kompetenz* principle, an arbitral tribunal has the authority to rule on its own jurisdiction. Recent court decisions in a case in which arbitral tribunal extended the arbitration agreement to non-signatories have confirmed this includes a determination on whether a party is bound by an arbitration agreement.

In *Peru SAC v Langostinera Caleta Dorada SAC and others*, the arbitral tribunal found there was a fraudulent scheme by a group of companies and applied the principle of lifting the corporate veil of the companies involved in the scheme. As a result, the tribunal decided to extend the arbitration agreement to non-signatories and issued an award against all the defendants.

The First Commercial Chamber of the Lima Superior Court initially set aside the award upon a request filed by the non-signatory parties. The court found that under Peruvian law there was no basis to extend the arbitration agreement beyond its signatories, rejecting the application of the doctrine of piercing the corporate veil.

TGS challenged this decision before the Supreme Court by an appeal request. The request was granted and the Supreme Court annulled the Superior Court's decision. The Supreme Court found the Superior Court had erred in finding that the arbitral tribunal could not make determinations on situations such as fraud and piercing of the corporate veil, by placing the arbitral jurisdiction in an inferior position to judicial jurisdiction, which is incorrect under Peruvian law.

In addition, the Supreme Court considered that, in applying the *Kompetenz-Kompetenz* principle, the courts may not question the substance of the arguments on the basis of which

a tribunal has determined its own competence. As a result, in 2013 the Superior Court issued a new decision confirming the award.

As described in last year's Peru chapter, the new Peruvian arbitration law contains a provision pursuant to which the arbitration agreement extends to non-signatories (article 14).[10] Even when this case refers to an award issued before the new arbitration law entered into force, we believe it will be useful to support the position that the tribunal's analysis with respect to the extension of the arbitration agreement to non-signatories (under this new legal provision) is a matter covered by the principle of *Kompetenz-Kompetenz* and thus the substance of such decision may not be questioned by the courts.

Since the approval of the new arbitration law, few cases have referred to the application of article 14. In recent cases, the courts have not questioned the substance of the arbitrators' determination with respect to the incorporation of non-signatory parties. However, in a case in which the tribunal had applied article 14, the Lima Superior Court evaluated whether the party applying for set aside on the basis of lack of an arbitration agreement had implicitly accepted the arbitration agreement during arbitration proceedings.

Expert Decisions

The Thirteenth Complementary Provision of the arbitration law establishes that the arbitration law is applicable 'in whatever corresponds' to the expert decisions that solve technical issues or factual issues. It also states the expert's decision is binding for the parties, the judicial authorities and arbitral tribunals, unless otherwise agreed by the parties.

In a recent case, the Lima Superior Court concluded that an expert decision will be deemed an arbitral award and therefore may be subject to set aside. The Court stated the expert decision was an arbitral award because it complied with all the legal requisites of an arbitral award contained in articles 54 (solves a dispute), 55 (must be written and signed by the arbitrator), 56 (expresses the reasoning followed by the arbitrator, unless otherwise agreed by the parties) and 59 (is definitive and not subject to appeal) of the arbitration law.

The Court also stated that the parties could not validly waive their rights to a set aside request because that is only possible in the case regulated in article 63.8 of the arbitration law; that is, when none of the parties is Peruvian or none of the parties is domiciled in Peru.

Possible Bad Faith And Corruption Issues In Arbitration

The current arbitration law has faced recent criticism because a number of cases were brought to light in which fraudulent awards were issued in order to transfer property and register transfer titles in the public registries.

In Case No. 00166-2012-0-1817-SP-CO-02, the Superior Court set aside an arbitration award that decided the transfer of property based on grounds a), b) and d) of article 63 of the arbitration law. The Court concluded there was no arbitration agreement between the parties after reviewing the award and the contracts supposedly entered into by the parties. The Court also concluded that the defendant was not notified with the arbitration proceedings, deeming a notification in an incorrect address not valid. In addition, the Court set aside the award based on ground d) because the sole arbitrator had ordered the registration of the property transfer when such matter had not been part of the issues subject to arbitration by the parties.

The Court considered that the sole arbitrator had been so negligent in handling the arbitration proceedings that it had to notify the national prosecutor and the Lima Bar, and an investigation for possible criminal behaviour was carried out.

CURRENT DEVELOPMENTS IN PERUVIAN ARBITRATION PRACTICE

There is currently an ongoing discussion regarding the modernisation of certain arbitration customs or practices. The arbitration centre of the Lima Chamber of Commerce is currently working on a new set of arbitration rules that will possibly enter into effect this year.

The Peruvian arbitration law explicitly establishes that customs or practices of arbitration are a supplementary source in case the statute is silent on any specific matter. This rule is generally understood to make certain generally applicable principles contained in matters such as the IBA guidelines and rules that have been approved by international entities such as the ICC or ICSID. As a result, we believe there are certain issues that are expected to change in Peurvian arbitration practice or that are generally recommended by many practitioners, include the following:

Allowing For Electronic Notification Of Orders And Submissions During The Arbitration

Currently, hard copies of every submission or order need to be filed. The arbitration centres also notify each submission or order by hard copy, consuming time and resources.

Limiting The Number Of Submissions By The Parties

Parties are currently not used to agreeing on a calendar for a limited number of submissions during the arbitration or to request the tribunal for permission to file briefs after the claim and response has been filed. Parties therefore end up filing numerous documents with their positions and allegations, prolonging the duration of the arbitration unnecessarily.

The Set Of Rules For The Arbitration Should Be Negotiated By The Parties To Adapt The Rules To The Case

Currently, procedural rules are usually decided in an 'installation hearing' which can be eliminated if the parties start to negotiate the applicable rules privately and submit the agreed rules to the Tribunal for approval.

Organising More Effective Hearings

Currently, tribunals organise hearings on non-consecutive dates and for several purposes: the installation of the tribunal, the determination of the 'disputed matters' in the arbitration, hearing on the merits and so on. Parties should negotiate and agree with the tribunal on the necessary days to carry out the hearings and try to eliminate hearings for procedural acts that can be handled by phone or with no hearing at all.

Notes

1. The authors have reviewed a total of 253 decisions on setting aside applications issued on applications filed on 2012, 2013 and 2014 before the first and second Commercial Chambers of Lima's Superior Court.
2. Decision in Case No. 00233-2012-0-1817-SP-CO-02.
3. Decision in Case No. 00033-2012-0-1817-SP-CO-01.
4. Decision in Case No. 00101-2012-0-1817-SP-CO-01.
5. Decision in Case No. 201-201-0-1817-SP-CO-02.

6. Case No. Cas. 02391-2013.
7. Case No. 00108-2013-0-1817-SP-CO-02.
8. Case No. 00205-2012-01817-SP-CO-02.
9. Case Cas. No. 4671-2012-Lima.
10. Article 14: 'The arbitration agreement shall extend to those parties whose consent to arbitration, in good faith, may be determined by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement or to which the arbitration agreement relates. It also extends to those parties who intend to derive rights or benefits from the contract.'

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Summary

DENUNCIATION OF THE ICSID CONVENTION AND THE EASY PATH

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

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

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

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

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

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

DIFFERENT THEORIES

Contractual Approach But Revocable Offer

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

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

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

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

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

Firm Offer

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

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

International Obligation Derived From A Unilateral Act Of The State

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

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

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

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

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

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

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

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

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

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

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

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

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

RIGHTS AND OBLIGATIONS

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

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

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

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

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

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

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

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

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

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

PRACTICAL IMPLICATIONS

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

its disputes and can only make use of the remaining forums in the event of unavailability of the first forum). The latter example is the case for the majority of BITs ratified by Venezuela.-[33]

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

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

Notes

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

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

Hence, the tribunal held that the offer is required to be accepted in writing before it was withdrawn. To support this argument, the Tribunal cited Schreuer, Christoph, 'The ICSID Convention: A Commentary: a Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', 2nd edition 2009, par 618.

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

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

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

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

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

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