What's New in Latin American ADR?
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INTERNATIONAL DEVELOPMENTS

What's New in Latin American ADR?

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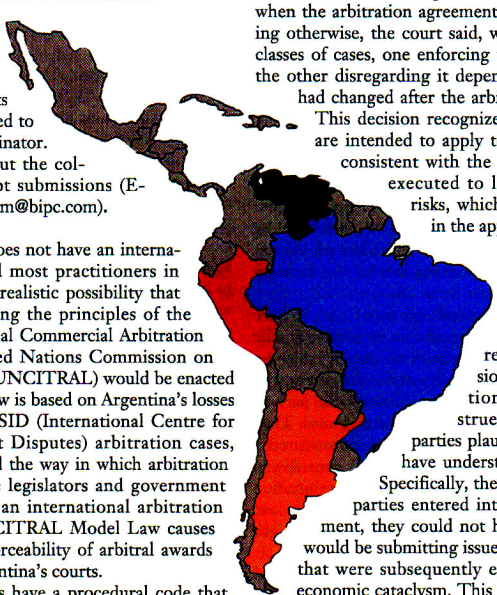
A Few Words about this Column

That the *Dispute Resolution Journal* is introducing this new column recognizes the growth and importance of ADR, particularly international commercial arbitration, in Latin America. This development began in the early 1990s, largely in response to globalization, Latin America's increasing openness to foreign investment and infrastructure projects, and concerns investors have about litigating disputes in national courts. Since then, many Latin American countries have revised their laws or enacted new ones to foster the use of ADR. The result is, with some exceptions, a pro-arbitration environment.

In this column, practitioners and academics from Latin America will report on legislative and judicial ADR developments in the region. I am delighted to serve as the column coordinator. I welcome comments about the column as well as manuscript submissions (E-mail them to mauricio.gomm@bipc.com).



Argentina. Argentina does not have an international arbitration law and most practitioners in Argentina do not see any realistic possibility that an arbitration law following the principles of the Model Law on International Commercial Arbitration promulgated by the United Nations Commission on International Trade Law (UNCITRAL) would be enacted in the near future. This view is based on Argentina's losses in a number of recent ICSID (International Centre for Settlement of Investment Disputes) arbitration cases, which has probably tainted the way in which arbitration is perceived by Argentine legislators and government officials. The absence of an international arbitration statute based on the UNCITRAL Model Law causes uncertainty about the enforceability of arbitral awards that are challenged in Argentina's courts.

Argentina's 24 provinces have a procedural code that mentions arbitration. However, these provisions are dated, cumbersome and costly, and need to be amended to reflect modern trends in international arbitration. The good news is that the Province of Rio Negro has recently amended the arbitration rules in its procedural code in accordance with UNCITRAL principles. Its example could inspire new provincial amendments by other provinces.

With regard to the courts, the National Commercial Court of Appeals sitting in Buenos Aires, by far the most important commercial court of the country, has blown hot and cold with respect to arbitrator authority. In *Mobil Argentina S.A. c. Gasnor S.A. s/Laudo Arbitral s. Queja* (Aug. 8, 2007), the court ruled that the arbitrator had authority to decide a party's constitutional challenge to economic emergency laws enacted after the signing of the arbitration agreement, to determine whether they applied to the dispute. The court stated, "[A]rbitration clauses always apply to future disagreements and these disputes are not limited to being resolved under the laws existing when the arbitration agreement was entered into." Holding otherwise, the court said, would create two different classes of cases, one enforcing the arbitration clause and the other disregarding it depending on whether the law had changed after the arbitration clause was signed. This decision recognized that arbitration clauses are intended to apply to future disputes. This is consistent with the notion that contracts are executed to limit certain foreseeable risks, which would include a change in the applicable law.

However, in *Rivadeneira, Hugo Germán c. ABN AMRO Bank N.A. y otros s. ordinario* (Feb. 28, 2008), the same court reached a contrary conclusion, ruling that the arbitration clause should be construed according to what the parties plausibly understood or could have understood when they signed it. Specifically, the court ruled that when the parties entered into their arbitration agreement, they could not have understood that they would be submitting issues to arbitration under laws that were subsequently enacted in response to an economic cataclysm. This decision was clearly a step backwards for arbitration.

However, in a subsequent decision, *ARC & CIEL S.A. c. Sky Argentina S.C.A. y otros* (April 3, 2008), the court reached a decision in line with *Mobil Argentina. ARC & CIEL* held that the arbitral tribunal had competence to decide the plaintiff's challenge to the constitutionality of economic emergency laws enacted after the execution of the contract containing the arbitration clause. (It may be worth noting that the arbitrators decided that the emergency laws were constitutional, a position consistent with

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that of the Buenos Aires court.) The court noted that the parties did not dispute the arbitrability of the subject mater of the dispute and that arbitrators have authority to resolve any matter submitted to them unless prohibited by law. Thus, the fact that a party raised a constitutional issue should not result in displacing the arbitrators.

The justification for the decision is that arbitrators are considered to have the same authority as judges (except for coercive powers), and this includes the power conveyed by Argentina's National Constitution to determine the constitutionality of any law applicable to a case.

Finally, it should be noted that many decisions by Argentine courts still construe international arbitration agreements restrictively despite commentators who urge broad interpretation and enforcement. *—By Fernando Aguilar, Of Counsel, Marval, O'Farrell & Mairal, Buenos Aires (FA@marval.com.ar)*

Brazil. On Feb. 26, 2008, in *CAOA Comércio de Veículos Importados et al. c. Renault do Brasil S/A et al.*, the São Paulo Court of Appeals (Appeal No. 1.117.830-0/7, published in São Paulo's official gazette on March 07, 2008), consistent with modern principles of international arbitration and Brazilian case law, rejected a party's attempt to attack the enforceability of an arbitration clause.

The *Renault* case deserves attention because it was decided just a few days after the much-criticized decision by the Parana Court of Appeals in *Inepar v. Itiquira* (Appeal No. 1.117.830-0/7, published in Parana's official gazette on Jan. 30, 2008). *Inepar* astonished the local and international arbitral community with an ill-advised ruling that a submission agreement (*compromisso*) is always required to initiate arbitration. *Renault* reached the opposite conclusion, holding that a *compromisso* is not necessary when the parties have agreed on an arbitration clause that contains all the elements for the appointment of the arbitral tribunal (a "full" arbitration clause). (The *Renault* and *Inepar* cases are discussed in detail in the next issue.)

The *Renault* opinion takes a solid, mature and unequivocal pro-arbitration approach to the role of national courts that are asked to rule on challenges to arbitration agreements and arbitral awards based on the absence of a *compromisso*. *Inepar*, on the other hand, is an aberration and may well be rectified in a forthcoming *en banc* decision by the Parana Court of Appeals.*—By Mauricio Gomm-Santos*

Peru. Through Legislative Decree No. 1071 of June, 27, 2008 (published in *El Peruano*, the official gazette, on June 28, 2008), Peru enacted a new arbitration law based on the UNCITRAL Model Law on International Commercial Arbitration, which, as of Sept. 1, 2008, replaced the General Arbitration Act [Law No. 26572] in force since 1996. Despite the success of the General Arbitration Law (1,800-2,000 arbitration proceedings had taken place annually since 1996), Peru's legislators felt that it would be beneficial to enact a more modern arbitration law, like those in Germany, Spain and Austria.

The new arbitration statute does away with the practice of applying different rules to domestic and international arbitration. Nevertheless, there are still a few provisions that apply exclusively to international arbitration. These are aimed at providing a freer, more open regime in order to guarantee the efficacy of the arbitration agreement.

Here are some of its salient features. The new law extends the "in writing" requirement in Article 13 to include any form of recording that evidences the parties' intention to enter into an agreement to arbitrate. It addresses for the first time (in Article 14) the effects of an arbitration agreement on "non-signatories." It recognizes the parties' freedom to agree on the selection procedure (Article 23) and then places residual appointing authority in the Chambers of Commerce (Article 29).

In addition, the new law adopts the UNCITRAL's changes to the Model Law on the issue of interim measures of protection issued by the tribunal, but with simplified wording (Article 47). In addition, it authorizes the recognition and enforcement of interim measures mandated by an arbitration tribunal sitting outside Peruvian territory (Article 48.4).

Peru's new arbitration law is one of the few new statutes to regulate confidentiality. Article 51 provides that, unless otherwise agreed, all participants in the arbitration (arbitrators, secretaries, arbitration institution, witnesses, experts, the party representatives and legal counsel) are to keep the arbitration proceedings and the award confidential. However, confidentiality is not required in the following circumstances: (1) when disclosure is required by law, (2) disclosure is necessary to protect or enforce a right, (3) a proceeding is brought to set aside or enforce the award, or (4) one of the parties is the Peruvian State. In the last situation, the award must be made public.

Article 66 contains one of the most relevant changes. It establishes that the filing of an action to set aside an award does not suspend enforcement of the award, unless the reviewing court issues an express interim measure to suspend enforcement, in which case it shall necessarily order the granting of the corresponding guarantee (in the absence of an agreement, a banking bond in favor of the other party, for an amount equivalent to the value of the award's conviction).

Finally, the new law adopts the UNCITRAL's July 7, 2006 recommendations regarding Article VII(1) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UNCITRAL recommended that Article VII(1) allow any interested party to avail itself of its rights under the law or treaties of the country where an arbitration agreement is sought to be relied upon to seek recognition of that agree-

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ment. This is intended to allow Peru's arbitration law to be applied when its terms are more favorable than those of an applicable treaty.—*By Fernando Cantuarias Salaverry of the Universidad Peruana de Ciencias Aplicadas (fcantuar@upc.edu.pe)*

Venezuela. On Oct. 17 2008, a majority of the Constitutional Chamber of the Supreme Tribunal, Venezuela's highest court, issued a major pro-arbitration decision addressing whether Article 22 of the 1999 Law for the Promotion and Protection of Foreign Investors, allows foreign investors who are not protected by a bilateral investment treaty to make claims against the Venezuelan Government through an ICSID arbitration proceeding. Although the Chamber has given arbitration a major push by enforcing arbitration agreements entered into by individuals, legal entities, the Venezuelan Government and state-owned entities, in this decision the majority ruled that, unlike bilateral investment treaties signed by Venezuela, which clearly provides for the Government's consent to ICSID arbitration, Article 22 does not provide for such consent. One judge dissented. (The Spanish version of the decision is available online at www.tsj.gov.ve/decisiones/scon/Octubre/ 1541-171008-08-0763.htm.

Nevertheless, the majority's decision reaffirmed the following principles:

- Arbitration is part of the Venezuelan justice system and must be promoted by the legislature and the judiciary.
- Any legal rule or judicial interpretation that hinders arbitration is unconstitutional.
- The government and its owned entities may enter into arbitration agreements in contracts of general interest and enter into, approve and ratify treaties, agreements or conventions where controversies are subject to arbitration, and doing so is not unconstitutional.

With regard to Article 22, the Chamber found that for any form of international arbitration to proceed, the treaty or agreement must reflect the Government's consent to the process. It observed that such consent is normally clearly stated in bilateral investment treaties signed by Venezuela. But it concluded that Article 22 does not in any case contain such consent.—*Eloy Anzola, an international arbitrator (jeanzola@ gmail.com)* ■

Survey: 68% Nix EJC Role in EU BIT Disputes

Sixty-eight percent of people surveyed at a conference on European investment disputes at Lovells on Dec. 4, 2008, opposed having the European Court of Justice (ECJ) be the exclusive arbiter of investor-State disputes under bilateral investment treaties (BITs) between European Union Member States.

According to Lovells, this view is contrary to an opinion by the ECJ's advocate general arguing that Austria and Sweden violated European Community law by having clauses incompatible with European Union (EU) law in BITs negotiated prior to membership in the EU. Lovells predicts that if this opinion is confirmed in an ECJ judgment, dozens of BITs might have to be renegotiated, "causing uncertainty and instability in international investment.

Ninety-seven respondents participated in Lovells' survey: 40% were attorneys in private practice, 20% were government lawyers or advisers, and the remaining 40% were academics.

Lovells' press release about the survey can be found on Lovells' Web site. ■

Bahrain-AAA Partner to Establish ADR Centre

The American Arbitration Association (AAA) announced in December 2008 that it has entered into a memorandum of understanding with the Ministry of Justice of the Kingdom of Bahrain to establish the Bahrain Chamber for Dispute Resolution–AAA, dedicated to resolving domestic and regional disputes through the use of arbitration, mediation and other alternative dispute resolution (ADR) techniques. The ICDR (International Centre for Dispute Resolution), the AAA's international division, will provide technical and administrative assistance, staff training and skills training to Bahraini arbitrators and mediators. In addition, the ICDR will establish offices in Bahrain, to be known as ICDR-Bahrain.

Sheikh Khaled Bin Ali Al Khalifa, Minister of Justice & Islamic Affairs of the Kingdom of Bahrain commented that this will make Bahrain the centre for dispute resolution for its neighbors and for states that are members of the Gulf Cooperation Council. "This is of critical importance to meet the demands of commercial development in the region," he said.

AAA President and CEO William K. Slate II said there are "exciting ADR dynamics coming to fruition" in the Gulf Region, making "the potential contributions of ADR systems more important and promising."

The arrangement with the AAA is part of Bahrain's Strategic Plan calling for state-of-the-art, expeditious and cost-effective ADR processes and techniques to be available in Bahrain to enhance its justice system. A Special Project Steering Committee has been formed to carry out this project. ■

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