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In this issue:

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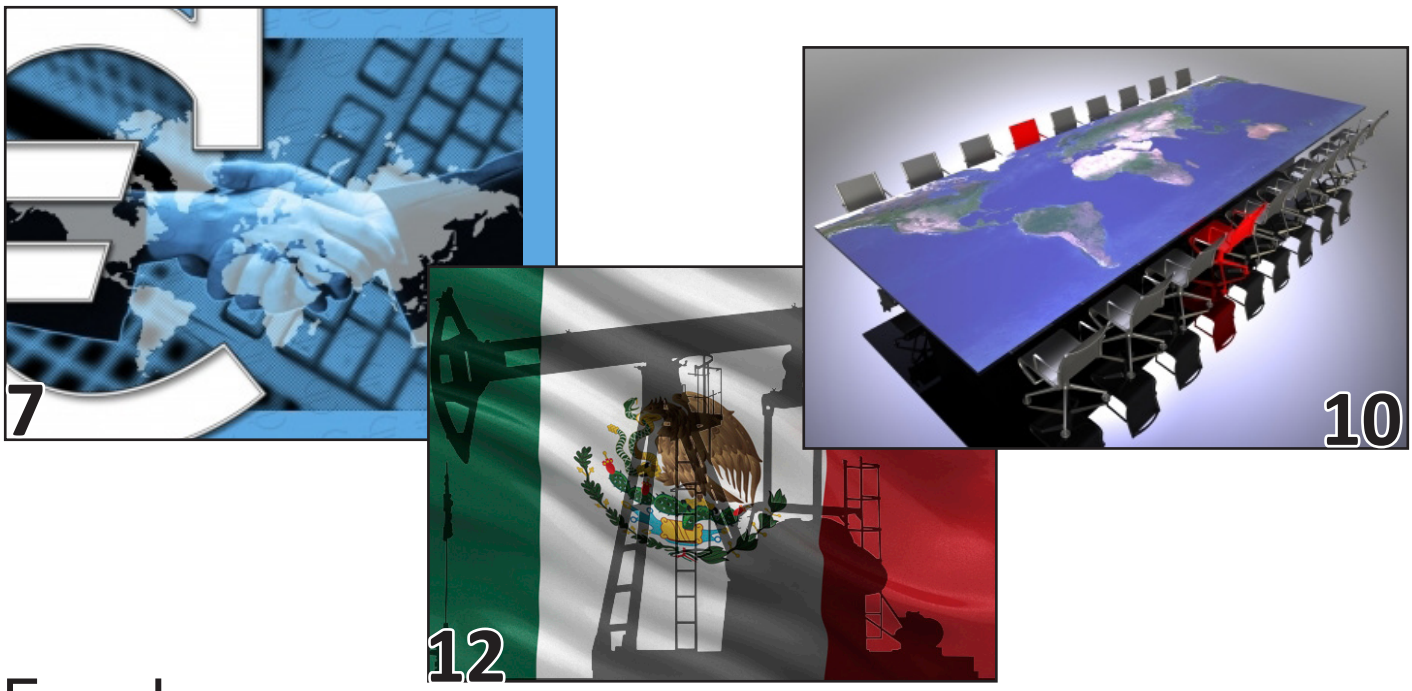

Features

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Message From the Chair


E. PALMER

As chair of the International Law Section of The Florida Bar (ILS), it is my pleasure to welcome you to another outstanding edition of the *International Law Quarterly* (*ILQ*). This issue focuses on a topic of vital importance to Florida: international arbitration. The ILS has played an important role over the years in helping to create the necessary legal infrastructure to develop Florida, and Miami in particular, as a leading center for international arbitration proceedings arising in the Americas.

Miami's large bilingual professional workforce, geographic proximity to capitals throughout Latin America and relatively lower cost of doing business provide it innate competitive advantages over traditional arbitral centers such as New York, London or Paris. In addition, the ILS has helped to enact supportive legislation in the form of the UNCITRAL Model Law, Florida Bar Rule 1-3.11, which allows foreign counsel to participate in international arbitration proceedings conducted in Florida and establishes a specialized court in Miami to preside over judicial proceedings related to international arbitration matters. As a result of said innate advantages and legal infrastructure, Miami has come of age as a leading venue for international arbitration in the Americas.

This issue features various articles exploring this area of the law, including articles discussing the law applicable in international arbitration proceedings, the growing area of international commercial mediation, and energy reform and arbitration in Mexico. Moreover, the World Roundup section of this *ILQ* provides brief summaries of important developments in the area of international law from around the world.

I hope you enjoy this issue of the *ILQ* and remember to stay involved with the ILS in order to continue to work to make Florida one of the world's leading jurisdictions for the practice of international law.

Eduardo Palmer, Chair
Eduardo Palmer, P.A.

From the Editor…


Y. LORENZO

This issue of the *International Law Quarterly* is focused on international arbitration. Every year, the international arbitration field gains more traction. Given that I focus my practice on international arbitration, this area is of special interest to me, and I am always looking for new resources to support my practice. I recently learned about a new application for smartphones and tablets that I want to share with the readers of the *ILQ*. Developed by Covington, *The Arbitration Handbook* is a comprehensive compilation of institutional rules, national laws, guides and treatises that are useful to all practitioners of international law. This is particularly exciting in light of the fact that most lawyers are not exactly on the cutting edge of technology, and, therefore, the cool tech gadgets take longer to work their way into this profession. More importantly, resources like this provide access and opportunity to anyone who is interested in international law. *The Arbitration Handbook* can be downloaded from Apple's App Store and Google Play.

Moving to the contents of this issue, I hope you will enjoy the excellent contributions submitted by all of our authors. This, like many of the prior issues of the *ILQ*, was made possible thanks to the support of Omar K. Ibrahem, Sandy P. Jones and Susan Trainor. As always

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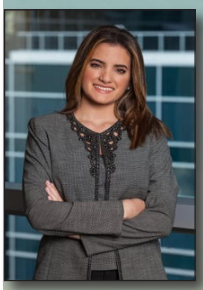
Welcome, new editors!



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Claudia Casalis is a transactional attorney at Robert Allen Law. She has a diverse U.S. and international client base, which is facilitated by her fluency in Spanish. Claudia's practice is focused in corporate, trade finance, intellectual property, maritime law and general business matters. She handles mergers, acquisitions and other business combinations, as well as advises boards of directors and special committees of boards on significant transactions and corporate governance, and other matters raising fiduciary duty and business judgment issues.

Claudia has extensive experience in representing a broad spectrum of clients in the yachting industry, including yacht manufacturers, yacht brokerages, franchisors, franchisees, marine lenders and purchasers and sellers of pleasure yachts.

She is also an active member of the Brazilian American Chamber of Commerce as well as the Spanish American Chamber of Commerce, Florida Yacht Brokers Association and National Marine Lenders Association.

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Javier Peral II graduated from the Harvard Law School in 2012. Javier works as an associate at the Miami office of Hogan Lovells US LLP, advising clients on litigation, arbitration and employment matters with a particular focus on commercial litigation and international arbitration. He has represented numerous international companies in multibillion-dollar arbitrations seated in the United States and abroad.

J. POYER

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Joshua Poyer is a trial and appellate lawyer whose practice focuses on complex international and domestic litigation in a wide range of substantive areas. He has taken discovery and handled litigation in cases across the world and has prepared matters for arbitration in the United States and in Europe. He is admitted to the Bar in Florida and in several U.S. trial and appellate courts.

Joshua joined Aballí Milne Kalil PA as an associate in September 2003. Through more than a decade at the firm, he has taken and assisted in the taking of discovery across the United States and in the Caribbean, Asia and Europe. His work has routinely involved the analysis of the application of substantive and procedural laws from multiple U.S. and foreign jurisdictions as they apply to the firm's class action, complex multidistrict and multicountry cases.

He has tried and won complex multimillion-dollar federal trials as first chair, procuring judgments on behalf of the firm's clients. He has personally written numerous appellate briefs submitted to state and federal courts of appeal, including the U.S. Supreme Court, and has argued before the U.S. Court of Appeals for the Eleventh Circuit.

FROM THE EDITOR, continued

I am grateful to their dedicated service to the *ILQ*. Regrettably, both Omar and Sandy are transitioning to work on other projects. While I am sad to see them leave, I am thrilled to announce some new additions to the *ILQ*'s editorial team: Javier Peral, an associate at Hogan Lovells, will be joining us as the articles editor, Claudia Casalis, an associate at Robert Allen Law, will serve as the managing editor and Joshua Poyer will serve as the first-ever web editor. With their support, I look forward to continuing to publish top-quality issues with valuable content for the members of our legal community. Please share the *ILQ* with your contacts and help us to continue expanding our presence in Florida and across the world.

Very sincerely,

Yara Lorenzo, Editor-in-Chief
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Applicable Law to the Contract, Arbitration Agreement and Arbitration Procedure

By Mark R. Cheskin and Hans H. Hertell, Miami

As could be expected, international arbitrations usually arise out of cross-border commercial transactions involving a complex interaction of laws. There are many issues—from the capacity of the parties to sign a contract to the recognition and enforcement of an award—that require the application of different laws and rules in order to resolve the dispute properly. In this context, questions often arise surrounding which laws or sets of rules should govern the underlying contract, the arbitration agreement and the arbitration procedure. This article is designed to provide a brief overview of these issues as they could play out in an international arbitration.

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Substantive Law Applicable to the Contract

Substantive contractual issues most often refer to the interpretation, validity, rights of parties, performance, breaches and remedies derived from a contract. Given that in a cross-border transaction, laws from several jurisdictions may potentially apply, the question is what criteria should be used to determine the law governing these substantive contractual issues.

Party Autonomy

A generally accepted principle is that parties entering an international commercial transaction are free to choose the law applicable to such agreement and that arbitral tribunals will respect the parties' autonomy to do so. This principle of party autonomy is recognized not only by most systems of national law and arbitral tribunals, but also by international conventions and institutional arbitration rules such as those from UNCITRAL, ICC, LCIA and ICDR.[1]

Even though parties usually choose a national or a state law to govern the contract, they are not limited to these common choices. Parties also may choose other sets of rules such as public international law, transnational law (e.g., the United Nations Convention on Contracts for the International Sale of Goods), general principles of law or equitable principles, or even agree that different parts of the contract will be governed by different laws.[2] This choice can be made either when the contract is made or by a later agreement.

Mandatory Law

There are some limits to the principle of party autonomy. These limits ordinarily involve laws that regulate matters of public policy within a given country. By way of example only, parties cannot opt out of United States securities laws when the object of the contract is raising capital in the United States, or exclude Venezuelan currency controls when the object of the contract is investing in Venezuela,[3] or contract away Colombian environmental regulations when the object of the contract is constructing a power plant in Colombia.[4] Parties should carefully consider the applicability of mandatory local laws before entering into a contract.

Lack of Express Provisions

While parties usually provide for their choice of law applicable to the contract in express terms, what happens when the parties to a contract fail to do so?

Generally, courts and arbitral tribunals resolve this issue

... continued on next page

Applicable Law to the Contract, continued

by assessing party intent and selecting the law that the parties are presumed to have intended to choose. For example, in the absence of an express contractual provision, a Mexican arbitral tribunal resolving a dispute between a Mexican company and a U.S. contractor for a construction project in Mexico under a contract executed in Mexico may infer that the parties intended for the contract to be governed by Mexican law, despite the fact that one of the parties is not Mexican.

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In cases where no inference as to intent of the parties can be drawn, however, the governing law of the contract shall be the one resulting from the application of conflicts of laws rules from the seat of arbitration.[5] Many jurisdictions include in their conflicts of laws rules specific criteria, such as the state or the country to which the contract is most closely connected or where the contract was executed, to determine the applicable law of the contract. In countries that are signatories to the European Convention on International Commercial Arbitration of 1961, however, arbitrators are not bound by the conflicts of laws rules from the seat of arbitration; rather they are free to "apply the proper law under the rule of conflict *that the arbitrators* deem applicable."[6]

Law Applicable to the Arbitration Agreement

Notably, an arbitration clause and the underlying contract are generally considered separable contracts under a widely accepted legal theory known as the separability doctrine. Therefore, different laws may apply to the contract and the agreement to arbitrate.

Similar to the substantive law applicable to the contract, the parties can choose the substantive law governing the arbitration agreement. The question is, again, what law should apply absent such agreement. Courts and arbitral tribunals differ about which approach to take.

For example, the English Court of Appeals formulated a three-stage inquiry to establish the law of an arbitration agreement: (1) whether the parties expressly chose the law of the arbitration agreement; (2) whether the parties made an implied choice of law for the arbitration agreement; and (3) in the absence of express or implied choice, the system of law with which the arbitration agreement has "the closest and most real connection."[7]

In contrast, courts in Singapore and Hong Kong have ruled that the law of the seat of arbitration is the appropriate one to govern the parties' arbitration agreement in the absence of an express provision.[8] Similarly, the New York Convention specifies that, absent express agreement between the parties, the applicable law to the agreement should be the one where the award is made, i.e., the seat of the arbitration.[9]

Parties may, therefore, find it surprising that a court or a tribunal deciding their case may end up applying different laws to the underlying dispute and the arbitration agreement, even when the parties have expressly chosen the law applicable to the underlying dispute. In order to reduce uncertainty, the parties should use clauses stating in express and unequivocal terms the substantive law governing the arbitration agreement.[10]

Law Applicable to the Arbitration Procedure

Since arbitration is by nature contractual, parties also can agree to different procedural laws that will govern the arbitration proceedings. Usually, the rules of arbitral institutions such as the ICC, ICDR, LCIA or HKIAC,[11] or the UNCITRAL Arbitration Rules (in the case of ad hoc arbitration), as well as supplemental rules such as the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, provide the procedural framework for the parties to

Applicable Law to the Contract, continued

conduct the arbitration. Parties may also choose national or state laws either to govern the arbitral procedure or to supplement the rules of the selected arbitral institution.

Lex Arbitri

In addition to the procedural law chosen by the parties, the law of the seat of the arbitration, known as the lex arbitri, which the parties are also free to choose by virtue of their choice of arbitral seat, is a source of procedural laws affecting the rights and remedies available to parties.[12]

The lex arbitri refers to mandatory provisions imposed by each country on arbitrators in their own territory on issues such as arbitrability, interim measures, entitlement of the tribunal to rule on its own jurisdiction (otherwise known as the doctrine of competence-competence), judicial assistance, rules of ethics and many others. Because the lex arbitri often relates to matters of public policy, parties and tribunals are usually not allowed to circumvent these laws.

Therefore, because the lex arbitri may take precedence over other freely chosen rules of procedure, and may subject the arbitral award to annulment if some aspect of the arbitral proceeding or award is found to violate the lex arbitri, parties should be careful in choosing the seat of the arbitration.

Conclusion

Parties have ample autonomy to choose the law or rules that apply to an arbitration. If chosen hastily, however, this freedom comes with inherent risks, as described above. Therefore, parties should make it a practice to recognize potential conflicts and issues at the outset; limit to the extent possible the number of potentially conflicting laws and rules governing the contract, the arbitration agreement and the arbitration proceedings; and aim to be consistent with national or state laws, including the lex arbitri.

Note: This article was prepared for Mark Cheskin's presentation at the Ninth Latin American Arbitration Congress in Lima, Perú, 28-30 April 2015.

Mark Cheskin *is a partner in the International Arbitration Group in the Miami office of Hogan Lovells. He also is co-head of Hogan Lovells' global Construction & Engineering practice.*

Hans H. Hertell *is a senior associate in the International Arbitration Group in the Miami office of Hogan Lovells. He focuses his practice on international litigation and arbitration of commercial and investor-state disputes, including derivative litigation in U.S. federal and state courts.*

Endnotes

1 United Nations Commission on International Trade Law (UNCITRAL), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and International Centre for Dispute Resolution (ICDR).

2 The choice of more than one law or sets of rules is known as dépeçage. See Ferrari, Franco, Conflicts of Laws in International Arbitration 272 (1st ed. 2011).

3 *See* Venezuela, Foreign Exchange Control Law.

4 *See* Decree 2820, August 5, 2010, Diario Oficial (Colom.).

5 Each country has different conflicts of laws rules. In countries that adopt the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), Article 28(2) of the Model Law provides: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it consider applicable."

6 European Convention on International Commercial Arbitration of 1961, Art. VII (emphasis added).

7 Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A., [2012] EWCA Civ 638 (appeal taken from Eng.).

8 *See* generally, Alastair Henderson, Lex Arbitri, Procedural Law and the Seat of Arbitration, 26 Singapore Academy of Law Journal 886 (2014), available at http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/703/%282014%29%2026%20SAcLJ%20886-910%20%28Lex%20Arbitri%20-%20Alastair%20 Henderson%29.pdf

9 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(1)(a), June 10, 1958, 21 U.S.T. 2517 (the New York Convention).

10 *See* Ormsby, Harry, Governing Law of the Arbitration Agreement: Importance of Sulamérica Case Reaffirmed Where Choice of Seat Was Agreed Without Actual Authority, Kluwer Arbitration Blog, Jan. 29, 2014, http://kluwerarbitrationblog.com/blog/2014/01/29/governing-law-of-the-arbitration-agreement-importance-of-sulamerica-case-reaffirmed-where-choice-of-seat-was-agreed-without-actual-authority/

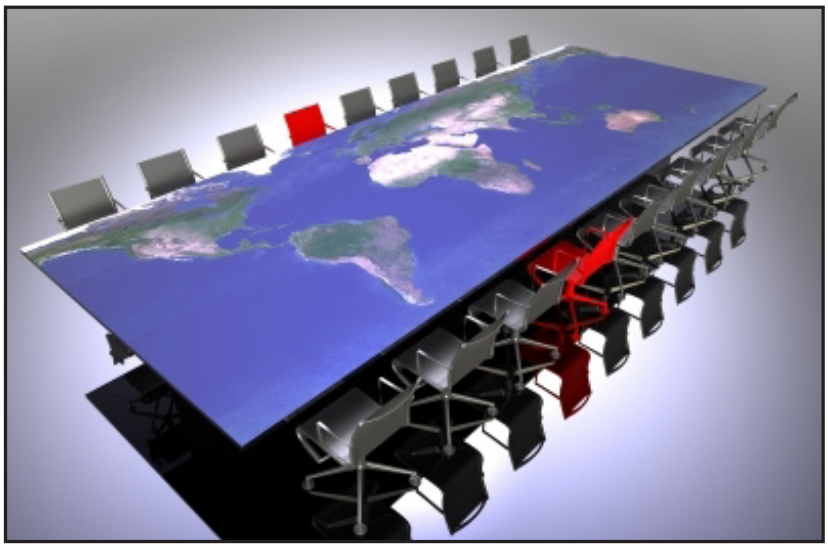
11 Hong Kong International Arbitration Centre (HKIAC). *See also*, supra note 1 and accompanying text.

12 *See* Shaun Lee, The Laws Governing an Arbitration, Singapore International Arbitration Blog, 26 June 2012, http://singaporeinternationalarbitration.com/2012/06/26/the-laws-governing-an-arbitration/

International Commercial Mediation: A Supplement to International Arbitration

By Ricardo J. Cata, Miami

International commercial arbitration has been, for many years, the preferred means of resolving cross-border business disputes. The international corporate community has become increasingly concerned, however, about rising costs, delays and procedural formalities with that adjudicatory method.[1] International arbitration is costly. According to a 2010 chart on comparative costs between arbitration and mediation provided by the International Chamber of Commerce (ICC), the cost of an international commercial mediation ranges from about US$5,000.00 to US$12,000.00, and commercial mediations are usually concluded within two days. According to the ICC chart, the following total average costs were noted between arbitrations and mediations of US$25 million disputes: Total costs—arbitration: US$2,836,000.00; total costs—mediation: US$120,000.00. The total average costs of a commercial mediation, according to the 2010 ICC chart, represent less than 5% of what the total average cost of an arbitration would be at that monetary level of dispute.[2]



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Moreover, international arbitration is, in general, relatively slow to bring a dispute to a final hearing. The international arbitration process can take months, and at times years, for the final hearing. Thereafter, there will be further delay waiting for the arbitration award to be published. If the dispute is complex, and there are multiple parties and contracts, the issuance of the arbitration award could take months. There may then be further delay in enforcement of the final award, or in dealing with appeals before commencing the process of enforcement.[3] According to the 2010 ICC chart, the average times for an international arbitration are as follows: hearing: one to three weeks; preparation: twelve to eighteen months; overall resolution time: eighteen to twenty-four months.[4]

Further, the American Arbitration Association (AAA) conducted an international survey in 2006, in which it sought feedback on international mediation by questioning 101 Fortune 1000 companies with average revenues of US$9.09 billion. According to that survey, the two primary reasons expressed by respondents for using mediation were saving money and saving time. 91% of the companies surveyed noted that saving money was a reason for their use of mediation, and 84% cited saving time as another reason for using mediation.[5]

Arbitration, while private and confidential, is an adjudicatory and formal method of dispute resolution. The arbitration award is usually not subject to appeal, except on limited and narrow procedural grounds.[6] The final arbitration award, on the other hand, will be recognized and enforced in many countries through the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention),[7] which has been signed and ratified by 154 states as of January 2015.[8] Because the process of arbitration is, as noted above, adjudicatory and adversarial in nature, the arbitration

International Commercial Mediation, continued

tribunal therefore looks back in time to an existing dispute, and adjudicates a winner and a loser between the parties; this process, in turn, can make it unlikely for the parties' business relationship to survive the arbitration process.[9] International arbitration has also evolved in recent years into a proceeding that is more like U.S.-styled litigation.[10] A factor frequently noted for this evolution is that U.S. attorneys have become more involved in international arbitrations, as the complexity of cross-border disputes have increased, and the amounts in controversy have dramatically increased to hundreds of millions or even billions of dollars.[11] The advent of "litigation tactics" has also increased the costs and the length of an arbitration, as well as the adversarial nature of the process.

As a result of the increased complexity and damage amounts involved in international commercial disputes, resolving these disputes through arbitration requires increased fact-finding, cross-border legal research and opinions and greater investigation of damages issues. This, in turn, motivates parties to use litigation-styled techniques and to undertake broader fact discovery. Also, a significant number of arbitrations are "seated" in the United States, and arbitrators from the United States are generally more likely to allow broader discovery.[12] This trend has been exacerbated by electronic record keeping, which becomes another significant cost factor in international arbitration. Moreover, arbitration hearings in some instances give greater importance to oral testimony and cross-examination (another technique of U.S.-styled litigation), which further increases costs. These procedural developments in international arbitration have concerned many businesses based outside the United States as to the efficiency of this adjudicatory method.[13]

The 2010 ICC chart noted above comparing the average costs and the average duration of international commercial arbitration versus international commercial mediation reflects the following as to the time components related to mediation: Average times—hearing: one to two days; preparation: three to five days; overall resolution time: two to three months.[14]

The same 2010 ICC chart noted the average total costs for an international arbitration with three arbitrators and a London, UK, venue, to be US$2,836,000.00, and the average total costs for an international mediation with one mediator to be US $120,000.00. Moreover, the previously noted AAA international survey of Fortune 1000 companies noted that in 77% of mediated cases, the overall costs to resolve the dispute were reduced, and that in 80% of the cases mediated, mediation also reduced the total time to resolve disputes.[15]

Mediation, as a conciliatory process, provides the parties with the opportunity to reach an agreed settlement of their dispute, resulting in a solution acceptable to both sides. This aspect of mediation may allow for, or at times enhance, future business relationships between the parties. Mediation by its nature requires each side to understand and to negotiate with the opposite party.[16] With the assistance of the mediator, parties are sometimes able to reestablish the trust that was compromised as a result of the dispute. Mediation, unlike arbitration, is more about how the parties can make their business relationship work better in the future. An adjudication of breach by one of the parties in an arbitration is likely to have an adverse impact as to any possibility for future business transactions between the parties. This would not necessarily be the case with a mediation settlement agreement (MSA).[17]

Mediation is less formal and much more flexible than arbitration.[18] In contrast to arbitration, which can offer only a limited range of remedies to resolve a dispute, there are virtually no limits as to what kinds of remedies and conditions (as to past disputes and possible future relationships) the parties can agree to in their MSA, as long as the terms and conditions are not illegal or against the public policy of the jurisdiction.[19] The freedom to decide on the terms and conditions of the outcome of a dispute is an important factor that makes cross-border commercial mediation an appropriate and attractive supplemental tool to arbitration for resolving international business disputes.[20]

An agreement to mediate as part of a comprehensive

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Energy Reform and Arbitration in Mexico

By Martha A. Villalobos-Murillo, Mexico

Historic legal reform was enacted in the energy sector by the Mexican federal government in 2013. The reform seeks modernization of the energy sector and the attraction of private investment. For such purposes, the inclusion of alternative dispute resolution methods was of great importance. This article analyzes the relevant provisions on arbitration in the newly enacted Mexican energy reform.

Arbitration Regulations in Mexico

Commercial arbitration in Mexico was first regulated in the Mexican Commercial Code in 1989, but it wasn't until 1993 that the Mexican Commercial Code was amended to adopt the UNCITRAL Model Law on International Commercial Arbitration.

Photo credit: Rice University

Mexico had, however, ratified without reservation the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention), in 1971 and 1977, respectively.

Today, the Fourth Title of Book Five of the Commercial Code (containing the adopted UNCITRAL Model Law on International Commercial Arbitration and the New York and Panama conventions) constitutes the cornerstone of commercial arbitration in Mexico.

Energy Reform

After years of discussion, in December 2013, the Mexican Congress approved a constitutional reform intended to modernize the energy sector. The constitutional reform published in the Federal Official Gazette on 20 December of that year was followed by publication of secondary laws on 11 August 2014 and other subsequent publications of relevant regulations on the matter. The Mexican energy reform includes, among others, important changes for the opening of *Petróleos Mexicanos* (*PEMEX*) and the *Comisión Federal de Electricidad* (*CFE*) to the private sector, strengthening these two strategic companies in order to attract national and foreign investment.

As a consequence of the Mexican energy reform, new laws were created: the Hydrocarbons Law, the Hydrocarbon's Income Law, the Electric Industry Law, the PEMEX Law and the CFE Law.

The energy reform has, among others, the following objectives:

1. Modernize, without privatizing, PEMEX and CFE, which will remain 100% public and 100% Mexican owned
2. Guarantee international standards of efficiency, quality and reliability of energy supply, as well as transparency and accountability
3. Fight corruption in the energy sector
4. Lower electric rates and natural gas prices
5. Achieve higher than 100% proven reserves of restitution rates of oil and natural gas
6. Increase daily production of oil from 2.5 million barrels to 3 million barrels in 2018 and to 3.5 million in 2025, as well as increase daily production of natural gas from 5,700 million cubic feet to 8,000 million in 2018 and 10,400 million in 2025
7. Create more than a half-million additional jobs during the current presidential administration and reach 2.5 million by 2025

Energy Reform and Arbitration, continued

8. Replace diesel-based electric plants with clean technologies and encourage the use of natural gas in electricity generation

One of the most important aspects of the energy reform is that, with some exceptions, energy-related contracts are no longer considered administrative contracts, but commercial contracts, and as such, they can now be the subject matter of arbitration.

Arbitration Under the Energy Reform

Arbitration is regulated under the Hydrocarbons Law, the PEMEX Law and the CFE Law, as follows:

Hydrocarbons Law

The Hydrocarbons Law regulates:[1] (1) the exploration[2] and extraction[3] of hydrocarbons; (2) the treatment, refining, sale, commercialization, transportation and storing of oil; (3) the processing, compression, liquefaction, decompression and regasification and the transportation, storing, distribution, commercialization and final consumer sale of natural gas; (4) the transportation, storing, distribution, commercialization and final consumer sale of oil-bearing products; and (5) the pipeline transportation and pipeline-related storage of petrochemicals.

The Mexican Hydrocarbons Law provides that in case of any controversy related to the contracts for exploration and extraction, except for administrative rescission, alternative methods for resolution can be agreed upon by the parties, including arbitration in terms of the Fourth Title of Book Five of the Mexican Commercial Code and the international treaties on arbitration and resolution of controversies to which Mexico is a signatory.[4]

The National Hydrocarbons Commission and the contractors cannot, however, submit themselves, in any event, to foreign laws, and the arbitration procedure must provide that: (1) applicable law shall be the Mexican federal laws; (2) arbitration shall be conducted in Spanish; and (3) the arbitration award shall be issued in strict law and shall be binding and definitive for both parties.

Substantive applicable law to the contracts for exploration and extraction shall be the Mexican

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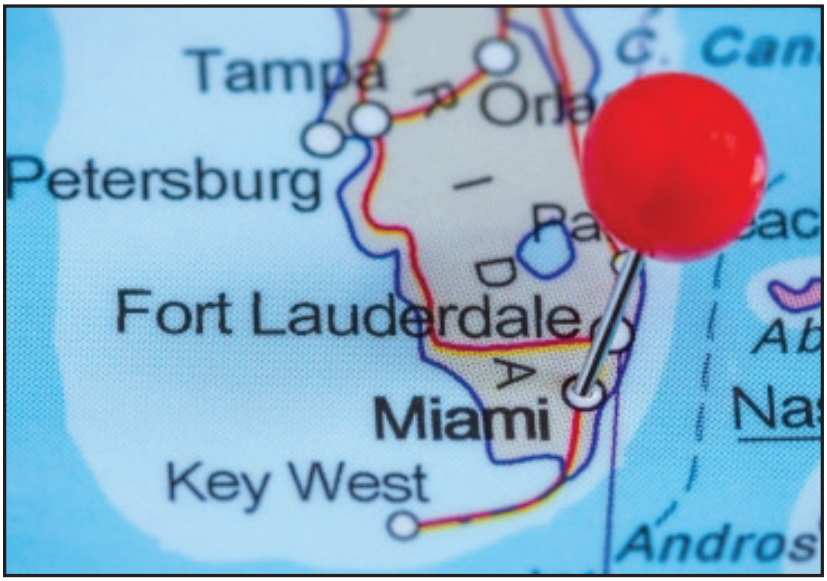
Miami: Una Nueva Estrella en el Arbitraje Comercial Internacional

Por María Eugenia Ramírez y Roland Potts, Miami



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Además de sus bellas playas, clima agradable, enormes centros comerciales, extensa gastronomía, música variada, cultura diversa, y punto geográfico estratégico como puente entre América del Norte, América Latina, el Caribe y Europa, Miami, ciudad al sureste de la Florida, puede ahora añadir otra descripción a su extensa página de vida: sede codiciada para los arbitrajes comerciales internacionales.

En los últimos años, Miami ha sido impulsada como una de las sedes más populares para los arbitrajes comerciales internacionales, compitiendo con otras ciudades como Nueva York, Londres, Paris, y Hong Kong. De hecho, la selección de Miami como sede en arbitrajes internacionales ha venido en aumento en los últimos años, y la expectativa es que dicho patrón continuará hacia el futuro.

¿Pero, y por qué este ascenso en la popularidad de Miami como sede de arbitrajes internacionales? La respuesta es sencilla: Miami es una ciudad cosmopolita, donde practican abogados bilingües y trilingües con experiencia en arbitrajes internacionales celebrados en múltiples idiomas (entre ellos, inglés, español, y portugués). Modificaciones recientes en las leyes de arbitraje internacional de la Florida y el surgimiento de un grupo de abogados y jueces sumamente especializados en el área de arbitrajes internacionales (varios miembros de la Sociedad Internacional de Arbitraje de Miami o MIAS por sus siglas en inglés, o practicantes en firmas que tienen departamentos legales con áreas de práctica de arbitraje internacional), han contribuido a que Miami continúe evolucionando y avanzando para ser reconocida como el destino predilecto para la resolución de arbitrajes comerciales internacionales.

En efecto, en junio del 2010, el Estado de la Florida aprobó la Ley de Arbitraje Comercial Internacional de la Florida (la Ley de Arbitraje Internacional de la Florida), la cual está basada en la Ley Modelo de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional Sobre Arbitraje Comercial Internacional junto a sus enmiendas del año 2006 (UNCITRAL por sus siglas en inglés) (la Ley Modelo).[1] *Véase* Fla. Stat. §§ 684.0001 *et seq*. Dicha Ley de Arbitraje Internacional de la Florida contiene múltiples provisiones relativas al arbitraje internacional, incluyendo provisiones respecto a la emisión de medidas cautelares, descubrimiento de prueba, y el reconocimiento y ejecución de laudos arbitrales internacionales. *Véase id*. La Ley de Arbitraje Internacional de la Florida ha contribuido a que haya una disminución en el número de obstáculos legales que se pueden presentar durante el desarrollo de un arbitraje comercial internacional en la Florida.

Además de la aprobación de la Ley de Arbitraje Internacional de la Florida, la ciudad de Miami también ha estado recientemente desarrollando su sistema judicial para proveer recursos adicionales en el área de arbitraje comercial internacional. Así, en diciembre del 2013, el Undécimo Circuito Judicial para el Condado de Miami-Dade creó la Corte de Arbitraje Internacional,

Miami: Una Nueva Estrella, continued

una subsección dentro de la división de Litigios de Negocios Complejos del Tribunal de Circuito del Condado de Miami-Dade dedicada a atender arbitrajes internacionales. Uno de los propósitos principales detrás de la creación de dicha subsección fue darle la oportunidad a un grupo selecto de jueces a recibir un entrenamiento especializado en el campo de arbitraje internacional con aras a llegar a un mejor entendimiento sobre las complejidades que a veces surgen en este tipo de disputas.

Aunque lo anterior pareciera mucho, no nos quedamos ahí. Miami también cuenta con una infraestructura impresionante de hoteles de primera clase donde cómodamente se pueden alojar clientes, árbitros, testigos, y peritos, y donde se pueden celebrar arbitrajes en sus amplias salas de conferencia. Asimismo, Miami ostenta de un vasto aeropuerto internacional, con múltiples opciones de vuelos diarios hacia América Latina, el Caribe, y Europa. Todas estas ventajas tornan a Miami en una sede para arbitrajes internacionales no sólo privilegiada y moderna, sino también increíblemente conveniente.

El surgimiento de Miami como uno de los destinos más convenientes para celebrar arbitrajes internacionales no ha quedado desapercibido. Tanto el Centro Internacional para la Resolución de Disputas de la Asociación Americana de Arbitraje como JAMS han abierto centros de resolución sumamente modernos en Miami para ser utilizados por entidades e individuos que hayan optado por el arbitraje internacional bajo dichos centros como método de resolución para sus disputas. Asimismo, en abril del 2014, el Consejo Internacional para el Arbitraje Comercial (ICCA por sus siglas en inglés) celebró su conferencia bianual en Miami, siendo éste el primer congreso de ICCA en los Estados Unidos desde el año 1986. Y la Corte Internacional de Arbitraje de la Cámara de Comercio Internacional (ICC por sus siglas en inglés) celebra todos los años una conferencia de arbitraje comercial internacional en Miami a la que asisten cientos de practicantes o individuos interesados en el arbitraje internacional. No podemos tampoco olvidar que Miami ahora también servirá como sede de un arbitraje multibillonario sobre el financiamiento y construcción del proyecto de expansión del Canal de Panamá, lo cual también ejemplifica la popularidad de Miami como sede preferida para el arbitraje comercial internacional y la resolución de disputas altamente complejas y de alto perfil.

En vista de todos los recursos que posee en el ámbito de arbitraje internacional, podemos sentirnos confiados de que Miami continuará cultivando su nueva popularidad como una de las sedes preferidas por empresas transfronterizas para sus arbitrajes comerciales internacionales.

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Roland Potts *es Asociado en la firma jurídica Hogan Lovells US LLP, en Miami, Florida, y es miembro del Área de Práctica de Arbitraje Internacional de la firma.*

Nota Finales

1 Sólo ocho estados norteamericanos, incluyendo la Florida, han aprobado leyes basadas en la Ley Modelo: California (1988), Connecticut (1989), Texas (1989), Oregon (1991), Illinois (1998), Louisiana (2006), Florida (2010), y Georgia (2012). Florida, sin embargo, es el único estado de la nación norteamericana que ha adoptado la Ley Modelo junto a sus enmiendas del año 2006. Dichas enmiendas modificaron la Ley Modelo para incluir cláusulas detalladas sobre varios temas como, por ejemplo, la emisión de órdenes ex parte y medidas cautelares.

Salir de Pesca, Sólo en Vacaciones: La Base Adecuada para Laudos sobre Daños

Por Quinn Smith y Diego Gosis, Miami

Si bien puede parecer misterioso y hasta ser fuente de comprensibles temores, el papel del tribunal en la determinación de los daños a menudo puede ser la tarea más importante. En muchos sentidos, mirar el caso a través del lente de los daños reclamados puede ayudar a explicar los hechos. Por ejemplo, una vez que el tribunal puede determinar la viabilidad económica del reclamo de la parte demandante, luego pueden evaluarse las pérdidas económicas probadas y tal vez incluso la credibilidad de las declaraciones de los testigos de hecho.

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Sin embargo, con demasiada frecuencia, la cuantificación de daños se realiza con el mismo método casero para determinar la dirección del viento, elevando sobre la mollera un dedo recién humedecido. El proceso de arbitraje internacional exige mucho más para que los daños que se decidan satisfagan los requisitos de rigor establecidos en los conceptos básicos que sustentan el proceso arbitral.

Este artículo explica los conceptos y limitaciones aplicables al proceso de adjudicación de daños económicos, con ejemplos recientes de decisiones del tipo analizado. Como surge del análisis de los principios que siguen, la adjudicación de daños económicos requiere detallar y probar con precisión las alegaciones y la causalidad invocadas, lo que es mucho más que simplemente identificar un acto antijurídico y hacerlo seguir de una sopa de letras de metodologías valuatorias incompatibles o incomprensibles.

El Mandato del Tribunal Arbitral y sus Características Inherentes

Independientemente de la posición que se adopte con respecto al origen de las facultades de los árbitros, es indiscutible que el Tribunal Arbitral tiene la obligación de resolver la disputa dentro de los límites de su mandato. Este mandato típicamente se deriva de un contrato, o puede encontrar su alcance delimitado en un tratado o una ley, en los casos en que el consentimiento a arbitrar se expresa por invocación de una oferta de arbitraje contenida en uno de tales instrumentos. Al mismo tiempo, las normas aplicables están contenidas en la legislación nacional sustantiva y procesal, en las reglas de arbitraje (si las hay), y –en el caso de los procesos de derecho internacional público– en los tratados internacionales, el derecho consuetudinario y otras fuentes.[1]

En cualquier caso, el arbitraje es diferente de los sistemas judiciales. Como ha señalado recientemente Gary Born, "[e]n todos los casos, sigue siendo esencial clasificar y tratar el arbitraje como una disciplina distintiva y autónoma, especialmente diseñada para lograr un determinado conjunto de objetivos".[2] Dentro de este sistema, los árbitros tienen una función jurisdiccional que consiste en resolver la controversia entre las partes sobre la base de sus presentaciones y de las pruebas ofrecidas que resulten admisibles.[3]

Los árbitros deben tratar a las partes con igualdad, o correrán el riesgo de violar las reglas de arbitraje aplicables, y las leyes nacionales y/o internacionales.[4] Al mismo tiempo, el Tribunal Arbitral no puede ir más allá de los límites de su mandato en búsqueda de las respuestas que quiere encontrar.[5] La Corte Suprema de los Estados Unidos ha afirmado, en relación con esta cuestión, que los tribunales arbitrales no pueden decidir sobre la base de políticas de su creación, que lleven a la

Salir de Pesca, continued

implementación de "su propia marca de justicia industrial".[6] Es decir que los árbitros deben supervisar el proceso y asegurar la equidad procesal, para luego resolver la controversia considerando las pruebas, argumentos jurídicos, y los testimonios presentados.

Las Limitaciones Básicas en las Facultades del Tribunal

En el desempeño de su mandato, el Tribunal considera esencialmente tres tipos del elemento procesal: pruebas de hecho, pruebas periciales, y argumentos jurídicos. Cada uno de estos elementos tiene sus propios supuestos básicos que subyacen al trabajo del Tribunal. Cuando el Tribunal considera los hechos, está juzgando la credibilidad de los testigos y documentos que los expresan o reflejan, y es relativamente libre de asignar el peso que considere apropiado al testimonio o documento—lo que incluye la posibilidad de atribuir poca importancia a los testigos o documentos que parecen ser falsos o inconsistentes. El Tribunal estudia la prueba documental y las declaraciones de los testigos—orales o escritas—y saca las conclusiones apropiadas de sus formulaciones, para bien o para mal de la parte que las presenta. En ningún caso podrá el Tribunal inventar o crear declaraciones o documentos no presentados, ni crear en ellos afirmaciones probatorias que no surjan de sus textos, o de las inferencias que ellos permitan. El Tribunal está obligado a los hechos expuestos por las partes.

Las pruebas presentadas a través de peritos y expertos—especialmente los designados por las partes—llaman a una serie de consideraciones ligeramente distintas que las aplicables a los testigos de hecho, pero se aplican a ellas, en lo relevante, los mismos principios discutidos *supra*. Los expertos presentan su análisis de los hechos sobre la base de la metodología que proponen, y las situaciones hipotéticas que consideran relevantes. A pesar de que los expertos pueden hacer conclusiones jurídicas, esas conclusiones podrán ser más o menos persuasivas, pero no de gran peso procesal, y no resultan

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SECTION SCENE

The Florida Bar International Law Section

2015 Florida Bar Annual Convention

Lucia Victoria Concepción, Carlos Concepción, Alvin Lindsay

Sandy Quinter, Dean Cecile L. Dykas, Peter Quinter

Glenn Cooper (left)

Judge Eileen O'Connor (ret.), Peter Quinter

Glennys Ortega Rubin, Leyza Blanco

SECTION SCENE

Darren Latham, Ed Mullins, Mr. and Mrs. William Hardy Hill Jr.

Melanie E. Damian, Leslie J. Lott, Peter Quinter

Yara Lorenzo, Ricardo H. Puente, Gustavo Lamelas, Gabriella Morello

Peter Quinter, Leslie J. Lott

Kim Radcliffe, Peter Quinter

Robert Becerra, Yara Lorenzo, Peter Quinter, Gabriella Morello, Alvin Lindsay

Stefan Stein (2nd from left), Peter Quinter (center), Grier Wells (right)

Jennifer Olmedo-Rodriguez provides an interview.

Ricardo J. Cata, Katherine Sanoja, Mariela Malfeld, David Lichter

Eduardo Palmer and Alvin Lindsay present the Lady of Justice to outgoing ILS Chair Peter Quinter.

Stefan Rubin, Glennys Ortega Rubin, Sandy Quinter, Peter Quinter

Larry Rifkin, Zel R. Saccani

Clarissa Rodriguez provides an interview.

Helene Carrier

ILS annual executive council meeting

James M. Meyer, Angel Valverde, Robert J. Becerra

Peter Quinter, Carlos Concepción, Eduardo Palmer

The International Law Section recognizes Cuban dissident lawyer René Gómez Manzano for working to establish the rule of law and fighting against human rights violations in Cuba.

Jim Meyer, René Gómez Manzano

Jim Meyer, Peter Quinter, Alvin Lindsay, René Gómez Manzano

Jim Meyer, Peter Quinter, Eduardo Palmer, René Gómez Manzano, Alvin Lindsay

René Gómez Manzano addresses the ILS.

WORLD ROUNDUP

AFRICA

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International drug traffickers zero in on West Africa.

The various countries in West Africa are serving not only as a destination for the shipment of drugs from Latin American cartels but more recently for the local production of methamphetamines. The member states of the Economic Community of West African States are being assisted by international partners, such as the U.S. Drug Enforcement Administration and the EU, in combating the influx of drugs as well as diminishing its local production. The exporting of contraband from West Africa extends to Europe and reaches as far as Japan. The increase in drug trafficking and production in West Africa should be a topic of prime importance in the United Nations General Assembly Special Session on Drugs in April 2016.

The vagaries of trophy hunting highlight the need for international concern.

After the trophy hunting and killing of the famous Cecil the lion in Zimbabwe earlier this year, international focus is centering on the practical nature of the practice. The alleged benefits of the trophy hunting enterprise include enriching local areas where tourism would be otherwise negligible, as well as continuing efforts to increase the lion population to supply game for hunters. For instance, South Africa runs breeding programs to allow for a practice called "canned hunting." As for the alleged benefits of trophy hunting, the first assertion is being debated, as it is proving hard to track the actual investment and spread of financial gains into local economies. The second alleged benefit is also called into question, specifically considering that although countries like Zimbabwe maintain a quota on hunting, those numbers are often exceeded in the actual practice of trophy hunting, and thus the practice is deemed unsustainable. The main culprit in lion depopulation has been and remains the degradation of habitat for farmland and raising livestock. At a minimum, the reaction to the hunting of Cecil the lion calls attention to the dwindling numbers of lions in Africa and the need for international cooperation to stem the tide.

BRAZIL

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New arbitration and mediation laws approved.

After a lengthy amendment process, on 27 July 2015, certain amendments to the Brazilian Arbitration Law (BAL) came into effect. These amendments seek to codify existing practice and to clarify issues such as the interaction between the courts and arbitrators in cases where a party seeks interim relief in aid of the arbitration and before an arbitration panel has been formed. Some doubt exists regarding the ability of courts to order a "supplemental award" in the event that the tribunal fails to decide all matters, but practitioners and users of arbitration have largely lauded the amendments. Two days after adopting the amendments to the BAL, Brazil also passed a new mediation law. For years, practitioners have attempted to enshrine certain mediation concepts through legislation, giving the process greater certainty and helping to increase its use. With the adoption of the mediation law, it appears that such efforts have paid off.

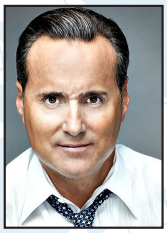
Lava Jato scandal endangers growth prospects.

Since the investigation became public in late 2014, Brazilian media and civil society have been following closely the corruption scandal called *Lava Jato*, translated "car wash." Lava Jato has resulted in convictions and sentences of many of the top executives at major Brazilian companies and has led to calls for investigations of the president and her inner circle. Hundreds of millions of dollars have been paid in fines and back taxes, and officials estimate over R$1 billion in kickbacks and bribes may have been taken. The scandal has led to a suspension of government bids and stalled projects as new indictments are frequently announced. For the first time in many years, the Brazilian Real has begun to devalue progressively in relation to other global currencies, and the economy looks set to contract by almost 2%. Businesses and professionals are closely monitoring the scandal and its effects as they impact international trade and disputes.

New Civil Procedure Code adopted.

In yet another piece of major legislation, Brazil adopted a new Civil Procedure Code, set to enter into force in 2016. The new code was adopted in April 2015, and its impacts are widespread. It has generally met with approval, especially its attempts to greater limit appeals and to streamline the court system.

EUROPEAN UNION



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European Parliament moves to exclude investor-state arbitration from the Transatlantic Trade and Investment Partnership (TTIP).

The European Parliament voted to remove investor-state arbitration from the Transatlantic Trade and Investment Partnership (TTIP) negotiations. The TTIP is an international trade and investment agreement between the United States and the European Union. The EU Parliament recommended that investor-state arbitration should be replaced with a new system that would resolve issues with "publicly appointed, independent professional judges in public hearings" instead of private arbitration panels of corporate lawyers.

The EU resolution was the result of widespread skepticism among the EU institutions toward investor-state arbitration. Business groups, however, were disappointed with the EU Parliament's resolution. As a concession to TTIP skeptics, they vowed to support TTIP negotiations that would "include an effective [investor-state arbitration system] that protects investors from unjust discrimination and unfair treatment."

Hague Convention Choice of Court Agreement to take effect in EU

On 15 October 2015, the European Union will welcome a much-anticipated international agreement that promises to radically streamline international litigation that involves choice of court clauses or in cases where such clauses are absent.

The agreement, known as the Hague Convention on Choice of Court Agreement, is "designed to offer greater legal certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide judicial dispute resolution mechanism alternative to the existing arbitration system . . . It does so by providing a framework to facilitate mutual enforcement of forum selection clauses in international commercial transactions."

In addition to clarity on jurisdictional issues, the Convention may ultimately offer contracting parties the same certainty as to the enforceability of foreign judgments as the New York Convention offers parties in respect to international arbitration awards.

French court upholds principle of immediate enforceability of awards in $740M case against Venezuela.

The Paris Court of Appeal recently refused to stay the enforcement of a $740 million arbitral award against Venezuela and allowed the immediate execution of the award while an action to set aside had been commenced in Paris. The case, *Gold Reserve v. Venezuela,* illustrates how quickly the enforcement of an award can take place in France—even if the award was rendered against a state and amounted to hundreds of millions of dollars.

Under the principle of immediate enforcement of arbitral awards, codified in Article 1526 of the French Code of Civil Procedure, arbitral awards are enforceable immediately after a court has issued an order granting leave to enforce the award. This is true even when an action to challenge or set aside the award has been commenced. While Article 1526 allows a party to petition the court to stay the enforcement of an arbitral award upon a showing of "severe prejudice," in practice French courts grant such petitions only in the most extreme circumstances, such as when an award was rendered fraudulently.

The *Gold Reserve* case showcases the French legal system's commitment to ensuring that arbitration remains an efficient and trustworthy dispute resolution mechanism and highlights the swift application of the principle of immediate enforceability of arbitral awards no matter how substantial the stakes.

German court decision casts doubts over validity of international sports arbitration awards rendered by the "Supreme Court for World Sport" on public policy grounds.

A recent German court case challenged the validity and enforceability of arbitral awards rendered by the Court of Arbitration for Sport (CAS) widely considered the "Supreme Court for World Sport."

The case of *Pechstein v. ISU* is significant because it undermines the authority of the CAS and provides a future avenue for challenging sports arbitral awards in countries throughout the world—particularly on public policy grounds.

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World Roundup, continued

The CAS was established to provide a fast and cost-effective forum for resolving international sporting disputes, such as those concerning the Olympics.

While CAS awards are enforceable in national courts under the New York Convention, courts may refuse to enforce CAS awards if they are contrary to the "public policy" of the state where enforcement is sought. This is what took place in *Pechstein.*

Pechstein was decided on a breach of German competition law regarding "abuse of market power." Because abuse-of-market-power arguments invite easy application of other anti-competition law regimes, e.g., European competition law and Section 2 of the United States' Sherman Antitrust Act, arguments challenging CAS awards on this basis now gain a significant advantage in having an award invalidated.

English court rules in favor of one-stop litigation over arbitration.

The English High Court recently upheld an arbitral tribunal's finding that the court and not the tribunal had jurisdiction under the exclusive jurisdiction clause in a termination agreement.

In *Monde Petroleum SA v. WesternZagros Ltd.*, the High Court was asked to determine whether a dispute resolution clause in a settlement agreement referring disputes to the English court superseded an arbitration provision in the underlying contract so as to govern resolution of subsequent disputes arising out of both agreements.

The court held that the later clause controlled, and it applied a presumption of one-stop adjudication as evidenced by the language of the clause itself as well as the surrounding factual circumstances, including the timing of the agreement to the conflicting provisions.

In upholding the arbitral tribunal's finding that the court and not the tribunal had jurisdiction under the exclusive jurisdiction clause in the termination agreement, the High Court undermined the common assumption that courts will usually defer to arbitration whenever an arbitration clause is invoked. Each case will depend on its facts, and the use of clearer wording in the agreement at issue in *Monde Petroleum* might have avoided this dispute entirely.

MIDEAST REGIONAL UPDATE

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Egypt to introduce new labor law.

Four years in the making, Egypt's Ministry of Manpower and Immigration finished a draft of a new labor law and sent it out to business and labor groups for review. The draft law would replace current labor law number 12 of 2003. The new draft law comprises 270 articles and changes several aspects of the current law, including the employer's right to terminate an employee's contract and conditions under which the employer may do so. So far, most business groups have welcomed the new law but have reservations about some articles. Labor groups are divided into two main camps: those who welcome the draft law and others who are against it because they do not believe it goes far enough in protecting workers' rights.

Dana Gas gets favorable LCIA arbitration ruling against the Iraqi semi-autonomous Kurdistan Regional Government.

Dana Gas, an Abu Dhabi firm that leads a consortium of investors, filed an arbitration in the London Court of International Arbitration (LCIA) against the Kurdistan Regional Government (KRG) after a dispute regarding Dana Gas's long-term rights to develop and produce gas and oil products from the Khor Mor and Chemchemal fields. The LCIA tribunal recently handed down a partial final award finding in favor of Dana Gas as to its contractual development and production rights. The tribunal also confirmed that the KRG will be required to pay outstanding payments due to Dana Gas. The amount of the payments will be decided by the tribunal in a later award.

Sharjah bans the sale of energy drinks at restaurants and cafeterias.

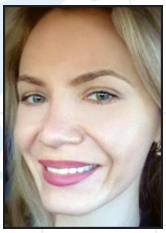
Due to health concerns, the municipality of Sharjah in the United Arab Emirates has banned the sale, display or mixing of energy drinks at all restaurants and cafeterias in the municipality. Retail outlets like grocery and supermarket chains may continue to display and sell energy drinks, but they must be displayed separately from other drinks.

World Roundup, continued

GCC states begin process of unifying trade and commercial laws.

Following a recent meeting, the Ministries of Commerce and Industry in the Gulf Cooperation Council (GCC) states have begun the process of unifying their local laws to facilitate the flow of goods and trade between them. In particular, the GCC will unify consumer protection laws, commercial anti-cheat laws, trademark laws and anti-dumping laws. The GCC is also discussing a joint committee to regulate and develop the insurance industry in the GCC states.

RUSSIA AND THE CIS



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New draft arbitration law in Russia will facilitate unified arbitration process.

In May 2015, the Russian government introduced a revised draft law with significant changes. The current law on arbitration allows for different types of arbitral tribunals, permanent and ad hoc, but does not in any way regulate creation of the permanent arbitration institutions or ad hoc arbitral tribunals. Such organizations need only to file the copies of the supporting documents with the competent state court to have their award recognized.

Under the draft law, organizations wishing to create an arbitration institution will need to apply for permission from the Russian Ministry of Justice. Article 44 of the draft law will require foreign permanent arbitration institutions (such as ICC) to obtain permission for execution of their functions in accordance with the Russian law. Otherwise, they will not be recognized as permanent arbitration institutions in Russia, which threatens the enforceability of their arbitral awards in the country. The requirements include: (1) a list of at least 30 recommended arbitrators; (2) rules of the institution should comply with the local law; (3) work of an institution should promote arbitration and the rule of law; and (4) be a non-commercial legal entity. The draft law also adds a provision for corporate disputes to be arbitrable in Russia. Arbitration agreement could be included in the bylaws of a legal entity, except for public joint stock companies that have more than 1,000 shareholders.

While the law has many proponents, there are some that strongly oppose it, saying that undue interference by the state into the arbitration process could damage the very basis of the independent dispute resolution process in Russia.

Investor-state arbitrations initiated against Ukraine.

There were at least three investment treaty cases initiated against Ukraine in 2015 after a difficult year for the country. Following political and economic crisis, the government implemented restrictive measures to prevent capital outflow: a war tax, increase of royalties for gas production, restrictions on repatriation of dividends by foreign investors and repatriation of funds received by foreign investors due to the sale of equity interests in Ukrainian companies, additional customs duties and foreign currency control rules.

JKX Oil & Gas and its subsidiaries filed claims against Ukraine in three different investment arbitration cases. On 16 February 2015, the UK-based company initiated investment arbitration in accordance with the UK-Ukraine BIT in ad hoc arbitration under UNCITRAL Rules while JKX's Dutch and Ukrainian subsidiaries started arbitration proceedings under the Netherlands-Ukraine BIT at the ICSID. Earlier that month, all three companies commenced investment arbitration against Ukraine at the Stockholm Chamber of Commerce (SCC) under the Energy Charter Treaty (ECT). The emergency arbitrator issued a decision prohibiting Ukraine to impose royalties exceeding 28% on gas production by JKX during the SCC proceedings. The claims exceed $180m for the rental fees that JKX's subsidiary spent on gas and oil production since 2011. In addition, JKX claims compensation for increase of the royalties on gas production to 55%, exclusive authority of the state-owned company Naftogaz to sell the gas to private parties, prohibition against repatriation of dividends imposed on foreign companies and other restrictions on foreign cash transactions.

Arbitrations against Russia follow Crimea annexation.

Russia is facing investment treaty claims from PrivatBank over alleged losses suffered following the annexation of Crimea. The proceedings commenced under the UNCITRAL rules seated at the Hague. Interestingly, the majority shareholder of PrivatBank, Ihor Kolomoyskiy, has been accused by the Russian government of criminal activities such as violent takeovers of companies, fraud, theft and sponsoring of the Dnieper battalion that was involved in numerous murders of innocent civilians (including women and children) during the Eastern Ukrainian conflict.

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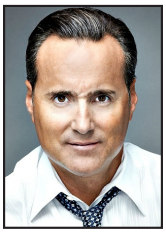
World Roundup, continued

SINGAPORE/SOUTHEAST ASIA



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Singapore's new "Arb-Med-Arb" protocol combines best features of mediation and arbitration into unified dispute resolution regime.

The Singapore International Mediation Centre (SIMC) and the Singapore International Arbitration Centre (SIAC) recently launched its "Arb-Med-Arb" protocol to encourage the use of mediation for the resolution of disputes that are referred to arbitration in Singapore.

Singapore's new Arb-Med-Arb model is designed to raise awareness of the availability of mediation in arbitration among parties doing business in Asia. While the International Chamber of Commerce and the Hong Kong International Arbitration Centre support a similar approach, the new SIMC-SIAC model promises to attract more parties to mediation, particularly in Asia, where mediation is sometimes viewed with suspicion.

Singapore's Arb-Med-Arb model clause provides as follows:

> All disputes, controversies or differences (Dispute) arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) for the time being in force.
>
> The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (SIMC), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

One of the Arb-Med-Arb model's most attractive features is that it allows for a mediation settlement to be converted into a consent award that can be enforced under the New York Convention. This feature alone may be enough to motivate other institutions in the region to establish their own versions of Arb-Med-Arb.

Singapore Court of Appeal confirms finality and enforceability of interim awards.

A recent decision of the Singapore Court of Appeal confirms that interim awards made under Singapore's International Arbitration Act (IAA) are final and enforceable. The decision is significant because it reinforces the "pay now, argue later" principle central to Singapore's dispute resolution regime.

The Court of Appeal's decision in *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* addressed significant concerns that Singapore's international arbitration legislation threatened the enforceability of interim arbitral awards made in Singapore, by confirming that interim awards made under Singapore's *International Arbitration Act* (*IAA*) are final and binding.

The Court of Appeal's decision in *Perusahaan* will no doubt be welcomed by those involved in international projects in Singapore. The case confirms the final and binding nature of an interim arbitral award issued under Singapore's international arbitration legislation and highlights Singapore's continued support for arbitration, whether domestic or international.

SOUTH AMERICA NORTHERN CONE

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American attorney is murdered in Caracas, Venezuela, after a botched kidnapping attempt.

John Ralston Pate, 70, a successful American expat lawyer, was found dead on 9 August 2015, and his girlfriend, Sally Elizabeth Evans, was left wounded after being attacked by unknown intruders at their home in Caracas, Venezuela. The couple was likely attacked during a kidnapping attempt gone wrong, according to local media. The victims were reportedly stabbed by two or three men who forced their way into the home. Mr. Pate helped found locally based law firm De Sola Pate & Brown and specialized in representing international companies entering the Venezuelan market.

Unrest arises in Ecuador over new features in the inheritance tax laws.

In June 2015, the Ecuadorian government proposed the "Law of Wealth Redistribution" in order to change certain provisions of the inheritance tax law. Under

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current law, inheritances must exceed US$68,800 in order to be subject to inheritance tax laws. The new law proposed a 2.5% tax on all inheritances greater than US$35,400. Furthermore, the tax could be as high as 47.5% for direct heirs (defined as children of the deceased) and 77.5% for indirect heirs and corporate entities.

Protests immediately erupted over these new provisions, and President Rafael Correa subsequently withdrew the proposed law. Local attorneys are certain, however, that a version of the Law of Wealth Redistribution will eventually pass and have begun taking steps to advise their clients of the potential consequences.

Since June, protests have taken place across the country against the policies of President Correa and his political party, PAIS Alliance. The protests are largely being fueled by social media, and protesters have reportedly come from a wide range of social and economic backgrounds. On 10 August, Ecuador's Independence Day, one of the country's largest protests took place in various cities and towns.

Colombia proposes a "Mini Congress" to resolve disputes between the government and FARC.

President Juan Manuel Santos recently proposed creating a "Mini Congress" that could more quickly approve amendments to a constitution arising out of peace talks between the government and FARC. Peace talks have taken place on and off since the early 1990's. Most recently, the government has been negotiating peace since November 2012.

President Santos rejected FARC's proposal to hold a constitutional assembly to ratify amendments, arguing that the proposed Mini-Congress would be more acutely aware of the negotiations and, therefore, would have a better understanding of the facts.

SOUTH AMERICA SOUTHERN CONE

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There will be no fix for Argentina's chronic debt crisis in 2015.

According to several reports, Argentina's debt crisis won't be resolved until after the country's next president takes office in December and tries to get the country's lagging economy moving again.

Argentina is locked in a battle with a group of U.S. hedge funds over unpaid debt and despite a U.S. court order to repay fully the US$1.3 billion debt plus interest. Argentina's USD bonds are issued under New York law in the United States. In 2012, the U.S. District Court of New York ruled that paying the exchange bondholders and not the holdouts was in violation of the pari passu clause requiring that all bondholders be treated equally. Argentina filed several appeals, but the decision wasn't reversed (*NML Capital Ltd. v. Republic of Argentina*, 12-00105, U.S. Court of Appeals for the Second Circuit (New York)).

The debt-restructuring contract that Argentina entered into with the exchange bondholders contains a clause, the Rights Upon Future Offers (RUFO), that President Cristina Fernandez has invoked to refrain from paying the holdouts. According to *The Bubble* (bubblear.com), Argentina faced a situation in June 2014 that looked like this:

1. If Argentina continued to pay exchange bondholders without paying the holdouts, U.S. financial institutions would be barred from processing the payments. This would result in the payments not reaching the bondholders and getting stuck in banking limbo, and a technical default.

2. If Argentina paid the holdouts full face value, this would trigger the RUFO clause. Argentina would have to pay the exchange bondholders full face value as well, which would decisively cripple the country.

3. If Argentina made no payments to anyone, it would still default, but would not have the moral claim inherent in option 1.

4. There were private sector options on the table whereby private Argentine banking groups offered to pay the holdouts. If Argentina accepted this option, the holdouts would be paid, but the private sector and "pro-business" groups villainized by the administration would take credit for saving the country.

At midnight on 31 December 2014, the RUFO clause expired, meaning that if Argentina's government *wanted* to, it could now pay the holdouts, or vultures, without having to pay the holders of exchanged bonds the same amount, thus bankrupting the country. To most investors and analysts, the option that made more sense was number 4. Argentina "chose" option 1, however, and financial analysts say that it underlined Argentina's willingness to pay a high price to ease a liquidity crunch rather than settle with the funds. So, expectations for

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a settlement have shifted to after a new Argentine president is installed in December 2015.

Paraguay ends its objections to Bolivia becoming a full Mercosur member.

On 17 December 2014, the leaders of Brazil, Argentina, Paraguay, Uruguay and Venezuela attended the 47th Mercosur Summit (Common Market of the South) in Parana, Argentina. Among the topics discussed was the entry of Bolivia as the newest full member of the economic bloc. Bolivia's entry had already been approved by Brazil, Venezuela, Uruguay and Argentina, from a time when Paraguay was under suspension due to the overthrow of former President Fernando Lugo. With the sanction lifted, Paraguay tried to renegotiate the terms of membership.

On 17 July 2015, President Dilma Rousseff of Brazil said that the heads of the Mercosur trade bloc decided to accept Bolivia as a full country member. Notwithstanding the announcement, Bolivia's admission still needs to be approved by the Brazilian and the Paraguayan congresses.

UNITED STATES

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United States amends regulations concerning Cuba.

United States government agencies including the State Department, the Office of Foreign Assets Control and the Commerce Department have amended regulations now that Cuba has been removed from a list of State Sponsors of Terrorism. Some trade has been encouraged, and travel to Cuba by Americans is certainly much easier.

***Trek Leather* decision holds individuals responsible for fraud.**

The U.S. Court of International Trade issued the famous *Trek Leather* decision in 2013, which was affirmed on appeal in 2014. This case holds individuals responsible for committing customs fraud for fraudulent acts committed by the company.

U.S. CBP pursues anti-dumping investigations.

U.S. Customs and Border Protection continues to aggressively pursue investigations, audits and fraud penalty cases against importers for evading the payment of anti-dumping duties for numerous types of imported products.

U.S. agencies investigate military/defense export violations to China, Iran.

Special agents from the U.S. Bureau of Industry and Security and the U.S. Department of Homeland Security are actively investigating Florida persons and companies for violating export laws and regulations, especially regarding military or defense articles destined for China or Iran.

International Dispute Resolution in Cuba

By Karin Paparelli, St. Petersburg

Whether regarding real property claim disputes, joint venture conflicts or contractual disagreements, how disputes are resolved in Cuba and the likelihood of enforceability are probably among the most important concerns for foreign investors today. It can be said that an agreement is only as good as its enforceability. Without the opportunity for fair resolution of disputes, any agreement becomes meaningless, its terms worthless and the entire venture much too risky for even the most experienced investor. This article addresses how international commercial disputes are resolved in Cuba.

Cuban National Courts

Typically, dispute resolution begins in Cuban national courts; however, Cuba's investment legislation leaves the method of dispute resolution open to the contracting parties.[1] The process may be outlined in the constitutive documents of the joint venture, including a provision to submit claims to international arbitration.[2] If the parties do not designate alternate dispute resolution, disputes will be submitted to the Cuban Court of International Commercial Arbitration (CCACI), which is preferred by the Cuban Constitution.[3]

Within the CCAI's Model Clause for Arbitration and Mediation it is suggested that:

> The parties shall comply with the contract in good faith. Any discrepancy in its performance, or agreements arising or in connection therewith, shall be settled through friendly negotiations or mediation if necessary. Parties [who] do not reach an agreement agree to submit such dispute to the Cuban Court of International Commercial Arbitration, by arbitration, subject to its Rules of Procedure.[4]

Bilateral Investment Treaties

Investors may also find protection in a bilateral investment treaty.[5] Bilateral investment treaties (BITs) were developed to promote and protect foreign investments between states and to settle related disputes.[6] During the 2000's, investor-state arbitration was successfully introduced.[7] Today, it is not uncommon for BITs to include two dispute resolution clauses; one for state-to-state arbitration and another that allows investors to bring arbitral claims directly against host states for disputes concerning investments.[8]

Cuba has entered into BITs with a litany of states,[9] including Chile, China, France, Germany, Italy, Mexico, Spain and the United Kingdom.[10] Cuban BITs address four topics: "(1) conditions for the approval of foreign investments, (2) state treatment of foreign investors, (3) expropriation, and (4) resolution of disputes between the foreign investor and the host country."[11] Other important inclusions are most-favored nation (each foreign investor treated no better or no worse than other foreign investors) and national treatment (foreign investors receive the same treatment as Cuban nationals) provisions.[12] BITs offer an alternative for dispute resolution and should provide some assurance that the investment will be protected from expropriation (or nationalization) without prompt, adequate compensation based on fair market value at the time of the taking.[13]

International Arbitration

The inclusion of an international arbitration provision in the investment agreement is another alternative available, but needs to be negotiated at the time of contracting.[14] International arbitration is recognized and accepted as a neutral evaluation of foreign disputes often resolved by the International Chamber of Commerce,[15] whose awards are enforceable in states that are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards known as the New York Convention of 1958.[16] Cuba is a signatory to the New York Convention,[17] and theoretically, that should provide some measure of assurance. Anyone who has tried to enforce a judgment at home or abroad, however, is keenly aware of the distance between enforceability and collectability. For the foreign investor, this may be a significant hurdle to overcome in the process of dispute resolution in Cuba.

The foreign investor may have more success collecting

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escalating dispute resolution clause in an international commercial contract has recently become a more popular option.[21] A contractual mediation clause that sets out the specific conditions and time for triggering the mediation, as well as the name of the international mediation service provider, the mediation rules to be used, the substantive law to be applied during mediation, the location where the mediation will take place and the language in which the mediation will be conducted can be of significant consideration in the enforceability of such a clause by a court, and will also facilitate a more efficient and streamlined mediation.[23] In some countries where the parties have a contractual agreement to mediate a dispute, courts have declined to hear the matter if mediation was not undertaken beforehand. In countries such as Germany, England, Belgium and France, the legislatures have provided that in cases where there is a clear and unambiguous mediation clause in the contract, the courts will not hear a claim if one of the parties has invoked the contractual duty to mediate.[24] The more specific and detailed the provisions that are included in an agreement to mediate are, the greater likelihood that such an agreement to mediate will be enforced by a court in an international dispute. Obviously, the enforceability of contractual agreements to mediate contributes to the development and success of cross-border commercial mediation.[25]

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Selection of an experienced neutral mediator is an important factor in preparing for a cross-border mediation and for increasing the chances of a successful mediation process involving a cross-border dispute.[26] Knowledge by the mediator of the substantive aspects of the dispute may be important, as well as the mediator's prior experience and his or her degree of trans-cultural sophistication and familiarity with the cultural, commercial and legal issues involved in the particular dispute. If the parties cannot mutually agree on the selection of a mediator, the parties should consider availing themselves of recommendations and methods of selection of mediators that may be offered by the institution selected to administer the arbitration.[27]

Another important consideration for parties and counsel in preparation for cross-border mediation is the method of mediation to be used by the mediator; that is, should the mediator be "facilitative" or "evaluative" in his or her approach, and how proactive should the mediator be in so far as presenting settlement proposals?

The answer to these questions may depend to some degree on which mediation rules are used. For example, Rule 7 of the ICDR Mediation Rules gives the mediator the option to make oral or written recommendations for settlement. Likewise, Rule 6 of the CPR European Mediation Procedure permits the mediator to present a final settlement proposal to the parties, and the mediator may also give the parties an evaluation of the likely outcome of the case at arbitration. Article 7 (4) of the UNCITRAL Conciliation Rules allows the conciliator to make a proposal for settlement at any stage of the proceedings.[28]

Therefore, in international mediation, the role and authority of the mediator, the mediation rules selected and the method of mediation to be used should be carefully considered. These need to be set out and clarified up front by the parties in their dispute resolution clause, or by mutual agreement during

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the dispute, because the power and scope given to mediators pursuant to some of the international mediation rules include the power to recommend settlements, to investigate the facts and law of the dispute and to issue a written report with the mediator's recommendations.[29]

The "language" of the mediation is another important factor in cross-border mediations and in the selection of the mediator and also in the terms of the agreement to mediate. If this important item is not addressed by the parties in their agreement to mediate, it may then be decided by the mediation rules selected. For example, Rule 18 of the ICDR Mediation Rules provides that if ". . . the parties have not agreed otherwise, the language(s) of the mediation shall be that of the documents containing the mediation agreement."[30] Under Article 5.5 of the LCIA Mediation Rules, the mediator decides ". . . the language(s) in which the mediation will be conducted." Under Article 5.4 of the ICC ADR Rules, the agreement of the parties controls the language to be used in the mediation, but if there is no agreement, the mediator decides the language or languages to be used. And under Rule 3.4(c) of the CPR European Mediation Procedure, unless otherwise agreed by the parties, the mediator decides the language in which the mediation is to be conducted and whether any documents should be translated.[31]

As such, the parties and their counsel need to anticipate and prepare for potential language factors. Qualified interpreters should be used if the parties and/or counsel need assistance with accurate verbal communications. Qualified translators should be used as to documents.[32] During the course of the mediation, the mediator and/or counsel should frequently restate what they think they are hearing from the mediator and/or from the other side, and seek clarification if necessary. Photographs,

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graphs and visual aids should be used as needed to supplement and clarify verbal communications.[33]

Before attending a cross-border mediation, make sure to investigate, anticipate and prepare for cultural factors. A person's culture and legal training (i.e., common law versus civil law) and the "legal culture" of his or her practice experience is very likely to have an impact (positive or negative) on that person's approach and attitude toward the mediation process, as well as during the mediation conference. The parties and their counsel, as part of their preparation, need to have an understanding of the communication patterns and norms (verbal and nonverbal) of the opposing party and counsel, such as the so-called "high context cultures" (information found in context, and not always verbal, and values tradition) and of "low context cultures" (communicates directly and in a straightforward manner, and relies on verbal communication).[34] In the appropriate dispute (depending on the complexity and amount of the claim and the cultural issues presented), language and culture barriers may at times be minimized through the use of co-mediators, that is, using an additional mediator from the subject country or region.[35]

The best time to mediate a dispute otherwise subject to arbitration would be after the appointment of the arbitrator, for reasons discussed in more detail below related to the extraterritorial enforcement of MSAs. Consideration should be given to commencing the mediation after selecting the panel, and a statement of claim and a statement of defense have been exchanged, or at another point along the arbitration process in relation to the availability of documents and other evidence.[36]

Another factor as to the timing for commencing the mediation is the point at which the parties reach a good factual and legal understanding as to the basis for and amount of the damages sought in the dispute.[37] Even an "early mediation" that may not settle the entire dispute could, nevertheless, be of significant value in reducing the number of legal and/or factual issues to be arbitrated, and in reducing the corresponding time and costs for overall resolution of the dispute.

Knowledge of the law should also include knowledge of the law of the jurisdiction where the mediation is held and/or where an MSA, turned into an arbitration award by consent, would be enforced. In international arbitration, arbitral awards may be set aside by the courts of the jurisdiction where the arbitration was held; enforcement may be refused wherever the award was made if the arbitration was not in conformity with the agreement of the parties, or if it was not in accord with the law of the country where the arbitration was held. Enforcement may also be refused if recognition or enforcement of the award would be contrary to the public policy of the country where the arbitration took place.[38]

In international commercial disputes, where often a great deal is at stake monetarily and in other ways, and/or where the legal issues to the dispute are complex (e.g., choice of law, application of mandatory law, cross-border regulatory issues, jurisdictional matters, extraterritorial application of evidentiary privileges, etc.), mediation of the entire dispute may be more difficult, and consideration should then be given to mediating selective components or issues of the dispute and arbitrating fundamental issues of law that may be involved, or the more complex components of the dispute.[39] Contractual transactions have become much more complex and diversified in international business transactions.[40] Even if the subject deal involves only a single contract between two parties, several contracts or agreements may need to be reached for that transaction (e.g., a contract of sale, a licensing agreement, a contract of carriage, a contract of insurance, an agreement of payment and an agreement for dispute resolution).[41]

The mediation decision might become whether to address the entire dispute at mediation or to consider mediating only selected components of the dispute and arbitrating the more complex or adversarial ones. The best approach when facing an upcoming final hearing in an international arbitration with substantial costs, expense and risk, which will result in a final award with limited grounds for appeal, would be to make the best effort to resolve the entire dispute at mediation,

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if possible, and to take control over the terms and conditions and damage components of the resulting MSA and of the consent arbitral award resulting from the MSA. Though the risk of one party walking away from mediation always exists (domestically or cross border), participating in mediation may encourage the parties to make a good faith effort to attempt resolving all the components of a dispute, and at a minimum, will likely minimize the number of issues to be resolved at arbitration.[42]

Confidentiality is critically important to parties in an international mediation. In a cross-border mediation, the scope and extent of confidentiality protection can and does vary from country to country, and also among the various international mediation rules' providers. This consideration, obviously, takes greater importance if the mediation effort does not succeed, because the information shared during mediation is then known to the other party, even if that information is not admissible in a court or in a tribunal.[43] Moreover, the mediator will become aware of confidential information from each of the parties during private caucuses. This is a risk factor in international commercial mediation that must be considered, especially in "Arb-Med-Arb" and "Med-Arb" proceedings, where the mediator may also be the arbitrator (discussed below).[44]

In cross-border disputes, additional attention needs to be given to how an MSA will be enforced outside the jurisdiction wherein the mediation takes place. Pursuing enforcement of a cross-border MSA on a breach of contract basis in the local court of a foreign country can take significant time, can be expensive and can be a much less reliable enforcement tool.[45] One of the potential "solutions" to the enforcement of an MSA resulting from a cross-border mediation is for the settlement agreement to be drafted in detail and signed by the parties, and for the parties then to appoint the mediator as an arbitrator to turn the settlement agreement into an agreed arbitral award. Questions persist, however, as to whether such an agreed or consent award would be enforceable under the New York Convention.[46] The key legal question on this is whether a consent award can be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved by agreement in mediation.

It is accepted practice for an arbitrator to enter a "consent award" if the parties reached the settlement agreement during the course of the arbitration. In that case, the agreed award will be the product of the parties' settlement agreement, and not the result of the arbitrator's decision. Such an agreed award would be enforceable under the New York Convention.[47] The UNCITRAL Model Law on International Commercial Arbitration adopted by the U.N. Commission on International Trade Law of 1985 permits for such a consent award and its recognition.[48] Nevertheless, it is the general consensus that the applicability of the New York Convention in this context is questionable as to MSAs reached by the parties in a dispute before an arbitration was commenced, or as to MSAs turned into an arbitration award by consent, where there was no preexisting arbitration agreement between the parties.[49]

Mediation of cross-border disputes have been increasing significantly as a result of the several factors

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discussed above; these include the perception of the "Americanization" of international arbitration, which has caused some to call arbitration the "new litigation."[50] Thus, mediation is now viewed as a useful and successful additional tool to deal with the increased costs, litigation tactics, procedural burdens and delays of international arbitration. Settlement rates in international mediation have been reported to range from between 70% to 85%.[51] The interest in mediation of international commercial disputes has grown significantly in the past years. Seventy-five percent (75%) of users responding to a January 2013 survey conducted by the International Mediation Institute indicated that arbitration providers should encourage parties to try to settle their dispute through mediation.[52]

In October 2014, a Convention on Shaping the Future of International Dispute Resolution was held in London. More than 150 delegates from more than twenty countries from North America, Europe, Asia, Australia, the Middle East and Africa were asked to vote, using electronic handsets, on how international mediation and arbitration should develop in the future.[53] The participants consisted of users, advisors, providers, mediators, arbitrators and educators in the field of international arbitration and international mediation. About half of the thirty panelists at the convention, and almost 20% of all delegates were corporate users, many from large multinationals.[54] The following results were reported as to users (though responses were also received from the other groups of participants noted above), which directly relate to the topic of this discussion:

- Two-thirds (2/3) of users noted risk reduction and costs reduction as the most important factors in international dispute resolution;
- Over three-quarters (3/4) of users voted that mediation should be used as early as possible in a dispute;
- Two-thirds (2/3) of users (and providers) valued dispute resolution clauses that require mediation to take place before litigation or arbitration;
- Almost 80% of users thought arbitration institutions and tribunals should explore, at the first meeting, what other dispute resolution methods might be appropriate to involve in a dispute; and
- Eighty-five percent (85%) percent of users and 47% of advisors believed there is a need for an UNCITRAL convention on the recognition and enforcement of MSAs.[55]

Such an UNCITRAL Convention on International Commercial Mediation and Conciliation was already proposed. The proposal was made by the United States on 2 June 2014 (Future Work for Working Group II, U.N. Doc. A/CN.9/822). This process could take a long time, however. In its February 2015 report, the working group agreed to suggest to the commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and to develop possible solutions, including the preparation of a convention, model provisions or guidance text.[56]

While mediation offers important benefits over adversarial systems of dispute resolution, mediation remains underutilized in international settings in part because of the uncertain enforcement practices of MSAs obtained outside the process of an arbitration. Some nations have promoted legislation for the summary enforcement of mediation settlement agreements obtained by the parties in the context of a cross-border mediation. These legislations, however, differ as to the degree of the "arbitral context" required to record a settlement agreement as an arbitration award.[57] This may put at risk the enforceability of awards obtained under these legislations under the provisions of the New York Convention. In other words, for greater likelihood of the enforcement under the New York Convention of an MSA turned into an arbitration award by legislation or by consent, the MSA should be reached as a result of a process that commenced as an arbitration of an existing dispute. The parties should have commenced the arbitration before commencing the mediation.[58]

One approach being used to enhance enforceability of international MSAs is the "Arb-Med-Arb" method, wherein the process begins as an arbitration, but at some point in the process, the parties try to settle their

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dispute through the use of mediation. Under the Arb-Med-Arb method, if the parties are not able to reach an agreement (in whole or in part) during the mediation effort, the arbitration process will then be continued so that the arbitrator can hear and determine the matter and enter an award based on adjudication. Any issues that may have been resolved at mediation will be incorporated by consent into the arbitration award.[59] If the parties reach an agreement of the entire dispute at mediation, their agreement will then be entered by the arbitrator, by consent, as an arbitration award enforceable under the New York Convention.[60]

"Med-Arb" is another approach becoming popular since it is a method wherein the arbitrator can act as an arbitrator and/or a mediator during the same procedure. The advantages of this approach are that the parties can either settle the entire matter at mediation, or in the alternative, come to an agreement at mediation on certain components of the dispute. As to those components, the arbitrator can function as a mediator, resolve those specific issues by agreement and incorporate the mediated settlement agreement into the arbitral award rendered by the "arbitrator" at the conclusion of the process.[61] In Med-Arb, the arbitrator is able to hear both sides of a dispute during an adversarial hearing with presentations of legal evidence, and when the arbitrator believes he or she has obtained sufficient information, the arbitrator can then assume the role of a mediator to assist the parties to obtain a settlement on part of or the entire dispute.[62]

As previously noted, however, if the parties in the Med-Arb process commence mediation first and settle their dispute before a demand for arbitration and the convening of an arbitral tribunal, it could be argued that at that point there is no longer a dispute upon which an arbitrator can base an arbitral award. Therefore, to be in the best position to take advantage of the New York Convention and of the arbitration laws of many jurisdictions, in Med-Arb the settlement agreement should be reached as a result of a process that started as an arbitration and evolved into a mediation.[63] Moreover, under the local laws/rules of a number of jurisdictions, the appointment of the arbitrator cannot be made after the dispute is settled because there must be a "dispute" at the time the arbitrator is appointed.[64]

In either Arb-Med-Arb or Med-Arb, if the parties are going to use the same third party as the mediator and the arbitrator in the dispute (not recommended), it is of crucial importance that the parties give, at the outset, their expressed, detailed, comprehensive and explicit consent in writing to the same person acting as both arbitrator and mediator, waiving conflict of interests and consenting to that same party holding separate confidential sessions with the parties in mediation, and if the mediation reaches an impasse, for that same third party to arbitrate the dispute.[65]

Because not all jurisdictions may give legal effect to such a waiver on the basis of public policy consideration, preference should be given to the use of separate third persons as arbitrator and as mediator ("co-Med-Arb"), if the monetary amount of the dispute would justify the additional costs and time required for this method.[66] Under this co-Med-Arb approach, the mediator and the arbitrator hear the parties' presentation together and both participate in non-confidential sessions. Only the mediator can attend separate confidential sessions. This would avoid any possible objections that could be raised to a subsequent arbitration award in the event the mediation efforts fail on the basis of lack of consent, a breach of confidentiality, the use of confidential information learned at caucus or any other basis.[67]

In conclusion, international commercial mediation is emerging as a useful tool to international commercial arbitration to resolve all or some of the issues in dispute at mediation in a more economical, expedited and flexible manner than would be possible solely in the arbitration process.

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arbitrator for the Florida Supreme Court since 2015 and a member of the American Arbitration Association's Mediator Panel and the AAA's Roster of Neutrals. A native of Cuba, he is bilingual and able to mediate in Spanish and English, has an understanding of the culture and business environment in Latin America and has traveled widely in that region.

Endnotes

1 S. I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 42 Washington University Journal of Law & Policy (2014), at 2 (http://www.ssrn.com/abstract=2363149). *See also*: John M. Barkett, *Avoiding the Costs of International Commercial Arbitration: Is Mediation the Solution?*, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010), at 360-361, and 395; Steven Seidenberg, *International Arbitration Loses Its Grip*, ABA Connection (2010), at 2.

2 Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Dispute Settlements?* NYSBA International Law Practicum, Spring 2013, at 45-46; Barkett, note 1 *supra*, at 359-360.

3 Rhys Clift, *Introduction to Alternative Dispute Resolution: A Comparison Between Arbitration and Mediation,* Hill Dickinson (2005-2006), at 7. (available at: http://www.hilldickinson.com)

4 Gaultier, note 2 *supra*, at 46. *See also*: Timothy Martin, *International Mediation: An Evolving Market,* in Arthur W. Ravine, ed., Contemporary Issues in International Arbitration and Mediation, The Fordham Papers (2010), at 404.

5 Gaultier, note 2 *supra*, at 46. *See also*: Jacqueline Nolan-Haley, Mediation: the 'New' Arbitration, 17 Harv. Negot. L.R. (2012), at 10.

6 Gaultier, note 2 *supra*, at 44; Clift, note 1 *supra*, at 4; Brette L. Steele, Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention, 54 UCLA L. Rev. (2007), at 1393.

7 Steele, note 6 *supra*, at 1393; Gaultier, note 2 *supra*, at 48. *See also*: Thomas Stipanowich, J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 19 Harvard Negotiation Law Review 1 (2013), at 17.

8 https://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards; Gaultier, note 2 *supra*, at 48; Seidenberg, note 1, *supra*, at 2; Barkett, note 1, *supra*, at 359, 361.

9 Strong, note 1 *supra*, at 7; Gaultier, note 2 *supra*, at 46; Nolan-Haley, note 5 *supra*, at 13. *See also*: Kimberly Taylor, Mathew Rushton, *The International Challenge* (2012).

10 S. I. Strong, *Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, a New Approach to Cures,* 7 World Arbitration and Mediation Review 117 (2013), at 118-121; Nolan-Haley, note 5 *supra*, at 12; Stipanowich, Lamare, note 7, *supra*, at 18.

11 Seidenberg, note 1 *supra*, at 2-3.

12 *Id.*; S. I. Strong, note 10 *supra*, at 117; Seidenberg, note 1 *supra*, at 3.

13 Seidenberg, note 1 *supra*, at 2-3.

14 Gaultier, note 2 *supra*, at 46.

15 *Id.*; Stipanowich, Lamare, note 7 *supra*, at 5-6.

16 Gaultier, note 2 *supra*, at 46; Paul E. Mason, *What's Brewing in the International Commercial Mediation Process: Differences from Domestic Mediation and Other Things Parties, Counsel and Mediators Should Know*, Dispute Resolution Journal, February/April 2011, at 67.

17 Gaultier, note 2 *supra*, at 46; Clift, note 1 *supra*, at 14; Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, http://www.sussmanadr.com/docs/Enforcement_Fordham_82008.pdf (2010), at 1; Bobette Wolski, *Arb-Med-Arb (and MSAs): A Whole Which is Less Than, Not Greater Than the Sum of Its Parts,* 6 (2) Contemp. Asia Arb. J. 249 (2013), at 255.

18 Gaultier, note 2 *supra*, at 47.

19 *Id.*; Sussman, note 17 *supra*, at 3; Mason, note 16 *supra*, at 70; Steele, note 6 *supra*, at 1391. On the issue of "control over remedies," there are recent articles discussing whether (or not) arbitrators "split awards" rather than ruling firmly on one party's favor. *See* Russ Bleemer, Editor, *Still Splitting the Baby: New Rand Report on Why Corporate Attorneys Use ADR,* CPR's Alternatives (2011), at: http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/694; and Ana Carolina Weber, Carmine A. Pascuzzo S., Guilherme de Siqueira Pastore, Ricardo Dalmaso Marques, *Challenging the "Splitting the Baby" Myth in International Arbitration,* Journal of International Arbitration, Vol. 31, Issue 6 (2014), at 719.

20 Gaultier, note 2 *supra*, at 47.

21 Taylor, Rushton, note 9 *supra*.

22 International Centre for Dispute Resolution (ICDR), International Chamber of Commerce (ICC), Alternative Dispute Resolution (ADR), London Court of International Arbitration (LCIA), International Institute for Conflict Prevention & Resolution (CPR) and United Nations Commission on International Trade Law (UNCITRAL).

23 *Id.*; Gaultier, note 2 *supra*, at 47; Wolski, note 17 *supra*, at 256; *See also*: Zeno Daniel Sustac, *Overview on the Mediation in Cross-Border Conflicts – Sources and Application Areas*, Mediate.com (March 2014), http://www.mediate.com/articles/SustacZ7.cfm, at 2.

24 Gaultier, note 2 *supra*, at 47.

25 Wolski, note 17 *supra*, at 256.

26 Barkett, note 1 *supra*, at 386; Harold I. Abramson, *Mining Mediation Rules for Representation Opportunities and Obstacles,* The American Review of International Arbitration, 15:1 (2004), at 103-104; Zeno Daniel Sustac, Jamie Walker, *Best Practice Guide on the Use of Mediation in Cross-Border Disputes*, Mediate.com (February 2014), http://www.mediate.com/articles/sustacz6.cfm, at 1; Gaultier, note 2 *supra*, at 50.

27 Barkett, note 1 *supra*, at 387-388.

28 Barkett, note 1 *supra*, at 388.

29 *Id.*; Gaultier, note 2 *supra*, at 39-40; *See also*: Colin J. Wall, *The Growth of International Mediation in Commercial Disputes*, Who's Who Legal (September 2011), http://www.whoswholegal.com/news/features/article/29214/growth-international-mediation-commercial-disputes, at 1-2.

30 Abramson, note 25 *supra*, at 103; Barkett, note 1 *supra* at 365.

31 Barkett, note 1 *supra*, at 388, note 137; Mason, note 16 *supra*, at 70.

32 Eric Watness, *Cross-Cultural Mediation*, JAMS ADR Blog, 13 February 2013, http://www.jamsadrblog.com/author/ewatness/, at 2-3.

33 *Id.*

34 Gaultier, note 2 *supra*, at 51-52 (low context: United States, Canada, Australia, Northern and Western Europe; high context: Asian countries and most other countries not listed herein. *Id.*, at 51); Mason, note 16 *supra*, at 68; Wall, note 28 *supra*, at 2.

35 Taylor, Rushton, note 9 *supra*; Mason, note 16 *supra*, at 70.

36 Barkett, note 1 *supra*, at 389-391, 395.

37 *Id.*, at 390, 395-398.

International Commercial Mediation, continued

38 Barkett, note 1 *supra*, at 392-394; Wall, note 28 *supra*, at 3; Edna Sussman, *The New York Convention Through a Mediation Prism*, Dispute Resolution Magazine, Vol. 15, No. 4 (Summer 2009), at 11; Alan L. Limbury, *Med-Arb: getting the best of both worlds*, International Mediation Institute (29 February 2012) (imimediation.org), at 2.

39 Strong, note 1 *supra*, at 8; Gaultier, note 2 *supra*, at 55.

40 Strong, note 10 *supra*, at 118-119.

41 *Id.*, at 120.

42 Gaultier, note 2, *supra*, at 49.

43 Abramson, note 25 *supra*, at 108; Clift, note 1 *supra*, at 8; Gaultier, note 2 *supra*, at 44; Wall, note 28 *supra*, at 3; Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process,* NYSBA New York Dispute Resolution Lawyer, Vol. 2, No. 1 (Spring 2009), 71, at 71-72.

44 Sussman, note 42 *supra*, at 72.

45 Gaultier, note 2 *supra*, at 47; Sussman, note 37 *supra*, at 10; Sussman, note 17 *supra*, at 7.

46 Sussman, note 37 *supra*, at 12; Sussman, note 17 *supra*, at 19; Gaultier, note 2 *supra*, at 48.

47 Sussman, note 37 *supra*, at 12.

48 *Id*.

49 *Id*.; Steele, note 6 *supra*, at 1399-1400.

50 Seidenberg, note 1 *supra*, at 1; Strong, note 10 *supra* at 127; Nolan-Haley, note 5 *supra*, at 12.

51 Sussman, note 17 *supra*, at 1; Wall, note 28 *supra*, at 3; Gaultier, note 2 *supra*, at 48; 5th ICC International Commercial Mediation Conference: A Global Platform for In-House Counsel (2014), found at: www.iccwbo.org, at 1.

52 Edna Sussman, *Med-Arb: an Argument for Favoring Ex Parte Communications in the Mediation Phase*, World Arbitration and Mediation Review, Vol. 7, No. 2 (2013), at 1.

53 Michael Leathes, Deborah Masucci, *The Urgent Need for Data: Are the Needs of Users and the Dispute Resolution Market Misaligned?* Mediate.com (November 2014), at 1-3.

54 *Id*.; Conciliation: a Preliminary

55 *Id*.

56 S. I. Strong, Use and Perception of International Commercial Mediation and Conciliation: A Report on Issues to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation (17 November 2014), found at: http://www.ssrn.com/abstract=2526302. The Proposal was made by the United States: Future Work for Working Group II, U.N. Doc. A/CN.9/822 (2 June 2014). *See also*: Report of Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/832, at 11.

57 Steele, note 6 *supra*, at 1389.

58 Wolski, note 17 *supra*, at 261; Steele, note 6 *supra*, at 1397.

59 Wolski, note 17 *supra*, at 261.

60 *Id*.

61 Gaultier, note 2 *supra*, at 55.

62 *Id*.; Limbury, note 37 *supra*, at 1-2.

63 Wolski, note 17 *supra*, at 261.

64 Sussman, note 17 *supra*, at 18.

65 Sussman, note 51 *supra*, at 9-10 (see specifically p. 10 for the author's detailed suggestions as to provisions for an express written consent); Wolski, note 17 *supra*, at 262-263; Limbury, note 37 *supra*, at 3.

66 Wolski, note 17 *supra*, at 269; Limburg, note 37 *supra*, at 3.

67 *Id.*

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the judgment by seeking Cuban assets abroad in nations that are also parties to the New York Convention and enforcing (and collecting) the judgment elsewhere. The recent decision involving Chilean national Max Marambio presents an excellent illustration of this precise dilemma.[18]

Max Marambio

In February 2010, the Cuban government closed two plants belonging to Rio Zaza Food as the result of a corruption investigation of co-owner Max Marambio.[19] Marambio took his complaint to the International Chamber of Commerce (ICC), and in July 2012 Marambio received a favorable ruling regarding the dissolution of the company and the liquidation of the assets shared with the Cuban state.[20] Under the New York Convention, if the award is sought in a country that is party to the convention, it must be enforced.[21] Collecting on the award in this circumstance, however, may prove to be difficult, perhaps even impossible.[22]

Typically, when a court recognizes a foreign judgment, it accepts that the matter has been fairly adjudicated in the foreign court and does not need to be re-litigated in order to be enforced.[23] What happens if Cuba will not recognize the award? One option is to enforce the judgment in another jurisdiction that is also a party to the New York Convention and has Cuban assets that are used for commercial endeavors.[24] It is important that the jurisdiction enforcing the judgment is aware of the distinction of those assets (commercial versus sovereign or diplomatic) and is willing to enforce such a judgment.[25] Of course, this is a diplomatic issue left to the discretion of court of the nation to which the request is being made.[26] Simply because there are Cuban assets in another jurisdiction does not guarantee that this nation will be willing to get involved in the enforcement of the judgment. Enforcement is also premised on the fact that the recognition of such judgment is in no way

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Hydrocarbons Law and its regulations, and in lieu of applicable provisions therein, then the commercial and civil legislation.

As an exception to arbitration, the Hydrocarbons Law provides that the National Hydrocarbons Commission may administratively rescind[5] contracts for exploration and extraction[6] and take back the contractual area[7] in the following material cases:[8]

1. If, for more than 180 continuous calendar days, the contractor[9] does not start or stop the activities set forth in the exploration plan or the development for extraction plan in the contractual area, without reason or authorization from the National Hydrocarbons Commission
2. If the contractor does not comply with the minimum works commitment, without reason, per the terms and conditions of the relevant contract for exploration and extraction
3. If the contractor assigns, totally or partially, the operation or the rights granted under the contract for exploration and extraction, without prior authorization
4. If a serious accident occurs as a result of malice or fault of the contractor, generating damage to installations, death or loss in production
5. If the contractor on more than one occasion maliciously or unreasonably submits false information or reports to, or hides them from, the Ministry of Energy, the Ministry of Tax and Public Credit, the Ministry of Economy, the National Hydrocarbons Commission or the National Agency of Industrial Safety and Environmental Protection of the Hydrocarbons Sector, regarding the production, costs or any other relevant aspect of the contract
6. If the contractor defaults compliance with a definitive, res judicata resolution of any federal jurisdictional body
7. If the contractor unreasonably omits any payment to the State or the delivery of hydrocarbons to the State, as set forth in the relevant contract for exploration and extraction

Contracts for exploration and extraction also provide termination and rescission clauses in addition to those set forth in the Hydrocarbons Law.

Chamber of Deputies, Mexico City, https://en.wikipedia.org

The declaration of administrative rescission shall require previous notice to the contractor informing the contractor of the causes of rescission. Once notified, the contractor shall have a term of thirty calendar days to present its defense and to provide evidence.

The National Hydrocarbons Commission shall have a term of ninety calendar days to issue its resolution.

PEMEX Law

PEMEX Law is a federal regulatory law to article 25, paragraph 4 of the Mexican Constitution and of the Twentieth Transitory Article of the Energy Reform Decree published in the Mexican Federal Official Gazette on 20 December 2013. PEMEX Law regulates the organization, administration, operation, control, evaluation and information of the state productive company PEMEX, and it also regulates its special regime.[10]

The PEMEX Law provides that domestic controversies where PEMEX or any of PEMEX's subsidiary productive companies are a party, whatever the nature of the controversy, shall be the purview of the federal courts. PEMEX and PEMEX's subsidiaries may agree, however, on alternative conflict resolution methods or arbitration clauses or agreements, as set forth in the applicable Mexican commercial legislation and the international treaties to which Mexico is a signatory. In case of contracts effective or executed outside Mexican territory, PEMEX and PEMEX's subsidiaries may agree on the application of foreign law and the jurisdiction of foreign commercial courts, and they may enter into arbitration agreements whenever such is convenient.[11]

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CFE Law

CFE Law is also a federal regulatory law to article 25, paragraph 4 of the Mexican Constitution and of the Twentieth Transitory Article of the Energy Reform Decree published in the Mexican Federal Official Gazette on 20 December 2013. CFE Law regulates the organization, administration, operation, control, evaluation and information of the state productive company CFE, and it also regulates its special regime.[12]

The CFE Law includes identical provisions to those of the PEMEX Law, and thus, it also provides that domestic controversies where CFE or any of CFE's subsidiaries is a party, whatever the nature of the controversy, shall be the purview of the federal courts. CFE and CFE's subsidiary productive companies may agree, however, on alternative conflict resolution methods or arbitration clauses or agreements, as set forth in the applicable Mexican commercial legislation and the international treaties to which Mexico is a signatory. In case of contracts effective or executed outside Mexican territory, CFE and CFE's subsidiaries may agree on the application of foreign law and the jurisdiction of foreign commercial courts, and they may enter into arbitration agreements whenever such is convenient.[13]

Conclusion

Recent reforms to the energy sector in Mexico leave the door open for commercial arbitration, with the exception of administrative rescission in cases of what the Hydrocarbons Law considers material defaults by the contractor under contract for exploration and extraction.

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contrary to the public policy of the nation where it is being sought.[27]

International arbitration and BITs work together to create the optimum setting for obtaining fair and impartial adjudication for the foreigner investing in Cuba.[28] As Cuba continues to attract and secure a greater number of foreign investors, it can be expected that dispute resolution, international arbitration and enforcement of arbitral awards will remain hot topics for discussion.

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Endnotes

1 Law No. 118, Ch. XVII, art. 61.; Jorge F. Pérez-López & Matías F. Travieso-Díaz, *The Contribution of BIT to Cuba's Foreign Investment Program*, 456-480, 472 Asce Cuba (2014) [Hereinafter *The Contribution of BIT*] http://www.ascecuba.org/c/wpcontent/uploads/2014/09/v10-plandtravieso.pdf

2 *Id*.

3 *Id*.; International Commercial Arbitration, Cuba, see *http://www.cepec.cu/en/arbitration*

4 International Commercial Arbitration, Cuba, see *http://www.cepec.cu/en/arbitration*

5 Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, Vol. 55, 2-3, Harvard Int'l L. J., (2014) *available at*: http://ssrn.com/abstract=2315078

6 *The Contribution of BIT, supra* note 1, at 456.

7 *See* United Nations Conference on Trade and Development, World Investment Report 2013: Global Value Chains: Investment and Trade for Development, UNCTAD (2013) http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf

8 *See, e.g.*, Treaty Series No. 50, 1995 UK-CUBA Bilateral Investment Treaty for the Promotion and Protection of Investments, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/917; 2012 U.S. Model Bilateral Investment Treaty arts. 24, 37, 2012, *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

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Endnotes

1 Article 2 of the Hydrocarbons Law.

2 Per Article 4, fraction XIV of the Hyrdrocarbons Law, exploration means activities through direct techniques such as well drilling, for the identification, discovery and evaluation of hydrocarbons in the subsoil, in a defined area.

3 Per Article 4, fraction XV of the Mexican Hydrocarbons Law, extraction means activities for the production of hydrocarbons, including drilling of production wells, injection and stimulation of fields, improved recovery, re-collection, conditioning and separation of hydrocarbons, elimination of water and sediments, in the contractual area, as well as the construction, localization, operation, use, abandonment and dismantling of production installations.

4 Article 21 of the Hydrocarbons Law.

5 Article 20 of the Hydrocarbons Law.

6 Per Article 4, fraction IX of the Mexican Hydrocarbons Law, a contract for exploration and extraction is that entered with the Mexican State, through the National Hydrocarbons Commission, whereby the exploration and extraction of hydrocarbons is agreed upon with respect to a contractual area and for a specific duration.

7 Per Article 4, fraction III of the Mexican Hydrocarbons Law, contractual area means the determined surface and depth as directed by the Ministry of Energy, as well as the geologic formations contained in the vertical projection of such surface for such depth, in which exploration and extraction of hydrocarbons will be carried out under a contract for exploration and extraction.

8 Article 20 of the Hydrocarbons Law.

9 Per Article 4, fraction X of the Mexican Hydrocarbons Law, contractor means PEMEX, any other state productive company or any entity, subscribing with the National Hydrocarbons Commission, a contract for exploration and extraction, whether individually or as a member of a consortium or association in participation, in terms of the Income on Hydrocarbons Law.

10 Article 1 of the PEMEX Law.

11 Article 115 of the PEMEX Law.

12 Article 1 of the CFE Law.

13 Article 118 of the CFE Law.

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vinculantes para la parte que presenta a ese testigo, ni para el Tribunal.

El Tribunal tiene capacidad para juzgar la credibilidad del experto y su metodología, y también para analizar los hechos y premisas fácticas a las que se aplicará la metodología para llegar a un resultado final, lo que de ordinario será realizado sobre la base del material proporcionado por los diversos expertos y las declaraciones de los testigos de hecho, y los argumentos e interrogatorios a unos y otros realizados por las partes. Sin embargo, el Tribunal no puede crear una metodología. El Tribunal tampoco puede crear hechos para ajustar el número final en la metodología. Al igual que sucede con los elementos de hecho, el Tribunal está obligado por el testimonio de expertos y los documentos presentados; no hay lugar para la invención.[7]

Los argumentos de derecho son el área donde el Tribunal probablemente tiene más libertad, aunque existen igualmente limitaciones. El Tribunal está limitado a aplicar las soluciones legales presentadas por las partes. Aunque la mayoría de los sistemas legales permiten que el Tribunal emita con cierto alcance limitado una decisión jurídicamente equivocada,[8] el Tribunal no puede aplicar nuevas teorías legales no presentadas por las partes o crear leyes que no existen. El Tribunal tampoco puede voluntariamente optar por no cumplir con la ley, una vez que tiene la ley colocado delante de él. En otras palabras, el Tribunal tiene numerosas limitaciones, pero no hay forma del mandato del Tribunal que permite crear hechos, metodología, o la ley que no existe.

Las Limitaciones Básicas Aplicadas a los Daños Económicos

Con estos principios en mente, uno puede entender mejor la cuestión específica de los daños económicos, y de las cargas que la parte que solicite una compensación de ese tipo debe satisfacer.[9] La comunidad internacional ha llegado a un consenso respecto de que sólo corresponde otorgar reparación de los daños causados por actos que violen el derecho aplicable. En el contexto de las obligaciones internacionales, la Comisión de Derecho Internacional, en el Artículo 31 de sus Artículos sobre Responsabilidad de los Estados por Hechos Internacionalmente Ilícitos llega a esta conclusión,[10] pero el mismo resultado surge de la legislación nacional de muchos países, lo que difícilmente resulta sorprendente. La consecuencia natural de este principio es el requisito de la causalidad—el Tribunal debe limitarse a conceder una indemnización monetaria cuando la parte que solicita este tipo de daños demuestre una relación causal entre la violación jurídica respectiva y las pérdidas económicas sufridas.

La consecuencia contraria es igualmente cierta. Si una parte no muestra ninguna pérdida económica derivada de la violación jurídica discutida en el proceso, entonces no podrá tener acceso a una compensación económica relativa a la violación alegada.[11] Esta afirmación ha sido aceptada por diversos Tribunales en diversos contextos fácticos. Algunos Tribunales se han negado a otorgar compensación económica cuando los hechos que respaldan la demanda son inciertos o mal definidos.[12] En otros casos, el Tribunal ha rechazado ciertas fórmulas compensatorias como inapropiadas para el tipo de demandante.[13] Por ejemplo, un análisis de flujos de caja descontados normalmente sólo puede tener sentido cuando se calcula respecto de las operaciones comerciales de un negocio en marcha que puede demostrar haber tenido un historial de rentabilidad. A falta de estos hechos, es probable que el análisis de flujos de caja descontados resulte en guarismos y proyecciones que no tienen ningún nexo causal con el daño causado. En otros casos, los Tribunales han

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decidido no otorgar ninguna reparación cuando no existía ninguna vinculación entre el daño alegado y las pérdidas allegadamente sufridas—o, lo que es lo mismo, por falta de causalidad de los daños reclamados.

Otras decisiones recientes ilustran estos principios en acción. En una decisión unánime dictada en 2013, el Tribunal de *The Rompetrol Group c. Rumania* estudió una situación en la que el demandante alegaba una serie de actos que habrían constituido violaciones del derecho internacional que justificaban la indemnización solicitada. El Tribunal rechazó la solicitud de daños, pero luego de llevar a cabo una serie de constataciones. En primer lugar, el Tribunal se abocó a la determinación de si efectivamente se había producido una violación del derecho internacional. Seguidamente, se aplicó al análisis del testimonio de los expertos presentados como testigos en el proceso, para determinar si la metodología propuesta podría resultar aplicable al tipo de reclamo iniciado, y a las infracciones identificadas. Al comprobar que el demandante no había cumplido con su carga de probar su caso, el Tribunal describió con énfasis justificado el enlace necesario entre el incumplimiento y los daños reclamados:

La verdadera situación es que los daños, en el sentido jurídico, deben ser entendidos como aquello que se requiere para recomponer, en términos monetarios, y tomada en su conjunto, la alteración duradera y perjudicial de la situación económica, financiera o comercial del inversionista extranjero que se remonte, de un modo suficientemente directo y próximo, al comportamiento ilícito del Estado receptor de la demanda.[14]

El Tribunal en *Rompetrol* sí encontró una violación del derecho internacional respecto de uno de los puntos alegados por los demandantes, pero ésto no resolvió la cuestión. Luego de esta constatación, se volcó a analizar la evidencia sobre daños presentada por el demandante, lo que lo llevó a rechazar cualquier forma de reparación económica, en los siguientes términos: "[b]ajo las pruebas presentadas ante el Tribunal, el Demandante no ha sin embargo cumplido la responsabilidad que le cabía de él mismo probar que sufrió pérdidas económicas o daños resultantes del incumplimiento especificado [en el laudo]".[15] En otras palabras, el mero hecho de probar una violación de ley no alcanza para hacerse de una condena en daños.

Siguiendo el razonamiento expuesto por el Tribunal en Rompetrol, se hace evidente que la carga del demandante de establecer una causalidad que resulte en daños probados derivados de la violación legal sigue reglas precisas. En términos procesales, esa carga requiere probar los hechos, para lo que el demandante debe presentar testigos—incluidos, si lo considera necesario, expertos—y documentos creíbles, ya que el Tribunal no puede ir en busca de los hechos que prueben el caso de la demandante fuera de la prueba presentada. Si la causalidad requiere el testimonio de expertos, otro requisito es que la metodología debe ser capaz de encajar en los hechos que sirven de premisas subyacentes al caso valuatorio. Esto requiere, por su vez, que el experto sea creíble, y que presente una metodología que también sea creíble. Así, en ningún caso podría un Tribunal asumir la existencia de pérdidas económicas sólo en base a la existencia de una violación

de la ley o contrato. Lo mismo puede decirse de otros remedios—debe haber causalidad para poder reclamar cualquier forma de compensación, ya sea que el remedio buscado consista en una medida cautelar, de naturaleza declarativa, o algún tipo de reparación moral.

De hecho, los Tribunales no tienen la obligación de asignar daños económicos en virtud de la mera existencia de una violación legal. El derecho internacional, por ejemplo, conoce bien de otros remedios, que son muy típicos en materia de solución de controversias internacionales Estado-Estado. Un arbitraje puede resultar en un laudo de satisfacción moral, que es uno de los resultados más comunes en el derecho internacional. Un Tribunal también puede otorgar una medida que puede ser crucial para determinar otras obligaciones, como el pago de una póliza de seguro. El Tribunal en el caso *Biwater Gauff v. Tanzania* se refirió precisamente a esta cuestión, en el marco de un largo debate sobre la necesidad de probar la causalidad:

El Tribunal Arbitral considera que la expropiación puede tener lugar con motivo de una interferencia sustancial en los derechos, incluso si no hay pérdida *económica* causada como consecuencia de ello, o si ella no puede ser cuantificada. En tales casos, reparaciones no pecuniarias (por ejemplo cautelares, remedios de naturaleza declarativa o de restitución) todavía pueden ser apropiados.[16]

La compensación monetaria no es la única forma de remedio; hay otros tipos de resultados que pueden ser apropiados cuando están debidamente reclamados y probados. Pero en ningún caso puede el Tribunal gestar alquímicamente una suma en concepto de daños que no surja directamente de los hechos, el testimonio de los expertos, y el derecho presentados.

Observaciones a Modo de Conclusión

La misma precisión necesaria en la alegación sobre jurisdicción y responsabilidad es necesaria también para la reclamación de daños económicos. Si bien el arbitraje internacional es un excelente método para resolver los conflictos internacionales, sus limitaciones deben ser respetadas a fin de arribar al tipo de decisiones que justifican el costo y los gastos del proceso. La mejor manera de evitar la arbitrariedad en el proceso de arbitraje es adherirse a las limitaciones consagradas y establecidas en los conceptos fundamentales que subyacen en el arbitraje internacional.

Además, las recientes críticas del proceso de arbitraje han reforzado la necesidad de respetar las limitaciones de los tribunales arbitrales. Por ejemplo, diversos Estados e inversores han criticado—por varias razones valederas—el funcionamiento del sistema de arbitraje del CIADI y las decisiones dictadas.[17] El resultado natural ha sido el estudio de los laudos, lo que desató refutaciones que buscaban probar que las propias decisiones eran justas. Sin embargo, la respuesta apropiada a esa inquietud se basa de manera inevitable en la calidad de la decisión. Si la calidad de la decisión es precaria, independientemente de los mantras que rezan que el arbitraje resuelva la disputa de manera definitiva, las partes rechazarán el sistema. Esta reacción es especialmente cierta toda vez que el CIADI, como la mayoría de las instituciones arbitrales,[18] no contiene reglas que permitan el examen en apelación, sino sólo causales limitadas para anular la decisión, o para remediar ciertos errores fácticos u oscuridades. En la medida en que un error visible e imperdonable no pueda ser rápidamente enmendado, las dudas sobre la viabilidad y conveniencia del sistema, y su legitimidad, serán justificadas.

En otras palabras, aun si algunos errores pudieran, por hipótesis, ser técnicamente posibles y válidos, desde una perspectiva práctica, los Tribunales deben hacer algo más que garantizar un proceso justo y emitir un laudo; también tienen que decidir con razonamientos carentes de arbitrariedad. En efecto, esta obligación puede ser incluso mayor en los casos de arbitraje de inversión, donde los resultados pueden tener efectos dramáticos sobre el sistema financiero global, las políticas presupuestarias de un país, y la vida de millones de personas.

Dentro y fuera del campo del arbitraje de inversiones,

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una de las mejores maneras de asegurar la legitimidad de los laudos, y su respeto continuado por parte de los tribunales nacionales que deban darle reconocimiento o ejecución, es el respeto de las limitaciones inherentes al arbitraje internacional, especialmente en lo que hace a la adjudicación de condenas dinerarias que, con creciente recurrencia, superan las decenas o cientos de millones de dólares.

Q. Smith

D. Gosis

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Notas Finales

1 En tales supuestos, resultarán aplicables las fuentes del derecho internacional listadas en el Art. 38 del Estatuto de la Corte Internacional de Justicia, que son consideradas un listado exhaustivo y correcto bajo el derecho internacional consuetudinario.

2 *Ver* Gary B. Born, Arbitraje Comercial Internacional, Ed 2d. (2014), 217.

3 *Id*., 1974

4 Ley Modelo de Arbitraje Comercial Internacional de la CNUDMI, Art. 18 (con las enmiendas del 2006); Reglas de Arbitraje de la CCI, Art. 22(4) (versión 2012), Reglas de Arbitraje Internacional del ICDR, Art. 16(1).

5 *Ver* Nathalie Meyer Fabre, Arbitrators, don't overdo it without involving the parties!, Les Cahiers de l'Arbitrage, 2012-1 (comentando sobre el caso de *Overseas Mining Investment Ltd. c. Caribbean Nickel*, que fue anulado por las cortes franceses (la sede del arbitraje) porque el tribunal otorgó daños por una teoría que no fue planteada por el demandante).

6 *Ver Stolt-Nielsen v. AnimalFeeds Intern. Corp*., No. 08-1198, 559 U.S. __ (2010).

7 El tribunal puede considerar sin duda la credibilidad del experto si ha rendido opiniones contradictorias sobre hechos similares en otros procesos, lo cual es un problema que justifica un artículo aparte.

8 *Ver*, para una discusión del alcance de esta posibilidad jurídica de errar en el marco del arbitraje CIADI, D.B. Gosis, "Addressing and Redressing Errors in ICSID Arbitration", en TDM 1 (2014) (disponible en www.transnational-dispute-management.com/article.asp?key=2072).

9 Este artículo se centra, en gran medida, en las pérdidas monetarias, económicas, con una breve mención de otras formas de valorización. Los principios descritos en el presente documento se aplicarían a otras formas de compensación, que los autores no tienen la intención de excluir.

10 Comisión de Derecho Internacional, Artículos sobre Responsabilidad de los Estados por Hechos Internacionalmente Ilícitos, Art. 31(1) (2001) ("el Estado responsable está bajo una obligación de hacer reparación completa para el perjuicio causado por el acto ilícito").

11 *Ver, v.gr., Inmaris Perestroika Vela Maritime Services GmbH y otros c. Ucrania*, Caso CIADI No. ARB/08/8, Laudo con fecha 1 de marzo de 2012 ("Inmaris"), ¶¶386, 390-391 ("El Tribunal no ve ninguna base para la adjudicación de daños y perjuicios por las demandas que son ya sea disputadas o no verificadas. El Tribunal entiende el argumento de las Demandantes de que estas afirmaciones eventualmente pueden ser probados y aceptados por el administrador de la insolvencia. Sin embargo, el Tribunal no puede basar su decisión en la posibilidad incierta que esto vaya a suceder"). *Ver, también, British Caribbean Bank c. Belice*, Caso PCA No. 2010-18, Laudo con fecha 19 de diciembre de 2014, ¶265 ("[e]n el presente caso, el Tribunal observa que la valuación del valor justo del mercado, como está prescrito en Articulo 5 del Tratado, no ha sido presentado por el Demandante. Las aservaciones poca apoyadas del Demandante que el valor nominal pendiente de los Acuerdos de Préstamo y Garantía es equivalente al valor justo del mercado no llega a cumplir con el mínimo nivel de prueba requerida para llevar a cabo un reclamo por daños basado en esta metodología").

12 *Ver, v.gr., Metalclad c. Estados Unidos de México*, Caso CIADI No. ARB(AF)/97/1, Laudo de fecha 30 de agosto de 2000 ("Metalclad"), ¶115 ("Metalclad también solicita US$20-US$25 millones adicionales por las repercusiones negativas que presuntamente las circunstancias han tenido en otras de sus operaciones comerciales. El Tribunal desestima esta reclamación, puesto que diversos factores, no necesariamente vinculados a la explotación de La Pedrera, han incidido en precio de las acciones de Metalclad. La relación causal entre las medidas adoptadas de México y la reducción del valor de otras operaciones comerciales de Metalclad es demasiado remota e incierta para sustentar esta reclamación, de la cual, por lo tanto, se hará caso omiso").

13 *Ver, v.gr., Inmaris*, ¶424 ("En contraste con la metodología del experto de daños de las Demandantes, la metodología empleada por el experto de daños del Demandado es, al menos, una metodología objetiva en lugar de su mera opinión. El Tribunal, por lo tanto, aplica una tasa de descuento de 14,95 por ciento para calcular el valor actual neto de los beneficios esperados por los Demandantes a partir de abril de 2006").

14 *Ver The Rompetrol Group c. Rumania*, Caso CIADI No. ARB/06/3, Laudo con fecha 6 de mayo de 2013 ("Rompetrol"), ¶287.

15 *Id*., ¶299(d).

16 *Ver Biwater Gauff c. Tanzania*, ¶781.

17 *Ver*, por ejemplo, la publicación de la Conferencia de Naciones Unidas sobre Comercio y Desarrollo (UNCTAD, por sus siglas en inglés) de 2013 denominada "Reform of Investor-State Dispute Settlement: In Search of a Roadmap" (disponible en http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf), donde se discuten estas críticas y algunas propuestas para dar respuesta a ellas.

18 Una excepción—tan reciente como novedosa—la constituyen las reglas sobre apelación optativa sancionadas por la American Arbitration Association en 2013.

International Dispute Resolution in Cuba, from page 41

9 *The Contribution of BIT, supra* note 1, at 463. Between 1993 and 1999, Cuba signed forty-five BITs.

10 United Nations, International Investment Agreements, Cuba http://investmentpolicyhub.unctad.org/IIA/CountryBits/52 (visited 25 July 2015).

11 *Id*.

12 *The Contribution of BIT, supra* note 1, at 467.

13 *Id*. at 479; Matias F. Travieso-Diaz & Charles P. Trumbull IV [Hereinafter *Travieso-Diaz & Trumbull IV], Foreign Investment in Cuba: Prospects and Perils*, 182, footnote 6, (2003) 35 Geo. Wash. Int'l L. Rev. 903; also *available at* http://www.ascecuba.org/c/wp-content/uploads/2014/09/v12-travieso.pdf

14 Marc Frank, foreign correspondent & author [Hereinafter *Frank*]. Frank addressed a legal delegation in Cuba during The Florida Bar International Law Section's person-to-person visit (28 May 2015). Frank, author of *Cuban Revelations*, a firsthand account of daily life in Cuba at the turn of the twenty-first century, is a U.S. born journalist living in Havana for almost a quarter century. He has personally observed the best days of the revolution, the fall of the Soviet bloc, the great depression of the 1990's, the stepping aside of Fidel Castro and the reforms now being devised by his brother. Osvaldo Miranda Diaz, Esq., Cuban attorney, Havana, Cuba [Hereinafter *Miranda Diaz*] presented a lecture on the Cuban legal system to a legal delegation from Florida, coordinated by the International Law Section of The Florida Bar (29 May 2015).

15 The International Chamber of Commerce (ICC), established in 1919, is headquartered in Paris and founded the International Court of Arbitration for international commercial arbitration to settle disputes with finality. The Court operates pursuant to Rules of Arbitration. *See* http://www.iccwbo.org/products-and-services/arbitration-and-adr/

16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter *NY Convention*] *http://www.newyorkconvention.org* (visited 29 June 2015).

17 Cuba ratified this Convention on 30 December 1974, and it entered into force in Cuba on 30 March 1975. *See* http://www.uncitral.org

18 Varona, Arnold, *Chilean Entrepreneur Max Mararmbio Responds to Cuba*, The Cuban History (29 July 2013) http://www.thecubanhistory.com/2013/07/chilean-entrepreneur-max-marambio-responds-to-cuba-empresario-chileno-max-marambio-contesta-a-la-acusacion-de-la-justicia-cubana/

19 Varona, *supra*; Marc Frank in Havana, *Cuba Crackdown Sees Foreign Companies Exit* (21 May 2012) Financial Times http://www.ft.com/intl/cms/s/0/e76f3952-a34b-11e1-8f34-00144feabdc0.html#axzz3jZlQitPE [Hereinafter *Frank, Cuba Crackdown*].

20 Vito Echevarria, *Experts debate enforceability of ICC ruling against Cuba*, Cuba News (1 December 2012) reprinted by The Free Library (28 June 2015) *available at* http://www.thefreelibrary.com/

21 NY Convention, *supra* note 16.

22 Echevarria, *supra.*

23 Michael A. Tessitore, *Give Us Your Tired, Your Poor*, 15 No. 9, 7 The Fla Bar, Int'l L. Q. (Winter 2000), The enforceability of foreign judgments.

24 Echevarria, *supra* note 20. Elina Mereminskaya, special counsel at the Santiago Chamber of Commerce's Arbitration and Mediation Center, offered, "It would be completely illusory to aspire to obtain the enforcement of that award in Cuba."

25 *Id*. Elina Mereminskaya warned about the importance of other jurisdictions recognizing the distinction between de jure gestioni versus de jure imperii in the enforcement of foreign judgments.

26 *Id*.

27 Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* 766 (5th ed. 2009). "If the recognition of a foreign judgment would have the effect of depriving a party of his right to a fair trial, it may well be that its recognition will be contrary to natural justice, or to substantial justice, or to public policy." In such circumstance, it is only reasonable that the court would lack the power to recognize such judgment; Linda J.Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 643 (2000). "Every statute, treaty, model law, or rule concerning recognition of foreign judgments the world over provides an escape hatch termed public policy"; Briggs & Rees, *supra* at 687, "The proposition that recognition will be denied where recognition would be manifestly contrary to public policy is a rule to be found, one supposes, in all systems which recognize foreign judgments."

28 Rolando Anillo-Badia, *Arbitration and Mediation: Impartial Forums to Resolve International Commercial Disputes in Cuba*, 271, *see* http://www.frclaw.com/files/Arbitration_and_Mediation_in_Cuba.pdf

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