

# International Disputes Quarterly

## *Focus on Arbitration in Latin America*

**In This Issue...**

Introduction: Latin American Arbitration in Comparative Perspective ..... 1

The Evolution of Dispute Resolution in Latin America ..... 4

Investment Arbitration in Latin America ..... 6

Commercial Arbitration in Latin America ..... 11

Tips on Drafting Arbitration Clauses ..... 18

Client Alerts: Recent Developments in International Arbitration ..... 22

What Our Practitioners Are Saying ..... 25

Practitioner Appointments, Practitioner Recognition and Selected White & Case International Arbitration Events ..... 27

### Introduction: Latin American Arbitration in Comparative Perspective

This issue of White & Case LLP’s *International Disputes Quarterly* focuses on developments in commercial and investment treaty arbitration related to Latin America.

After a history of hostility toward arbitration, Latin American countries have transformed the legal framework for arbitration in the region over the past decade or so. With respect to commercial arbitration, numerous countries have modernized their arbitration laws, usually based on the UNCITRAL Model Law on International Commercial Arbitration. Most countries have ratified the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and the 1975 Inter-American Convention on International Commercial Arbitration (“Panama Convention”).

With respect to investment arbitration, most Latin American countries have ratified the Convention on the Settlement of Disputes between States and Nationals of Other States (“ICSID Convention”) and many have concluded multiple bilateral investment

treaties (“BITs”), free trade agreements or multilateral conventions allowing investment disputes with host states to be submitted to arbitration. Among the latter, the North American Free Trade Agreement (NAFTA) and the Free Trade Agreement between the United States, the Dominican Republic and Central America (DR-CAFTA) are noteworthy.

Reflecting this trend, we provide a “Compendium of Latin Arbitration Law,” developed by White & Case lawyers over a number of years, which summarizes the arbitral framework across each Latin American jurisdiction, both with respect to commercial and investment arbitration. Regarding commercial arbitration, the Compendium notes whether each country has ratified the New York and Panama Conventions and the year of ratification and notes the year in which each country’s current arbitration law was passed. Regarding investment arbitration, the Compendium notes whether each country has ratified the ICSID Convention and lists the number of BITs and free trade agreements ratified by each country that provide for international arbitration of investment disputes.



**Editors’ Note**

Welcome to the first issue of International Disputes Quarterly (IDQ), a publication by the White & Case LLP International Arbitration Group. For two decades, White & Case has published an arbitration newsletter for clients and colleagues, highlighting the latest developments in the field and our practice. IDQ builds upon this history. IDQ combines a new format (including electronic and web-based distribution) with a substantive focus on specific industries and geographic regions. In this first issue, we focus on commercial and investment arbitration related to Latin America. We welcome your comments.

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“International Arbitration Team of the Year”

—Chambers USA Awards 2007

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Leader in Latin  
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White & Case's  
International  
Arbitration Group  
has decades of  
experience advising  
on Latin American  
disputes.

Compendium of Latin American Arbitration Law						
	Commercial Arbitration			Investment Arbitration		
	New York Convention Entry into force	Panama Convention Entry into force	Arbitration Laws/ Amendments Year adopted	ICSID Convention Entry into force	Bilateral Invest. Treaties In force	Free Trade Agreements In force
Argentina	1989	1995	1967/81	1994	54	0
Bolivia	1995	1999	1997	1995 – 2007	18	1
Brazil	2002	1995	1996	No	0	0
Chile	1975	1976	2004	1991	39	8
Colombia	1979	1987	1989/91/96/98	1997	1	1
Costa Rica	1988	1978	1998	1993	13	5
Dominican Republic	2002	No	1987	No	6	3
Ecuador	1962	1991	1997/2005/06	1986	24	0
El Salvador	1998	1980	2002	1984	20	5
Guatemala	1984	1986	1995	2003	13	4
Honduras	2001	1979	2000	1989	8	3
Mexico	1971	1978	1993	No	22	12
Nicaragua	2003	2003	2005	1995	14	3
Panama	1985	1976	1999/2006	1996	17	3
Paraguay	1998	1977	2002	1983	21	0
Peru	1988	1989	1996	1993	30	0
Uruguay	1983	1977	1988	2000	26	1
Venezuela	1995	1985	1998	1995	22	0

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The transformation of the region’s arbitral framework has led to the increase in the inclusion of arbitration clauses in commercial contracts and an increase in the number of investment arbitrations involving Latin American parties. The evolution of the framework continues. See “Central America: Investor-State Dispute Resolution under DR-CAFTA”; and “Colombia, Panama and Peru: Status of US Trade Promotion Agreements.”

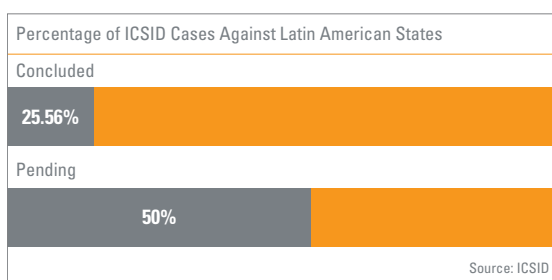
The ICC reported that Latin American parties were involved in 83 ICC arbitrations during the year 2000. This number grew to 151 in 2006. During the same timeframe, the numbers grew over 50 percent for Mexico and increased six-fold for Brazil.

In the case of ICSID arbitration, Latin American states were respondents in 26 percent of the total concluded cases and 50 percent of the cases which remain pending.

The growth of arbitration in Latin America and corresponding tensions, are evident in the comparative developments reported in this issue of IDQ. Across Latin America, courts are grappling with the application of arbitration laws. See “Brazil: Enforcement of Arbitral Awards”; “Peru: Constitutional Court Rules on Arbitral Jurisdiction”; and “Mexico: Supreme Court Rules on the Principle of Kompetenz-Kompetenz.” In addition, in some countries, concerns have arisen regarding the availability of arbitration to resolve disputes—whether commercial or investment—involving states and state-owned entities. See “Colombia: Recent Developments in the Applicability of International Arbitration to State Contracts.” Others, like Bolivia, Ecuador and Venezuela have taken or threatened to take steps to curb recourse to investor-State arbitration. See infra “Treaty Developments in Bolivia, Ecuador and Venezuela”; “Bolivia: Investor-State Dispute Resolution Mechanisms Under Bolivian BITs.” These developments will shape the ongoing evolution of arbitration across the region.

	2002	2003	2004	2005	2006
Argentina	30	33	30	9	13
Brazil	18	22	30	1	67
Chile	0	1	8	4	8
Colombia	4	5	8	2	1
Mexico	34	27	37	50	45
Panama	9	9	3	7	5
Venezuela	17	17	3	4	2

Source: ICC Bulletin



	Concluded	Pending
Argentina	11	33
Bolivia	1	1
Chile	2	1
Costa Rica	1	1
Ecuador	3	6
El Salvador	1	—
Guatemala	—	1
Honduras	1	—
Mexico	8	5
Nicaragua	1	—
Panama	—	1
Paraguay	1	1
Peru	1	4
Venezuela	3	4
<b>Total</b>	<b>34</b>	<b>58</b>

Source: ICSID

## A Multilingual Team Our Group

encompasses more than 120 lawyers, 30 of them partners, including more than two dozen lawyers fluent in Spanish or Portuguese and partners and associates with extensive experience living and working in Latin America. Our Latin American arbitration experience spans multiple White & Case offices, including Washington, DC, New York, London, Paris, Miami, Mexico City, São Paulo and others.



Jonathan C. Hamilton

## The Evolution of Dispute Resolution in Latin America

### A Q&A Discussion With White & Case's Jonathan C. Hamilton

*Political, legal and economic changes over the last decade have transformed the mechanisms for cross-border disputes involving Latin America. In this Q&A, Washington, DC-based partner Jonathan C. Hamilton comments on the latest developments in the region.*

#### Q: Why are dispute resolution options important to clients doing business into and out of Latin America?

The availability of reliable dispute resolution mechanisms minimizes the risks of doing business across borders in Latin America and beyond. Historically, Latin America was perceived as a hostile environment for international dispute resolution due to unreliable courts, a cultural disdain for arbitration and the difficulty of enforcing judgments. The lack of reliable dispute resolution mechanisms was an impediment to economic growth. It remains a challenge today.

#### Q: How has the legal framework for dispute resolution in Latin America changed in the past decade, particularly with respect to arbitration?

Starting in the 1990s, most Latin American countries adopted a host of legal and policy changes aimed at promoting free markets. At the same time, they gradually changed their policies with respect to arbitration. To facilitate commercial arbitration, many countries changed their domestic arbitration laws, and those that had not ratified the New York and Panama Conventions did so. In addition, most countries ratified the ICSID Convention, numerous bilateral investment treaties (BITs) and free trade agreements with investment protection chapters. Collectively, Latin American states are now parties to almost 300 investment treaties.

The legal framework for arbitration has remained in flux as different countries have adopted laws and ratified treaties over time. One way I have

tracked these changes for years is by maintaining a compendium of Latin American arbitration law including information relevant to both commercial arbitration and investment arbitration. We draw on primary and secondary sources, government officials and lawyers in our offices and local firms across Latin America, including with respect to the latest cases in the region.

#### Q: Did these legal changes pave the way for more commercial arbitration in Latin America?

Yes. The changes in the legal framework created the foundation for a significant increase in the volume of commercial arbitration in Latin America. At the international level, billion-dollar commercial arbitrations are no longer out of the ordinary (such as an oil and gas sector arbitration that White & Case is handling). In 2000, 83 ICC cases involved parties from Latin America; in 2006, there were 151 cases. There is a similar spread of interest in mediation reflected in organizations such as the Mexican Mediation Institute, which we have assisted in developing programs for training mediators.

#### Q: What are some of the comparative advantages and disadvantages of arbitration and litigation in Latin America?

Enforcement is an important issue, since dispute resolution ultimately depends on enforcement, whether you are attempting to enforce an arbitration award or a judgment by a domestic or foreign court. If one party does not have confidence in an opposing party's capacity to enforce an award or judgment, it is less likely to comply. There are no treaties governing, for instance, the enforcement of a New York judgment in Latin American courts. In contrast, the New York and Panama Conventions encourage enforcement of arbitration awards. While some Latin American courts have made and will make spectacularly bad decisions that appear to undermine arbitration, many courts are "getting it right." We also have to keep in mind that the same trend of mostly successful enforcement (with some

aberrations) remains true even in pro-arbitration jurisdictions like the United States. Outlying cases should not be taken as a sign that arbitration in Latin America will or has failed.

**Q: Have there been any “anti-arbitration” developments in the region?**

Reports of the demise of arbitration are overstated because the reality is more nuanced. Particularly in the area of investment arbitration, developments over the past couple of years have prompted warnings of the return of the Calvo Doctrine, the century-old doctrine which in effect holds that foreigners should submit to local courts to resolve disputes. ICSID cases against Latin American states constitute only 20 percent of concluded cases but 60 percent of pending cases, prompting concern by some governments. Last year, the Venezuelan Minister of Energy stated that “Arbitration is over” (“Se acabo el arbitraje”). This year, Bolivia denounced the ICSID Convention, and Ecuador commenced a review of its investment treaty program.

The pro-arbitration legal framework put into place over many years otherwise remains in place. Troubling developments in one or two markets have not stopped the ratification of additional investment treaties or the growth of commercial arbitration across the region.

**Q: Does dispute resolution in Latin America require parties to confront a civil law/common law divide?**

This divide must be bridged in nearly every case, because most disputes are multi-faceted. They require consideration and assessment of public international law, civil law and common law issues, all in more than one language. They also involve consideration of industry practices and trade usages. And they often require coordination with public officials in more than one jurisdiction.

**Q: What characterizes White & Case’s presence in Latin American dispute resolution?**

White & Case has been active in Latin American dispute resolution for decades. We have approached arbitration in the region by focusing first on our

substantive capacity and experience as a pioneer in international arbitration, as well as on our cultural and linguistic capacity. These qualifications must go hand-in-hand; language skills without the substantive focus does not serve clients well. This approach has helped us experience strong, uninterrupted annual growth in Latin American arbitration and dispute resolution.

We rely on the Firm’s 120 arbitration lawyers including dozens of lawyers fluent in Spanish and Portuguese; our network of offices including in Brazil and Mexico; and other lawyers throughout our network whose practice focuses on Latin America. We advise on some of the most complex cases in the region, including at present the largest investment treaty arbitration in the region, one of the largest commercial arbitrations in the region and numerous other litigation and arbitration matters.

**Q: In summary, how would you characterize the future of Latin American dispute resolution?**

Overall, Latin America has become a legal environment in which arbitration is part of a toolbox of dispute resolution mechanisms that may include commercial arbitration, treaty disputes, litigation, enforcement proceedings, workouts, negotiations and settlements—sometimes all at once. Arbitration is now a critical, viable option for the resolution of disputes related to Latin America. It is not a panacea, because enforcement issues persist and different dispute mechanisms are more suitable or reliable than others depending on the nature of the dispute, the relevant industry sector and the enforcement strategy.

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**Experience Across the Americas**  
White & Case has advised on dozens of cases across virtually all Latin American jurisdictions, including matters involving more than a dozen jurisdictions during 2007.

**Award-Winning  
Work**

Our leading presence in Latin America contributed to the selection of our Group as the Chambers USA's 2007 International Arbitration Team of the Year. The Chambers guides have recognized our "extensive experience" and "solid reputation" in Latin America and our "lawyers who practice in Spanish."

## Investment Arbitration in Latin America

Contributing Authors: Jonathan C. Hamilton, Sabina Sacco, Stephen Ostrowski, Mairée Uran-Bidegain, Monica Fernández-Fonseca, Javier Ferrero and Rafael Llano Oddone.

### Central America: Investor-State Dispute Resolution Under DR-CAFTA

The Free Trade Agreement between the United States, the Dominican Republic and several Central American States ("DR-CAFTA") creates a new free trade zone in the Americas and aims to encourage investment among ratifying countries by providing substantive and procedural protections to investors.

Signed in 2004 by the US, the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, DR-CAFTA has entered into force in all but one of the signatory countries. Only Costa Rica is still in the process of ratifying DR-CAFTA and is scheduled to hold a binding referendum later this year.

Chapter 10 of DR-CAFTA contains the substantive protections afforded to investors of the member states. These protections are similar to those available in other free trade agreements signed by the US and include national treatment, most-favored nation treatment, minimum standard of treatment in accordance with customary international law (including fair and equitable treatment and full protection and security) and the guarantee of no expropriation without prompt, adequate and effective compensation. Extensive annexes detail the scope of these protections.

In addition, Chapter 10 establishes a dispute resolution mechanism for investors who consider that one of the state parties has not respected the investment guarantees and protections granted by the treaty. This multi-tiered process begins with a requirement that the state and the investor "seek to resolve the dispute through consultation or negotiation" (Article 10.15). The investor may commence arbitration against the host state after

sending a written notice of its intention to submit its claim to arbitration at least 90 days before such submission (Article 10.16(2)). Claims may be submitted to arbitration six months after the events giving rise to the claim, but not more than three years from that date (Articles 10.16(3) and 10.18(1)). An investor may bring claims for breach by the host state of the substantive protections afforded in the treaty itself, breach of an investment authorization, or breach of an investment agreement (Article 10.16(1)).

Under Article 10.16(3), the investor may select from three different sets of arbitration rules to file its claim: (a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), provided that the investor's home state and the respondent state are both parties to the ICSID Convention; (b) the ICSID Additional Facility Rules, if the investor's home state or the respondent state is not a party to the ICSID Convention or (c) the UNCITRAL Arbitration Rules. As of today, all DR-CAFTA contracting states, with the sole exception of the Dominican Republic, are parties to the ICSID Convention.

Investors intending to submit a claim to arbitration should pay particular attention to the fork-in-the-road provisions contained in Article 10.18(2) and Annex 10-E. First, the notice of arbitration must be accompanied by written waivers "of any right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach" under the treaty. Second, the claim may not be submitted to arbitration if domestic court proceedings have been initiated by the investor when the claim involves

the alleged breach of an investment authorization or an investment agreement (but not when the claim is based on a breach of the substantive guarantees established in Section A of Chapter 10). This provision does not apply to investors of the United States; if they choose to submit claims for breaches of obligations under Section A to domestic courts in Central America or the Dominican Republic, that election shall be definitive (Annex 10-E). Investors may, however, initiate parallel court actions that seek interim injunctive relief and do not involve the payment of monetary damages, without affecting their right to submit to arbitration under CAFTA (Article 10.18(3)).

Chapter 10 also contains detailed rules on the conduct of arbitration proceedings, selection of arbitrators, production of evidence, consolidation of claims, rendering of awards and service of documents. Article 10.20(4) offers the respondent state the opportunity to make preliminary objections on the basis that “as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.” Article 10.21 contains rules to ensure the transparency of arbitral proceedings, providing that arbitral hearings shall be public and that the respondent state has a duty to make available to the public the submissions filed and decisions rendered in the arbitration. In addition, Article 10.20(3) grants the tribunal authority to accept and consider *amicus curiae* submissions from non-disputing parties.

A novel feature of DR-CAFTA’s dispute resolution system is the parties’ commitment to the creation of an appellate body tasked to review awards rendered by arbitral tribunals under Chapter 10. Annex 10-F provides that within three months from the entry into force of the treaty, the Free

Trade Commission created under the treaty shall establish a negotiating group to develop an appellate body or similar mechanism “to provide coherence to the interpretation of investment provisions in the Agreement.” This appellate body shall be implemented through an amendment to the agreement. Some free trade agreements and trade promotion agreements recently negotiated by the United States (such as those with Colombia, Singapore, Chile, Peru and Panama) provide that the parties will discuss at a later stage whether to establish an appellate body to review arbitral awards rendered under those treaties, but DR-CAFTA is distinctive in requiring the creation of an appellate body.

At least two disputes have so far arisen under the scope of DR-CAFTA, against Guatemala and the Dominican Republic. In the first case, US-based Railroad Development Corporation, Inc. (“RDC”) and its Guatemalan subsidiary *Compañía Desarrolladora Ferroviaria*, have registered with ICSID a request for arbitration asserting a number of claims under CAFTA against the Guatemalan government arising from the annulment of a railroad concession contract. In the second case, Spanish-owned *Unión Fenosa* alleges several breaches by the government of the Dominican Republic of DR-CAFTA’s investment protection provisions, which *Unión Fenosa* claims have adversely affected its investments in the energy sector in that country. According to press reports, a letter of intention to arbitrate has already been filed with the government of the Dominican Republic.

With respect to such disputes, DR-CAFTA includes not only substantive investment protection and guarantees, but also a dispute resolution mechanism that includes certain novel provisions.

**Cutting-Edge Cases**  
White & Case is advising on some of the largest pending cases involving Latin America. As indicated in the *American Lawyer Scorecard 2007*, White & Case is advising on the largest investment arbitration and one of the two largest commercial arbitrations involving Latin American parties.

## Breadth Across Industries

Our lawyers have handled cases across all major industry sectors in Latin America. Selected recent matters include disputes related to sovereign bonds issued by Argentina, a duty-free business in Argentina, the electricity sector in Peru, a hydro-electric project in the Andes, an oil refinery in Mexico, an airport in Central America, a power plant in Brazil and diverse investments in other sectors and countries across Latin America.

## Colombia, Panama and Peru: Status of US Trade Promotion Agreements

The United States is currently in the process of ratifying new Trade Promotion Agreements (“TPAs”) with three Latin American countries: Colombia, Peru and Panama. These TPAs not only seek to increase trade between the United States and these countries by eliminating tariffs and other barriers to trade, they also aim to promote investment between the parties by providing certain substantive protections to investments made in one state party by investors of the other state party, and establishing special dispute settlement mechanisms for investment disputes.

Specifically, these TPAs allow investors to settle investment disputes with the host state through international arbitration through the International Center for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) (either under the ICSID Convention and the ICSID Arbitration Rules, if both states are parties to the ICSID Convention, or through the ICSID Additional Facility Rules, if only one of the states involved is a party to the ICSID Convention), or through ad hoc arbitration under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

The final texts of the TPAs have already been signed by the US Trade Representative and the governments of the respective countries, and are currently being submitted to the US Congress for its approval. These final texts incorporate certain requirements of the bipartisan agreement on trade policy reached by the US administration and congressional leadership on May 10, 2007 (the “Bipartisan Trade Agreement”). In compliance with the Bipartisan Trade Agreement, the TPAs now include core international labor standards and certain environmental protection standards, as well as new provisions on investment, government procurement, intellectual property and port security.

The US Congress is continuing to consider the Peru and Panama TPAs. The outlook for Colombia may be less optimistic. Colombia recently agreed to incorporate the standards set forth in the Bipartisan Trade Agreement, but some in Congress have raised concerns about Colombia’s alleged history of violence against trade union members.

## El Salvador: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*: No Jurisdiction Where Investment Not Established “In Accordance With Law”

The ICSID Tribunal in *Inceysa Vallisoletana S.L. v. Republic of El Salvador* declined jurisdiction to hear claims of breach of contract and expropriation asserted by a Spanish company, Inceysa Vallisoletana, S.L. (“Inceysa”), against the Republic of El Salvador.<sup>1</sup> The Tribunal concluded that it lacked jurisdiction where Inceysa’s underlying investment was not made “in accordance with law.”

Inceysa commenced arbitration in July 2003 following the decision of El Salvador’s Ministry of the Environment and Natural Resources (“MARN”) not to proceed with a November 2000 concession contract for the operation of vehicle inspection services. Despite previously awarding the concession to Inceysa, MARN subsequently retained two other companies to provide similar services and ultimately moved to terminate the contract in the Salvadoran courts. According to Inceysa, MARN’s actions breached the concession contract and El Salvador’s national investment law and violated a 1995 bilateral investment treaty between Spain and El Salvador (the “BIT” or the “Treaty”).<sup>2</sup> Inceysa sought more than US\$120 million in damages.

El Salvador contended that the “Investment Treaty by its terms and intent extend[ed] protection only to investments made in El Salvador *in accordance with its laws*,” and that its national investment

law similarly excluded “fraudulent investments” from the scope of its protections.<sup>3</sup> El Salvador’s jurisdictional objection centered on the allegation that Inceysa obtained the concession by defrauding the state during the public bidding process, including through submission of false financial documentation, intentional misrepresentation of its qualifications and concealment of its relationship with another bidder. According to El Salvador, where its consent to ICSID jurisdiction was expressly limited to “disputes involving investments otherwise entitled to protection under the Treaty, i.e., investments made in accordance with Salvadoran law,” Inceysa could not invoke its protections.<sup>4</sup>

The tribunal agreed, finding that “because Inceysa’s investment was made in a manner that was clearly illegal, it [wa]s not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT,” and thus “the disputes arising from it [we]re not subject to the jurisdiction of the Centre.”<sup>5</sup> In order to arrive at this conclusion, the Tribunal undertook a two-part analysis, first considering whether El Salvador had limited its consent in the BIT to disputes concerning investments made legally and if so, whether Inceysa’s investment was made in accordance with Salvadoran law.

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<sup>1</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award dated August 2, 2006 (ICSID Case No. ARB/03/26).

<sup>2</sup> Agreement for the Reciprocal Promotion and Protection of Investments signed between the Republic of El Salvador and the Kingdom of Spain (Feb. 1995).

<sup>3</sup> *Inceysa* at ¶¶ 45–52 (emphasis added).

<sup>4</sup> *Id.* at ¶ 141.

<sup>5</sup> *Id.* at ¶ 257.

The tribunal assessed El Salvador's written consent to ICSID jurisdiction in the BIT, which, flowing from Article 25(1) of the ICSID Convention, the tribunal recognized a fortiori did not constitute a limitless agreement to arbitrate any dispute purportedly falling within the Treaty's terms. Rather, the tribunal determined that it was bound to examine whether the particular dispute was within the scope of El Salvador's consent, giving effect to both the will of the contracting states as well as the principle of good faith.

After noting that so-called "accordance with law" clauses were among the most common mechanisms employed by states to limit the scope of investment protection obligations, the tribunal examined the express language of the Treaty itself. Here, although the clause did not appear in the Treaty's definition of investment, the parties included such a qualification in two other articles regulating the "Protection" and "Promotion and Admission" of that investment. Moreover, the Treaty's travaux préparatoires made clear the parties' mutual intent that compliance with local law be a precondition to an investment's protection under the Treaty. The tribunal noted that the diplomatic exchanges between Spain and El Salvador firmly established, "without any doubt,... the will of the parties to the BIT... to exclude from the scope of application and protection of the agreement disputes originating from investments which were not made in accordance with the laws of the host state."<sup>6</sup>

On the facts, the tribunal concluded that El Salvador had substantiated its allegations that Inceysa acted fraudulently during the bidding process and that consequently Inceysa's investment failed to comply with Salvadoran law. The tribunal held that Inceysa's actions violated the principle of good faith underlying El Salvador's consent to ICSID jurisdiction, a principle found applicable under the BIT and the Salvadoran Constitution. The tribunal likewise concluded that upholding jurisdiction under the BIT could not be squared with international public policy barring parties from benefiting from their own fraud, declaring that Inceysa could not "seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host state."<sup>7</sup>

For the same reasons, the tribunal held Inceysa's actions barred it from accepting the unilateral offer to arbitrate disputes before ICSID contained in El Salvador's national investment law. Finally, the tribunal ruled that it had no jurisdiction to hear Inceysa's breach of contract claims as the provisions in the concession contract did not meet the standards set forth in Article 25 of the ICSID Convention for consent to jurisdiction.

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<sup>6</sup> *Id.* at ¶ 195.

<sup>7</sup> *Id.* at ¶¶ 242, 252.

# Commercial Arbitration in Latin America

Contributing Authors: Jonathan C. Hamilton, Sabina Sacco, Mairée Uran-Bidegain and Monica Fernández-Fonseca.

## Brazil: Enforcement of Arbitral Awards

Several developments in the past decade have contributed to increased legal certainty for arbitration in Brazil, as reflected in a series of rulings by Brazilian courts.

In 2001, the Brazilian Federal Supreme Court upheld the constitutionality of Brazil's 1996 *Lei de Arbitragem* ("Arbitration Law") (*MBV Commercial and Export Management Establishment v. Resil Industria e Comércio Ltda., Kingdom of Spain*, December 12, 2001 ("*MBV Commercial*"). The Arbitration Law, Law 9307, was based on the Spanish arbitration law of 1988 and the UNCITRAL-Model Law on International Commercial Arbitration. It made it considerably easier to enforce an arbitration agreement and the resulting arbitral award by eliminating certain burdensome requirements. For example, before the enactment of the Arbitration Law, Brazilian law required the so-called "double *exequatur*"—i.e., court recognition of foreign awards by the courts of the forum and by Brazilian courts—and precluded the enforcement of a pre-dispute arbitration agreement. In addition, Brazil ratified the United Nations Convention for the Recognition of Foreign Arbitration Awards (the "the New York Convention") in 2002. In this context, Brazilian courts have faced various recognition and enforcement issues. Following are some of the more noteworthy decisions in this field.

- Arbitration agreements have been given effect over procedural formalities:
  - The Superior Court of Justice, which is charged with considering the recognition of foreign arbitral awards under a 2004 constitutional amendment, held that the

respondent, by participating in the arbitration without challenging the jurisdiction of the arbitral tribunal, had tacitly recognized the existence of an arbitration clause (*L'Aiglon S/A v. Têxtil União S/A*, May 18, 2005)

- Disputes arising from administrative contracts have been held subject to arbitration:
  - Several Brazilian courts have held that the primary public interest, which is non-negotiable and subject to the sole jurisdiction of the courts, is distinct from the interests of the public administration, which can be subject to arbitration. Thus, state-owned companies may be parties to arbitration proceedings relating to negotiable rights (*Companhia Paranense de Gás (Compagás) v. Consórcio Carioca-Passarelli*, June 15, 2004; *AES Uruguaina v. Companhia Estadual de Energia Elétrica (CEEE)*, October 25, 2005; and *Nuclebrás Equipamentos Pesados SA (NUCLEP) v. TMC Terminal Multimodal de Coroa Grande SPE SA*, December 7, 2005)
  - The Supreme Court has concluded that it is legal for an arbitral tribunal to decide disputes involving private and public joint stock companies ("sociedades de economia mista") when they have entered into an arbitration agreement. (*União v. TMC Terminal Multimodal de Cora Grande SPE S.A.*, September 27, 2006) The Court reasoned that these private-public companies are on equal footing with private companies when they conduct ordinary commercial transactions and are therefore not subject to restrictions on their ability to enter into arbitration agreements.

- There is, however, one case pending where a court in the State of Paraná has granted an anti-arbitration injunction based mainly on the argument that the claimant was a corporation controlled by the government of the State of Paraná (*Companhia de Energia Elétrica do Paraná (COPEL) v. UEG Araucária*, July 5, 2004)
- The Superior Court of Justice has tempered the procedural hurdles on enforcement, holding, among other things, that:
  - Foreign arbitral awards or judicial decisions may produce effects in Brazil while an application for ratification is pending (Article 4.3, *Resolution No. 9* of May 4, 2005)
  - Injunctions may be granted in applications for the ratification of foreign arbitral awards or judicial decisions (Article 4.3, *Resolution No. 9* of May 4, 2005)
  - The existence of a pending action to set aside an arbitral award does not impede its recognition (*First Brands do Brasil Ltda. & STP do Brasil Ltd. v. STP Petroplus Produtos Automoviles S/A & Petroplus Sul Comercio Exterior S/A*, November 23, 2006)
- The Supreme Court has acknowledged that it may refuse to enforce foreign arbitral awards only on limited grounds, including:
  - Upon determination that the award fails to comply with certain formal requirements (*Tremond Alloys and Metals Corp v. Metaltubos Indústria e Comércio de Metais*, June 19, 2006)
  - When the award is contrary to public policy or national sovereignty (*Id.*; *Oleaginosa Moreno Hermanos Sociedad Comercial Industrial Financiera Inmobiliaria y Agropecuaria v. Minho Paulista Ltda.*, May 17, 2006)<sup>8</sup>
  - When there is a violation of the right to counsel or to legal defense (*Grain Partners SPA v. Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda. & Cooperativa dos Produtores e Trabalhadores Urbanos e Rurais de Sorriso Ltda.—COOPERGRÃO*, October 18, 2006)

Although the Supreme Court has not upheld all arbitral awards submitted for recognition (e.g., *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria v. Moinho Paulista Ltda.*, May 17, 2006), the decisions cited above suggest a trend that appears to follow the precedent set by *MBV Commercial* in confirming the constitutionality of the Arbitration Law and the effectiveness of arbitration.

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<sup>8</sup> *But see* Tips on Drafting Arbitration Clauses, discussing the scope of public policy in the *Oleaginosa* decision.

## Colombia: Constitutional Court Rulings on the Applicability of International Arbitration to State Contracts

The Colombian Constitutional Court has upheld the arbitrability of a contract dispute involving a State entity, el Departamento del Valle del Cauca, suggesting that parties are free to choose the procedural rules applicable to arbitrations involving state contracts. The *Valle del Cauca* decision contrasts with the *TermoRío* opinion of the Council of State (Consejo de Estado), Colombia's highest administrative court, holding that an arbitration agreement contained in a state contract providing for ICC procedural rules violated Colombian law.

The *Valle del Cauca* decision (sentencia de unificación), rendered by the Constitutional Court on March 14, 2007, sets forth certain factors applicable to the arbitrability of contractual disputes involving a state entity, including the choice of procedural rules. (*Corte Constitucional, Sentencia SU-174/07, Exp. T-980611, March 14, 2007*). The case related to a concession agreement for the construction, operation and maintenance of a public road between Concesiones de Infraestructura S.A. ("CISA") and the Departamento del Valle del Cauca ("Valle del Cauca"). A dispute over the application of certain contractual terms was resolved by an arbitral award rendered in favor of CISA. The award was challenged before the Council of State and was upheld. Not satisfied with the outcome, Valle del Cauca filed a constitutional protection claim (acción de tutela) before the Constitutional Court, alleging violation of due process. On March 22, 2006, the Constitutional Court annulled both the award and the decision of the Council of State (*Corte Constitucional, Sentencia T-481-2005, March 22, 2006*). A year later, on March 14, 2007, the Court overturned its own decision, declaring that (i) a constitutional protection claim could not be used to challenge the validity of arbitral awards and annulment proceedings and (ii) in any event, neither the arbitral tribunal nor the Council of State had violated Valle del Cauca's due process rights because the subject matter of the dispute was arbitrable.

Valle del Cauca had argued, inter alia, that the unilateral declaration of the termination of the concession agreement could not be subject to arbitration as it was a prerogative of the state. On this issue, the Constitutional Court set out certain factors relevant to the interpretation of the arbitrability of administrative acts. It distinguished between the economic aspects of a dispute arising in connection with an administrative act, which can be subject to arbitration and the review of the validity and legality of administrative acts, which it identified as the exclusive prerogative of the state. The Constitutional Court held that (i) arbitration is an alternative voluntary method of dispute resolution that is constitutionally guaranteed and protected and "constitutes the manifestation of a democratic and participative regime"; (ii) all arbitral awards are final and binding, differing from a judicial decision only in that they are not subject to appeal (with the exception of certain limited remedies established by law) and (iii) given the contractual and voluntary nature of arbitration guaranteed by Colombian law, parties may freely choose the rules governing arbitration proceedings.

The decision of the Constitutional Court in the *Valle del Cauca* case contrasts with a previous opinion of the Council of state setting aside an arbitral award involving a state-owned entity, holding that an arbitration agreement providing for arbitration under the ICC Rules violated Colombian law. (*Electrificadora del Atlántico S.A. c. TermoRío S.A. E.S.P., Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera, Sentencia de 1 de agosto de 2002*). In the *TermoRío* case, the parties had concluded a power purchase agreement governed by Colombian law referring all disputes to ICC arbitration. The Council of State vacated the award, holding that the arbitration agreement violated Colombian law because (i) the arbitration was domestic in nature, as the conditions established by Law 315 of 1996 for international arbitrations

had not been met and (ii) under Decree 2279 of 1989 (in force at the time of the agreement), the parties did not have “either the freedom or the authorization” to choose the rules to govern the arbitral proceedings.

Subsequently, TermoRío and one of its shareholders filed suit before the US District Court for the District of Columbia, seeking to enforce the award. On May 25, 2007, the DC Circuit Court of Appeals affirmed the decision of the district court, applying the New York Convention and refused to enforce the award (*TermoRío S.A. E.S.P. v. Electrificadora del Atlántico S.A. E.S.P.*, 421 F. Supp. 2d 87 (D.D.C. 2006)). The appellate court held that “the arbitration award was lawfully nullified by the country in which the award was made,” and therefore TermoRío could not “seek enforcement of the award under the Federal Arbitration Act or the New York Convention.” It further held that to enforce an arbitration award lawfully set aside by a competent authority in the state in which the award was made “would seriously undermine a precept of the New York Convention.” The Court clarified that “[b]ecause the Consejo de Estado is undisputedly a ‘competent authority’ in Colombia and there is nothing in the record indicating that the proceedings before the Consejo de Estado were tainted... appellants have no cause of action” pursuant to the New York Convention, Art. V(1)(e). (*TermoRío, S.A. & Lease Group, LLC v. Electrificadora del Atlántico S.A.*, No. 06-7058, F.3d, 2007 WL 1515069 (DC Cir, May 25, 2007)).

Under the *TermoRío* decision, domestic arbitration had to be governed by the Colombian Code of Civil Procedure. In contrast, the *Valle del Cauca* decision allows parties to choose freely the procedural rules applicable for the resolution of a dispute. The Council of State had nevertheless, already begun moving in this direction when it ruled on a case involving an arbitration with a seat outside Colombia. In that case, *Empresa Colombiana de Vías Ferreras (Ferrovías) v. Drummond Ltd.* (decisions of October 24, 2003 and April 22, 2004), the Council held that it lacked jurisdiction to set aside

an ICC award rendered in Paris pursuant to French procedural law and which related to a contractual dispute between Ferrovías, a Colombian state-owned entity and Drummond, a private company. Attempting to follow the *TermoRío* precedent, Ferrovías had argued that contractual disputes between the parties could not be governed by international rules, as had been provided in the arbitration clause, as they involved a public entity, the contract was to be performed in Colombia and it was governed by Colombian law. The Council rejected this argument and held that under the applicable Colombian law, state contracts may be submitted to international arbitration. The Court further reasoned that, pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), which prevailed in this case over the Code of Civil Procedure, only the competent authority of the country in which the award was rendered, *i.e.*, the French courts, could annul the award. (*Empresa Colombiana de Vías Ferreras c. Drummond Ltd.*, Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera, October 24, 2003 and April 22, 2004).

Notwithstanding the *Valle del Cauca* and *Ferrovías* decisions, it is not clear whether international arbitration is available for all state contracts. In a decision rendered on November 22, 2006 (C-961/2006), the Constitutional Court confirmed the constitutionality of provisions of the Investment Stability Law (Law 963/2005), pursuant to which investors may submit disputes to domestic arbitration governed by Colombian law, but not to arbitration under international rules. The Court held that legal stability agreements are a type of administrative contract concluded to guarantee a stable application of Colombian law to investors. The Court further noted that because any dispute would relate to the application of Colombian law, it is “reasonable” and “proportional” for the arbitration proceedings to be domestic and governed by Colombian law. (*Corte Constitucional Sala Plena, Sentencia C-961/2006, Exp. D-6304, November 22, 2006*).

## Mexico: Supreme Court Rules on the Principle of Kompetenz-Kompetenz

The Mexican Supreme Court has settled a contradiction between the rulings of two federal courts relating to the applicability of the principle of kompetenz-kompetenz, according to which an arbitral tribunal is the judge of its own jurisdiction. See *Contradicción de Tesis 51/2005-PS, Tesis de Jurisprudencia 25/2006*. With this decision, the Supreme Court attempted to reconcile diverging interpretations of two seemingly inconsistent provisions of the Mexican Commercial Code on the question of whether the validity of an arbitration agreement should be decided by the arbitral tribunal or the judge.

The debate centered on the interpretation of two articles of the Mexican Commercial Code that appear to provoke contradictory results when applied to concrete cases. Article 1424 mirrors the language of Article 8 of the UNCITRAL Model Law on International Arbitration (the “Model Law”) and Article II.3 of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, or “New York Convention.” It provides that judges shall refer the parties to arbitration when their dispute is subject to an arbitration agreement, unless such agreement is found to be null and void, inoperative or incapable of being performed. In turn, Article 1432 of the Commercial Code tracks Article 16 of the Model Law and provides that an arbitral tribunal shall decide on its own jurisdiction, including objections related to the existence or validity of the arbitration agreement.

On January 11, 2006, the Mexican Supreme Court held that parties are free to refer contractual disputes to arbitration and affirmed the applicability of the principle of kompetenz-kompetenz, stating that the general rule is that arbitral tribunals have jurisdiction to intervene, hear and decide on the existence or validity of both the underlying contract and the arbitration agreement.

The Supreme Court also affirmed the parties’ rights under paragraph 2 of Article 1424 to commence or continue arbitration proceedings while the issue of validity of the arbitration agreement is pending before a judge, even when the subject of the arbitration is the existence or validity of the underlying contract, over which the arbitral tribunal retains exclusive jurisdiction.

At the same time, however, the Supreme Court carved out an exception for disputes brought before the courts where the submitting party claims that the arbitration agreement is null and void, inoperative or incapable of being performed. The Supreme Court reasoned that the existence of due judicial control over arbitration should not be disregarded and that given that the jurisdiction of an arbitral tribunal emanates from the free will of the parties, if the arbitration agreement is affected by a defect of consent, the annulment action should be resolved previously by the Court. The Supreme Court decision may have implications for arbitration matters that fall within the exception carved out by the Court.

The Supreme Court in effect adopted language that is already set forth in two of the leading international instruments relating to arbitration: the Model Law and the New York Convention. The risk is that the exception established by the Court will nonetheless provide an opening for parties to interfere with arbitration proceedings by resort to Mexican courts. Unless that risk is realized, it may be hyperbole to suggest that the exception constitutes an erosion of Mexico’s comparatively strong pro-arbitration tradition.

## Peru: Constitutional Court Rules on Arbitral Jurisdiction

A decision by the Peruvian Constitutional Court reaffirms Peru's commitment to arbitration as an effective means of dispute resolution, further consolidating a legal framework developed over the past two decades. The court examined the constitutional basis for arbitral jurisdiction and explicitly recognized the autonomy and independence of arbitral tribunals, holding that arbitral jurisdiction is an essential element of the Peruvian constitutional public order. *Fernando Cantuarias Salaverry*, Decision of the Peruvian Constitutional Court, February 28, 2006, EXP No. 6167-2005-PHC/TC, Part IV §1.

The petitioner, Mr. Cantuarias, was a member of an arbitral tribunal in a dispute between two private mining companies. He was challenged by one of the parties to the arbitration and later charged criminally for procedural fraud and related offenses in connection with his functions as arbitrator. Mr. Cantuarias filed a writ of habeas corpus that was ultimately rejected by the Constitutional Court. The court noted, however, that the criminal proceedings instituted against Mr. Cantuarias should not be used as an excuse to examine the underlying claim submitted to arbitration, over which the arbitral tribunal had jurisdiction.

The court also examined the role of arbitration in the Peruvian legal system and recognized that arbitration is an essential part of Peruvian constitutional order. Arbitration is expressly recognized by Article 139 of the 1993 Peruvian Constitution and according to Article 63 of the Constitution, the Peruvian State and its legal entities are authorized to participate in arbitration proceedings. The court also upheld the authority of the arbitral tribunal by confirming the full applicability of the principle of kompetenz-kompetenz and the principle of non-interference.

The court sustained the independence of the arbitral tribunal, holding that control of arbitral decisions by judicial authorities should be exercised exclusively ex-post, through the appeal and annulment proceedings provided in the General Arbitration Law, enacted in January 1996 (Law No. 26572). The court observed that constitutional review of an award is not excluded but should be limited to determining arbitrators' potential disregard of constitutional jurisprudence or procedural guarantees.

## Chile: Chilean Appellate Court Rules on Applicability of International Arbitration Law

The Santiago Court of Appeals has upheld the applicability of Chile's law on international commercial arbitration (Law No. 19,971, the "International Arbitration Law"). Relying on an analysis of retroactivity rules, the court held that the International Arbitration Law (enacted in September 2004 and based on the UNCITRAL Model Law on International Arbitration) governs the procedure of disputes arising from contracts executed prior to its enactment, confirming at the same time the limited role of judicial courts in the conduct of arbitral proceedings. See *D'Arcy Masius Benton & Bowles Inc. (Chile) Ltda. c. Otero Lathrop Miguel*, Recurso de Hecho, Rol No. 865-2000, Corte de Apelaciones de Santiago, Primera Sala, May 25, 2006.

The parties had entered into a share purchase and shareholders agreement on May 12, 1996. The agreement contained an arbitration clause and sometime after the enactment of International Arbitration Law, the parties submitted a dispute to arbitration. On December 26, 2005, the arbitrator ruled that, given that one of the parties was domiciled in Paris, France (both at the time of the contract and at the time of the dispute), the arbitral procedure should be governed by the International Arbitration Law. *D'Arcy Masius Benton & Bowles Inc. (Chile) Ltda.* ("DMB&B") requested the arbitrator to reconsider and filed alternatively for an appeal. The arbitrator denied both petitions and DMB&B challenged that denial before the Santiago Court of Appeals.

DMB&B argued that pursuant to the law on the Retroactive Effect of the Laws (*Ley de Efecto Retroactivo de las Leyes*, or "Retroactivity Law"), legal provisions effective at the time of execution of a contract should be deemed to be incorporated in such contract. Thus, reasoned DMB&B, the

arbitration should be governed by the laws in force at the time of execution of the agreement. However, the Santiago Court of Appeals upheld the arbitrator's decision, pointing out that the very same Retroactivity Law provided that laws related to the filing of claims or to the conduct of judicial proceedings are effective immediately and are excepted from the rule cited by DMB&B (although procedural deadlines and judicial acts already commenced are subject to the laws in force at the time of their commencement). In the court's view, only substantive legal provisions should be deemed incorporated to contracts and should prevail over laws enacted after the contract's execution; procedural laws, on the other hand, should not be deemed incorporated to contracts and therefore new laws governing procedure should prevail. The court held that the International Arbitration Law is procedural in nature and therefore it should apply to all international arbitration proceedings from the date of its entry into force.

The court also confirmed that the role of domestic courts in international arbitration proceedings is limited. Citing Article 5 of the International Arbitration Law (which mirrors Article 5 of the UNCITRAL Model Law), the court emphasized that regarding matters governed by the International Arbitration Law, court intervention in arbitral proceedings is limited to the situations specifically provided in that law. Accordingly, the court held that the decision issued by the arbitrator was not subject to appeal and therefore the challenge brought by DMB&B should be rejected.

The court's unequivocal decision suggests that Chilean courts may be likely to uphold Chile's new international arbitration framework when their intervention is sought in arbitral proceedings.



Rafael Llano Oddone

## Tips on Drafting Arbitration Clauses

### Arbitration Clauses for Cross-Border Contracts With Latin American Parties

There are three key considerations relevant to drafting an arbitration clause for a cross-border contract with a Latin American party. First, account for procedural differences in relevant jurisdictions. Failure to do so may ultimately impair access to arbitration or frustrate procedural expectations. Second, select a place of arbitration that will pose the fewest obstacles to the proceedings and the enforceability of the award. Finally, where the contract will constitute a foreign investment for purposes of investment treaties, the transaction should be structured to ensure access to the protections of such treaties.

#### Procedural Issues

*Tip 1: Account for national laws requiring mandatory submission agreements*

Parties arbitrating in either Argentina or Brazil should account for the requirement of a “compromiso” (or post-dispute agreement to arbitrate).

In Argentina, the compromiso is mandatory in all cases and cannot be waived, even if the parties have a pre-dispute arbitration clause. Parties that provide for ICC arbitration satisfy the requirement of a compromiso through the Terms of Reference envisaged in ICC procedure,<sup>9</sup> but courts have retained the ultimate authority to determine the content of this document in case of disagreement between the parties.<sup>10</sup> The risk of judicial intervention is therefore inevitable on extreme cases, but the risk

of procedural delays is diminished by agreeing to ICC arbitration, which sets forth specific timeframes to establish the Terms of Reference.

In Brazil, the compromisso is required only when the constitution of the tribunal is not regulated in a pre-dispute arbitration clause.<sup>11</sup> To avoid this requirement, parties should either provide for a mechanism to appoint the tribunal in their arbitration clause, or refer to institutional rules that establish a default method for constitution.

*Tip 2: Provide for application of the IBA Rules on the Taking of Evidence*

A provision requiring arbitrators to apply the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) (“IBA Rules”) is one way to overcome different assumptions of parties regarding discovery. Procedural laws in Latin American countries typically do not allow for the common law practices of document discovery and cross-examination of witnesses, except under very limited conditions. In addition, Latin American arbitrators are usually not agreeable to strictly enforce a contractual provision for US-style discovery or rules of evidence. The IBA Rules provide for document production (with certain limitations) and cross-examination, but have nonetheless gained widespread acceptance among Latin American arbitrators. They are regarded as offering satisfactory solutions for both

<sup>9</sup> See Article 18 of the Rules of Arbitration of the International Chamber of Commerce.

<sup>10</sup> This rule was applied in the 2004 *Yacreta* case, where a Buenos Aires district court determined that the Terms of Reference in an international ICC arbitration comprised the requisite compromiso and stayed the proceedings, (seated in Buenos Aires), pending a decision on the merits of a disagreement by the Argentine party as to the content of the Terms of Reference and various arbitrator challenges. See *Entidad Binacional Yacreta v. Eriday et al.*, Case 26.444/04, Federal District Court of Buenos Aires, Decision of September 27, 2004.

<sup>11</sup> See João Bosco Lee, *Brazil*, in N. Blackaby et al. (eds.), *International Arbitration in Latin America* (2002), pp. 70–72 (citing the 1999 decision by the São Paulo Court of Justice in *Renault do Brasil S.A. v. Carlos Alberto de Oliveira Andrade*); Horacio Grigera Naón, *Arbitration and Latin America: Progress and Setbacks* (2004 Freshfields Lecture), 21 *Arb. Int'l* 126, 150–51 (2005).

civil and common law practitioners<sup>12</sup> and have been increasingly applied in arbitrations in the region. Parties from common law jurisdictions interested in preserving their rights to access documents held by the other side and/or to cross-examine witnesses, should therefore provide for the application of the IBA Rules in their arbitration clauses, particularly when they foresee that the tribunal in a potential dispute will likely include Latin American (civil law) arbitrators.

### Seat of Arbitration

Central and South American countries remain largely untested as places to hold major cross-border arbitrations and their selection is not advisable for non-Latin American parties. Despite the rise in the number of Latin American arbitrations, statistics reflect that parties engaged in complex deals in the region still prefer to seat their arbitrations in one of the established centers (e.g., New York, Miami, London or Paris). The ICC, for example, heard approximately 110 Latin American cases annually between 2000 and 2005 and approximately 12 percent of its 2005 docket featured Latin American parties, but only about 20 cases per year had a Latin American place of arbitration. Of these, most were seated in Mexico City, Buenos Aires and São Paulo.

Latin American Jurisdictions Designated as Seats of Arbitration, 2004 – 05	
ICC	ICDR
Argentina	Brazil
Bolivia	Ecuador
Brazil	Mexico
Chile	Panama
Colombia	Paraguay
Costa Rica	El Salvador
Guatemala	
Mexico	
Uruguay	
Venezuela	

Source: ICC, ICDR

As the following set of tips will show, if a Latin American forum will be selected, the main aspect to consider is the attitude of the courts toward arbitration in the selected jurisdiction, both as to their intervention during the arbitration and the enforcement of awards. Parties should, of course, also factor in the location of assets of the other side for purposes of enforcement, as well as their own convenience, the location of potential witnesses and documents and the availability of facilities (e.g., hotels, translators and stenographers).

*Tip 3: Avoid, where possible, jurisdictions with a record of judicial interference during the proceedings*

Judicial interference inevitably leads to added costs of local litigation and jurisdictional battles and poses a disadvantage for these jurisdictions as places of arbitration. The principal form of intervention in Latin America has occurred when courts, rather than arbitrators, decided on the validity of arbitration clauses. Most Latin American arbitration laws recognize the power of arbitral tribunals to rule on such issues (i.e., kompetenz-kompetenz), but courts in certain countries, including Brazil and Venezuela, have nevertheless stepped into the jurisdiction of arbitrators.

Within Brazil, courts in the States of Paraná and Rio Grande do Sul have displayed higher levels of intervention, particularly in relation to arbitrations against state entities. Two recent cases in Paraná involving the electric utility Copel began with injunctions against arbitrations held in Paris and Brazil, respectively.<sup>13</sup> The first case is pending before an appellate court in that state and the second injunction was reversed by that same court.<sup>14</sup> Two other arbitrations against the Paraná gas utility, Compagas and the Rio Grande do Sul electric

<sup>12</sup> See, e.g., Michael Bühler and Carroll Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration—Novel or Tested Standards?*, 17 J. Int'l Arb. 3, 3 – 4 (2000).

<sup>13</sup> See *Companhia Paranaense de Energia (COPEL) v. UEG Araucária Ltda.*, Third Court of Public Finances of Curitiba, Decision of March 15, 2004; *Companhia Paranaense de Energia (COPEL) v. Energetica Rio Pedrinho S.A.*, Second Lower Treasury Court of the State of Paraná, discussed in Mauricio Gomm Ferreira dos Santos, *Overview of and Update on Recent Developments and Trends in Arbitration in Brazil*, in *International Arbitration 2007*, Practising Law Institute (2007), at Vol. 1, pp. 377 – 80.

<sup>14</sup> *Companhia Paranaense de Energia (COPEL) v. Energetica Rio Pedrinho S.A.*, Court of Appeals of the State of Paraná, Decision of May 10, 2005.

company CEEE, were initially enjoined by courts in these states, but the stays were later overturned at the appellate level.<sup>15</sup> By contrast, courts in the States of São Paulo and Rio de Janeiro have displayed a pro-arbitration stance, making these locales preferred places in which to hold an arbitration in Brazil.

In Venezuela, the Supreme Court enjoined ICC proceedings conducted in Miami in the 2004 *Four Seasons* case. It held that parties could seek constitutional protection from the courts by challenging the validity of the arbitration clause, notwithstanding that the Venezuelan arbitration law codifies the kompetenz-kompetenz principle and that an arbitral tribunal had already ruled it had jurisdiction over the dispute.<sup>16</sup>

Other instances of intervention have stemmed from parties' disagreements as to the manner in which arbitrators or institutions managed the proceedings. Such was the case with the 2004 *Yacyreta* decision by an Argentine district court, which stayed an international ICC arbitration seated in Buenos Aires and opened the door to extensive litigation.<sup>17</sup> The court found jurisdiction to decide on whether the Terms of Reference included all the necessary points of the dispute and whether the ICC had properly ruled on the respondent's challenges against the three members of the tribunal. Similarly, in July 2007, an Argentine appellate court ordered the suspension of an ICSID-administered ad hoc investment arbitration brought by *National Grid Transco* against

Argentina and found jurisdiction to hear a dispute concerning a challenge against an arbitrator.<sup>18</sup>

*Tip 4: Avoid jurisdictions offering non-waivable means of recourse*

The principal treaties on enforcement of arbitral awards, adopted almost without exception in Latin America,<sup>19</sup> permit denial of enforcement where the award has been annulled or set aside in the country of issuance. Parties should therefore seek to limit the opportunities of challenge against their awards and select a place of arbitration where appeals and other means of recourse, are either not afforded or may be waived. This does not apply to the right to request the annulment of arbitral awards (as distinct from challenges to the award on the merits), because this right is typically not subject to waiver, either in or outside Latin America.

As has been observed recently, non-waivable challenges can bog down the enforcement of awards for years in court litigation. For example, Mexican law, which follows the UNCITRAL Model Law, formally allows only annulment actions, but a practice has developed whereby parties resort to "amparo" proceedings, seeking constitutional protection against adverse court rulings in such annulment cases. This practice has resulted in considerable extensions of post-award litigation.<sup>20</sup> By contrast, both Colombian and Venezuelan courts have held that constitutional actions may not be used to challenge arbitral awards.<sup>21</sup>

15 See Gomm Ferreira dos Santos, *supra* note 5, at 377 – 80.

16 See Grigera Naón, *supra* note 3, at 153.

17 See *Entidad Binacional Yacyreta v. Eriday et al.*, Case 26.444/04, Federal District Court of Buenos Aires, Decision of September 27, 2004.

18 See Investment Treaty News (July 31, 2007), available at <http://www.iisd.org/investment/itn>.

19 The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the principal instrument utilized in cross-border enforcement of awards, has been ratified by every country in the American continent. Other treaties on the subject include the 1975 Inter-American Convention on International Commercial Arbitration ("Panama Convention"), ratified by all except four countries in the region (Cuba, Dominican Republic, Haiti and Nicaragua) and sub-regional instruments, such as the MERCOSUR Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters ("Las Leñas Protocol"), signed in 1992.

20 Claus von Wobeser, *Mexico*, in N. Blackaby et al. (eds.), *International Arbitration in Latin America* (2002), p. 188.

21 Regarding Colombia, see *Corte Constitucional, Sentencia SU-174/07, Exp. T-980611*, March 14, 2007 (discussed elsewhere in this issue).

As to Venezuela, see *Grupo Inmensa C.A. et al. v. Soficredito Banco de Inversión, C.A.*, Tribunal Superior de Justicia, Decision of May 23, 2001.

But see Grigera Naón, *supra* note 3, at 152 – 53 (suggesting that Venezuela has departed from its pro-arbitration attitude).

Another example exists in Argentina, where procedural law allows for waivers of appeals in the *compromiso*, but the extent to which such waivers will be upheld has become unclear. In its June 2004 *Cartellone* decision, the Argentine Supreme Court held that waivers were invalid when issues of public policy are at stake.<sup>22</sup> More recently, in the 2006 *Cacchione* case, the high court affirmed a waiver clause,<sup>23</sup> but the survival of the public policy exception remains uncertain.

*Tip 5: Avoid jurisdictions prone to annul or overturn arbitral awards*

One of the most frequently used bases for the annulment of awards is the violation of public policy. To safeguard the integrity of their awards, parties should avoid jurisdictions where the concept of public policy is interpreted expansively, or where the standards for vacatur are comparatively easy to meet.

In Brazil, the highest civil court refused to enforce an award in an international arbitration seated in Brazil, finding that the absence of a written arbitral agreement is contrary to Brazilian public policy.<sup>24</sup> As mentioned above, São Paulo and Rio de Janeiro courts have generally demonstrated a stronger commitment to arbitration. Among other cases, a São Paulo court refused to set aside an arbitral award issued in New York in the *CAOA* case and a Rio de Janeiro court dismissed annulment proceedings based on the alleged failure of the parties to agree on the limits of arbitral jurisdiction in the arbitration clause (*Doux* case).<sup>25</sup>

In Argentina, the *Cartellone* decision appears to have expanded the bases to vacate awards in this jurisdiction. There, the Supreme Court stated that an arbitral award may be overturned if found to be “contrary to public policy, unconstitutional, illegal or unreasonable.”<sup>26</sup> This broad scope of review was coupled with the Court’s invalidation, noted above, of the parties’ waiver of appeals on public policy grounds.

### Investment Protection

*Tip 6: Structure investments so as to gain access to the arbitral jurisdiction established by international investment treaties*

Where a transaction will constitute a foreign investment under bilateral or multilateral investment treaties signed by the host state, investors should structure the transaction (and their dispute resolution provisions) to avail themselves of the rights offered by those treaties. Most investment treaties, for example, provide investors access to arbitration venues to resolve disputes with host states, including the International Centre for Settlement of Investment Disputes (“ICSID”), ad hoc arbitration (e.g., under UNCITRAL rules) or private institutions.

To gain access to treaty jurisdiction, investors must be located in a state that has signed an investment treaty with the host state, granting investors such access. Companies from countries that have signed few or no investment protection treaties (such as Brazil and Colombia) may obtain protection of their investments in other Latin American states or elsewhere by structuring their investments through other countries with which the host state signed such a treaty. If a contract is entered into with the

22 See *José Cartellone Construcciones Civiles S.A.*, Corte Suprema de Justicia Nacional, Decision of June 1, 2004. See also Grigera Naón, *supra* note 3, at 161.

23 See *Cacchione, Ricardo C. v. Urbaser Argentina S.A.*, Corte Suprema de Justicia Nacional, Decision of August 24, 2006.

24 See *Oleaginosa Moreno Hermanos S.A. v/ Moinho Paulista Ltda.*, Superior Tribunal de Justiça, Decision of May 17, 2006. Commentators have suggested that a broader concept of public policy may exist in Latin America regarding the enforcement of awards, so that the potential bases for challenging enforcement of the award are increased. E.g., Carlos J. Bianchi, *The Enforcement of Foreign Arbitral Awards in Latin America*, International Arbitration in Latin America Conference, April 25, 2007.

25 See Sergio Bermudes & Fabiano Robalinho Cavalcanti, *Brazil: An Arbitration-Friendly Jurisdiction*, LatinLawyer Online, posted on March 6, 2007.

26 See *Cartellone*, *supra* note 13. See also Grigera Naón, *supra* note 3, at 163-64 (suggesting that, on the facts of the dispute, the Court could have reached the same conclusion on annulment grounds).

host state or state-owned entity, the arbitration clause should preferably give the investor the option to refer disputes to arbitration under the relevant treaty or to an alternative arbitration forum. This will clarify at the outset that the parties did not intend to foreclose investment treaty arbitration in their dispute resolution clause.

If the investor wishes to gain access specifically to ICSID jurisdiction, it must either meet the location requirement mentioned above, or sign a contract with the host state (or state-owned entity) providing for ICSID arbitration. In the latter case, the parties should preferably also establish an alternative arbitration forum, in case ICSID jurisdiction is denied, which can happen if the parties do not meet other jurisdictional hurdles under the ICSID Convention (e.g., the definition of “investment”). The parties

may establish that the specific consideration to be provided by the investor is deemed an investment for purposes of the ICSID Convention. Such a provision is advisable, but will not guarantee jurisdiction.

Host states that are not parties to the ICSID Convention may still consent to ICSID jurisdiction under the ICSID Additional Facility Rules, either in a treaty or by contract with the investor. Two of the main Latin American economies, Brazil and Mexico, are not parties to the ICSID Convention and Bolivia has recently announced its withdrawal.<sup>27</sup> Arbitration clauses in investment contracts with these countries should refer to the Additional Facility Rules as well as an additional default forum and may provide that the ICSID Convention will apply if adopted by the host state after the contract is signed.



Rima Al-Mokarrab

## Client Alerts: Recent Developments in International Arbitration

### \$1782 Discovery in Aid of International Arbitral Proceedings

On April 2, 2007, the US District Court for the District of New Jersey granted discovery under 28 U.S.C. §1782 in aid of an international arbitration. Other circuit courts have held that §1782 does not apply to private arbitrations. The New Jersey court interpreted prior rulings narrowly and permitted a party to a foreign investor-state arbitration to obtain testimony and documents from a non-party.<sup>28</sup> Taken with other recent developments, §1782 may increasingly permit parties to import US-style discovery into international arbitral proceedings.

#### Discovery Under 28 U.S.C. §1782

§1782 gives federal courts discretion<sup>29</sup> to grant discovery “for use in a proceeding in a foreign or international tribunal” if, among other requirements, the target of discovery “resides or is found” in the US district in which the application for discovery is made and the request for discovery is made by the foreign or international tribunal or “any interested person.”

Historically, §1782 was not often invoked in aid of international arbitration. The Second and Fifth Circuits have ruled that a private international

<sup>27</sup> Other non-parties are Suriname, Belize, Dominican Republic and Haiti.

<sup>28</sup> *In re Oxus Gold plc*, MISC No. 06-82-GEB, 2007 WL 1037387 (D.N.J. Apr. 2, 2007).

<sup>29</sup> *Intel Corp. v. Advanced Micro Devices Inc.*, 124 S.Ct. 2466, 2483 (2004) (emphasizing that application of § 1782 is discretionary and listing four factors to be considered in exercising this discretion).

commercial arbitral tribunal is not a “tribunal” under §1782.<sup>30</sup> In its 2004 *Intel Corp.* decision, the US Supreme Court’s broad interpretation of “tribunal” laid the groundwork for change.<sup>31</sup> The Court found that the European Commission is a “tribunal” under §1782 because the EC Director General for Competition acts as a first-instance decision maker and resembles an adjudicatory administrative agency.

### Discovery for Use in Public International Arbitration

The dispute in *Oxus*<sup>32</sup> arose between Oxus Gold, PLC, an international mining group based in the UK and the Kyrgyz Republic. The Kyrgyz government had granted a license for the development of a gold deposit in Kyrgyzstan to a joint venture company created by affiliates of Oxus Gold and the Kyrgyz state. Upon cancellation of the license, Oxus Gold initiated an arbitration against Kyrgyzstan for unlawful and discriminatory conduct in violation of the UK-Kyrgyz BIT. Oxus Gold also filed an ex parte application with the New Jersey district court, seeking documents and testimony from Mr. Jack A. Barbanel, a non-party to the arbitration who likely possessed important evidence and who was “found” in New Jersey within the meaning of §1782.<sup>33</sup>

The New Jersey district court upheld an order permitting Oxus Gold to obtain discovery from Mr. Barbanel. The court did not specifically invoke *Intel Corp.*’s reasoning, based on first-instance decision making and resemblance to

an adjudicatory administrative agency. Instead, the court distinguished *Oxus*, involving a public international arbitration, from Second and Fifth Circuit jurisprudence, which addressed private arbitrations.<sup>34</sup> The *Oxus* arbitration was administered by a tribunal constituted under UNCITRAL rules and conducted pursuant to the UK-Kyrgyz BIT. This BIT “specifically mandates that disputes between nationals of the two countries would be resolved by arbitration governed by international law... [and the arbitration] is thus being conducted within a framework defined by two nations.”<sup>35</sup> In this context and given the Supreme Court’s broad interpretation of “tribunal” in *Intel Corp.*, the court found that the UNCITRAL tribunal in *Oxus* was a “tribunal” under §1782.

The court did not address whether §1782 applies to private arbitrations. The question remains open in the Third Circuit.

### Discovery for Use in Private International Commercial Arbitration

The Eleventh Circuit is poised to review *Roz Trading*,<sup>36</sup> in which a Georgia district court upheld an order granting discovery for use in a private international commercial arbitration. *Roz Trading* followed the *Intel Corp.* and *Oxus* approach of interpreting “tribunal” broadly, but went even further than *Oxus*. The court interpreted *Intel Corp.* to invalidate prior Second and Fifth Circuit jurisprudence and to mandate a broad interpretation of §1782.<sup>37</sup>

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30 See *Nat’l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) (legislative history of § 1782 did not contemplate that it would apply to private international arbitral tribunals); *Republic of Kazakhstan v. Beidermann Int’l*, 168 F.3d 880 (5th Cir. 1999) (§ 1782 was not intended to apply to private international arbitral tribunals).

31 *Intel Corp.*, 124 S.Ct. at 2479 (the Court cited an article by Hans Smit stating that “the term tribunal ... includes ... administrative and arbitral tribunals ...”) (emphasis added) (citations omitted).

32 *In re Oxus Gold plc*, 2007 WL 1037387, at \*1.

33 *Id.* at \*4 (Barbanel resides in Moscow but leases an apartment in New Jersey and travels there regularly).

34 See *supra* note 3.

35 *In re Oxus Gold plc*, 2007 WL 1037387, at \*5.

36 *In re Roz Trading Ltd.*, 469 F.Supp.2d 1221 (N.D.Ga. Dec 19, 2006).

37 *Id.* at \*1 n.1 (the court explicitly rejects any interpretation of *Oxus* that might preserve a distinction between public and private arbitral tribunals, a distinction which is not found in the text of § 1782).

If other US circuits follow *Oxus* and *Roz Trading*, assuming the latter is affirmed on appeal, parties to foreign international arbitrations may have access to broad US-style discovery. Such access raises concerns of party autonomy, especially where US discovery is imported into arbitrations that have no connection to US law. Restraint in the use of §1782 in international arbitral proceedings will

ultimately depend on US courts. Even in the Third and Eleventh circuits, *Oxus* and *Roz Trading* will not guarantee discovery in all instances, since the application of §1782 is discretionary.<sup>38</sup> However, in the face of uncertainty, it is likely that §1782 applications will increase, as will forum shopping for arbitration-friendly venues.



Johan Berg

## Revised Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce

The Arbitration Institute of the Stockholm Chamber of Commerce (“the SCC Institute”) has adopted new arbitration rules, which entered into force on January 1, 2007 and will be applied to any arbitration commenced on or after January 1, 2007, unless otherwise agreed by the parties. The new rules update the former version (adopted in 1999), with the intention of making the rules more accessible to international users.

A number of the changes to the Rules are of a structural or linguistic character, for example, changing “Place of Arbitration” to the more technical “Seat of Arbitration.” One of the most important substantial changes, is the new Article 11, which now includes a provision on consolidation. Upon the submission of a Request for Arbitration concerning a legal relationship in respect of which an arbitration between the same parties is already pending under the Rules, the Board of the SCC Institute may, at the request of a party, decide to include the claims contained in the Request for Arbitration in the pending proceedings. Such decision will, however, only be made after consulting the parties and the Arbitral Tribunal. The former Rules do not contain any such provision on consolidation.

The revision of the Rules has also led to changes regarding the appointment of arbitrators. Whereas

the former Rules stated that, if the Arbitral Tribunal consisted of a sole arbitrator, he should be appointed by the SCC Institute, the new Rules state that the parties are given 30 days within which they have the opportunity to jointly appoint the arbitrator. If the parties fail to make the appointment within the aforementioned time period, the arbitrator shall be appointed by the Board of the SCC Institute. It should also be noted that the parties are free to agree on a different procedure for the appointment of the Arbitral Tribunal than that provided for under the Rules (Article 13(1)).

Another significant change of the provisions on appointment of arbitrators is in cases where there are multiple claimants or respondents and the Arbitral Tribunal is to consist of more than one arbitrator. If so, the multiple claimants, jointly and the multiple respondents, jointly, shall appoint an equal number of arbitrators. This was also the case with the former Rules. However, in contrast to the former Rules, if either side fails to make such joint appointment, the Board of the SCC Institute shall appoint the entire Arbitral Tribunal (Article 13(4)). The reason for this change is to avoid the risk that a national court should consider the appointment of arbitrators as unfair and quash the award.

<sup>38</sup> *E.g.*, courts may consider factors such as whether the movant sought permission first from the arbitral tribunal.

Pursuant to the revised Rules, in the case of a challenged arbitrator, the arbitrator shall resign if the other party agrees to the challenge (Article 15(4)). The procedure under the former Rules (i.e., decision by the Board of the SCC Institute) shall be applied in all other cases. Another new feature is the provisional timetable, intended to increase the efficiency of the proceedings (Article 23). After the referral of the case to the Arbitral Tribunal, the Arbitral Tribunal shall promptly consult with the parties in order to establish a provisional timetable for the proceedings.

Additionally, various provisions on evidence have been rewritten. The new Rules expressly state that the admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine. It is also stated that, at the request of a party, the Arbitral Tribunal may order a party to produce any documents or other evidence which may be deemed relevant to the outcome of the case.

There is also a new provision which provides that the Arbitral Tribunal may, at the request of a party, grant any interim measures that it deems

appropriate (Article 32). An interim measure may take the form of an order or an award. This should also be in line with UNCITRAL's Model Rules on interim measures.

The Swedish Arbitration Act does not include any basic rules on the confidential nature of the proceedings and the Swedish Supreme Court recently ruled that the parties do not incur any duty of confidentiality sanctioned by liability in damages. Nor are the parties' legal representatives or the arbitrators under any legal obligation to maintain secrecy concerning the dispute according to the Swedish Arbitration Act, although the consensus view is that arbitrators shall observe discretion about the arbitral proceedings. The new Rules, however, stipulate that the SCC Institute and the Arbitral Tribunal, appointed under the Rules, shall maintain the confidentiality of the arbitration and the award, unless otherwise agreed by the parties (Article 46).

The revision of the Rules is hoped to further strengthen the SCC Institute and Stockholm as an attractive location for future domestic and international arbitration proceedings.

## What Our Practitioners Are Saying

### **Paul Friedland, New York, on Most-Favored-Nation Clauses and the Energy Charter Treaty**

On May 18, 2007, Paul Friedland, Partner, New York, spoke at the Conference on Investment Protection and the Energy Charter Treaty (ECT) in Washington, DC. In a session focused on selected standards of treatment under the ECT (moderated by Charles N. Brower and co-paneled by Christoph H. Schreuer and William W. Park), Friedland discussed the application of the Most-Favored-Nation (MFN) standard of treatment to disputes arising under BITs and the ECT. In examining whether more favorable dispute resolution arrangements in a treaty between the state and a third party can be imported into

the treaty between the state and the arbitration claimant via the MFN clause, Friedland identified two distinct approaches adopted by arbitral tribunals: the "Maffezini Approach" and the "Salini/Plama Approach." Friedland suggested that, in considering these different approaches, drafting distinctions account for some, but not all, of the outcomes of the awards. Rather, Friedland proposed that, where the measure sought to be imported into the basic treaty, touches upon the admissibility of the claim (where, e.g., the basic treaty contains a pre-condition that the investor submit its claim to local courts for a certain period of time before resorting to arbitration and the more favorable treaty contains no such pre-condition), the more favorable treaty's provision will fall within the scope

of the MFN clause. Where, however, the measure sought to be imported into the basic treaty touches upon the issue of jurisdiction (i.e., where, e.g., the basic treaty contains no reference to ICSID and the more favorable treaty does), the more favorable treaty's provision will not fall within the scope of the MFN clause.

Following an examination of the MFN treatment standard as incorporated in various provisions of the ECT, Friedland concluded that, although the issue of importing more favorable dispute resolution mechanisms via MFN clauses is much alive in investment treaty arbitration, given the investor-friendly nature of the dispute resolution provisions in the ECT, it is unlikely that an investor will seek to import the benefits of some other dispute resolution arrangement into the ECT.

**Thomas Heather, Mexico City,  
on Cross-Border Insolvency  
Arbitration in Latin America**

Thomas Heather, Partner, Mexico City, was appointed as a delegate by the International Insolvency Institute and participated in the working group sessions of the United Nations Commission on International Trade Law (UNCITRAL). The sessions were held at the UN Headquarters in New York from May 14 to May 16, 2007. Heather discussed the possible use of arbitration as a means to address cross-border insolvencies and argued this could be particularly effective in Latin America, given a lack of specialization in national courts.

**Andrew McDougall, Paris,  
on Parallel Arbitration Proceedings**

Andrew McDougall, Partner, Paris, spoke on "Parallel arbitral proceedings in related matters: their impact on the arbitral proceedings" at a Young Arbitration Practitioner's conference in Brussels on May 4, 2007. This speech dealt with two or more overlapping arbitrations in related matters, noting that the same issues arise where two or more arbitrations do not overlap, but concern related matters. Real-life examples were given to show six different ways in which such arbitrations can arise: (1) horizontal disputes; (2) vertical disputes; (3) same groups of companies, different contracts; (4) same parties, different contracts; (5) same parties, same contract and (6) investment disputes. The impact on the arbitral proceedings was discussed in the context of jurisdictional, substantive and case management issues. In particular, *lis pendens* and *res judicata* were discussed, as were the 2006 Reports of the International Law Association's International Commercial Arbitration Committee on these two subjects. The increasing complexity of contractual arrangements and legal rights and, thus, the increasing complexity of disputes were among the reasons given for more parallel proceedings. The advantages of considering the issues arising from parallel arbitrations in advance and being prepared for different eventualities were highlighted.

# Practitioner Appointments, Practitioner Recognition and Selected White & Case International Arbitration Events

## Practitioner Appointments

Ank Santens (New York) has been appointed to the International Commercial Disputes Committee of the New York City Bar.

Eckhard Hellbeck (Washington, DC) has been appointed to Corresponding Editor to *International Legal Materials*, a bi-monthly publication of The American Society of International Law.

Alexander Lütgendorf (London) has been appointed to the ICC Commission on Arbitration Task Force on National Rules of Procedure for Recognition and Enforcement of Foreign Awards.

## Practitioner Recognition

White & Case was named International Arbitration Team of the Year at the *Chambers USA Awards 2007* and was ranked Tier One by *The American Lawyer 2007*, *Chambers USA 2007* and *Legal 500 USA 2007*. *PLC Which Lawyer? 2007* gives White & Case a "Highly Recommended" rating nationally and in New York and Washington, DC for Dispute Resolution/Arbitration.

White & Case recently achieved a major victory for the Republic of the Philippines in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25). The Tribunal dismissed the case for lack of jurisdiction.

Stephen Bond (Paris) and Christopher Seppälä (Paris) were named as leading arbitration counsel by *Chambers Europe 2007*. Stephen Bond, Christopher Seppälä and Michael Polkinghorne (Paris) were individually noted in the *Legal 500 EMEA 2007*.

Carolyn Lamm (Washington, DC) has been named by *The National Law Journal* as one of the 50 Most Influential Women Lawyers in the US (2007).

Paul Friedland (New York) has recently published the second edition of his book, *Arbitration Clauses for International Contracts* (Juris Publishing).

## A Selection of White & Case International Arbitration Events

Michael Polkinghorne, Paris, gave a three-day seminar on upstream oil and gas agreements, organized by UNI (Universal Network Intelligence) in Cairo from August 28 to August 30, 2007.

Christopher Seppälä, Paris, participated in a panel on August 31, 2007, discussing "Best Practices in International Construction Contracts" at a conference on International Construction Projects organized by the International Bar Association in Rio de Janeiro, Brazil.

Jonathan C. Hamilton, Washington, DC, is chairing a panel on "The Efficacy of Latin American Investment Arbitration" at the New York State Bar Association International Law and Practice Section Conference, September 24 to September 29, 2007, in Lima, Peru.

Abby Cohen Smutny, Washington, DC, will speak at the ICC Annual Conference entitled "International Commercial Arbitration in Latin America: The ICC Perspective." The Conference is being held in Miami from November 4 to November 6, 2007.

Christopher Seppälä, Paris, will chair the first day of an ICC/FIDIC Conference on January 24, 2008 addressing "International Construction Disputes" being organized by the ICC in Monte Carlo.

## White & Case—Worldwide

If you have any comments or questions regarding this newsletter or any of the matters discussed herein, please contact any of the following members of the International Dispute Resolution Group:

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## White & Case

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