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LATEST DEVELOPMENTS

AIA is pleased to announce the receipt of a grant from European Commission for launching our project titled 'European Mediation Training for Practitioners of Justice' (EMTPJ). Our project partners are University of Warwick (UK) and Katholieke Universiteit Brussel (Belgium).

The project concentrates on mediation training that reaches practitioners of traditional justice and beyond. It aims to develop a new legal reflex whereby the practitioners of justice, when confronted with a dispute, will first consider mediation as the means of resolution. The project involves mediation workshops, research in mediation, publication of resulting research papers, organizing a conference, inter alia. Therefore, unlike other current mediation training programs, the EMTPJ project also aims at reflecting on the theoretical aspects underlying the practice of mediation alongside the practical information.

You will be informed with regular updates about the EMTPJ project in our upcoming newsletters.

WHAT IS GOING ON IN LATIN AMERICAN ARBITRATION?

AIA attended for the first time the ICC Conference about Arbitration in Latin America at Miami this November. This is the most important yearly gathering for arbitrators, counsel, academics and any one interested in arbitration in Latin America. AIA's aim was to grasp the most important issues and trends in Latin American arbitration and strengthen our network for future research and events in this part of the world.

The ICC 7th conference on International Commercial Arbitration in Latin America included several panels of experts who addressed topics like the effect of the economic crises on arbitration, reports on current practices, legislation and case law, a mock case about the breach of an arbitration agreement, the development of Brazil and Mexico as forums for international arbitration, the ICC award, the interaction between international commercial arbitration and investment arbitration and ethics in the context of international and national standards.

It would be impossible to write down in a few pages the presentations, discussions and questions which made the conference such a vivid event. Nevertheless, some of the main ideas will be pointed out hereunder.

Arbitrating under Economic Distress

Initially, a group of experts assessed whether the economic crisis had affected and/or would impact in any way the use of arbitration in the years to come. John Ellison (President KPMG, LLP, United Kingdom) stated that there is not a real evidence of significant impact at this moment. The main possible reasons to explain this conclusion were that i) financial institutions tend to reach settlements between themselves; ii) parties may be delaying actions; and iii) full impact of the recession may not have worked the way through the system.

In fact, what seems to be happening is an increase of arbitration proceeding worldwide. For

instance, arbitration increased in 2008 according to the numbers of some of the most important arbitration institutions (AAA, ICC and LCIA). In the case of the ICC, some numbers are clear evidence of this tendency: 663 requests for arbitration were filed with the ICC court and they concerned 1,758 parties from 120 countries. In addition, the places of arbitration were located in 50 countries throughout the world and arbitrators of 74 nationalities were appointed or confirmed.

In summation, as expressed by Fernando Pelaez-Pier (Partner, Hoet Pelaez Catillo & Duque, Venezuela; President International Bar Association, London) arbitration keeps being a very strong mechanism to solve disputes internationally and the economic crisis has strengthened the idea of arbitration as a “strategic ally” in times of distress.

Report on Legislation and Current Practices

Peru

Fernando Cantuarias (Dean, Law School, Universidad Peruana de Ciencias Aplicadas, Peru) made a complete presentation about arbitration in Peru. This country has shown an interest in incorporating international standards in its domestic legislation. As evidence of this, it adopted the UNCITRAL Model Law in 1996. Furthermore, Peru recently decided to update its arbitration law having in mind the international experience of other countries (Germany, Spain and Austria) and some of the standards recognized by the 2006 UNCITRAL Model Law. Nowadays, Peru has one of the most modern arbitration laws (Decreto Legislativo No. 1071 de 2008) in the world. A key idea behind the reform has been to step up efforts to offer clear rules and principles to the whole arbitration community considering the increase of international trade and investment in that country.

The 2008 Act regulates arbitration in an integral manner avoiding the problems of having two set of regulations, one for domestic arbitration and another for international arbitration which still is the case for a significant number of jurisdictions. However, the Act contains some rules exclusively applicable to international arbitration whereby the parties have a roomy space for autonomy and the intervention of the judiciary is restricted to very precise and limited circumstances. Also, the formality of the arbitration agreement has been replaced for a concept in which the substance of the agreement (as long as can be proved) prevails over its form and arbitrators do not have to be lawyers.

Peru has been described as a friendly seat for national and international arbitration including cases with private parties and State entities.

Dominican Republic

Marco Peña-Rodríguez (Partner, Jimenez Cruz Peña, Dominican Republic) presented an overview about arbitration in Dominican Republic. It is important to highlight that this country has the most recent law about arbitration in the region. The Act is based on the 2006 UNCITRAL Model law and was enacted in December 2008. The Act’s main purposes are to promote domestic and international arbitration within the business community, step up the involvement of local lawyers in the field and position this country as a neutral and favorable forum for arbitration nationally and internationally.

The Act provides freedom for the parties regarding the rules of the proceedings and it is clearly stated that the Dominican State can validly agree to submit disputes to arbitration. Moreover, it

has been expressly stated that no defense on grounds of sovereign immunity can be invoked by the State. Additionally,



the Dominican State has expressed its support to promote Dominican Republic as a place for arbitration and it is expected that this country will increase its presence as an international forum.

Venezuela

Fernando Pelaez-Pier commented on the influence of the political environment on the development of arbitration in Venezuela. Initially, there is concern that the principle of judges’ impartiality is being replaced by a principle of judges’ partiality. The comment is based on the fact that the majority of the judicial power is subordinated to the executive branch and in recent decisions or interventions by the same courts.

Various courts have not played a role of collaborators in arbitration proceedings but rather a more controlling function in which the development of arbitration is subject to a good number of pitfalls through restrictive interpretations. In this sense, the bedrock of arbitration is moving away from the common principles applied internationally to the old idea of “protection of sovereignty”. In particular, the enforcement of arbitration agreements or awards has been limited under the concept of public

order and constitutionality actions seeking nullity or constitutional control. Besides, the promulgation of new laws in the hydrocarbons sector have banned or restricted the possibility to include arbitration as a way to resolve future disputes. In conclusion, the political situation has affected negatively the development of arbitration in Venezuela, in particular for foreign investments.

Brazil and Mexico: Forums for International Disputes

Yves Derains (Partner, Derains Ghavari & Lazareff, France) analyzed the possibility for Brazil and Mexico to become leading arbitration forums at an international level. The presentation included some references to cases in which he has acted as an arbitrator in these countries. Initially, it was stated that any arbitration forum that wants to have a favorable development requires two main features: (i) an adequate legal framework and (ii) a favorable environment towards arbitration.

In the case of legal framework, the two countries have modern arbitration legislations which give the parties and the arbitrators enough space to organize the proceedings as long as due process is respected. Also, both are signatories of the New York Convention. In the case of favorable environment, it was stressed that the two countries have capable people to act as arbitrators and counsel and normally courts have shown a collaborative approach to arbitration. In short, the conclusion is that Brazil and Mexico have all the features to become two leading arbitration forums in the region and internationally.

In any event, there are limitations that still exist which are part of the legal traditions and culture of each country but this is present in any country. For instance, Eduardo Siqueiros (Partner, Barrera, Siqueiros y Torres Landa SC, Mexico) mentioned that in Mexico's case the legal system allows multiple challenges against the arbitration award which delayed the enforcement process.

Finally, it was stressed that the region needs other arbitration forums and these could be the case of countries like Argentina, Colombia, Peru and Dominican Republic.

Natural Resources Disputes

Elisabeth Eljuri (Partner, Macleod Dixon, SC, Venezuela) made a very complete and interesting analysis on the arbitration of natural resources in Latin America. It was stressed that States and State Entities have the control over natural resources in Latin America. Thus, the involvement of the State raises a unique set of issues that must be addressed when considering natural resources disputes. While there are different trends and political approaches about foreign investment and arbitration in the region there is a group of politically aligned countries which is worth of note.

In the case of some oil producing countries (particularly Venezuela, Ecuador and Bolivia), they have made deliberate attempts to restrict foreign investment by international oil companies. Also, they have limited access to international arbitration. The instruments used to restrict property or contract rights of international oil companies include direct expropriation of project assets or rights under granting instruments, denial or revocation of permits required for activities authorized under the granting instrument, changes in the fiscal and regulatory landscape, forced renegotiation of contract terms and conditions and nullification or revocation of granting instruments.

On the other hand, the instruments to limit access to international arbitration have been: explicit waiver of right to international arbitration in the context of forced renegotiations, threats to cancel concessions or exclude the international oil company from future contracts if they bring international arbitration claims, refusal to incorporate commercial arbitration clauses in new contracts, constitutional amendments to eliminate or restrict international investment protections, restrictive interpretations of local legislation denying access to ICSID and denunciation or non renewal of bilateral investment treaties.

Additionally, the objections presented by States (this includes other countries) in the case of the enforcement of arbitration clauses and awards are varied including constitutional arguments, sovereign immunity, public policy, administrative contract, force majeure, change of circumstances and corruption. In this context, a careful examination of potential public policy and sovereign arguments is required when entering into a host government contract.

The Future Ahead: Hot Topics

Mark Baker (Partner, Fullbright & Jaworski LLP, Houston-USA) and Cesar Coronel (Partner Coronel & Perez Asociados, Ecuador) referred to some "hot topics" in the world of arbitration for the years to come. The topics are relevant for the arbitration community and will shape the development of this institution in the future.

Where to arbitrate investment disputes. There is a concern about the way and time that ICSID takes to resolve its disputes. The ICSID system is under scrutiny and other institutions might take a more important role on this regard.

Where to draw the line between arbitrators and counsel. There is a vivid debate about the role of these two actors in arbitration and the convenience of exchanging roles. This includes a long debate about

independence and reliability on the system.

Interest of third parties. The main question is how far should be recognized the interest of third parties and in particular in the case of investment arbitration. This issue has been object of important academic discussion and will be faced by arbitration tribunals in different cases.

Increase of arbitration. The statistics show an increasing number of cases. This is a field which will expand domestically and internationally. It requires well prepared professionals, more forums and a good legal framework.

The role for protection of investments and resources. Just as in the colonial times, it is a key element for some countries and its investors to guarantee access to resources and protection for investments. Latin America represents at this moment the natural setting where some of the most important legal boundaries on this matter will be defined.

The interaction between the principles applied in international commercial arbitration and investment arbitration. Some times international commercial arbitration and investment arbitration seems to converge in standards and practices but in others they seem to operate under different principles and paradigms. The interplay between these two institutions has not been well defined and this will have to be addressed by all the different actors involved.

Finally, AIA would like to thank the ICC and congratulate them for such a well organized and high profile conference.

IPR AND ARBITRATION- A GOOD COMBINATION?

In recent years, the legal world has seen a rise in the number of Intellectual Property (IP) disputes that are settled by arbitration and it has happened with good reasons. Where one is dealing with international IP rights (IPR) disputes involving various jurisdictions, there is a very real possibility of having different outcomes in different jurisdictions. The same issues will receive different substantive and procedural treatment from one legal system to the next. They will be decided upon by panels with varying degrees of expertise in the relevant field. Additionally, enforcement of foreign judgments receives differing treatment in different countries. For example, in China enforcement of a foreign award often faces delays and protectionism.

Arbitration gives the opportunity to resolve the dispute in a single procedure as opposed to multiple parallel procedures. Certainly this helps to save time and money. A single expert witness/group

of expert witnesses can testify instead of various experts giving testimony in the various jurisdictions involved. Similarly, the number of counsel needed is also reduced. Expertise of arbitrators in the relevant technological field would also reduce the need for many expert witnesses. Such expertise, of course, cannot be guaranteed in most jurisdictions for judges presiding over cases in court.

For IPR disputes, confidentiality is often at the heart of the matter. This is definitely the case where the dispute concerns designs or patents in its developmental stage or classified product information. Although this is not uniform in all arbitral jurisdictions, arbitration by its nature offers confidentiality to the proceedings. Through the arbitration agreement, the parties can include far-reaching confidentiality obligations. One of the most important arbitration institutions for IP disputes is the World Intellectual Property Organization (WIPO). The WIPO Arbitration Rules explicitly provide for protection of confidentiality. This is manifest in Art. 52 that contemplates the appoint of a Confidentiality Adviser who's main purpose will be to deem whether a matter in question is confidential and if so, how best to deal with it. This way, the arbitral tribunal doesn't get involved in the matter until its determination by the Confidentiality Adviser is completed.

Limited ability to appeal against an arbitration award is also a cause for its popularity. In the USA, for instance, most of the patent damages decisions do not withstand appeals and are reversed. Arbitration of the same issue would definitely provide for more certainty.

In countries such as Germany arbitration is quite likely to be more popular than litigation despite its well known low litigation costs and fast proceedings. This is due to the split in the German legal system. For patents registered in Germany and subject to German Law, issues of validity of the patent and infringement of patent must be dealt with separately in different proceedings. The district court only has the authority to adjudicate on matters of patent infringement. If it considers that there is an issue of invalidity that need to be settled, it will have to suspend the infringement proceedings upon request of the defendant who wishes to raise invalidity as a defense. The decision about suspending infringement proceedings are always based on the likelihood of success for the nullity proceedings. Invalidity actions can only ever be tried by the Federal Patent Court in Munich.

However, it is not always possible to resort to arbitration for IP matters. Arbitrability forms a hindrance here. Certain jurisdictions determine matters involving public policy as

being non-arbitrable. It is argued that where the dispute concerns issues which would affect the public at large, private adjudication is not suitable. As IPRs are created and granted by the state with the aim of furthering the economic development of the country and because factors such as educational policies and public health considerations would affect decisions regarding it, the dispute should be dealt with publicly. Determining arbitrability is always a central consideration because any enforcement of a foreign award under the 1958 New York Convention is always subject to the dispute being capable of being settled by arbitration. With this backdrop, a key factor that has to be kept in mind is that, with the exception of jurisdictions such as Switzerland, any award made by an arbitral tribunal does not affect the validity of the registered IPR. It will only ever have *intern partes* effect. In Switzerland, awards made by any arbitral tribunal registered IPRs could be struck down. Most other countries adopt a middle ground. In Japan for instance, parties are allowed to arbitrate where the matter concerns infringement of IPR but validity of IPR is not an issue that is allowed to be determined by private arbitration. Among the more liberal countries, we find the USA where any IPR dispute can be settled by arbitration, including issues about validity. The only restriction is that it only has *inter partes*. South Africa is among the strictest category of nations as it does not allow any form of IPR dispute to be determined by private arbitration.

But even if the matter is an arbitrable one and the dispute is determined by arbitration, problems can still persist. Currently, some of the fastest patent and trademark generators are Japan, China and South Korea. For arbitrations held in China, for example, there are factors that a foreign investor needs to be aware of. Arbitration tribunals are not allowed to give any interim remedies unless it is necessary to be able to implement any future award or it is needed to preserve evidence. Further, when it comes to enforcement of foreign arbitration awards, observers have noticed a tendency, on the part of the local officials, to offer protectionism to the local parties involved. In turn, this could result in a delay of enforcement or even frustrate the award given.

In international IPR arbitration, a very basic matter that could also contribute to list of cons is language. Given the complexity of the jargons in use an accurate translation could be difficult if not impossible. In many jurisdictions such as the US, the words under which the patent is granted can only be taken at face value. The consequences could be dire. What would qualify as a valid patent in one jurisdiction could easily be concluded as being invalid in another.

As a positive note, it needs to be said that the existence of the WIPO Arbitration and Mediation Centre brings IP arbitration to a new and improved standard. The WIPO arbitration rules

vigorously pursue efficient conduct of arbitration proceedings. This is further promoted by, for example, providing a specialist panel of arbitrators with expertise in technical and scientific matters within the realm of IP. Therefore costs involved are also reduced greatly. It offers a purely neutral forum for dispute settlement ensuring that it is never tainted with any appearance of protectionism towards either party involved.

In the current state, along with challenges faced in resolution of IP disputes one has to keep in mind developments such as the introduction of WIPO. Such developments will pave the way for a more consistent global approach in the resolution of international IP disputes. With the growing number of IPRs being registered worldwide and the increasing popularity of IP arbitration, this is sure to come.

THOMAS VS. CARNIVAL: HOW QUICKLY TABLES CAN TURN...ON ARBITRATION

Facts

As a general rule, lawsuits, including arbitration disputes, usually stem from an unlucky mix of coinciding circumstances or one's simple moment of misfortune. The disagreement between [Puliyurumpil Mathew Thomas v. Carnival Corporation](#), No. 08-10613 (11th Circuit Court of Appeals, July 1, 2009) is not different. On November 8, 2004, Thomas, head waiter on the 'Imagination', one of Carnival Corporation's Panamanian cruise ships that operated in Florida waters, slipped and fell on a wet spot in one of the ship's dining rooms. Not only did he injure his spine and right shoulder because of the fall, but he also burned his leg with hot coffee contained in the pot he unfortunately dropped. In the absence of an arbitration clause in the contract at that date in the existing Seafarer's Agreement between Thomas and Carnival, Thomas subsequently sued his employer for negligence. This was based on a lack of medical care he claimed to have received from the onboard doctor, failure to provide prompt and adequate maintenance and cure under general maritime law of the United States and failure to pay wages under the Seaman's Wage Act. All claims were asserted under the Jones Act.

After attempting to retain his position as waiter on board the Imagination in October 2005, Thomas concluded a new Seafarer's Agreement with Carnival, this time including an arbitration clause that assigned the Philippines as the appropriate arbitration venue and Panamanian law as the applicable rules to resolve any dispute between

employer and employee. Only two months later, the onboard physician rendered Thomas unfit for continuing his duties, triggering his medical sign-off with a \$700 payment and three months' worth of maintenance and cure payments.

Separating the arbitrable from the non-arbitrable vs. judiciary efficiency

In first instance, Florida district court compelled arbitration upon both parties, but it was not free from controversy. Thomas appealed against this decision arguing the non-existence, at the time of the accident, of a written arbitration clause in the first Seafarer's Agreement, rendering the New York Convention inapplicable and leaving Carnival's hopes on enforcing a future Panamanian arbitral award in the US shattered. Carnival's defense stated that the new Seafarer's Agreement governs the present dispute since the claim was brought after the signing of the later Agreement. The 11th District Court of Appeals dissected the question by putting a burden of proof on Carnival to establish some form of connection between Thomas' claims and the arbitration clause in the new Seafarer's Agreement, irrespective of the links between his claims and the employment or the incident that occurred on the ship. On that ground, the Court of Appeals did not consider the claim for negligence as falling under the arbitration clause's scope.

Furthermore, the Court ordered that Carnival's maintenance and cure obligations under the old Seafarer's Agreement had not yet expired because of Thomas' unsuccessful attempts to retain his working position. In fact, these obligations should be carried by Carnival until the moment Thomas would have been put in a pre-accident position, *quod numquam*. For that reason, the Court found these obligations as an integrated part of the old Seafarer's Agreement and not of the new one, leaving the arbitration clause ineffective.

With regards to Thomas' wage claims, the Court of Appeals simply divided those made for the payments due before the signing of the new Seafarer's Agreement and those made after, compelling arbitration only on the latter claims due to their immediate link with the new Agreement. Although the Florida appellate court cancelled most of what the first instance pro-arbitration District Court ordered it is somewhat unclear whether or not the 11th District Court of Appeals is contra-arbitration. Simultaneously the latter court endangered judiciary efficiency by artificially separating arbitrable from non-arbitrable legal disputes.

How arbitrable wage claims under US statutory law become unarbitrable under Panamanian law

To remove all doubts on the Court's position on arbitration as an

ADR-tool, it ruled that even the isolated claim for wage payments regarding the period after signing the new Seafarer's Agreement was not arbitrable. Following the US Supreme Court's older Mitsubishi and Vimar case law, the Court was of the opinion that an arbitration clause should be rendered null and void if it could be interpreted as a prospective waiver of one party's right to pursue statutory remedies – *in casu* the wage claims under the Seaman's Wage Act – without having some form of assurance of a subsequent opportunity for judicial review. Although the mere choice to arbitrate in a foreign country, such as the Philippines, does not automatically lead to the non-applicability of US statutory law, an explicit choice-of-law-clause, such as the Panamanian one present in the new Seafarer's Agreement, however, constitutes a waiver of Thomas' statutory remedies under the US Seaman's Wage Act and is therefore in direct violation of US public policy.

For that reason, the Court of Appeals had chosen not to enforce the arbitration clause, thereby turning the first instance court's judgment around by 180 degrees. The debate on whether or not a choice-of-law-clause applying non-US law constitutes a violation of public policy once it hampers with US citizens' statutory remedies seems to have been decided in favor of arbitration skeptics. The question remains, however, to what extent this Court ruling will impede on future commercial arbitrations. Although the Court's judgment can be respected from an employer's point of view, it risks being transposed to more commercial areas of law as well, hereby endangering the enforcement in the US of arbitral awards made under non-US law.

Equally regretful, the Court based its appellate judgment on article V of the New York Convention that only governs the actual enforcement of an arbitral award that has already been made and its alignment with the public policy of the country where the enforcement is sought. What the Court should have used as a responsible ground for the reversal of the first instance's order to compel arbitration, is article II (3) of the New York Convention that explicitly orders national courts to refuse the referral to arbitration in case the arbitration agreement is null and void, i.e. because of a violation of that nation's public policy.