Association for International Arbitration
In Touch

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CONTACT US:
146, Avenue Louise
B-1050 Brussels
Belgium
Fax: +32 2 646 24 31
Tel: +32 2 643 33 01
Email:
administration@arbitration-adr.org

AIA Upcoming Events

- Conference on **The UNCITRAL Model Law on International Commercial Arbitration: 25 years** organized by the Association for International Arbitration in Brussels, Belgium. June 4, 2010
- Conference on **The Most Favored Nation Treatment of Substantive Rights** organized by the Association for International Arbitration in Brussels, Belgium. October 22, 2010

For further information on conferences organized by the Association for International Arbitration in Brussels, Belgium, please visit our web site

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Inside this month's issue:

Ireland Reinforces Arbitration Regime 1

European Enforcement of Arbitration Agreements in Insolvency: Which law applies after Syska v Vivendi? 3

Restoring Investor Confidence: Arbitration During the Financial Crisis. 5

ICSID's Ad hoc Committees and Inherent Powers. 6

China and Latin America: Boosting Confidence, Prevailing the Crisis, and Collaborative Development 8

Amendment of an ICDR Award: T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc. 8

Ireland Reinforces Arbitration Regime

By Joe Kelly, Partner and Siobhan Kirrane, Solicitor, A&L Goodbody

Dublin Castle, location of 50th Anniversary Conference.

Ireland is completing the enactment of significant Arbitration legislation. The changes are likely to be in force by March 2010 at the latest. The initiative reflects the Irish Government's consistent support for arbitration processes, support also shown by the Irish judiciary. The legislation addresses an issue discussed at the International Council for Commercial Arbitration Conference, held in Dublin to celebrate the 50th anniversary of the signing of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Ireland had already adopted the United Nations Convention on International Trade Law ("**UNCITRAL**") Model Law on International Commercial Arbitration ("**Model Law**"). The legislation builds on codifying earlier legislation and removing redundant legislative distinctions between domestic and international arbitration. Previously, Irish law allowed for applications to the High Court by way of a case stated procedure, but these provisions are being repealed. The opportunities for parties to seek judicial intervention in arbitration proceedings will be severely curtailed, in keeping with the Model Law.

The legislation includes the entire text of the Model Law and will be instantly recognizable to lawyers from other jurisdictions. It will repeal and replace the Arbitration Act 1954, the Arbitration Act 1980 and the Arbitration (International Commercial) Act 1998. Historically, there was a separate legislative framework for domestic and international commercial arbitration. The new legislation will apply the Model Law to all arbitration proceedings in Ireland.

Since the new law will apply to all arbitration proceedings which commence after the legislation comes into force, it is vital that Irish practitioners and arbitrators become familiar with the changes.

Model Law

The Model Law has been adopted by more than 50 countries and covers all stages of the arbitral process. Although originally primarily designed for international commercial arbitration in mind, other countries such as Germany, New Zealand, and Kenya have extended it to the domestic arbitrations. Ireland originally adopted the Model Law in the Arbitration (International Commercial) Act 1998, but only for international commercial arbitrations.

Significant Changes to Irish Arbitration Law:

1. Domestic/International Arbitrations

There will be no difference between the legislative provisions relating to domestic arbitrations and international arbitrations. Irish practitioners will need to be familiar with the Model Law and this will be particularly useful when advising on contractual arbitration clauses, particularly those which have an international dimension.

2. Case Stated

The 'case stated' procedure is being abolished. Arbitrators will no longer be able to refer to the Courts a question of law arising in the course of the arbitration. The change reflects a perception that the case stated procedure might be used by parties to slow down an arbitration. The change is intended to strengthen the integrity of the arbitration process. In appropriate circumstances, it remains open to an arbitrator to seek independent advice if necessary in relation to a point of law arising in the arbitration.

The removal of the case stated procedure and significant reduction of the scope for judicial intervention is likely to lead to an increased focus on the choice of arbitrators and appointment mechanisms and requirements.

3. Challenging an Award

The only method of challenging an arbitral award will be under Article 34 of the Model Law. The grounds are extremely limited and the new legislation will make it far more difficult to challenge an arbitral award than currently is the case. The Model Law grounds of challenge have been interpreted narrowly in other jurisdictions, and the Irish Courts are likely to adopt a similar approach, in keeping with their approach to arbitration generally.

4. Jurisprudence

The application of the Model Law for all Irish arbitrations will mean that Irish arbitration practitioners can avail of the wealth of international jurisprudence concerning the Model Law.

5. Reasons

The arbitrator will be required to give reasons for his award unless the parties have agreed otherwise (Article 31(2) of the Model Law). This is a change to the default position. The requirement for a reasoned award imposes an additional rigor on the arbitrator.

6. Costs

The Bill allows the parties to agree on the allocation of costs either before or after the dispute has arisen (Section 21). The previous legislation provided that any such agreement on costs was only binding if it was reached after the dispute had arisen.

7. Consumer Claims

Consumer claims under €5,000 will not be covered by arbitration agreements unless the consumer agrees to go to arbitration after the dispute has arisen or the agreement has been individually negotiated (Section 31).

8. Single Arbitration Judge

The Bill introduces the concept of a single arbitration judge (Section 9) to deal with any applications. One judge will develop a particular expertise in issues involving arbitration. This should ensure a consistent judicial approach, and will also reduce the risk that parties might inappropriately seek judicial intervention in an attempt to delay or obstruct arbitration processes.

Furthermore, and exceptionally, there is no right of appeal to the Supreme Court from the High Court in respect of applications under the new legislation – the High Court is the court of final jurisdiction in that regard.

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European Enforcement of Arbitration Agreements in Insolvency: Which law applies after *Syska v. Vivendi*?

Where a secured or unsecured creditor C has commenced arbitral proceedings against its debtor D in one Member State of the European Union to enforce its claim, the question arises whether or not C is allowed to continue those proceedings once D has consecutively been declared insolvent in another Member State. Only where actions (legal or arbitral) are brought to determine the existence, validity, content, or amount of a creditor claim, will art. 15 of the Insolvency Regulation appoint the lex loci arbitri as the applicable law to the consequences of the insolvency to the continuation of the arbitration or lawsuit.

Since the enactment of the European Insolvency Regulation nr. 1346 on May 29, 2000 scholars have been struggling to assess its repercussions for arbitrations being conducted in one Member State of the European Union while in another Member state an insolvency procedure involving one of the parties to the arbitration agreement was commencing. One question that serves as a permanent background issue is which law should apply to the consequences of the commenced insolvency to that pending arbitration: the law of the seat of arbitration (*lex fori arbitri*) or the law of the country where the insolvency procedure was opened (*lex fori concursus*)? In general, the latter should apply to the consequences of the insolvency on all its internal matters, such as the respective powers of the debtor and the liquidator within the insolvency (art. 4(2)(c) Insolvency Regulation). However, art. 15 of the Insolvency Regulation designates the *lex fori arbitri* or *lex fori processus* as the law applicable to the consequences of the insolvency on a pending lawsuit or arbitration regarding assets divested by the insolvent party. It states that: "*The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending*." [emphasis added]

Syska v Vivendi: Facts

In *Jozef Syska (acting as the Administrator of Elektrim S.A) v Vivendi Universal S.A.*, the UK courts have had the chance to bring forward their opinion on the extent of art. 15 of the Insolvency Regulation. Vivendi Universal and Vivendi Telecom concluded an investment agreement with the Polish company Elektrim in order to acquire an interest in PTC (at the time a subsidiary of Elektrim). The share purchase agreement contained an arbitration clause to arbitrate in the auspices of the London Court of International Arbitration in London, UK (LCIA). Although the investment agreement was explicitly governed by Polish law, the parties chose English law to apply to the disputes concerning the arbitration agreement itself. After alleging that Elektrim breached its obligations under the share purchase agreement by interfering with, or failing to secure, the interest that Vivendi was supposed to obtain in PTC, Vivendi commenced arbitration proceedings at the LCIA for € 1,9 billion. Subsequently, Elektrim was declared bankrupt by an order of the Warsaw District Court pursuant to its own petition after which the Polish insolvency court appointed Jozef Syska as the administrator for Elektrim.

Elektrim filed a counterclaim before the arbitral tribunal stating that the commencement of insolvency proceedings in Poland deprived the London arbitral tribunal of any jurisdiction to decide on Vivendi's claim. In an interim partial award, however, the arbitral tribunal upheld its jurisdiction and declared Elektrim in breach of contract.

Syska v Vivendi: *lex loci arbitri* applies

During the ongoing arbitration procedure, Syska pursued legal action in England. It demanded an anti-suit injunction against Vivendi ordering it to stop continuing the arbitration claim in front of the LCIA. In first instance, however, the Queen's Bench Division did not follow suit and upheld the jurisdiction of the arbitral tribunal. More importantly, Christopher Clarke J applied English law to the question of which law should govern the consequences of the insolvency procedure commenced in Poland to the ongoing arbitration dispute in England. In effect, it confirmed the clear wording of the Insolvency Regulation. The conflict of laws provisions favouring the *lex loci concursus* in art. 4.2 were treated as *lex generalis*, the exception to which is provided in art. 15 that ambiguously favours the *lex loci arbitri* and should be treated as *lex specialis*.

The Court of Appeal confirmed the conclusion reached by the Queen's Bench Division but clarified Christopher Clarke J's reasoning. It was found logical to apply the *lex loci arbitri* in-

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stead of the *lex loci concursus* to determine whether or not the pending arbitration in front of the LCIA needed to be stayed or could continue. According to the Court of Appeal, applying the *lex loci arbitri* is necessary 'to protect the legitimate expectations and the certainty of transactions in the Member State other than that in which insolvency proceedings are opened, including the expectation of businessmen that lawsuits should come to an appropriate conclusion'. Using English law as the *lex loci arbitri*, the judges reached the decision to confirm the arbitral tribunal's jurisdiction and denying Syska's claim to have the arbitration agreement annulled. The commencement of the insolvency proceedings did not render the arbitration agreement void or inoperable.

More difficult to answer is the question of what kind of creditor claims trigger the conflict of laws provision in art. 15 of the Insolvency Regulation. The wording of art. 15 only appoints the *lex loci processus* in case of an already 'pending lawsuit' before the commencement of insolvency proceedings in another Member State. The Court of Appeal sought a definition of such a 'pending lawsuit' but decided to give the wording a very narrow scope. Only where actions (legal or arbitral) are brought to determine the existence, validity, content, or amount of a creditor claim, will art. 15 of the Insolvency Regulation appoint the *lex loci arbitri* as the applicable law to the consequences of the insolvency to the continuation of the arbitration or lawsuit. Claims such as these do no more than allow a creditor to join the existing body of creditors with an established claim. Protection of the debtor by its own insolvency law would be redundant since such a claim does not seek to seize specified assets of the debtor, unlike individual enforcement actions. For claims of the latter sort, the *lex fori concursus* would apply. The Court of Appeal found that a debtor needs protection from its own insolvency law against individual enforcement claims to secure the insolvency law principles of collective action and prohibition on individual enforcement.

Lex loci arbitri versus parties' chosen law

Although the English courts have decided in favor of the *lex loci arbitri*, the question remains open to what extent it remains applicable if the parties (creditor and debtor) choose a different law to govern, amongst other things, the existence, validity and scope of the arbitration agreement. In essence, it brings up the question to what extent the parties' chosen law, e.g. German law, would cross paths with the mandatory appointed *lex fori arbitri*, e.g. English law, concerning the consequences of the insolvency commenced in one Member State on the pending arbitration in another Member State. More importantly for the parties, it is paramount to consider what repercussions their 'choice of law' clause will have on the future of their pending arbitration proceedings. Will they be stayed under German insolvency law or are they allowed to continue under English law? Or should the general rule of excluding insolvency disputes from the scope of arbitration agreements prevail so that the pending arbitration proceedings are dismissed altogether? The English courts did not answer any of these questions in Syska v. Vivendi, partially because Elektrim and Vivendi had already chosen English law to govern any dispute concerning the arbitration agreement, hereby not deviating from the *lex loci arbitri*. Several hypotheses are possible where *lex loci arbitri* and the parties' chosen law collide:

First of all, if the *lex loci arbitri* were to exclude insolvency disputes entirely from the scope of arbitrable disputes in its country, allowing the insolvency court to disregard the parties' choice of a different applicable law would lead to the dismissal of the entire arbitration claim. This would leave no room for a potential and less intrusive stay of the proceedings. Even if the parties' choice of law were to be upheld, one could argue that the mandatory appointment of the *lex loci arbitri* under art. 15 of the Insolvency Regulation should still prevail over the potentially more favourable arbitration law provisions upon which the parties agreed.

Secondly, if the *lex fori arbitri* were to initially exclude insolvency disputes from the scope of arbitrable disputes in its country, but at the same time only order a stay of pending arbitrations in the event of an insolvency, allowing the national insolvency court to disregard the parties' chosen law would still leave the arbitration agreement intact as a foundation for an arbitral tribunal's jurisdiction. In fact, the arbitration agreement would be found existent, valid and arbitrable under the *lex fori arbitri*, but the proceedings would simply be stayed until after the end of the insolvency procedure. If the law agreed upon by the parties were to be taken into account, however, multiple questions arise as to the extent to which that law should be applied. Would it only apply to the questions of existence and validity of the arbitration agreement, leaving the question of arbitrability and scope of the arbitration agreement to the *lex loci arbitri*? Or

should the parties' choice of law induce a two-stage test, where issues of existence, validity and arbitrability could all be dealt with under the agreed law as an initial step? If, on the one hand, such issues proved to be troublesome, the arbitration agreement could be declared void and the entire arbitration proceeding would be dismissed under the parties' agreed law without being stayed and without applying the *lex loci arbitri*. If, on the other hand, the arbitration agreement is found to be existent, valid and arbitrable under the parties' chosen law, the second stage of the test could still allow the *lex loci arbitri* to obstruct the arbitration by staying the procedure until the insolvency is finalised.

Thirdly, in the case that the *lex fori arbitri* does not exclude insolvency disputes from the scope of arbitrable disputes in its country nor order a stay of pending arbitrations in the event of an insolvency, allowing the national insolvency court in one Member State to disregard the parties' choice of law will not hinder the continuance of the arbitration in the other Member State. However, once the parties' chosen law is taken into account for the questions concerning the existence, validity and arbitrability of the arbitration agreement, the pending arbitration could face three possible outcomes depending on the content of the law upon which the parties have agreed. First and least problematic of all, the arbitration agreement can be found existent, valid and arbitrable under the chosen law, allowing the arbitration to continue according to plan. Second, the parties' chosen law can find the arbitration agreement existent, valid but not arbitrable because it prohibits insolvency disputes to be arbitrated. This hypothesis would induce a conflict between the parties' chosen law ordering the arbitration to be entirely dismissed and the *lex loci arbitri* allowing the arbitration to continue. Lastly, if the parties' preferred law makes an exception to that arbitrability prohibition by ordering a temporary stay of the arbitral proceedings until after the insolvency, another conflict would arise. On the one hand, the law upon which the parties have expressly agreed to deal with the arbitrability issues of their contract would order a stay, whereas the application of the *lex loci arbitri* would, on the other hand, force both parties to continue the arbitration.

By constructing these hypotheses, it becomes clear what potential risks parties to an arbitration agreement can incur by not knowing under which law the arbitrability of their agreement will be settled and to which far-reaching consequences this legal uncertainty might lead. A pending arbitration procedure discussing a claim of a creditor who simply wants to have its claim confirmed through an arbitration procedure instead of an insolvency court verification procedure could end up dismissed under the law of one Member State, stayed in another or continued in yet another Member State. From this a secondary more policy-related question arises: could or should the parties themselves assess the aforementioned risks by more carefully choosing their seat of arbitration, hereby encouraging 'forum-shopping'? It is rather peculiar that, on the one hand, parties would possibly not be able to execute their choice of applicable law to their arbitrability disputes, while on the other hand they are still allowed to agree upon a venue to which art. 15 of the Insolvency Regulation will attach the applicability of that country's law from the moment the sword of an insolvent Damocles drops.

Restoring Investor Confidence: Arbitration During the Financial Crisis

Historically, it is common for the number of commercial disputes to increase during economic crises as the financial environment worsens. The recent financial crisis presents an even greater challenge to the business world given the height in both the number and complexity of current investment disputes. Both consumers and companies are filing claims as they strive for liquid funds and financial security. Financial institutions are suing one another as they attempt to unravel numerous credit transactions and companies are looking to retract from undesirable contracts. Similarly, the lack of consumer confidence has caused an overwhelming amount of investors to withdrawal from transactions they had entered into the past during more sound economic times.

Parties in conflict are discouraged from seeking litigators to carry out their disputes in courts because of the high volume of cases and the complexity of the issues. Thus, there has been a dramatic increase in the number of arbitration cases filed, and it has been steadily increasing as the crisis continues to dismantle future and former investment treaties. The upturn in arbitral proceedings is seen across several major arbitration institutions worldwide. But, the most shocking story is that of FINRA, the largest independent securities regulator in the US. It has reported that 6,113 complaints

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have been filed in the first ten months of 2009 alone. This is a 23% increase over the total number of complaints filed in all of 2008.

Nevertheless, not all institutions have seen this dramatic upsurge. For example, ICSID actually reported a drop in arbitration cases. It is entirely possible that many increases are due simply to the continuing growth in popularity of arbitration as a means for dispute settlement. While arbitration is frequently sought for its expediency, there is a danger that the influx of complaints due to the economic downturn could delay proceedings. However, arbitration remains a positive means for dispute resolution given the nature of the financial crisis and so-called crisis of confidence.

Currently financial institutions struggle to remain solvent and must compete to appear attractive to investors. Any further negative publicity will worsen the crisis of confidence, and is therefore best avoided Investors must be assured their assets are liquid for the crisis of confidence to dissolve and there can be a return of healthy transactions. Given the nature of the crisis, the parties' incentives are more likely to align if they are granted the confidentiality of arbitral proceedings. Similarly, many claimants are in situations that require a fast, cheaper alternative to court. Because financial damage inflicted is so severe, it is unrealistic for investors to pay the high costs of litigation. Thus, the expediency of arbitration offers them a quick path towards liquidity.

The financial crisis may be dissipating, but it has left investor confidence delicate. While arbitration institutions may struggle with an abundance of claims, ad hoc arbitration is a viable option for parties to receive the administered processes in a timely manner. The ability to structure a process that works based on the particular circumstances can be advantageous to a demarcated institutional model. Arbitration on an ad hoc basis provides the means for settling investment disputes that offers the parties autonomy and flexibility. They will also be valued for their promptness if the trend in complaints continues as it has. In a frail commercial atmosphere, they will be valuable and necessary to restore investors' optimism and promote financial relationships Consequently, arbitrators will indeed have their hands full in 2010.

ICSID's Ad hoc Committees and Inherent Powers

In December 2009, an ad hoc committee made a decision on the application for a preliminary ruling in the annulment proceeding between RSM Production Corporation (Applicant) and Grenada (Respondent). In this case, there is an interesting analysis regarding the jurisdiction of ad-hoc committees under the ICSID Convention. In particular, the decision elaborates on the idea of inherent powers by international courts and tribunals and how this could be understood under ICSID's self-contained system of arbitration.

Background

In 1996, RSM Production Corporation (RSM) and Grenada closed a long-term arrangement for the exploration and potential extraction of oil and gas reserves. As a first step, RSM was granted an opportunity to apply for an exploration license within 90 days of signing the agreement. Fourteen days after the agreement was signed, RSM made used of a broadly worded force majeure clause which allowed RSM to delay its application for the exploration license. The critical point of the dispute was when RSM ended its declaration of force majeure, and in turn, at what point the 90_-day countdown resumed, having in mind that RSM had sent two letters revoking force majeure on different dates to different government bodies of Grenada. As a result, the Tribunal concluded that the 1996 agreement either lapsed as of the end of March 2004 (taking into account the 14 days that elapsed in 1996 and the RSM's first letter revoking force majeure); when the 90-day period ran out; or when it was lawfully terminated by Grenada in 2005.

On 26 June 2009, RSM submitted a Request for Annulment to the ICSID Secretariat pursuant to article 52(1) of the ICSID Convention, requesting the annulment of the Award of 13 March 2009 rendered by the Tribunal in the arbitration proceeding between the same parties. Additionally, RSM requested the Ad hoc Committee investigate suspected corruption in the contract underlying the present dispute at the procedural hearing and on a written application, both in October 2009. RMS inferred that Grenada's denial of the Applicant's application for an exploration license and Grenada subsequent termination of the 1996 agreement was motivated by an alleged bribe that was paid, or was to be paid, to the then-Attorney General of Grenada by a third party. To

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support the jurisdiction of the Ad hoc Committee on this corruption ground, the Applicant explained that the Committee possessed an inherent jurisdiction to investigate allegations of bribery, which it described as contrary to "accepted norms of international public policy" and a "universal norm of international law". RSM supported that the Committee had an inherent jurisdiction in this case and mentioned that "international tribunals have jurisdiction to make inquiries and decisions beyond the scope of their technical mandate where circumstances so require".

The Committee's Views and Decision

Inherent Powers. The Committee agreed with RSM that international courts and tribunals have certain inherent powers which permit them to exercise power that may go beyond the express terms of their constitutive instruments, However, the Committee considered that international courts and tribunals can only exercise such power where those powers are necessary to ensure the performance of functions that have been expressly conferred. Furthermore, it expressed that there are limitations on the exercise of inherent powers, including that such powers cannot be inconsistent with the terms of the relevant constitutive instrument of the international tribunal.

Previous cases. The Committee referred to two previous arbitral decisions which dealt with the power of international courts and tribunals to reopen a case for newly discovered evidence. The decisions were *Ram International Industries, Inc. v Air Force of Iran* and *UNCITRAL Tribunal in Biloune and Marine Drive Complex Ltd. v Ghana Investment Centre and the Government of Ghana*. The Committee considered the relevance of those decisions and concluded that, in the present case, the application had not been made to the original tribunal which determined the merits of the dispute and RSM had not argued that the Award was the product of false testimony or fraud.

ICSID post-award phase. The Committee referred to the procedural powers of ICSID Tribunals in the post-award phase. It mentioned that the ICSID Convention and the ICSID Arbitration Rules establish the power of rectification (Article 49(2)), the power to issue a supplementary award (Article 49(2)), the power of interpretation (Article 50(1)), and the power of revision (Article 51(1)). It also explained that these powers are to be exercised by the original Tribunal which determined the merits of the dispute, and can only be exercised within certain stipulated time periods. Also, it stated that ICSID Convention Article 51 expressly enable either party to apply to the original Tribunal for the revision of the award "on the ground of the discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence".

Further, the Committee noted that in addition to those post -award powers of the original Tribunal, the ICSID Convention provides that either party can request the annulment of an award. It mentioned that Article 52 sets out five grounds on which a request for annulment may be based and the fact that they are exhaustive. However, it stressed that "an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their promise the record before the Tribunal".

Decision. In summary, the Ad hoc Committee decided that the application was outside of its jurisdiction and rejected it entirely.

Comment

While the "inherent powers" doctrine was recognized as an important tool for international courts under certain special circumstances, it cannot be used as an instrument to add a new form of review by an ICSID's Committee over a previous Tribunal's decision. Further, it should not be used as a way to present new arguments on fact and law that a party failed to put forward in the original arbitration proceeding. Neither should it be an instrument for a party to adopt a new position which is inconsistent with that which it expressly took before the Tribunal.

The procedural powers conferred on ad hoc committees have been narrowly defined in accordance with the ICSID Convention in order to determinate disputes. The jurisdictional mandate is exhaustively stated by the five grounds for annulment incorporated in article 52 of the ICSID Convention. Therefore, the inherent powers for ad hoc committees could not be extended or interpreted beyond the "five corners".

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China and Latin America: Boosting Confidence, Prevailing the Crisis, and Collaborative Development

III China –Latin America Business Summit - Bogotá

On the 25th of November, 2009, the Third China –Latin America Business Summit was held in Bogotá, Colombia with the presence of business representatives, political leaders, promoting organizations, and scholars.

The main theme of the summit was "Boosting Confidence, Prevailing Crisis, and Further Promoting Collaborative Development of China and Latin– America". According to the information of the summit there has been a considerable increase in trade between China and Latin America between the years 2000 and 2008.

To the date, 3 summits have taken place by several countries for the promotion of commerce between these two regions. The first summit took place on November 27, 2007 in Santiago de Chile and the second summit took place on October 20, 2008 in Harbin.

The Third China –Latin America Business Summit was carried out with a great success, and created a great expectation among all participants.

Among the many issues addressed by this summit the promotion of mechanisms to resolve commercial disputes arising between parties involved in commerce between the two regions has caused a great interest.

Arbitration and conciliation were recognized as effective mechanisms to resolve conflicts and were broadly supported.

Although the promoting entities of summit remain in full awareness of the difficulties surrounding this task, they subscribed under the document called *Declaration of Bogota* to promote the legal framework in conflict resolution.

A memorandum of understanding was also subscribed between the China Council for the Promotion of International Commerce—CCPIT and the Chamber of commerce of Bogotá - CCB to promote business cooperation in the future.

Hopefully, the often criticized gap between the western arbitration and Chinese arbitration law may find a meeting point with these efforts, and provide a secure environment for investors.

The results of these commitments will be assessed in the Fourth Business Summit which is programmed to take place in China.

Amendment of an ICDR Award: *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*

In a motion to vacate an arbitral award, the district court's order affirming the arbitrator's original award and vacating subsequent amendments to the award by the arbitrator is affirmed in part where the award did not manifestly disregard the law because the arbitrator's process of calculating damages constituted a reasonable interpretation of the legal distinction between the diminution-in-value damages that were available to respondent under the N.Y. U.C.C. and the consequential damages that were excluded by the parties' contracts. However, the order is reversed in part where the district court erred in applying the functus officio doctrine to the arbitrator, as the arbitrator was acting on the parties' petitions for reconsideration, and he revised the award pursuant to his interpretation of the arbitral rules under which the parties had agreed the arbitration would be conducted.

Background

The arbitral award concerned a dispute over allegedly defective steel pipe that T.Co Metals, LLC (seller) delivered to Dempsey Pipe & Supply, Inc (buyer) in accordance to the terms of two sales contracts engaged into by the parties. The arbitration procedure was conducted according to the procedure rules of the International Center for Dispute Resolution (ICDR) of the American Arbitration Association.

A petition was brought by the parties to the arbitrator to amend the award pursuant to ICDR article 30 (1). The arbitrator accepted some of the requested changes and ordered the amendment of the original award. As a result, a second award was issued. Both parties then filed petitions before the district court to modify or to vacate the amended award. T.Co. Metals, alleged that the arbitrators' decision to award diminution damages to Dempsey constituted *manifest disregard of the law*, requiring that portion to be vacated. On the other hand,

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Dempsey argued that the arbitrator exceeded its authority because the corrections were not related to clerical errors within the meaning of ICDR article 30 (1).

On July 8, 2008 the district court issued a decision rejecting T.Co Metals's manifest disregard argument and accepting Dempsey contention that the arbitrator lacked the authority to correct the award, adding that to do so would violate the *functus officio* doctrine.

Discussion

Manifest Disregard. The court acknowledges that manifest disregard remains a valid ground for vacating arbitration awards, but agrees with the district court's refusal to vacate the arbitrator's damage award to Dempsey on the ground of manifest disregard. The court considered that when assessing damages in the arbitration proceeding, the arbitrator engaged in determining the value differential component of the buyer's total loss, not the subjective lost profits and lost business opportunities. It further considered that this process of calculating damages constituted a reasonable interpretation of the legal distinction between the diminution-in-value damages under the N.Y. U.C.C. and the consequential damages excluded by the parties' contracts.

Attorney fees. On June 3 2009, Dempsey had filed a motion requesting to award reasonable attorneys fees based on its contention that the seller's manifest disregard claim is frivolous. However, the court considered that the issue was not clear enough to prevent discussion and stated that it could not be concluded that the manifest disregard argument of T.Co. Metals was not lacking in merit as to warrant the award of legal fees.

Functus Officio Doctrine. In regards to whether the arbitrator exceeded his powers in reconsidering the original award the court concludes that the district court erred in applying the *functus officio* doctrine to the arbitrator, as the arbitrator was acting on the parties' request for reconsideration and did not exceed his powers by revising the original award in a way consistent with his interpretation of his reconsideration authority under ICDR article 30 (1).

The court reverses the district court's decision confirming the original award and remands with instructions that, upon application, the amended award should be confirmed.

Comment

The court's order to reverse the district court's decision is based on the premise that there was an erroneous application of the *functus officio* principle. This is mainly supported on the court's assumption that the arbitrator was empowered by the parties who displayed an unmistakable intent to submit the question to arbitration.

However, the existence of such intent causes controversy and the grounds to sustain that the arbitrator was empowered to amend the award are not clear.

Given that the existence of an agreement is one of the court's main arguments, the question at stake is: Where is this agreement made?

Article 30(1) of the ICDR rules, provides that "any party, with notice to the other parties, may request the tribunal to interpret the award or correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award".

From the lecture of Article 30(1) of the ICDR rules, one cannot necessarily conclude that the parties could expect a broad amendment of an award or the reassessment of the merits of the award. Furthermore, an agreement is not even necessary to bring about the correction of an award. Under the article, it is sufficient that the requesting party give notice to the others parties.

According to the court, the arbitrator was fully empowered by the fact that the parties had decided to conduct the arbitration under ICDR rules and the *functus officio principle* is only applicable when these powers cease. This necessarily would imply that when adopting ICDR rules, the parties agree to submit to arbitration the correction of an award to the same extent as they agree to submit their arising disputes, a conclusion that provides no certainty to them.

Under these circumstances, where is there a safe path in case of accordance to the merits of an award that is affected by clerical, typographical or computation errors? Does adopting ICDR rules still allow to take the issue before the district court as provided under FAA Section 11 and will the *functus officio* doctrine be then applicable?

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