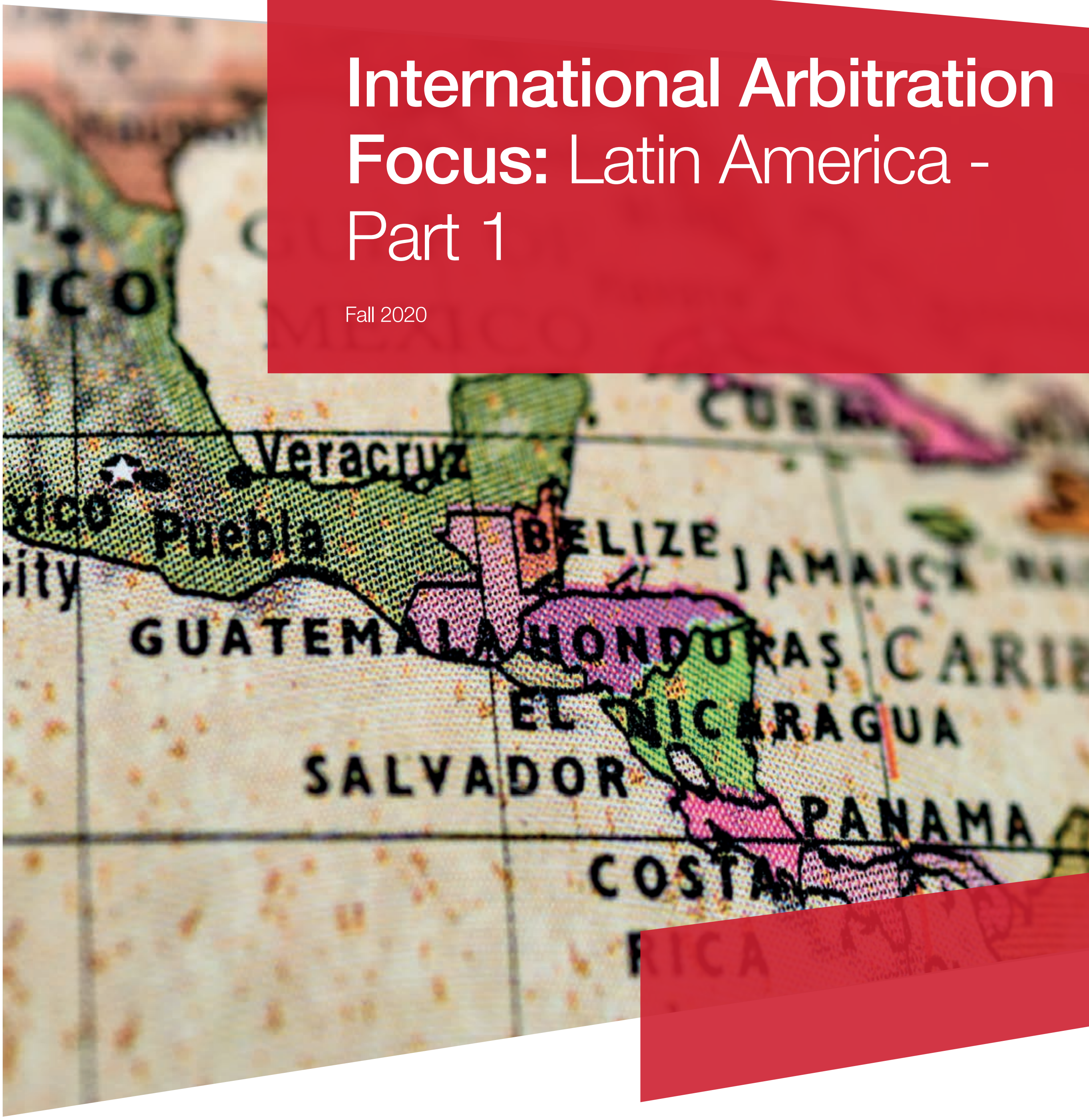
International Arbitration Focus: Latin America - Part 1

Fall 2020



ReedSmith

Driving progress
through partnership

Contents

Welcome

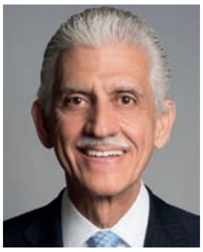
Welcome to the latest issue of Reed Smith's newsletter on international arbitration.

As mentioned in previous issues, we are mindful that there is no shortage of arbitration newsletters – we hope you find our editions different.

In keeping with the firm's strategic focus on our clients' key geographical regions and our five focus industries – energy and natural resources, life sciences, transportation, financial services, and entertainment and media – each Reed Smith newsletter has a theme. Our prior issues have focused on themes such as arbitration in Asia and investor-state arbitration.

This one focuses on arbitration issues in Latin America, a diverse, far-flung region in which arbitration is widely used and in which our firm has a broad and long-standing arbitration practice – so we had no shortage of topics from which to choose. Given the scope of the region and our practice in it, we have decided to devote more than one issue to the region, this one being just the first, with more to come in the future.

We hope you will find the newsletter to be of value and, as always, would welcome your feedback.



José Astigarraga
Global Chair – International Arbitration
Miami
+1 786 747 0202
jia@reedsmith.com

Note from the Editors

Bienvenidos to the third issue of *International Arbitration Focus*: Latin America - Part 1.

Referring to an area as a whole is always tricky. Latin America is far from a homogeneous unit, with each country in the region having a distinct legal system and approach to international arbitration. Despite these differences, however, common trends can be discerned. In this issue, we take a regional focus on some of the issues that are most prevalent in the Latin American region.

We start with Chloe Carswell, Lucian Ilie, Ben Love, Francisco Rivero, Nicolas Borda, Danny Avila and Alejandro Agredano, who take an in-depth look at some of the recent measures Mexico has taken in the renewable energy sector and their potential implications for foreign investors. The authors consider how these measures may give rise to investment treaty claims in the future and the manner in which those claims may be formulated by the investor, as well as possible defenses which may be available to Mexico.

Marine de Bailleul then considers some of the recent challenges facing the natural resource industries in Latin America and the increasing use of international arbitration as a mechanism to resolve cross-border disputes. Marine examines some of the recent commercial and investor-state arbitration awards emanating from Latin America and some of the regulatory measures which may give rise to future claims.

Next, Sujey Herrera details some of the important considerations for enforcement of arbitration awards. Sujey starts by considering the treaties that govern the recognition and enforcement of commercial arbitration awards in Latin America before looking at national arbitration laws. Finally, Sujey analyses judicial attitudes towards international arbitration by reference to some of the recent enforcement decisions coming out of Latin America.

Editor Ed Mullins, Daniel Sox and Anabel Blanco then take a look at the use of a 28 U.S.C. section 1782 application as a tool for discovery in support of private international arbitrations, including its use in connection with Latin American disputes. Breaking down the mandatory elements and discretionary factors that support the granting of a section 1782, the authors consider the conflicting case law on whether a private international arbitration constitutes “a foreign or international tribunal” under section 1782 such that a district court is authorized to grant it discovery assistance. Indeed, the Seventh Circuit rendered a decision just before press time. The authors conclude by outlining some of the key features of a section 1782 application, which make it such a useful tool in arbitration.

Next in this issue, Will Russell considers the impact of cross-border insolvency on international arbitration, providing multinational enterprises and international arbitration practitioners with a summary of the legal policies in conflict and the tools potentially available to the bankruptcy court to influence international arbitration proceedings. As Will notes, the fallout of the COVID-19 pandemic has both highlighted and hastened the clash of two historically invincible policy adversaries: international arbitration and bankruptcy proceedings, including in connection with the Latin American region.

Finally, Jeb Clulow and Nick Wright look at the “contract eject button,” namely, the invocation of a contractual

force majeure clause, a perennial issue for Latin American focused clients, which has only been heightened by the COVID-19 pandemic. The article focuses on three areas: (1) force majeure clauses, (2) notice clauses in respect of force majeure, and (3) how choice of tribunal can be critical to the determination of rights in respect of (1) and (2).

On behalf of the editorial board of *International Arbitration Focus*, we hope you enjoy this trip around Latin America. *Les deseamos un buen viaje!*

Edward Mullins, Editor
Partner
Miami
+1 786 747 0203
emullins@reedsmith.com

Cristina Cárdenas, Guest Co-editor
Partner
Miami
+1 786 747 0204
ccardenas@reedsmith.com

Lucy Winnington-Ingram
Associate-editor
Associate
London
+44 (0)20 3116 3891
lwinnington-ingram@reedsmith.com

The attempted unplugging of Mexico's renewable energy market and its potential implications under investment treaties

This article analyzes the potential repercussions of recent governmental measures adopted by Mexico's National Center for Energy Control (*Centro Nacional de Control de Energía*) (CENACE), which acts as the Independent System Operator (ISO), the Federal Economic Competition (*Comisión Federal de Competencia Económica*) (COFECE), the National Commission on Regulatory Improvement (*Comisión Nacional de Mejora Regulatoria*) (CONAMER), the Ministry of Energy (*Secretaría de Energía*) (SENER), and the Energy Regulatory Commission (Comisión Reguladora de Energía) (CRE), on the development, operation and transmission of renewable energy projects in Mexico.

This article begins by examining the current state of Mexico's vastly transformed renewable energy sector. Thereafter, it examines potential investment treaty protections, defenses, and remedies, as well as potentially available local and international law protections. Finally, this article enumerates potential considerations to be weighed-in by affected investors attempting to navigate Mexico's evolving renewable energy landscape.

Mexico's renewable energy sector today

(a) The renewable energy sector

In December 2013, the Mexican Constitution was amended to liberalize the Mexican energy sector with the aim of creating jobs, attracting foreign investment, and developing and expanding Mexico's energy infrastructure.

Mexico's new federal executive branch took office on December 1, 2018, and thereafter articulated a desire to achieve greater energy independence, reducing energy imports, and strengthening the productive state enterprises (EPEs) in the energy sector (e.g., the Federal Electricity Commission (CFE) and Petróleos Mexicanos (PEMEX), the State Electricity Company and the State Oil and Gas Company), vis-à-vis the private sector. In addition to its newly published energy sector strategy, the administration put its plan into place by (i) suspending two major electric transmission lines in Baja California and Oaxaca, canceling long-term electricity auctions (SLPs) which had traditionally resulted in lowering electricity prices (about US$20 per MW of solar energy); (ii) cancelling auctions for financial transmission rights; and (iii) enacting administrative measures negatively impacting new solar and wind projects amidst the ongoing COVID-19 pandemic.

Changes in the regulatory framework have sought to limit dispatch orders for renewable energy projects under development and those in operation, and have affected compliance with Mexico's clean energy commitments under the multilateral Paris Agreement aimed at curbing greenhouse gas emissions.

The vast majority of solar and wind projects in Mexico are privately owned. It is no surprise, then, that a number of industry associations related to solar, wind, and hydroelectric generation have already expressed concerns about the significant risk Mexico's recent measures could pose for both existing and future renewable energy opportunities. Such potential projects are considerable not only in number, but also in energy output considering they include more than 50 projects already under construction and/or testing, representing approximately 130,000 distributed generation projects equivalent to about 8.4 GW, and 260 power plants actively in operation, representing some 32.6 GW of power.

SENER estimates that clean energy generated in Mexico accounts for 31 percent of the total installed capacity. This includes nuclear, hydroelectric, and geothermal power produced by CFE in combination with wind and solar power generated by the private sector.

Adding to the chorus of renewable-focused industry groups, local governments, industry chambers, and associations have also voiced their concerns regarding recent governmental measures discriminating against solar and wind projects in favor of conventional energy power plants reliant on PEMEX's domestically-produced fuel oil.

In response, the federal government has sought to justify its recent measures by claiming that a potential blackout (due to reduced energy demand and interruptions in certain renewable energy nodes) could prove devastating to a population currently under lockdown in the middle of a pandemic.

(b) Recent changes to the energy sector's regulatory framework

Less than two weeks after the World Health Organization (WHO) declared the COVID-19 health crisis a pandemic, Mexico's Ministry of Health (Secretaría de Salud) published in the Federal Official Gazette (Diario Oficial de la Federación or DOF) a resolution establishing certain precautionary measures to be adopted by the private, public, and social sectors, allegedly to mitigate and control risks emanating from the COVID-19 virus (the COVID-19 Resolution). Mexico's President ratified the COVID-19 Resolution on the date of its publication.

Roughly a month later, on April 29, 2020, CENACE issued a resolution purportedly to guarantee the efficiency, quality, reliability, continuity and stability of the National Electric System (the CENACE Resolution). The CENACE Resolution was framed as a mechanism to protect the reliability of the electric grid. Its ramifications, however, were most immediately felt by the renewables industry that saw the dispatch of new solar and wind power plants impacted via the suspension of pre-operational tests from May 3, 2020 going forward, and through the granting of an indefinite preferential right of access to the grid to non-renewable energies.

Four days later, on May 7, 2020, Mexico's Federal Economic Competition Commission (*Comisión Federal de Competencia Económica* or COFECE) published several recommendations against the CENACE Resolution on the basis that these measures would directly benefit Mexico's Federal Energy Commission (CFE), paving the way for CENACE to dispatch energy from CFE's more expensive, less efficient, and polluting power plants. Mexico is currently saddled with a surplus of fuel oil and a limited market for such high-sulfur fuel given its negative environmental footprint. Although COFECE's recommendations are non-binding, the intent of its recommendations was clear that restricting competition would affect efficiencies and would unduly discriminate against renewable energy projects from the private sector.

Little more than a week later, on May 15, 2020, SENER issued its own resolution in support of the CENACE Resolution by publishing its own mandate establishing the Policy of Reliability, Security, Continuity and Quality of the National Electric System (the SENER Resolution). However, before the publication of the SENER Resolution in the DOF, the National Commission on Regulatory Improvement (*Comisión Nacional de Mejora Regulatoria* or CONAMER) intervened, opposing the publication of this new resolution which it argued was presented without regulatory impact justifications and devoid of the necessary public consultations to ensure regulatory efficiency. In spite of CONAMER's objections, the SENER Resolution was published within 24 hours and notably without the requisite public consultation. Thereafter, CONAMER's general director submitted his formal resignation.

On June 10, 2020, CFE published new wheeling charges for renewable and efficient cogeneration projects, known as legacy permits (these permits had been granted

previously by the CRE under the former electricity law). Pursuant to the CRE's Resolution RES/894/2020, published on June 12, 2020, the wheeling rates for high, medium, and low tensions, soared by 568 percent, 528 percent and 911 percent, respectively. These sudden rate changes will have a significant impact on the business plans of the renewable energy legacy permits.

On June 12, 2020, Mexico's National Institute for Transparency, Information Access and Personal Data Protection (the INAI) requested that CRE explain how the federal government intended to reach 35 percent clean energy generation by 2024.

On June 22, 2020, COFECE filed a constitutional controversy *(controversia constitucional)* before the Mexican Supreme Court of Justice alleging that the SENER Resolution violated Articles 16, 28, and 133 of the Mexican Constitution.[1] COFECE's constitutional controversy also alleged that the SENER Resolution was contrary to various laws and/or regulations, including the Electric Industry Law's obligations related to non-discriminatory open access to the transmission and distribution electric grids.

To date, more than 50 amparo lawsuits (constitutional protection lawsuits similar to non-criminal habeas corpus in the United States) have been filed against the CENACE, SENER, and CRE Resolutions. Several Mexican courts have already issued temporary and final stays preventing the new regulatory measures from entering into effect. These legal actions have not been finally resolved and are still ongoing as presiding courts work to determine whether the respective resolutions will be declared valid or void. Moreover, we understand that as of the publication of this article, there have been no actions (notices of change in law, experts, or arbitration claims), brought under the power purchase agreements executed between CENACE and the private energy companies).

Recently, the Mexican states of Jalisco and Colima filed constitutional controversies against the SENER Resolution before the Mexican Supreme Court. The Mexican Supreme Court has admitted both constitutional controversies and suspended the effects of the SENER and CENACE Resolutions until it issues a final judgment. If there is a final judgment issued by a supermajority vote of eight of the 11 justices of the Supreme Court, it may impact the legal viability of the SENER and CENACE Resolutions, not only for Jalisco and Colima but more broadly for all third parties that could have been impacted by the Resolutions.

Potential investment treaty protections, defenses, and remedies

Mexico is currently party to 29 bilateral investment treaties (BITs) and 17 multilateral instruments with investment provisions that are in force.[2] Most recently, the United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020, replacing the North American Free Trade Agreement (NAFTA). NAFTA's provisions will remain available for three additional years for investments made prior to the USMCA's entry into force. In addition to being part of the Trans-Pacific Partnership, Mexico is also negotiating a comprehensive free trade agreement with the European Union. This prospective free trade agreement contains an investment chapter and is intended to replace Mexico's existing BITs with EU member states, which account for nearly half of Mexico's BITs in force.

(a) Jurisdiction and access to arbitration

The central protection provided by Mexico's investment treaties is access to investor-state arbitration. Investor-state proceedings allow qualified investors with claims against the state to bypass domestic courts in favor of a neutral tribunal of international arbitrators. These arbitrations are often held under the auspices of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) or pursuant to the Arbitration Rules of the United National Commission on International Trade Law (UNCITRAL), after a negotiation period of six months. Resulting arbitral awards are enforceable worldwide under either the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) or, if applicable and in the case of arbitrations not brought under the ICSID Convention, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

To successfully pursue international arbitration under Mexico's existing investment treaties, claiming parties must qualify as an "investor" under the applicable treaties. Many of Mexico's investment treaties provide that nationals of a contracting party or an enterprise constituted under the laws of that contracting party with investments in the other contracting party qualify as "investors." Some of Mexico's treaties also require that enterprises have their corporate seat in their state of incorporation (BITs with Argentina, Finland, and Spain), and other more recent treaties require an enterprise to have substantial business activities in the territory of incorporation (BITs with China, Kuwait, Singapore and the USMCA).

Mexico's investment treaties generally also provide a broad definition of protected "investments," which generally include "every kind of asset" owned or controlled, directly or indirectly, by investors of one contracting party and invested in the territory of the other contracting party. That said, some Mexican treaties (e.g., with the United Kingdom) exclude certain types of assets (e.g., claims under commercial contracts for the sale of goods) from the definition of a protected "investment."

Even if the formal requirements for jurisdiction exist, investors should consider whether the applicable treaty protecting their investments contains a fork-in-the-road or waiver provision that would affect the arbitration of disputes already submitted to a domestic court or arbitration panel under an applicable contractual instrument. Although not all of Mexico's investment treaties contain such clauses, it is important to assess the specific requirements for accessing arbitration under each applicable treaty to attempt to ensure optimal investment protection.

(b) Substantive protections

Assuming that the conditions for accessing international arbitration can be met, many of Mexico's investment treaties provide a full range of standard investment protections against adverse state conduct, including:

- Protection from direct or indirect expropriation of investments (a "taking" or substantial deprivation by the state of the value of the investment) or through measures that lack a public purpose, are discriminatory, or lack due process, without compensation.
- Obligations to afford investments fair and equitable treatment (requiring transparency, good faith, no arbitrary or discriminatory conduct, no lack of due process, and protection against a denial of justice by the host state's courts) and provide full protection and security (a duty to abstain from state interference, and a duty to protect the investment from third-party action).
- Obligations to afford foreign investments "national treatment" and "most favored nation" treatment, meaning that Mexico has an obligation not to treat foreign investors and investments in a manner less favorable than a comparable Mexican investor, or otherwise to discriminate against a given foreign investor on the basis of nationality.
- Obligations to observe commitments undertaken in respect of protected investments (also known as an "umbrella clause" and notably only found in 12 of Mexico's 29 BITs).

Recent investment treaty jurisprudence arising out of the renewable energy sector in other countries may prove relevant to evaluating the viability of such potential claims against Mexico. For instance, although the jurisprudence has been inconsistent and has included some arbitrator dissents, certain tribunals have held that states have breached their obligation to afford fair and equitable treatment to renewable energy investments by altering the regulatory framework in ways that contravened the legitimate expectations investors relied upon when making their investments.[3] Whether such a case could be established against Mexico will depend on an evaluation of the individual facts of each claim under the standards of protection of the applicable treaty or treaties.

(c) Potential defenses

Where confronted with investor-state claims arising out of its recently enacted regulatory regime, it is likely that Mexico will raise a variety of anticipated defenses to such investment treaty claims, including: (i) primary defenses based on the substance of applicable treaty standards, and (ii) secondary defenses available under customary international law.

(i) Treaty-based defenses

Some Mexican treaties contain exceptions to investment protection standards with respect to measures taken for reasons of national security, public health, or to maintain public order.[4] As such, Mexico may seek to rely on these express investment protection carve-outs to attempt to derogate from its investment protection obligations.

Even in the absence of express treaty provisions, Mexico may seek to justify its recent regulatory measures, arguing that these represent a legitimate exercise of its police powers and thus are non-actionable under investment protection standards.[5] For instance, in *Philip Morris v. Uruguay*, a majority of the tribunal held that certain anti-smoking policy measures taken by Uruguay with a view to protecting public health in fulfilment of its national and international obligations were a valid exercise of the state's police powers for the protection of public health and, as such, did not constitute a breach of the state's international treaty obligations.[6]

While each case is fact-specific and an award will not bind a subsequent tribunal, Mexico may seek to argue that its legislative measures were a valid exercise of its police powers. To be successful, tribunals have held that states relying on a police powers defense need to prove that the measures in question were taken in good faith, for the purpose of protecting a key interest of the state, were non-discriminatory, and were proportionate to the objective pursued.[7]

(i) Customary international law defenses

Another set of legal and factual considerations concern a range of customary international law "circumstances precluding wrongfulness" codified in the International Law Commission (ILC) Draft Articles on State Responsibility for Internationally Wrongful Acts.[8] Of the various defenses contained therein, the most likely to be invoked in investment treaty arbitration are (a) force majeure (Article 23), (b) distress (Article 24), and (c) necessity (Article 25).

The plea of force majeure (i.e., the inability to perform an obligation due to unforeseen circumstances beyond the control of the state) has rarely been invoked in investment treaty arbitration. However, one tribunal that considered it, in *Autopista v. Venezuela*, held that it could only be relied upon if three conditions are met: (i) impossibility of performance, (ii) unforseeability of the event, and (iii) the force majeure event was not attributable to the state.[9]

The defense of distress has typically been invoked for more discrete situations of threat to human life, and does not appear to have been invoked in investment treaty arbitration. Unlike a situation of force majeure, distress involves a voluntary action by the state, rather than an inability to act due to unforeseen circumstances. Moreover, as the commentary to the ILC Articles has clarified, this defense is limited to specific instances of threats to human life (e.g., breaching a maritime boundary to save a sinking ship), not "more general cases of emergencies, which are more a matter of necessity than distress."[10]

The defense of necessity presupposes that a state had no choice but to take certain actions against a "grave and imminent peril" to an "essential interest of the state." Several investment awards, the majority of which relate to Argentina's 2001-2002 economic crisis and to the 2008 financial crisis, have considered the defense of necessity.[11] If a situation of necessity is found, it is relevant to assess the period during which it was applicable because measures adopted outside that period may not be covered by such a defense.[12]

To be successful under the conditions for invoking necessity provided in ILC Article 25, Mexico would need to show that the regulatory measures it has imposed impacting the renewable energy sector were the only way to safeguard an "essential interest," that Mexico did not contribute to the situation of necessity, and that the measures did not seriously impair serious interests of the state to which the obligation exists or of the international community as a whole.

(d) Available remedies

Although not exclusive, the most common remedies in investment treaty arbitration are interim relief and damages in the form of monetary compensation.

The availability of interim relief is rare,[13] in particular when natural resources are involved. That said, tribunals have generally considered the following factors when deciding requests for interim relief: urgency, necessity to avoid the risk of harm or prejudice, existence of a right to be preserved, the existence of *prima facie* jurisdiction, proportionality, a *prima facie* case on merits, and the existence of extraordinary circumstances.[14] The most common types of interim relief applied for in investment arbitrations include refraining from aggravation of the dispute, a stay of parallel proceedings in the respondent's courts, preservation of the investments or status quo, staying criminal investigations or proceedings, and requests for security for costs.[15]

In turn, monetary compensation in investment arbitration is generally intended to wipe out all of the consequences of the illegal act(s).[16] Considerations of compensation in disputes involving the energy sector are unique because such disputes are often high-value and involve long-term investments, are subject to price volatility, and are often more susceptible to political risk. As is currently the case with Mexico, other states such as Spain, Italy, and the Czech Republic have recently withdrawn incentives or subsidies previously offered in the renewable energy sector. These regulatory changes have themselves given rise to more than 80 investment arbitrations,[17] some of which have yielded significant damages awards in favor of investors.[18]

Conclusions

Mexico's current federal government has adopted a series of regulatory measures squarely affecting the viability of Mexico's privately dominated renewable energy sector. Motivated by a desire to achieve greater energy independence and reduce energy imports, the current administration has ostensibly relied on the COVID-19 pandemic while strengthening its productive state enterprises.

The implementation of Mexico's newfound energy sector strategy has already significantly impacted both existing and future renewable projects, prices, and investments in Mexico. For potentially affected investors gauging whether a viable case may exist against Mexico, this will depend on the individual facts of each claim as seen through the lens of the applicable treaty protections. Mexico's existing bilateral and multilateral investment protections – in addition to local and international protections – have the potential to afford investors a full suite of standard investment protections against international law breaches. Given the nascency of such claims and the regulatory changes, recent investment treaty jurisprudence may prove to be of particular relevance in evaluating the potential merits of, and defenses to, such claims.

Authors:

Nicolas Borda
Partner
Houston
+1 713 469 3882
nborda@reedsmith.com

Chloe Carswell
Partner
London
+44 (0)20 3116 2861
ccarswell@reedsmith.com

Francisco Rivero
Partner
Houston
+1 713 469 3817
frivero@reedsmith.com

Ben Love
Counsel
New York
+1 212 549 4189
blove@reedsmith.com

Daniel Avila II
Associate
Houston
+ 1 713 469 3896
davila@reedsmith.com

Lucian Ilie
Associate
London
+44 (0)20 3116 3789
lilie@reedsmith.com

Alejandro Agredano
Other Timekeeper
+1 713 469 3621
aagredano@reedsmith.com

The effects of energy and mining arbitration in LatAm: increased economic and political turmoil?

2020 is a turning point for international arbitration – even more so for international arbitration in countries in LatAm which have witnessed acute disturbances in their economic, political, and social landscapes.

Arbitration users know that changes in a state's political regime often result in changes to the approach adopted towards economic development, national investment, foreign direct investment (FDI), and economic policies governing what foreign businesses may or may not do within the territory of the state. Simply put, changes in approach to domestic and foreign investment are often driven by changing political winds. With respect to the energy sector, the arbitration landscape in LatAm will likely be shaped by the recent regulatory measures adopted by states towards that sector.

In LatAm, subsoil resources belong to the state. Thus, only the state can determine if and how private investors participate in resource exploitation, retaining regulatory powers and control over subsoil use contracts.

The drop in oil revenues and prices due to COVID-19 could put LatAm oil-dependent countries in trouble, including Mexico, Brazil, Venezuela, and Ecuador. Natural resource industries and oil and gas companies with production facilities have been forced to halt extractive operations, and exploration and development projects have been suspended. In April 2020, 14 LatAm countries asked the International Monetary Fund for urgent financial aid totaling $4.48 billion to cope with the economic recession.[19] COVID-19 will likewise reduce the flow of FDI globally and a number of businesses, including several owned by foreign investors, have already been forced to cease operations.[20]

Amidst these barriers, the use of international arbitration as a mechanism to resolve cross-border disputes in LatAm continues and is increasing. However, arbitration will only remain attractive as a dispute resolution method if it is seen to work in times of crisis. For that to happen, arbitration will have to adapt.

Steps towards this adaptation are already being taken in LatAm. In July 2020, the LatAm Arbitration Association announced the creation of a Permanent Observatory on the state of arbitration in the region.[21] Its role will be to monitor the rise of arbitration cases expected in LatAm due to the COVID-19 crisis, and to encourage a dialogue with authorities, arbitration centers and users, about how to respond adequately to the eventual issues that will emerge. Notwithstanding this, the adaptation of LatAm countries to the new economic, political, and social landscape in dealing with arbitration proceedings will not be without challenges.

LatAm states faced with high value awards in the energy and mining sectors

The past year saw notable arbitral awards and resultant enforcement proceedings involving LatAm states and state-controlled companies, especially in the oil and gas and mining sectors. A selection of these are considered below.

First, in January 2019, Venezuela, the most frequent respondent in investor-state arbitration in LatAm,[22] defeated a $600 million claim by UK mining investor Anglo American over the alleged expropriation of assets relating to a nickel project.[23] The claims, brought under the Venezuela-UK Bilateral Investment Treaty (BIT) and ICSID Additional Facility Rules, arose out of the government's cancellation and nonrenewal of nickel-mining concessions owned by Anglo American's Venezuelan subsidiary, Minera Loma de Níquel. Anglo American alleged that the permanent end to production and mining activities, with Venezuela assuming control of the ore deposit, processing plant, and facilities, constituted a breach by Venezuela of the fair and equitable treatment, national treatment, and full protection and security standards, as well as an unlawful expropriation of Anglo American's investments under the BIT. Venezuela argued that the mining assets were due to

revert to the state without compensation upon the expiry of the concessions in 2012. The tribunal dismissed all of Anglo American's claims. The majority found that, as a matter of Venezuelan law, the nickel processing facility and inventory automatically reverted to Venezuela free of charge on expiry of the mining concessions, pursuant to a clause in the concession contracts; there was, accordingly, no illegal taking by Venezuela. Arbitrator Guido Santiago Tawil dissented and found that, by operation of Venezuelan law, the assets should not have reverted to the state upon the expiry of the concession, because they were non-reversionary assets not intended for the purpose of the concession. He thus found Venezuela liable for breaches of the BIT.

Second, in March 2019, an arbitral tribunal awarded damages of $8.7 billion to U.S. oil producer ConocoPhillips in its claim against Venezuela. This is the largest award against the country to date and the largest award rendered pursuant to the ICSID Convention.[24] This arbitration arose out of Venezuela's 2007 nationalization of its oil industry.[25] The tribunal found that Venezuela had unlawfully expropriated ConocoPhillips' investment, and failed to negotiate the compensation payable to ConocoPhillips in good faith and pursuant to the "market value" standard in the BIT. Further, the tribunal decided that compensation should not be calculated as of the date of the expropriation, but rather as at the date of the award – this outcome benefitted ConocoPhillips since oil prices were significantly higher at the date of the award. Unable to secure voluntary payment by Venezuela, ConocoPhillips initiated enforcement proceedings in the United States.[26] However, only a month later, opposition leader Juan Guaidó's lawyers announced their intention to submit an application to annul the award for an alleged error in the damages calculation,[27] which they ultimately did in November 2019. Recently, the government of Nicolás Maduro failed to disqualify the ICSID annulment committee members appointed to hear the annulment application, after they refused to exclude Mr. Guaidó's lawyers from the case.[28] The challenge was filed in April 2020 and rejected by the chairman of the ICSID Administrative Council, David Malpass, in July 2020. Ultimately, it remains unclear if Mr. Guaidó's representatives have standing to act in investor-state arbitrations since the World Bank and ICSID have not yet decided whether to recognize Mr. Guaidó as the proper representative of Venezuela.

Third, Brazilian state-owned oil company Petrobras was ordered in July 2018 to pay $622 million plus interest to Cayman Islands offshore drilling company Vantage Drilling for the wrongful termination of a contract for the lease of a deep-water drilling ship, allegedly procured through bribery.[29] Vantage Drilling was awarded the contract in 2009, but Petrobras terminated it in 2015, citing operational failures and alleging that Vantage Drilling had procured the contract fraudulently through bribery of former Petrobras officials. In support of its fraud allegations, Petrobras submitted, *inter alia*, a Brazilian federal court judgment finding certain individuals guilty of bribery and corruption in the procurement of the contract. The tribunal found that Petrobras had provided "no convincing evidence" to show Vantage Drilling was aware of the scheme and, accordingly, rejected Petrobras' bribery defense. Moreover, the tribunal noted that regardless of whether Vantage Drilling was aware of or participated in the alleged unlawful acts, subsequent novations and amendments of the contract cured it of any of the alleged illegalities. The tribunal also found that, in any event, Petrobras had "knowingly ratified" the contract after it was already aware of the bribery allegations; Petrobras was thus estopped from claiming the contract was void.

Vantage Drilling sought enforcement of the award with the U.S. District Court for the Southern District of Texas. In May 2019, the district court confirmed the award and entered judgment for $734 million. Petrobras satisfied the award, but retained the right to appeal the district court's judgment and seek to have the award set aside; however, these efforts did not prove fruitful. Indeed, in July 2020, the U.S. Court of Appeals for the Fifth Circuit dismissed Petrobras' motion to vacate and instead confirmed the award.[30] The appeals court, following the arbitral tribunal's reasoning, found that Petrobras had failed to prove that Vantage Drilling was guilty of bribery in entering into the contract and, accordingly, dismissed Petrobras' arguments that enforcement of the award would violate U.S. public policy. Furthermore, the appeals court determined that the public policy ground for refusing enforcement could not be used to simply question the merits of the award. Whether the contract should be voided because of bribery was a question about the validity of the contract, which the parties had delegated to the arbitrators to decide.

Faced with these often unfavorable arbitral awards, an interesting question emerges: do they, or could they, result in a change in LatAm states' perception of the legitimacy of the system of investor-state dispute settlement? Whilst some LatAm

governments are willing to pay or settle awards issued against them voluntarily, others have failed to satisfy their liabilities and have routinely sought annulment of adverse awards.[31] Generally, however, the trend has been for LatAm countries to pay awards or settle cases in which awards were issued against them. This trend increases legal security for investors, and has demonstrated the value of investor-state arbitration in resolving disputes. But there are some notable obstacles.

The challenging economic and political landscape in LatAm

Each LatAm country approaches the regulation of its energy sector, and arbitrations arising therefrom, differently. These differences are often tied to political and economic changes experienced in the past decades.

The political, economic, and social context in LatAm has been very unstable in recent months. In particular, Argentina and Ecuador have been faced with potential further sovereign debt defaults; Peru, with the dissolution of congress and exit of the president and vice president, saw its constitutional order broken and was plunged into its deepest political crisis in decades; Brazil has faced a number of corruption scandals; Colombia, Ecuador, and Nicaragua have experienced serious social unrest; Bolivia and Chile have been immersed in constitutional crises; and Venezuela's critical shortages and economic collapse triggered the biggest geopolitical crisis in the region in decades.

To date, none of the deep-rooted challenges faced by various LatAm countries have been fully resolved. They create uncertainty and instability within the region, and with this, the capacity for an increase in disputes with foreign investors who rely on particular economic policies at the time of investing. In the same way as for Argentina in the early 2000s, LatAm countries can generate a myriad of investment arbitration claims, especially in light of governmental measures taken to cope with the crises. Any change in the regulatory framework – in terms of timing, underlying objective, and effects – will be scrutinized in the course of due diligence undertaken for contemplated projects or by investors considering an investment treaty claim. If a government faces economic or political pressure to backtrack on some of its commitments to foreign investors, disputes are likely to arise.

In Venezuela specifically, it is difficult to predict with certainty what a regime under opposition leader Juan Guaidó – who has been recognized by dozens of governments as the acting president of Venezuela[32] – or another regime would mean for the country's energy policies. The political uncertainty and divided recognition of Mr. Guaidó have had immediate repercussions on ongoing arbitration disputes, including, in particular, creating complications for claimants and award creditors seeking to recover money from Venezuela (the country considers that Mr. Guaidó does not have actual control over the country's assets against which the successful claimants wish to enforce their awards).[33] Likewise, in Argentina, any impacts the new Fernández administration might have on arbitration are yet to be seen.

What the rest of 2020 and beyond could look like for arbitration in LatAm

What is certain is that, in the face of these challenges, LatAm states and foreign investors will be considering their positions under applicable BITs. In particular: is a state's measure affecting investors in the energy sector in breach of the substantive provisions of a BIT or investment agreement? Does a state have a valid defense to a claim, such as the doctrine of necessity, police powers, or taking measures to protect the "essential interests" of its population?

Sooner or later, arbitration claims will be filed, testing the system in unprecedented ways. They will require arbitral tribunals to determine how to balance the competing interests of stakeholders, namely, sovereign and police powers of states versus private economic interests of investors. It will be interesting to see how tribunals will approach such issues and, in particular, whether we will witness a change in interpretation of BIT guarantees, or even a new generally adopted standard tailored to situations of crisis.

It is hoped that any exercise in re-examining the BITs and economic policies, in terms of their substance and interpretation, will prove beneficial: it will likely enable the start of a dialogue between states and foreign investors seeking to find a compromise to their mutually beneficial relationships. As such, the various crises hanging over LatAm's head may ultimately create an opportunity to build stronger companies and better opportunities, as well as to develop better FDI policies, which can all survive even during unprecedented crises.

Author:

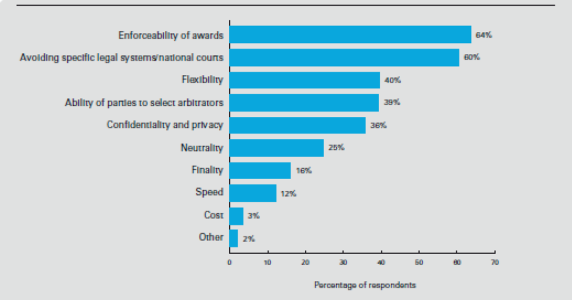
Marine de Bailleul
Associate
London
+44 (0)20 3116 2768
mdebailleul@reedsmith.com


GULF OF
MEXICO
Tampico
Mexico
BELIZE
GUATEMALA
EL SALVADOR

Considerations for parties to avoid Pyrrhic arbitral victories in Latin America

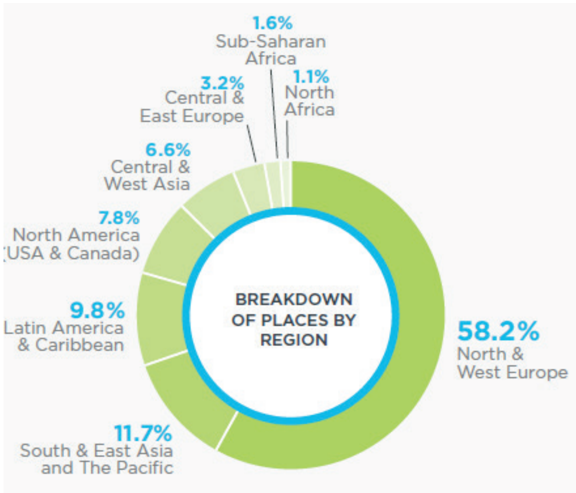
For parties obliged to determine a dispute by way of arbitration, the main concern has been, and continues to be, the enforceability of any future award. This was confirmed most recently in the 2018 Queen Mary University of London Survey on the Evolution of International Arbitration, wherein survey respondents listed the enforceability of awards as the most valuable characteristic of international arbitration:[34]

Chart 3: What are the three most valuable characteristics of international arbitration?

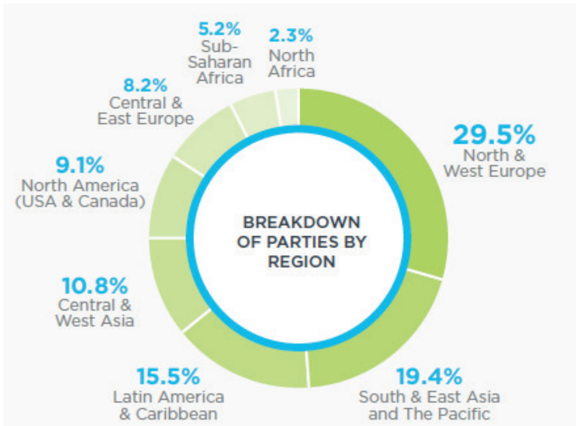


This does not come as a surprise – a claimant in an arbitration will be in a worse position than it started off in if having expended hundreds of thousands of dollars (or even millions) to pursue its claims, it ends up with an arbitral award that is not capable of enforcement in a jurisdiction where the respondent has assets.

This consideration will be of equal importance in Latin America, where certain cities are increasingly being selected as seats of arbitration, with award enforcement also sought there. The International Chamber of Commerce releases statistics every year of the arbitral seats or places of arbitration selected by parties for their new filings.[35] In 2019, these statistics showed that of new cases filed, 9.8 percent had a place of arbitration in Latin America or the Caribbean (up from 8.7 percent in 2018):[36]



Mexico and Brazil are among the top 10 countries selected for arbitral seats.[37] Moreover, the statistics showed that Latin American parties accounted for 15.5 percent of litigants:[38]



With the increasing prevalence of arbitrations involving Latin American parties and Latin American seats, parties doing business in the region should be vigilant to ensure that any award rendered in their favor does not become a Pyrrhic victory. Key considerations in this regard will be: (1) the international treaties applicable to the recognition and enforcement of arbitral awards; (2) domestic laws which could be applied to avoid recognition of an award; and (3) previous decisions of the domestic courts and court practice which is not supportive of recognition and enforcement of arbitral awards.

International treaties relating to the recognition and enforcement of arbitral awards in Latin America

In Latin America, there are two treaties that govern the recognition and enforcement of commercial arbitral awards: (1) the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); and (2) the Inter-American Convention on International Commercial Arbitration (Inter-American Convention).[39]

Other than Cuba, all Latin American countries are signatories to both the New York Convention and the Inter-American Convention. Whilst the New York Convention is a global treaty, the only non-Latin American signatory to the Inter-American Convention is the United States. This means that the New York Convention will apply to the enforcement of any award rendered in an arbitration relating to any dispute between a Latin American party and a party that is not from Latin America or the United States. On the other hand, if the parties are all members of the Inter-American Convention, the United States has made a reservation that it will apply the Inter-American Convention, instead of the New York Convention, if the majority of parties to the arbitration agreement are citizens of a state that has ratified or acceded to the Inter-American Convention.[40] Otherwise, the United States will apply the New York Convention.[41]

The grounds under which recognition and enforcement of the award can be refused are substantially similar under both of these Conventions (and are set out at Article V(5) of each respective Convention): (1) one of the parties lacked capacity under the applicable law or the agreement was not valid under the applicable law or law of the state in which the decision was made; (2) there was a lack of notice of the arbitration and/or of the procedure to be followed in the arbitration, and/or a party was unable to present its defense; (3) the award concerns a dispute that was not envisaged in the parties' agreement; (4) the constitution of the arbitral tribunal or the arbitration procedure was not carried out pursuant to the terms of the agreement; (5) the award is not yet binding or has already been annulled; (6) the subject of the dispute cannot be resolved by arbitration under the law of the state where recognition and enforcement are being sought; and (7) the recognition and enforcement of the award would violate the public policy of the state where recognition and enforcement are being sought.[42]

It is important to note that the scope of the third exception is arguably broader under the New York Convention than under the Inter-American Convention. The New York Convention provides that recognition and enforcement may be refused where the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, **or it contains decisions on matters beyond the scope of the submission to arbitration**,"[43] while the Inter-American Convention does not include the latter exception.

Despite this limited difference, each Latin American country has committed to recognize and enforce arbitral awards save on the limited grounds enumerated in the Conventions.

National arbitration laws in the Latin American region

Another important consideration is the domestic legislation of the country where the award will be enforced. This is important because Article V(2)(a) of both the New York Convention and the Inter-American Convention provides that recognition and enforcement may be refused if the "subject" of the dispute is not capable of arbitration under the laws of the state where recognition and enforcement are sought. Thus, internal arbitration laws that prohibit arbitration of certain disputes would affect the recognition and enforcement of any award.

For the most part, countries in Latin America have in the past decade endeavored to modernize their arbitration laws to make them more pro-arbitration. For example, Costa Rica amended its laws in 2011;[44] Colombia amended its laws in 2012;[45] Panama amended its laws in 2015;[46] Brazil amended its laws in 2015;[47] and Argentina amended its laws in 2018.[48]

These amendments are aimed at creating a more robust international arbitration culture in the region, and have for the most part involved the adoption of the UNCITRAL Model Law and its 2006 amendments.

For example, in Costa Rica, before the 2011 amendments, all arbitrations in the territory had to be in Spanish and the arbitrators had to be members of the Costa Rican bar.[49] The 2011 amendments eliminated these requirements and incorporated a provision that mirrored Article V of the New York Convention for any application to set aside an award.[50]

Likewise, 2018 amendments to Argentina's arbitration law also provided for substantial improvements. Although the law had been amended in 2015 to create a national arbitration law (to replace the prior system, which relied exclusively on territorial procedural codes), this national law was applied in conjunction with these territorial codes, giving rise to inconsistency and a lack of clarity. The 2018 amendments make clear that the national arbitration law will apply to all international commercial arbitrations and serves as the exclusive applicable law.[51] Although this law adopted the UNCITRAL Model Law, certain provisions were excluded. For example, Argentina did not adopt the Model Law's interpretation of "international" if the parties expressly agree that the subject matter of the agreement relates to more than one country.[52] Moreover, the 2018 amendments explicitly provide that they will not apply to any dispute previously determined to be non-arbitral under Argentine law.[53] This is key because the Argentine courts have ruled that a number of disputes are non-arbitrable, including disputes involving the rights of users and consumers, adhesion contracts, and employment matters.[54] Thus, a party with an award based on a dispute arising from consumer affairs, adhesion contracts (also known as standard form or boilerplate contracts), or employment issues, may face barriers to recognition and enforcement of that award in Argentina.

In contrast, Brazil's amendments were primarily aimed at codifying common pro-arbitration practices and case law. For example, the arbitration law explicitly provided that arbitrators can issue partial awards.[55] The amendments also confirmed that the initiation of an arbitration interrupts any limitation period, even if the arbitration is later dismissed for lack of jurisdiction.[56]

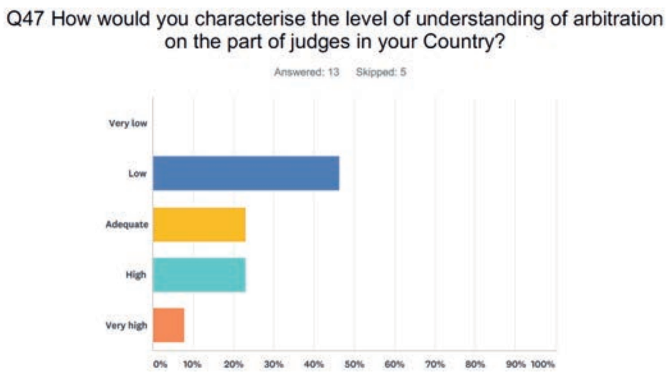
Judicial attitudes to international arbitration in Latin America

Notwithstanding the majority of the jurisdictions in Latin America adopting pro-arbitration legislation, the true indicator of whether a party will be able to ensure the recognition and enforcement of an arbitral award comes from previous judicial decisions and court practice.

It is when analyzing these judicial decisions that the true risks of recognition and enforcement in Latin America may come to light. These risks are to some extent a function of the perception of arbitration in the region.

The University of Leicester's Survey of Arbitration in the Americas of 2018 provides some insight in this regard.

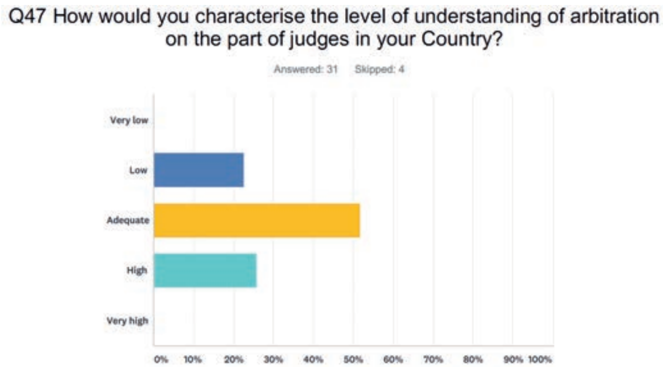
For example, the majority of respondents surveyed felt that judges in Argentina had a low understanding of arbitration:[57]



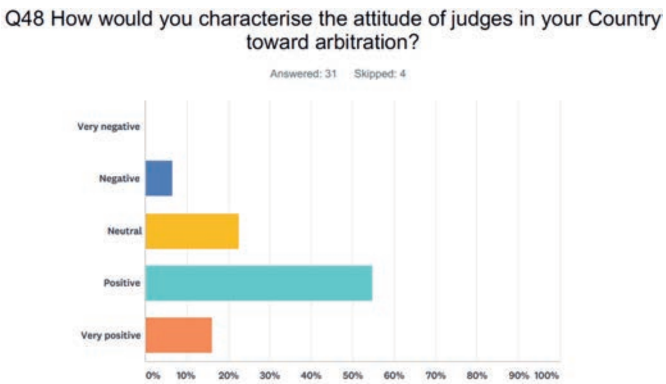
30 percent of the respondents to the survey further characterized the attitude of judges in Argentina towards arbitration as "negative."[58]

A review of *Yasa S.R.L. v. Telecom Personal S.A.* substantiates this perception. In this case, an Argentine court determined that an arbitration clause contained within an alleged adhesion (also called a standard form) contract was contrary to public policy, and accordingly void.[59] In arriving at this conclusion, the court first determined that the contract was a contract of adhesion because it contained standard terms that were not specifically negotiated.[60] On the basis of this finding, the court determined that the arbitration agreement within the contract was void.[61] Thus, any party seeking to have an award recognized or enforced in Argentina runs the risk that the courts will refuse enforcement where the underlying contract can be construed as an adhesion contract and thus contrary to public policy. It is important to note, however, that there have been other court opinions in Argentina that have held that it is within the arbitrator's authority to decide whether the arbitration agreement is valid in light of the existence of an adhesion contract.[62] That determination by an arbitrator, however, does not prevent Argentine courts from deciding that an arbitration agreement does not exist on an application for recognition or enforcement under Article V of the New York Convention (or Inter-American Convention).

The vast majority of survey respondents in Brazil felt that, in contrast to practitioners in Argentina, Brazilian judges had an adequate or high understanding of arbitration:



Based on this perception, it is not surprising that respondents in Brazil also felt that the attitude of Brazilian judges towards arbitration was mostly positive:[63]



A review of case law from Brazil further supports its pro-arbitration status. For example, the Brazilian Superior Court of Justice (SCJ) has recognized and enforced arbitral awards despite allegations of non-party status and allegations that the contract is invalid because it is a contract of adhesion.[64] The SCJ has also recognized and enforced arbitral awards despite allegations that the arbitration agreement does not apply because its application to a subrogated party violates public policy.[65] Indeed, the SCJ, which has exclusive jurisdiction over the recognition of foreign arbitral awards and is the highest court to decide non-constitutional matters, is reputed by commentators to be favorable towards arbitration.[66]

Despite its generally pro-arbitration approach, Brazil is one of the jurisdictions that will not recognize or enforce an award that was annulled in the seat or place of arbitration. For example, in *EDF Int'l S.A. v. Endesa Latinoamerica S.A. and YPF S.A.*,[67] one of the parties sought recognition and enforcement of an award rendered in Argentina. However, an Argentine court annulled the award before recognition and enforcement in Brazil. The Brazilian court clarified that the recognition procedure cannot be used to remove deficiencies or give a different interpretation to a decision of a foreign state.[68] The court accordingly determined that as an Argentine court annulled the award, the award could not be recognized in Brazil.[69]

Another basis which has been adopted by courts in the region to challenge recognition or enforcement of an arbitral award has been constitutional challenges. For example, in Colombia, the Constitutional Court has indicated that constitutional injunctions ("*tutelas*") can be used in connection with international arbitrations seated in the country.[70] In a constitutional proceeding initiated by Gecelca S.A E.S.P and Gecelca 3 S.A.S E.S.P, the applicants sought a constitutional injunction against the award, alleging that their constitutional rights were violated due to a lack of due process and that they were denied access to justice.[71] This proceeding went through two levels of review where the courts determined that the constitutional injunctions were not proper because they could not be used to re-open arbitral proceedings and because they did not apply while annulment proceedings were pending.[72] The Constitutional Court confirmed the findings of the lower court that constitutional injunctions do not apply while annulment proceedings are pending, but concluded that it is in principle possible to make constitutional objections against the enforcement of international arbitration in certain circumstances.[73] Specifically, a party must show three elements: (1) constitutional relevance such that there has been a direct violation of a fundamental right; (2) exhaustion of available remedies by seeing annulment of the award; and (3) examination of admissibility requirements, such as a substantive (relating to misapplication of the law), organic (relating to lack of arbitral jurisdiction), procedural (relating to an arbitrator's failure to conduct the proceedings pursuant to the parties' agreement or the law), or factual defect (relating to an arbitrator's failure to consider or give appropriate weight to evidence).[74]

Conclusion

Parties invest substantial sums in arbitration to obtain an award in their favor, and should start with the end goal in mind. Consideration as to where an award may be enforced should accordingly begin at the outset of any claim. This will help to maximize the chances of recognition and enforcement of a favorable award. Identifying enforcement issues early on will also help to inform any settlement negotiations and, where necessary, prompt early consideration of alternative means for obtaining the relief sought.

This exercise is just as important (if not more so) in Latin America, where each jurisdiction has its own arbitration law, history, and culture, as well as judicial precedent that will impact enforcement.

Author:

Sujey Herrera
Associate
Miami
+1 786 747 0207
sherrera@reedsmith.com

Section 1782 is a powerful discovery tool in aid of private international arbitrations if your target is the right jurisdiction

28 U.S.C. section 1782 is a United States federal statute authorizing the federal district courts to grant discovery to aid litigants engaged in proceedings before foreign or international tribunals.[75] Remarkably, the statute offers litigants in foreign proceedings the opportunity to obtain more discovery pre-filing than what the Federal Rules of Civil Procedure offer litigants in U.S.-based proceedings. The United States Supreme Court addressed specific circumstances under which section 1782 assistance is available to litigants in the 2004 decision *Intel Corp. v. Advanced Micro Devices, Inc.*[76] The *Intel* decision, however, left open significant questions regarding the applicability of section 1782, among them whether section 1782 discovery is available in aid of private commercial arbitrations seated outside the United States. The United States circuit courts of appeals are divided on that issue, and the split has become increasingly pronounced in recent years. This article (1) provides a brief introductory background on section 1782; (2) summarizes the current circuit split; and (3) explains the significance of this issue by addressing the relationship between section 1782 discovery and international commercial arbitration.

28 U.S.C. section 1782 – assistance to foreign and international tribunals and to litigants before such tribunals

The critical portion of section 1782 provides that:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing **for use in a proceeding in a foreign or international tribunal**, including criminal investigations conducted before formal accusation.[77]"

Although legislative history accompanying the statute is brief,[78] it generally is recognized that the primary goals of the statute are to provide efficient discovery assistance to participants in international tribunals and to encourage foreign countries to provide similar means of assistance to American courts.[79] Thus, the general statement accompanying the legislation noted that its enactment constituted "a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[80]

The statute authorizes district courts to issue a discovery order pursuant to a letter rogatory or a request from a "foreign or internal tribunal" or upon the application of "any interested person."[81] The discovery order may compel testimony and statements as well as the production of documents and other tangible evidence.[82] A request for discovery under section 1782 presents two primary inquiries:

1. whether the district court is authorized to grant the request, and
2. whether it should exercise its discretion to do so.[83]

With respect to the first inquiry, there are four mandatory elements of a section 1782 petition:

1. whether the target is found in the district;
2. whether the applicant is an interested person;
3. whether the applicant seeks evidence (documents or testimony), and
4. whether the discovery sought is for a proceeding before an international tribunal.[84]

With respect to the second inquiry, the *Intel* Court identified factors that district courts should consider in deciding whether to grant a section 1782 request, including:

1. whether the person from whom discovery is sought is a participant in the foreign proceeding;
2. the nature of the foreign tribunal;
3. the character of the proceedings underway abroad, and the receptivity of the foreign tribunal to u.s. federal-court judicial assistance;
4. whether the discovery request is an attempt to circumvent foreign proof-gathering restrictions or other policies; and

5. whether the request is unduly intrusive or burdensome.[85]

The circuit split, however, centers on the fourth element of the first of the two inquiries. Specifically, it pertains to whether a private international arbitration tribunal constitutes "a foreign or international tribunal" under section 1782 such that a district court is authorized to grant it discovery assistance.

Section 1782 and discovery in aid of private international arbitration tribunals

(a) Intel Corp. v. Advanced Micro Devices, Inc.

The *Intel* case originated with an antitrust claim brought before the European Union's antitrust enforcement agency – the Directorate-General for Competition of the Commission of the European Communities.[86] Advanced Micro Devices (AMD) filed a complaint against its competitor Intel Corporation (Intel) with the Directorate-General, alleging that the latter's actions violated European competition law.[87] In pursuit of its complaint, AMD petitioned the U.S. District Court for the Northern District of California pursuant to section 1782 for an order directing Intel to produce potentially relevant documents, and the case reached the Supreme Court on the broad issue of whether the district court had authority under section 1782 to entertain AMD's discovery request.[88]

The Court answered in the affirmative and held, among other things, that the Commission of the European Communities qualified as a "tribunal" pursuant to section 1782 when it acted as a "first-instance decisionmaker."[89] In making this determination, the Court explained that when Congress established the Commission that ultimately recommended the modern revision of section 1782, it instructed that the Commission "recommend procedural revisions 'for the rendering of assistance to foreign courts **and quasi-judicial agencies**,'" and that it understood the final language of the statute to "provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]."[90]

Notably, the Court also referenced a law review article defining the term tribunal as "includ[ing] investigating magistrates, administrative and **arbitral tribunals**, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[91] Since the *Intel* decision, the lower federal courts have struggled to determine whether *Intel* requires that a private commercial arbitral tribunal seated outside the United States is a foreign or international tribunal within the meaning of section 1782.

(b) How the circuit courts responded

The circuit courts of appeals are divided on the applicability of section 1782 to international commercial arbitrations, as opposed to purely interstate arbitration (which is between two nation-states), or investor-state arbitration (which involves a private party but is only possible because of treaties among nation states). The distinction between commercial and purely interstate or investor-state arbitration is that interstate and nation-state arbitrations originate in an intergovernmental process pursuant to international instruments, and therefore have the sanction of their respective governments.[92] As noted by Professor S.I. Strong, interstate arbitrations may be said to "fall[] within the terms of [section 1782] because such proceedings involve an international agreement containing a grant of jurisdiction from the sovereign states to the arbitral tribunal."[93]

The circuit courts that explicitly have rejected the applicability of section 1782 to private international commercial arbitration have distinguished it from interstate and nation-state arbitrations on the above grounds, explaining that section 1782 was meant to apply only to governmental and intergovernmental tribunals.[94] In pre-*Intel* decisions, the Second Circuit and Fifth Circuit both held that private arbitral tribunals established by contract do not qualify as "a foreign or international tribunal" pursuant to section 1782.[95]

Moreover, both courts have reaffirmed this view following *Intel*. In a 2009 unpublished opinion in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, the Fifth Circuit specifically stated that its prior holding "that a 'tribunal' within the meaning of § 1782 did not include a private international arbitral tribunal" remains unchanged after *Intel*.[96] It explained that neither the applicability of section 1782 to private international arbitration tribunals nor the concerns raised in its prior decision regarding such application were considered by the *Intel* Court.[97]

Likewise, in the 2020 case *In re Application of Hanwei Guo*, the Second Circuit concluded that its prior holding that private arbitral tribunals seated outside the United States do not qualify as foreign or international tribunals under section 1782 remains good law.[98] Like the Fifth Circuit, the Second Circuit explained that the distinct question of whether a private international arbitration tribunal qualifies as a "tribunal" under section 1782 was not before the *Intel* Court and, therefore, there were insufficient grounds on which to overrule its prior decision.[99]

In *Servotronics Inc. v. Rolls-Royce PLC et al*, No. 19-cv-1847 (7th Cir. Sept. 22, 2020) at 15, the Seventh Circuit aligned itself with the Second and Fifth Circuits in holding "that § 1782(a) does not authorize the district courts to compel discovery for use in private foreign arbitrations."

The Fourth and Sixth Circuits have reached the opposite conclusion. In its 2019 decision in *In re Application to Obtain Discovery for Use in Foreign Proceedings (FedEx)*, the Sixth Circuit expressly rejected the Second and Fifth Circuit rationales and held that section 1782 can be employed in support of private commercial arbitrations.[100] In reaching this result, the Sixth Circuit relied primarily on an analysis of section 1782's text and specifically on the meaning of the word "tribunal."[101] It explained that "*Intel* contains no limiting principle suggesting that the ordinary meaning of 'tribunal' does not apply" to "arbitral authorities constituted pursuant to a contract between private parties."[102] The court also found that neither the statute's context nor its legislative history contradicted this conclusion.[103]

In 2020, the Fourth Circuit joined the Sixth Circuit, holding in *Servotronics, Inc. v. Boeing Co.* that a private commercial arbitral tribunal seated outside the United States is indeed a foreign or international tribunal within the meaning of section 1782.[104] Like the Sixth Circuit, it expressly rejected the argument that the term "'tribunal,' as used in § 1782(a), still refers only to 'an entity that exercise[s] government-conferred authority,'" concluding that this view represented "too narrow an understanding of arbitration."[105]

Finally, in a 2012 opinion that was later vacated and superseded, the Eleventh Circuit held in *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.* that section 1782 could be used in support of private commercial arbitrations seated outside the United States.[106] It found the *Intel* opinion's emphasis on the breadth of the statutory term "tribunal" to be significant.[107] Thus, it explained, "while the Supreme Court in *Intel* was not tasked with specifically deciding whether a private arbitral tribunal falls under the statute, its broad functional construction of the term 'tribunal' provides us with substantial guidance."[108] But upon reconsideration of *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.* in 2014, the Eleventh Circuit expressly declined to answer whether private arbitral tribunals fall within the scope of section 1782, granting the section 1782 application in support of a reasonably contemplated foreign court proceeding.[109]

The significance of section 1782 to private international commercial arbitration

Recent decades have seen a tremendous expansion in the use of international commercial arbitration as a dispute settlement mechanism. For example, the ICC International Court of Arbitration, which is generally accepted as one of the world's leading international commercial arbitration institutions, registered a total of 869 new cases in 2019.[110] This is the second highest number of newly registered cases in the almost 100-year history of the arbitral institution (behind the record figure of 966 cases in 2016).[111] Of the new cases added in 2019, 80 percent did not involve a state or a state entity.[112] Latin America and the Caribbean saw a 14 percent increase in the number of parties before the ICC in 2019 for a total of 386. And of those 386 parties, 133 were from Brazil, which is ranked third behind the United States and India among the countries whose citizens most used ICC arbitration. Other leading arbitration institutions have likewise seen a steady increase in private international arbitration disputes.

Although private international commercial arbitration has proven increasingly valuable, it is not without its limitations. Section 1782 applications may be useful in addressing two common restraints faced by arbitral tribunals: limited authority to issue and enforce discovery orders and limited evidentiary gathering procedures.

Because private international commercial arbitration is a creature of contract, arbitral tribunals lack the authority of a state apparatus to issue and enforce discovery orders. In other words, arbitrators do not have the same powers as national courts to compel either parties or non-parties to produce evidence without judicial assistance, which national courts may or may not provide. With respect to parties, arbitral tribunals generally have three primary means through which to coerce the production of evidence: imposing monetary sanctions; requiring the withholding party to bear the costs of the arbitration and/or the other side's legal fees; and drawing an adverse inference against the withholding party.[113] However, when it comes to non-parties, arbitral tribunals generally lack the ability to issue subpoenas or to otherwise compel third parties to provide evidence.

Section 1782 helps address this limitation by allowing discovery from any person, including a non-party, who "resides or is found" in the district where the section 1782 application is filed.[114] In fact, the first factor identified

by the *Intel* Court as bearing consideration in ruling on a section 1782 request is whether the person from whom discovery is sought is a participant in the foreign proceeding.[115] As explained by the Court, the need for section 1782 aid is usually more apparent when evidence is sought from nonparticipants in the foreign proceeding because these "may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid."[116] Notably, a Southern District of Florida court recently agreed with Reed Smith's argument that section 1782 actions themselves may be subject to arbitration,[117] in which case the section 1782 applicant's request, if granted, may be limited by the arbitrator's discretion and authority to compel the discovery.

Indeed, evidentiary gathering procedures in international arbitration usually are more limited than in many common law court systems. By way of example, with respect to requests for the production of documents in the possession of an opposing party, the IBA Rules on the Taking of Evidence in International Arbitration were drafted specifically with the understanding that "[e]xpansive American- or English-style discovery is generally inappropriate in international arbitration."[118] The IBA Rules are broadly considered the most widespread and successful initiative to provide a balanced approach to evidence gathering and presentation in international arbitrations. By contrast, to the extent that a discovery order pursuant to section 1782 does not prescribe the specific practice and procedure to be employed, the statute provides that these shall be "in accordance with the Federal Rules of Civil Procedure."[119] Therefore, a successful section 1782 application potentially allows for a broader scope of discoverable information than would be available under the applicable arbitration rules.

Authors:

Ed Mullins
Partner
Miami
+1 786 747 0203
emullins@reedsmith.com

Daniel Sox
Associate
Miami
+1 786 747 0233
dsox@reedsmith.com

Anabel Blanco
2021 Incoming Associate

Unstoppable forces and immovable objects: the impact of cross-border insolvency on international arbitration

The fallout of the COVID-19 pandemic has both highlighted and hastened the clash of two historically invincible policy adversaries: international arbitration and bankruptcy proceedings. Both are spurred forward by contract defaults, calling of guaranties, insolvencies of businesses, and the other types of economic destruction caused by the pandemic's economic slowdown. Which of these policies will reveal its dominance during these tumultuous times: the immovable policy favoring arbitration, or the unstoppable force of cross-border insolvency proceedings? Will the individuality of international arbitration proceedings yield to the collectivism of insolvency proceedings?[120]

This article seeks to provide the foot soldiers in this conflict – multinational enterprises and international arbitration practitioners – a survey of the munitions and battlefields at issue, including the legal policies in conflict and the tools potentially available to the bankruptcy court to influence international arbitration proceedings.

The immovable object: pro-arbitration policies

State policies favoring arbitration are strong, durable, and ubiquitous throughout the world. The Supreme Court of the United States has articulated "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[121] The Supreme Court has further instructed that the deference to arbitration is particularly strong in the context of international agreements.[122] The predictability and reliability of the enforcement of agreements to arbitrate and arbitral awards are important components in the foundation of international commerce.[123] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[124] (the New York Convention) elevates the recognition and enforcement of international agreements to arbitrate and the subsequent awards to treaty-based obligations by the signatory countries. The New York Convention is essential to the predictability and reliability of the enforcement of these agreements. It has been ratified by over 160 countries throughout the world, including the United States.[125] The New York Convention has been implemented in the United States through Chapter 2 of the Federal Arbitration Act (the FAA).[126] The Supreme Court reiterated that "[t]he goal of the [New York Convention], and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[127]

The highest standards must be met to override the provisions of the FAA. The Supreme Court explained that in order to remove a claim from the ambit of the FAA, Congress must have expressly excluded it:

The FAA, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.[128]

Ultimately, the policies and legal frameworks buttressing international arbitration protect party autonomy to resolve their disputes as contracted, the neutrality of a forum, the parties' privacy, and the predictability of enforcement.

The unstoppable force: bankruptcy proceedings

Insolvency proceedings, on the other hand, often seek the opposite of arbitration. Scholars have observed that U.S. insolvency law, for example, primarily serves two fundamental purposes: (1) ensuring an insolvent is afforded the opportunity for a "fresh start;" and (2) providing a means to equitably distribute nonexempt assets to creditors.[129] The centralization of insolvency-related disputes is essential to providing insolvent parties an expeditious remedy and preserving creditors' interests in the insolvency estate:[130]

"To protect reorganizing debtors and their creditors from piecemeal litigation, the bankruptcy laws centralize all disputes concerning [a debtor's legal obligations] so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas."[131] This is particularly so under Chapters 11 and 15 of the U.S. Bankruptcy Code, which mandates a worldwide stay of proceedings against the debtor. The automatic stay, in theory, centralizes the administration of competing claims and prevents forum shopping in various jurisdictions by different creditors. This automatic stay, however, is not available as part of bankruptcy proceedings in all jurisdictions throughout the world. In the European Union, for example, unlike the United States, it is market practice that all classes of creditors and shareholders will sign the same intercreditor agreement with the goal of achieving the results of the automatic stay via contractual agreement, namely preventing forum shopping and centralizing and agreeing the parties' relationship and their claims process.

In many instances, arbitration could be antithetical to these goals. Insolvency proceedings often require sacrifice of some of both the debtor's and creditors' rights in order to benefit the creditor group as a whole. For example, the estate's time and expense invested into a single creditor's claim could be harmful to other creditors. Practically speaking, enforcement of an agreement to arbitrate or award could be like a priority over the other unsecured creditors.[132] The inherently limited funds in the bankruptcy estate are better used for funding the collective summary proceedings under the unified control of the bankruptcy proceedings, rather than for the fees for the attorneys, experts, arbitrators and administrators in a claim by an individual creditor. Creditors benefit from a single, transparent, equal, and predictable claim process as opposed to a multifarious process through individual court cases or arbitrations.

Courts have recognized this conflict with a now oft-quoted statement that insolvency and arbitration policies can present "a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution."[133]

Legal framework

The clash between these two procedures will implicate various bodies of law, with which a practitioner would be well served to be familiar before a conflict arises. These key bodies of law and some provisions of note are set out below.

(a) UNCITRAL Model Law on Cross-Border Insolvency and U.S. Bankruptcy Code Chapter 15

On the insolvency side of the conflict, a practitioner should be familiar with the 1997 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the Model Law).[134] To date the Model Law has been adopted in 48 states in a total of 51 jurisdictions, including the United States and certain Latin American countries (*i.e.*, Chile, Colombia, Dominican Republic, Mexico, and Panama).[135] The Model Law was implemented in the United States in 2005 through Chapter 15 of the United States Bankruptcy Code.[136]

The stated purpose of the Model Law was "to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws ….”[137] The purpose of Chapter 15 implementing the Model Law in the United States is realized through five objectives:

1. to promote cooperation between the U.S. courts and parties of interest and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

2. to establish greater legal certainty for trade and investment;

3. to provide for the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor;

4. to afford protection and maximization of the value of the debtor’s assets; and

5. to facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[138]

The Model Law recognizes “main” and “non-main” foreign proceedings. A main proceeding takes place “in the State where the debtor has the centre of its main interests” (COMI).[139] The non-main proceeding, on the other hand, takes place in a state in which the debtor has an “establishment,” which is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.” The concept of the debtor’s COMI is not defined in the Model Law, and the Model Law likewise does not provide guidance on how to navigate the COMI analysis in the context of corporate groups. The only guidance provided by the Model Law is found in Article 16(3), which provides that “in the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.” The United States adopted the principle in 11 U.S.C. Section 1516(c), which uses the phrase “in the absence of evidence to the contrary.”[140]

The importance of the debtor’s COMI is that, presumably, it provides the primary law governing the insolvency proceedings, and thereby it should provide some degree of unanimity and consistency for the worldwide allocation and distribution of assets. The goal of COMI, and harmonized bankruptcy rules in general, is to provide greater predictability about the rules and regulations that would apply in a debtor’s insolvency proceedings and, by extension, allow current and potential creditors to better calculate and access their rights, remedies, cost, and exposure in the case of an insolvency. Some implementation questions which can arise, however, include, among others: how to determine the COMI of a multinational group of independent affiliated companies with multiple states of incorporation and business, how to categorize proceedings filed where a company is registered but not actually doing business, how to determine the COMI of companies which do business in various countries over the internet, and how to treat individuals who move residences after the proceedings are initiated.[141]

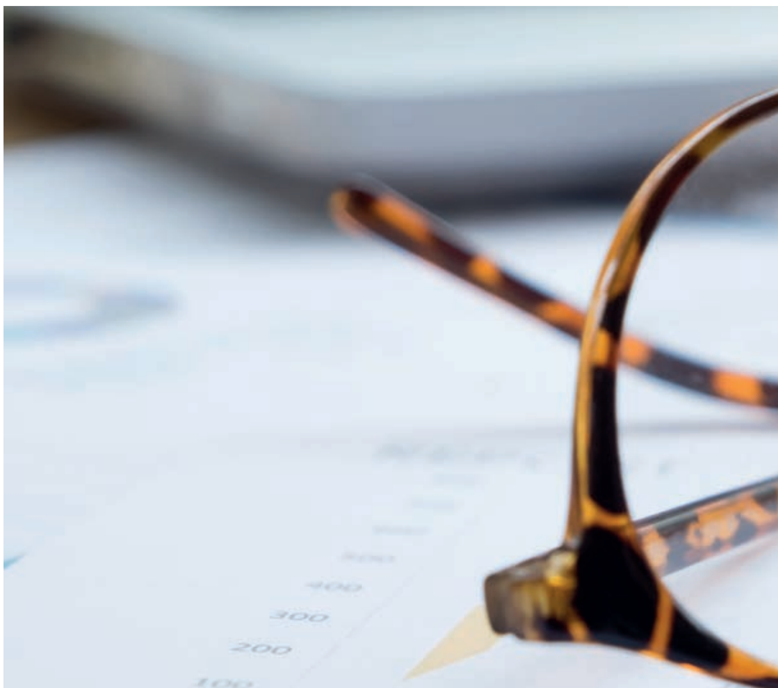
The Model Law and Chapter 15 also codify a general principle of cooperation and communication when insolvency cases are opened in more than one country.[142] Examples of various tools the Model Law and Chapter 15 give to bankruptcy courts to influence arbitrations are discussed later in this article.

(b) The New York Convention and the Federal Arbitration Act

As referenced above, the New York Convention is the preeminent treaty supporting the recognition and enforcement of international agreements to arbitrate and the subsequent awards. In international arbitration circles, its provisions are considered sacrosanct. The FAA provides generally that the New York Convention “shall be enforced in United States courts in accordance with [Chapter 2 of the FAA].”[143]

Provisions of the New York Convention most at issue in this conflict include those mandating the recognition and enforcement of agreements to arbitrate and awards. For example regarding agreements to arbitrate, Article II(1) mandates that a court “**shall** recognize an agreement …to submit to arbitration all or any differences which have arisen or which may arise between them … concerning a **subject matter capable of settlement by arbitration**.” (emphasis added). Article II(3) also mandates that the court “**shall** …refer the parties to arbitration, unless it finds that the said agreement is **null and void, inoperative or incapable of being performed**.” (emphasis added).

Regarding awards, Article III mandates that a signatory state “**shall** recognize arbitral awards as **binding** and **enforce** them in accordance with the rules of procedure of the territory where the award is relied upon ….” The grounds for refusing to enforce an award under the New York Convention are extremely limited. Article V(1) allows



that recognition and enforcement of an award **may** be refused **only** under certain circumstances, including in relevant part:

> "The parties to the **agreement** [to arbitrate] … **were, under the law applicable to them**, under some **incapacity**, or the said **agreement is not valid under the law to which the parties have subjected it** or, failing any indication thereon, under the **law of the country where the award was made**; …"

(e) The award … has been **set aside or suspended** by a competent authority of the country in which, or under the law of which, that award was made. (emphasis added).[144]

Additionally, Article V(2) provides that a court also **may** refuse recognition and enforcement of an award if:

(a) "The **subject matter** of the difference is **not capable of settlement by arbitration under the law of that country**; or"

(b) "The recognition or enforcement of the award would be **contrary to the public policy of that country**. (emphasis added).[145]"

The FAA is in accord. Section 207 of the FAA provides that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention."[146]

As the Second Circuit noted, the New York Convention makes no provisions on how to address conflicts in these provisions with the provisions under bankruptcy law.[147] Similarly, the New York Convention does not expound on whether a country's bankruptcy policy is the type of public policy recognized in Article V(2)(b) as grounds to refuse to recognize an award.[148]

(c) Which law would govern the conflict?

When arbitration and insolvency proceedings compete for control over a dispute, what law should govern the decisions on how to proceed? And what law should an arbitrator look to for questions of arbitrability, capacity, and enforcement? For example, an arbitrator may have to decide conflicts of laws questions such as:

- Should the arbitrator look to the insolvency provisions of the law of the seat of arbitration?
- Should the arbitrator look to the insolvency provisions of the governing law of the contract?
- Should the arbitrator look to the insolvency provisions of the law of the state of incorporation of the debtor?
- If the insolvency proceedings are not in the same country as the seat or governing law, should the arbitrator take them into consideration?
- Should the law of the "main" insolvency proceedings govern?
- Does the bankruptcy proceeding also have influence over counterclaims and set-offs? What law would govern?
- Should the tribunal consider the law of the likely country of enforcement?[149]

One illustration of this conundrum is the inconsistent results from the Vivendi/Elektrim group of cases from 2008-2009. Elektrim was a Polish company that was declared bankrupt in Poland.[150] Elektrim was a party to two arbitrations, one in Switzerland and one in England. The issue in both forums was whether the impact of bankruptcy on a pending arbitration is governed by the law of the state in which the bankruptcy was declared or the law of the state in which the arbitration has its seat. Polish bankruptcy law provided unequivocally that arbitration clauses entered into by the debtor lose their effect upon the filing of an insolvency proceeding, and any arbitration proceedings shall be discontinued.

The Switzerland-seated arbitration, and later the Swiss court, found that the law of the state of incorporation of the company, Poland, determined its legal capacity. The tribunal and court found that the tribunal, therefore, had no jurisdiction over Elektrim. On the other hand, the English court found that pursuant to English/EU insolvency law the England-seated arbitration shall look to the law of the state in which the arbitration was pending, and therefore, the court determined that the tribunal **did** have jurisdiction over Elektrim.

Tools available to U.S. bankruptcy courts to impact international arbitrations

Insolvency laws of various jurisdictions provide an assortment of powerful tools to the bankruptcy courts to consolidate proceedings, protect assets of the debtor, and protect claims of the creditors. This is particularly so in the U.S. Bankruptcy Code.

(a) Automatic stay and anti-arbitration injunctions

A well-known tool the U.S. bankruptcy courts have at their disposal is the automatic stay of proceedings and, if needed, an anti-arbitration injunction. The language of U.S. Bankruptcy Code Section 362(a) provides that the stay prohibits acts against the debtor or property of the debtor's estate, or efforts to exercise control over the debtor's property. The stay gives the U.S. bankruptcy court and parties time to reorganize the finances of the debtor and ensure control of the allocation of assets by the bankruptcy court – not by individual creditors and tribunals without considering the macro view of the estate. These collective proceedings are designed to be speedy and efficient, and to ensure all creditors are treated equally and fairly.[151] The purposes of the stay "are to protect the debtor's assets, provide temporary relief from creditors, and further the equity of distribution among the creditors by forestalling a race to the courthouse."[152]

U.S. courts have been relatively clear that the scope of the automatic stay in Bankruptcy Code Section. 362 "is broad and covers all proceedings against a debtor, including arbitration."[153] Moreover, the stay is considered to have worldwide effect.[154] This feature makes proceedings in the United States attractive to borrowers and creditors. The broad recognition of the stay by financial institutions and other creditors is part of the reason that even in New York-law governed cross-border financings, market practice does not include "all stakeholder" intercreditor agreements of the type that is common in European financings.

This tradition continues in Article 20 of the Model Law regarding the effects of recognition of a foreign main proceeding, which provides that if the foreign proceeding is recognized as a "main" proceeding, then the following mandatory actions are taken:

(1)(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.[155]

Further, the Model Law also provides under Article 21 that the court **may** issue the aforementioned stays for "non-main" proceedings.[156] Article 15 of the Bankruptcy Code is in accord. Section 1520 instructs that Section 362's provisions will apply equally to an insolvent's U.S. assets upon recognition of that insolvent's "foreign main proceeding." The Guide to the Model Law clarifies that the restrictions on the "commencement or continuation of individual actions" also "covers actions before an arbitral tribunal."[157] The Guide to the Model Law explains, however, that the particularities of international arbitration cannot be completely accounted for in applying the stay in an international proceeding. "For example, if the arbitration does not take place in either the **enacting State** [of the Model Law on Cross-Border Insolvency] or the **State of the main proceeding**, it may be difficult to enforce the stay of the arbitral proceedings." (emphasis added).[158] Nonetheless, an arbitration tribunal may also wonder if it is at risk of being held in contempt in the bankruptcy proceedings if it decides it can proceed with the arbitration. By forcing parties to the bankruptcy court to lift the stay, the bankruptcy court effectively has the authority to determine whether or not the arbitration is appropriate. Similarly, an arbitration tribunal may also have to address questions regarding who has the right to appear on behalf of the debtor: would it be the debtor or the trustee?

(b) Agreement to arbitrate void or dispute not capable of being arbitrated

Multiple U.S. courts, as well as courts in other jurisdictions, have found that the institution of an insolvency proceeding renders the agreement to arbitrate by the debtor void, or that the issue is no longer capable of resolution by arbitration.[159] Commentators suggest, however, that this power is limited only to pure or core bankruptcy issues. In other words, the very core of insolvency issues – appointment of the trustee, verification, acceptance of the creditors' claims, etc.– may not be subject to arbitration.[160]

The question then arises as to whether this is contrary to the mandatory provisions of the New York Convention regarding the recognition and enforcement of agreements to arbitrate.[161] Did the parties not agree to remove the dispute from the ambit of the courts of the parties (including their bankruptcy courts)? Are the recognition and enforcement of these agreements under the New York Convention not public policy of the United States? Note that the Model Law allows a court to refuse to take action if it "would be manifestly contrary to the public policy of" the country.[162] Moreover, Chapter 15 defers to treaties in Section 1503: "To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty … the requirements of the treaty … prevail."[163] On the other hand, the New York Convention recognizes exceptions to recognition and enforcement of agreements to arbitrate and awards for public policy reasons[164] or if they are null, inoperative, or not capable of arbitration under the law of the place of enforcement.[165] The guide to the Model Law regarding Article 20 pronounces without analysis that "[s]uch limitations [including the stay] are not contrary to the … [New York Convention]."[166] There are examples of U.S. courts weighing in on the side of the supremacy of bankruptcy policy: "In the bankruptcy setting, congressional intent to permit a bankruptcy court to enjoin arbitration is sufficiently clear to override even international arbitration agreements."[167]

(c) Enforcement of award prevented

Another tool available to the bankruptcy court is to find that if the arbitration proceeded to an award, then the award would not be enforceable against the debtor or the debtor's assets. Some courts have found that such an award would be "void."[168] Section 541 of the U.S. Bankruptcy Code defines property of the bankruptcy estate broadly, stating that it effectively shelters a debtor's assets from becoming subject to an arbitral award without court approval.[169] If enforcement were sought in the bankruptcy court against the assets of the debtor, the claimant would argue that the liability and quantum of the claim were conclusively established by the arbitration as provided by the New York Convention. The insolvency court, on the other hand, may not agree and refuse to recognize the award. Would recognition of the arbitral award finding liability and quantum not be tantamount to a preference to those creditors who fractured the claim process and proceeding in international arbitration? If the bankruptcy court refuses to recognize the award, the time and expense spent in obtaining the award may have been for naught.[170] Commentators have mused over whether the arbitrator should consider and analyze such enforcement issues in accord with the desire to render an enforceable award.[171]

Arbitral mischief in bankruptcy proceedings

This clash is not a one-sided engagement dominated completely by insolvency proceedings; international arbitration can cause a bit of mischief in its own right. A comprehensive list and in-depth analysis of ways international arbitration can impact insolvency proceedings are beyond the scope of this article. Nonetheless, some of these impacts deserve mention, if only to acknowledge international arbitration's valor in this conflict.

For example, a winning party in an arbitration may seek to use the bankruptcy proceedings to conduct asset discovery to locate assets or potential revenue streams for execution on the award. The winning party in the arbitration might be subject to the automatic stay and would not be able to execute on assets without going through the bankruptcy process. Nonetheless, the winner may have the ability – subject to court approval – to take the lead in asset discovery against the debtor. The arbitration award creditor can also seek relief from stay or dismissal of the case if it was filed in bad faith. A creditor who is also an arbitration party might also be able to bring to light efforts to conceal assets from the court.

A party to an arbitration might also attempt to use as leverage the bankruptcy of a company related to a party to the arbitration. For example, if a non-party shareholder of the claimant in an arbitration declared bankruptcy, could the respondent seek to have the insolvency proceeding subsume, stay, or otherwise interfere with the arbitration? The claimant would argue against this, noting that the non-debtor company (the claimant) may be owned in whole or part by the debtor, but the claimant itself is not an asset of the bankruptcy estate and, therefore, not subject to a stay.[172] In any event, if an owner or affiliate of a party to an arbitration initiates a bankruptcy proceeding, counsel for both arbitration parties would be wise to have bankruptcy counsel at the ready.

Conclusion

The clash between the immovable object of pro-arbitration policy and the unstoppable force of collective resolution by the bankruptcy court can take place on multiple battlefields, including pre-petition breach of contract arbitration claims against a debtor, claims against subsidiaries or affiliates of the debtor, creditor claims against a non-debtor such as a guarantor,[173] enforcement of pre- or post-petition awards, arbitration of claims during the insolvency proceedings administered by the trustee, and others. International arbitration and bankruptcy practitioners alike would be well served to be aware in advance of the tools available to the bankruptcy court and the associated risks in order to prepare an effective strategy to pass through this conflict zone.

Author:

William Russell
Counsel
Houston
+1 713 469 3634
wrussell@reedsmith.com

The “contract eject button”: precision in drafting, contract and notices

What happens when a party wants to rely on force majeure to pause or end its contract obligations, i.e. to hit the “contract eject button”? This is a perennial issue for South and Central American clients, which has only been heightened by the COVID-19 pandemic.

In this article we focus on three areas: (1) force majeure clauses under English law; (2) notice clauses in respect of force majeure; and (3) how choice of tribunal in a London seated arbitration can be critical to the determination of rights in respect of (1) and (2).

The eject mechanism: force majeure

The words “force majeure” come from the French civil law tradition and literally mean “superior force.” The term is familiar to most and in many legal systems refers to the occurrence of something outside of a party’s control that stops that party from being able to perform its obligations under a contract.

English law does not recognize the concept of force majeure under common law. Rather, force majeure is a contractual term that only arises on the basis of a force majeure provision in a contract. The effect of such a clause will depend entirely on its wording.[174] It follows that an event may be extreme and/or economically devastating, yet fall outside of the terms of the clause and give no relief from performance.

The approach under English law is that the contractual parties are free to stipulate when and how their respective obligations will come to an end on occurrence of an event outside of their control. The inclusion of a force majeure provision to this effect in the contract means that the parties may no longer rely on the common law doctrine of frustration to the extent their chosen force majeure wording covers the same events.[175]

The precise conditions for invoking force majeure depend entirely on the wording of the relevant clause. However, in general, most force majeure clauses require a party to show that:

1. performance has been “prevented”, “hindered”[176] or “delayed” as a result of an event listed in the clause (which may include a catch-all provision such as “any other cause beyond the [party’s] reasonable control”[177]);

2. the event and inability to perform are beyond the parties’ control [178]; and

3. no reasonable steps could be taken to avoid the event or its consequences.[179]

Where these conditions are satisfied, a party will no longer be required to perform under the contract (whether by suspension or termination of the contract). In the alternative (and less commonly), a party may be

protected against any liability arising out of their non-performance due to a force majeure event.

English law takes a narrow approach to force majeure clauses (as with any other exclusion or exceptions clause) and looks strictly to the wording of the relevant clause. The courts will not readily release a party from their original bargain and thereby allow that party to avoid performance under, or terminate, a contract (depending on the clause). A party must, accordingly, demonstrate that the events relied on fall squarely within the contractual force majeure wording. Any ambiguity will be resolved against the party relying on the clause. Economic factors are ignored, even if a contract becomes completely uneconomic to perform.

A good example of the strict interpretation adopted by the English courts can be seen in the recent decision of the English Court of Appeal in *Classic Maritime Inc v. Limbungan Makmur Sdn Bhd*,[180] a dispute that followed the catastrophic collapse of the Brazilian Fundão dam in 2015.

The case concerned a long-term contract of affreightment (COA) for the carriage of iron ore from Brazil to Malaysia, by which the charterers had to ship a certain number of cargoes within a set period. Under the contract, the charterers had previously shipped iron ore from a mine that was affected by the collapse of the dam. When production from that mine ceased, the charterers purported to rely on force majeure in the form of an exemption from liability for failing to ship cargoes as required under the COA.

The relevant clause in the COA excluded liability for any failure to supply cargoes where such failure "result[ed] from … floods … accidents at the mine … or any other causes beyond … Charterers' control".

The claim was initiated by the shipowners, who claimed for lost freight in respect of shipments that were required under the COA but never made. The High Court held the charterers liable but only awarded nominal damages because of a finding that the contract could never have been performed due to the dam burst. The shipowners appealed that decision to the Court of Appeal.

The Court of Appeal took a different view from the High Court on causation and held that the words "result[ed] from" imposed a strict causation test. If, "but for" for the dam's collapse and its effect on the mine, the charterers would have performed, they were excluded from liability. If they would not, they were liable to the shipowners. In this respect, the Court of Appeal relied on a finding of the High Court (unchallenged on appeal) that had the dam not collapsed, the charterers would have defaulted on their obligation to provide cargoes anyway. A collapse of demand in the Malaysian markets had meant that, even prior to the failure of the dam, the charterers had already defaulted on the provision of two cargoes. Therefore, the failure of the dam, and resulting impact on production from the mine, was not the true cause of the charterers' non-performance. The result was a judgment in excess of $19 million against the charterers.

This causation test applies wherever a force majeure clause requires that performance be "prevented," "hindered" or "delayed." The relevant question is, therefore, what would have happened if the force majeure event had not occurred? If the answer is that performance would not have taken place anyway, force majeure will not apply.

The situation is even more restrictive in shipping time charters, where (broadly) the parties' bargain is that the owners provide a vessel and crew while the charterers pay hire (and supply fuel (bunkers) to the vessel). A force majeure clause that only applies where the charterers cannot "make use of" the vessel will almost never be successfully invoked because the charterer will always be able to find some use for the vessel, even where such use is uneconomic (for example, the carriage of cargo occupying only 5 percent of the vessel's carrying capacity). In these circumstances, nothing short of an event rendering performance actually impossible (e.g. a government edict making it illegal to use the vessel for the contracted trade) will interrupt the charterers' obligation to pay hire. It follows that, when a dispute arises, determination of what is possible becomes a key issue.

If a time charterer is relying on one source of supply to justify their use of a vessel, they bear the risk of paying hire on an ongoing basis in the event that supply is lost unless there is an express contractual provision to the contrary. It should be borne in mind that the effect of including "unavailability of cargo" (or similar) as a force majeure event would be to ask the shipowners to assume the risk of a supply failure, with the result that they may lose out on hire payments and potentially have to lay up their vessels until alternative employment can be found.

It follows that it is prudent to give careful consideration to the wording of any force majeure clause and analyze the respective risks arising out of a listed event. The clearer the drafting of such a clause, the less likely it is to give rise to a dispute. As a result, it may be necessary to consider the types of event that might make performance impossible, extremely difficult, or even uncommercial, and establish a clear idea of what does and what does not constitute force majeure under the contract.

Unfortunately, it is often the case that not enough attention is paid to force majeure clauses when contracts are negotiated (force majeure clauses are often considered "boiler plate" clauses). In the context of charter parties, these clauses are often the charterers' construction, drafted with a pre-conceived idea of what force majeure means and lacking the precision necessary to withstand determination under English law. Effective clauses may also be watered down in rounds of negotiations with owners, resulting in a lack of clarity.

By way of example, the standard form of charter parties and bills of lading did not consider the effects of the COVID-19 pandemic on shipping and trade. As a result, the default position that the parties are to continue their respective obligations has remained unchanged: absent legal prohibitions (such as quarantines) imposed on vessels, charterers continue to be held to their obligations under charter parties.

Charterers relying on mining and production in Latin America may be particularly affected by the major COVID-19 outbreak in the region. Whilst mines have generally remained open across the continent, the industry has been significantly affected by the pandemic. For example, Mexico suspended all mining operations on April 2 for six weeks in response to the crisis[181] and a major Brazilian iron ore facility was ordered to halt production in June due to health concerns.[182] Levels of production for the rest of the year remain uncertain as the infection rate among workers continues to rise. In addition, mining projects set to commence in 2020 have been delayed and strikes are threatened by workers demanding increased protection.[183] Although these measures are likely to negatively impact production (and accordingly supply), charterers will likely remain liable to fulfil their obligations under a charter, even where it is uneconomical to do so.

The eject button: notices

One further fertile area for disputes arises where reliance on a force majeure clause is conditioned on service of valid notice. If a notice does not contain the information required by the terms of the contract or is factually inaccurate, the right to rely on force majeure can be lost.

Fortunately, English law affords more flexibility to force majeure notices than it does to the clauses themselves. The terms of a notice must be sufficiently clear to leave a "reasonable recipient" in the position of the other party "in no reasonable doubt as to how and when [the notice] is intended to operate."[184] Therefore, in respect of notices, if it can be shown that the parties understand the substance of a notice from its context, an otherwise vague statement such as "you know who has done you know what" might be perfectly clear to the parties for the purposes of tendering a valid notice under English law. Clearly, arbitrating or litigating on that basis would be extremely risky because the parties may not agree on what a reasonable recipient in the position of a party would have understood.

Taking the example above, had there been a notice requirement and the charterers given notice that "following the collapse of the Fundão dam, we are declaring force majeure," the notice would have been ineffective. The shipowners were not in a commercial position to be expected to know the details of how the dam collapse had affected the charterers' supply chain or ability to provide cargoes for the vessel. As such, a reasonable recipient in the position of a shipowner would not know that the collapse of the Fundão dam would mean the charterers could no longer provide cargoes to the ship.

Therefore, erring on the side of caution in how notices are prepared is often necessary. In order to avoid the risk of disputes arising about whether or not a force majeure notice was effective, notices should follow the requirements of the force majeure clause, setting out the relevant facts, identifying the relevant force majeure event, explaining how performance under the contract in question has been affected, and clearly stating what the intended effect of the notice is (by reference to the specific clause number).

If in any doubt as to the accuracy of the notice, a party should continue serving further notices without prejudice to any earlier notice. For example, where it is unclear that performance has been "prevented", but it is clear it will be so in the future, it would be reasonable to serve weekly, or even daily, notices.

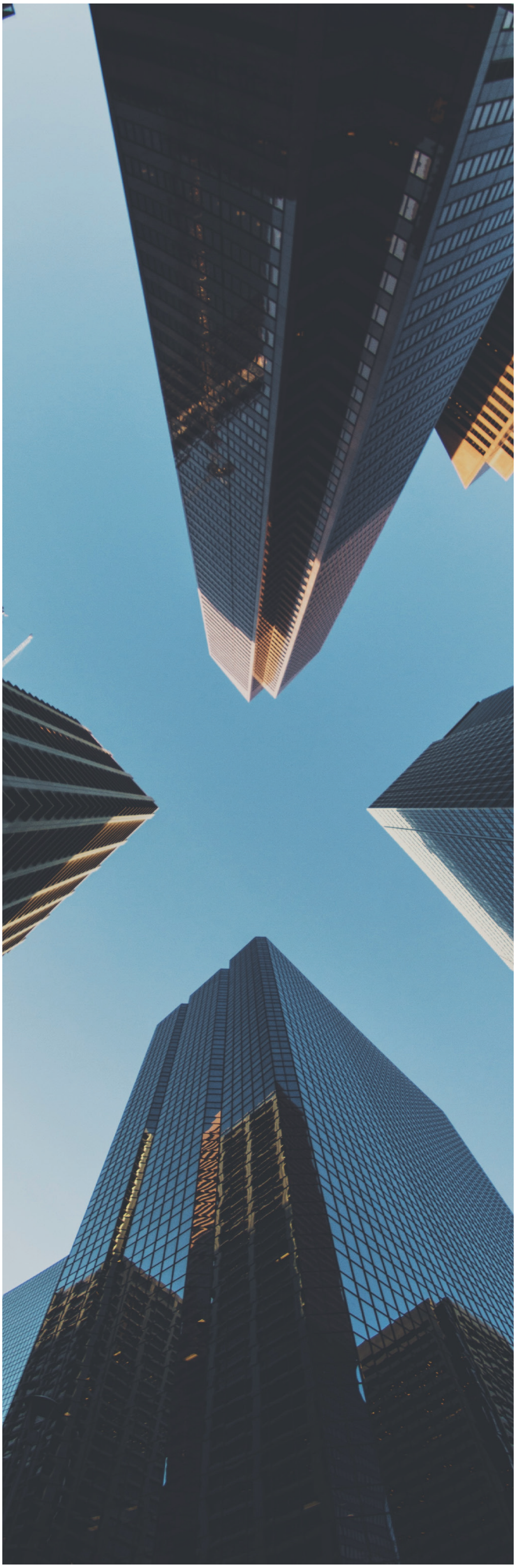
London arbitration – choice of tribunal

The role of an arbitration tribunal is to hold the parties to their respective obligations. In theory, all experienced arbitrators in a London seated arbitration should apply the law in exactly the same way and in a manner that is consistent with the English courts. However, in reality (and often depending on the experience or makeup of the tribunal) certain tribunals may be inclined to adopt a more "commercial" approach.

Tribunal selection will accordingly be critical to the determination of force majeure, and parties may wish to consider this at the outset of their contractual negotiations (rather than when a dispute arises).

For example, a contractual requirement that, in the event of a dispute, the tribunal must comprise of English Queen's Counsels (QCs) or retired English judges is likely to result in the adoption of a legalistic, rather than commercial, approach to the dispute. We have recent experience of such a clause, which provided for the appointment of QCs, but specifically those with 15 years' experience practicing in maritime law (the result of this was to significantly narrow the pool of potential candidates). This is likely to be preferable when a party is seeking to hold another party strictly to their obligations. QCs (or ex-judges) will generally take a black-letter approach to the law and a decision rendered by a tribunal of three QCs is likely to construe any contractual provisions strictly.

However, if you are the party who is more likely to rely on force majeure in the future, it may be preferable to seek a more permissive dispute resolution clause that would allow for the appointment of arbitrators with a commercial or industry background.



Authors:

Jeb Clulow
Partner
London
+44 (0)20 3116 3567
jclulow@reedsmith.com

Nick Wright
Associate
London
+44 (0)20 3116 3765
nwright@reedsmith.com

Endnotes

The attempted unplugging of Mexico's renewable energy market and its potential implications under investment treaties

1 The Mexican Constitution provides for three different types of actions to protect constitutional rights: (i) an amparo, a civil injunction similar to habeas corpus; (ii) constitutional controversy, a constitutional action filed by certain autonomous local, state, and federal government entities in connection with an invasion of jurisdiction by another governmental branch; and (iii) a constitutional challenge, a legal action that can be brought against a law that is unconstitutional.

2 See UNCTAD Investor Policy Hub: International Investment Agreements Navigator (available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/136/mexico).

3 See, e.g., InfraRed Environmental Infrastructure GP et al. v. Kingdom of Spain (ICSID Case No. ARB/14/12) award, August 2, 2019, para 455; Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain (SCC Case No. 2015/063) final award, February 15, 2018, para. 697; Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain (ICSID Case No. ARB/13/31) award, June 15, 2018; Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic (SCC Case No. 2015/095) final award, December 23, 2018.

4 See, e.g., Germany-Mexico BIT, Protocol, Ad article 3 (clarifying the measures taken for national security, public interest, public health, or morality shall not be considered "less favorable treatment" for purposes of evaluating national treatment and most-favored nation treatment standards).

5 A number of states have sought to invoke the "police powers" doctrine as a defense to claims arising from regulatory changes. This doctrine protects the state's bona fide right to regulate in such matters as the maintenance of public order, health, or morality, even when it causes economic damage to an investor.

6 Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7) award, July, 8 2016.

7 For instance, where a state acquired majority ownership of a bank, subsequently taking a number of management decisions resulting in the dilution of the shareholders' interest, a tribunal held that the conduct did not constitute unlawful expropriation, but was permissible on the basis that it was non-discriminatory, proportional and taken in good faith pursuit of a legitimate public policy objective. See Investment Group v. The Republic of Cyprus (ICSID Case No. ARB/13/27) award, July 26, 2018. On the other hand, another tribunal held that such conduct will not be permitted where it was adopted on a discriminatory basis, where public health is invoked as a pretext for other improper motives, where the state's actions exacerbate the crisis and cause avoidable harm to an investment, or where states could have adopted measures in pursuit of the policy objective without violating international treaty obligations. See AWG Group Ltd. v. The Argentine Republic (UNCITRAL) award, April 9, 2015).

8 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10).

9 In 2003, Venezuela failed in its attempt to invoke force majeure to defend a claim related to road tolls (Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/00/5) award, September 23, 2003.

10 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), page 80, paragraph 7.

11 See, e.g., Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1) decision on liability, December 27, 2010; CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8) award, May 12, 2005; BG Group Plc. v. The Republic of Argentina (UNCITRAL) final award, December 24, 2007; Suez et al. v. The Argentine Republic (ICSID Case No. ARB/03/17) decision on liability, July 30, 2010; EDF International S.A. et al. v. Argentine Republic (ICSID Case No. ARB/03/23) award, June 11, 2012; LG&E Energy Corp. Et al. v. Argentine Republic (ICSID Case No. ARB/02/1) decision on liability, October 3, 2006, para 257; Urbaser S.A. et al. v. The Argentine Republic (ICSID Case No. ARB/07/26) award, December 8, 2016.

12 By emphasizing the exceptional nature of this defense, the tribunal in LG&E held that "[e]mergency periods should be only strictly exceptional and should be applied exclusively when faced with extraordinary circumstances" and decided, ultimately, that "the damages suffered during the state of necessity should be borne by the investor." See LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic (ICSID Case No. ARB/02/1) decision on liability, October 3, 2006, paras. 229 and 264.

13 Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24) procedural order, September 6, 2005, paragraph 38.

14 Kryvoi, Y., Goldberg, D., and Philippov, I., Provisional Measures in Investor-State Arbitration, BIICL/White & Case, London, 2019, p. 15.

15 Kryvoi, Y., Goldberg, D., and Philippov, I., Provisional Measures in Investor-State Arbitration, BIICL/White & Case, London, 2019, p. 10.

16 Germany v. Poland (Factory at Chorzów), Merits, 1928 PCIJ (Ser. A) No. 17 (September 13).

17 On June 5, 2020, the Energy Charter Secretariat published the latest statistics on investment treaty cases brought under the Energy Charter Treaty, available at https://www.energychartertreaty.org/cases/statistics/.

18 See, e.g., PV Investors v. Spain (PCA Case No. 2012-14) award, February 28, 2020 (awarding EUR 91.1 million); NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11) award, May 31, 2019 (awarding the claimants EUR 290.6 million); and Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain (ICSID Case No. ARB/13/31) award, June 15, 2018 (awarding the claimants EUR 112 million).

The effects of energy and mining arbitration in LatAm: increased economic and political turmoil?

19 “14 Latin American nations seek IMF help to combat big recession,” The Financial Times, April 5, 2020, available at https://www.ft.com/content/dfd1aeed-6d56-466a-be6c-7bb73fc8da23.

20 United Nations Conference on Trade and Development, Investment Trends Monitor, March 2020 Special Issue, available at https://unctad.org/en/PublicationsLibrary/diae_gitm34_coronavirus_8march2020.pdf.

21 https://iea.ec/noticias/creacion-del-observatorio-permanente-sobre-el-estado-del-arbitraje-en-america-latina/ (in Spanish).

22 For the past two decades, Venezuela has been the locus of the largest energy arbitrations in LatAm. Venezuela has continued to dominate headlines with new cases, enforcement actions, and political and social crises.

23 Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, award dated January 18, 2019, available at https://www.italaw.com/cases/2513.

24 ConocoPhillips Petrozuata B, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, award dated March 8, 2019, available at https://www.italaw.com/cases/321.

25 When he came to power in Venezuela in 1998, Hugo Chavez started to reverse an earlier government’s liberalization of the energy market and laws and policies designed to encourage FDI in the oil industry.

26 ConocoPhillips v. Bolivarian Republic of Venezuela, No. 19-cv-00683, Dkt 1 (DDC, March 11, 2019).

27 “Venezuela’s Guaido to seek to annul $8.7 bln Conoco award,” Reuters, April 16, 2019, available at www.reuters.com/article/venezuela-politics-conocophillips/update-1-venezuelas-guaido-toseek-to-annul-8-7-bln-conoco-award-idUSL1N21Y1H6.

28 http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C259/DS14654_En.pdf.

29 https://images.law.com/contrib/content/uploads/documents/401/9302/Petrobras-award.pdf.

30 https://www.courtlistener.com/pdf/2020/07/16/vantage_deepwater_company_v._petrobras_amer.pdf.

31 https://globalarbitrationreview.com/benchmarking/the-arbitration-review-of-the-americas-2017/1067603/investment-treaty-arbitration-in-the-americas.

32 Juan Guaidó was declared president of Venezuela by the National Assembly on grounds that the 2018 re-election of President Nicolas Maduro, who is backed by the Supreme Court, was illegitimate.

33 https://globalarbitrationreview.com/benchmarking/the-arbitration-review-of-the-americas-2020/1195567/investment-treaty-arbitration-in-the-americas.

Considerations for parties to avoid Pyrrhic arbitral victories in Latin America

34 2018 International Arbitration Survey: The Evolution of International Arbitration, available at http://www.arbitration.qmul.ac.uk/research/2018/.

35 ICC Dispute Resolution Statistics, available at https://iccwbo.org/publication/icc-dispute-resolution-statistics/.

36 Id.; 2018 ICC Statistics, https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/.

37 2019 ICC Dispute Resolution Statistics, available at https://iccwbo.org/publication/icc-dispute-resolution-statistics/.

38 Id.

39 The provisions of other treaties may apply to investor-state disputes, such as Article 52 of the ICSID Convention.

40 Id.

41 Id.

42 New York Convention, available at http://www.newyorkconvention.org/english; Inter-American Convention, available at http://www.oas.org/en/sla/dil/inter_american_treaties_B-35_international_commercial_arbitration.asp.

43 New York Convention, Art. V(1)(c), available at http://www.newyorkconvention.org/english (emphasis added).

44 Costa Rica Law 8937 of 2011.

45 Colombia Law 1563 of 2012.

46 Panama Law 61 of October 7, 2015.

47 Brazil Law 13.129 of May 26, 2015.

48 Argentina Law 27.449 of 2018.

49 Costa Rica Law 7727 of 1997, Arts. 20, 25, 41.

50 Costa Rica Law 8937 of 2011, Art. 34.

51 Argentina Law 27.449 of 2018, Art. 1.

52 Compare id., Art. 3 with UNCITRAL Model Law on International Commercial Arbitration, Art. 1(3)(c).

53 Argentina Law 27.449 of 2018, Art. 5.

54 Argentina National Civil and Commercial Code, Art. 1651.

55 Brazil Law 13.129 of May 26, 2015, Art. 23.

56 Id., Art. 19.

57 University of Leicester, Arbitration in the Americas: Report on a Survey of Arbitration Practitioners, Argentina Data, available at https://www2.le.ac.uk/departments/law/research/arbitration.

58 Id.

59 Case No. 21501/2015, dated August 30, 2016.

60 Id.

61 Id.

62 Telcel S.A. v. Cablevision S.A., Case No. 11344/2018/CA1, dated March 21, 2019.

63 University of Leicester, Arbitration in the Americas: Report on a Survey of Arbitration Practitioners, Brazil Data, available at https://www2.le.ac.uk/departments/law/research/arbitration.

64 See, e.g., Louis Dreyfus Commodities Brasil S/A v. Leandro Volter Laurindo de Castilhos, Foreign Judgment Challenged No. 6.335, Case No. 2011/0072243-3, dated March 21, 2012.

65 See Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A., Foreign Judgment Challenged No. 14.930, Case No. 2015-0302344-0, dated May 15, 2019.

66 Arnoldo Wald and Ana Gerdau de Borja, The New Brazilian Arbitration Law, 47 U. Miami Inter-Am. L. Rev. 21, 24 (Univ. of

Miami 2016), available at http://repository.law.miami.edu/umialr/vol47/iss1/5.

67 Foreign Judgment Challenged No. 5.782, Case No. 2011/0129084-7, dated December 2, 2015.

68 Id.

69 Id.

70 Judgment No. T-354/19, Constitutional Injunction Proceeding Against Arbitral Award.

71 Id.

72 Id.

73 Id.

74 Id.

Section 1782 is a powerful discovery tool in aid of private international arbitrations if your target is the right jurisdiction

75 See 28 U.S.C. § 1782.

76 See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

77 28 U.S.C. § 1782(a) (emphasis added).

78 See James L. Buchwalter, Annotation, Construction and Application of 28 U.S.C.A. § 1782, Permitting Federal District Court to Order Discovery for Use in Proceeding in Foreign or International Tribunal, 56 A.L.R. Fed. 2d 307, § 2 (2011).

79 See, e.g., Hans Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 Syracuse J. Int'l L. & Com. 1, 11 (1998) ("The purpose of Section 1782 is to liberalize the assistance given to foreign and international tribunals.").

80 S. Rep. No. 1580, 88th Cong., 2d Sess., reprinted in 1964 U.S. Code & Ad. News 3782, 3783.

81 28 U.S.C. § 1782(a). The phrase "interested person" encompasses a broader category than litigants or parties to the foreign proceeding. See Intel Corp., 542 U.S. at 255.

82 28 U.S.C. § 1782(a).

83 See Buchwalter, supra note 4, § 2.

84 See Intel Corp., 542 U.S. at 253.

85 See id. at 264–65.

86 542 U.S. at 246.

87 Id.

88 Id. at 246–47.

89 Id.

90 Id. at 257–58 (emphasis and alterations in original) (citations omitted).

91 Id. at 258 (citing Hans Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1026–27 and 1026–27 nn.71, 73 (1965)) (emphasis added).

92 See infra note 19.

93 S.I. Strong, Discovery Under 28 U.S.C. S 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration, 1 Stan. J. Complex Litig. 295, 331 (2013).

94 See Servotronics Inc. v. Rolls-Royce PLC et al, No. 19-cv-1847 (7th Cir. Sept. 22, 2020) at 12 (a "foreign tribunal," as used in §1782(a), "means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure'"); Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) (explaining that section 1782 was only meant to apply to governmental and intergovernmental tribunals); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 882 (5th Cir. 1999) (concluding same); see also Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP, No. MC 18-103 (RMC), 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) ("[A]rbitrations pursuant to Bilateral Investment Treaties are not merely private arrangements; they are sanctioned by their governments . . . ."); In re Mesa Power Group, LLC, 878 F. Supp. 2d 1296, 1307 (S.D. Fla. 2012) (permitting section 1782 application in support of a NAFTA arbitration).

95 See Nat'l Broad. Co., 165 F.3d at 191 (denying section 1782 application brought in support of an ICC arbitration); Biedermann, 168 F.3d at 883 (rejecting section 1782 application brought in support of an SCC arbitration).

96 El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31, 33 (5th Cir. 2009).

97 Id. at 33–34.

98 In re Guo, 965 F.3d 96, 109 (2d Cir. 2020), as amended (July 9, 2020). Notably, the District Court for the Southern District of New York recently applied Guo for the proposition that section 1782 applied to a UNCITRAL investor-state arbitration "in light of the role of bilateral investment arbitration as a tool of internal relations" and because of "the fact that the Tribunal derives its jurisdiction from the Treaty." In re Application of Fund for Prot. of Inv'r Rights in Foreign States pursuant to 28 U.S.C. § 1782 for an Order Granting Leave to Obtain Discovery for Use in a Foreign Proceeding, 19 MISC. 401 (AT), 2020 WL 5026586, at *2 (S.D.N.Y. Aug. 25, 2020).

99 In re Guo, 965 F.3d at 105 ("Intel does not cast 'sufficient doubt' on the reasoning or holding of [Nat'l Broad. Co. v. Bear Stearns & Co.").

100 In re Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710, 726–28, 730–31 (6th Cir. 2019).

101 Id. at 717–31.

102 Id. at 725–26.

103 Id. at 727.

104 Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 216 (4th Cir. 2020).

105 Id. at 213.

106 In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 990 (11th Cir. 2012), opinion vacated and superseded sub nom. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262 (11th Cir. 2014).

107 685 F.3d at 994.

108 Id. at 995.

109 Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1269–70, 1270 n.4 (11th Cir. 2014).

110 Int'l Chamber Com., ICC Dispute Resolution 2019 Statistics 9 (2020). Although the ICC also handles arbitrations involving states and state entities, the majority of its caseload comprises commercial arbitration, with only two of the cases filed in 2019 being brought on the basis of bilateral investment treaties. Id. at 11.

111 Id. at 9.

112 Id. at 10.

113 See, e.g., Alexander Sevan Bedrosyan, Adverse Inferences in International Arbitration: Toothless or Terrifying?, 38 U. Pa. J. Int'l L. 241, 249 (2016).

114 28 U.S.C. § 1782(a) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.").

115 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004).

116 Id.

117 In re Motransa, S.A., 19-25026-CIV, 2020 WL 4251145, at *2 (S.D. Fla. July 24, 2020).

118 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration 7 (2010).

119 28 U.S.C. § 1782(a).

Unstoppable forces and immovable objects: the impact of cross-border insolvency on international arbitration

120 The author wishes to thank Elizabeth Tabas Carson and Eric Schaffer from Reed Smith LLP for their insightful comments and input on this article.

121 Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

122 Mitsubishi v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 639 (1985).

123 Jack J. Coe, Jr., International Commercial Arbitration: American Principles and Practice in a Global Context, 61 (Transnational Publishers, Inc. 1997).

124 See http://www.newyorkconvention.org/english.

125 See https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

126 Federal Arbitration Act, 9 U.S.C. Sec. 201, et seq.

127 Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15 (1974).

128 Shearson/American Express v. McMahon, 482 U.S. 220, 226-27 (1987) (citations and quotation marks omitted).

129 Julian Ellis, A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings, 92 Am. Bankr. L.J. 141, 146 (2018) (collecting articles and cases).

130 Adams v. Zarnel (In re Zarnel), 619 F.3d 156, 171 (2d Cir. 2010) (noting bankruptcy's centralization feature "ensures a fair distribution of assets if the debtor proceeds through bankruptcy").

131 Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.), 403 F.3d 164, 170 (4th Cir. 2005) (citations and quotation marks omitted).

132 Jay Lawrence Westbrook, Symposium Issue: International Academy of Commercial and Consumer Law, 15th Biennial Meeting, Toronto, July 21-24, 2001: Bankruptcy and Insolvency: International Arbitration and Multinational Insolvency (Winter 2011).

133 In re U.S. Lines, Inc., 197 F.3d 631 (2d Cir. 1999); Societe Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp., 80 B.R. 606, 610 (D.Mass.1987); Fotochrome, Inc v. Copal Co, Ltd, 517 F 2d 512 (2d Cir 1975).

134 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 (1997), available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

135 Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

136 11 U.S.C. Sec. 1501, et seq.

137 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 (1997), available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency; see also Model Law, Preamble.

138 See 11 U.S.C. Sec. 1501; see also Chapter 15 – Bankruptcy Basics, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics#.

139 COMI is not a judicial concept with a long history, but rather, it develops in light of the changing market conditions and evolving business practices and corporate structures. The first attempt to introduce harmonized rules in handling cross-border insolvencies in Europe was the 1980 Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings, which was never adopted but included the one-debtor, one-insolvency proceeding stance and proposed a term debtor's "center of administration" from which the concept of COMI has developed. The first time the word COMI was used was in the 1990 Istanbul Convention on Certain Aspects of Bankruptcy, drafted under the auspices of the Council of Europe and then the 1995 European Convention on Insolvency Proceedings (the 1995 Convention). The 1995 Convention strongly influenced both the UNCITRAL Model Law on Cross-Border Insolvency of 1997 and the European insolvency regime adopted by the European Union in 2000.

140 See In re Tri-Continental Exch. Ltd., 349 B.R. 627, 634-35 (Bankr. E.D. Cal. 2006).

141 See, e.g., Allan L. Gropper, The Arbitration of Cross-Border Insolvencies, 86 Am. Bankr. L.J. 201, 208 n.21-28 (Spring 2012).

142 Model Law, Arts. 25-27; 11 U.S.C. Secs. 1525-27; see also Allan L. Gropper, The Arbitration of Cross-Border Insolvencies, 86 Am. Bankr. L.J. 201, 206 (Spring 2012).

143 9 U.S.C. Sec. 201.

144 New York Convention, Art. V(1)(a), (e). For awards that have been set aside or suspended under Art. V(1)(e), the Convention provides in Art. VI that the court may "adjourn the decision on the enforcement of the award and may also …order the other party to give suitable security."

145 New York Convention, Art. V(2)(a), (b).

146 9 U.S.C. Sec. 207.

147 Fotochrome, Inc v Copal Co, Ltd., 517 F 2d 512, 515-16 (2d Cir 1975).

148 But see In re U.S. Lines, Inc., 197 F.3d 631, 639 (2d Cir. 1999), infra.

149 For discussion see Sara Nadeau-Séguin, When Bankruptcy and Arbitration Meet: A Look at Recent ICC Practice, 5 DRI 79 (May 2011); Westbrook, Jay Lawrence, Symposium Issue: International Academy of Commercial and Consumer Law, 15th Biennial Meeting, Toronto, July 21-24, 2001: Bankruptcy and Insolvency: International Arbitration and Multinational Insolvency (Winter 2011); Edna Sussman, International Perspectives: Arbitration Agreements and Bankruptcy, NYSBA New York Dispute Resolution Lawyer, Vol. 2, No. 2, 58 (Fall 2009).

150 Vivendi and Elektrim v. Deutesche Telekom AG, First Civil Law Department, Zurich, decided on March 31, 2009 Docket No. 4A_428.2008; Jozef Syska, as Administrator of Elektrim S.A. and Vivendi Universal [2009] EWCA Civ. 677 decided on July 9, 2009; Edna Sussman, International Perspectives: Arbitration Agreements and Bankruptcy, NYSBA New York Dispute Resolution Lawyer, Vol. 2, No. 2, 58 (Fall 2009).

151 Sara Nadeau-Séguin, When Bankruptcy and Arbitration Meet: A Look at Recent ICC Practice, 5 DRI 79 (May 2011).

152 Reliant Energy Servs., Inc. v. Enron Canada Corp., 349 F.3d 816, 825 (5th Cir. 2003) (quoting GATX Aircraft Corp. v. M/V Courtney Leigh, 768 F.2d 711, 716 (5th Cir. 1985)).

153 ACandS, Inc. v. Travelers Cas. & Sur. Co., 435 F.3d 252, 259 (3d Cir. 2006).

154 11 U.S.C. Secs. 362(a), 1110(2) (2012); In Re Nakash, 190 BR 763, 768 (Bankr, SD NY, 1996).

155 Model Law, Art. 20(1).

156 Model Law, Art. 21(1)(a-c).

157 Guide to the Model Law, n. 40, at para. 180.

158 Id.

159 See, e.g., In Re White Mountain Mining Company, L.L.C., 403 F.3d 164 (4th Cir. 2005) (international arbitration clause refused enforcement in core proceeding); In re Nat'l Gypsum Co., 118 F.3d 1056, 1066 (5th Cir. 1997) (denying enforcement of arbitration clause but finding bankruptcy court discretion in all core cases); Jay Lawrence Westbrook, Symposium Issue: International Academy of Commercial and Consumer Law, 15th Biennial Meeting, Toronto, July 21-24, 2001: Bankruptcy and Insolvency: International Arbitration and Multinational Insolvency (Winter 2011); Sara Nadeau-Séguin, When Bankruptcy and Arbitration Meet: A Look at Recent ICC Practice, 5 DRI 79 (May 2011) (briefing examples from various jurisdictions).

160 Sara Nadeau-Séguin, When Bankruptcy and Arbitration Meet: A Look at Recent ICC Practice, 5 DRI 79 (May 2011).

161 New York Convention, Art. II(1), (3).

162 Model Law, Art. 6.

163 11 U.S.C. Sec. 1503, International Obligations of the United States.

164 New York Convention, Art. V(2)(b).

165 Id. at Arts. II(1, 3); V(1) (a, e), (2)(a-b).

166 Guide to the Model Law, n. 40, at para. 180.

167 In re U.S. Lines, Inc., 197 F.3d 631, 639 (2d Cir. 1999).

168 ACandS, Inc. v. Travelers Cas. & Sur. Co., 435 F.3d 252, 260 (3d Cir. 2006) (holding that a domestic arbitration award in contravention of the Sec. 362 stay was void).

169 Julian Ellis, A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings, 92 Am. Bankr. L.J. 141, 149 (2018).

170 Jay Lawrence Westbrook, Symposium Issue: International Academy of Commercial and Consumer Law, 15th Biennial Meeting, Toronto, July 21-24, 2001: Bankruptcy and Insolvency: International Arbitration and Multinational Insolvency (Winter 2011); Sara Nadeau-Séguin, When Bankruptcy and Arbitration Meet: A Look at Recent ICC Practice, 5 DRI 79 (May 2011).

171 Some commentators argue that the answer is no: "The enforcement of an award is, in the first place, the responsibility of the parties. Arbitrators should certainly make sure that the award is valid at the place of the seat of arbitration and conforms to the law of the arbitration agreement, but as far as the law of the place of enforcement of the award is concerned—to the extent it can be determined in advance—the duty of an arbitrator would not exceed a warning to the parties that they may face problems of enforcement in a specific state, at least so long as the award is enforceable in another state." Bernard Hanotiau, What Law Governs the Issue of Arbitrability (1996) 12:4 Arb Int 391, n 22.

172 See Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 332 F.3d 815, 818 (5th Cir. 2003) (finding that the arbitration award entered in favor of the company owned by the debtor is a corporate asset of that company, and is not an asset of any shareholder of that company, including the debtor).

173 See, e.g., In Re Vitro S.A.B. de C.V., 701 F.3d 1031, 1059 (5th Cir. 2012) (finding that discharge of debtor's debt does not necessarily affect the liability of other entities on such debt).

The "contract eject button": precision in drafting, contract and notices

174 Whether or not it refers to the words "force majeure" at all.

175 Frustration applies where unforeseeable events outside the parties' control render performance impossible (physically or commercially) or so radically different it no longer resembles the parties' original bargain.

176 Understood to mean made extremely impractical, such as having to relocate a business in order to perform.

177 Which is generally read as not limited to events *ejusdem generis* with those previously enumerated: *Chandris v. Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240, 245–246.

178 However, unlike the doctrine of frustration, force majeure events do not have to be unforeseeable, unless the clause says so.

179 Channel Island Ferries Ltd v. Sealink UK Ltd [1988] 1 Lloyd's Rep. 323.

180 [2019] EWCA Civ 1102.

181 https://www.foreignbrief.com/daily-news/mexican-mining-industry-to-fully-reopen/.

182 https://www.reuters.com/article/vale-itabira-covid/brazils-vale-signs-deal-with-authorities-on-covid-19-monitoring-at-itabira-mines-idUSL1N2E22OY.

183 https://ihsmarkit.com/research-analysis/latin-america-mining-industry-most-impacted-COVID19.html; https://www.mining.com/web/latin-america-virus-surge-puts-worlds-biggest-mines-at-risk/; https://santiagotimes.cl/2020/06/15/chilean-copper-miners-threaten-strike-over-alarming-increase-in-covid-19-cases/.

184 *Delta Vale Properties v. Mills* [1990] 1 WLR 445, approved by the House of Lords in *Mannai v. Eagle Star* [1997] AC 947, 780.

About Reed Smith's international arbitration practice

Reed Smith is strongly positioned to provide the highest level of service in dispute resolution to our clients. With offices in the world's leading arbitration centers, including London, Paris, New York, Singapore, Hong Kong, Dubai, Miami, and Houston, we have one of the largest and most diverse international arbitration practices in the world, with the ability to represent clients in every significant arbitral center and seat around the globe.

We are a recognized leader in international arbitration, and are ranked in the elite GAR 30, *Global Arbitration Review*'s ranking of the world's leading international arbitration practices. We have substantial experience representing both claimants and respondents, and a strong track record of obtaining successful results. Our deep knowledge of industry sectors including energy, natural resources, life sciences, transportation, telecoms, insurance, and banking enables us to understand the industry-specific factors and environments affecting our clients' disputes. This combination of deep arbitration experience, our lawyers' advocacy skills, and industry knowledge gives us a competitive advantage when representing our clients.

Updates on the go

Listen to our international arbitration updates on the go and at your convenience through our podcast channel, *Arbitral Insights*. Presented by our international arbitration lawyers from across the Reed Smith global platform, the series explores trends, developments, challenges, and topics of interest in the field. Access our episodes **here**.

Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City/DX18 London

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

reedsmith.com