Kluwer Arbitration Blog

El Salvador, Towards An Arbitration Friendly Jurisdiction

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A few weeks ago, we read a post on Kluwer Arbitration Blog about El Salvador by Ricardo Cevallos. The title was “El Salvador becomes an anti-arbitration jurisdiction?” According to the post, El Salvador is becoming an anti-arbitration jurisdiction. We respectfully disagree with the author’s conclusion. It is true that, since 2009, the Arbitration Law of El Salvador was amended and now the arbitral awards can be subject to Appeal before the courts. However, there are still many arbitration proceedings (national and international) taking place in El Salvador, and the country is making great efforts to become a more arbitration friendly jurisdiction.

During the past years, there has been a notable growing acceptance of arbitration in El Salvador, which has lead to a more favorable climate to arbitration and a wider use of this dispute resolution method. As Cevallos mentions, ever since the first constitutions, arbitration has been recognized as a constitutional right. Furthermore, El Salvador has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), the Convention on the International Centre for the Settlement of Investment Disputes (ICSID Convention), and the Inter-American Convention on International Commercial Arbitration (The Panama Convention).

It is true that the Law on Mediation, Conciliation and Arbitration (*Ley de Mediación, Conciliación y Arbitraje “LMCA”*), enacted 11 July 2002, by Decree No. 914, marked a great advance in the arbitration field. There has been an extraordinary change in the regulation and practice of arbitration in El Salvador. This law was a response to the need for a fast, simple and private way of resolving disputes and since then, there has been a considerable development of arbitration in the country. It is important to mention that the increase of international trade and the commercial liberalization of Salvadorian markets have contributed to this legal evolution.

Despite the global economic problems, the country is becoming an attractive place for foreign investment and is making many attempts to improve its position in the global market. As part of its modernization, El Salvador implemented the CAFTA-DR in January 2009, a free trade agreement between the United States, Guatemala, Nicaragua, Costa Rica, Honduras, El Salvador and the Dominican Republic. The Agreement regulates dispute resolution provisions, which give US investors the option for commencing arbitration under the ICSID Convention. In fact, El Salvador is involved in two investor-state arbitrations based on CAFTA-DR: *Pacific Rim Cayman v El Salvador and Commerce Group Corp and San Sebastian Gold Energy Inc v El Salvador*.

In addition, the Law of Acquisitions and Contracts of the Public Administration (*Ley de Adquisiciones y Contrataciones de la Administración Pública "LACAP"*) provides a legal framework for the institutions of the public administration when it comes to contracts and acquisitions.

As Cevallos explained, in 2009, the LMCA suffered some amendments, which introduced the possibility to appeal the arbitral awards. According to the new article 66-A, any ad-hoc arbitral award issued in *de jure* arbitration would be subject to appeal. The appeal is filed to the Court of Appeals with competence in civil matters, located at the respondent's domicile. The decision of the Court of Appeals is final and not subject to recourse.

It is true that this new remedy entitles the party not satisfied with the award to appeal before the national courts, opening the possibility that the arbitral award may be revised in its substance through a recourse which implies dealing again with the content of the decision, but it is also true that the parties can waive their right to appeal. This is one of the main reasons why we do not agree with the conclusions of Cevallos. We believe that El Salvador has been and is still a good place to arbitrate.

In December 2011, the Supreme Court of Justice decided on a request to declare unconstitutional the above amendments. According to the Supreme Court, the amendments are constitutional. However, it is important to note that, regarding Article 66-A of the LMCA, the Supreme Court established that the award issued in "law" arbitration is subject to appeal unless agreed otherwise. As Cevallos quotes in his article, the Court concluded that "an award issued in a *de jure* arbitration is appealable, unless there is an agreement" between the parties not to appeal. This clearly gives the parties the possibility to waive their right to appeal the award. Therefore, even when the law establishes the right to appeal, the parties are free to agree otherwise.

It is true that the amendments to the law were seen as a negative change, and inevitably caused a decrease on the amount of domestic arbitration cases. Nevertheless, there are still many arbitration proceedings taking place in El Salvador, which have not been affected by the amendment because the parties are free to waive their right to appeal the award and all awards of institutional arbitrations cannot be appealed. Further, Salvadorean parties have been involved in various ad-hoc and international arbitrations, and there have been international arbitrations under institutional rules such as AAA, ICC, CIAC, CANACO, among others.

We agree that parties should carefully draft their arbitration clauses, especially when the law allows the parties to appeal the final award. This also includes agreements where the government is a party. Despite this, it cannot be concluded that El Salvador is becoming an anti-arbitration jurisdiction. After all, the arbitration belongs to the parties and they are free to agree not to appeal the award.

Moreover, the LACAP also suffered an amendment in 2009. Previous to such amendment, the law provided for arbitration in equity. Articles 161 and 165 were changed and now the type of arbitration shall be *de jure* arbitration so the tribunal decides based on the applicable legal provisions. It is important to mention that the government is allowed to participate in both ad-hoc and institutional arbitrations. According to Article 169 of the LACAP, in case of an institutional arbitration, the parties cannot appeal the award. Therefore, to avoid the possibility of appealing the award, the best option is to submit all disputes with the State to institutional arbitration; an additional reason why we do not agree with Cevallos' position.

Finally, it must be noted that while some steps have been taken to promote confidence in this dispute resolution method, the courts and the legal community have to work together to improve some aspects of arbitration so there is a more favorable development. Currently, many institutions have gathered to work together in the promotion of a new arbitration law in El Salvador. This effort to modernize the law and create an arbitration friendly environment is going to help El Salvador stand in the Region. El Salvador will be even more arbitration friendly.

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