A Recent Latin -American Example of the Increasing Recurrence of Multiple Proceedings in International Arbitration

Kluwer Arbitration Blog
February 12, 2017

Julián Bordacahar (Permanent Court of Arbitration)

Please refer to this post as: Julián Bordacahar, 'A Recent Latin -American Example of the Increasing Recurrence of Multiple Proceedings in International Arbitration', Kluwer Arbitration Blog, February 12 2017,
http://arbitrationblog.kluwerarbitration.com/2017/02/12/recent-latin-american-example-increasing-recurrence-multiple-proceedings-international-arbitration/

In *Scherk v. Alberto-Culver Co*, the US Supreme Court stated that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." While this statement holds almost invariably true in the majority of cases, a recent example proves that this is not always the case. This post discusses one of the most exciting and complex international arbitration cases in Latin America.

The case involved the consolidation of three different related arbitrations, parallel judicial proceedings in different jurisdictions, the issuance of conflicting interim measures, anti-arbitration injunctions, the annulment of procedural orders, the setting aside of the arbitral award, recognition proceedings of said award, among others. The result, an arbitral tribunal confronted with the seemingly impossible task of having to comply with contradictory judicial orders and endless difficulties to fulfill its task of rendering an enforceable award. And yet, this epic litigation journey may not be over yet.

Factual Background

In the very interesting (and still unresolved) case of *YPF v AESU, SULGAS and TGM*, a dispute arose under a multilateral Gas Supply Agreement (the "GSA") concluded between two major Latin-American Oil & Gas companies (YPF and Petrobras) and several other Brazilian and Argentine distribution and transport companies. The gas would be imported from Argentina to Brazil for the construction of a thermal power plant fueled by natural gas in the Brazilian city of Uruguaiana.

The GSA contained a somewhat unusual ICC arbitration clause. While it provided for the place of arbitration to be in Montevideo, Uruguay, and that any award rendered shall be final and binding, it also stated that the only recourses available against any award would be motions for clarification and/or annulment under Article 760 of the Civil and Commercial Procedure Code of Argentina, which shall be filed exclusively before the courts and in accordance with Argentinean laws (the "Choice of Forum Clause").

A series of disputes eventually arose in 2008 and 2009 and three different arbitration proceedings

were commenced, which were later consolidated into one. Hence, all the parties assumed the role of claimants and respondents simultaneously involving an aggregate amount at stake of approximately US$ 1.6 billion. They agreed to bifurcate the proceedings into liability and damages stages. In May 2013, the arbitral tribunal issued a final partial liability award against YPF.

As a result, parallel judicial proceedings were commenced (i) by YPF before Argentinean courts –the agreed forum– (set aside action and anti-arbitration injunction); and (ii) by the winning parties before Uruguayan courts –the courts of the seat– (declaratory relief as to the exclusive jurisdiction of the courts of the seat to the exclusion of the chosen ones and injunction for the arbitral proceedings to continue).

Court Proceedings and Award on Damages

As a consequence, national courts from Argentina and Uruguay issued conflicting judgments. They each declared that they had exclusive jurisdiction and issued contradictory interim measures. While the Argentinean court ordered the tribunal to stay the arbitration, the Uruguayan court order it to resume it. Furthermore, even though no annulment action ever took place at the seat, the Argentinean court eventually vacated the award in November 2014. Irrespective of this, in April 2016, the arbitral tribunal issued its final award ordering YPF to pay approximately US$ 185 million to AESU and SULGAS and US$ 319 million to TGM. Nonetheless, YPF also challenged this award in Argentina.

While the Uruguayan judgment on exclusive jurisdiction is final, the Argentinean judgment has been challenged before Argentina's Supreme Court, who has not ruled yet on whether it will hear the challenge or not. Finally, on May 2016, AESU and SULGAS initiated recognition proceedings of the liability award in the courts of New York. However, no decision was ever rendered because it was recently made public that YPF, AESU and SULGAS had settled.

General Comments on the Choice of Forum Clause

This case raises a very interesting question: are parties allowed to agree that courts, other than those of the seat of arbitration, will have exclusive jurisdiction over the challenge of an award?

Despite acknowledging that parties have ample autonomy, the Uruguayan court held that parties are not allowed to confer jurisdiction to courts other than those of the seat. The mere choosing of a seat has the unavoidable consequence of applying the seat's *lex arbitri* because arbitrations are "localized" and, hence, establish jurisdiction at the seat. This is true even in the rare cases where parties may decide to choose other procedural law, which despite arguably indicating that the award should carry said law's nationality, does not suffice to deprive the award from carrying the seat's nationality.

Moreover, no accumulation of jurisdiction can be permitted neither under the Panama Convention on International Commercial Arbitration ("Panama Convention") nor the New York Convention ("NY Convention"). In addition, Article 22(1) of the Mercosur Convention on International Commercial Arbitration enshrines the "unity of jurisdiction" principle providing exclusive jurisdiction to the courts of the seat. As a result, the Choice of Forum Clause of Argentinean courts had no effect at all.

In contrast, the Argentinean court ruled that international arbitrations are not *prima facie* subject to any national legal system. It further noted that it was undisputed that (a) it was agreed that Argentinean courts would have exclusive jurisdiction; and (b) party autonomy is the cornerstone of

arbitration. Since no violation of international public policy had occurred, the court held, such autonomy must be respected.

Furthermore, because the Mercosur Convention entered into force after the GSA was concluded, it did not apply to the validity of the Choice of Forum Clause or, in any event, the parties were allowed to deviate from the provision which attributes jurisdiction to the courts of the seat. Finally, neither the Panama Convention nor the NY Convention prohibit –directly or indirectly– the choice of a forum other than the seat.

Concluding Remarks

Because of the particularities of this case, it would have certainly been interesting to see the outcome of the recognition proceedings in New York. On the one hand, the parties clearly chose Argentinean courts to have the exclusive final say on the award's validity, and said courts annulled it. To the extent that such choice is not considered invalid (which is certainly controversial), it could be argued that it should only be fair for the parties to respect the decision of the mutually agreed forum.

On the other hand, however, even if *arguendo*, such agreement was valid, said award may arguably still be recognized under the NY Convention (or the Panama Convention) because it could also be argued that the Argentinean court is simply not the "competent authority of the State in which, or according to the law of which, the decision has been made". Nonetheless, because one of the wining parties, TGM, could still commence recognition and enforcement proceedings, the outcome of this issue remains open.

This case is also another clear example of divergent (and conflicting) interpretations by state courts of the NY Convention, as well as of the lack of dialogue and cooperation between different national courts hearing the same dispute. The case involved complex factual and legal issues, including intricate private as well as public international law questions. All this in the context of a multimillion high-stake dispute arising out of a sensitive natural resources' area as the gas industry, and involving both multinational corporations as well as state-owned entities. Yet, both courts showed indifference to the ongoing proceedings taking place in the other State.

In this vein, neither court decided to consider the fact that the other was also hearing the same case, or the possibility to stay its proceedings pending the outcome of the other, and no considerations of comity or mutual respect were even mentioned. Moreover, given that the interpretation of Mercosur Law was at the heart of the validity of the Choice of Forum Clause, both courts could have made use of the possibility to request a non-binding advisory opinion from the Mercosur Permanent Review Tribunal as suggested by the dissenting judge of the Argentinean Court of Appeals. However, neither of them did.

Because of the increasing complexities involved in modern cross-border dispute settlement, every adjudication body should make use of any available tool which facilities the coordination of parallel proceedings, even though these may still fall short of being able to provide efficient and predictable outcomes. Among other issues, multiple proceedings increase litigation costs, may lead to delays, create the risk of contradictory decisions, double recovery, among others. It is clear that one of the critical challenges of our time is to find better ways for national and international courts and tribunals to be better equipped to deal with these issues.

All in all, while it is fair to concede that the case discussed in this post is somewhat unique because of the unusual drafting of the arbitration clause, it also constitutes another example showing the

growing recurrence of parallel proceedings taking place in modern international dispute settlement and the various legal and practical complexities which they raise.