The Return of “Forwarding” in the Costa Rican Arbitral World

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The Return of the Jedi is a 1983 science fiction movie set in 4 ABY, a year after the Imperial occupation of Cloud City, when Luke Skywalker and his friends travel to Tatooine to rescue Han Solo from the clutches of Jabba the Hutt. The Empire prepares to destroy the Rebel Alliance with a more powerful Death Star, while the rebel fleet attacks it. Luke Skywalker faces his father, Darth Vader, in a final duel under the gaze of Emperor Palpatine. So, the Jedi Luke Skywalker returns triumphantly to overcome the dark forces, which allows the progress of the galaxy. [fn] This contribution has been previously posted in Spanish in here.[/fn]

Image: John Williams – Star Wars Episode VI: Return Of The Jedi (Original Motion Picture Soundtrack)[fn]Source:https://www.amazon.com/[/fn].

Something similar happened on July 13, 2018 with the return of the figure of "**Forwarding/Re-Sending**" (there is no real translation for the "Reenvío" which is the term used in Spanish) to arbitration practice in Costa Rica. By **"Forwarding"** I refer to the figure created by the First Chamber of the Supreme Court of Costa Rica (see Decision 0941-F-07), that allows arbitrators to recover their competence after the award is rendered, in order to correct defects of nullity affecting such award. Despite of the criticisms against the figure of **"Forwarding"**, it is a mechanism that keeps parties from wasting time and resources in an arbitration process. Despite the benefits of this figure created by case law of the First Chamber, jurisprudence made a turn, and stopped its application in national arbitration. As a result of that decision, a considerable number of awards were annulled for defects that could have been corrected by the Arbitral Tribunal through this jurisprudential

figure.

Faced with this reality, the First Chamber of the Supreme Court has returned to the year 2007 (returning to the past is not necessarily a bad thing) in which "Forwarding" in national arbitration was possible, in order to save the sunk costs and time of an award that gets vacated for an absurd – yet legal – reason.

In Decision 666-S1-18, the First Chamber of the Supreme Court of Costa Rica vacated an award and instead of closing the case, it sent it back to the Arbitral Tribunal because it considered that the reason that lead to the annulment of the award, was something that the tribunal could revise. In this context, the First Chamber ordered the tribunal not to change its decision per se, but to repeat a critical part of the evidence hearings stage, that lead to a due process violation by not allowing each party to present their case.

The problem surged due to the impediment of the respondent to obtain and offer a key witness statement. The Arbitral Tribunal rejected receiving such testimony because the claimant decided not to present the witness. Now, here it becomes tricky and it's perfectly fine if you are not following the lines, because the witness system in Costa Rica is a bit strange. Let me explain. In some arbitration cases in Costa Rica (not all, but in some) the civil procedural rules are strictly followed, including the traditional rule that "no one can serve as evidence of their own case". Hence, general managers, CEOs, presidents and other corporate officials cannot be called to testify by the party they represent, they can only be called by the opposing party. The rule, however, allows them to partake in some sort of cross-examination, i.e., they can be questioned by their own attorney, as long as they were initially called to testify by the other party.

In Decision 666-S1-18, the claimant requested the confession of the respondent´s legal representative, a key character of the commercial dispute. After the tribunal granted claimant's petition, the respondent also requested to examine the same witness, which was his legal representative after all. The problem surged when, after the tribunal granted Claimant´s petition, Claimant withdrew its confession request, and consequently the tribunal decided to deny respondents' request. This was considered by the First Chamber a violation of due process, and ordered the Tribunal to allow the testimony.

The First Chamber considered that: "*it is not explainable or justified how the*

arbitration body denied the evidence,,, The interest that both parties considered at the time in the information and data that Mr. V.L. could offer for the resolution of the litigation and the current importance that the defendant's highlights in that statement are evident. Consequently, the Chamber considers the practice of this proving relevant." (Decision No. 666-S1-2018, First Chamber, Supreme Court of Justice of Costa Rica). To translate it into practical terms: arbitrators must ensure that key evidence to an arbitral proceeding to take place. The other element is that anyone can withdraw its intention to practice an evidence once it has been admitted by the Tribunal, but such withdrawal must be done with the consent of all parties involved. This is a clear manifestation of good faith in arbitral practice and more importantly, the decision traces a route to modernity for the Costa Rican arbitral practice.

Consequently, the First Chamber ordered the Arbitral Tribunal to practice said proof within the following six months. As opposed to the Costa Rican International Arbitration Act that does not provide a fixed term, the country's Domestic Arbitration Act (Law 7727) states that the tribunal has to render a decision within 6 months from the submission of the statement of claim. The First Chamber's ruling preserved the right of the Arbitral Tribunal to assess the evidence as appropriate for the purpose of solving the violation of due process affecting the respondent.[fn]Thanks to Marcela Filoy for sharing the First Chamber ruling.[/fn]

From the judgment of First Chamber, we can conclude that:

1. "Forwarding" has returned, which undoubtedly will be a benefit for the arbitration community, in particular for its users that require an expeditious and definitive resolution of the conflicts that arise in a commercial relationship. The component of finality is maintained, even when the arbitrators have a "second chance" (as a result of resubmission) to analyze the errors and correct them. However, the question remains as to whether the "**Forwarding**" will only operate when the term to issue the award has not expired yet or whether it will be used regardless of the expiration of such term.

2. Respect for the criterion of the arbitrators in regard to the assessment of the evidence, because the interest of the First Chamber is really that there is no breach of due process, and ultimately that the arbitration process is legitimised through the satisfaction of its users, who must be afforded the opportunity to present their case.

3. A fracture – but no rupture – with the system of the Civil Procedure Code that is about to lose validity due to the entry into force of the New Code of Civil Procedure, that moves away from the principle of "Nobody can be a witness of his own cause". This is, in addition, a positive factor as it goes hand in hand with the dominant arbitration currents in the most developed jurisdictions, in which the restriction on legal representatives to be called as witnesses by their own attorney has been removed.

The emphasis of Decision 666-S1-18 is not on formalism, but on potentiating due process by allowing an intense debate in the evidentiary stage of the process, providing for the possibility to reach the "real truth" as the First Chamber itself points out (Latin American judges love to create classifications of the truth, having a "real truth" to refer to what actually happened; and a "docket true" which refers to what the facts of the case file show). This is covered by two fundamental pillars of arbitration: the principle of defense, and parties' opportunity to present their cases, which are manifestations of the principle of due process.

In short, the "**Forwarding**" may have its criticisms, but the perfect is the enemy of the good, and we need good mechanisms to resolve trade conflicts to alleviate social pressure. First Chamber: well done.