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El Salvador becomes an anti-arbitration jurisdiction?

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A brief history
Arbitration has been a part of the laws of El Salvador for more than a hundred years. The Constitution of 1983 clearly states in Article 23 that every citizen of the country has the right to terminate his or her civil or commercial matters through arbitration.

July 2002 marked a dramatic change in the arbitration landscape, when the Salvadoran Congress passed the Mediation, Conciliation and Arbitration Law (*Ley de Mediacion, Conciliacion y Arbitraje* or LMCA). Until then, arbitration was used more commonly among international companies doing business in the country or most commonly between companies doing business with the central government. The law was greatly modeled after the UNCITRAL model law of 1985 and like most arbitration laws around the world, it did not allow for the appeal of any type of arbitral awards.

What happened next…
Then came Legislative Decree 141 of October 1, 2009 amending and adding articles to the LMCA. Article 66-A was added and now states in part: The arbitral award issued in a *de jure* arbitration, is appealable with suspensive effect… before the Appellate Courts with jurisdiction in civil matters.

A Constitutional challenge.
After the amendments and additions surprisingly passed through congress, in July 2010 two appellate courts – using the constitutional authority granted to them – decided not to apply Article 66-A of the LMCA because they considered that it violated Article 23 of the constitution. Under the legally established procedure, the files for these cases were sent to the Supreme Court for it to make a decision whether the appellate courts were correct in not applying the recently added article.

Before any decision was made by the Supreme Court an attorney acting as a citizen filed a request for a declaration of the unconstitutionality of the new Article 66-A of the LMCA. His request was admitted by the Constitutional Chamber of the Supreme Court (the Chamber) on April 14, 2010 and marked in the docket as 11-2010.

This challenge to Article 66-A of the LMCA was that *de jure* arbitral awards should not be appealable before Civil Appellate Courts because it conflicts mainly with Article 23 of the Constitution.

The Decision

The Chamber started by making reference to Article 23 of the Constitution which initially establishes freedom of contract and finishes by establishing the freedom to arbitrate. The Chamber stated that the freedom of contract is a manifestation of the right of freedom, understanding it as the possibility to "act or not without being forced or objected to it, as well as the right of persons to guide their will towards an objective, that is to say, the ability to take decisions without being determined by the will of others including the State". Then it goes on to explain that as a materialization of such right, Article 23 also provides for a specific "constitutional permission" referring to the way in which individuals want to solve their civil and commercial disputes.

It further clarified that the freedom of contract is applicable also to the content of all the clauses in the contracts including "protecting the right of the parties to opt for any of the legally recognized means to resolve a conflict". It continues to make reference to party autonomy based on the fact that parties are "conferred" the ability to subject their controversies to the decision of an arbitrator or arbitration tribunal different from judges or magistrates of the common jurisdiction". The decision also states, without much explanation, that the right of the parties to decide to arbitrate is protected by article 23 of the Constitution but is "naturally not absolute, because for reasons of constitutional importance, it may be justifiably limited".

The decision continues by establishing the phases of arbitration including what it calls the control phase. It describes it as the phase in which in order to not have areas "outside a zone of control [by the State], the parties are provided with a right to challenge the decision". The control phase is based on the Chamber's recognition of the "**fallibility of the arbitrators and the guarantee that a judicial tribunal will correct a possible error made by an arbitrator or tribunal**".

Based on existing jurisprudence it then goes to define jurisdiction as the "authority that arises from the sovereignty of the State that materializes in the irrevocable application of the law to the protection of subjective rights, impose sanctions and **control legality and constitutionality through objectively sustained and legally supported parameters carried through independent and impartial judges**."

For the Chamber, such characteristics are "guaranteed" by the Constitution only to the Judiciary. It calls this authority "The Principle of Jurisdictional Exclusivity", then it tries to explain it by stating that it is not referring to "the exclusion of the possibility that other entities different from the judiciary can apply the law, but that the decisions issued by such entities are susceptible to jurisdictional review". It further states that any decision from such entities lacks the "irrevocable" nature of jurisdictional decisions because having decisions that are not controlled ex post by judges is incompatible with Article 172 paragraph 1 of the Constitution, **because an irrevocable decision can only be issued by a judge – who has been assured a status of impartiality and independence**".

When referring to arbitral awards the Chamber states that there is a "constitutional requirement that there not be zones exempt of control in the activities of arbitral tribunals". But in the case of arbitration clauses, private parties may agree that the decision of the tribunal be final, except in the case in which a party is the State where the Chamber was clear that awards may always be appealed due to the "public interest that may be at stake in the arbitration".

Constitutionality under the right to terminate civil and commercial matters under Art. 23…

The Chamber states that arbitral tribunals once they provide their award to the parties, they

effectively “resolve the conflict”. In this way, this ADR mechanism is completed and the arbitral phase concluded, at this time the control phase begins through the activity of the Judiciary through the Appellate Courts. The fact that there could be an appeal on an arbitral award “does not prevent arbitrators from carrying their work as requested by the parties”. It concludes that the “appeal can only be accessed after the award has been issued; which presupposes that the conflict has been resolved, at least in that instance”.

It concludes with this issue by pointing out an “award issued in a *de jure* arbitration is appealable, unless there is an agreement exclusively between private parties by which they have decided that it will not be appealable”. The Chamber then argues that because the LMCA and the agreement between private parties allows them to choose in their arbitration agreement not to make the award subject to appeal and even the conditions by which it will be appealable, Article 23 of the Constitution is fully applied and respected with regards to party autonomy. It finally closes the issue by stating that “therefore if the interested parties can agree to something different than what is stated in Article 66-A, it is not true that such provision prohibits the right of parties to terminate their controversies through the arbitral system”.

Against the argument posed by the plaintiff that establishing the appeals procedure against arbitral awards would always depend on the activity of the State through the judicial branch; the Chamber revisited its arguments regarding the constitutional mandate not to have areas exempt of control and closed by stating that it is not unconstitutional to have such control. It also made reference to the fact that in the law there already exists an annulment procedure for arbitral awards, which in a strict sense, has not been challenged and therefore accepted, which already forces the parties to “end up” in the judicial branch.

Is arbitration in El Salvador moot and useless?

After this decision, parties doing business in El Salvador and their attorneys must know that unless carefully drafted and the right to appeal expressly excluded, they will end up in the local courts if the law of El Salvador is applicable. For those dealing with the government there is no option, one may arbitrate and win but at the end of the day, the local courts will review the award. At least one knows that in El Salvador´s local courts one is as close as one can get to legal heaven because, as the Supreme Court´s Chamber clearly states it, arbitrators are “fallible” and only the judicial courts are assured with “independence and impartiality”. Maybe El Salvador has become an anti-arbitration jurisdiction because its courts are infallible?

This entry was posted on Tuesday, April 23rd, 2013 at 7:50 pm and is filed under Anti-arbitration, Appeal, Arbitration, CAFTA, Domestic Courts, Legal Practice, National Arbitration Laws
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