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An Unusual Motion against Arbitration Awards in Latin America

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One of the most important elements to consider when participating in arbitration proceedings is the available mechanisms to challenge the award of the arbitral tribunal. This element acquires an added significance when it comes to international arbitration where the award may be enforced in several jurisdictions.

With that in mind, it is pertinent to refer to the *writ of amparo*, a unique mechanism that exists in Spain and in most of Latin American countries. Although its exact name may vary depending on the relevant legal system, the *writ of amparo* is an extraordinary action which main purpose is the protection of the citizens' constitutional rights, so its resolution is usually more expeditious than any regular motion.

Regardless of the legislation establishing it, the rationale behind the *writ of amparo* is twofold: as already mentioned, it seeks to protect the citizens in the successful exercise of their constitutional rights and secondly, to guard the provisions of the Constitution ensuring their effectiveness when they are violated. By sharing these two key characteristics, the *writ of amparo* has been compared to the constitutional complaint procedure (*Verfassungsbeschwerde*) that exists in Germany and the *writ of security* (*Mandado de segurança*) found in Brazil.

Being an extraordinary remedy with a brief procedure, as well as taking advantage of the abstractness and amplitude which can be exercised when interpreting constitutional rights, the amparo has been used in several Latin American jurisdictions to challenge the decisions of domestic and international arbitration tribunals.

Recently, a Superior Court in Caracas annulled an award issued by an arbitral tribunal in Miami, which was constituted under the auspices of the International Centre for Dispute Resolution of the American Arbitration Association. The Superior Court overturned the award because it thought that the arbitrators did not apply rules of Venezuelan public policy while deciding the dispute.

Specifically, the parties had entered into a contract for the transfer of shares of a corporation engaged in the insurance and financial intermediation activities. The relevant rules of Venezuelan law require that any modification in the ownership of the shares of such type of corporations has to count with the previous authorization of the insurance and banking authorities. According to the Superior Court, such mandate was circumvented by the arbitral tribunal.

The annulment of the award through a *writ of amparo* occurred despite of what it is provided in the New York Convention, the Inter-American Convention on International Commercial Arbitration ("Panama Convention") and even the UNCITRAL Model Law. From a comprehensive reading of such instruments, it follows that there is a general principle in international arbitration which provides that, for reasons of international order and coherence, the only competent courts for setting aside an award are those of the place where the award was rendered. This is the most important aspect to keep in mind when choosing the seat of arbitration.

For instance, Article V(1)(e) of the New York Convention provides that the recognition and enforcement of the award may be refused if there is proof that the award has been set aside by a competent authority of the country in which, or under the law of which, the award was made.

Thus, such Article reveals that the courts of States different to the one in which the award was rendered, may only refuse to enforce the award if they have evidence that the award has been annulled by a court from the jurisdiction where it was issued. Put simply, the courts of where the award was rendered are the only ones with the power to annul it.

Another important aspect to take into account is that under Venezuelan law, as well as in most of the countries that have this special mechanism, the *writ of amparo* should not be admissible when there is an ordinary motion, as it is the case with the motion to set aside the arbitration award. Consequently, if the losing party of the arbitration is not satisfied with the award, it should try to vacate it in the courts of the seat of arbitration, instead of filing different motions in other courts around the world to try to avoid a possible execution of the award. However, unless it is deemed illegal in the relevant jurisdiction, it is understandable that counsel to the losing party tries to exercise any possible remedy to prevent the execution of a decision that affects its client's interest.

Perhaps the most effective way to prevent these episodes is to seek a modification of the relevant domestic legislation on arbitration in order to clarify that the *writ of amparo* is not admissible against arbitration awards, since there is the motion to vacate the award. Accordingly, this should be accompanied with the repeated application of such rule or mandate by the courts of each State. In Venezuela, for example, the Constitutional Chamber of the Supreme Tribunal of Justice (the highest court in the nation) ruled in 2008 against the replacement of the motion to set aside an award with the *writ of amparo* but as it is clear, such criterion has not been consistently followed by the lower courts.

For its part, in September 2011, the Constitutional Court of Peru decided to strengthen arbitration proceedings in the country, so it decided that the *writ of amparo* was not an admissible remedy against arbitration awards. In that judgment, the Constitutional Court ruled that the motion to set aside the award fulfills a role equivalent to the *writ of amparo* in the protection of fundamental rights in relation to arbitration. Therefore, it is the motion to set aside an award the appropriate remedy to challenge arbitral awards.

That is the trend that has prevailed also in Spain, with the help of its Constitutional Court, as well as in Colombia. In Mexico and Panama, for example, the use of the *writ of amparo* against awards remains a debated issue. Several scholars have opted to interpret that admitting the use of the *writ of amparo* would clearly contravene the principles laid down in the New York Convention, which was ratified by such States in 1971 and 1984, respectively.

We will have to wait and see what happens in Venezuela, where it is expected that the

Constitutional Chamber of the Supreme Tribunal of Justice issues a ruling on the issue in the following weeks. Meanwhile, a rational interpretation prevailed in the Florida United States District Court, which decided to recognize and order the execution of the award issued in Miami, even though it was previously annulled by the Venezuelan Superior Court. Such decision was reached by invoking the provisions of the Panama and New York Convention.

With respect to Article V(1)(e) of the New York Convention, the District Court interpreted the phrase "*under the law of which, that award was made*" as a reference to the procedural law governing the arbitration, not the substantive law governing the underlying agreement. Consequently, where an arbitration agreement specifies the place of arbitration, this "*creates a presumption that the procedural law of that place applies to the arbitration.*" This strong presumption can only be overcome by an express designation of another country's procedural law in the arbitration agreement. Thus, as the agreement at issue in the case specifically identified Miami, Florida, as the seat of arbitration, it created a strong presumption that the applicable procedural law in such case was United States law. Therefore, the Venezuelan courts could not be considered to qualify as a "*competent authority of the country in which, or under the law of which, that award was made.*"

Hopefully, in the case of Venezuela, the Constitutional Chamber of the Supreme Tribunal of Justice will definitely establish that the *writ of amparo* is not admissible against arbitration awards. Undoubtedly, such determination will help to further consolidate arbitration in the region.

This entry was posted on Thursday, June 27th, 2013 at 7:00 am and is filed under Annulment, Applicable Law, Arbitral seat, Arbitration, Arbitration Awards, Arbitration Institutions and Rules, Arbitration Proceedings, Enforcement, Latin America, Seat of the arbitration, Set aside an arbitral award, Set aside an international arbitral award, South America
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